

The Responsible Path between Scylla and Charybdis

Making Sense of Appeals to Equity in Climate Change Loss and Damage Mechanisms

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In ancient Greek Mythology, Scylla was said to be a giant monster, Charybdis a whirlpool. Safely avoiding one meant getting too close to the other. As the story goes, the captain, Odysseus, must carefully choose between the monster that would certainly take several sailors, and the whirlpool that threatened to destroy the entire ship. Choosing between Scylla and Charybdis now stands as a potent metaphor for a choice between evils. It is an apt metaphor for a choice climate change negotiations confront, namely, the choice between thinking of loss and damage in terms of the certain costs associated with rectifying a past wrong or in terms of balancing uncertain future burdens in the face of unknown harms. I will show these two approaches to loss and damage correspond to two ways of addressing reasonable demands for the inclusion of equity-as-fairness into climate change policy: a forward-looking distributional approach and a backward-looking accountability approach. These forms of equity, I will suggest, help shed light on the best way to frame climate change loss and damage mechanisms. In what follows I will argue that focusing on past harms as a matter of equity has a number of comparative disadvantages. The forward looking approach is more practicable, better able to address problems that have not yet arisen but will certainly arise, and better able to integrate certain intuitive strengths of the backward-looking view. Preparing to address the unknowns of the future, the Charybdis of our time, provides a better way of dealing with climate change equitably.

This conclusion in favor of an approach that is more forward directed suggests a way to frame hitherto underspecified loss and damage mechanisms in climate policy debates, specifically the “Warsaw International Mechanism for loss and damage associated with climate change impacts” (UNFCCC 2013; hereafter “the Warsaw Mechanism”). I will conclude that a sensible way to structure that mechanism lies in an insurance framework wherein parties pool resources for the sake of future harms, as a balance against the predictable future loss of well-being and opportunity. The resources to be pooled may well be assessed in accordance with historical emissions or other metrics. This allows some form of accountability to be built into the framework, capturing much of what was appealing about the backward-looking accountability approach without endorsing some of the more problematic and impractical features of that approach. The paper begins with a short discussion of the process that led to the development of the Warsaw Mechanism as a response to the loss and damage expected to result from climate change. Then I will briefly consider equity and the relation of equity to forward- and backward-looking accounts. I will then argue that the notion of responsibility at issue in the loss and damage associated with climate change points us toward a forward-looking account. I will conclude by considering a promising form such a forward-looking version of the Warsaw mechanism might take: *insurance for opportunity*.

Three important caveats are worth mentioning. The details associated with an international insurance scheme are complex and nuanced. There is no space to develop such an account in these pages. Here I provide only a framework in support of such a scheme, and a set of considerations in favor of that framework. Second, and similarly, there is not the space necessary to do justice to the many ways issues of equity arise in the climate change literature (but see Gardiner 2004, 2011; Jamieson 2014; and the essays collected in Shue 2014). Third, this essay's focus is not on the particular policy machinations, or the political consequences of the development of the Warsaw mechanism, but rather on the role equity plays in that mechanism. Rather, this essay will endeavor to use the troublingly contested notion of equity as a way of looking at the moral significance of loss and damage language in any successor treaty to the Kyoto Protocol. I will argue that there is good reason to think of loss and damage in terms of the opportunities and prospects that may accompany a changing climate. Capabilities and opportunities provide the appropriate conceptual apparatus for integrating equity into Loss and Damage mechanisms.

Warsaw and the Warsaw Mechanism

While for years the climate policy process was limited to balancing efforts to mitigate emissions with efforts to adapt to the changes generated by those emissions, more recently “loss and damage” has played an increasingly significant role (Baer, et. al., 2009; Light 2013). Even before the recent IPCC AR5 report and the US National Climate Assessment painted in stark relief the dire consequences of unchecked climate change, it was clear that even with substantial mitigation and robust adaptation strategies, there would be losses associated with climate change, losses for which there is no substantial policy mechanism (IPCC 2012; US National Climate Plan).¹ At the 18th meeting of the conference to the parties (COP 18) in Doha, Qatar, in November of 2012, a decision was made to generate a mechanism to deal with loss and damage (UNFCCC 2012). Acknowledging the need for such a mechanism constituted a substantial step forward in the policy process, but more was needed.

