

Rule Change and Intergenerational Justice¹

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Introduction

Constitutions have attracted the attention of intergenerational justice specialists for at least two reasons. Activists have defended the need for constitutionalising the rights of future generations.² And theorists have stressed the problematic nature of constitutions insofar as their rigidity allows earlier generations to impose rules that later ones may otherwise not have chosen.³ Examples include requirements of qualified majority to modify constitutional provisions or the introduction of restrictions such that provisions could only be revised by a legislature if they were included in a list by the previous legislature. Such mechanisms are at times a solution (e.g. for those who want it to be hard to question a concern for future generations that would already be embodied in a constitution) and at other times a problem (insofar as generations may disagree with each other on constitutional matters). Constitutional rigidity is thus a double-edged sword from the perspective of intergenerational justice.

In contrast to constitutional rigidity, rule *change* – including constitutional change – has not attracted much attention, be it from philosophers in general⁴ or from those concerned with intergenerational justice in particular. People make choices on the basis of expectations regarding the degree of stability of legal rules (e.g. urban planning or tax regimes). In non-traditionalist societies, rules are changing constantly. Tax reforms affect our disposable incomes. Changes in environmental standards leave us with more or less freedom to proceed with polluting behaviours. Each time, either some lose and others gain, or some lose or gain more than others. The question then arises as to whether transition losers should be compensated (possibly through taxing transition winners) for such losses. When a natural disaster affects a region, it seems obvious to most people that some solidarity should operate. Why not when new rules are being imposed by a majority, to the detriment of at least some

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² See J. Tremmel in this volume

³ See e.g. Jefferson (1789), Holmes (1995: chap.5), Otsuka (2003: chap. 7)

⁴ See however the two following exceptions: Campbell (1973), Fried (2003). See as well : Murphy & Nagel (2002 : 128-129)

of us? From the losers' perspective, rule change can very well be regarded as one among other exogenous changes in the environment in which we live.

This paper aims at identifying the extent to which *rule change* in general, and reforms with a marked intergenerational impact in particular, do raise challenging questions that theories of justice should address. Mechanisms of "grandfathering"⁵, claims of "droits acquis" ("vested rights")⁶ or the prohibition on "ex post facto" legislation all point in the same direction. Still, we lack a clear normative framework to address all general cases as well as the intergenerational ones, and more specifically those involving *overlapping* generations. We shall proceed in four steps. First, the general problem of justice and rule change will be identified. Second, a normative solution will be proposed. Third, we shall present three examples where rule change has a distinctively intergenerational impact. Finally, we will ask ourselves whether the general solution applies to such intergenerational cases.

1. Rule change and transition losses

If any reform were to be considered necessarily unjust all things considered, we would be forced to close down parliaments, freeze every existing social rule, and defend each of them as part of our tradition forever. This would be quite a radical (or rather radically traditionalist) posture. Yet, most of us accept the view that rule changes, albeit often necessary and just "all things considered", can still generate specific injustices that could themselves be corrected. Let us consider climate change. Many of us find it critical to reduce our global CO₂ emission level. Still, on the emission side, some of us will lose more than others from such reduction measures. This is especially the case with countries engaged in economic activities that are highly carbon-intensive, or with those who have developed consumption patterns associated with higher than average CO₂ emission levels. Hence, the introduction of a (new) standard aiming at a reduction of greenhouse gas emissions changes the rules of the game. And some may then be tempted to consider the higher impact on those

⁵ See below for a definition

⁶ For a recent example from the Belgian debate on early retirement: « Que fait-on de ceux qui sont actuellement en prépension? Il ne faut pas leur faire peur. C'est un droit acquis ». V. Rocour interviewing Federal MP B. Drèze on end of career issues (*La Libre Belgique*, Oct. 8, 2004, p. 7). Such a notion of vested rights ("droits acquis") would need further theorisation. At this stage, beyond the standard notion of vested rights in administrative law, there are at least two additional intuitions at play in the retirement benefits context. The first idea is that these rights have been "bought" (the "acquired" rather than the "secured" meaning of "acquis") by the beneficiaries, since either they funded them (funded pension schemes) or they financed the previous generations's pensions (pay-as-you-go pension schemes). There is a second intuition, captured e.g. in the 1993 Canadian Supreme Court decision *Dayco (Canada) Ltd. v. TCA-Canada* (<http://www.canlii.org/ca/cas/scc/1993/1993scc53.html>), that is specific to contexts in which retirement benefits result (fully or in part) from collective bargaining exercises. In such cases, a right resulting from a collective agreement will be "vested" if, once a person retires - leaving by this very fact the collective bargaining process -, her right remains unaffected by the entry into force of collective agreements subsequent to the one in force when the person retired (see as well Vallée (1995, notes 53 & 65). This corresponds to a general principle of contract law (non-invocability against third parties), which has connections with the democratic idea that all those affected by political decisions should have the right to vote, entailing that decisions to which people had no chance to participate (directly or through representatives) should not bind them. This could entail - by analogy to the collective bargaining case - that if we were to add an upper age limit of e.g. 60 to the existing minimum age limits on voting rights, those above 60 could only be subject to legislation in force until the first elections to which they were not allowed to vote anymore. 60-plussers would be exempt in this case from the scope of any subsequent reforms. See as well: Sack (1929: 136, note 1).

already engaged in a highly pollution way of life as unfairly heavy. One solution to this consists in exempting such actors for a while from the application of the new rule. This is referred to as grandfathering. More generally, there are two ways to smoothen the impact of rule change on its losers. Either we compensate them in cash (e.g. through taxing those who are the winners in the new regime). Or, we exempt them (in kind) from the scope of the new rule, be it “forever” (e.g. “droits acquis” in case of rights that end with a person’s life rather than earlier) or for a limited period of time (some forms of grandfathering, e.g. with a gradually diminishing weight in the CO2 emission rights allocation formula).

