

# LEGAL AND EQUITABLE RIGHTS OF OUR ANCESTORS

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## Abstract:

Following the judgment of the Supreme court in Philippines in the celebrated case of *Minors Oposa v Secretary of the Department of Environment and Natural Resources* in 1993 the idea that future generations have a vested interest in the natural resources exploited by the current generation has become settled law and Inter-generational equity as a concept has come to stay. The concept of intergenerational equity argues that we inherit the Earth from previous generations, our ancestors and have an obligation to pass it on in reasonable condition to future generations our descendants. It means that in between generations will exist vested rights which will need to be protected and therefore natural resources will have to be used with inter-generational equity in mind. The effect of this ruling was to stretch and expand the meaning of the word "society" to include not only future generations but also past generations for in truth we inherit the earth and its resources from past generations, our ancestors and much as we owe a duty to pass it on to future generations in a reasonable condition so also do we owe it to our ancestors to be good custodians and exercise good stewardship over the earth and its resources.

A group of children, including those of renowned environmental activist Antonio Oposa, brought this lawsuit in conjunction with the Philippine Ecological Network, Inc. (a non-profit organization) to stop the destruction of the fast disappearing rain forests in their country. The plaintiff children based their claims in the 1987 Constitution of the Philippines, which recognizes the right of people to a "balanced and healthful ecology" and the right to "self-preservation and self-perpetuation". Oposa also raised the idea of "intergenerational equity" before the court, which is the idea that natural resources belong to people of all ages and that if adults were to harvest all of a country's resources, they would be stealing from their children, their children's children, and all future generations.

In this essay, we will be concerned with making on behalf of our ancestors the same argument made in favor of future generations in the above cited case by investigating what legal or vested rights if any a person retains or has once he or she is dead and gone. We will deal with issues of capacity and the locus standi of our ancestors to an action for the protection and preservation of these rights if any exists in law or in equity.

The question that needs to be answered then should be whether a person can similarly bring an action in court where it finds that the current generations use of its natural resources is guaranteed to deprive future generations of the benefits there under and are therefore in breach of trust.

**Keywords:** Inter-generational equity, locus standi, capacity, ancestors, descendants, equity, fiduciary, settlor, trustee, vested rights, juridical, voidable

## 1. Introduction

Rights are real and intangible and can be described as existing when a person accrues an interest in a thing. Where it vests in a person it crystallizes into legal rights also called vested rights<sup>314</sup>. This means that it is capable of being enforced or protected at law and as against the whole world. Most living beings by virtue of their being alive inherit at birth certain rights that are inalienable; that are so fundamental that they could be taken for granted. Examples of such rights are a person's right to life, freedom of speech, to practice his or her religion of choice, right to vote and freedom of association. These freedoms or rights are protected by the 1992 Constitution of the Republic of Ghana<sup>315</sup>. Certain rights, however are accrued rather than a birth. In this sense we have second generation rights that accrue to a person but are not inalienable as in the fundamental human rights and freedoms protected under the constitution but which in the right circumstances will receive the protection of the law. Apart from these rights that accrue to a person by virtue of his station in life there are also property rights where a person's vested rights translate into ownership.

In this essay, we will be concerned with investigating what legal or vested rights if any a person retains or has once he or she is dead and gone. We will deal with issues of capacity and the locus standi of our ancestors who are dead to an action for the protection and preservation of these rights if any exists in law or in equity. The main

<sup>314</sup> Vested rights by Daniel Shapiro Esq., February 28th 2014

<sup>315</sup> Chapter Eleven of the 1992 Constitution of the Republic of Ghana

thrust of this article while examining the concept of intergenerational equity would attempt to argue that our ancestors are just as important as the unborn.

## 2. Past Generations And Society

To the African and indeed in many parts of the world, death is not the end of life, it is a continuum and as such the African dead are not totally cut-off from their descendants. As a matter of fact, the African dead have an endless fellowship with the living in the community<sup>316</sup>.

