

NON-IDEAL THEORY IN CLIMATE AGREEMENTS

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ABSTRACT

My research explores climate justice and non-ideal theory. Using Laura Valentini's conception of non-ideal theory, this is applied to the distribution of climate mitigation obligations, with a particular focus on the common but differentiated responsibilities of developed and developing countries. I wish to evaluate this distribution of obligations and determine whether it is an effective method of climate change mitigation, with consideration to non-ideal elements of partial or non-compliance. Climate change is one of the biggest challenges faced by the international community, and it is a problem that requires collective action. However, due to ineffective international agreements and a lack of willingness to alter lifestyles, this action is often not achieved. Agreements commonly result in targets that are not sufficient to exact the change required, instead representing only the states' willingness to mitigate the destructive aspects of climate change while maintaining economic growth. I suggest that a shift in focus is required to obtain relevant and effective agreements that will reach the required targets. I propose that an Ability to Pay approach and a turn to investment incentives may result in more favourable outcomes. Recent climate agreements have focused more on the investment in clean energy and sharing of resources, however, I argue that this needs to be taken further in order to achieve the collective goal of mitigating climate change.

Key Words: Non-ideal theory; Climate justice; Obligations; Development; Innovation.

Introduction

This paper discusses present climate agreements and their foundations, while also suggesting mechanisms to improve climate agreements for the future. An important aspect of this discussion involves the application of non-ideal theory, using a formulation by Laura Valentini. Non-ideal theory ought to be an important consideration for international agreements. Agreements need to be adjusted to account for partial compliance and non-ideal solutions for any chance of reaching the ideal goal. Firstly, this paper establishes the principles that are used in current agreements to determine the differing obligations of developed and developing countries in relation to climate change mitigation. This is discussed in relation to non-ideal situations. The paper then outlines a potential revision of the Emissions Trading Scheme which might increase compliance and achieve the ideal goals of climate agreements for the future. I also suggest a proportional distribution of obligations relative to the contribution of all nations to the problem. This focus would then remove uncertainty arguments and attribute responsibility proportionate to human contributions to the change in climate.

Non-ideal Theory

Non-ideal theory offers a realistic, practical view of the situation, taking away presumptions of perfect compliance and ideal assumptions.

In relation to issues of compliance, I will use Laura Valentini's two assumptions of ideal theory based on the conception by Rawls. These are: 1) All relevant agents comply with the demands of justice applying to them; and 2) natural and historical conditions are favourable (Valentini 2012, 655). These assumptions are directly relevant to many significant areas of climate justice, especially for the developed and developing distinction. Valentini clarifies "natural and historical conditions are favourable" refers to whether a society is sufficiently developed to realise justice (655). The use of the word developed is perhaps telling, as one of the large disputes in relation to the distribution of obligations is whether developing countries can balance their obligations for climate justice with their right to develop. There are also historic and current considerations that have weight in the distribution of obligations and these can have significant implications on compliance.

Considering the global nature of climate change and the need for collective action there are serious consequences for non-compliance, but even partial compliance is likely to be not enough.

International Law Efficacy

International law and international agreements are often thought to be of little effect, however, this is the best means for addressing a global issue. There are serious concerns that international agreements always result in the lowest possible obligations, as this is the only way to gain widespread acceptance without a global leader for climate change mitigation (Shue 2011, 18). Though this may be effective in many other areas of international cooperation, for climate change it may become an issue of not doing enough. Non-compliance of low standards amounts to not enough action being taken to address the issue of climate change. The non-ideal theoretic approach needs to be applied to international agreements, and should be a consideration during the negotiation process when real, tangible results are required.

Part 1: Present Approaches

When determining the differing obligations of developed and developing states in climate negotiations there are several elements that need to be evaluated. This section will

explore the issues of: uncertainty; impact on developing nations; historic emissions; climate debt; and ability to pay.

Uncertainty

There are two interrelated elements of uncertainty that play into climate negotiations. The first relates to climate deniers, the second to measuring the impact of past emissions. There are varying reports as to the impact of human activity on climate change, however, there seems to be a strong body of evidence to suggest that there are natural processes that are being exacerbated by human activity. Therefore, though we may dismiss climate change deniers as uninformed or self-interested, there are legitimate questions about what level of involvement developed countries have truly had on the environmental change that is occurring. If we cannot accurately, or relatively-accurately, determine the impact of previous emissions then differentiated duties may be undermined. It becomes much more difficult to justify imposing stricter obligations on developed nations based on the impact of previous emissions. There will obviously be opportunity to impose *some* higher, or more stringent, obligation through the understanding that emissions have definitely accelerated the process, however, not to the extent that we currently differentiate between developed and developing states.

The issue of uncertainty raises questions as to regarding the allocation of obligations when the true impact of past actions is in doubt, and therefore responsibility or accountability of nations for previous emissions. Developed states would feel that they should not be bearing more than their share of the burden. It would not be fair and just to allocate more of the burden to developed nations because they contributed the emissions that resulted in some of the climate change events that happen today. However, it would also be unfair to place this burden on developing states who have not contributed to the problem to the same extent as the developed states. One could argue that there may have been a natural process through which we would have seen some of the effects of climate change, however, the effects would have been less than the catastrophic effects that are projected to occur if we do not take action now.