In every regime of rules, each person has a given opportunity set, i.e. the set of possible behaviours that are within this person’s reach, given the means she has to act and the constraints imposed on her by various social restrictions. Once rules change, some will benefit from a larger opportunity set than before and others from a smaller one. And in some cases, depending on the range of this opportunity set they were planning to use, people’s expected utility will be affected. Hereinafter, we propose to define the problem of rule change as having to do with *transition losses* or *transition gains* only. In order to identify precisely the scope of the notion of “transition loss”, let us distinguish among six types of cases, depending on whether investments did or did not take place, and on whether, had the rule been different at a given time, such an investment would or would not have taken place. Notice as well that the four first cases deal with pre-change investments whereas the two last ones are examples of post-change (future) investments. Here are the six situations:

1. **Did-but-would-not-have-done:** The agent would not have made such an investment had the new rule applied at the time of the investment (or had she known about its future entry into force). She would not have invested at all, or less, or differently. Pension reform is a typical example since it affects the return that people get at the end of their life, on an investment they made during their period of activity.
2. **Did-and-would-have-done:** No matter whether the agent would had known about the rule change or not, she would still have stuck to the very same investment as the one she has actually made (even if the return would have turned out to be lower than under the present rule).
3. **Did-not-but-would-have-done:** No investment was made before the rule change entered into force. Still, had the new rule applied earlier (or had the person heard about its future entry into force), she would no doubt have decided to invest. A typical example is provided by unemployment benefits (or pension benefits) on which someone relies and that are suddenly cancelled. The person would certainly have organised herself differently had the unemployment benefits not existed or had she known they would get cancelled. And one thing she would have made is investments e.g. in broadening her range of skills. Another illustration is a situation in which speaking a *lingua franca* that one never learnt suddenly becomes a general requirement. Had we known that, many of us would have invested in learning such a language.
4. **Did-not-and-would-not-have-done:** A situation in which, be it under the existing rule or under the new rule, the investment would not have been made anyway.
5. **Did-not-yet-but-would-have-done:** This is a case in which I could have invested in the future, and I would have done so, had the rule not changed.
6. **Did-not-yet-and-would-not-have-done:** A case in which I *could* have invested in the future had the pre-existing regime remained but I *would* not have done so anyway.

As we shall see, not all transition losses should be compensated. But even prior to that, among the six types of situations listed above, we propose to include only type-1 and type-3 as belonging to the scope of “transition losses”. Here are the reasons why.

First, the exclusion of type-5 rests on a normative argument according to which, if we had to compensate *ad infinitum* future investments that have been made uninteresting by the existence of a new rule, this would amount, as a matter of fact, to cancelling the rule. Hence, it is absurd for us both to claim that a new rule is a better one, and that all coming generations should be compensated for investments they were unable to make because of this new rule. The same argument holds for type-6 cases, with the additional fact that in such cases, there would not even be any “expected utility” type of loss, since the agent would not have used the opportunity it would have had anyway.

This latter remark leads us to look at the reason why we also exclude type-4 cases should also be excluded from the scope of our notion of “transition losses”. We consider that in cases where, as a matter of fact, the behaviour of the agent would not have been modified by the change in rule, such a rule change cannot be said to reduce the expected utility of the agent. Admittedly, there might be some disutility associated with the mere fact of having a narrower range of opportunities than the one an agent actually could have had. But this is a specific type of loss that we propose to exclude from the examination below. We cannot exclude however that the twofold test proposed hereinafter could perfectly apply to this very special type of loss as well.

In type-2 cases, the investor would not have decided to modify the nature of her investments (its object, its size, etc.). The new rule clearly only allows for a lower return than the pre-existing rule. Still, this loss is not as such a transition loss. There is thus a clear loss in utility, but not one that is due to the change itself.

We are therefore left with two types of cases. Type-1 is clearly the paradigmatic example of a situation leading to transition losses. Moreover, there are no reasons *of principle* to exclude type-3 situations from the scope of transition losses. Are there *practical* reasons to exclude type-3 cases from the scope of possible compensation in actual legal regimes, that would not apply equally to type-1 situations? In fact, both types of cases involve counterfactual assumptions about what the agent would otherwise have done. In a real situation, we shall tend to rely on assumptions about the way in which representative and/or reasonable members of the public are likely to have behaved. The non-observability of people’s counterfactual behaviour is thus not an definitive obstacle. We therefore propose to include both type-1 and type-3 situations within the scope of what we refer as transition losses.

Transition losses can thus be defined as losses in the expected return on *effective investment* in type-1 cases or losses resulting from the opportunity cost of *non-investment* in type-3 cases due to rule change. Obviously as well, the scope of the problem excludes types of activities that merely involve negligible investment. For example, if we change the rules applying to domestic violence, there are definitely winners and losers, but probably no *transition* losers. Finally, let us add that compensation may also apply to *transition gains*, i.e. gains resulting from a reduction in the costs one should in principle have incurred in return for a benefit that one already obtained. As we shall see, all active workers above 20 benefit from transition gains in the cancellation of age-based mandatory retirement example.

Actually, this focus on transition losses is closely connected with the idea of prohibiting *ex post facto* regulation. The pure case of an *ex post facto* legislation is the following. Imagine that

someone envisages breaking the law as it applies to speed limits. At the time he wants to do so (T0), he knows for example that if he drives at 150 KM/hour on the motorway he will not risk a license confiscation. Imagine now that sometime later (T1), the law changes and is adopted in such a way that it is meant to apply back to T0. The new law strengthens the penalty by imposing driving license confiscation for the same behaviour. This would be considered an unacceptable *ex post facto* legislation as a citizen is supposed to be able to know *at the time he acts* what the legal consequences of his/her action will be. This can be considered a matter of vertical justice, i.e. of just relationships between the public power and the individual citizens.⁷ *Ceteris paribus*, regulatory stability will of course tend to lead to greater vertical justice in this respect. Moreover, such “legal security” requirement is also supposed to serve efficiency purposes under some circumstances.

Now, there are many situations in which some degree of “retroactive” impact is either unavoidable or acceptable.⁸ This is especially the case whenever an activity involves an investment that requires time to get the expected return. In such cases, there is a sense in which the change in rule will necessarily violate the prohibition on *ex post facto* regulation, because it modifies the potential return that the investment was associated with in the past, at the time it was initiated. Hence, if breach of the above mentioned rule of vertical justice is somehow inevitable as well as justifiable on an all-things-considered basis in such cases, horizontal justice (i.e. justice between citizens) should at least lead us to be concerned with the fact that some may lose whereas others will lose less or even gain from such rule change. Moreover, the fact that a change in rule would be decided by a majority in the most democratic way does not exonerate such a society from making sure that those who would unfairly lose from it be compensated. This is clearly what we do for matters such as takings. Hence, democratically decided change in rules could very well be treated from the point of view of one of its victims, as equivalent to sudden changes in atmospheric or seismological conditions, taking the form of a hurricane or an earthquake. This leads us to the normative side of our question. It should help us assessing whether it is indeed right to assimilate transition losses from rule change to disadvantages flowing from brute bad luck arising from natural disasters.

2. Which transition losses should be compensated?

Now that a notion of transition loss has been defined, we have to ask ourselves: should all transitional losses (be they absolute or relative) be compensated for in case of rule change? We suggest the following twofold test:

Predictability component	Should the citizen have reasonably expected that the previous rule would not be changed?
Legitimacy component	Should the citizen not have considered the previous (social or legal) rule as obviously insufficient from a moral point of view?

