

“Climate Change, Environmental Rights, and Emissions Shares”

Steve Vanderheiden, University of Minnesota Duluth¹

The 1992 Framework Convention on Climate Change (FCCC) declares anthropogenic climate change to be a “common concern of mankind” and resolves to take all necessary steps in order to prevent “dangerous anthropogenic interference with the climate system.” Noting that “the largest share of historical and current global emissions of greenhouse gases has originated in developed countries,” the 192 national signatories to the treaty pledged to freeze greenhouse gas (GHG) emissions at 1990 levels (pending further study) by the year 2000 and, through future international action undertaken through the auspices of the FCCC process, to “protect the climate system for the benefit of present and future generations of mankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capacities.” It was for these latter two explicitly recognized reasons – that the world’s industrialized countries were primarily responsible for causing the problem and were uniquely capable of its mitigation – that concerns for “equity” were held to require that “the developed countries take the lead in combating climate change and the adverse effects thereof.”² Five years later, the Kyoto protocol imposed binding emissions caps upon the world’s industrialized nations, temporarily postponing the imposition of such caps on developing countries, and in doing so would provide the rationale for both the initial opposition to treaty’s ratification in the U.S. Senate (declared 95-0 with the 1997 Byrd-Hagel Resolution) and the Bush administration’s formal withdrawal from the Kyoto framework in 2001. Calling the treaty “unfair,” the administration merely echoed the Senate’s earlier claim that the “disparity of treatment” between industrialized nations and developing ones like China and India (both specifically mentioned) justified U.S. nonparticipation in that regime.

Indeed, normative concerns for fairness have featured prominently throughout the global climate policy process, and debates over the treaty’s fairness are inseparable from those about its efficacy, as no unfair global climate regime stands a chance of gaining the assent of the world’s nations and no ineffective agreement can mitigate the unfairness of a global environmental problem that is disproportionately caused by the world’s affluent while visiting disproportionate harm upon the world’s poor (as rising atmospheric GHG concentrations are expected to do³). In

¹ Prepared for delivery at the 2006 Western Political Science Association meeting. Departments of Political Science & Philosophy, 304 Cina Hall, 10 University Dr., Duluth, MN, 55812-2496, svanderh@d.umn.edu.

² United Nations, *United Nations Framework Convention on Climate Change* (1992).

³ According to the Intergovernmental Panel on Climate Change’s *Third Assessment Report* (2001): “The impacts of climate change will fall disproportionately upon developing countries and the poor persons within all countries, and thereby exacerbate inequities in health status and access to adequate food, clean

response to the president's claim that the Kyoto protocol is unfair, the Dehli-based Centre for Science and Environment invokes a counterargument about fairness, rejecting the premises that underlie Bush's claim and highlighting the wide global disparities between affluent industrialized nations like the U.S. and poor developing ones like India, arguing that such disparities constitute a morally relevant difference that justifies their differential treatment under such a regime:

The total carbon dioxide emissions from one U.S. citizen in 1996 were 19 times the emissions of one Indian. U.S. emissions in total are still more than double those from China. At a time when a large part of India's population does not even have access to electricity, Bush would like this country to stem its "survival emissions," so that industrialized countries like the U.S. can continue to have high "luxury emissions." *This amounts to demanding a freeze on global inequity, where rich countries stay rich, and poor countries stay poor, since carbon dioxide emissions are closely linked to GDP growth.*⁴ [emphasis in original]

Several normative claims about fairness are presented here, and each is worth considering with some care, as each bears upon the fair allocation of the requisite costs of a global climate regime. First, this rebuttal claims that the high per capita emissions rates of industrialized nations (relative to developing countries) are morally relevant in that *excessive* emissions (not *all* emissions) are causally responsible for the problem (in that anthropogenic climate change would not exist if all persons produced GHGs at the average Indian per capita rate), and therefore connote moral responsibility (or *liability*) for redressing it through a global climate regime. Second, the above reply distinguishes between a basic minimum level of GHG emissions that all need in order to survive ("survival emissions") and those which go beyond what are necessary for mere survival, resulting instead from activities usually associated with affluence ("luxury emissions"), arguing that the former ought to be given priority over the latter, and that Bush's objection (along with the global climate policy obstructionism that it represents) fails to adequately recognize that priority. Finally, it asserts a right for nations like India to develop (based in concerns for global equity or cosmopolitan justice), increasing their per capita GHG emissions (beyond the threshold defining survival emissions) at the same time that industrialized nations that were assigned emissions caps under the Kyoto protocol are required to decrease their overall and per capita emissions.

In addition to the explicitly-claimed right to develop, another kind of right (and one that is likewise grounded in an equity-based conception of justice) is being implicitly asserted above. Insofar as a global climate regime must be charged with allocating the remedial costs of GHG

water, and other resources." An ineffective climate regime would allow this inequitable pattern of allowing industrialized nations to transfer the costs of their affluence onto poor countries.

⁴ "The leader of the most polluting country in the world claims global warming treaty is 'unfair' because it excludes India and China," Centre for Science and Environment (Dehli), March 16, 2001. Online at: <http://www.cseindia.org/html/au/au4_20010317.htm>.

emissions reductions, the assessment of national liability ought to be based upon findings of fault rather than relying upon a standard of strict liability, in which nations are held liable only for those emissions above the “survival” threshold. By this line of argument, no person can be faulted for those acts which are necessary for survival, as they cannot plausibly be expected to refrain from committing them (or as Kant famously put the same point, *ought* implies *can*), and such persons would likewise lack the remedial capacity necessary for assuming liability without fault, since they literally cannot reduce their emissions any further. In assigning national emissions caps or in otherwise assessing remedial liability for global climate change, then, the argument asserts a right to some basic minimum level of per capita GHG emissions (“survival emissions”), below which nations cannot be held responsible for causing climate change (and so don’t deserve to be assigned liability for its mitigation), but above which (with their “luxury emissions”) they begin to incur liability for their respective causal contributions to climate change. India, by this argument, cannot be assigned liability for causing climate change, since its average citizen only produces survival emissions (or so, at least, is implied), but the United States (where per capita emission rates are 19 times higher and are substantially above survival rates) can be faulted for causing the problem, and must consequently pay the costs of its mitigation.

