

A BATTLE FOR, AGAINST OR WITH THE FUTURE?: HUMAN RIGHTS FOR FUTURE GENERATIONS

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ABSTRACT

Members of future generations are excluded from most human rights considerations and issues. Even for today's humans, the access to basic human rights is not met equally across geographical, racial, ethnic and gender lines. It is likely that the access to human rights for future generations could be divided along such lines, unless actively fought against. When speaking of future generations' rights these dynamics of power and hierarchy must simultaneously be dealt with. This article is threefold. Firstly, we define WHO are potential holders of rights in the future (Groups, Individuals & Types). Secondly, we address the four common issues of "non-identity," "non-existence," "enforceability" and "self-sanctions" to understand the complexity of justifying rights for future generations. Third, we address WHY the rights for future people need to be juristically considered. Finally, we explore HOW rights for future generations can be justified by combining utilitarian and distributive ethics approaches.

Keywords: future generations, human rights, distributive ethics, utilitarianism, climate justice

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I. Introduction

A CENTRAL part of the reshaping of today's international legal systems and institutions, dealing with issues on how to prepare for predicted climate changes and disasters, is how to best include the rights of future "people". With sea levels and temperatures rising, making some places on earth inhabitable, effective measures to mitigate the worst effects and how to best adapt to the changes already beyond prevention is on both national and international agendas.¹ As predicted by scientists, the effects of climate change will hit unequally across the world, affecting the poor in developing countries the most. Therefore, there is a need to not only discuss how to hold actors accountable for the liveability of "a" future generation, but to acknowledge the difference in consequences based on an intersection of inequalities as well as place the burden of the measures needed to be undertaken based on difference in resources to deal with it.

In this essay we shall first discuss how to conceptualize future generations and which issues occur when negotiating their rights into current laws and policies. Secondly, it shall be discussed why an intergenerational approach is necessary in negotiations around climate mitigations and adaptations. Lastly, with the use of a utilitarian and distributive justice approach, there will be a concluding discussion on how to justify rights for future generations and their relationships with current right holders. In this section we aim to highlight why there is a need to look at patterns of inequalities to distribute the burdens and the rights differently to create more just futures.

II. WHO: Future Generations

The question of how to treat the so called "future generations" when policies are discussed is a complex matter. First, there is no coherent definition as to what "future generations" might be, both in terms of defining which generation is talked about and second, considering that these "people" do not exist in the present, thus don't have a voice in the way the current generations have. Herstein writes that despite the ambiguities in finding a clear definition of the term "future generations" there is a need to define which entity of "future generations" is talked about when discussing human rights issues.² Herstein inquires "which of these uses

¹ Edward A. Page, *Climate Change, Justice and Future Generations* (Edward Elgar, Cheltenham, 2006).

² Ori J Herstein, "The Identity and (Legal) Rights of Future Generations" 77 *The Georg Washington Law Review* 1173 (2009).

denote a future entity that is worthy of moral concern and as such should be the holder of the legal rights ascribed to future generations?”³ Herstein suggests discussing it in terms of three entities, namely “future groups, future individuals, and types of future people”.⁴ Breaking them into smaller groups provides better tools to match the discriminations against future generations in the current legal systems. Apart from deciding which form of identification best serves to discuss the moral significance of future generations, Grossier puts forth four issues that complicate the justification of rights granting to future generations, namely “non-identity,” “non-existence,” “enforceability” and “self-sanctions”.⁵

A. Non-Identity and Non-Existence Argument

Firstly, “the nonidentity argument concludes that future people cannot be made worse off by (most) acts and choices that occurred prior to their birth, so long as those particular people would have never been born (or conceived) had those events not occurred”.⁶ Secondly, the nonexistence argument is related to the non-identity argument and relies on that these individuals do not yet exist and therefore cannot be accounted for individually. A way to overcome that issue is to see future generations as types rather than individuals.⁷ In this way, the types of people that most likely will be affected by something can be considered and given a sort of agency, judged by the perspective of current generations and how they can ensure habitats securing the livelihood of future generations. Despite the problems with their lack of existence, rights could be granted within the current system “as particular instances of a normatively protected type of person”.⁸

The problem with granting rights to types within the current system is that “a right is always the right of some actual particular entity, such as a person, corporation, animal, collective, or group”.⁹ “Rights, by their nature, benefit the right-holder; as such, the rights-holder must be capable of having interests”.¹⁰ One idea on how to overcome this barrier, “is that norms can confer (legal) rights not on types per se but on future people as tokens of types of people (not

³ *Id.* at 1174.