Table 1: The compensation test

Let us illustrate this. As to the *predictability* component, *ceteris paribus*, the reason to compensate for transition losses will be greater if, for example,

⁷ For developments on this matter in Belgian criminal law: Closset-Marchal (1983 : 23-31)
⁸ Similarly, when we deal with the prohibition on unilateralism in some cases in free trade zones, there is an extent to which extra-territorial impacts of domestic rules are unavoidable. In this case, international trade exchanges are the equivalent of the temporal dimension of investment here.

- the rule was *of a lower order* (e.g. a ministerial decree as opposed to a constitutional provision),
- there was *very little debate* as to its acceptability (e.g. nothing in the press, no discussion in parliament,...), suggesting that such a non-problematic rule would remain in force. Of course, if there is on the contrary a large and lively debate, the issue is whether this should be seen as a factor of predictability of change, or whether only an early official announcement of rule change should be taken into consideration in assessing the predictability of the change. We would tend not to adopt the latter view.
- there was *strong opposition to any change* (e.g. an influential minority politically being able to block any change) or one lives in a *super-traditionalist society* in which rule change hardly ever takes place.

Of course, the cognitive abilities of the transition loser might be taken into account here, referring e.g. to those of an average individual placed in similar conditions. The intuition behind this predictability component of the test is a normative one. In case of (risk of) harm (e.g. in a car crash) it is reasonable for potential victims to adopt measures such that they would reduce the amount of the harm done (e.g. to exit the car as soon as possible).⁹ If a legal change has been announced well in advance and an economic actor does not try to reduce the amount of transition loss resulting for him from this shift to a new rule, he should be considered partly responsible for the extent of such a loss. In short, one possible rule of justice considers that victims should make reasonable efforts to mitigate damages done to them by nature or other people.¹⁰ In the case of rule change, predictability certainly affects the extent of anticipation efforts that people should reasonably be expected to make in order to mitigate transition losses. The significance of this component is that strong, *ceteris paribus*, predictability will certainly constitute one reason to deny full compensation to victims of transition losses. In such cases, they would for example be expected to contract an insurance if it is available and if they can reasonably afford it. Redistribution will then require that differences in insurance premium resulting from circumstantial factors (rather than choices) be compensated.¹¹

⁹ On the recognition of such a duty to mitigate damages in civil law systems : Kruithof (1989). Notice that a distinction is generally made between the duty to take reasonable preventive measures to mitigate future damage and the duty to mitigate damage once it has actually started to occur.

¹⁰ An anonymous referee suggested that the « unpredictability condition may be justified via a different route, namely the morally desirable tendency or even obligation of states to guarantee to its citizens some safety of planning ». The idea would entail that the unpredictability requirement refers not to an obligation of citizens towards other ones, but to an obligation of the State towards its citizens. The unpredictability of changes should lead to compensate transition losses, not because it rendered the losing citizens unable to act upon their obligation to mitigate harm, but because the State violated its obligation to stick to predictable changes as much as possible. Actually, the two accounts are not mutually exclusive. Yet, we believe that the « obligation to mitigate harm » account is more general than the one in terms of « State obligation of rule stability ». For in some cases, it is reasonable to claim that an abrupt reform is preferable to an unjust status quo. In such cases, the State did the right thing. If we were then to rely only on the State obligation account, there should be no room for compensation since, all-things-considered, it would have done the right thing. If we believe that even in such cases, there could still be room for compensation among citizens (e.g. transfers from transition winners to transition losers) a reference to the « obligation to mitigate » account should then be preferred.

¹¹ See on this: Fried (2003).

As to the *legitimacy* component, it assumes that it is not always morally sufficient to act in accordance with the law. In other words, it does not follow from the fact that a given behaviour is lawful that this behaviour should be considered morally acceptable. Compare two equally predictable reforms, the former consisting in a day-to-night shift from left-hand side driving to right-hand side driving, and the latter consisting in the introduction of measures aimed at reducing gender discrimination on the labour market. *Ex hypothesi*, the entry into force of each of these measures has been announced five years in advance. In each case, some will lose and others will gain. In the traffic rule case, exclusive pedestrians or those who are generally less dependent on a car will certainly have to support lower transition costs than others as a result of the measure.¹² In the gender-justice-oriented labour market reform case, the male active population will certainly lose and the female one will win. Still, whereas in the hand side driving case, it is hard to see how departing from the pre-reform rule might be obviously morally better, the gender-justice-oriented reform illustrates a situation in which it is commonly acknowledged that some of the gender-based wage gap and other gender differences on the labour market are hard to justify, despite still being widely practised.¹³ Such considerations should lead us to the view that while compensating drivers by taxing pedestrians or less car dependent people might be an option (at least if we leave aside environmental concerns), taxing women to compensate men is certainly not an option.¹⁴

The idea is that it is illegitimate for a given actor to claim compensation for unfulfilled expectations each time such expectations had to do with the permanency or the introduction of an morally illegitimate situation. In fact, there are two possible intuitions underlying the legitimacy component.¹⁵ The first one is that if a privilege is cancelled, compensation would go against the very goal of the reform. We believe however that this is not the best rationale to justify the legitimacy requirement for compensation. For there could be cases in which only those who were already actively involved in relying on an undue privilege could be compensated. In such a case, this would merely limit and/or delay the effect of the reform, not cancel it. Still, even in such a case in which the reform would clearly come to effect, one

¹² One difficulty in this case is to set up a compensation scheme that does not in turn generate injustices. For example, if those who do not have a car tend on average to be poorer than those who do.

¹³ For a relevant source in labour economics: Altonji & Blank (1999)

¹⁴ Taxing less affected men to compensate more affected men could perhaps be one however.

¹⁵ There are at least two extra arguments against compensation, both focusing on problems of incentives. Argument 1: If we hold the view that justice-oriented reforms should be encouraged, and if we believe that an obligation for the State to compensate transition losers constitutes a strong disincentive to such changes, then compensation could be denied in cases of justice-oriented reforms. For an analogous argument going rather in the opposite direction, based on the assumption that new rules tend not to go in the right direction and that rule change should therefore be discouraged: Epstein (2003). Argument 2: "Aggressive" rule change, i.e. imposing a new law without any prior announcement and/or room for compensating losers, generates strong incentives for e.g. manufacturers to constantly look for potentially less harmful products in anticipation of possible rule change (For a very interesting discussion on this and other incentive problems: Levmore (1999)). A related idea is that the advanced announcement of a reform aimed at cancelling undue privileges coupled with a promise to compensate transition losers generates an incentive for those heavily relying on such undue privilege to rely on it *even more* between the time of announcement and the entry into force of the reform. Doing so would increase the amounts they could be compensated for. This is a classic when establishing e.g. tradable permits schemes on a grandfathering basis. This second extra reason not to grant such compensation and/or not to announce the reform in advance thus refers to problems either of lack of incentives to anticipate, or of perverse incentives - not on the State's side this time, but on the side of those to whom the new law will apply.

could object to compensation. This suggests a better rationale. The idea is not that such compensation would cancel the effect of the reform. Rather, it consists in claiming that one should not expect compensation for loss in undue privilege, at least not from those who were the victims of such privileges, or would have been such victims in the absence of rule change. Hence, changes in network standards (e.g. in telecom) that are not necessarily justice-oriented are not incompatible with taxing transition winners to compensate transition losers.¹⁶ They have to do with coordination concerns and fit with quality requirements rather than with removal of undue privileges. In contrast, in case of justice-oriented reforms, taxing the target group explicitly supposed to benefit from the reform would be not only in tension with the very idea of the reform (it would cancel or delay its effects), but more importantly unfair (because it implicitly considers as legitimate the fact for actors to base their existence on expectations of status quo re. unfair rules).¹⁷ Hereinafter, we illustrate the possible use of our twofold test with some typical examples.