An ancestor is a person:

- who died a good death after having faithfully practiced and transmitted to his descendants the laws left to him by his ancestors.
- who contributed to the continuation of the line by leaving many descendants.
- who was a peacemaker, a *link*, that fostered communion between the living and the dead, through sacrifices and prayers.
- A person who is the first-born is a candidate 'par excellence' to become an ancestor because he is able to maintain the *chain* of the generation in a long genealogy. The right of the first born is thus an inalienable right<sup>317</sup>.

Whether or not there is life after death, one cannot ignore the vast gorge that exists between the land of the dead and the land of the living. It is a fact that once a person is dead he ceases to have anything to do under the sun. This is evidenced from the fact that all human interaction and communication ceases and as far as the living is concerned the person has joined our ancestors. In fact it is recorded in the bible in ecclesiastics that "...under the sun".

Our societies have long acknowledged and respected the dead. In many traditional African societies the dead hold a very important place in society. They are consulted on many issues, they are invoked to deliver solutions to problems, to be present at important family gatherings, libation is poured to them in their memory and reverence and the names of some of the most important ones are reserved and given to those yet to be born<sup>318</sup>.

That society is made up of the dead, the living and the yet unborn<sup>319</sup> is a concept that is well established in Africa and other parts of the world.

The qualifications of the ancestors are that: only those who have led a good life, lived to a ripe old age, died good death and accorded full burial rites. To the African, burial is very significant and symbolic. Thus, burial has theological, environmental and spiritual imports. Theologically, proper burial is the requirement for admission into the communion of the ancestors. People who are not properly buried revolve around. It behooves us to address the various misrepresentations of the ancestors in African society. Contrary to opinions by many, ancestors are not worshipped rather they are revered as a result of their great feat and influence on the affairs of their descendants and their cordial relationship with the supersensible world. It is the general assertion that veneration does not amount to worship, rather it is African social behavior bequeathed to the dead. (Avalon Sakti, 2009).

It is a manifestation of an unbroken relationship between the parent who has departed from this world and the offspring who are still here. Agreeably, ancestors are included in the religious hierarchy of the African and are charged with the responsibility of acting as intermediaries between men and the supersensible world. Therefore, they are not restricted to their mundane or social environment but have great flair for religious issues. As a matter of fact, ancestors maintain healthy and uninterrupted relationship with their immediate families which enable them to give consideration to human feelings. They get in touch with their siblings often and participate in everyday activities. Admittedly, the ancestors are constantly invoked, and they are not unaware of the actions, intent and feelings of their descendants who on their behalf are the **temporary caretakers of lineage and prosperity**. Sometimes, in order to maintain the relationships, the spiritual head carries out rituals, and cannot take food in religious gathering or drinking without first and foremost throwing out a morsel or pouring libation

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<sup>316</sup> Ancestors: Your Invisible allies. Copyright © Avalon Sakti, 15.09.2009

<sup>317</sup> *ibid*

<sup>318</sup> *Minors Oposa v Secretary of the Department of Environment and Natural Resources*

to the ancestors. Likewise, it is believed among Africans that it is an abomination to empty their pots at night so that when the ancestors come, they can have a share from the remnant<sup>320</sup>.

Some of these ancestors are celebrated with great festivals. There are communal ceremonies in respect of African dead. Among them are Mnuo in Igbo land, Adae ceremony among the Akan, Uda in Ekpoma, Obazu in Aoma and Edo land. During these festivals, animal offerings are made to the ancestors and they are followed by prayers, and the Oriki praise names of the ancestors are chanted<sup>321</sup>.

These African ancestors were heroes in their lifetime. They had positively influenced lives, affected development, liberated people from imperialism, etc. Oftentimes, they could be remembered by building schools or erecting markets in their honor. Ancestors are also referred to as “moral paragons” because, they uphold morality and also, they are custodians of traditional morality<sup>322</sup>.