Impact on Developing Nations

Developing nations have significant barriers to participation in climate negotiations. One should note the vested interest many developing nations have in climate negotiations, as it is often the less developed, low lying lands that are affected by changes in tidal behaviour, and economies dependent on harvests that will be affected by changes in climate (Posner and

Weisbach 2010, 11). However, often this cannot result in an increase in the burden to developing countries, primarily because they are unlikely to be able to afford it.

The recognition of the different obligations for developed and developing countries is partly founded on the “right to develop” (Shue 2014, 45). Developing countries argue that they should also be able to use resources and create industry as the developed countries have done and that it would be unfair for them not to have this right and continue to live in lesser conditions (46). There is also the understanding, set out above, that developed countries must do relatively more in the face of climate change because they are more responsible for it than developing countries. The “right to develop” is taken to mean that developing countries have *lesser* duties in relation to climate change mitigation, however, it cannot mean that there are no obligations or that developing countries can exploit natural resources to the same extent as the developed nations did before them. There must be some recognition of the science and new understanding of the impact of human activity on the environment and this cannot be ignored for the sake of an even playing field for development.

There is an obligation on all states to do their part in addressing climate change and developing countries may have the right to develop but not at the expense of the common goal of climate change mitigation. It cannot be correct that a state’s right to develop can override the goal of protecting the environment from collapse which would result in more problems across the globe. Although some authors suggest that the right to develop is an overriding right, there must be a balance achieved where states work together to develop clean methods of development that can level the playing field. With current knowledge, it is unconscionable to exploit resources to develop as was done in the past.

Historic Emissions and Climate Debt

Historic emissions may be hard to determine with certainty. However, to distribute obligations fairly, climate negotiations have often included considerations of historic emissions.

Climate debt it is the idea that there is a debt that must be paid by those who have contributed more to climate related problems. Pickering and Barry suggest the moral element of climate debt is the idea that “Countries that have emitted more than their fair share of the Earth’s capacity to safely absorb emissions have moral responsibilities towards low-emitting countries and those vulnerable to the impacts of climate change.” (Pickering and Barry 2012, 670). The moral grounding of this claim rests on the idea of the global commons which is often assumed and widely accepted (671). The idea of a global commons creates moral

responsibilities around fair use (671). This can only work when considered on a state level, and similar to the above, if it is based on some form of outcome responsibility. Outcome responsibility is the idea that parties should be jointly responsible for their involvement in activities that produced the outcome. Outcome responsibility does not attribute blame, but focuses instead on righting the wrong that was a consequence of actions by the party in question (Miller 2004, 246).

Historic emissions are reflected in principles such as “polluter pays” and “beneficiary pays” which account for contributions to a problem and the responsibility to remedy the problem. These are contrasted by principles such as the “ability to pay principle” which takes a no-fault approach to allocating responsibility (Shue 2014, 189). Climate negotiations often have elements of both approaches in order to reach agreement. It is hard for developing nations, or nations that have developed but not through the same emissions intensive methods, to agree to share the burden when it appears as though other nations have benefited and done the damage. On the other hand, it is hard for developed countries to agree to take on greater obligations in the face of uncertainty. A compromise between these principles allows for developed nations to take on some additional burden compared to the developing states, while also recognising the importance of the ability to pay principle in fairly distributing the burdens.

Polluter Pays Principle

The polluter pays principle in relation to differentiated responsibilities suggests that if different states contributed to different extents to the causing of climate change, they ought to have different levels of responsibility (Roser and Seidel 2017, 118). The principle demands states take responsibility for their actions. This is one of the “historical” principles of distribution, as the distribution of costs is dependent on what happened in the past (118). Dominic Roser and Christian Seidel suggest that those with higher past emissions should have greater disadvantages in relation to the sharing of the costs of coping with climate change, which is supported by the United Nations Framework Convention on Climate Change’s (UNFCCC) moral implications of differentiated responsibility (118).

There are two versions of the principle that have different moral implications and chances of success.

1. Someone takes more than their fair share and in addition harms others. (119).
In this instance, the polluter pays principle will specify who must rectify the damage.
2. Someone takes more than their fair share and there is no longer enough to spread equally. (119).

In this instance, the polluter pays principle specifies how the remaining benefits should be distributed among the perpetrators and others involved. (119).

The first reading of this principle focusses on the burden of adaption funds and compensation. Roser and Seidel suggest the costs of adaptation can be considered as “putting one’s moral house in order.” In climate change this means reducing vulnerability to climate damage through contributions to adaption funds or, at least, compensating those who were harmed. However, there can be harm without unfairness and unfairness without harm and therefore this reading is difficult to apply in such uncertain circumstances. (119-120).

The second reading addresses the distribution of remaining emissions, particularly, the distribution of costs for mitigating climate change and correcting the unfairness of previous action. This reading states that those who have taken more than they were entitled to have failed to show appropriate moral restraint and must therefore counterbalance this in future actions. Issues of uncertainty are again relevant here and some argue that perhaps there should be limitation in the interpretation of “lacking moral restraint” to only a point after which it was known, or ought to have been known, that anthropogenic climate change was likely to occur. (120-124).

Roser and Seidel suggest the second reading also faces challenges. This is through the requirement that individuals bear the costs of past countrymen, which would require some form of individual inheritance of duties. In order to make this more successful the focus would need to be on inherited benefits rather than inherited unfairness. Roser and Seidel conclude that this reading of the polluter pays principle is not convincing. (122-123).