These two kinds of rights-claims (along with a third to be introduced below) together inform the design of a fair and effective global climate regime. First and most obviously, the claim to some limited access to the planet’s atmospheric absorptive capacity (that common pool resource which allows a finite quantity of GHGs to be safely absorbed into sinks without raising atmospheric concentrations of those heat-trapping gases) can be regarded as a kind of right, and one that is implicitly invoked each time that persons engage in those myriad activities which produce such gases. Since this ecological capacity is finite, the assignment of emissions rights must likewise be capped at some level; the distinction between survival and luxury emissions implies that per capita emissions caps be set at a level equal to or above the survival threshold, and that none be allowed luxury emission until all are guaranteed survival emissions. Should this per capita emissions cap be set too high, however (where, as is currently the case, total global GHG emissions exceed this absorptive capacity), a second right (one to climatic stability, held by both current and future generations) comes into play. Luxury emissions must be strictly limited, or increasing atmospheric concentrations of these heat-trapping gases will cause significant climatic instability, likely producing the range of adverse effects identified by climate scientists, thereby violating the rights of current and future persons to a stable climate. On the other hand, assigning emissions caps upon developing countries levels that are *too low* to allow for their development (as would be the case if countries like India or China were held to the historical

baseline formula of the Kyoto protocol) raises the possibility of violating a third right (one to develop). While this latter right may at first appear to be distinct in kind from the first two (as it ostensibly reflects economic interests rather than environmental protection), the case for development rights can be cogently framed in the context of claims to environmental space: nations or persons must be allowed adequate atmospheric absorptive capacity not only for mere survival, but may also have a valid rights-based claim to sufficient GHG emissions allowances to allow for economic or human development (processes that are instrumentally associated with human flourishing).

In this essay, I will weigh these rights-based claims, paying attention both to the way in which each might be normatively justified as well as the implications of each for the design of a fair and effective global climate regime. I shall argue not only that all three of these rights-claims are valid ones (i.e. they represent important interests and so fit within existing schemes of similar rights in both structure and justification), but that they together imply a rather specific allocation formula for the manner in which global GHG emissions shares are assigned to nations or persons. A just global emissions allocation (which is part and parcel of a fair and effective global climate regime) is one that pays sufficient attention to global emissions caps such that it avoids causing future climatic instability, while at the same time ensuring that the distribution of emission shares among and within nations allows for adequate economic and human development and assigns the remedial costs associated with climate change mitigation in accordance with a defensible account of moral responsibility, in which fault-based liability is assigned in accordance with luxury but not survival emissions (as one cannot be faulted for claiming some share of a common resource to which one is entitled as a matter of right). If all three of these rights are recognized, a global climate regime will be required to allocate GHG emissions rights much more equitably than is the case under status quo use-based claims (where the richest 20 percent of the world now make *de facto* claims upon the vast majority of atmospheric space) or even under those schemes (like the Kyoto protocol) that have been developed under the auspices of the FCCC. Such considerations are not merely of theoretical interest: allocating GHG emissions shares in a fair manner (i.e. one which recognizes and protects these three kinds of rights) is an essential feature of any effective global climate regime, as any effective global regulatory apparatus must necessarily rely upon the voluntary cooperation of member nations (subject to binding caps and with sufficient mechanisms for monitoring and ensuring compliance), and no nation can voluntarily submit to terms that violate the rights of its citizens (present or future). Recognizing such environmental rights, and building that recognition into the structure of a global climate regime (especially as it allocates emissions shares), is therefore both a principled and practical project, and one with some urgency.

Environmental rights

While commitments to ideals of equity and responsibility may be declared in the text and entrenched in the design of the climate convention,⁵ their formal recognition in law and policy can more effectively be accomplished by substantiating them as environmental rights, which provide the necessary legal and political support for assisting right holders in having their claims recognized. Since a right connotes a valid claim to either provision (in the case of positive rights) or noninterference (with negative rights), the legal protection of rights offers a more robust form of protection for those interests that they are designed to advance (providing potential claimants an avenue of appeal against rulings or shortcomings of the climate regime, allowing for a quasi-judicial check upon its administration) as well as having a powerful effect on the formation of social norms. As Tim Hayward notes of instantiating aims of environmental protection through legal or constitutional rights, “it entrenches a recognition of the importance of environmental protection; it offer the possibility of unifying principles for legislation and regulation; it secures these principles against the vicissitudes of routine politics, while at the same time enhancing possibilities of democratic participation in environmental decision-making processes.”⁶ Given the trumping power of constitutional rights, Hayward makes the case for them by comparing environmental rights to the set of recognized universal human rights, noting the intuition that “an adequate environment is as basic a condition of human flourishing as any of those that are already protected as human rights.”⁷ Hayward argues that the right to an adequate environment meets the standard test for a genuine human right, since it protects human interests that are “of paramount moral importance” (given that “environmental harms can threaten vital human interests”), and that such a right would also be genuinely universal, as “the interests it is intended to protect are common to all humans.”⁸

Although many formulations of environmental rights exist in law and in the academic literature of human rights, the most general and encompassing formulation of the range of interests that they might protect posits a right to a physical environment which provides the requisite material basis for human flourishing (and not merely human survival – a point to be

⁵ By “climate convention” I mean those various treaties and international agreements (including but not limited to the 1997 Kyoto protocol) developed under the auspices of the FCCC.

