

Intergenerational Multispecies Justice: No Longer a Leap Elsewhere

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JUSTICE IS A LOFTY AND WEIGHTY CONCEPT. LOOKING BACKWARDS, IT PROMISES THE restoration of a moral order heretofore disrespected and violated; looking forward, the establishment of the institutional conditions in which lives might flourish without fear of arbitrary deprivation and harm. This, at least, is the ideal. In practice, under conditions where the logics of colonialism, capitalism, extractivism and human exceptionalism remain hegemonic, the justice mainstream institutions deliver all too often serves to lend legitimacy of the greatest injustices of our age (Davis et al.). Too often, the lens of contemporary institutional justice renders invisible those who are harmed, not by discrete acts that show up as aberrant against the background of fossil-fuelled and extractive forms of life, but by those normalised forms of life themselves. Future generations of humans, but also current and future generations of beings other than humans are chief amongst them.

The constrained aperture of the institutions charged with delivering justice was in stark evidence in the recent decision on the appeal in the Sharma case heard by the Full Bench of the Federal Court of Australia (Federal Court of Australia, *Minister for the Environment* 651-4). The Justices denied the claim brought by Anjali Sharma and seven other Australian children, that in making a determination concerning fossil fuel extraction (in this case a mine extension), the Minister for the Environment owed them, and other Australian children, a duty of care. In the

face of incontrovertible expert testimony, the Justices did not deny the causal links between extracting and burning fossil fuels, climate change, climatic hazards, and the devastation of future generations' mental and physical health, even to the point of death. What they found they could not allow, though, given the logic of the law to which they declared themselves bound, was that when she made a decision at the base of the causal chain, enabling fossil fuel extraction, the Minister bore responsibility for the impacts the forces that would flow along that chain would have, eventually reaching the adults that today's children will become, in the form of fire, flood and unimaginable loss.

The three Justices provided various and different reasons for overturning the original decision, where Justice Bromberg had found in favour of the children, including reasons concerning the limitations of the relevant legislation, the *Environmental Protection and Biodiversity Conservation Act* (Federal Court of Australia, *Sharma* 247). For my purposes, it is the class of reasons concerning the type of responsibility legible to the law of tort that is of particular interest. Put simply, the law, they argued, could not recognise the Minister as responsible for the devastating outcomes future generations would suffer as a result of climate change, because in this case the causal chain that linked her decision with those outcomes was long, complex and traversed time, and because it reached forward to a class of people that was, in legal terms, indeterminate.¹ Of course, the class of beings who will be effected by the decisions that the adults of today are making concerning the emission of greenhouse gases is far broader than the children who brought the case; broader even than other Australian children, all other children, and even any other humans yet to be born. It encompasses all earth beings present and future for whom the conditions of survival and flourishing are rapidly diminishing. From their perspective, standing, by the lights of the court, at too remote a reach, the theories of responsibility the court had to offer may have looked like a shrug of the shoulders.

Theories of responsibility and causality are, of course, essentially contested, and the annals of philosophy, literary studies, social theory and jurisprudence are riddled with deep disagreements over, inter alia, matters of directness, proximity, knowledge and contribution.² In this sense, the Justices' embrace of a theory of responsibility that insists upon directness and both spatial and temporal proximity between act and effect falls well within the bounds of widely accepted understandings, especially in the context of Western liberal modernity where that

¹ As per Justice Beach, 'Indeterminacy is the quality of something which is not fixed in its parameters or is uncertain in extent or character' (*Sharma* 2, at [713]). Liability cannot hold where the class affected is indeterminate.

² I discuss some of this in both *The Sins of the Nation and the Ritual of Apologies* (2009) and *The Prevention of Torture: An Ecological Approach* (2018) (Celermajer, *The Sins*; Celermajer, *The Prevention*).

ultimate value of freedom cleaves to the notion of untrammelled individual agency. The problem is that such theories are hopelessly inadequate when it comes to bringing the healing work of justice to the gravest challenges of our time. True, there is uncertainty about the precise timing and character of what will unfold. Nevertheless, there exists a completely predictable path between a myriad coordinated and uncoordinated actions and inactions committed over the last decades and with ever greater intensity today, and the wreckage to be laid at the feet of the children of today and future generations, and the devastation of the lives of other earth beings.