⁴ *Ibid.*

⁵ Axel Gosseries “On Future Generations’ Future Rights” 38 *The Journal of Political Philosophy* 447 (2008).

⁶ *Supra* note 2.

⁷ *Id.* at 1188.

⁸ *Id.* at 1174.

⁹ *Id.* at 1188.

¹⁰ *Ibid.*

as a particular individual person)”.¹¹ Even in current legal systems most legal norms refer to types of people, which then can become rules applied to people, like in the example put forth by Herstein, that if a tax law for people earning above a million would count for a type of people it does not apply to anyone until they earn over the threshold.¹² Similarly, if considering future generations as a type of people not yet existent one can still make laws which will consider their rights and therefore be able to hold actors accountable for injustices in the current times that will violate their rights in the future.

To make sure that the laws implemented also cover the rights of future generations, constitutions are a prime platform for such, since they are made to be long term legal guidance.¹³ There are examples of countries having adopted rights of future generations in their constitutions. One is the Norwegian constitution from 1814, with the article 112 stating that “every person has a right to an environment that is conducive to health and to natural surroundings whose productivity and diversity are preserved. Natural resources should be made use of on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well.”¹⁴ Another example is the Egyptian Constitution of 2014, article 32 stating that “The state commits to preserving such resources, to their sound exploitation, to prevent their depletion, and to take into consideration the rights of future generations to them.”¹⁵

B. Enforceability and Self-Sanction

Even if overcoming the non-identity and non-existence challenges and seeing future generations as valid right holders, which constitutions and international legal instruments have already included, especially when working with impacts of climate change, etc., there is according to Gosseries, still the issue of “enforceability” and “self-sanction” complicating the matter of taking the rights of future generations into consideration.¹⁶ According to Gosseries, the problem of enforceability comes with the fact that the consequences will come “too late,” meaning that of the harmful actions are carried out now which will first have an effect later, it

¹¹ *Id.* at 1189.

¹² *Id.* at 1191.

¹³ Jörg Tremmel “Whose Constitution? Constitutional Self-Determination and Generational Change” 32 *Ratio Juris* 49 (2019).

¹⁴ The Constitution of Norway, art. 112.

¹⁵ The Constitution of Egypt, art. 32.

¹⁶ *Supra* note 5 at 38.

will be hard to settle in courts, for example.¹⁷ There is also the aspect that nations and corporations do not see the benefit in agreeing to the sanctions on their own actions, because the cost of the sanctions will be higher than what they are willing to commit to. When the consequences will first be experienced at a later stage it is easier to disregard these consequences and the rights of the generations yet to come. This problematic is clearly seen in a court case between some environmental groups against the Norwegian state based on article 112 of their constitution, concerning the impacts of the extraction of oil. The environmentalists argued that the current profit driven extraction of oil harms the livability of future generations. In the end the Norwegian state won the court case, granting them the ability to keep extracting oil. The loss of this court case exemplifies how the concern over loss of capital and thus the high living standard of the current generations in Norway triumphs the rights of future generations.¹⁸

Secondly, the problem of “self-sanction” is another related issue complicating the matter. Even if putting sanctions on current generations to provide “intergenerational justice” (more about this concept in the last chapter), this could lead the current generations to find other ways to compensate, such as not transferring as much inheritance as they would have otherwise.¹⁹ Glossaries uses the term “intergenerational dependency” to exemplify this issue. Taking the example of parents-children this dependency can go in both directions: either the welfare of the parents can depend on the welfare of the children, or the children’s welfare can be dependent on the welfare of the parents and thus the wealth or resources that they have built up. Therefore, in the direction of children’s welfare being dependent on the parents’ welfare, if there are serious sanctions on the parental generation, this could have a spillover effect on the children, even if the initial idea was to sanction the first generation in a way to benefit the second.²⁰

By first dealing with how one should define future generations, as well as acknowledging the difficulties with incorporating them into the legal systems, the process can be initiated. As Herstein argues, by defining future generations as types one can easier adopt their rights into legal systems, as there can be more discussions around the rights that should be given based

¹⁷ *Id.* at 464.