⁶ Tim Hayward, *Constitutional Environmental Rights* (New York: Oxford University Press, 2005), p. 7.

⁷ Hayward (2005), p. 11.

⁸ Hayward (2005), pp. 47-48.

considered further below), an exemplary version of which can be found in the opening principle of the Stockholm Declaration (from the 1972 UN Conference on the Human Environment):

Man has the fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.⁹ (*Principle 1*)

Essential to the expression of the right to an adequate environment are several features that are instructive to the case for a right to climatic stability, which we shall consider below. First, the environmental conditions that the right aims to secure are set alongside basic human ideals of freedom and equality in order to emphasize that all three (and not merely the first two) ought to have the status of fundamental rights (which have priority over other less important rights) and that the three are interrelated (i.e. in the absence of adequate environmental conditions, the ideals of freedom and equality cannot fully be realized, and that greater freedom and equality may also be necessary conditions for protecting the environment). Second, all three of these rights are associated with human dignity and well-being (or welfare), which aims to undercut the common assertion that environmental protection trades off against human welfare. Finally, the resolution associates this right to a “solemn responsibility” (correlative duties of environmental protection) to which persons are obligated from cosmopolitan and intergenerational justice.

The right to an adequate environment is intended to encompass a broad range of duties of environmental protection in which persons are the primary beneficiaries of obligatory actions (its aims of protecting human dignity and welfare are explicitly anthropocentric, so it cannot connote duties in which nonhuman animals or ecosystems are the exclusive beneficiaries), and the right to climatic stability appears to be an obvious corollary of such a right. While climate change is only one of many ongoing threats to the maintenance of an adequate environment, it must be regarded as among the most serious threats. Therefore, the duty to maintain climatic stability (or to refrain from excessive GHG emissions) is a necessary but insufficient condition for meeting the general obligation to maintain an adequate environment, making the right to climatic stability a subsidiary right to the general right sketched above. Whether the right to climatic stability is sufficiently distinct or inherently weighty to require a separate legal or constitutional mention, or whether by contrast it ought to be considered as a necessary part of a more general fundamental right to an adequate environment, need not concern us here. Suffice to observe that the two are very closely associated and share a similar form, so that the case for the more general right for which Hayward argues entails the recognition (in some form) of a right to climatic stability. Before we can fully

⁹ Declaration of the United Nations Conference on the Human Environment (1972).

understand the implications of recognizing the right to an adequate environment, though, we must first consider those two rights against which its GHG-reducing imperatives must be balanced, as both the right to survival emissions (or, more generally, to subsistence) as well as the right to develop both weigh in the opposite direction, and are jeopardized by global emissions allocation schemes that excessively limit national emissions in order to guard against climatic instability.

GHG emissions rights

Rather than beginning with the more ambitious claim that residents of developing nations have a right to develop – or, in what comes to the same thing, that all persons have an entitlement to some level of luxury emissions – we’ll begin with the more modest claim that all persons have a valid claim (as a matter of basic or fundamental right) to survival emissions. In examining a nation’s historical and current emissions, such a right requires that we distinguish between survival and luxury emissions, where none can be held liable for the harm that results (through anthropogenic climate change) from the former, but where all must (by the responsibility-based principle of distribution expressed in the FCCC) be assigned remedial costs in proportion to their share of the latter. By this distinction, survival emissions clearly warrant the status of a basic right (for reasons that shall be further considered below), but luxury emissions do not so clearly qualify for the sort of protection that rights entail, as the interests they represent are less basic than those of survival emissions. Moreover, persons can be held responsible for their luxury emissions in a way that they cannot be held so for their survival emissions, following Brian Barry’s formulation of the *principle of responsibility*, in which he posits that: “a legitimate origin of different outcomes for different people is that they have made different voluntary choices... The obverse of this principle is that bad outcomes for which somebody is not responsible provide a prima facie case for compensation.”¹⁰ In no sense can the emissions that a person produces as minimally necessary to meet their basic needs be attributed to their voluntary acts or choices (they are, by definition, unavoidable), but persons can and do elect to produce GHG emissions beyond that threshold. By the principle of responsibility, therefore, persons must be held responsible (through assignments of liability) for the latter and not for the former.

Insofar as all persons have a vital interest in the necessary conditions for human survival, they have a vital interest in survival emissions; insofar as they have a somewhat less basic (but still important) interest in flourishing (i.e. beyond what is minimally necessary for mere survival), they have a strong (if not vital) interest in luxury emissions. We might put this observation in a

¹⁰ Brian Barry, “Sustainability and Intergenerational Justice,” in *Fairness and Futurity*, ed. by Andrew Dobson (New York: Oxford University Press, 1999): 93-117, p. 97.

slightly different way in order to illuminate the role of rights in the design of a global climate regime: persons have a *basic right* (a strong claim of entitlement capable of trumping non-basic interests and with associated claims for legal remedy to deprivations of those interests related to the right) to their survival emissions, but they may not have a right (or have as basic a right) to their luxury emissions. Several implications follow from formulating this distinction in terms of rights. As previously observed, all persons have valid claims of entitlement to emit GHGs up to the survival threshold, so assessments of liability (which imply fault) cannot be made against acts to which persons are entitled as a matter of right. Additionally, this right entails a valid claim for remedial state assistance when others (whether states or private parties) threaten the practical ability of persons to exercise the right (for example, a global climate regime may curb luxury emissions in order to allow sufficient atmospheric space for survival emissions). Finally, survival emissions maintain their priority over luxury emissions even in the context of significant global inequality (as a basic right, claims to survival emissions trump claims based upon lesser rights, such the property right claims usually wielded in defense of inequality); the government of a poor nation cannot be allowed to sell its “unused” survival emissions in GHG markets to a rich nation seeking more luxury emissions, regardless of the price offered in return.