If my observation about the mismatch between the inherited and required theories of responsibility seems harsh or obscure, it was in fact made, albeit in less colourful and loaded terms, by one of the very Justices who assumed himself bound to the former, impoverished theories. In setting out his reasoning, Justice Beach also noted that, while operant in the common law, the concepts on which he was basing his decision, such as 'sufficient closeness and directness' and 'indeterminacy' may

in their present form [...] have reached their shelf life, particularly where one is dealing with acts or omissions that have wide-scale consequences that transcend confined temporal boundaries and geographic ranges, and where more than direct mechanistic causal pathways are involved. (Federal Court of Australia, *Minister for the Environment* 754)

In other words, the logics within which the interpreters of the law found meaning and produced 'justice' were built for a world other than the one that the Court, and more importantly, the children who turned to it for justice, were (and are) facing.

Such a stark disparity between the law's logic and the world before us might seem shocking, but it is unsurprising. For the Australian common law is an artefact of the Australian state, founded on colonial theft, enriched by extraction (from ecosystems, from other animals, from First Nations peoples and cultures, from other marginalised humans, and from future generations) and legitimated through a moral framework that valorises the accumulation of advantage by putatively unencumbered free individuals. In this sense, a legal imaginary where responsibility adheres to the direct consequences of the actions of time bound and choosing individuals is continuous with the dominant social imaginary of success and progress. The contention that building an economy and ensuring the persistence of national wellbeing legitimately relies on the production of surpluses generated by extracting what belongs not only to the deep past and present (including the earth and First Nations peoples), but also what belongs to the future (of people and other earth beings) requires blotting out any claims of

justice that those, human and more-than-human inter-temporal others, might have upon the present. It is for this reason that the law's capacity to articulate conceptions of justice appropriate to the age of catastrophic climate change and the devastation of biodiversity requires a much larger transformation in the imaginary of who humans are and to whom we are responsible.

How though, might this transformation be made? The answers people might offer and have offered to that question are as many as there are disciplines and scales, art forms and technologies of change. I find one answer, though, in the very judgments written in response to the two Sharma cases, that is, in the modality in which we are willing or able to engage with the world before us. Put more simply, encounter and embodiment enable transformation.

The first time I read the judgment in the original Sharma case, I was, quite literally, struck in my body by how Justice Bromberg depicted what he experienced when he confronted the case, and the children before him. His words merit quoting at some length:

It is difficult to characterise in a single phrase the devastation that the plausible evidence presented in this proceeding forecasts for the Children. As Australian adults know their country, Australia will be lost and the World as we know it gone as well. The physical environment will be harsher, far more extreme and devastatingly brutal when angry. As for the human experience—quality of life, opportunities to partake in nature's treasures, the capacity to grow and prosper—all will be greatly diminished. Lives will be cut short. Trauma will be far more common and good health harder to hold and maintain. None of this will be the fault of nature itself. It will largely be inflicted by the inaction of this generation of adults, in what might fairly be described as the greatest inter-generational injustice ever inflicted by one generation of humans upon the next. (Federal Court of Australia, *Sharma* 293)

True, like his fellow Justices in the case on appeal, elsewhere in the judgment Justice Bromberg deploys the abstract reasoning required to justify the move from a set of accepted legal precedents and principles, through the facts of the case, and to a specific finding. And yet here, the nature of his encounter with the material is visceral, embodied passionate. One cannot but feel his distress in contemplating the fear and loss the children will experience, and his outrage at the failure of his generation to act to prevent what will befall them. And yet critically, as generations of feminist scholars have insisted, far from being 'essentially unreliable, untrustworthy, and morally irrelevant, an inferior domain to be dominated by a superior, disinterested (and of course masculine) reason' the operation of his 'desire, caring, and love' (Plumwood 5), rooted in an embodied

encounter with others, was essential to his capacity to reason. Indeed, as Hannah Arendt wrote in response to a critic's accusation that in her book, *On Totalitarianism* she had departed from 'the tradition of *sine ira et studio* (without anger and fondness)':