At the COP 19 meetings in Warsaw, Poland, in November of 2013, in response to the demand for some instrument to address loss and damage, parties

agreed to the Warsaw Mechanism. This decision, arrived at late in the meetings after a good deal of contention, was another substantial step forward. Yet it remains unclear what form the mandated institutional arrangements will take. There are, however, two reasonably clear alternatives. The arrangements might take the form of a liability or accountability scheme based on compensation for past damage. Or they might take the form of a distributive scheme focused on addressing the now inevitable losses and damages attached to a changing climate.

There is good reason to think of loss and damage in terms of the opportunities and prospects that may accompany a changing climate.

While not explicitly addressed in the sparse text of the mechanism, two ways of understanding loss and damage seem to pervade the talks. On the one hand negotiators might base a mechanism on the historical contribution to loss and damage associated with climate change. On the other hand, negotiators might develop a mechanism that seeks to establish policy instruments responsive to the current and future loss and damage associated with climate change – that which is not covered under existing mitigation or adaptation frameworks. Below I will outline how these options map on to two different forms of equity.

When loss and damage is viewed through the lens of accountability for historical pollution, it is understandable that some parties are keen to advance a retrospective approach, according to which any mechanism for addressing loss and damage would be focused on accountability for past emissions. However, for reasons outlined below, such an approach is not productive in the context of developing policy solutions for dealing with loss and damage. While we cannot ignore historical emissions, dealing with loss and damage as they occur should be our primary motivation, and that is often best addressed through developing resilience and other forward-looking efforts that seem more suited to our changing circumstances.

This shifts policy mechanisms away from causal liability and historical accountability metrics, but it still allows a moral imperative directed at the consequences of climate change, consequences that disproportionately affect the most vulnerable. Concerns over the capacity of more vulnerable populations to address the challenges of a changing climate have provided the basis for traditional appeals to equity in the climate process (Shue 1999). While these concerns cannot be ignored, for matters of practical politics as much as morality, they also cannot be allowed to prevent the international community from developing a reasonable policy to address one of the greatest moral challenges of our age (Light 2013). Addressing this challenge will require finding a way forward that is responsive both to past harms and to future needs.

Equity in the Climate Process

Equity, in some form, constitutes a crucial moral dimension of ongoing efforts to address climate change (Jamieson 2012, 2014; Caney 2014; Light 2013; Gardiner 2010; Shue 1996, 1999). Different conceptualizations of equity can serve to frame an important moral dimension of climate change, one with substantial practical ramifications. Examining options through the lens of equity provides a means of making salient the moral dimensions of climate change, and the various policy options available. It also makes apparent the difficult political tradeoffs, and the political realities associated with the development of a viable and just climate policy. Beyond the practical tradeoffs that lie at the surface of the negotiations, important conceptual tradeoffs take place as a consequence of the way we frame the moral dimensions of climate change.

Should we approach equity with a backward-directed accountability approach, or a forward-directed development approach?

Most discussions of equity in climate change focus on the “common but differentiated responsibilities” mandated in the Kyoto Protocol (UNFCCC 1998, article 10). The form these responsibilities take was

not clarified in the original documents, and so the notion of fairness or equity underpinning such responsibilities has remained unclear (Light 2013). Whether we differentiate our responsibilities by, for example, providing financial compensation for the current and projected effects of our historical emissions or by respecting different development needs will make a substantial difference in the nature of those responsibilities (Caney 2014; Baer 2008, 2009; Vanderheiden 2008). Should we think of our responsibilities in terms of rectifying past wrongs, as a matter of accountability? Or should we think of them in terms of a country’s capacity to pay? I suggest we rephrase the central contrast in the following terms: should we approach equity with a backward-directed accountability approach, or a forward-directed development approach?