Upon what basis should such a right (to survival emission) be regarded as alongside the widely recognized set of universal human rights to which all are entitled? Perhaps the most compelling case for this kind of environmental right follows from Henry Shue’s work on subsistence rights. Shue argues against the conventional distinction between security rights (which are often regarded as more fundamental and so are better protected under law) and economic rights (which enjoy considerably less protection), suggesting that the more salient distinction among categories of rights - and one supporting a priority system for weighing competing rights claims - is between basic and non-basic rights. Basic rights, he suggests, “specify the line beneath which no one is to be allowed to sink” and so constitute “everyone’s minimum demand upon the rest of humanity.” A right that is genuinely basic trumps those rights which may assist in the further development of human potential but which are not essential for basic functioning in cases where the two kinds of rights conflict, Shue argues, and ought to be given greater protection when deploying scarce resources. The justification for this priority system is built into the idea of a basic right itself, he argues: “When a right is genuinely basic, any attempt to enjoy any other right by sacrificing the basic right would be quite literally self-defeating, cutting the ground from beneath itself.”¹¹

¹¹ Henry Shue, *Basic Rights* (Princeton, NJ: Princeton University Press, 1980), pp. 18-19.

Although security rights (for example, rights against harm, wrongful arrest, or excessive punishment) have long been enshrined within law and protected by states, social and economic rights (for example, the right to public education or to organize a labor union) have more recently begun to be added to legal and political documents alongside these security rights, engendering at least some controversy about whether or not they belong there. As the standard criticism goes, security rights are more fundamental than are social or economic rights in that they protect the most basic human interest not to be harmed (a person can survive without a public education or a labor union, but not without basic protection from harm), and for this reason ought to enjoy priority over less important rights; societies may elect to provide social and economic rights after all security rights have been provided for, but the former are optional and clearly of a lesser priority. Moreover, the standard criticism equates security rights with negative rights, which are more cheaply and easily provided by the state since negative rights correspond only with the duty to refrain from certain acts, whereas social and economic rights are usually equated with positive rights, which are assumed to be more costly to provide. To illustrate this distinction as it is often made, if you have a negative right (e.g. against harm), then I have a correlative duty (relatively easily met) to refrain from harming you, but if you have a positive right (e.g. to public education), then I have a correlative duty to help pay for it through my taxes. Taken together, the standard criticism maintains that new economic or social rights should not be added to the already lengthy lists of individual or human rights until security rights have been fully guaranteed, and then only after considering the opportunity costs of providing for such expensive claims.

Against these prevailing distinctions between economic and security rights, Shue points out that many security rights are partially positive in character (requiring provision rather than mere restraint) and actually quite expensive to maintain (including the costs of domestic law enforcement and the military, along with the judicial and penal systems), while many economic rights (e.g. antipollution regulations and workplace safety standards) are largely negative and cost relatively little for the state to provide. Insofar as the conventional case against economic rights rests upon the mistaken assumption that they are more costly for a state to guarantee, Shue offers the basic/non-basic distinction as a more defensible priority system for weighing conflicting claims and in deploying scarce state resources. Rather than relying upon false generalizations (e.g. that all security rights are negative and thus inexpensive to maintain) married to cost-benefit analysis (which supposes that protecting rights is only justified when it is cost-effective for the state to do so), Shue argues for a priority system based upon the extent to which rights protect activities that are essential to meeting human needs or safeguard those which are instrumental to

human flourishing. According to Shue, the protection of basic rights is a matter of basic justice, and ought therefore to be secured before attempts are made to provide for less basic rights.

Once we think of rights in this way, a right to survival emissions becomes plausible. As Shue notes, basic rights protect vital human interests in physical security as well as minimal economic security (or *subsistence*), with the latter including “unpolluted air, unpolluted water, adequate food, adequate clothing, adequate shelter, and minimal preventative health care.”¹² In contrast to global efforts that have treated poverty and hunger as problems of charity rather than issues of justice or basic rights, Shue urges that subsistence be socially guaranteed as a matter of right, or else “attempts to actually enjoy the other rights remain open to a standard threat like the deprivation of security or subsistence.”¹³ Moreover, since the priority of basic over non-basic rights is based upon the parallel distinction between vital and non-vital interests, Shue argues that the world’s affluent are required to sacrifice (in increasing order of importance) their preference satisfaction, cultural enrichment, and non-basic rights – and are permitted, but cannot be required, to sacrifice some of their basic rights – in order to secure the basic rights of the world’s poor.

According to Shue, this obligation of justice is based upon the *vital interests principle*, which holds that “it is unfair to demand of people actions the very performance of which would preclude for themselves a way of protecting a vital interest while failing to provide some other protection for that interest, when it is possible to protect it by means that do not threaten the vital interests of anyone.”¹⁴ Failing to act in order to protect threatened basic rights when this can be accomplished without the sacrifice of anyone’s basic rights is essentially to fail to regard persons as equals; it is to give priority to the non-vital interests of some over the vital interests of others. It is, in other words, a violation of a fundamental premise of egalitarian justice: that no person is intrinsically more valuable than another. For Shue, this entails a duty on the part of national governments, as uniquely capable of securing basic rights globally and as “powerful institutions capable of causing severe deprivations when they do not restrain themselves,” to avoid depriving others of their basic rights, whether through a negative act of restraint (for example, by avoiding causing catastrophic environmental problems like climate change) or positive acts of provision.

In addition to various basic rights that Shue lists above, one might also suppose that a stable climate might be considered as among the basic rights of humans (as Hayward claims), and that anthropogenic climate change therefore threatens not only to transfer substantial costs onto

¹² Shue (1980), p. 23.

¹³ Shue (1980), p. 34.

