

ENABLING FUTURE ACCESS

NATIONS, GENERATIONS, INSTITUTIONS AND OPPORTUNITY COSTS

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The following paper is a response to Axel Gosseries's "Nations, Generations and Climate Justice." The core argument in Gosseries's sharp and challenging text states that (1) we can understand intergenerational justice as transit duties between countries; that (2) impartial global planners should realize these duties through an intergenerational global leximin principle; and (3) that the right implementation of this principle implies strictly equivalent intergenerational transfers.

In this text I will address the evaluative perspective of the impartial global planner and its institutional interpretation; then I will briefly present an "opportunistic" reply to the vagueness objection to rectificatory justice; finally I briefly examine the development of the right of transit in the UN *Convention of the Law of the Sea* and the limits to its intergenerational extension.

Axel Gosseries's paper presents a series of challenges that reflect the intrinsic nature of the problems it addresses. This commentary points to some possible vagueness and opens the way to further development of such a concise piece of philosophical work.

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1. Impartial Perspective and Institutions: *Imagine there's no country.*

Gosseries's affirms that his work assumes an "impartialist" evaluative perspective, and a Rawlsian framework of reference to discuss the "just savings" duty and the duty of international assistance. By impartialist perspective one infers that the reader is expected to identify herself with the point of view of an impartial global planner, bracketing her domestic allegiances and partial commitments. However, it is not always clear whether we are assessing the problems under a cosmopolitan or international veil of ignorance. We do not always know if these are recommendations for a world state or for an international system.

If impartial consideration of the interests of humanity takes precedence then allegiance to national projects is in need of justification. Partiality might then be (1) *tolerated* as a factual limitation (humans are just unable to be proper cosmopolitans); it might be a (2) *permissible* alternative (if all things considered, a civilized internationalism brings about outcomes equivalent to those of an institutional cosmopolitanism); it might have a (3) *functional* justification (national allegiance works as a motivational incentive that leximins global welfare); or national allegiance might have an (4) *independent* justification. In this last case, it might be contemplated as an independent source of rival values that take (4.1.) lexicographic priority over and *constrains* the shape of a global leximin redistribution. Or shared political membership may be conceived as the (4.2.) proper site of distributive justice, ruling out cosmopolitanism in favor of *humanitarian* assistance.

If our institutional landscape is an international system of territorial states, should a single nation embrace these impartialist conclusions regardless what the others do? Should they instead advance through common institutions in concerted cosmopolitan reform? Gosseries' text is focused on the obligations of justice and it would be unfair to expect a whole treatise that deals also with all the questions of institutional translation. My main remark is just to point that our *prima facie* agreements about abstract issues like intergenerational justice could later dissolve once we make explicit the institutional structure where the principles are embedded. Even if they seem *prima facie* plausible and convincing they could end up subordinated to other conflicting considerations. Political structures are not just empty vehicles but they are constituted themselves by diverse hierarchies of values and principles. This is not being denied at any point in the article. It is just left outside of the main discussion. The main problem comes with

the indeterminacy in the opening line, where we are invited to take the perspective of a “global policy-maker.” If our global planner was sitting as a party at the Copenhagen Conference on Climate Change she may come with the right principles around which all parties should be of one mind. This is an outstanding theoretical task of its own. Unfortunately, most of the intergenerational problems are typically also problems of collective action about global commons and limited resources. At this level it is inescapable that there are several particular minds with very particular priorities. How would a cosmopolitan impartialist bridge this gap? Does it matter whether we are talking about the foreign policy of a democratic republic, ethical principles for the international community or cosmopolitan principles of justice for a global federation?

Gosseries’ essay is admirable because it does not address the question of Climate Justice in isolation but in tandem with the current global distributive obligations. But if the conclusion is that we have strong inter and intra generational obligations of justice that our political structures consistently avoid then the next stop would be to address the conflict between the values and principles that our international system expresses and other plausible alternative institutional scenarios. This would be a much desired follow up for a theory that aspires to guide the decisions of “global policy-makers.”