<i>Rule change</i>	<i>Coordination-oriented</i>	<i>Justice-oriented</i>
<i>Less likely</i>	1. Price setting mechanism in a super-traditionalist society	2. Recognition of a set of fundamental human rights following a revolution
<i>More likely</i>	3. Pre-announced network standard shift	4. Pre-announced gender-justice-oriented reform

Table 2: Illustrating the twofold test

This twofold test is of course very general and will not automatically deliver an answer in all relevant circumstances. What is clear is that if the idea was to cancel a clearly undue privilege, there should be no room for compensation – at the very least not by the intended beneficiaries of the reform. Similarly, if the change in rule was clearly predictable for a long time, there should in principle be no room for compensation transition losers either. Intermediate cases involving high (non-nil) predictability and high illegitimacy of the status quo, or low predictability and low illegitimacy of the status quo are less straightforward to deal with. This is especially important as some reforms are hard to classify. For instance, change in planning status in the context of urban planning can both pursue coordination and justice-oriented goals. The goals (and/or effects) are more clearly mixed here than in other cases (e.g. shift from French to English as an official language where the coordination component will at least be dominant).¹⁸

Of course, whether we are actually facing a “clearly undue” privilege has to be decided on the basis of a given theory of justice. This calls for a clarification in two steps of the idea of

¹⁶ A difficult question is whether a decentralized market-driven change in standard (through an accumulation of consumption and production decisions) should be treated differently from a legally-driven change in standard.

¹⁷ Notice that we are talking here about taxation with the specific purpose of compensating for transition losses. Rejecting such particular taxation in some cases does not preclude the possibility – in the very same cases - of taxing the groups of people mentioned above with the view of compensating the victims of *overall* brute luck disadvantage.

¹⁸ Of course, the coordination dimension cannot be totally disconnected from the justice one. If shifting to a single language allows for efficiency gains in terms of communication costs, such efficiency gains may in turn benefit the least well off as well. Moreover, there may be more straightforward arguments of justice in favour of a shift towards a single language (e.g. English), such as the one discussed in Van Parijs (2004: 377) (negative correlation between cultural diversity and the strength of labour organisations). Thanks to Ph. Van Parijs for pointing me this twofold point.

legitimacy. In this chapter, we are only concerned about *output* legitimacy (as it is assessed by substantive theories of justice) as opposed to *input* legitimacy, i.e. the fairness of the procedure that led to the adoption of a given pattern of rights and obligations. This *firstly* means that when we consider a privilege to be undue, such a claim should be based on the assumption that it violates the requirements of the substantive theory of justice we find most compelling, rather than procedural constraints regarding the way the existing norm should have been adopted (e.g. follow a clearly democratic procedure). It also means, *secondly*, that the reform (as opposed to the pre-existing regime) could be procedurally fine and still lead to an output that may not be legitimate either overall, or due lack of compensation of transition losers, if required.

Thus, in the context of this paper, a privilege will be undue, regardless of the fairness or unfairness of the decision procedure that led to its establishment. It is undue because it does not fit with the requirements of substantive theories of justice. The test will thus have to be applied from the perspective of a given theory of justice, each of which is likely to deliver different results. This is not a problem if we consider that it makes sense to claim that some theories of justice are better than others. The difficulty in practice is rather to determine the extent to which individual citizens can be expected to know about these different theories. This is the reason why only clear cases of pre-existing undue privileges (e.g. on which different theories of justice converge) will qualify as instantiations of justice-oriented reforms. In other words, compensation cannot be excluded, not only in clear coordination reform case, but also in justice-oriented reforms involving extremely technical reasoning that standard citizens cannot be expected to grasp without considerable time investment.

Moreover, the model does *not* tell us whether more weight should be ascribed to one of the test's two components. Each of them rests on a given moral intuition (the obligation for the victim to mitigate damage as much as possible; the illegitimacy of relying on the permanency of unfair situations). The examples above suggest however that the moral intuition underlying the legitimacy component should probably dominate the one at work in the predictability component. Despite such difficulties, the test gives some idea of considerations that should be regarded as central in assessing whether transition losers should be compensated. It also allows in practice for what we could refer as intra-criterion comparisons in table 2. Let us now turn to the intergenerational context.¹⁹

2. The intergenerational impact of rule change

Everything we said so far was meaningful even in a world in which a single generation would be at stake. Hereinafter, we illustrate with three examples the way in which some types of changes in rules can have a clearly intergenerational impact. In other words, transition losses and transition gains can be spread across different generations in such a way that we end up with winning and losing generations. Let us stress as well the fact that

¹⁹ To return briefly to our comparison between rule change and natural disasters, the predictability component could certainly be used in defining a fair way of dealing with such natural disasters. In both rule change and natural disaster cases, the extent of predictability of the event should give us an idea of the amount of preventive mitigation measures that could be expected from the potential victim. In contrast, the legitimacy component renders the context of rule change different from the one of natural disasters. Consider the following position: differences in natural endowments (be they of internal or external resources) are never unfair as such. It is only people's (in)action with regard to such differences in people's natural endowments that can be regarded as unfair (Rawls). For those holding such a view, the legitimacy requirement will not be relevant in the case of natural disasters in the same way as it is in the case of rule change.

we do not assume here that the reforms we are dealing with lead to efficiency gains or losses benefiting current generations. Hence, losses and gains will be considered as *relative* rather than *absolute* ones. We only care about the intergenerational distributive dimension, leaving aside the intergenerational efficiency one. The introduction of overall efficiency changes would complicate the analysis without providing us with significant additional insights. No matter whether there are efficiency gains or not, there will always exist some *relative* winners and losers. Dealing with winners and losers in absolute terms would make the examples more straightforward (although more complicated), but the same reasoning applies for relative winners and losers in cases when there are overall efficiency changes.

