

The Immigration Crisis' Challenge to the Universality of Intergenerational Justice

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Abstract. This essay raises the question whether the intergenerational justice (IGJ) debate is entering a new phase, in which cultural identity matters are gaining more weight. After the United Nations Conference on Sustainable Development failed, in 2012, to adopt the institution of the Ombudsman for Future Generations, the IGJ debate in its traditional form, i.e. centered upon environmental quality and natural resources, faded. A new intergenerational 'good' is now capturing the attention of societies and policy makers. Concern for cultural preservation is widespread among European host societies in the context of the actual immigration crisis, and is at the same time enshrined in the Budapest Memorandum (2014) as an intergenerational duty. Integrating massive numbers of migrants originating from cultures very different from the one of the host country is a challenge to cultural preservation, and thus to the understanding of IGJ declared by the signatories of Budapest Memorandum. Inspired from the international law mechanism of diplomatic protection, this essay proposes that *inter-national*, rather than universal intergenerational justice, should be aimed at as a first step, under these circumstances.

Keywords: *immigration crisis, intergenerational justice, Budapest Memorandum, identity*

Introduction

After decades of intellectual exploration, the idea that posterity has rights because we have duties towards it¹ has prevailed over the view that future people do not exist yet, and thus they cannot have anything, rights included.² Once accepted theoretically, intergenerational justice needed operationalized, and the first half of the present decade has shown encouraging signs. At international level, OECD and UN have made the mainstream position clear. The former maintains in its Glossary of Statistical

¹See, e.g., Matthew H. Kramer, "Getting Rights Right", in *Rights, Wrongs and Responsibilities*, ed. M.H. Kramer (Basingstoke: Palgrave 2001), 54.

²See, e.g., Richard T. George, "The Environment, Rights and Future Generations", in *Ethics and Problems of the 21st Century*, eds. K.E. Goodpaster and K.M. Sayre (Notre Dame: University of Notre Dame Press 1979), 95.

Terms³ that intergenerational justice (IGJ) is an “issue of sustainable development”, while the latter shows that only for sustainable development issues, as an exception, international solidarity embraces generations who do not yet exist, otherwise the matter pertains to relations among currently living representatives of different generations.⁴ The starting point of this approach to IGJ, i.e. bundled into sustainable development (SD), was the famous Brundtland Report, in the often quoted reference to “development which meets the needs of the present without compromising the ability of future generations to meet their own needs”.⁵ Recent significant steps in this direction include the debate in the civil society over the institution of an Intergenerational Ombudsman at UN,⁶ and proposals in academia for a constitutional intergenerational convention.⁷

Sustainability was, in a historical perspective, the third framework for discussing IGJ, after individual liberties in the aftermath of the American and French revolutions, and then peace and national freedom, starting with the United Nations Charter (1945) and moving along the decolonization period. Interestingly, we have now *an emerging fourth view*. If in late 18th century, IGJ was related to freedom, in mid 20th century to peace, in late 20th century to ecology, in early 21st century it seems to necessarily include a cultural component. Indeed, in April 2014, gathering in Budapest, the representatives of independent offices or parliamentary bodies handling intergenerational issues in the few countries that have already operationalized the IGJ principles agreed on the necessity of “safeguarding the natural environment, the natural resources and the climate, *together with our cultural heritage*”.⁸

³ OECD, Glossary of Statistical Terms. <http://stats.oecd.org/glossary/detail.asp?ID=1387>. Accessed March 17, 2016.

⁴United Nations, The Road to Dignity by 2030: Ending Poverty, Transforming All Lives and Protecting the Planet. Synthesis Report of the Secretary-General on the Post-2015 Agenda’, 4 December 2013. http://www.un.org/disabilities/documents/reports/SG_Synthesis_Report_Road_to_Dignity_by_2030.pdf. Accessed March 28, 2016.

⁵World Commission on Environment and Development, Our Common Future (Oxford: Oxford University Press 1987), 43.

⁶ See, e.g., Catherine Pearce, "Ombudspersons for Future Generations: A Proposal for Rio+20", Perspectives 6 (2012), www.unep.org/civil-society/Portals/24105/documents/perspectives/ENVIRONMENT_PAPERS_DISCUSSION_6.pdf, accessed March 11, 2016.