1.1. A Realistic Intergenerational Utopia.

Rawls’s proposal of a realistic utopia for the international order defends that the principles for an international society of decent peoples could be arrived at, independently and coincidentally, both from a national (liberal-democratic) point of view and from an international overlapping consensus. However, cosmopolitan critics claim that this reconciliatory strategy legitimizes and reproduces unacceptable levels of international inequality that are at odds with his general conception of domestic social justice.

The Rawlsian framework is a problematic reference for examining intergenerational justice from a cosmopolitan perspective. When considering the “just savings” principle Rawls introduced “care for the descendants” as a “partialist” motivational force to overcome indifference between generations when real savings are required (Rawls, 1999a: 160 n.39). Similarly, Rawls makes peoples responsible owners of their territories in perpetuity in order to motivate environmental sustainability over time (Rawls, 1999b: 8-9, 38-39). Care for the offspring and concern about one’s land are two

functional and partialist motivational forces. Rawls held the Kantian hope that the principles of the Law of Peoples would be eventually internalized and upheld by the different national constituencies (Rawls, 1999b: 112-113). However, this aspirational belief aims at the spontaneous realization of his sufficientarian international benchmark and not at the progressive institutionalization of more demanding cosmopolitan terms (Rawls 1999b: 106-107).

In contrast, Gosseries's text assumes that Portuguese citizens should reconsider their deep attachment to the Alentejo's environment on global impartial grounds. Similarly, Portuguese "just savings" should go to those most unfortunate worldwide, irrespective of what the rest of the nations do. Lacking a background cosmopolitan order, unilateral sacrifices come at a larger cost. On the one hand, co-nationals may feel that they are being left-behind in terms of relative disadvantage or forgone opportunities, and that they are suffering the consequences of generalized international indifference. On the other hand, the compensatory international solidarity embraced by the Portuguese government would imply a relative international disadvantage in terms of welfare, market or political influence. This principled impartialist commitment has an impact on the values and social cohesion that support the Portuguese national project. In the following lines I sketch some alternative ways to accommodate national allegiances and impartial commitments.

An impartialist agent acting in an uncoordinated competitive environment of generalized non-compliance has to face that if "doing one's share" is determined only by the situation of the recipient then it may imply a disproportional sacrifice for the complying few that do not discriminate between domestic and foreign poor (*altruist*). Alternatively, if we understand "impartiality" as the principle that determines the distribution of duties and benefits at the level of an ideal benchmark of perfect compliance, then we may understand that while the allocation is "impartial," all agents may exercise permissible partiality in scenarios of imperfect compliance (Murphy, 2000). Accordingly, one may just "do one's share" (reducing emissions) even if this is globally insufficient (*rigorist*). Or this agent might even be allowed to fail if "doing one's share" entails some unilateral disproportionate disadvantage before rival competitors (*realist*).

Finally, we can conceive some (*pragmatic*) reconciliation. In an international system of limited compliance and non-altruistic national constituencies a global rank-constrained leximin could work as a practical compromise. Following this rule, we can stipulate that the national quota of

transfers should not modify the global ranking of national GDPs and must be allocated through a leximin ordering. However, this partialist compromise is far from ideal from a cosmopolitan perspective, as it legitimizes the current distributive benchmark and the particular entitlements it supports.

1.2. Assisting to Save: The Global Piggy-Bank.

An additional source of ambiguity concerns the institutional division of labor between domestic savings and international assistance. This problem is also inherited from the Rawlsian framework.

“Accumulation phase” and “steady state stage” they both refer to the efforts that burdened societies make to achieve a sufficient level of political self-determination. Gosseries discusses the problem of justifying a temporary investment that partially sacrifices the lot of the worst-off in the generations below the target stage. As the time arrow only flies forward, the beneficiary generation faces also the impossibility of reciprocating for the legacy. However, this problem is framed in the terms of national peoples and their duties towards the future nationals.