Cancelling mandatory retirement²⁰

Let us consider our first example. Age-based mandatory retirement is supposed to reduce job-scarcity on the labour market. All of a sudden however, it is being decided that age-based *mandatory* retirement amounts to unlawful age discrimination and that its mandatory nature should therefore be cancelled. What are the effects of this policy change? To keep the analysis simple, we assume that labour demand is fixed, i.e. that no matter how many workers supply their labour on the market, the firms always hire the same amount of workers. Jobs are thus scarce. An increase in labour supply due to the cancellation of mandatory retirement does then not lead to efficiency gains. The policy change only has distributional effects. Who are the winners of this reform?

First, let us look at the old generation that is already retired at the moment the policy change takes place. Once the mandatory retirement age is cancelled, they can return to work if they want. However, they first have to search for a job and compete for it with younger individuals. The probability that they really find a job is thus rather small. Consequently, the benefit they get from the policy reform is positive, but very limited. The old thus have already benefited from the return on “investment” (limited job competition), while not being obliged anymore to pay the investment (mandatory retirement). Clearly, they are transition winners.

Focus next on the generation that is just below the mandatory retirement age when the policy reform takes place. The presence of a mandatory retirement age was beneficial for them during their working period, because this limited job competition. It was therefore easy for them to find a job when they were young. However, since the policy reform takes places at the time they reach the retirement age, they will not have to pay the cost of this reduced job competition that resulted in forced retirement. They can just keep working as long as they want. This generation thus benefits most from the policy change. Again, they get transition gains since they got the return on investment without being obliged to pay afterwards the investment costs.

Finally, consider the young generation that just entered the labour market at the time the policy reform entered into force. During the first time of their life, up to the age that was previously the retirement age, they are disadvantaged by the policy change. In fact, before the reform, the young people who entered the labour market could get the jobs that elderly workers had to give up because of mandatory retirement. However, once the reform has been enacted, the old do not have to retire any more, and some might in fact renounce doing so. There are thus fewer jobs available to the young people and job competition increases,

²⁰ Another problem that leads to a similar pattern as the one that will be illustrated here is the cancellation on so-called « clauses orphelins » in labour law. See Volovitch (2000)

leaving more young people on unemployment. This is the cost of this reform that the young people have to pay. However, these young job seekers will also end up getting old themselves. And when they will finally reach the age corresponding with what was previously the mandatory retirement age, they will also be able to continue working. Hence, they will benefit from the policy reform, transferring the costs to the new young generation. Since we assumed labour demand to be fixed, these people work the same amount during their life, but this time is shared more equally along their life, having unemployment spells when they are young and continuing to work when they are old. These people thus neither win nor lose as a consequence of the policy reform.²¹

The distribution of benefits of the policy reform as a function of the age at the time of the reform can thus be depicted as in figure 1, where we assume that the mandatory retirement age was at 60 years.

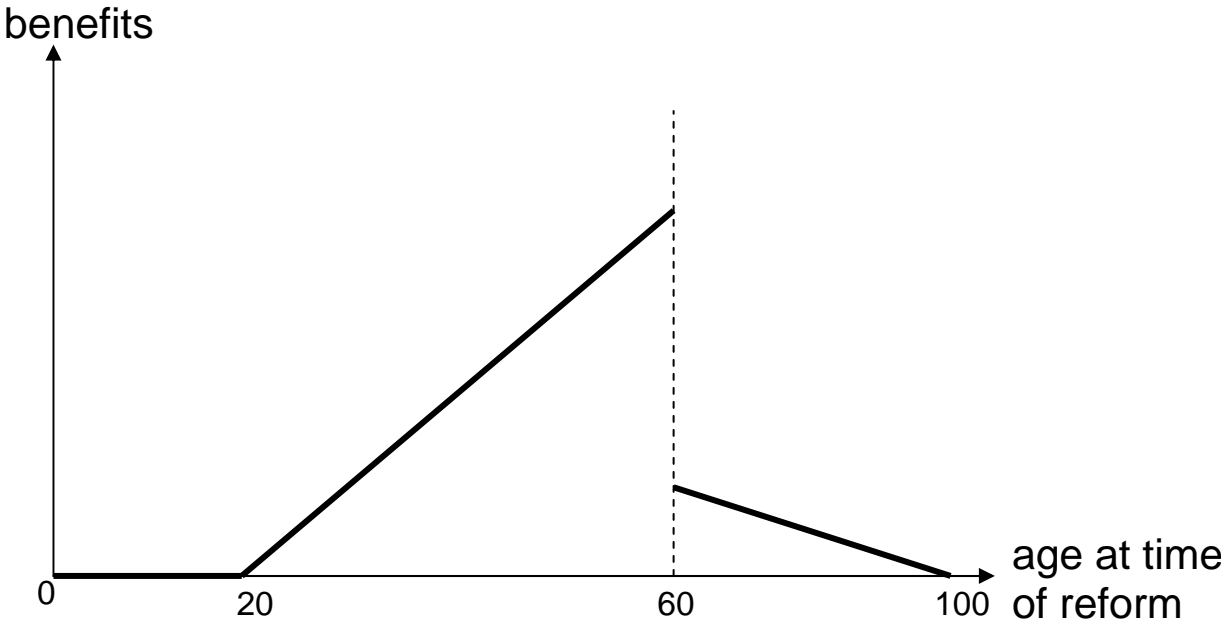


Fig. 1: The generational impact of cancelling mandatory retirement.

Phasing out the right to early retirement

Next, consider the case in which the government has set up early retirement schemes to avoid job competition. Workers can voluntarily retire at the age of 50, in which case they will benefit from an early pension until they reach the normal age of pension. The measure is

²¹ It might thus seem that there are no losers of this policy reform (since all present generations seem to win), contradicting thereby our assumption that the policy reform has no efficiency gains. However, the young always transfer the cost to the next generation, *ad infinitum*. It is thus the last generation (the “end-of-the-world generation”) that pays the final cost. This cost can however be transferred to earlier generations if the current generations agree to let a “bequest” to the following generations and so forth. Notice that the losses affecting this last generation do not constitute transition losses.

financed through taxes on labour income. Suppose that, because of concern for e.g. the viability of our pension system, the government wants to cancel this option. Workers would not be entitled to benefit from a pension until they reach the age of 60. Which generations will benefit or lose from this policy change. As in the previous example, we abstract from efficiency gains generated by the cancellation of early retirement schemes. We focus exclusively on the distributional effects, and more specifically from an intergenerational perspective.²² This amounts again to the assumption that labour demand is fixed: jobs are scarce and the policy reform does not increase the number of jobs to be filled.