⁷Stephen M. Gardiner, "A Call for a Global Constitutional Convention Focused on Future Generations", Ethics & International Affairs 28 (2014).

⁸*Budapest Memorandum* signed by the participants of the Conference of Model Institutions for a Sustainable Future held in Budapest, 24-26 April 2014 (Emphasis added).

The Memorandum, in spite of limited adherence, is of high significance, since it conveys the view of those who actually took seriously the intergenerational equity principles, and operationalized them at constitutional and institutional levels; we may thus even see this position as indicating a change in the global understanding of intergenerationality. But if we introduce the cultural variable into the IGJ equation, we necessarily challenge the axiomatic declamation of its universality found for instance in a United Nations's document stating that "universality is the core attribute of ... intergenerational justice".⁹The massive migration from certain countries in Africa and Asia, that is, mostly Muslim and belonging to the Global South, brings an obvious cultural challenge to the secular, developed, European countries of destination – a challenge that, put in an intergenerational perspective, may switch the focus of present generations from environmental to cultural preservation, and from a universalist to a communitarian approach.

Reviving the Intergenerational Justice debate: Step I

Is this the end of the debate on intergenerational justice? Not necessarily, but universalism should be aimed at via a different path. Introducing culture, a matter so intimately related to communities' identity, on the intergenerational agenda infuses it with a degree of localism that requires rethinking its operationalization at global level. We should therefore replace international with *inter-national* intergenerational justice, and the norms of public international law are useful in this endeavor. To this end, I propose that the virtues of localism, as far as intergenerational concerns are concerned, should be openly acknowledged as a first step.

This is more difficult from a moral and political correctness perspective, than from a conceptual one. Conceptually, the universalism of IGJ is anyway built on weak foundations, as demonstrated by the failure to craft an accepted theory of justice in the field - let alone to operationalize it. Universalists rely heavily on the globalizing effect of the words "human" and "planet" - see for instance Feinberg

http://futureroundtable.org/documents/2238847/0/Budapest_Memorandum.pdf/0b6c83e2-5217-4ef7-8a62-01156974fdbd, accessed February 22, 2016.

⁹United Nations 2013, para. 48.

("The human future ... will, after all, be human"),¹⁰ Weiss ("each generation is entitled to inherit a robust planet")¹¹ or Weston ("our planet", "planetary catastrophe").¹² Speaking from the Eastern cultures perspective, Kobayashi even discusses the "Global Family Person". But all these appear excessively idealistic when confronted with a simple, real-life argument: a universal theory of IGI "cannot offer any reason for people in rich countries to cut back so as to improve the prospects of future people in other communities".¹³

That affinities are stronger in groups like family, friends, towns or even countries is well demonstrated - see, e.g., the concentric circular model proposed by Oldenquist,¹⁴ showing that loyalties fade the more we move towards the outer circles, and are the weakest when we come to the most remote circle, that of the human species. Therefore, we should build upon affinities in the unit of nation-state, at least for the practical reason that countries are well-defined and perennial in the sense that even when they disappear, we have clear rules of succession, which is often not the case with other types of communities. Most importantly, nation states are the smallest unit where projects implying considerable degree of self-sacrifice to others' benefit, including future others, are feasible: from redistribution of wealth between geographic or ethnic units within the state to life risking during wars, many types of self-sacrifice require the fuel of patriotism.

The problem is that we enter a field of total war between adepts of patriotism as virtue, such as MacIntyre or Wingo, and those who reject it as "bad faith" (Keller), a "moral burden" (Miller), going as far as labeling it as "racism" (Gomberg). However, there is safe ground in the no man's land: Nathanson's "moderate patriotism", Nussbaum's "globally sensitive patriotism", Audi's "minimal nationalism", or Virolì's "reformulated" patriotism as tool to combating nationalism are but few of the constructs allowing room for "good" patriotism. Perhaps the

¹⁰ Joel Feinberg, "The Rights of Animals and Unborn Generations", in William T. Blackstone (ed.), *Philosophy and Environmental Crisis* (Athens, GA: The University of Georgia Press 1974), 66.