In examining the discussion of Roser and Seidel above, the first reading appears to be more useful in distributing obligations in a fair and just way. It still cannot overcome many of the challenges of uncertainty and determining exact obligations would be difficult. This reading does impose a limited moral obligation on countries who have caused harm through their emissions, but how to distribute the obligations towards adaption and compensation are vague and not enough to assist in preventative action.

Beneficiary Pays Principle

The beneficiary pays principle aims to incorporate the complexities of the real world in allocating responsibility to those who have benefited from the wrongdoing. In this section I will summarise the discussion by Roser and Seidel, which I believe accurately analyses the Beneficiary Pays principle. Roser and Seidel summarise the principle neatly saying, “If an offender wrongs someone and a third person benefits from the wrongdoing, then the third party

seems to have a duty to the victim to make amends for the wrong – at least when the perpetrator is no longer in a position to do so.” (130).

Roser and Seidel apply this conception to climate change, stating that the prosperity in the “North” can be closely connected with a high-emission economy, as without these emissions the North would not be as well off as they are today. These greenhouse gas emissions are leading to climate change that is causing the suffering of others. Applying the above conception of the beneficiary pays principle, we can see: 1) there is a wrongdoer (previous generations from the “North”), 2) a third person benefits from the wrongdoing (current populations in the North enjoying greater prosperity), and 3) a wronged party (those suffering from the consequences of climate change) (130-131).

The beneficiary pays principle is also a “historical” principle of distributive justice, as it “distributes the costs on the basis of the past.” It differs from the polluter pays principle in its focus on the effects of harm or injustice rather than the causes. Justification for imposing costs can be made purely from the benefit derived from past emissions, regardless of the current actions of the individual. (131).

Roser and Seidel identify three effects of past emissions that are morally problematic:

1. The effect of climate change as a harm.
2. The effect of the advantages as past unfairness.
3. The effect of inequality. (132).

The first effect focuses on the harm caused by historic emissions to people living in developing countries. The reading assigns adaptation and compensation costs to the beneficiaries of past emissions in proportion to their respective advantages. This correction of the wrong means that beneficiaries must bear the costs of ensuring that those harmed by past emissions have the best protection against climate change effects, or are compensated for the damage caused. This reflects the idea of “putting one’s moral house in order” as the duty arises from the benefit obtained through the harm suffered by others. Roser and Seidel argue that this reading at best compliments the polluter pays principle, capturing forms of damage to the climate that are not covered by polluter pays. The reasoning is that, where it is possible to hold the polluter themselves liable, it would not make sense to hold the beneficiary liable. Another strong critique of the principle states that, it cannot always be the case that all undeserved benefits from a wrong obligate a beneficiary to pay compensation. It is only when there is an element of perpetuating, enabling, or exploiting the wrong where such an obligation arises. Past emissions do not perpetuate the wrong of climate change damage, which therefore

undermines the validity of the first reading of the beneficiary pays principle as a principle for fair and just distribution. (132-136).

The second reading focuses on the unfairness that industrialised countries used more emissions than they were entitled to, and therefore must receive a smaller proportion of remaining emissions. Countries would therefore receive a smaller share in relation to the proportion of benefits derived from past emissions. The compensation here is to counterbalance the lack of moral restraint that resulted in the benefits enjoyed. The critique of this reading is the presupposition of a different principle of distributive justice. It requires that there is already knowledge of what a country was entitled to in the first instance. (133-134).

The third reading focuses on the inequality caused, or increased, between industrialised and developing countries due to past emissions. The remedy for this wrong would be to divide the benefits and disadvantages of past emissions equally. Therefore, advantaged industrialised countries would need to compensate developing countries to an amount that represents an equal benefit from the historic emission. "If a wrong is unavoidable, then everyone should benefit equally from it." This principle guides this reading of the wrong caused by past emissions. It imposes a duty on those who benefit unduly from the wrong. The issue with this reading is that it considers inequality in itself to be the reason for compensation. This looks more like the ability to pay principle (discussed below) where a wealthy country, by virtue of their relative wealth, must do more in compensating for the wrong of past emissions. This is therefore not clearly a beneficiary pays principle anymore. (133-134).

Overall, these readings of the beneficiary pays principle are difficult to apply. Firstly, they require imagining what the world would have looked like without industrialisation through emissions intensive means. There would also need to be a system to differentiate between prosperity due to past emissions and prosperity due to personal skills and attributes. (137).

Historic Knowledge

Another aspect of historic emissions in relation to distribution of burdens relates to the knowledge at the time. It seems unfair to hold countries liable for emissions that were created when there was little to no knowledge of the harmful effects that would result (Pickering and Barry 2012, 674). Similar to many other areas of law, retrospectivity is heavily discouraged as it undermines the stability and predictability of social relations. If someone in the future were to look back and criticise the use of cars by our generation, that would be acceptable. However, it would be a step further to therefore hold the future generations accountable for our actions in using our cars. This is essentially what is done through differentiated obligations and

discussed in relation to intergenerational justice. Though it is understandable to want to attribute responsibility and ensure countries reflect their obligations and their contribution to the problem, the issue of knowledge at the time ought to limit this obligation to some extent.

