

Do we have duties towards future generations?

A utilitarian view on sustainability.

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Otherwise than some may expect, this is not in the first place a plea for sustainability or an argument why we ought to take care of future generations. This is essentially an attempt to show how conceptual thinking can help us to answer difficult questions, such as the question whether our behavior ought to be sustainable in order to protect the interests of future generations.

1. Legal argumentation should be based on good reasons, but an adequate theory of what reasons are good seems to be lacking. One view, which is seldom accepted explicitly, but often assumed implicitly, is that good reasons are reasons that convince. This may work in court, when the issue is whether one wins a case, but it should not work in science. Often the most convincing reasons are those which plead for a position that the audience was already holding, and only strengthen it in its opinions. Reasons are not good because they convince, but because they should convince.

What reasons should convince depends on the method that is – or rather should be – used and that is in turn the outcome of methodological considerations.¹ The main method of this short essay is a priori reasoning. I use non-empirical knowledge that is my opinion generally available, and try to show that this knowledge suffices to answer important questions about duties towards future generations.

2. There are two ways in which a person can be legally obligated to do something: she can have a legal duty, or she can be under a legal obligation. In the continental legal tradition, the word 'obligation' is used in a broad sense for a legal relation between a creditor and a debtor, and in a narrow sense for what the debtor has to do in this connection. Obligations in this sense are always the result of an event (e.g. a contract, or an unlawful act) that creates the obligation, and this event also determines who the creditor and the debtor of the obligation are and its content, that is what the debtor has to do.²

The creditor of an obligation, who is *ipso facto* the holder of a personal right against the debtor, can be unknown, but she cannot be undetermined. Since members of future generations are undetermined – it is not even certain that they will ever exist – they cannot be creditors of obligations, and there cannot be obligations with these future persons as creditors and right-holders. In this technical sense of 'obligations', there are no obligations toward future generations.

3. Otherwise than obligations, duties are not directed in the sense that there is a right-holder towards whom the duty exists. A duty is never a duty towards somebody, although duties may have beneficiaries and although the interests of beneficiaries may be the reason for the existence of duties. So, strictly speaking, there cannot be duties towards future generations. But it may be interesting to investigate whether there are duties that aim to protect interests of persons in future generations.

In this connection it is important to distinguish between the abstract duty to safeguard the interests of future generations, and more concrete duties, such as the duty not to pollute the oceans more than a certain measure, which happen to protect the interests of future generations and which perhaps even exist for that purpose.

¹ The considerable issues at stake here are discussed in Hage 2015.

² See Hage 2018, pp. 136/7.

4. Members of future generations do not exist yet. It is not even certain that they will ever exist; they are 'possible persons'. Possible persons cannot have actual interests, but at best possible interests. So we should not investigate whether there are duties that aim to protect interests of persons in future generations, but whether there are duties to protect possible interests.

5. There are four different ways in which a legal duty can exist:

- a. a valid legal rule attaches this duty to some fact, for instance that the duty-holder has a particular legal status (think of the duties of the dean of a law faculty);
- b. the duty was imposed by somebody who had the legal power to do so (e.g. a police officer regulating the traffic);
- c. the duty exists, because its existence is widely recognized (customary law);
- d. the duty exists, because it is reasonable that it exists (many duties of 'unwritten law', e.g. duties of care).³

The duties that exist for one of the reasons a-c are duties of positive law (law that exists as a matter of social fact, and which has often – but not necessarily – been laid down, *positus*). The duties that fall under (d) are duties of rational law, a kind of law which is seldom recognized as such, but which plays a crucial role in our legal systems as 'unwritten law', or 'legal principles'.⁴

6. Whether a 'duty towards future generations' exists in the ways (a), (b) or (c) depends on the positive law. I do not think that we have the abstract duty of care to protect 'the possible interests of future generations', but – depending on the positive law – this might be possible. However, it is not unlikely that some of the duties that the law imposes are at least in part meant to protect such possible interests. Think of the possible duty, mentioned before, not to pollute the oceans more than a certain measure. Legally speaking, such duties are 'ordinary' duties which do not even mention future generations and which for their existence do not depend on future generations, but only on the contingent sources of law.

For the rest of this argument, I will ignore duties that are based on positive law. I will now turn to duties based on rational law.

7. An interesting question is whether it is so reasonable to take the possible interest of future generations into account, that we already now have an unwritten legal duty to behave in a particular way. For instance, do we already have a legal duty to protect the environment because possible future people might have an interest in a healthy environment? Here is where utilitarianism enters the picture.⁵ Utilitarianism is, in one of its most prominent versions, the ethical theory claiming that the best possible action is the action that maximizes happiness. If the government is to create the best possible duties, it should create duties that maximize happiness.⁶

³ Duties of the categories (a), (b) and (d) are discussed in Hage 2018, pp. 127/8. The existence of duties of category (c) follows from the facts that many, if not all, duties exist as a matter of social fact. See Hage 2018, pp. 82-88 and Hage 2020, pp. 171-179.

⁴ This distinction between positive and rational law plays a central role in Hage 2019.

⁵ In this presentation I will not argue for (my particular version of) utilitarianism, but just assume that it is relevant. Readers who are interested in my reasons for adhering to utilitarianism may consult Hage 2015b and my *Reader: Rechtvaardigheid, een inleiding*, pp. 20-34.