If we step back from the domestic picture then we have to face that the real transfer to a burdened society has to come from the richest countries in virtue of an intragenerational global leximin or via an international duty of assistance. Whatever saving duty that burdens a society below this threshold cannot be “just” and, consequently, it should be covered by the international duty of assistance.

According to Gosseries, a proper understanding of an intergenerational leximin leads to a “principle of strict equivalence.” This implies that nations in a steady state stage should not save and transfer to the next generation more than what they received from the previous one –because that would be at the expense of the currently worst-off; but they should neither reduce (dis-save) the lot they inherited –and make the next generation worse-off. This makes sense because Gosseries’s impartial perspective minimizes the significance of spatial or temporal jurisdictions. If geography and history are morally arbitrary factors then the world behaves like a unified distributive system in which generations are time-slices of a fixed population size (let’s keep the serious demographic problem out of the equation).

Under Gosseries’s leximin, every “surplus” belongs to the currently worst-off while every improvement in today’s threshold should be transferred in equivalent terms to the next generation. Every international

transfer increases the intergenerational debt of the recipient state (“just savings”). Consequently, every penny earmarked for the worst-off should be also split with the intergenerational piggy-bank. Gosseries is right when he points to the necessity of conceiving intergenerational and global justice in an interconnected way.

In fact, this leximin approach makes a pretty strong case for a global institutional reform. If the case for strong interconnected duties of inter and intra generational global justice is sound, then the burden of proof rests on those that defend an institutional design in which these duties are freely and discretionally observed or arbitrarily avoided. If the global argument is convincing then the institution that embeds this global leximin principle should be perceived with the legitimacy to determine one’s contribution and the authority to collect it. Why not a global tax authority? A single centralized account could establish the saving rates, investments and borrowing conditions. It could also establish premiums and liabilities if responsibility applies. However, such a leximin piggy-bank presupposes a substantive degree of political integration along the international-cosmopolitan continuum, and that kind of integration may be justified as a global and intergenerational duty.

2. Rectificatory Hook and Opportunistic Nets.

Gosseries’s main objection to rectificatory arguments in climate change justice is that these claims are parasitic on the recognition of a prior distributive theory. It is this theory that grounds the arguments and defines the compensation after unjustified diversions from the right course of action. Lacking that prior criterion of justice, today’s attempts at rectification imply retroactive imputations to agents that lacked full knowledge of the consequences of their actions at that time (industrialization period), and punishes their descendants for this lack of prescience.

Regarding the robustness objection of the rectificatory claims, we can agree on this point while resisting the temptation of throwing the baby with the dirty water.

In the non-ideal conditions of our shared history we can presume that much of the industrialization effort has been made through forced and unconsented colonial exploitation and resource exhaustion. Some other “voluntary” transactions” were made under conditions of duress and in many other circumstances through an abusive and disproportionate bar-

gaining power. Even in these cases, transactions were often made through non-representative leaders. In some other cases, voluntary transactions took place with peoples that were not aware of how the transfer of these raw resources to foreign powers would exponentially exacerbate their own dependency.

These arguments also cast a doubt on the robustness and legitimacy of the *prima facie* voluntary market transactions in the historical path of development and industrialization. We can acknowledge the lack of a patterned distributive principle that regulates historical emissions. But we can recognize the presence of a robust historical pattern that partially undermines the claims to the full entitlement of the benefits of (non-patterned principles of) voluntary transactions.