First, let us assume that the workers who quitted the labour market for early retirement at the time of the policy reform are not obliged to go back to search for work, but can keep benefiting from their early retirement scheme. People above the age of 50 thus do not see their situation change as a result of this reform. They are neither affected by increased job competition, nor do they benefit from the decrease in taxes that were necessary to finance early retirement. Similarly, the people below the age of 20 who did not enter the labour market yet neither lose nor win. During their lifetime, the lower taxes on labour income will exactly outweigh the losses from increased job competition and longer working life.²³

What happens however to the generations that are between the age of 20 and 50 at the time the reform came into effect? Those workers who were just about to reach the age of 50 at the time of the reform cannot go benefit from early retirement anymore. They have contributed up to that moment to finance the early retirement benefits of the older generations. Still, once they reach that age themselves, they do not have this possibility anymore. They are obliged to remain on the labour market, while they might prefer to retire early. Therefore, they are clearly the transition losers. The younger generations lose less, because they have been contributing for a shorter time to the financing of the early retirement scheme. They thus profit more from the decrease in taxes on labour income than the generation that is just about to reach the age of 50. Here is how we can represent the situation (fig. 2).

²² Governments in fact often justify the cancellation of generous early retirement schemes by economic efficiency arguments. This however only complicates our analysis, without adding new insights on the intergenerational distribution of benefits and losses. That is why we prefer to keep the analysis as simple as possible.

²³ This is mainly due to our assumptions of fixed labour demand. If the policy reform increased job creation, then these generations might win due to the efficiency gain, while the old generations are still not affected by the efficiency gains (except, of course, if pensions are increased, for example if they are indexed to total economic output).

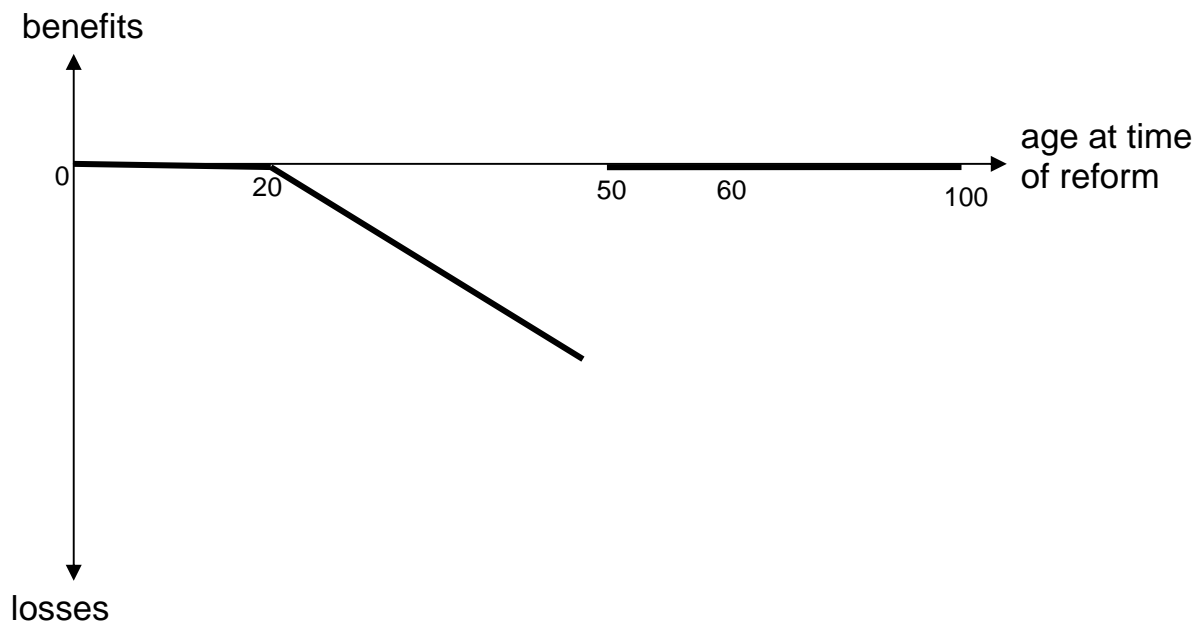


Fig. 2: The generational impact of phasing out the right to early retirement

As in the previous case, the losses identified above are transition losses. The losers contributed through taxes to the early retirement of the old. Hence, they made the investment without getting a chance to benefit from the return on such an investment. In contrast with the previous case, there are two differences however. First, the active generation experiences losses rather than gains. Second, contrary to what happens in the mandatory retirement cancellation case, 60-plussers (as well as those who already opted for early retirement) remain unaffected by the change in rule.

Cancelling mandatory military service²⁴

Let us now turn to our third and last intergenerational illustration. There are two common ways in which military service can be provided for. First, there is the possibility of a mandatory military service for young adults (limited in some cases to young adult males). In this case, the service is paid by each (male) citizen in kind. The second option consists in setting up a professional army, increasing taxes to finance such a professional body of persons. The service is then paid in cash. What are then the distributional consequences between generations resulting from a shift from a mandatory military service to a professional army²⁵?

²⁴ On the « sans nous » movement in France, i.e. the last cohort of those draftees who had benefited from deferment and were eventually exempted from August 1, 2001 onwards: Chambon (2000), Isnard (2001). On the German debate: Marion (2004)

²⁵ Once more, we assume that there are no efficiency gains or costs attached to this policy reform. A shift from mandatory military service to a professional army is in fact difficult to assess in economic terms. One would have to attribute a value to the public good of security, and to determine in which way this is best secured. Furthermore, one has to quantify the opportunity cost of mandatory military service, i.e. one has to estimate what the young adults would have earned if they had not done the military service. For articles assessing the relative costs of relying on volunteers v. conscription: Hansen & Weisbrod (1967), Fischer (1969), Ross (1994).

First, let us consider the case of those who already did their mandatory military service. They thus paid in kind. However, they will also be affected by the increase in taxes due to the shift towards a professional army. The amount they lose depends on their age at the time of reform. Very old people will die soon. Hence, they will only have to pay the additional taxes during a short period of time. At the other edge, those who just made their mandatory military service in the year before the reform entered into force will have to pay the additional taxes during all their life. They will therefore lose the most from this policy reform. Again, such losses are transition losses because these people have to pay the investment twice (once in kind, and once more in cash).

What happens to those young people who had not reached yet the age of military service when the policy reform took place? Instead of contributing in kind, they will have to pay for the army in cash. The policy change thus only affects the way they pay the army, not the amount they pay. They are neither winner nor losers of this reform.²⁶

The distribution of the losses as a function of the age at the time of the policy reform is shown in figure 3. Notice that in this simple model, we do not consider the impact of compulsory military service in terms of access to the job market.²⁷ The last draftees are especially disadvantaged in this respect as they are directly competing for jobs with the first generations of non-draftees.