In several cases, the ancestors also condemn and punish those who commit atrocities, such as murder, stealing, witchcraft, adultery, false oath, hatred, incest, bearing false witness among others. In fact, the communal ceremonies unify and consolidate the society, because it is generally believed that when people converge in public gathering, they express their feelings, emotions, even sentiments through singing, dancing, clapping of hands and expression of joy. Undoubtedly, this act of public gathering at which people or community meet to honor their ancestors is called festival which promotes social solidarity, communal order and, hopes of people are kept alive. Socially speaking, festivals virtually bring together whole communities and provide an occasion for the renewal of strained relationship among members of the community.

Meanwhile, the ancestors are referred to as “moral paragons” in which case, they are custodians of public and traditional morality in their community. However, it is no longer true today that they are still virtuous. They are morally bankrupt as a result of the fact that some moral problems such as stealing, incest, sorcery, witchcraft, killings, maiming, disobedience, adultery, false oath, hatred and lots of others have assumed dangerous and unprecedented dimension. These moral problems which are supposed to attract sanctions by the ancestors are allowed to soar and remain unchecked.

In point of fact is that the ancestors are today blind to the endless challenge we face in the society. Looking at the role of ancestors, it is certain that much power has been given to them, as such we expect much from them. Today, the opposite is the case, because our lives are dependent on multifarious variables. These variables are both endogenous and exogenous in nature. It is endogenous in the sense that the problems we cause for ourselves, emanating from the family or head of the family cannot be handled by the ancestors. The fact is that the ancestors cannot provide for all our material well-being. Similarly, exogenous problems, emanating from bad leadership, harsh economic reforms, political uprisings, social crises, among others, cannot be solved by the ancestors. Even when the so-called living are caught in the intractable web of these problems, they go scot-free without sanction from the “moral paragon”.

In African religious belief, the ancestors are consulted through the oracle before any function is performed. Lately, human beings have taken over the position of the ancestors, they no longer consult the oracle so as to know the mind and choice of the ancestors concerning certain issues affecting the community. For instance, money is freely used in many communities to determine the next king of which the kingmakers are brought over and they speak their minds instead of the minds of ancestors. Where are the ancestors? If they are still the “living-dead”, it means they are crying for justice, reinstatement and restoration. One would be compelled to agree with Kofi Awoonor that:

*The gods are crying, my father's gods are crying for a burial... for a final ritual... but they should build the fallen shrines have joined the dawn marchers singing their way towards Gethsemane...the gods cried, shedding clayey tears on calico; the drink offering had dried up in the harmattan and the fetish priest is dressing up for the Easter service*<sup>323</sup>.

The foregoing reveals that the ancestors are handicapped and men have taken over their position hence they are screaming for a burial consequent upon their abandonment. Judging from the magnitude and multifarious problems in the post colonial period of the African society, the place of the ancestors cannot be justified.

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<sup>320</sup> The Place Of African Ancestors In The Age Of Modernity by A.G. Alamu

<sup>321</sup> ibid

<sup>322</sup> ibid

<sup>323</sup> Kofi Awoonor, “Easter Dawn” cited by Ogbu-U-Kalu” After the Former Rains: Paradigm Shift in the Study of Cultural Identity and Christianity in Nigeria” in P. Ade Dopamu and E. ADe Odumuyiwa (eds.) *Religion, Science and Culture* (Ikenne-Remo: Olarotayo & Co, 2003), p.312.

Therefore, the ancestors should be made to perpetually rest in peace and be forgotten unless it is absolutely necessary to invoke their presence.

All said and done there is one point that remains true. That we have been handed down a legacy by our ancestors. Our culture, beliefs, communities, festivals, natural resources, and our identities have been handed down to us to hold in trust for future generations<sup>324</sup>. This is the concept of intergenerational equity which has been advanced in recent years to expand and stretch the meaning of the word 'society'. *That society is made up of the dead, the living and the yet unborn is a concept that is well established in Africa* and other parts of the world and just as in the case of *Minors Oposa v Secretary of the Department of Environment and Natural Resources* (1993) a case can be made in support of granting locus to our ancestors in situations where there is a real fear that someone or a group is undermining the good stewardship of the earth's natural resources.