¹¹ Edith Brown Weiss, "Our Rights and Obligations to Future Generations for the Environment", *The American Journal of International Law* 84 (1990): 200.

¹² Burns H. Weston, (2012), "The Theoretical Foundations of Intergenerational Ecological Justice: An Overview", *Human Rights Quarterly* 34 (2012): 257.

¹³ Brian Barry, "Sustainability and Intergenerational Justice", in *Fairness and Futurity*, ed. Andrew Dobson (New York: Oxford University Press 1999), 95.

¹⁴ Andrew Oldenquist, "Loyalties", *Journal of Philosophy* 79 (1982): 179.

most convincing plead for patriotism as usually a good thing came (see Cafaro), relevantly to my argument, in the field of environment, where the corrosive “us versus them” danger of patriotism turns into a beneficial “us, as example and inspiration to them”.

A counterargument to relying on patriotism as fuel for intergenerational care may be related to the already existent multiethnic societies in the countries of the Global North. One may legitimately ask what patriotism could we invoke in countries as diverse as the United States, Canada, or certain European states; the answer is that *at a minimum*, multiethnic countries can rely on the 'constitutional patriotism' popularized in the 1980s by the German political philosopher Jürgen Habermas. Constitutional patriotism implies that "political attachment ought to center on the norms, the values and, more indirectly, the procedures of a liberal democratic constitution",¹⁵ rather than a national culture.

Therefore, patriotism with its power to inspire sacrifice for the well-being of others can be one of the two missing links between a communitarian and a universal understanding of intergenerational equity – the second link being the rules of public international law, as shown in the next section.

Reviving the Intergenerational Justice debate: Step II

Even without further steps, national operationalization of IGJ will lead to universalistic impacts, by an aggregative process:

It is true that any communitarian theory ... only argues for the justice obligations of each community for its own successor generations. Yet, if we presume that part of every culture, no matter how different in other ways, is a shared sense of its own successor generations, then a theory of intergenerational justice ... has a universalistic impact. True, it is an appeal that works only for a community in consideration of its obligations of justice to its own future generations, but it makes the appeal to every community to act in such a way. (Hiskes 2006:84)

I propose, however, that aggregation is enhanced via a mechanism conceptually and procedurally described in the following. We should first note that intergenerational issues have long been intuitively located within the broader

¹⁵Jan-Werner Müller, *Constitutional Patriotism* (Princeton, NJ: Princeton University Press 2007), 1.



concept of human rights, accepted as universal since they are inherent to us as human beings. But human rights themselves face the dilemma of protection in cases of extraterritorial abuse. Under the International Covenant for Civil and Political Rights (ICCPR) and under the regional human rights conventions, states are responsible for breaches of their nationals' rights; the extraterritorial application is limited to cases when the breaching state exercise some form of effective control overseas – a logical consequence of the fact that it is primarily the responsibility of the victim's state to protect the rights of its nationals.

But in 2014 – and here is where my parallel starts – the Human Right Committee urged that the right to privacy has to be respected *regardless of the nationality or location* of the individuals whose communications are under direct surveillance.¹⁶ At least for the right to privacy in the context of secret mass surveillance, control is not necessary for the existence of the breach. A state can breach human rights of existing generations anywhere on Earth. In theory, an effective remedy in cases of extraterritorial human rights abuse without effective control is the victims' state taking the case to the International Court of Justice, by way of diplomatic protection.

If we add the temporal variable to the spatial one – that is, if violations are done abroad, but to future generations – the mechanism should remain applicable. Present generations in one country can breach the rights of future generations in another country – and since there is no jurisdictional link between perpetrators and victims, the state of the victims should be allowed to bring a claim on their behalf; a “diplomatic protection” for unborn victims. The parallel is even more comprehensible if we think that states *already* function of speakers for other generations, in the case of apologies for past events whereby generations in one country have hurt future (future, from their perspective; present, from ours) generations abroad.