¹⁸ *Greenpeace Nordic Ass’n and Nature and Youth v. Ministry of Petroleum and Energy* (Jan. 4, 2018) Case no. 16-166674TVI-OTIR/06 Oslo District Court.

¹⁹ *Supra* note 5 at 38.

²⁰ *Id.* at 469.

on the traits and necessities. Their lack of existence and identity, as well as the ability to enforce the laws implemented to ensure their rights and to avoid the issue of “self-sanctioning” are issues that must be comprehended to then be able to effectively discuss these issues when creating legal systems adapted for the future. The next section will go on to explain why there is a need for an intergenerational legal approach when dealing with problems that will have consequences in the future, such as climate changes.

III. WHY?: Human Rights and Climate Justice

A. Case Study: Climate Justice & Human Rights

Although questions of rights for humans have been on the agenda in philosophical discussions for longer, a more international understanding of a common basis for human rights was institutionalized in 1948 with the Universal Declaration of Human Rights.²¹ The way human rights are embodied today is as “a set of individual and collective rights that have been formally promoted and protected through international and domestic law.”²² The Universal declaration from 1948 is seen as one of the most important legal documents in the 20th century and was created in a post-WW2 context to contribute to the prevention of similar events happening in the future, or at least to have an international legal framework suitable to hold actors accountable for violating the basic rights of people.²³ The declaration inspired several other legal documents such as the international human rights law and the International Bill of Human Rights.

Over the last decades a new pressing issue has come to the foreground of discussions both nationally and internationally, namely the urgent matter of climate change. It is predicted that these changes will lead to vast infringements on some of the most basic human rights and put serious pressure in upholding the promised rights from the universal declaration.²⁴ Because of these changes that humanity is facing, there is a need to update the laws intended to serve human rights. The intention of this is to be resilient for the future and to ensure that the rights declared in the Universal Declaration can be upheld for all people in a more egalitarian way. The current ratified human rights treaties and declarations ensure rights like the freedom of

²¹ Todd Landman “The Scope of Human Rights” in *Studying Human Rights* 110 (2005).

²² *Id.* at 111.

²³ Thomas Mertens, *A Philosophical Introduction to Human Rights* 232 (1st edn., 2020).

²⁴ Marcus Duwell and Gerhard Bos, “Human rights and future people— Possibilities of Argumentation” 15 *Journal of Human Rights* 233 (2016).

movement²⁵, to have children²⁶ and other “rights” which will have an ecologically damaging impact.²⁷

The issue of current human rights having a negative impact on future generations’ rights is something that within the current legal systems causes difficulties. For that there is a need to reshape “human rights regulation in the context of climate change and other ecological challenges”.²⁸ These ecological challenges will affect all the ways we see life today, such as where it is possible to live, under which climate, land use and generally the way we live life.²⁹ It is also apparent that these changes will impact unequally across socioeconomic and geographical lines. Therefore, it is the duty of governments, corporations and other important actors to take their fair share of the responsibility, also accounting for the differences in resources between the different countries.³⁰ The tools to best evaluate the responsibility of different stakeholders based on resources will be discussed in the third section.

B. Climate Justice through the Lens of Intergenerational Rights

The case of climate justice provides evidence of the consequences of a legal infrastructure that excludes the rights of future generations. With a rights system that prioritizes the existence of currently living humans, decisions concerning the interplay between present and future generations cannot be accounted for. The case of climate change illuminates the interdependence between present and future generations, and demonstrates the contradiction that many of the currently existing human rights contains. Namely, that without an intergenerational model, upholding particular rights in the present can decrease the implementation of those rights in the future. For example, by maintaining the right to have children, which can intensify the strain on ecological systems, those children may be brought into an ecological context on the brink of collapse – limiting their capacity to enjoy basic right-enabled freedoms, such as freedom of movement. This bias towards the present limits the social capacity for long-term thinking, reinforcing social mechanisms in the short-term which can have violent long-term consequences. This runs in parallel to capitalist market economics, which focuses on short-term gains often at the expense of long-term sustainability. Such an

²⁵ UN General Assembly, *Universal Declaration of Human Rights* 217 A (III) at art. 13 (1948).

²⁶ *Id.*, art. 16.

²⁷ *Supra* note 24.

²⁸ *Id.* at 232.

²⁹ *Ibid.*

³⁰ *Id.* at 233.

example provides a strong case for the implementation of an intergenerational model, as any human rights has a built-in temporality, where the capacity for humans to enjoy that freedom in the present is always pre-determined by an ecological history.