The form that the Warsaw Mechanism eventually takes will almost assuredly come with certain presuppositions about what equity amounts to, whether forward-looking, backward-looking, or some hybrid. Given the nature of negotiations, if there is to be any explicitly moral foundation to a future framework, we should expect the underlying notion of equity to be a hybrid. As a matter of political reality we should expect any future framework to avoid the language of blame or guilt that might be interpreted as an admission of legal liability. Yet such a framework will have to recognize past emissions and the harm generated by those emissions. It will be a delicate balancing act. But there is some hope this will occur.

A natural way to think about equity in the context of harm done, something we should expect to be common in the tumultuousness of a changing climate, is in terms of responsibility (Broome 2012; Hiller 2011; Nolt 2011). Traditional notions of responsibility focus on a historically salient connection between an agent in a culpable state of mind and a harm done (Hart and Honore 1985; Goodin 1986; but see Jamieson 2012, 2014; Thompson 2012).

The complexities associated with responsibility on the temporal and geographical scales appropriate to climate change require in the least that we not be wedded to traditional accounts of blame-based responsibility (Gardiner 2010; Jamieson 2012). Simon Caney, in a recent discussion of climate justice, urges us to think of responsibility not, primarily, in terms of culpability and intent, but rather in terms of the

probable consequences of climate change, and then see what might be done to avoid those consequences.

Climate change poses serious existential threats to many people's lives and to the very existence of some communities. Its effects will be extremely harmful, possibly catastrophic, for millions of people. Given this, I think we have reason to focus on what would most effectively prevent the onset of dangerous climate change, and then consider what responsibilities would follow from that (Caney 2014, p. 127).²

Doing what we can to avoid the most tragic consequences of climate change, the sort of dire predictions anticipated in the IPCC report (AR5) and related material (IPCC 2012; US National Climate Plan), should not only move us to act, but also serve as the foundation for our discussion of our responsibilities to address climate change. Of course this is not to say that history should be irrelevant to discussions of the moral responsibilities associated with the harms attendant to climate change, but that the focus should be on the harms, not the intent. Because many of the problems associated with traditional accounts of responsibility for climate change arise from a causal sequence linking culpable individuals to the harm *they* caused, avoiding this focus on individualistic causal sequence provides a more promising way to address climate change.

Such a shift in focus also supports a more promising way of thinking about equity. While an emphasis on an historically salient causal sequence leads to a backward-directed approach, equity-as-accountability, an emphasis on preventing harms done, requires a prospective, forward-directed approach, distributional equity.³ In short, what we should worry most about is harm, harm occurring and harm portended, not historical liability. The imminent nature of that harm is clear. With harm prevention and mitigation in mind, I turn to the two forms of equity at issue here.

Looking Backward and Looking Forward

I suggest that one helpful way to think about equity is in terms of whether our concern should lie in making amends historically, equity through the rectification of past wrongs, or in promoting fair burden sharing, i.e.

equity through fair distribution of future costs and benefits. When we ask if we are being equitable in addressing the loss and damage of climate change, we can look forward at the prospects for the distribution of harms and benefits on the basis of one or another proposal, or we can look backward, and consider whether we, or someone else, has suitably accounted for past behavior.⁴ In other words, one way to think about equity involves what we have done, making sure our failures are equitably redressed, and that we do not take undue advantage of our position in the past. This form of equity is closely aligned with corrective justice. Another way involves ensuring that there is an appropriate distribution of some good. This requires looking forward, and, for reasons that will become clear below, is more closely aligned with distributive justice. These two approaches to equity are in tension, and the choice between them is not obvious. There are reasons that support each.

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focuses on dealing with our now inevitable future.*

In support of backward-looking frameworks, one may note there is a real sense that the historical activities of the developed world, especially when coupled with its recent inaction to address the problem, makes it culpable for the harms done by climate change. A backward-looking framework better reflects an intuition that attributes responsibility to those who used up the climate commons, the amount of greenhouse gas that we might use before sending our climate spinning out of control. This notion of equity is tied to equal access to a shared resource (Shockley 2012). It is not fair, we might think, for someone to gain the benefits of a shared resource to the point that others are unable to use that same resource, a resource in increasingly scarce supply and the use of which leads to progressively more dire consequences. Those who gain, on this view, should provide compensation (whether financial or otherwise) to those thus denied access to the resource. This entails an appeal to corrective justice.