This encapsulates the concerns around climate debt, primarily that transferring this obligation seems an unfair action to take. The argument against this would be that there is a need to tackle the challenge of climate change and it would not be fair to place the burden evenly across all countries. Why should a country that did not contribute to the problem (or had a lesser impact) contribute the same amount to the solution? Climate change presents its own peculiar circumstance in that several generations may have passed since the original action was taken. The actions taken at the time were not done with any malice or intention to harm any other nation or its people. A balance needs to be found between the obligations from historic emissions and the recognition of a lack of blame due to limited knowledge and generational changes (Pickering and Barry 2012, 676).

It is therefore difficult to attribute some obligation that is owed by descendants in countries that historically polluted more, to the current generation. Though the beneficiary pays principle attempts to address this concern by attributing the responsibility because one has benefited from the emissions of an ancestor, it is not clear to whom the obligation is owed. It does not seem that the obligation should be owed to developing countries because no wrong has been committed to them specifically (excluding purposive pollution in developing countries) in the emissions of developed countries in the past. Perhaps it could be owed to the world generally, the current and future generations that will have to adjust their expectations of life due to the actions taken in the past (Shue 2014, 235). If this is the case, there would be less argument for the extra burden being placed on developed countries. The argument still holds however, when we consider the principles mentioned above, we can create a no-fault structure that can account for previous wrongs through outcome responsibility.

Ability to Pay

The Ability to Pay principle sets forth a different approach to climate change mitigation. The principle moves away from any focus on blame or previous emissions and instead focuses on who is able to pay for costs associated with climate change mitigation (Caney 2010, 207). The principle looks to provide an “ahistorical” answer, through looking at aspects in the present for the distribution of obligations (Roser and Seidel 2017, 140). Though this may appear unfair due to the notable difference in emissions between developing and developed countries, the

principle recognises the immediacy of the climate change threat and looks to find the actors who will best be able to mitigate this.

When considering the motivations for the distinction between developed and developing countries, I would argue that the ability to pay may be one of the fairest options available. Current prosperity may itself be considered a basis for distributing costs (Roser and Seidel 2017, 140). If one has the ability to pay and rectify a moral problem, then that might be enough justification for one doing so. The advantage of this solution is that the burden is not too heavy for a country to bear as it is calculated in relation to economic capacity (140). This solution therefore also reflects the wording of the UNFCCC Article 3.1 which discusses duties in relation to respective capabilities (140).

The argument that many of the benefits for people in developed countries comes from their exploitation of resources makes it understandable that they should carry some of the burden. I believe that an ability to pay approach would achieve this goal and therefore result in similar benefits as the Beneficiary Pays principle. If it is true that many of the developed countries are now in better positions, when determining who is able to pay it would primarily be the developed nations. The developing countries would then be liable for less of the burden but should still be involved as the issue is a global problem that requires collective action. The principle also neatly captures any countries that may have recently become heavy emitters and built powerful industry. This would not be achieved through an historic emissions or climate debt approach as the dates set are often too far in the past. For these reasons I argue the ability to pay approach achieves the goals of the Beneficiary Pays principle, without placing heavy burdens on those states that cannot afford it.

There are also challenges to the ability to pay approach. Firstly, there is the argument that considerations made in relation to ability to pay are more pragmatic than morally compelling arguments (Roser and Seidel 2017, 142). If we are looking for a just solution, then we need the moral justification to be present. However, this could be adapted so the ability to pay principle is framed differently. This framing could be for example, that those who have more than enough should contribute more, but never to the extent that they have less than enough (142). This could seek justice where everyone is sufficiently well placed, rather than some people having huge excesses. This is similar to the beneficiary pays model that discusses the notion of the wrong of inequality. This formulation of the ability to pay approach is one that treats inequality as a wrong in itself. The ability to pay principle expresses two morally guiding ideas; sufficiency and equality (145). However, there are further challenges that

remain, such as defining and determining what “sufficiency” would mean for this formulation; should it be limited to subsistence emissions? And what is the measurable output? (142).

The ability to pay principle raises questions around what a country ought to do, as only the state itself could accurately determine what it is able to do. When moral philosophers say “ought” implies “can” it means that we can have a duty only if we are able to do that duty (146). A classic example is of the drowning child in a pond. If there is a child drowning in a shallow pond, you ought to rescue them if you are able. The inclusion of “if you are able” is to ensure there is not an obligation on those who would not be able to rescue the child, for example if the person were tetraplegic. However, Roser and Seidel present the argument that the converse of this principle may also be relevant, that “can” does not necessarily imply “ought” (146). They use the example of being able to play the piano, just because you can does not mean you ought to (146). Roser and Seidel argue that this extends to providing assistance, being in a position to help someone does not of itself mean you are morally required to do so (146). They use the following example:

“If you own a postage stamp and a Spaniard who is unknown to you has become depressed because he wants to own *your* postage stamp in particular, then you are in a particularly privileged position to help him – and, without a doubt, it would be generous and nice of you if you did so, but this cannot be required of you.” (146).

They continue to say that if you were to give the Spaniard your stamp, it would be a supererogatory action. Roser and Seidel draw the parallel to climate policy and ask whether the distribution of costs of mitigating climate change on the basis of economic capacity would also be a supererogatory action, rather than a duty of justice. They acknowledge that this conclusion would be regrettable but not necessarily objectionable. (146).