IV. HOW?

Utilitarianist Justice

Considering the problems that can occur when placing future generations as right holders for policies being implemented in the current legal context, the policies and political decisions of today must be critically assessed. We posit that a utilitarianism approach leaves room to consider future generations in a way that includes the unequal impact that the decisions today will have on future people, taking into account their distinct degrees of privilege and marginalization. Utilitarianism is a philosophical ethics that is universal and judges human actions not by motives but by consequences.³¹ Thus, utilitarian actions are those that increase the overall welfare of a society, *i.e.* that create more benefits or increase the happiness for all (or at least many) people. The philosophy's founder, Jeremy Bentham, summarized it in the maxim of "*the greatest possible happiness of the greatest possible number*".³² With this approach and a global outlook and cooperation the varying regional impacts of our actions could better be taken into account.

Even though utilitarianism marks the starting-point for much of economic thinking, it is also an interesting ethical theory within the context of future generations, because it defines the moral goodness of acts and principles in terms of their consequences. As previously shown, we are connected with the future generations through the consequences of our acts and policies.

A. Distributive Justice

In addition to the approach of utilitarianism, we would like to include the theory of distributive justice by Page.³³ Distributive justice is "*the study of how benefits and burdens should be distributed across space and time*,"³⁴ letting us come to conclusions about where the responsibility for undertaking actions to sustain a healthy environment should lie. To include

³¹ Shelly Kagan, "The structure of normative ethics" 6 *Philosophical Perspectives* 232 (1992).

³² Klaus Schubert and Martina Klein, *Das Politiklexikon* 321 (Dietz, Bonn, 7th edn., 2020).

³³ Edward A. Page, *Climate Change, Justice and Future Generations* 3 (Edward Elgar, Cheltenham, 2006).

³⁴ *Ibid.*

a distributive justice is important due to findings that the effects of climate crisis are hitting unequally, with developing countries being disproportionately affected by climate changes and have and will most likely continue to have unequal capacity to deal with mitigations against the effects of climate changes.³⁵ The distributive understanding of ethics deal with questions that arise from this dilemma of competing claims taking "*the specification of the entitlements*" and the "*duties or obligations*" individuals or rights holders.³⁶ In our case the rights holders shall be groups of future people whose rights are endangered due to social inequalities and climate change.

Central in understanding and developing distributive theories is to analyze three issues: *scope*, *shape* and *currency*. The *scope* of justice describes the entities that are receiving the benefits and burdens. It also concerns the dimension of the claims.³⁷ The scope therefore is the entity we have addressed by asking WHO in the first section of this paper. The *shape* defines the amounts "*of a given measure of advantage (or benefit) people should receive*".³⁸ Deciding what kind of wellbeing or benefit is distributed in a particular matter is the *currency* of justice.³⁹

B. Utilitarian Approach to Distributive Rights for Future Generations

Robert and Parks revealed with a comparison of three case studies the causal mechanism that advanced some of the world's worst climate-related disasters.⁴⁰ They demonstrated that colonial histories put poorer countries in a difficult position when it comes to meeting the current needs of their populations and preventing and combating disasters. The consequences of this inequality and inability to respond are deadly.

The population in postcolonial and poor countries are denied the human right to a clean, healthy and sustainable environment disproportionately more than in the Global North.

³⁵ J. Timmons Roberts and Bradley C. Parks, *A Climate of Injustice: Global Inequality, North-South Politics, and Climate Policy* 83 (2007).

³⁶ *Id.* at 13.

³⁷ *Id.* at 50.

³⁸ *Id.* at 51.

³⁹ *Ibid.*

⁴⁰ *Id.* at 83.

An analysis by Roberts and Parks shows that both the highest risk of environmental disasters and the lowest number of ratified environmental treaties is found in poorer countries.⁴¹ The reasons for this are manifold and can be traced back to the colonial legacy of extraction. On the one hand, there may be a lack of capital to fund organizations and staff to participate in discussions and meetings for the treaties. Alternatively, countries might believe it to be unjust to be asked to forgo economic development to resolve environmental problems for which they bear little responsibility. There is also growing frustration in poorer countries over rich countries' failure to keep promises to provide them with sufficient environmental credits and foreign assistance to meet commitments under the new treaties.⁴²

To act utilitarian in this situation would mean to increase overall wellbeing. To add a distributive perspective would mean to distribute the following between current world population: resources, welfare, opportunities for welfare, basic capabilities to function, and access to advantage.⁴³ Combining the two and applying an utilitarian distributive justice to the scenario of climate justice while taking into account the fact that capitalism and wealth accumulation in the richer countries accelerate the climate crisis shows that the opportunity cost of decreasing the material wellbeing of a wealthy few will increase the material and ecological wellbeing of many. Therefore, action ought to be taken in the richer countries and distributive financial flows must become binding in the environmental treaties.

