

# Constitutionalizing Future Rights?

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Constitutionalizing the rights of future people is one way of acknowledging the importance of taking future as much as present generations into consideration when making decisions today. A constitutional provision may then be implemented through legislation in various domains. Rules may be enacted regarding e.g. pension schemes, the public debt, the long-term management of radioactive waste or the protection of biodiversity. Constitutional rights alone would no doubt be far from telling us how to do so in detail. But they would certainly give weight to the concern for intergenerational justice, whatever precise forms it may take.

Still, advocates of the rights of future generations have to face two fundamental challenges. First, how could people who do not exist have rights? This worry should be taken seriously. However, as it is realistic to assume that there will be at least some people in the future and provided we accept that these people, once they will come to exist, could *then* be regarded as right-bearers, this is enough to justify the possibility of correlative obligations accruing to the members of the *current* generation. Assuming e.g. that there will be some people in fifty years, some of which are not yet born, and that they will then have e.g. the right not to live a life not worth living because of given environmental conditions (such as a nuclear winter), we can justify the existence of e.g. the obligation for the current generation not to act so as to make the occurrence of a nuclear winter very likely in a fifty years. Admittedly, we only rely on a notion of future rights here. Still, such *future* rights could very well be correlated with *present* obligations as long as it is reasonable to expect some of our actions to have impacts in the future.

## Harm and Non-Identity

The second challenge – referred to as the non-identity challenge - is both more serious and more unexpected. Let us start with a simple case. A practitioner is being asked by prospective parents whether there is any chance that a given disease could be genetically transmitted to their child if they were to decide to conceive one. The doctor says "no" and the parents then decide to conceive a child. However, the latter turns out to be affected by the disease and the parents eventually find out that the doctor had misinformed them. One may very well consider that the doctor harmed the parents through his mistake. And as he should have known about the serious risk of genetic transmission, he also wronged them, i.e. he violated one of their rights (as it results from their contractual relationship with the doctor). There still remains an extra question: did the doctor also harm and wrong *the child itself*? In our example, the child, albeit being handicapped, has a life worth living. But the crucial fact is that the doctor's mistake is also a necessary condition for the handicapped child's very existence. Had the doctor not made this mistake, the parents would have decided not to conceive this child. Hence, the only possible existence for *this* child was the one he actually has, namely one affected with a genetic disease.

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When we use a concept of harm, we compare the current condition of a given person (here the newborn) with the condition that would have been hers in the absence of the allegedly harmful action. Once the former is worse than the latter, we conclude that this person has been harmed. However, in cases like the one we are discussing, such a comparison is made impossible since in the absence of the allegedly harmful action, the victim would not have existed. Once we accept that non-existence cannot be regarded as the state of a person, we have to conclude that, unless the child has a life not worth living, he cannot be said to have been harmed by the doctor's mistake. In such a "non-identity" context, our standard concept of harm is made inoperant. And once we consider that ascribing rights to people only makes sense if and only if their violation could be said to result in a harm to these people, this potentially affects, if not the possibility, at least the content that could be given to the rights of future people.

## The scope of the problem

The non-identity challenge affects all cases in which adopting one policy or another will also affect the identity of those who will be born, hence the possibility of using concepts of harm and rights. By "affecting the identity", we do not simply refer to whether Paul will be tall or tiny depending on whether we adopt a given food policy or any other course of action. We refer more radically to whether it is Paul or Ruth (or anybody at all) who will be born, namely different people.

In fact, it appears that the scope of the non-identity problem extends much beyond the medical case presented above. Hence, the non-identity challenge should be taken very seriously. Replace our choice between mistaken and non-mistaken medical advice with a choice between car and bike. If I take the car every day to go to the job, this will have two types of relevant consequences. It will have a negative impact on the present and future state of the atmosphere, given that it will increase emissions. However, it will also have an impact on the identity of my future child. Coming back home earlier or later than if I had taken a car will also affect the timing of my sexual intercourse. Hence, given the very large number of competing spermatozoa, it is very likely to affect the very identity of the child I will conceive together with my beloved. In other words, if not all, at least many of our actions and policy choices in the fields of transportation, energy, etc. that have no direct connection with procreation choices still have an impact on the identity of our children, through modifying the timing of our daily activities, including procreative ones.