Let us suppose ... that the historian is confronted with excessive poverty in a society of great wealth ... The natural human reaction to such conditions is one of anger and indignation because these conditions are against the dignity of man. If I describe these conditions without permitting my indignity to interfere, I have lifted this particular phenomenon out of its context in human society and have thereby robbed it of part of its nature, deprived it of one of its important inherent qualities. For to arouse indignation is one of the qualities of excessive poverty insofar as poverty occurs among human beings. ... This has nothing to do with sentimentality or moralizing, although, of course, either can become a pitfall for the author. If I moralized or became sentimental, *I simply did not do well what I was supposed to do, namely to describe the totalitarian phenomenon as occurring, not on the moon, but in the midst of human society.* (Arendt 403-4, emphasis added)

The embodied character of Bromberg's reasoning is also evident in the way he argues the case for the need for the law to transform its theory of responsibility according to historical conditions. Whereas, he points out, in the 12th to 17th centuries, 'the power of humans to cause injury was generally limited by physical proximity, except where nature provided an intermediate causal agent, such as water, fire, air or wild animals' (Federal Court of Australia, *Sharma* 123), the technological changes of the Industrial Revolution enhanced that power, with a correlative change in legal understandings of responsibility. And now, today, 'adults have gained previously unimaginable power to harm tomorrow's adults'; hence 'the common law should now impose correlative responsibility' (137). Legal theories must, in other words, be rooted in the material conditions of our lives, lest they discard from consideration the world before us.

And yet, this insistence on materiality and encounter may involve some moral hazards. If embodied encounters with those to whom humans are now able to cause grave harm is a condition of transforming social and political imaginaries and correlatively, of 'updating' theories of responsibility, the prospect of extending responsibility to anyone other than a very limited circle of humans, and humans in the present, would seem to be gloomy. For it is precisely embodied presence that the humans who will come after (and those who came before) seem to lack, and this not only in the sense that they are not able to politically press their claims, but in terms of phenomenal experience. As to beings other than humans,

to the individuals and species of animals for whom the planet is becoming unliveable and the ecological systems in collapse, they have plenty of presence, but western modernity has constructed a multidimensional institutional and discursive infrastructure designed to ensure that such presence is mediated to the point of moral irrelevance.

This latter example, however, where harm to other animals and ecosystems is present in a highly embodied way, but experienced as absent, demonstrates the complicated nature of what we might think of as the affective and moral politics of presence. Again, as feminist scholars from Carol Adams, with her notion of the absent referent, to Moira Gatens with her work on imaginary bodies have demonstrated (Adams; Gatens), how different bodies occur, their meaning and moral significance is always mediated through frames of meanings or social imaginaries (Lennon; Castoriadis). Even the apparent 'fact' that past and future generations are not present is mediated through an imaginary that posits the individual temporally bound human body as the ultimate unit of experience and existence. The self-evidence of this imaginary is testament not to its truth but to its hegemonic character in contemporary Western modernity and the epistemic violence that has been committed against other ways of being and knowing what it is to be human.

As Christine Winter, drawing on Māori ontologies and epistemologies has so compellingly argued in her writing on identity, ethics and intergenerational justice, 'past, present, and future may be understood as contemporaneous' (Winter, 'Does Time Colonise?' 282). Moreover, this apparently intertemporal reach of identity and experience is not limited to *human* ancestors and descendants, but may include the more-than-human world with which the human being is intimately bound. Even more importantly, this understanding is not secondary, layered over a more primary experience of time as a 'sequential forward projection' and of humans as radically ontologically and morally distinct, but is itself primary experience. Correlatively, it is, and can be the foundation of the institutions that operationalise understanding of time and identity through theories of justice that are intergenerational and multispecies (Winter, *Subjects*).

The incompatibility of the ways of being human and institutional forms Winter describes, and capitalist, colonial and extractivist forms of human life and the institutions of justice they produced is no coincidence. Only now, the latter, which sought the comprehensive eradication the former, is eating its own. Its very acceleration and intensification, considered marks of success by its own lights, have collapsed the distance it required be placed between those seeking to accumulate and those from whom benefit can be extracted. Future generations, now in the form of the children many people reading this have borne, or love, or teach, and beings other than humans, whose immolated bodies we breathed

during the Black Summer fires (the 2019-20 Australian bushfire season) (Verlie), press upon us. In this sense, inter-generational and multispecies justice are no longer leaps into an elsewhere, but the justice before us now.

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