### 3. The Legal Capacity Of The Dead

Legal Capacity is a power provided under law to a natural person or a juridical person to enter into binding contracts, and to sue and be sued in its own name<sup>325</sup>. The **capacity** of natural and juridical persons, and legal persons in general, determines whether they may make binding amendments to their rights, duties and obligations, such as getting married or merging, entering into contracts, making gifts, or writing a valid will. Capacity is an aspect of status and both are defined by a person's *personal law*<sup>326</sup>: When the law limits or bars a person from engaging in specified activities, any agreements or contracts to do so are either voidable or void for **incapacity**. Sometimes such legal incapacity is referred to as *incompetence*.

#### 3.1 Natural persons

Standardized classes of persons have had their freedom restricted. These limitations are exceptions to the general policy of freedom of contract and the detailed human and civil rights that a person of ordinary capacity might enjoy. Hence, for example, freedom of movement may be modified, the right to vote may be withdrawn, etc. As societies have developed more equal treatment based on gender, race and ethnicity, many of the older incapacities have been removed. For example, English law used to treat married women as lacking the capacity to own property or act independently of their husbands (the last of these rules was repealed by the Domicile and Matrimonial Proceedings Act 1973, which removed the wife's domicile of dependency for those marrying after 1974, so that a husband and wife could have different domiciles). Among the list of natural persons with restricted capacity are infants, mentally insane people, drunks, enemy aliens and bankrupts

The definition of an *infant* or *minor* varies. In many jurisdictions, legal contracts, in which one of the contracting parties is a minor, are voidable by the minor. For a minor to undergo medical procedure, consent is determined by the minor's parent(s) or legal guardian(s). The right to vote in the Ghana is currently set at 18 years, while the right to buy and consume alcohol is often set at 21 years. Some laws, such as marriage laws, may differentiate between the sexes and allow women to marry younger. There are instances in which a person may be able to gain capacity earlier than the prescribed time through a process of emancipation. Conversely, many states allow the inexperience of childhood to be an excusing condition to criminal liability and set the age of criminal responsibility to match the local experience of emerging behavioral problems. For sexual crimes, the age of consent determines the potential liability of adult accused.

As an example of liability in contract, the law in Ghana provides that an infant is not bound by the contracts he or she enters into except for the purchase of necessities and for beneficial contracts of service. Infants must pay fair price only for necessary goods and services. However, all contracts, including necessities and beneficial contracts of service, are unenforceable against an infant<sup>327</sup>. Only student loans and other contracts made specifically enforceable by statute will be binding on infants.

In contracts between an adult and an infant, adults are bound but infants may escape contracts at their option (i.e. the contract is voidable). Infants may ratify a contract on reaching age of majority. In the case of executed contracts, when the infant has obtained some benefit under the contract, he/she cannot avoid obligations unless what was obtained was of no value. Upon repudiation of a contract, either party can apply to the court. The court may order restitution, damages, or discharge the contract. All contracts involving the transfer of real estate are considered valid until ruled otherwise.

<sup>324</sup> African Traditional Religions And The Promotion Of Community-Living In Africa. By Christopher I. Ejizu

<sup>325</sup> definition at <http://www.businessdictionary.com/definition/juridical-person.html>

<sup>326</sup> find definition <http://www.definitions.net/definition/capacity>

<sup>327</sup> The British Columbia Infants Act (RSBC 1996 c.223)

Insanity, mental illness, and drunkenness or drug abusers also belong to a class of persons whose capacity is restricted. Individuals may have an inherent physical condition which prevents them from achieving the normal levels of performance expected from persons of comparable age, or their inability to match current levels of performance may be caused by contracting an illness. Whatever the cause, if the resulting condition is such that individuals cannot care for themselves, or may act in ways that are against their interests, those persons are vulnerable through dependency and require the protection of the state against the risks of abuse or exploitation. Hence, any agreements that were made are voidable, and a court may declare a person a ward of the state and grant power of attorney to an appointed legal guardian.