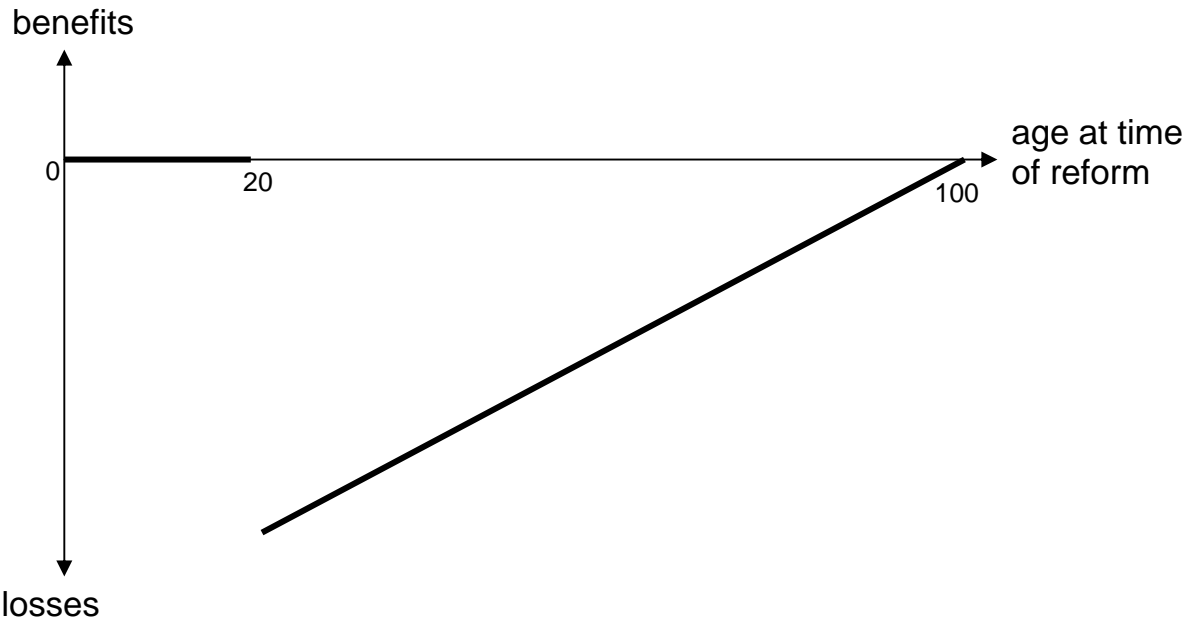


Fig. 3: The generational impact of ending compulsory military service.

4. What does the compensation test tell us in intergenerational cases?

²⁶ It thus looks as if there were no winners of the policy reform, such that this reform might look undesirable. However, it is again the last generations (the “end-of-the-world generations”) that benefit from the reform. They do have to pay the taxes only up to the end of the world and not up to the age of 100, while before the reform, they had to pay immediately in kind at the age of 20.

²⁷ For a discussion the effect on unemployment of ending compulsory military service in France : Baudet (2000)

Now that we have offered some illustration of the way in which rule change may have a clearly intergenerational impact, let us add a few considerations on how normative theories could deal with such findings. First, it is absolutely true that what matters once it comes to intergenerational justice is the *overall* intergenerational transfer taking place. Hence, if a given generation gains from one specific piece of reform, other intergenerational transfers might still be such that they more than compensate for such a gain. This should always be kept in mind. It does not mean however that a rule-specific way of dealing with intergenerational justice (as illustrated here) should be rejected. There are two reasons for that. Such partial analysis may be needed in order to get a clearer idea of the extent of macro transfers taking place between generations. And such partial analysis may be relevant as well in second-best contexts in which – for political or other reasons – there is room for intergenerational justice concerns only at such a specific (or “micro”) level.

Now, let us look at whether the compensation test applies. First, does it fall within the test’s scope, i.e. are we facing *transition losses* in the three examples above? It is clearly the case as in each of the three examples, some people have invested and their return on investment is being jeopardized. Actually, the investment dimension can be treated especially well in the perspective of a comparison between generations, comparing each of them in a longitudinal way, taking the whole life of their members into account. And at the same time, it is this very same investment dimension that potentially generates specific problems of justice insofar as rule change is concerned.

Second, were the three reforms likely (predictability component of the test)? The answer will of course depend on each domestic context. Nothing general can be said about the cancellation of age-based mandatory retirement in this respect. It has been cancelled in some European countries and hasn’t in some others. About early retirement benefits, there has been an ongoing debate in Europe for a while²⁸ and given the challenges we are facing with respect to the financing of our pension schemes, changes are a real option.

Regarding predictability, the most interesting of our three examples is the military service cancellation one. Let us imagine for a moment that in a country x, the shift to a professional army (hence, the cancellation of military service) had been decided for 20 years. It was thus predictable. Still, one factor should be borne in mind. Due to their early age, we cannot expect young future draftees to have the appropriate knowledge to act upon such predictability to mitigate the harm to them of military service cancellation. Between the moment they can reasonably be expected to have such knowledge and the time they will be called, there is only a short lapse of time that would not allow for proper harm mitigation measures. In case of equivalent predictability, such a lapse of time would be much larger in the early retirement and mandatory retirement cases. Now, one could think that an extra feature should be stressed: the fact that whatever the mitigation measures they would have taken, the last draftees would still have been obliged to complete their military service. Yet, this is not specific to the military service case. Even with full predictability, those who were just above 60 at the time of rule change (the group equivalent to the last draftees) still had the obligation to retire, even if they could re-enter the labour market once the measure enters into force. And all those who had not yet benefited from early retirement become excluded from such a right as soon as the measure comes into effect. In short, legal compulsion or loss of right is present in all three cases. The important point here is that the mandatory nature of

²⁸ E.g. Kohli (1991)

the investment is in principle not an obstacle to the adoption of harm mitigation measures.²⁹ In case of mandatory contributions to pensions, those who know in advance that the right to a pension will be modified could still contribute what the law requires from them and contribute to a private pension benefit scheme. And if we look at mandatory retirement as an ex post (and in kind) type of investment, those just above 60 when the measure will enter into force, knowing in advance that they will both have to retire and be able to return to the job market one or two years later, could make sure e.g. to keep their skills updated. What is specific to the military service case is that the lapse of time enabling the actors to act upon predictability and mitigate the effects of their relative disadvantage is too short. Hence, cancellation of mandatory military service offers us a clear case in which the predictability requirement is not met, not necessarily because of a lack of predictability as such, but rather because of the age at which the cognitive features needed to act upon such a predictability are present, as well as the length of time separating such an age and the entry into force of the measure.