I think there are problems with taking this approach to potential obligations where a significant harm is foreseeably produced. In the example of the Spaniard, it is not the case that: for every person you meet if you have a stamp they would like you must give that to them. When we look at climate policy we know that actions taken result in harm to others. One could take a proportionality approach to this and consider whether the harm that would be caused is significantly more than the inconvenience caused to those with the ability to pay. Whether this can be applied as a principle that creates obligations is debatable, however, it is important to consider the significant difference in the examples provided and the reality of the situation in climate change mitigation. It is not merely the fact that one is in a privileged position, but it is also the knowledge that the small inconvenience caused to one would result in widespread alleviation of harm. Furthermore, if we combine this with some of the other principles

discussed above, perhaps this is not comparable to a person unknown to us, who wishes for something that is seemingly trivial. In the case of climate change policy and the potential use of an ability to pay principle, those with the ability to pay likely have some duties towards poorer states arising from previous actions. However, this would then bring into account historic conditions which the ability to pay principle aimed not to do.

Perhaps the framing of inequality as a wrong in itself may overcome the challenge of assigning obligations for an ability to pay approach, as this could remove the idea that the wealthy are doing more when they are merely correcting the wrong of significant inequality. Again, this would create subsequent issues of determining the acceptable level of inequality and how much a person should contribute. Finally, as highlighted above, the principle is ahistorical. This was one of the goals of the principle however, it is also a potential complaint as it therefore fails to take into account any historic responsibility (147). Therefore, similar to the beneficiary pays principle, the ability to pay principle may not be desirable as a stand-alone principle of distribution.

I will defend a qualified ability to pay principle as the best means of distributing obligations fairly, with respect to the right to develop and the norm of sustainability. The principle works best when supplemented by other principles, in order to address issues such as historic responsibility in some form. The ability to pay approach arguably already has this feature, as those with the ability to pay are often those who emitted the most and profited from this in the past (Cutlip and Fath 2012, 451). Therefore, it is a principle that encapsulates much of the justice considerations we wish to address through a distribution principle.

These principles show that uncertainty remains, and this is an important element in the conflict at climate negotiations as nations are not willing to take on more than their “fair share” of the burden. A recurring theme in the principles discussed above is the accountability required from past emissions and for present additions to this. The polluter pays and beneficiary pays principles both have historical insights. Though neither principle on its own creates a clear just and fair solution, it is important to recognise the justifications for these principles and incorporate them to some degree in the distribution of obligations. The ability to pay principle can be seen as a means of doing this as it turns away from assigning blame and responsibility through historical accounts and instead is a means-tested method of distribution. If the arguments for the historic approach have weight, this should be captured through an ability to pay principle as those countries that are better off are likely to be the ones who were previously heavy emitters. The ability to pay principle also removes any unfairness in relation to burdens that are excessive, as it is limited to what countries are able to pay. The other principles could

also be limited in such a way but would then be less likely to reach the overall goal of climate change mitigation. Combining the principles in some form would be the most effective way to achieve the goal, doing so would be a significant challenge.

Current Non-Ideal Approaches

Climate agreements are centred around creating goals and obligations in an ideal situation where all countries participating will fully comply with the targets presented. However, as we all know, this is not what we commonly see.

The first assumption of ideal theory is the most pertinent for the distribution of obligations. This is the assumption that states will comply with the demands of justice applying to them, and it faces many of the same challenges as the distribution principles. I have argued that the ability to pay approach is the most just distribution principle, however, in a non-ideal context this may face greater challenges than other principles discussed above.

The previous discussion of “ought implies can”, is also relevant in this assumption. The assumption that states will comply with the demands of justice implies that the demands of justice will consider what the state can do. The considerations of what states can do may limit the possible action that can be justifiably assigned. However, we need not go as far as suggesting that poorer countries cannot do anything to mitigate climate change, they will still be able to contribute relative to their position. It is important to note that these sorts of secondary assumptions, present behind those identified by Valentini, have a significant impact on the applicability of these assumptions.

Through several different methods of distribution, there is a reoccurring theme of a greater obligation being owed by developed states. This assumes full, or significant, compliance. Through the uncertainty one can argue that, without specifics, we can proceed on the assumption that the demands of justice will be greater on developed countries than developing countries. This leads into the discussion of what can be done when we remove the assumption that the demands of justice will be complied with.

If we remove the assumption that states will do what justice demands of them, the problem of climate change becomes more threatening. More action needs to be taken to reach the overall goal of mitigating devastating climate change. The urgency of climate change mitigation is already challenged by the lack of certainty in assigning responsibility and obligations. This is compounded by states not doing their share as justice demands. Although we have not established what a country’s fair share might be, we have established that developed states must do more than developing states. This is an ideal-theoretic conclusion and

an important guide on how to justly distribute obligations. It appears as though there is a need for ideal theoretic factors, even in non-ideal contexts.

When the ideal-theoretic assumption that states will comply with the demands of justice is removed, it becomes harder to justify a right to develop. The right to develop requires a careful balancing of obligations and allowances for emissions. This cannot be done when there are large uncertainties around the actual compliance of states to targets that are assigned to them. In a non-ideal context then, the right to develop ought to be limited to ensure a balance with the norm of sustainability. The response is to consider what else can be done in the face of partial or non-compliance to the demands of justice.

There are three standard responses to non-compliance or partial compliance in international agreements (Miller 2011, 233):

- 1) Withdraw compliance: if some states are not compliant then there is no justification for the sacrifice of other states
- 2) Continue with the same goals: essentially ignore the withdrawal of states and continue with the agreed upon goals
- 3) Increase goals: an adaptive strategy to achieve the overall goal by spreading compliance across the remaining states.