¹⁴ Shue (1980), pp. 126-27.

the world's poor (indirectly affecting their subsistence rights) but also to directly undermine their subsistence by reducing crop yields, threatening water availability and quality, and in some cases threatening the territorial integrity of entire peoples. This latter case may be the most compelling of all rights issues related to climate change, as residents of low-lying and small island states have become increasingly vocal in climate debates by invoking their rights against having large parts (even all, in some cases) of their current territories inundated by projected sea level rises or being displaced by vanishing tundra. In 2005, for example, representatives of the Inuit (a people of 155,000 residing in Arctic regions of Canada, Alaska, Greenland, and Russia) filed a petition with the Inter-American Commission on Human Rights alleging that the United States (in its capacity as primary obstacle to an effective global climate regime as well as biggest GHG polluter) was violating their human rights by exacerbating global warming, since the warming trends caused by increasing GHG concentrations have already produced profound thinning effects on Arctic ice sheets, threatening those species upon which Inuit hunters depend and so, in effect, threatening the cultural preservation of the entire Inuit people. Since climate change is widely expected to threaten wildlife and shift species habitats, myriad other potential threats to traditional cultures may likewise be affected in similar fashion (threatening the preservation of indigenous culture, if not territorial integrity), elevating the prominence of such rights claims in the climate debate.

In fact, the idea of a right to survival emissions finds some direct theoretical mention in Shue's work on subsistence rights, which may also lend support to the notion of a right to develop on the part of poor countries that now have difficulty meeting the basic needs of their citizens (an extension of this idea that we shall consider below). Classifying access to the atmosphere's "emission absorptive capacity" as among basic rights, he suggests that persons ought to be entitled to a basic minimum level of per capita GHG emissions as a matter of right (essentially describing the concept of survival emissions), which entails that provision of this entitlement ought therefore to trump the exercise of other non-basic rights.

For practically everyone at present, and for the immediate future, survival requires the use of GHG emissions absorptive capacity. No reasonable, immediate alternative exists. Strange as it might initially sound, emission absorptive capacity is as vital as food and water and, virtually everywhere, shelter and clothing.¹⁵

Insofar as basic or subsistence rights can be understood as protecting vital interests, where one cannot enjoy other rights unless these basic rights are first protected, then supposing that survival emissions count among a person's basic rights clearly follows. Since persons literally cannot

¹⁵ Henry Shue, "Climate," in *A Companion to Environmental Philosophy*, ed. by Dale Jamieson (Malden, MA: Blackwell, 2001): 449-59, p. 451.

survive without them, they are as basic as physical security and the standard set of subsistence rights (rights to food, clean water, and so on). Moreover, as Shue suggests, attributing rights to survival emissions generates a distributive principle that applies to the assignment of national emissions shares: that “the only morally permissible allocations of emissions are allocations that guarantee the availability of the minimum necessary emissions to every person, which entails reserving adequate unused absorptive capacity for those unused emissions.”¹⁶

Development rights

If we suppose that nations like India have a right to develop, then we must also suppose that they have a right to emit GHGs at a per capita level considerably above the level of survival emissions, and one much closer to those now granted to industrialized nations. The claim made on behalf of such a right (and a recurrent one within the debates surrounding the development of the climate convention) invokes the normative ideal of equity, which is to be applied either to living standards, GHG emissions, or both. When so applied, it becomes clear what this claim is asserting: that the current worldwide distribution of wealth is highly inequitable (and is reflected in highly unequal national emissions rates), that justice demands that these inequities be reduced, and that imposing emissions caps on developing nations like India at levels that are too low to allow for industrialization and other forms of economic development (including higher levels of consumption) would in effect freeze the world’s nations in their present state of development, allowing rich countries to continue producing per capita GHG emissions at rates far higher than those in developing nations, unfairly reserving the benefits of high emissions allowances for those nations which are currently among the world’s affluent, and preventing their spread elsewhere. But upon what basis might such a right be justified?

As Thomas Athanasiou and Paul Baer point out, assigning equitable emissions caps to developing nations need not be justified on principled grounds alone (important as these are), since “a climate treaty that indefinitely restricts a Chinese (or Indian) to lower emissions than an American (or European) will not be accepted as fair and, finally, will not be accepted at all.”¹⁷ Neither India nor China would (or should) accept any climate convention that assigned them per capita emissions caps which are too low to allow for industrialization or increasing consumption rates, since these would constitute a *de facto* barrier to development. On the other hand, no climate regime that excluded India and China from GHG emission limits altogether stands a

¹⁶ Shue (2001), p. 454.

¹⁷ Thomas Athanasiou and Paul Baer, *Dead Heat: Global Justice and Global Warming* (New York: Seven Stories Press, 2002), p. 75.

chance of arresting the current growth in global emission rates. Normative concerns based in the “common but differentiated responsibilities and respective capabilities” model may have been the stated justification for the decision to exempt developing nations from mandatory caps during the first compliance period, but also significant was the desire on the part of industrialized countries to defer discussion of the incendiary question of how high or low to set any assigned per capita GHG caps in India and China if they were to be included under the first round of binding caps. Resolving this problem to the satisfaction of both industrialized and developing nations would have been far more difficult than simply deferring the question entirely (as was accomplished by exempting the latter from any mandatory caps), since basing future caps for China or India upon their 1990 baseline emissions would have raised valid objections about denying rights to develop.