Regarding the lack of awareness objection, we are familiar with situations where strict liability applies. It is commonly assumed even for totally accidental damages or to foreigners that act in good faith but ignoring the local laws. There are social efficiency considerations that justify these measures. Even if I am not morally responsible for passing out while driving I may still be accountable for the damages. In our case, presuming that CO₂ emissions imposed negligible externalities was a false belief with global negative consequences that are mostly borne by the most vulnerable developing nations. Ignorance was bliss, but current generations in developed countries inherited the material “benefits of the doubt.” On the full legitimacy of this entitlement I would cast a doubt. The historical case for plausible deniability may put current generations out of the moral hook but they are still in the accountability net.

In the default case of negative externalities attached to of *prima facie* voluntary transactions we do not have any criterion for background justice other than free agreement. However, if we presume that this history of disproportionate accumulation of benefits on one side leads to a inherited situation of disproportionate economic capacity, then the rectificatory argument may undermine the presumption to the full entitlement over the assets that the most developed nations command. Even if we cannot exact the amount of the compensation, the rectificatory claim may back an argument for a contributive duty based on a capacity claim. Consequently, developed nations should join the battle against climate change in more “generous” terms than the rest. This interpretation just backs Gosseries’s arguments for an “opportunistic” take on climate change justice.

3. The Jeffersonian conception: transit duties, enabling access and opportunity costs.

An account of intergenerational duties might get inspiration from how international law would handle a sea-less world in which all countries were land-locked. All generations are both period-locked and transit generation. (Gosseries, in this volume)

This idea, loosely borrowed from Thomas Jefferson, is perhaps the most original contribution to broaden our minds and explore our intuitions about intergenerational duties. Gosseries exploits the image of a world of land-locked territorial nations and the consequent duties of transit to third states as a powerful analogue to capture our moral imagination and model our transit duties towards future generations. Intergenerational legacy is the equivalent to international transit.

The conclusion that we arrive at is that there is a strong duty of justice towards future generations. Our succeeding generations depend on us like landlocked recipient nations depend on neighbouring transit states. If international law recognizes this *ius gentium* between neighbouring peoples then there is an analogous case to extend our institutional responsibilities to future peoples.

For the argument's sake, I will assume that transit rights impose unilateral obligations that are independent of any reciprocal interest between the intermediary and recipient states. I will also bracket the identity problems applied to peoples considered as historical collective subjects with variable composition and demographic size. Instead, I will assume that institutional continuity amounts to a persistent collective identity.

Gosseries's metaphor draws its rhetorical persuasion from the reconstruction of territorial transit as historical transmission. Conserving resources through time is like shipping them through space. Both shipments travel the dimensions and reach their targeted recipient. In both cases the transit peoples have a duty to allow the flow. In the territorial case it amounts to give access permits, refrain from imposing abusive taxes or burdensome bureaucratic procedures. These obligations can be read mostly in terms of negative duties, although they are grounded on an implicit recognition of a right to development on behalf of the landlocked recipient people. The "duty to allow" transit implies a negative duty of non-interference, understood as a unilateral principled restraint on the transit state's sovereign powers. Similarly, the duty to "preserve a legacy" can be read as a demand of non-interference that implies the positive obligation to keep the

resource intact. In this case the analogous sovereign restraint applies to the inherited resources.

If this analogy is to hold, we should deal with the disanalogy between succession and continuity. Succeeding generations are natural heirs of the national legacy as future selves of the same subject. Territorial transit states are not successors of the sender people. They are mere intermediaries and they do not inherit ownership of the shipment. However, we could say that their physical continuity as neighbours makes them depositaries of a duty of stewardship over the goods in transit. For this strategy to work, we have to assimilate one service (territorial access and transit dispositions) to an inherited good (material and immaterial legacy). The main difference is that in the first case, the territorial service implies a negligible burden while in the intergenerational case conservation may amount to a substantive opportunity cost for the transit generation. Although fungible or liquid assets may be replaced in a sustainable way, conservation always implies a sacrifice for the present generation. Here, the analogy with the international codification of the right of transit is the figure that helps us accept the opportunity costs implied in this intergenerational transmission of a legacy under a more favourable look.