In England and Wales, this is a specific function of the Court of Protection, and all matters concerning persons who have lost, or expect soon to lose, mental capacity are regulated under the Mental Capacity Act 2005. This makes provision for lasting powers of attorney under which decisions about the health, welfare and financial assets of a person who has lost capacity may be dealt with in that person's interests

This sort of problem sometimes arises when people suffer some form of medical problem such as unconsciousness, coma, extensive paralysis, or delirious states, from accidents or illnesses such as strokes, or often when older people become afflicted with some form of medical/mental disability such as Huntington's disease, Alzheimer's disease, Lewy body disease, or similar dementia. Such persons are often unable to consent to medical treatment and otherwise handle their financial and other personal matters. If the afflicted person has prepared documents beforehand about what to do in such cases, often in a revocable living trust or related documents, then the named legal guardian may be able to take over their financial and other affairs. If the afflicted person owns his/her property jointly with a spouse or other able person, the able person may be able to take over many of the routine financial affairs. Otherwise, it is often necessary to petition a court, such as a probate court, that the afflicted person lacks legal capacity and allow a legal guardian to take over their financial and personal affairs. Procedures and court review have been established, dependent on the area of jurisdiction, to prevent exploitation of the incapacitated person by the guardian. The guardian periodically provides a financial accounting for court review.

Although individuals may have consumed a sufficient quantity of intoxicant or drug to reduce or eliminate their ability to understand exactly what they are doing, such conditions are self-induced and so the law does not generally allow any defense or excuse to be raised to any actions taken while incapacitated. The most generous states do permit individuals to repudiate agreements as soon as sober, but the conditions to exercising this right are strict.

Bankruptcy of individuals who find themselves in a situation where they can no longer pay their debts, they lose their status as credit-worthy and become bankrupt. States differ on the means whereby their outstanding liabilities can be treated as discharged and on the precise extent of the limits that are placed on their capacities during this time but, after discharge, they are returned to full capacity. In the United States, some states have spendthrift laws under which an irresponsible spender may be deemed to lack capacity to enter into contracts (in Europe, these are termed prodigality laws) and both sets of laws may be denied extraterritorial effect under public policy as imposing a potentially penal status on the individuals affected.

During times of war or civil strife, the state will limit the ability of its citizens to offer help or assistance to Enemy aliens and/or terrorists. Hence, all commercial and other contracts with the "enemy", including terrorists, would be considered void or suspended until a cessation of hostilities is agreed.

### **3.2 Artificial persons**

Business entities, Corporations, incorporated partnerships, and other statutory bodies are all artificial persons and most often have all the powers of a natural person. An entity becomes a legal entity through incorporation under the law. The extent of an artificial person's capacity depends on the law of the place of incorporation and the enabling provisions included in the constitutive documents of incorporation. The general rule is that anything not included in the corporation's capacity, whether expressly or by implication, is ultra vires, i.e. "beyond the power" of the corporation, and so may be unenforceable by the corporation, but the rights and interests of innocent third parties dealing with the corporations are usually protected.

There is a clear division between the various definitions of partnerships. One group treats it as being general and limited partnerships as aggregate. In terms of capacity, this means that they are no more than the sum of the natural persons who conduct the business. The other group believes partnerships to have a separate legal personality which changes the capacity of the "firm" and those who conduct its business and makes such partnerships more like corporations.

In some states, trade unions have limited capacity unless any contract made relates to union activities.

When a business entity becomes insolvent, an administrator, receiver, or other similar legal functionary may be appointed to determine whether the entity shall continue to trade or be sold so that the creditors may receive all or a proportion of the money owing to them. During this time, the capacity of the entity is limited so that its liabilities are not increased unreasonably and to the detriment of the existing creditors.