Developing countries could not have been assigned (and would not have accepted) caps that represented per capita emissions rates that amount to a mere fraction of those allowed within industrialized nations (as would be the case if indexing them to the 1990 baseline), but neither could they be assigned caps set at the levels allowed for Europe and Japan (let alone the U.S.), for this would allow for significant increases in worldwide emissions even with developed nations (the U.S. included) meeting their assigned targets. In China, where there are eight motor vehicles for every 1000 people or in India where there are seven, mandatory emissions caps comparable to those assigned to the United States (where there are 767 increasingly-inefficient automobiles for every 1000 people) would obviously be unfair. As Athanasiou and Baer note:

We cannot hope to find justice in a world where the poor come to live as the rich do today, for there is not world enough. There will have to be some other kind of solution. There will, indeed, have to be new dreams on all sides, and the rich, in particular, will have to make those dreams possible by learning to share.¹⁸

Ecological limits on the absorptive capacity of the atmosphere require that increases in allowable per capita emissions from developing nations like India and China be accompanied by even larger decreases in allowable per capita emissions in the industrialized nations (with their smaller populations) merely in order to freeze global emissions (assignment of emissions shares among nations from a fixed sum being a zero-sum game), to say nothing of the emissions cuts that are necessary if humanity is to fulfill the FCCC’s mandate of avoiding dangerous interference with the planet’s climate system.

Denying developing countries sufficient GHG emissions allowances to accommodate development would have been tremendously unfair (and unacceptable to them), but adjusting the assigned emissions allowances within the industrialized nations to reflect significant per capita

¹⁸ Athanasiou and Baer (2002), p. 128.

increases in India and China while allowing the same global aggregate emissions levels would have been hugely unpopular, and even less likely to be accepted by the relevant parties. Opening up the question of developing country emissions caps, that is to say, would have forced delegates attending the conventions to at least consider the “contraction and convergence” scenario that has been urged by many climate activists, which would have required the industrialized nations to significantly reduce their GHG emissions (the *contraction*, with emissions cuts much steeper than those prescribed under the Kyoto protocol) in order to allow developing nations to eventually be allowed per capita emissions caps equal to those in the industrialized nations (the *convergence*). As Athanasiou and Baer suggest, ecological limits won’t allow for convergence (a demand of equity if developing countries are allowed the right to develop) without contraction (a necessary condition for the climate regime’s efficacy). During the FCCC process, temporarily exempting developing nations from emissions caps seemed a more plausible strategy than trying to convince either the developing countries to accept limits on development or industrialized ones to accept contraction - an estimation that has only been underscored by the Bush administration’s refusal to accept even modest cuts without similar caps being applied to developing countries.

Exempting developing countries from the initial round of binding GHG emissions caps may have been politically expedient, but is it unfair to industrialized countries like the United States, as the Bush administration has alleged? Here, it is helpful to think of a climate regime as essentially a decision about how to allocate costs (for mitigation and compensation), and to rely upon theories of justice and responsibility for assistance in determining a fair distribution of costs. As noted above, the principle of responsibility (as seen in fault-based liability) offers an account of the proper distribution of costs: those who are responsible for causing the problem (through their historical GHG emissions) are the ones that should pay, and in proportion to their historical luxury (but not survival) emissions. Despite being home to 40 percent of the planet’s population, China and India have together contributed only 9 percent of the total accumulated anthropogenic GHGs, compared with over 30 percent by the U.S. (with less than 5 percent of world population). By a standard of strict liability (i.e. making no distinction between survival and luxury emissions), the U.S. should bear 30 percent of total remedial costs, with China and India bearing a combined 9 percent. As the FCCC acknowledges, the world’s industrialized countries (which are together responsible for over 75 percent of historical GHG emissions though comprising only 20 percent of the world’s population) bear primary responsibility for causing global climate change, and so (by a standard of strict liability) ought to be assigned at least that same share of liability for its remedy. But should they accept *all* of the liability for the problem (if that is the effect of developing country exemptions)? Even though the average Indian

produces significantly less climate-changing gas than does the average American, they still contribute *some* GHGs into the atmosphere. Shouldn't they accept *some* (in proportion to India's total historical emissions) share of the costs?

Maybe or maybe not, depending upon which version of the "survival emissions" claim is most defensible. A weak version of it holds Indians significantly *less* responsible (though still responsible) for causing climate change, thus requiring them (by to the principle of responsibility) to bear *some* of the costs of its remedy, while a strong version (and the one implied by the in the above rebuttal to Bush) would maintain that Indians are not responsible at all for causing climate change, and therefore ought to be assigned *no* remedial burdens. Assuming that average Indians produce only survival and not luxury emissions (an assumption that shall be further examined below), the weak version is based upon a straightforward application of strict liability (assigning remedial costs in proportion to historical GHG emissions), but how might a defense of the strong version be formulated? The strong version, on the other hand, posits a basic minimum level of GHG emissions to which person might be entitled without being assessed liability, and assigns national liability based upon the total amount of historical emissions emitted above this minimum (that is, the mitigation costs assigned to each nation are based upon its historical share of total luxury emissions). Insofar as developing countries like India and China have historically produced only survival emissions and not luxury emissions, then they bear no responsibility for causing climate change, and hence can be attributed no liability for its remedy. The argument for the strong version, then, depends upon the association between fault and causal responsibility for avoidable harm, or (to put the same point another way) Barry's principle of responsibility, which attributes fault (and assigns liability) only to those emissions associated with activity beyond that necessary for bare subsistence. Either way, still lacking is an argument for granting persons a right to some quantity of luxury emissions (as necessary for development), given that both of these two standards assume liability for those emissions that exceed survival emissions, as such assessments may interfere with the practical realization of a right to develop.