As to the legitimacy component of the compensation test, none of these measures is cancelling a regime that could have been regarded as *obviously* unacceptable (as would have been the case e.g. with banning slavery). The two first cases have to do with the way in which we allocate access to employment across people's lifetime. By cancelling age-based mandatory retirement, we abandon this job-scarcity reduction mode and will probably replace it with other ones. Admittedly, it is correct to refer to age-based mandatory retirement as a "discriminatory" measure. And age is certainly one of our characteristics that is most imposed on us, as is the colour of our skin, our sex or our mother's tongue. It belongs to the sphere of circumstances rather than choice. Still, the fact that our age *changes* along our life makes it much more difficult to explain why exactly this form of discrimination can be seen as morally problematic.³⁰ The same holds *mutatis mutandis* for whether cancelling the option of early retirement is a change for the better or for the worse in terms of justice. Both cases have to do with the way in which we collectively decide to organise the time structure of our lives. And the possibly problematic nature of such collective choices will have to do with whether such a mode of organisation violates equality between people (once we consider the complete life of each of them) especially between different birth cohorts, with a certain sense of individual freedom to decide about the temporal pattern most adapted to the conception of the good life one considers most appropriate. But none of these two cases illustrate the abandonment of measures that are *clearly* unjust. Similarly, there is nothing *obvious* to the idea that shifting from a mandatory military service to a professional army is a change for the better in terms of justice.³¹ At least the way in which this could be shown

²⁹ This is a reply to the anonymous referee's claim that « in cases of forced investment (like mandatory contributions to pension funds or conscription) predictability is irrelevant ».

³⁰ See e.g. Gosseries (2003),(2004).

³¹ Which mode of payment should prevail is of course an important matter. Let us just note that the technological progress in military equipment might call for a smaller but more highly qualified army. Moreover, the tastes of each generations might differ: while the strong patriotic feelings of older generations may have let them prefer an in-kind payment, younger generations might live their patriotism differently, preferring the in-cash payment. The latter hypothesis is supported by some Swiss evidence. In their recent study, Haltiner & Wenger (2004: 162-164) show that while across the whole Swiss population, 43% would prefer a professional army to a conscription system, this proportion rises up to 61 % for the age-group 19-29. Leaving strict efficiency concerns aside, there are two angles under which the issue can be looked at from the perspective of political philosophy. First, the question of the *limits of political obligation* is at stake in both cases. See e.g. Klosko *et al.* (2003). Second, there are concerns as to the *distributive impact* of choosing a voluntary rather than a draft-based army, a matter that has been mostly looked at by economists. See e.g. Hansen & Weisbrod (1967). The

certainly requires more than the standard knowledge we should expect from average moral agents. For example, conscription looks like a stronger restriction on basic freedoms than voluntary hiring. Still, the extent to which this could be nothing more than “reluctant voluntariness” in many cases should not be underestimated.³² Moreover, while compulsory contribution in kind (through military service) may seem to allow for less “buying one’s way out” than compulsory contribution in cash (when financing a professional army through taxation), we should not forget that, in practice, military service often affects only one fraction of potential draftees, often excluding e.g. women as well as specific categories of young men.³³ Conscription may admittedly constitute an especially strong restriction on some of our most central basic liberties. Still, the extent to which deciding to enter the army as a professional can be seen as “voluntary” is often doubtful. Hence, even at this level, there is room for extensive debate and certainly no obvious *prima facie* answer.

Hence, the test tells us that there is a strong case for compensating the losers in each of the three cases, especially in the military service one. Whether the predictability component is there will be a matter of context in the mandatory and early retirement cases. It will certainly not be satisfied in the military service example. As to the legitimacy component, none of the three changes discussed consist in ruling out practices that one should have considered already as obviously illegitimate.

Before proceeding to the conclusion of this paper, let us mention one extra point.³⁴ There are other issues to which the same type of analysis could be applied. Is it the case for example with the passage from the absence of international regime regarding greenhouse gas emissions, to a Kyoto-type of legal regime setting up national caps on emissions? There are definitely transition costs associated with such a shift from total freedom to a Kyoto regime. The idea of grandfathering for example can certainly be read as one attempt at addressing this problem, as we have indicated elsewhere.³⁵ However, such transition costs are more likely to be distributed in this case along an *international* axis, than along a markedly *intergenerational* one.

former angle has to do with justifiable state authority on citizens, the latter with justice between citizens, both being interconnected through e.g. a rejection of “free-riding” justifying compulsoriness. See Klosko *et al.* (2003)

³² See Fischer (1969 : 239).

³³ See Hansen & Weisbrod (1967 : 397)

³⁴ This point is in reply to the request of a referee.

³⁵ Gosseries (in press)

Conclusion

Analysing rule change from an intergenerational perspective is interesting in two respects. First, it forces us to be explicit about principles of justice applying to a specific case of disadvantage resulting from our circumstances: transition losses resulting from rule change. Second, it allows us to address some complex problems of justice between overlapping generations that are generally not treated with the same care as others, such as whether we should preserve our oil reserves for future generations or whether we should accept to transfer a large public debt to our descendants.

We began with the identification of a specific kind of loss, identified as *transition loss*, tightly connected with the idea of investment and its temporal dimension. We then proposed and illustrated a twofold test aimed at telling us whether and to what extent victims of transition losses should be compensated by society. This issue can arise both in a strictly mono-generational environment (e.g. an imaginary world with a single generation) and in an intergenerational environment. The two components of this test are the *predictability* and the *legitimacy* one. Albeit still relatively rudimentary, we believe that these two components translate two moral intuitions that should be present in addressing such issues. We mostly concentrated on whether and under which circumstances transition losers should get compensation. Further research should be done regarding who exactly should bear the burden of such compensation and more precisely whether it should simply burden transition winners.

We then moved on to the analysis of the generational impact of three measures, focusing strictly on the distribution of losses and gains across the different generations at stake. The simplified model used here aimed at being purely illustrative. Still, it allows us to see that rule changes such as those examined above can have a clearly generational impact once we consider those generations overlapping at the time of the reform. Contrary to what happens for the generations that do *not* exist and overlap at the time of the reform, some of these generations will certainly lose or gain more than others. Basing ourselves on such an analysis, we then illustrated the way in which the general twofold test can be applied to these specifically intergenerational cases. As our discussion shows, there is certainly room for legitimate generational claims for compensation – whatever the form it takes – in cases such as the three discussed above. And this case is especially strong in the military cancellation case. Still, one should keep in mind that the assessment of such claims cannot be dissociated from a more general analysis of the extent to which one generation can be regarded as more disadvantaged than another. For at the end, intergenerational justice only makes sense if the whole set of intergenerational transfers is being taken into consideration. Hence, the fact that a generation would experience marked transition losses justifying compensation according to the twofold test could be offset by the fact that in other respects, this very same generation would be privileged compared to the other generations. This should not be overseen.

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