Generally, a person must have the requisite legal capacity to be a party to a lawsuit. Some people are considered non sui juris: they do not possess full civil and social rights under the law. Prisoners for instance have limited rights as parties to civil actions. They can appeal their convictions and bring Habeas Corpus petitions to challenge the validity of their incarceration. They can file prisoners' rights cases for a violation of their constitutionally protected Civil Rights. Some places permit prisoners to defend themselves in an action that threatens them with forfeiture of their property, but not many countries permit prisoners to start a civil lawsuit against any other party during the period of incarceration. Convicted felons or prisoners given life sentences may suffer what is called civil death, a total loss of rights, including the right to be a party in a lawsuit.

### 3.3 Legal capacity of our Ancestors

Legal disability does not mean, however, that persons in these categories are removed from civil actions. The claims or defenses of a person who is *non sui juris* usually can be asserted by a legal representative, such as a parent, guardian, trustee, or executor. Interestingly, it is true in fact and in law that a person's death does not bring an end to their legal status in as much they are survived by their estate fully managed by its administrator, or executor

The Legal representative of a person's estate arguably is clothed with capacity to enter into any contract, own property, sue and be sued. This means that the legal representative can bring an action against a party or persons for the protection of its vested rights.

Our ancestors, by virtue of their being part of society can sustain an action brought as a representative action as in the case of *Minors Oposa*. Where numerous persons in this case "members of society" have the same interest in any proceedings, proceedings may be commenced and continued by or against anyone or more of them as representing all or as representing some of them; those with similar interests who are alive representing those who are dead. This forms the basis of the Supreme court decision in *Minors Oposa v Secretary of the Department of Environment and Natural Resources in 1993* in which the law Lords with a little bit of legal ingenuity and managing to stretch the interpretation of society to include future generations may have just opened the door for our ancestors to be cloaked with capacity to maintain an action in cases where it finds it has a common interest to protect

### 3.4 The Locus Standi of our Ancestors

Locus standi means the right to bring an action, to be heard in court, or to address the Court on a matter before it. It is the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case. so for example while a person may have capacity to bring an action it may not have locus standi. It means it does not have sufficient interest in the matter to warrant their involvement. For example, in the United States, a person cannot bring a suit challenging the constitutionality of a law unless the plaintiff can demonstrate that the plaintiff is (or will be) harmed by the law. Otherwise, the court will rule that the plaintiff "lacks standing" to bring the suit, and will dismiss the case without considering the merits of the claim of unconstitutionality. This is so despite the fact that they have capacity as adults to sue. In order to sue to have a court declare a law unconstitutional, there must be a valid reason for whoever is suing to be there. The party suing must have something to lose in order to sue unless they have automatic standing by action of law.

The principle of locus standi is an age old one that forms the basis of any action in a court of law<sup>328</sup>. Locus standi is a Latin phrase meaning "place to stand". It refers to whether or not someone has the right to be heard in court. People may use the term "standing" or "legal standing" to describe this concept. In her book entitled "Locus Standi", Australian jurist Leslie Stein defines it as: "... the existence of a right of an individual or group of individuals ... to have a court enter upon an adjudication of an issue ... before that court by proceedings instigated by the individual or group."

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<sup>328</sup> Understanding the principle of locus standi by **Sokombaa Alolade** at <http://www.thelawyerschronicle.com/understanding-the-principle-of-locus-standi/>

A number of factors can influence locus standi for a given person or situation and legal standing can vary depending on the level of the court as well. This expression applies to people who want to bring suits, individuals who want to address the court, and people who want to be heard in the court. As a general rule, a person has locus standi in a given situation if it is possible for such a person to show that the issue at hand causes him harm and that an action undertaken by the court could redress that harm. If these conditions cannot be satisfied, the court may determine that an individual has no locus standi and it will not review it. Lord Denning in *R v. Paddington* said:

The court would not listen, of course, to a mere busybody who was interfering in things which did not concern him. But it will listen to anyone whose interests are affected by what has been done.