Recall that that higher per capita GHG emissions allowances for developing countries entail the "contraction and convergence" scenario of more equitably allocated emissions shares among the world's peoples and persons, as finite atmospheric space necessitates a zero-sum game where per capita emissions increases for some are possible only with offsetting emissions cuts for others. The argument for a right to survival emissions can be grounded (as Shue argues) in basic subsistence rights, but the right to develop requires a more difficult case from egalitarian justice, rather than one simply based in the avoidance of harm or protection of basic rights. Within the distributive justice literature, this contrast is often referred to as the difference between an equal

distribution and a one guaranteeing basic minimum (as found, for example, in the claim that justice only demands that all persons have access to a basic minimum set of social resources, not that they be equally allocated). The case for a universal human right to some level of survival emissions is more easily made than the case for a human right to development, but the latter is nonetheless asserted above and stands now in need of some justification. Having surveyed the case for the more limited right defended by Shue (and based in the distinction between survival and luxury emissions), how might the latter argument (which presumably allows for considerably more luxury emissions for those in India and considerably fewer for those in the U.S.) go?

From classical liberalism, a longstanding constraint on inequality comes from the proviso that Locke attaches to his labor theory of property (in the *Second Treatise*), where persons are allowed to appropriate natural resources (as persons now appropriate atmospheric absorptive capacity) only insofar as this does not limit others from doing the same (or, as Locke writes, so long as persons leave “enough, and as good” for others). The basic idea is that where resources are finite, the appropriation by some of a scarce resource can harm others, as their opportunities are thereby diminished. Given the finite (and increasingly scarce) capacity of the atmosphere to absorb GHGs, the overappropriation of the atmosphere by some countries violates this Lockean proviso (leaving too little atmospheric space for others), in effect preventing other countries from being able to develop, as insufficient atmospheric space remains to accommodate the additional growth in developing country per capita emissions endemic to such growth as the result of the high emissions rates within industrialized nations. Though Locke doesn’t advocate the equal allocation of natural resources under these circumstances, he does recognize a key limit upon appropriation, and upon claims based in rights of property or prior use. Those opponents of GHG regulation grounding their arguments for a Lockean “nightwatchman state” must realize that the central intellectual figure in the libertarian tradition long ago laid the groundwork for an international regulatory regime designed to allocate national emissions shares in a manner that avoids the problem that Locke identifies. If nothing else, the Lockean proviso stresses that the appropriation of natural resources must be subject to a distributive principle, not left (as claimed by some contemporary neo-Lockeans) to individual choice or *laissez faire* nonregulation.

To go from justified limits on appropriation to more equitable per capita emissions shares requires several additional steps, however, and relies upon the idea of cosmopolitan justice (in which egalitarian theories of distributive justice are applied across national borders). Charles Beitz’s resource redistribution principle,¹⁹ for example, argues for the egalitarian (or equal, if also

¹⁹ Charles R. Beitz, *Political Theory and International Relations* (Princeton University Press, 1979), especially pp. 138-49.

subject to something like the difference principle) allocation of natural resources, based on the logic of the Rawlsian thought experiment of the original position combined with the observation that the *de facto* global distribution of natural resources is morally arbitrary. Even if we reject Beitz's plausible contention that this principle applies to the allocation of all natural resources (including those resources now geographically located within national borders, and so subject to legal rights of ownership) and apply egalitarian distributive principles only to the resource (which transcends national borders and so has no prior ownership claims) of atmospheric absorptive capacity – the weakest possible interpretation of Beitz's argument for cosmopolitan justice – his analysis makes a strong case for the equitable per capita allocation of emissions shares, subject only to several side constraints concerning population growth. Given equal per capita emissions shares, no nation would be allowed any greater capacity to industrialize (with the emissions that such development produces) than any other, nor would any be granted the license to consume more than any other (which can prohibit social as well as economic development), and so such an allocation of national emissions shares would amount to the guarantee of a right to develop, at least so long as the absorptive capacity of the atmosphere can accommodate *any* development.

How does a right to develop emerge from the analysis of atmospheric absorptive capacity as a shared resource, along with Beitz's resource redistribution principle? Insofar as residents of developing nations are understood to have a right to develop, then there is not only a correlative negative duty on the part of the world's affluent nations not only to refrain from interfering with that development, but also a positive one to provide certain kinds of assistance in order to facilitate it. A right to develop, in other words, implies both positive and negative duties, and the recognition of such a right requires at minimum that nations not be *prevented* from realizing the benefits of development (as would be the case with overly restrictive emissions caps), as well as the positive duty requiring industrialized nations to yield some of the atmospheric space that they now claim through their much larger per capita emissions in order to accommodate the GHG emissions growth that accompanies development. These are minimal correlative duties – more extensive duties of assistance in the form of sustainable development aid are likely required as part of the egalitarian implications of cosmopolitan justice as applied to a global climate regime.

Due to the nonexistence of any sort of formal limits upon the greenhouse gases during those periods in which the world's affluent nations developed economically, their processes of industrialization were uninhibited in ways that can no longer be tenable allowed for those nations which have yet to undergo such processes of transformation. Should the industrialized nations now impose emissions caps upon developing countries such that their ability to industrialize was inhibited, they would in effect be prohibiting their further development (or interfering with their

right to develop). In order to accommodate their interest in development, sufficient atmospheric space must be freed up under a global emissions cap to allow for GHG emissions increases by developing countries, and this space can only come at the expense of decreased emissions from industrialized nations. As Baer argues, some practical equivalent to a recognized right to develop (accompanied by corresponding decreases in industrialized country emissions) may be necessary if developing countries like Brazil, India, and China are to be voluntarily brought into a system of binding emissions caps, noting: “Everyone in the developing world cannot emit at the high rates of the North, but why should developing countries agree to restrictions that bind them to their current, much lower per capita rates or that restrict their economic growth?”²⁰ As previously observed, they cannot voluntarily agree to such restrictions, so the climate regime must be fair (to them) if it is to be effective (in including them).