From the point of view of those who take themselves to be suffering the burdens of overused resources, those who are suffering the effects of climate change but who have, unfairly they would say, been deprived of the benefits of those resources, the current balance of benefits and burdens is strikingly inequitable. It is generally assumed that equity demands some form of compensation for past harms done. We can see this, for one example, in the proposal for integrating equity into loss and damage protocols advanced by India (United Nations 2011; Light 2013).

It may be less important to resolve historical injustices in the framing of climate policy, however, than it is to prepare for an uncertain and potentially troubled future. There are compelling reasons to support a forward-looking framework. For one, in a forward-looking way of addressing climate change, we have the prospect of equal effort. This equity of effort has great intuitive appeal. It seems just that as we, as a species, collectively face climate change, everyone puts in an equal share (whether determined by population, or by some other measure) in our effort to mitigate the causes of climate change, and adapt to those changes to which we are already committed. We can see this approach in a wide range of positions advocated by the US, and, to a lesser extent, by the EU (Light 2013).

Yet if we adopt this account of equity, history appears to be whitewashed. By focusing entirely on our present situation and our capacity to address future problems, we minimize or ignore entirely the transgressions of the past, many of which took place well after the time when one could reasonably claim non-culpable ignorance (Jamieson 2014; Gardiner 2011a, 2011b). Our behavior in the past has surely led us to where we are now, facing one of humanity's greatest moral challenges. Ignoring how we got here seems to miss much of the moral significance of the problem. And, indeed, much of what motivates many parties to argue for the inclusion of a moral dimension in the climate talks comes from a claim that the developed world needs to provide some compensation for the damages and losses it has, in some sense, caused.

Focusing on the Future

At the end of the day, the final Warsaw Mechanism document (UNFCCC 2013) was predictably and

notably vague, indicating only that a mechanism was to be developed as part of any future agreement. The proposal that came out of Warsaw and formed the Warsaw mechanism did not have unambiguously forward- or backward-directed language. It appealed to the harm of loss and damage and the need, even the responsibility, to address it. But the moral mandate did not contain a clear answer to whether the final framework would focus on historical accountability, the cause of those losses and damages, or on a forward-directed distributive approach, those now inevitable losses and damages themselves. So, while the Warsaw mechanism constituted a notable step forward in the UNFCCC process, it also left unanswered many of the troubling questions about the form that mechanism was to take.

There are, though, at least three compelling points in favor of a forward-directed approach. First, practically, the possibility of liability for harms done will make a loss and damage framework based on corrective justice extremely unpalatable for historical high emitters. Integrating those historical high emissions in a more constructive, and less oppositional fashion would provide a better option. Of course, whitewashing the history of emissions is not a practical or even reasonable approach. Any forward-directed approach must integrate the need for those who have polluted in the past to satisfy their "common but differentiated responsibilities."

But there is a clear value in the middle ground, one that accepts the realities of the past patterns of emissions that led us to be where we are, but focuses on dealing with our now inevitable future. We need to generate a framework that encourages parties not to get bogged down setting blame for past iniquities, and, while still acknowledging historical emissions, focuses on taking responsibility for our common future, to borrow a phrase (Brundtland 1987).

Second, in terms of implementing a forward-directed policy, an emphasis on harms done makes it problematic to plan for inevitable future harms. Moreover, there are productive means of integrating responsibility for past harm into such a forward-directed account that do not rely on the litigation intensive, punitive approaches that we can predict will be associated with backward-directed accounts.⁵

Third, there is a clear value in setting our policy for dealing with the costs of climate change in terms of our efforts at adapting to the unknown future, rather than our iniquities of the past. This is not

merely an academic matter. As we shift into an era of increasingly intense extreme weather events (IPCC 2012), it seems clear that we will need to adapt to an uncertain future. Relying on our historical practices in our response to unprecedented climatic disturbances seems ill advised and imprudent in the face of a challenging future.