For instance, imagine that a citizen wants to challenge a law. The citizen must first show that he or she is experiencing harm as a result of the law. This means that people cannot, in other words, challenge laws just on the principle of the matter or because they think that those laws might harm other people. These individuals must also be able to show that the court could take corrective action such as changing the law. When the case is filed, the court could determine that the citizen does indeed have locus standi and such a case will be heard.

The Supreme Court of the United States has stated: “In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues”. In the US, locus standi exists from one of three causes:

- i. The party is directly subject to an adverse effect by the statute or action in question, and the harm suffered will continue unless the court grants relief in the form of damages or a finding that the law either does not apply to the party or that the law is void or can be nullified. This is called the “something to lose” doctrine, in which the party has standing because they directly will be harmed by the conditions for which they are asking the court for relief.
- ii. The party is not directly harmed by the conditions by which they are petitioning the court for relief but asks for it because the harm involved has some reasonable relation to their situation, and the continued existence of the harm may affect others who might not be able to ask a court for relief. In the United States, this is the grounds for asking for a law to be struck down as violating the First Amendment, because while the plaintiff might not be directly affected, the law might so adversely affect others that one might never know what was not done or created by those who fear they would become subject to the law – the so-called “chilling effects” doctrine.
- iii. The party is granted automatic standing by act of law. Under some environmental laws in the United States, a party may sue someone causing pollution to certain waterways without a federal permit, even if the party suing is not harmed by the pollution being generated. The law allows them to receive a portion of any fines collected by the government from their violation of the law. In some U.S. states, a person who believes a book, film or other work of art is obscene may sue in their own name to have the work banned directly without having to ask a District Attorney to do so.

In human rights cases and administrative law, the first legal stumbling block an applicant faces is whether or not they have ‘standing’ to bring a claim to court. If they are not allowed to bring the claim, it will not be heard. It is therefore an essential element of procedural law that has a profound effect on the substantive development of law.

Most Commonwealth systems have adopted the test of ‘*sufficient interest*’ in interpreting *locus standi*. However, in some jurisdictions, this test has been interpreted to mean that only those who have a ‘personal right’. This restricts access to justice and therefore, accountability of government in several ways:

This concept was tested in the landmark case of *Minors Oposa v Secretary of the Department of Environment and Natural Resources*. This was a class action by children in the Philippines acting for themselves and representatives of future generations<sup>329</sup>. The basis of the action was to halt the cutting of trees by government licensees arguing that the continued logging of timber violated their right to a healthy environment and would entail an irreparable harm to them and future generations. The Attorney General argued *Locus Standi*, that a generation that is yet to exist has no capacity to bring such an action. The Lawyer for the children argued inter-generational equity and the responsibility of government to recognize their vested rights and presented statistics

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<sup>329</sup> see intergenerational equity

demonstrating the amount of forest cover necessary for a healthy environment for present and future generations. This was the beginning of the development of the concept of wise stewardship<sup>330</sup>.

The Locus standi of our ancestors established without doubt as it falls within the category of a party is not directly harmed by the conditions by which they are petitioning the court for relief but asks for it because the harm involved has some reasonable relation to their situation, and the continued existence of the harm may affect others who might not be able to ask a court for relief under the so-called “chilling effects” doctrine.

#### 4. The Concept Of Intergenerational Equity

Inter-generational equity is a concept that says that human beings 'hold the natural and cultural environment of the Earth in common both with other members of the present generation (intra- generation) and with other generations, past and future' (inter-generation),<sup>331</sup>. It means that we inherit the Earth from previous generations and have an obligation to pass it on in reasonable condition to future generations. It means that in between generations will exist vested rights which will need to be protected and therefore natural resources will have to be used with inter-generational equity in mind. That society is made up of the dead, the living and the yet unborn<sup>332</sup> is a concept that is well established in Africa and other parts of the world. The idea behind not reducing the ability of future generations to meet their needs is that, although future generations might gain from economic progress, those gains might be more than offset by environmental deterioration. Most people would acknowledge a moral obligation to future generations, particularly as people who are not yet born can have no say in decisions taken today that may affect them.