Imagine now a father having to face his daughter. Having grown 17 and having become a green activist, she asks him: "why did you not choose the bike rather than the car? The atmosphere would be much cleaner today! And given your circumstances at that time, you had no special reason not to take the bike!". The father may well answer: "True. Still, had I done so, *you* would not be here. Since your life in such a polluted environment is still worth living, why blame me? I certainly did not harm you. Which right of yours did I violate then?". Some will find the father's answer at best mis-directed, at worst shocking. And still, there may be no obvious way out.

## An obligation to catch up

Let me now suggest one avenue that applies in the car case, while not being applicable to our earlier medical case. Let us assume that we want to constitutionalize the right for the members of each generation to inherit an environment in as good a state as the one the previous generation inherited, everything else equal. Future people do not have this right now.

But they will, as soon as they will come to existence. Still, how can we address the non-identity challenge regarding this right? If we consider that the fulfilment of the obligation to bequeath a "clean" environment should be assessed *at the end of each person's life* (complete-life obligation), the following strategy can be envisaged. As long as the father's pro-car choice was a necessary condition for his daughter's existence, it remains unobjectionable. However, as soon as the daughter was conceived, all his subsequent polluting actions were no longer falling within the ambit of the non-identity context. Nor is there any reason to hold the view that given his pre-conceptual polluting behaviour, the father's obligation to bequeath a clean environment should be attenuated accordingly. In principle, we should expect the father to catch up as soon as his daughter has been conceived in order to be able, at the end of his life, to eventually meet the requirements of his constitutional obligation.

This "catch up" argument relies on the existence of a generational *overlap*. If we are dealing with three or four generations ahead, it is less likely that such an overlap would still hold, hence that this strategy would remain available. This is worrying as environmental problems often involve long-term impacts. However, there is a solution to this problem too. For we can adopt a transitive strategy, i.e. one that sets up rights and obligations only between neighbouring generations that will at least at some point in time have a chance to overlap. And with a chain of such obligations, it still remains possible to take into consideration remote future generations. Imagine three generations (G1, G2, G3). G1 overlaps with G2, but not with G3. G2 overlaps with G3. Members of G1 do not have obligations *towards* members of G3. Still, G1 has obligations *towards* G2. And among these obligations *towards* G2, there might be obligations *about* G3. The idea is not that from the point of view of G1, members of G3 matter less morally than those of G2 because they would be more remote in time. It is rather that given the absence of overlap between G1 and G3 and provided that we find ourselves in a non-identity context, most actions of G1 having an impact on G3 would be immune from potential moral criticism because they would all be "pre-conceptual" actions. Still, if it were to turn out that the long-term effects of G1's actions on the members of G3 would be such that it would force G2 to make extra efforts in order to make sure it would fulfill its own obligations towards G3, then G1 may in fact violate its obligations towards G2 itself. And this is how the transitive approach works. Admittedly, G2 should not fully compensate G3 for disadvantages resulting from G1's action, as G2 has no causal responsibility in G1's action. However, as a matter of distributive justice, G2 can be expected to operate some intergenerational redistribution, such that G3 would not end up worse off than G2, as when a person is morally expected to help another one facing some disadvantage caused e.g. by an Earthquake for which none of them can be held responsible.

## Phrasing future rights

Hence, regardless of the content of the rights we want to grant to future people and insert in a constitution, we have to consider two constraints on the nature of these rights. First, the rights of future generations – more precisely of future individuals – can only be *future* rights. Phrasings such as "Future generations have a right to..." should thus be abandoned as they convey the idea that such future people already have rights now. Second, as the rights of future generations should be conceived as correlates of obligations *towards* future people, they can only apply to overlapping generations. This is an extra reason to abandon the expression "Future generations have a right to...". For once we acknowledge that the scope of the non-identity context is a significant one, future generations beyond those which we shall overlap with will never have any rights towards us, not even future ones. Preference should then be given to sentences such as "Each generation has towards the previous one the right to ..." or "Each generation has towards the next one the obligation to...".

All this does not mean that future rights cannot be meaningful and necessary to account for some of our current obligations, nor that it may not be important to constitutionalize such future rights. It only entails that we should be clear both about the nature of these rights and about who their bearers are. Restricting ourselves to the future rights of the next generation(s) with which we shall overlap may seem minimalistic. It is however the price to pay if we take seriously the two challenges examined in this paper. And it is not too high a price as most of the work can be done on such grounds. What then remains to be offered is a proper definition of the content of such rights. But this is another story.