While the benefits of a forward-directed approach are substantial, the costs of a backward-directed approach are also worth emphasizing: accountability for past actions leading to present and future harms will lead to extensive burdens. While these financial and social burdens may be deserved in light of past actions, the real burden, the real price paid to Scylla, comes from the certainty that a backward-directed approach will not help us address future, predictable harms. And it effectively pits one part of the world against the other. This is not a recipe for a viable solution to a global problem. Of course, the forward-directed approach comes with its own set of problems, not the least of which stems from our inability to determine the precise nature of the harms brought about by climate change. By taking a future-oriented view we operate under uncertainty, and, under the substantial risks and potential catastrophic harms forced on us by climate change, particular policy choices may fail. We do not know just how the harms of Charybdis might affect us. However, we will face these harms, whatever they might be, regardless of the approach taken. A focus on minimization of risk by promoting opportunities and reducing vulnerability seems the better strategy.

A Way Forward: Insuring for Opportunity

The future challenges of a changing climate should lead us to accept a future-directed treatment of loss and damage. Let us think of loss and damage in terms of insuring for future harm rather than punishing polluters for past damage done. However, structuring that insurance around financial or economic measurements is dangerously misguided in a time of unprecedented change and environmental instability. I suggest that the insurance model of responsibility needs to be coupled not with a model of value based on financial compensation, but with one based on capabilities and opportunities.

Any insurance framework to address the loss and damage caused by climate change should take account of harms beyond typical financial loss and damage.

Given the uncertain circumstances and comparative novelty of a future conditioned by climate change, we need to shift to a scheme for recognizing loss and damage in terms of the possibilities and opportunities individuals might face under such uncertain conditions. Focusing on vulnerabilities and capabilities allows us to think about the harms associated with restricting opportunities and limiting possibilities, rather than just the harms done to individuals as passive entities.⁶

Vulnerabilities do not always track with models of loss tied to economic valuation. Consider cases of individuals moving from locations which have lower economic value (say a local farm) to an urban center where their financial standing is increased, but where they are more vulnerable to price shocks, political instability, and other features of a life in an urban center. Attention to vulnerabilities and opportunities provides a better framework for considering the wide range of “loss and damage” populations might face. A capabilities approach is more appropriate, and better captures the variances of our contemporary world.

The insurance model of responsibility needs to be coupled not with a financial compensation model of value, but with one based on capabilities and opportunities.

The model for dealing with the unknown future should be built not on recent financial costs of climate change but rather assure the background conditions necessary for the provision of opportunities. A capabilities approach to the background conditions that enable the development of opportunities allows us to reflect on what future prospects are enabled by conditions of the present, conditioned by past actions. Considering how those conditions have been compromised in the past allows a way of integrating historical culpability in the current circumstances, while keeping the focus squarely on the harms resulting from climate change.

We should think like insurers, insurers who recognize patterns of past behavior that may lead to variations in their payment scheme. One possible way of doing this is to rethink loss and damage in terms of an insurance pool where one’s premium depends in

part on one's contribution to the risk for which one is being insured, and an acceptance that all must pay into the pool as best they are able. I cannot develop the details of this proposal here, but rethinking responsibility in light of the different forms of equity salient to these contexts provides a helpful way of moving ahead that captures a forward-directed, distributive approach to equity.⁷ And it focuses on those most likely to be affected by the worst effects of climate change.

A forward-directed approach allows policy to attend to those most vulnerable to the ravages of a changing climate (Goodin 1984; Broome 2012; Gardiner 2012; Jamieson 2014). By integrating the influence of past actions on the opportunities available today, the capabilities approach also provides a middle ground between the historically focused liability approach and an approach to the future that whitewashes the past. It may not be the only way to integrate historical responsibility into a prudent forward-directed strategy, but it does so in a manner that allows for the inclusion of the concerns of the most vulnerable into the process (Sen 2000, 2009; Pettit 2001; Shockley 2014).

While much could be said in support of the ethical dimensions of this approach, this programmatic defense of forward-directed approach captures the moral imperative of directing efforts to help those who are most vulnerable, and reducing our common vulnerability to a changing world. The forward-directed approach represents a form of equity based on the fair distribution of effort and resources in light of such considerations.