The issue of non-compliance by developed countries may have different implications than that of developing countries. This is primarily because of the ideas mentioned earlier in this paper about climate debt and historic emissions. There are other relevant considerations such as a developed country's ability to pay and the potential impact of their non-compliance.

The potential impact of non-compliance by any country will likely be significant. International agreements often are weakened to be more inclusive, however, this means that anything less than the stated targets will not be enough. In achieving such agreements, it is unlikely that countries will step up to do more than they had agreed to. Therefore, there is an assumption that, at best, countries will continue with the agreed targets but not go beyond (Shue 2011, 243). The impact of these actions will affect developing countries first and more significantly. Firstly, developing countries will likely be the first to experience the worst effects of climate change (Moellendorf 2009, 248). These are weather events that are becoming more frequent and although manageable are devastating in poorer areas without the infrastructure to survive the weather or the aftermath. This could potentially obligate all countries to reach their climate goals in order to not be accountable for the damage of climate change.

This relates to the central distinction between developed and developing countries, the ability to pay. As stated above, it is more likely that developed countries will be better able to

pay for the costs of climate change mitigation. This perhaps assigns them an obligation to do so, as they may be the only ones with the ability to do so. However, an ability to pay mechanism should not be divided along the developed-developing distinction. Any country with the ability to pay ought to be compelled to contribute to the mitigation of climate change.

This still leaves the problem of partial compliance. In relation to climate agreements, there do not appear to be repercussions for lack of compliance that create enough incentive to motivate full compliance. Partial or non-compliance can often be easier for states who do not wish to do their share and hope that other states will compensate. The urgency of climate change means there is no time to wait for all countries to fall into line, it may be the responsibility of those who can contribute to do so until there is a viable solution, even if that means doing more than their original share. The issues highlighted above ought to compel action, how to achieve this motivation is yet to be determined.

Where Are We Now?

There is some hope for the future as countries are beginning to acknowledge and act with greater intentions of reducing emissions (Light and Taraska 2016, 177). With a notable exception, it appears that many are opting for the second approach of continuing with the same goals, however, there are also indications that some are willing to do more. There has also been an increase in the effectiveness of non-state actors who have influenced and contributed to climate mitigation efforts. For most states the priority has been, and continues to be, the economy (Shue 2014, 103). This causes a tension with climate action as, especially in situations where there is non-compliance, it becomes more of a burden for other states to continue with their obligations.

Part II Future

The Emissions Trading Scheme (ETS) illustrates one of the largest flaws in the current approach to climate agreements. The idea of ETS is to ensure efficiency in pollution by creating a market for “credits” which can be bought by countries that are large emitters to offset their emissions and sold by countries who do not need them, therefore increasing their ability to invest in clean energy or continue with their good practice (Posner and Weisbach 2010, 41). There are two significant flaws in this system I wish to address here. Firstly, there is a general concern that the ETS is not working towards the overall ideal goal of climate agreements, as it maintains essentially a status quo (Aldred 2016, 149). The second flaw is that ETS further inhibits development for developing countries. These states do not have the money to buy

credits and would be incentivised to sell their credits to wealthier, generally developed, countries, thereby inhibiting their own development.

The first concern has been thoroughly discussed by Jonathon Aldred in his paper, “Emissions Trading Scheme in a ‘Non-Ideal’ World” (Aldred 2016). In this paper, Aldred argues that ETS does not work towards the ideal goal as it inhibits innovation. Though Aldred accepts that there may be an incentive to reduce emissions in order to sell credits, he argues that the buyers of credits will continue to buy them when they are available. This is because it is often cheaper to buy the credits than it is to innovate. Aldred argues that the ETS is a short-term solution, when we are addressing a long-term problem. (151-153).

When countries and companies can buy solutions to environmental issues rather than working on improvements for the future, this severely limits the production of innovative solutions, as these wealthy elite are necessary funders of the new technologies required. Though ETS makes sense in the short-term, it does not contribute significantly to the overall ideal goal of reducing emissions completely. Including ETS in climate agreements is often a farcical way to include states with little intention of changing methods of production as they have the power and wealth to buy the lifestyle they desire. This opportunity to buy a particular lifestyle highlights the inequality present between developed and developing countries.

This leads into the second criticism of the ETS in climate agreements, the imbalance in bargaining power between developed and developing countries. Systems such as ETS have a tendency to enforce the norms of economic status. Richer countries can buy their way out of trouble, while poorer countries are forced to change their ways to comply with regulations as they cannot afford fees, nor can they afford the mechanisms to continue without innovation. However, in most cases they cannot afford the innovation either, leaving their progress stagnant. The idea behind ETS is that poorer states would at least get some capital to put towards their development. However, in reality, they must be receiving less than it would have cost richer countries to innovate, otherwise rich states would innovate rather than buy credits.

This structure does not allow for an even and fair society as wealthy states can control and grow at the expense of poorer states, while appearing to support them through payments. Wealthy states are therefore not required to invest in new technology or share this technology with developing states, but rather merely buy out the poorer states with what appears to be a large sum but in reality, cannot sustain the people of those countries. This injustice further illustrates why current systems are often inadequate for the purposes they wish to achieve.