In the mechanism I propose, they will equally speak for their future generations. I see three main pillars for operationalizing such approach, i.e. establishing norms and procedures related to *State Responsibility for Intergenerational International Wrongful Acts*.

a) The clean slate. Seen in the North/South perspective, inter-national

¹⁶Human Rights Committee, *Concluding observations on the fourth report of the United States of America*, March 26, 2014, CCPR/C/SR/3061.

intergenerational harm was mainly done by North in the last two centuries – from pollution and environmental degradation during its industrialization, to cultural aggression during the colonial period, and more recently to consumerist lifestyles for which the bill is paid by South, for generations to come. In turn, South now claims its own right to development – with the associated reverberations on the environment – plus, as said before, it exports people of which number and cultural homogeneity are at a level potentially affecting local cultures. An inter-national intergenerational convention should find ways to put up with these unresolved problems.

b) The list of intergenerational rights. With environment and culture as main candidates, participants to the intergenerational conference preparing the convention should first assess whether other rights should be on the list, e.g. related to wars and migration, to excessive borrowing, or to excessive prolongation of life. Then, it should detail a set of state obligations meant to ensure the realization of these rights. In identifying the list of intergenerational topics with inter-national relevance, thorny issues have to be touched, like North's overconsumerism, brain drain, nuclear waste disposal in the third world, or environmental destruction through their corporations under the name of 'development' – or, from the opposite side, South's demographic excesses.

The latter is perhaps one of the most sensitive issues to be included in the global intergenerational debate; on the one hand, the famous authors of the 'tragedy of the commons' boldly affirmed that "[f]reedom to breed is intolerable",¹⁷ but on the other hand, countries like China, which have tried to limit this freedom, are harshly criticized in the Western world, see the latest report (2015) of the United States' Congressional-Executive Commission on China. So far, reproductive rights are only touched upon in soft international law, see the well known Cairo Declaration referring to people's "freedom to decide if, when and how often to [reproduce]".¹⁸ But continuing to hide this thorny matter under the carpet for the sake of political correctness will not do any good to future generations. A universal cap on reproductivity makes sense if there is to make intergenerational

¹⁷ Garrett Hardin, "The Tragedy of the Commons", *Science* 162 (1968): 1246.

¹⁸ United Nations, *Declaration of the Cairo International Conference on Population and Development*, 04 September 1994, para.

7.2, <http://www.un.org/popin/icpd/conference/bkg/egypt.html>, accessed March 14, 2016.



justice really universal, and its place may be in a comprehensive inter-national intergenerational convention, given that for instance, countries may in the future raise claims to the global commons according to their population weigh.

c) The procedures. For *intra-national* intergenerational issues, the convention should employ the same mechanism found in the anticorruption conventions (OECD Anti-bribery Convention 1997, and United Nations Convention Against Corruption 2003) – state commitment plus reports and/or monitoring – and combine it with the ICCPR mechanism for complaints. For *inter-national* intergenerational issues, the solution might be an international arbitral court where states can bring claims on behalf of their future generations, when their substantive rights have been violated.

Conclusion

Policy makers in the countries that gathered two years ago in Budapest have shown determination to preserve their people's culture. This challenges the dominant understanding of intergenerationality during the last decades, i.e., related to resources and the environment.

Even though not officially related to the increased South to North migration, the addition of culture to the baggage we are supposed leave to our descendants requires rethinking the intergenerational justice debate. From this perspective, the migration flow, regardless of the migrants' motives for leaving their country, brings about two types of intergenerational injustice: that done by past generations in the Global North to present generations in the Global South, and those possibly done by present generations in the South to future generations in the North, mainly through excessive reproduction and subsequent migration.

If we accept the national cultural heritage as a right of future generations, the *inter-national* approach to IGJ is the only way to preserve the idea of IGJ's universality. True, it will depart from the "global commons" view of future generations, and for a good reason: as shown in the global commons' tragedy literature, the problem is that no one feels really incentivized to protect them. But "allocating" world's future generations to their countries is not a departure from universalism, or no less than the human rights system is. The mechanism I proposed in this essay would protect distant generations' rights in a manner similar to human rights protection – that is, acknowledging that humankind is one, but recognizing the state role in the field, domestically and internationally.

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