If a meaningful right to develop is to be effectively recognized and advanced by a global climate regime, it must avoid structuring incentives in such a way that developing countries are encouraged to sacrifice long-term economic viability for short-term gain. Rather, it must promote long term human and economic development goals in a manner that are environmentally as well as socially and economically sustainable, and do so in a manner that is consistent with the climate convention’s expressed goals of promoting equity and responsibility. This concern for equity and responsibility should not be dismissed as merely secondary commitments to the primary goal of avoiding catastrophic climate change, for the environmental problem of anthropogenic climate change is also a problem of global justice, and so cannot be remedied unless the international response to it aims to promote justice itself (through the promotion equity and responsibility) while limiting GHG emissions. The right to develop, in other words, is a right grounded in ideals of justice, which seek to guarantee that the “natural lottery” of birth not continue to dictate the radically unequal life prospects that currently attach to one’s nation of residence. Global climate may be only part of the complex causal chain which produces this unjust inequality, but resource exploitation patterns which contribute to climate change also lead to global inequality, and the predicted effects of climate change include the imposition of externality effects that significantly exacerbate that inequality. Given the interrelation between global inequality and environmental degradation – as the Brundtland Report aptly notes, global inequality is a primary cause of stress upon environmental resources, and environmental degradation is primary cause of that inequality – a right to develop (within sustainable limits) is grounded in the nature of anthropogenic climate

²⁰ Paul Baer, “Equity, Greenhouse Gas Emissions, and Global Common Resources,” in *Climate Change Policy: A Survey*, ed. by Stephen H. Schneider, Armin Rosencranz, and John O. Niles (Washington DC: Island Press, 2002), 393-408, p. 394.

change itself. Both global justice and global climate change must be addressed at once, and as manifestations of the same set of problems.

Conclusions

Insofar as persons have an interest in flourishing, and are not limited in their interests to mere survival, then they must also be recognized (as Hayward argues) as having a basic interest in an adequate environment (and one that is threatened by anthropogenic climate change) as well as a less basic one to development. Since rights exist in order to protect interests, a strong case can be made from the critical importance to human welfare of climatic stability for a right to an adequate environment with the corollary that the right includes climatic stability (which entails duties to ensure that this claim is met as well as a system of compensation when it is not). Given this interest in human flourishing, we can also posit that persons also have other rights that guard against threats to or constraints upon that interest, including a right (with positive and negative dimensions) to human and economic development. While such a right cannot be unlimited (a right to development, for example, does not entail a permission to deplete resources or befoul the environment), it must trump rights or other claims that are less basic to human flourishing, including those implicitly made by or on behalf of those residents of industrialized nations whose selfish desire to continue producing excessive luxury emissions is mistakenly taken to justify placing overly restrictive GHG emission limits upon poor countries that effectively prevent their further development. As Shue argues, more basic interests outweigh less basic ones, so more basic rights must also trump less basic ones. While the right to develop cannot trump the right to survival emissions (nor can it trump the equally basic right to an adequate environment), the former must be recognized as making a more compelling claim to limited atmospheric space than do those *de facto* claims now being made upon that space by the relatively affluent residents of industrialized nations, who selfishly seek to protect and enlarge their undeserved (following Beitz) advantages by denying to the less advantaged a prerogative (i.e. sufficient emissions for development) upon which their present prosperity is largely based.

The right to develop (with its positive duty of assistance as well as its negative duty not to impose practical or legal constraints upon such development) can be violated by a climate regime which places excessively restrictive caps upon the emissions limits assigned to developing nations not currently assigned binding caps under the Kyoto protocol, but it also weighs in the opposite direction as the right to climatic stability: indeed, many see these two rights-claims as existing in fundamental opposition. Since the right to development is less basic than either of the other two rights discussed above (as the interest in flourishing is less basic than that in mere

survival), it must be limited by those two more basic rights. Nations cannot be entitled (as a matter of right) to increase their luxury emissions to that point where dangerous climatic instability threatens the very existence of current and future peoples and persons, nor can such development be financed by the denial to any of some basic level of survival emissions, but the interests in (sustainable) development can nonetheless cogently be formulated in terms of rights, and the luxury emissions budgets of developing countries may defensibly be financed by cuts in the luxury emissions budgets of industrialized ones. As luxury emissions connote liability for the harm associated with climate change (without which the uncompensated harm of anthropogenic climate change would constitute another sort of global injustice), it is incumbent upon any fair and effective global climate regime to minimize the need for such liability (as it violates basic rights and so trumps any development interests of which luxury emissions are a component).

If all persons (including future generations) have a basic right to climatic stability (one that may be violated by anthropogenic climate change), then aggregate global GHG emissions must be capped at a level that is at or below the atmosphere's capacity to absorb those emissions. If all have a basic right to survival emissions, then the costs associated with achieving those necessary reductions from current emissions must be assigned on the basis of historical luxury and not survival emissions (as the latter cannot serve as the basis for liability) and must grant nations and persons entitlement (to which no future liability attaches) to some basic minimum per capita level of emissions. Recognizing a less basic right to develop along with these two basic rights requires that developing countries be allowed per capita emissions shares that include both survival and luxury emissions – with the latter being a necessary but insufficient condition for development – and that the interest served by this right trumps less basic interests against which it often competes, including those in private property and national sovereignty. If all three of these rights are to be recognized at once (and brought into a stable balance), the per capita emissions shares assigned to industrialized nations must be significantly reduced from both present levels as well as those mandated under the Kyoto protocol (which likewise unfairly freeze the wide global economic inequalities reflected in its 1990 baseline formula), in order not only to meet the FCCC's mandate of avoiding dangerous anthropogenic interference with the planet's climate system, but also to accommodate the development interests of residents of poor nations. In the interest of promoting global equity while at the same time protecting these three kinds of environmental rights, the allocation of luxury emissions among the world's nations and persons ought to be far less unequal than it is at present, and may need to contract and converge upon nearly equal global per capita emissions shares.