Caney suggests that though there are flaws in the way ETS are currently operated, this is not an inherent flaw in ETS themselves. Caney has a potential response to the second

criticism I have outlined above. He suggests that this criticism arises from the idea of civic duty, that one ought to do their part in civic society and those responsibilities cannot be bought or sold. Caney argues that this civic duty idea can be accommodated with a form of emissions trading. The idea of emissions trading is to reach an overall goal. Caney suggests that the value placed on civic duties arises due to the performance of the task – if this task can be bought or sold we do not have reassurance that it would be effectively performed. Therefore, Caney states that this is not directly applicable to ETS as there is no integral requirement that the duty to reduce emissions be performed by particular actors. (Caney 2010(b), 203-211).

Caney also raises an alternative approach to ETS, proposed by Oliver Tickell and Peter Barnes. Their approach promotes an upstream auction. This is the idea that emissions permits are sold to the highest bidder and the revenue gathered is then distributed. This approach has two strong benefits. Firstly, it promotes a form of the polluter pays principle, as those who wish to emit must pay. Secondly, it raises revenue which can be spent in ways that improve justice, for instance on mitigation strategies and adaptation measures. Caney discusses the concerns around this approach, especially in relation to the disparity between the wealthy and the poor. A potential solution would be to use the revenue gathered from auctioning the permits to help the least advantaged. (214-215).

Caney offers one further defence of ETS, which in my view is most effective as a non-ideal context solution. This is the idea that for ETS to be an effective solution, it merely needs to contribute to lowering emissions as part of a wider range of solutions that together address the necessary reductions (216).

This is therefore a suggestion of ETS as part of a non-ideal solution to both assist with getting more countries on board and also to offer some, though perhaps not significant, reductions in emissions. I advocate for non-ideal solutions, and Caney has provided an example of how ETS suits the non-ideal context, I do not think this means we must accept a status quo approach. I agree with Caney that there is perhaps nothing inherently wrong with ETS, but there is something wrong with the current model we are using. I suggest alternative solutions that have the potential to achieve more than a scheme that currently maintains a status quo and does not have the scope to achieve much more.

I suggest that we ought to shift from a punishment focus, where credits are bought to avoid public reaction or agreement repercussions, to a rewards focus. This could be done by awarding extra credits for the development and sharing of green technologies. This could incentivise investment in innovation, while simultaneously allowing for some emissions to continue through the transition. This may initially be unsatisfactory for the ideal goal, however,

once green technologies are developed, and the money has been invested in innovation, there would be a strong desire to use the new technology and create a positive public image. Aldred has suggested that fear of public prosecution on environmental matters is a bigger motivator than financial penalties (Aldred 2016, 161). This would be beneficial to developing countries who would be able to have a larger share of possible emissions (within reason for the ideal goal) and also receive and benefit from new technologies. It is important to keep emissions to a minimum, even if there was room within the budget of emissions. A significant flaw in the current system is that the emissions budget is calculated on what maximum limits can be applied. However, maximum limits are often based on agreed mid-range estimates, not on the extremes. This is because there would be no reasonable way for countries to adhere to limits required by the most extreme estimates of behavioural change, partly because of the efforts made to get consensus, and partly due to the desire for countries to continue to develop and not be limited beyond what is deemed necessary.

Caney suggests that there may be ways to achieve this goal which would be more agreeable to developed and wealthy states. This would be to allow states to borrow money to purchase green technology with payment to occur at a much later date (Caney 2014, 334). This would bring into considerations of intergenerational justice, such as how much debt a country can commit its future generations to. This idea would be based on the assumption that future generations would be at least as wealthy if not wealthier and therefore better able to pay the debt. This is still a promising compromise that may have scope to be incorporated with a range of other solutions in order to limit the debt created and maximise development to bring developing states to a certain threshold of wealth. This would therefore be another means of balancing the right to develop, by providing resources for development, while maintaining sustainable practices that act to mitigate climate change.

The recent extension of the climate fund from the Paris Agreement signalled a greater recognition of the collective nature of climate change challenges and the collective action needed to solve it. Perhaps, there can be either financial or technological investments that will satisfy this requirement of the agreement. In this way, where there has been investment in technology, the technology can act as payment rather than a financial contribution. Innovation is a central element that will determine the success or failure of collective action against climate change. As we have seen, the development of electric cars has increased exponentially, with many states setting targets for the end of sales of all petrol and diesel cars. Sometimes, information need not even be shared widely for a significant new idea to spread through the markets and force a change in habits. This is what is required for effective climate change

mitigation. Agreements need to reflect these requirements and include provisions for greater innovation and reduce incentives for minimising compliance.

Outcome responsibility and Ability to Pay

An issue that needs to be addressed further arises from the above discussion, namely, how do we allocate obligations on developed countries to share their resources with developing nations? This distinction must be adjusted to address the issue of the real position of states now, regardless of their previous actions or inaction. The focus of future agreements should be on how collective action can achieve the ideal goal of significant reductions in emissions, with due consideration to non-ideal elements. The focus should shift away from blame and punishment and towards responsibility and rewards for positive action. Responsibility ought to include a degree of outcome responsibility to acknowledge the advantage gained by previous resource exploitation.