There are two different ways of looking at the need to ensure that future generations can supply their needs. One is to view the environment in terms of the natural resources or natural capital that is available for wealth creation, and to say that *future generations should have the same ability to create wealth as we have*. Therefore, future generations will be adequately compensated for any loss of environmental amenity by having alternative sources of wealth creation. This is referred to as 'weak sustainability'.

The concept of weak sustainability is further founded on two arguments. The first being that we, the present generation have borrowed the resources we exploit from the future generations and therefore must be returned 'as is' if not with interest and the second based on the notion of a 'mortgage'. The present generation being the mortgagor and the future generations being the mortgagee with a charge on the natural resources we exploit today.

The other way is *to view the environment as offering more than just economic potential that cannot be replaced by man-made wealth* and to argue that *future generations should not inherit a degraded environment, no matter how many extra sources of wealth are available to them*. This is referred to as 'strong sustainability'.

It has been argued by experts and academics that unless substantial change occurs, the present generation may not be able to pass on an equivalent stock of environmental goods to the next generation. This would be due to three factors:

Firstly, the rates of loss of animal and plant species, arable land, water quality, tropical forests and cultural heritage are especially serious. Secondly, and perhaps more widely recognized, is the fact that we will not pass on to future generations the ozone layer or global climate system that the current generation inherited. A third factor that contributes overwhelmingly to the anxieties about the first two is the prospective impact of continuing population growth and the environmental consequences if rising standards of material income around the world produce the same sorts of consumption patterns that are characteristic of the currently industrialized countries<sup>333</sup>.

#### 5. Conclusion

I wish to conclude that the principle of inter generational equity is itself founded on the relationship between the past, the present and the future in a continuum that suggests that neither of the parts can be ignored. This creates the perfect basis for the formation of a "Trust". In the *Minors Oposa v Secretary of the Department of Environment and Natural Resources* case the plaintiff children based their claims on the 1987 Constitution of the

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330 Denmark v Norway - ICJ

331 (Weiss, 1990, p. 8)

332 *Minors Oposa v Secretary of the Department of Environment and Natural Resources*

<sup>333</sup> ESD Working Group Chairs 1992, p. 10



Philippines, which recognizes the right of people to a “balanced and healthful ecology” and the right to “self-preservation and self-perpetuation”<sup>334</sup>. Oposa also raised the idea of “intergenerational equity” before the court, which is the idea that natural resources belong to people of all ages and that if adults were to harvest all of a country’s resources, they would be stealing from their children, their children’s children, and all future generations. Without our future the human race becomes extinct. The Supreme Court ruled in favor of the children, and made several groundbreaking and powerful statements, finding:

- The right to a clean environment, to exist from the land, and to provide for future generations are fundamental.
- There is an intergenerational responsibility to maintain a clean environment, meaning each generation has a responsibility to the next to preserve that environment, and children may sue to enforce that right on behalf of both their generation and future generations.
- The Philippine Constitution requires that the government “protect and promote the health of the people and instill health consciousness among them.”

What rights do the past generation have? Can anyone likewise bring an action on behalf of himself and past generations as in the case above that the resources they handed down to us have been mismanaged in breach of the trust placed in them. If it is a continuum and a three way relationship we cannot underestimate the rights of the dead and the obligation we owe not only to future generations but also to our ancestors for the trust they placed in us. In this trust relationship, we, the current generation are the trustees, the future generations are the beneficiaries whilst the past generations, our ancestors are the settlors. So the trustees owe a fiduciary duty towards the settlor and the beneficiaries. A duty to take care, not to harm or mismanage the resource, act in the interest of the fiduciary to keep accurate records and to be a good steward. Thus, it is hereby submitted that in a representative action or by means of its Executor or Administrator, a dead person, our ancestors will be able to maintain an action for the protection and preservation of its interests.

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<sup>334</sup> see 16, Article II of the 1987 Constitution of the Philippines

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