In this paper I have argued that while responsibility for loss and damage associated with climate change might be assigned either on the basis of those historical emissions that contributed to climate change, or on the basis of one's ability to combat the effects of climate change, there are clear reasons to support a forward-directed view of our responsibilities. The two forms of equity correspond to these two ways of characterizing responsibility for loss and damage: equity as a corrective for past wrong doing, and equity as fair distribution of effort and resources. While the argument presented here was largely programmatic, there are good reasons to prefer the fair distribution model. The forward-directed approach to loss and damage that this form of equity indicates is not only more suitable for the uncertainties faced in a changing climate, but also

provides for a means of integrating the responsibility for past emissions in a politically feasible manner. While I have here argued we should approach the issue of equity from a forward-looking, distributional approach, we would do well to find a means of balancing the benefits of corrective and distributive approaches. I hope here to have provided the beginnings of such a framework.

If the Warsaw mechanism is developed suitably, it might well provide a means of getting past one of the more deeply divisive features of climate change negotiations: the way in which we are to understand equity in light of the "common but differentiated responsibilities" language in the Kyoto Protocol. As we move forward to a post-2015 treaty, resolving this issue will be essential for US involvement in any successor climate treaty (Light 2013), and essential for the success of any treaty. Perhaps integrating equity into loss and damage language in the way characterized here will provide such an opportunity. While more work needs to be done, it would seem that insuring for equity of capabilities with differentiated cost schemes is the right framework and provides hope for a successful post-2015 arrangement. It is a form of equity appropriate for the uncertainties we face.

Odysseus chose the monster rather than the whirlpool. Rather lose a few good sailors, he thought, than risk his whole ship. One good thing you can say about Odysseus, though, is that he appeared to understand what he was doing. He had to compare the costs of two different ways of getting home. If only the current negotiations in Warsaw took equity and the moral considerations on which equity is based – in either form – to be the basis of their decisions. That would be progress indeed. Here we are not trying to get back home, as much as avoiding impending disaster. Making a hard choice, even if the choice is tragic, is often better than talking past one another as the world heats up. Inaction is a morally worse option than either facing the Scylla of our past or the Charybdis of our future. Of course, practically, a middle ground is best. A different Greek, Aristotle, taught us that.

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Notes:

¹ “Loss and damage” is generally taken to include a wide range of economic and human considerations, costs not covered under existing mitigation and adaptation tracks (Taraska 2013).

² Simon Caney (2014) refers to a presentation of Robert Goodin’s at the conference, “Political Thought and the Environment,” held at the University of Cambridge (25 May 2012), wherein he points to taking this retrospective perspective. See also Shockley, forthcoming.

³ Appeals to equity have provided one dominant way of inserting ethical concerns into the climate policy debate, and the hoped for climate policy solutions. Appeals to equity in these contexts are closely related to appeals to justice (Shue 1999). In those terms, we can distinguish our two forms of equity in terms of the difference between corrective and distributional justice (Goodin 1995; Feinberg 1970).

⁴ Vanderheiden (2009) refers to mitigation as largely a forward-looking judgment. He says in accordance with a mitigation based approach we would “ask what proportion of the planet’s finite emissions absorptive capacity each of us is entitled to claim for ourselves”, whereas adaptation is largely a backward-looking judgment, “some party has been exposed to some risk or made to suffer some harm for which they are not at fault, and justice requires that the party that is responsible for that risk or harm either pay to insulate them from harm or else compensate them for the harm that occurs” (p. 284).

⁵ This might be done by simply prorating payments into an international insurance scheme on the basis of one’s historical emissions (see below). One promising attempt to operationalize this kind of approach can be seen in the work of Ecoequity (Baer et al 2009; Baer 2008; but see Shockley 2012). There may well be other means of integrating historical emissions that better capture other moral principles (see Sachs 2014).

⁶ Amartya Sen’s “Equality of what?” (1980) is instructive here.

⁷ There has been some work on developing an insurance model for dealing with climate change. See in particular the Munich Climate Insurance Initiative (MCII 2014). Ecoequity has provided a range of helpful models designed to integrate historical responsibility with a range of features (Baer, et al., 2008).

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