As discussed previously there are many difficulties in determining how significant resource exploitation was, and how responsible states may be for that exploitation. However, I have already previously suggested that there could be an application of outcome responsibility to reflect the fact that states, particularly developed states, have exploited resources and are in some way partially responsible for the current situation. I referenced the work of Miller, in relation to climate debt and historic emissions. Miller uses the work of Tony Honore to define outcome responsibility as follows:

“When we say that an agent is outcome responsible for the consequences of her action, we are attributing those consequences to her in such a way that, other things being equal, the resulting benefits and burdens should fall to her.” (Miller 2004, 245).

Miller continues, stating that if harm results from an action that the agent is responsible for then there may be a requirement to compensate for the harm caused (245). This is therefore relevant to the case of climate change because there can be a requirement for compensation due to the harms caused by previous emissions. Outcome responsibility only holds agents, or in this case states, responsible for actions which they had some control over. It is not merely that one participated in an action, but that the outcome was caused in some way by the state. However, it must be the case that, as many of the agents who caused the outcome are gone, those in the present generation who we wish to hold liable must be allocated responsibility based on the benefits they have received. Miller states that the purpose of outcome responsibility is normative, it is a guidance mechanism for where the consequences of an action should fall, but only in relation to actions which we have some control over (245).

Importantly, Miller notes that people cannot escape outcome responsibility if “through ignorance they failed to anticipate the results of their actions” (245). It is perhaps unfair to hold responsible those who did not know, and had no way of knowing, that their actions would have a negative effect on the environment. However, emissions did not cease or slow after this knowledge became available. From this point we can attribute outcome responsibility on all states that continued to emit, or increased emissions that have contributed to climate change and harm to developing nations.²

Alternatively, one could view outcome responsibility as a means of denying any historic responsibility, as perhaps the consequences of the actions could be too remote to be included. It could be argued that, though many states knew they were damaging the environment, they did not know that this would cause significant harm to the least-developed and developing countries. This is a difficult argument to make as the science has been clear for decades that the level of emissions would have a significant impact on the environment. Furthermore, I would argue that this situation would fall into the scenario of having, through ignorance, failed to anticipate the consequences of their actions.

Miller continues, stating that outcome responsibility is not as stringent as moral responsibility, which is relevant to assignment of praise or blame (246). This is important as there are fewer hurdles to jump in order to prove outcome responsibility over moral responsibility. However, returning to the first point, there is a benefit in not attributing blame in the climate change context. This approach will limit the confusion and uncertainty of historic responsibility and can instead turn to obvious instances of outcome responsibility which will not be a difficult task. When combined with an ability to pay approach, which ensures that those states who are emerging economies or have recently reached significant development, there would be a greater pool of resources to assist in the clean development of other states.

For quick development, fossil fuels are still the most cost-effective resources to use. However, technology is quickly becoming cheaper and with greater international cooperation there may be a way to balance both the right to develop and the norm of sustainability. It will likely be a slower path, but one that is justifiable and respects intergenerational justice. Furthermore, by combining the ability to pay with outcome responsibility, there is some recognition of historic responsibility which addresses one of the significant criticisms of the ability to pay principle. Firstly, as I discussed, ability to pay will likely encapsulate the aims of the beneficiary pays principle as most of those with the ability to pay are often those states who have benefited from past emissions. Outcome responsibility addresses the polluter pays principle, arguing that those who caused the harm should have a part in remedying the wrong.

I believe all of these elements are essential in creating a just distribution. However, I argue that combining the ability to pay and outcome responsibility concepts will better address the goal of balancing the right to sustainable development and the norm of sustainability. This combination allows for a higher chance of success, especially in a non-ideal context, without ignoring the important considerations that ought to be made when obligations are distributed.

These principles would allow for a just distribution where the least-developed and developing countries would have the smallest share of the burden, allowing them to develop and raise living standards. The shift from a blame-based approach to one that acknowledges responsibility creates a more positive obligation. It is a just outcome for those responsible for the problem to shoulder greater obligations, while the ability to pay ensures the urgency of climate protection is addressed.

Conclusion

This paper has aimed to develop new approaches to climate change mitigation. There are reasons to differentiate the responsibilities of developed and developing countries in relation to climate change mitigation. However, there cannot be a right to develop that extends beyond the limitations caused by climate change and the efforts to mitigate it. Developed countries may need to accept outcome responsibility for climate change, but the burden should not be too heavily placed on the basis of historic emissions or climate debt. The ability to pay approach seems the most effective and the most beneficial principle to consider in determining obligations for climate change mitigations because it recognises the collective nature of the problem and the immediacy of the required solution. Also, through the ability to pay approach, many of the developed countries that were historic polluters will be bearing more of the burden as the argument that they gained power and industry through these emissions will be reflected in their greater ability to pay. This is echoed in the case for developing countries, where it is less likely they will need to bear a large burden in climate change mitigation, due to less wealth.

Within all of this discussion, there must always be consideration of the non-ideal aspects of climate agreements. There will be states that do not comply with targets and it may be that the only option left is for other states to pick up the slack. This asks a lot of states, however, if a more cooperative, collective approach is taken, there could be significant progress in several aspects of international cooperation. Future agreements should move away from a blame-based approach to one of incentivising innovation and cooperation if the ideal goals of climate change agreements are ever to be achieved.

Notes

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Parts of this paper appear in: Jayasuriya, U (2018) “Climate Justice: Balancing the Right to Develop and the Norm of Sustainability” (Master’s Thesis) Victoria University of Wellington, New Zealand.

² Here I am assuming that states will be the relevant agents, and therefore I also assume a form of collective responsibility.

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