When extending the application of place and time of this scenario towards future generations climate change will, even with actions of mitigation and adaptation happening, increase the inequalities between the Global North and South countries.⁴⁴ A utilitarian distributive approach to the right to a healthy environment offers a starting point to extend the current scope of rights holders to the future generation. Thus, in a humanistic as well as in combining human and non-human paradigms, new entities have distributive claims against other. Since the condition of the group of future humans living in poorer and marginalized countries is proportionally more restricted in their right to an intact environment, their claims in mitigations of the present generation must be accounted for. By taking the welfare of current and future generations and their unequal distribution into account, based on distributive utilitarianism of a right to a

⁴¹ *Id.* at 207.

⁴² *Id.* at 209.

⁴³ *Supra* note 33.

⁴⁴ *Id.* at 50.

healthy environment, it can be calculated what kind of effects this will have for the welfare of the right holders. This could show whether the distributions of this approach can be assumed to have positive effects also on current generations and the inequalities in humankind. Chichilnisky *et. al's* publication on “*Fundamental utilitarianism and intergenerational equity with extinction discounting*” is an example for such an approach to which we suggest adding an analysis along inequality structures.⁴⁵

The inclusion of future generations as rights holders raises issues of hierarchy between current and future generations. This question is discussed with the shape of utilitarian distributive justice, which concerns the pattern of benefits that a theory of distribution recommends, in short, how much of a given measure of advantage (or benefit) people should receive.⁴⁶ This issue needs special consideration when deciding on environmental guidelines and policies and is of high complexity as the needs of the future generation can be influenced by several factors. On the one hand, it cannot be predicted whether and how the current generation will genetically manipulate its offspring to be better adapted to the environment changed by climate change. For another, humanity has been changing with the climate for thousands of years, so it can be assumed that people of the future will adapt to poorer air, water and climate quality.⁴⁷ Ways to measure these impacts are necessary for a just calculation of compromises the current makes for the future generation. An egalitarian approach weighing the needs at the same level might be to the disadvantage of the current generation.

V. Conclusion

The arguments and perspectives in this essay highlight both the need for rights for future generations and the difficulties and many questions yet to be answered. To include future generations as a type of people, rather than individuals provides tools to make laws accounting for them even before their existence. There is a need to overcome the rigid discussions about future generations' non-identity and non-existence, and acknowledging that certain rights, like the right to a livable habitat, can be accounted for even before their existence. Issues such as enforceability and self-sanctions remain a concern in accounting for future rights, due to lack of willingness today and the lack of foreseeability of the impact that certain sanctions today

⁴⁵ Graciela Chichilnisky, Peter J. Hammond and Nicholas Stern, “Fundamental utilitarianism and intergenerational equity with extinction discounting” 54 *The Society for Social Choice and Welfare* (2020).

⁴⁶ *Supra* note 33 at 51.

⁴⁷ *Id.* at 56.

will have in the future. The increasing inequality and continued marginalization of many by some in the global capitalist system must be considered in policies and binding treaties for climate justice.

Observations such as those of Roberts & Parks (2007) prove that progress in addressing global environmental problems, and thus securing human rights across generations, urgently requires addressing the severe inequalities in the global economy. Since capitalism is largely to blame for the climate catastrophe, it is worthwhile to proceed according to degrowth and democratizing principles.

The model of utilitarianism and distributive justice has emerged as a promising approach for calculating the distribution of human rights and their effects. Approaches should focus on distribution and degrowth rather than growth because the principle of: "*the greatest possible happiness of the greatest possible number*" can only be fulfilled if decisions will actually benefit the majority of the population (low income and middle class) and not capitalists and a rich elite.

To find a concluding phrase for this essay in the terminology of distributive justice, we propose for the future of human rights: current and future generations (at the level of scope); with utilitarian welfarism (at the level of currency); with intersectional equality (at the level of shape).