That brings us to the question whether, for instance, we should have protection of the environment, which may lead to more future happiness, but which also lead to less short term happiness? Or is it better to safeguard actual happiness, for instance through keeping jobs, with the serious risk of making a bigger loss of happiness in the future? This is the question whether we should balance actual happiness interests against possible future happiness interests. Should the difference between actual happiness and merely possible future happiness play a role in determining the best possible duties?

8. A well-known argument in this connection is based on the balancing of actual and future happiness in a single person.⁷ If, for a single person, it is rational to give up some actual happiness to secure a greater happiness later, for instance by visiting the dentist, then it might, for similar reasons, be rational to sacrifice some happiness of the present generation for a greater happiness in future generations. Many people believe that it may be rational for a single person to invest in this way in the future, and in that case the conclusion seems to follow that it may also be rational to invest in future generations. Then the difference between actual happiness and possible future happiness should not make a difference for the determination of what duties we have.⁸

9. A related line of reasoning is based on a parallel between inter-personal trade-offs and intergenerational trade-offs. A contested characteristic of utilitarianism is that it strives for maximization of happiness, without bothering about the distribution of happiness between individuals.⁹ Sometimes it is better to sacrifice some of the happiness of one or more persons for the greater gain in happiness of some others. Analogously, it may be claimed that it is sometimes better to sacrifice the happiness of the present generation for the greater gain in happiness of future generations. From these two (alleged) parallels, the first one is the stronger, because it also relies on counting future interests that do not already exist.

10. Otherwise than most people think, the continuity of a person is not something that is obviously given.¹⁰ Streams of consciousness typically take no longer than a few seconds, and when we sleep we are only conscious when we are dreaming. We experience ourselves as stretched out in time during the lives of our physical bodies, but even those bodies are less continuous than we may think. Depending on the kind of cells, most – but not all – cells in our bodies are replaced frequently, with intervals varying from a few days (cells in the colon), to several years.¹¹ The continuity of persons is something that we experience, but not something objective that we perceive. In fact, it is difficult, if not impossible, to point to something that continues to exist for the same period that we assume a person exists.

⁶ A critical reader may notice that here I am rather fuzzy about the difference between what it is rational to do, what is the best thing to do, what a legislator should do, and what 'we' have a duty to do. The reason is that if I spell out the argument in a way that avoids this fuzziness, it may become impossible for many readers to follow the argument because of its technicality.

⁷ The *locus classicus* for this line of argument is Parfit 1984, pp. 351-441.

⁸ Actually it is slightly more complicated, because future happiness is uncertain. In determining what duties we have, this uncertainty should play a role. Not because future happiness is less important, but because it is rational to have a discount for uncertainty. See also the last paragraph.

⁹ Driver 2012, pp. 67-84.

¹⁰ Strawson 2011.

¹¹ See <http://book.bionumbers.org/how-quickly-do-different-cells-in-the-body-replace-themselves/> (last visited on 27-11-2019).

A nice parallel in this connection is between (human) persons and states. A state may continue to exist for centuries, but its continued existence is attributed to a complex configuration of institutions that, taken individually, have a (much) shorter life span. Something similar seems to hold for human persons. There is discontinuity, both in their physical as in their mental aspect (if these two can be differentiated at all). Nevertheless, we 'see' continuity of a person in this discontinuity.

11. Humanity is like states in that it exists through the overlapping existence of other entities than humanity itself.¹² Where the overlapping entities in the case of states are institutions (and perhaps other entities), the overlapping entities in the case of humanity are human lives. If states and humanity are comparable in this respect, and if states and human persons are also comparable in this same respect, then – by transitivity of being alike (HUMANITY is like STATES are like HUMANS) - there is a strong case that humanity is like a person in this respect. If it makes sense for an individual person to balance actual and possible future interests in the determination of what to do, then there is a strong case that it makes sense for humanity to balance actual and possible future interests.

12. In this presentation I will not answer the question whether we should take possible future interests (the interests of future generations) into account in determining what duties we presently have. However, I will draw a hypothetical conclusion, and issue a warning. The hypothetical conclusion is that:

IF it makes sense for an individual person to balance her actual interests against her possible future interests, and
IF humanity is, where the determination of rational action is concerned, comparable to a single person, and
IF the determination of rational duties is a matter of determining what it is rational to do, and
IF the determination of what rational duties we have should be interpreted as practical reasoning for humanity,
THEN we should take the possible interests of future generations into account in determining what rational duties we presently have.

It should be emphasized that these four 'IFs' are elements of a sufficient condition. It is not possible to argue that if one of these conditions is not satisfied, we should not take the interests of future generations into account. However, if one of these conditions is not satisfied, there rests a heavy burden of proof on those who want to argue for the interests of future generations.

13. And finally the warning. Even if we should take the possible interests of future generations into account in determining what duties we presently have, we should realize three things:

a. the possible interests of future generations still need to be balanced against the actual interests of the present generation (think of the protests of farmers and of the yellow jackets);

¹² From a utilitarian perspective, this limitation to humanity, rather than the collection of all sentient beings, is misplaced. The reason why I nevertheless adopted humanity as the entity balancing actual and future interests is that we have a single noun for humanity, and not for the collection of all sentient beings. Another reason might be that we do not know of any other kind of sentient beings that is capable of balancing actual and potential future interests.

- b. because the possible interests of future generations are uncertain, a rational balance of actual against possible interests should apply a discount on future interests, because they are uncertain; the farther in the future an interest will become actual, the less it should count; and
- c. the interests of future generations, whether they are real or merely imaginary, also play a role through the love of members of the present generation for their (children's) children, which is an actual interest.

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