Despite of the persuasiveness of the analogy I would like to introduce an empirical sceptical note regarding the role of the international convention on the matter. The UN Convention on the *Law of the Sea* is the result of a protracted deliberation between developed and developing countries. The cause of the decade long discussion was precisely strong interest of the developed countries to drive a wedge between those measures that could be mutually beneficial or not burdensome cooperation and those that could imply an opportunity cost for their technological advantage.

The right of access for landlocked countries was generally accepted in the *Law of the Sea*, along with very advanced cosmopolitan and impartial considerations in the case of “geographically disadvantaged countries,” or prioritarian considerations in favour of landlocked developing countries for access to fisheries in the Exclusive Economic Zone of neighbouring countries (UNCLOS, Art.125).

1. Land-locked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end, land-

locked States shall enjoy freedom of transit through the territory of transit States by all means of transport.

2. The terms and modalities for exercising freedom of transit shall be agreed between the land-locked States and transit States concerned through bilateral, subregional or regional agreements.
3. Transit States, in the exercise of their full sovereignty over their territory, shall have the right to take all measures necessary to ensure that the rights and facilities provided for in this Part for land-locked States shall in no way infringe their legitimate interests.

Developed countries were also crucially benefiting from the codification of the international right of innocent passage through foreign waters and strategic straits under alien control (Tanaka, 2012: ch. 12). However, the divisive issue in these negotiations was the access to the international oceanic floor and the foreseeable exploitation of the rich mineral resources in the deep seabed. Only few industrialised nations have the technological capacity that allows access to the ocean floor but even for these few, exploitation is not yet cost-beneficial. The developing countries were interested in turn in preserving the common resource until all parties could have equitable conditions of access or adequate compensation for the consumption (Garrison, 2007).

The original proposal drafted by Arvid Parvo introduced the intergenerational and cosmopolitan principle of Common Heritage of Mankind to preserve and exploit the resources in the international common area for the benefit of whole human population, present and future. It contemplates some redistributive mechanisms and the duty to share the access technology.

The widespread conventions about the right to access and innocent passage presuppose that peoples depend on these strategic conditions for their development and that neighbours have a duty to facilitate it. However, regarding the common oceanic resources, developed nations wanted a regulation that reflected their preferential conditions of access and exploitation while minimizing their contribution for developing and future peoples alike.

Allowing freedom of transit and enabling access through shared knowledge are conceptually similar but entail different implications. Transit rights are recognized because they imply a negligible burden on the transit state. Scientific knowledge and technological know-how are considered public goods because ideas are immaterial assets that can be shared infinitely at the same quality of enjoyment (non-rivalrous). However, sharing access

conditions to the common implies a substantial opportunity cost for those holding the technological edge.

The final formula for the exploitation of the mineral resources in the common area eventually accommodated the relative advantage of developed countries by eliminating the duty to transfer their non-material public-good resources for access (technology & knowledge) as a condition to share in the common resources of humankind. The agreement also lifted access barriers, incorporated pro-market approaches and facilitated conditions for private enterprises. It also relaxed the parties' quota in the contribution for management, sustainability and development.

Although the International *Law of the Sea* was negotiated as a whole package, its procedural history shows that the pro-development attitude shared in regard to the right of transit was not extended to the conditions of access to the common resources of humankind. The particularist interest of developed nations trumped the impartialist extension of the metaphor of the "right of transit" to the common pool of resources.

Gosseries' heuristic strategy depended on the assimilation between access duties through space and time to defend a proposal of inter and intra-generational justice. After analyzing the trends behind the deliberations around the *Law of the Sea* one might question whether Gosseries' strategy is limited by a territorial and historical identity problem. The negotiations in international law suggest that the initial appeal of the Jeffersonian intergenerational model might rests on the assumption that the transferred legacy is earmarked for the succeeding generations of a particular people instead of conceived as a contribution to the common heritage of humankind.

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