

# Intergenerational Justice Review

Foundation for the Rights of Future Generations



**Issue Topic:**  
**Ways to Legally Implement  
Intergenerational Justice**

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## CONFERENCE PAPERS

### The reviewers for this issue were as follows (in alphabetical order):

**Prof. Tracy Bach** is professor of law at Vermont Law School and associate director of the Climate Legacy Initiative, a joint project of the Vermont Law School Environmental Law Center (VLS-ELC) and the University of Iowa Center for Human Rights (UICHR).

**Prof. Dr. Andrew Dobson** is professor of politics at Keele University at the School of Politics, International Relations and the Environment (SPIRE), and in the Research Institute for Law, Politics and Justice.

**Andreas Kraemer** is chairman of the Ecologic Institute in Washington D.C. and visiting assistant professor at Duke University.

**José Manuel Pureza** is associate professor of international relations at the University of Coimbra, Portugal.

**Prof. Shlomo Giora Shoham** is a professor of law and an interdisciplinary lecturer at the Tel Aviv University.

**Prof. Michael Wallack** is associate professor at the department

of political science at Memorial University of Newfoundland.

**Prof. Dr. Burns H. Weston** is Bessie Dutton Murray Distinguished Professor of Law Emeritus at the University of Iowa and director of the Climate Legacy Initiative, a joint project of the Vermont Law School Environmental Law Center (VLS-ELC) and the University of Iowa Center for Human Rights (UICHR).

Future generations lack representation in current day politics. Modern representative democracies are largely oriented to the short term. Moreover, our adjunct legal frameworks are ill-equipped to protect those who are disregarded by today's electorate. This has emerged historically as many European constitutions were originally conceived to protect those in the here-and-now. As such, it is imperative that we reflect on the law and its relation to future people. This poses particular difficulties at both a legal and an institutional level. If law is understood as person-affecting, that is: specifying rights of particular people, it inevitably neglects the interests of the unborn. At the institutional level, our current bodies and decision-making processes already have inherent tendencies towards the recognition and protection of future people, for instance the European Convention on Human Rights has been interpreted progressively. Nevertheless, it requires innovative thinking to imagine alternative provisions that can complement today's legal architecture but revolutionise our restricted thinking on this topic. This issue of IGJR attempts to draw attention to these important legal matters with the work of a wide range of professionals and academics who are working to address these questions.

There is an increasing number of institutions and bodies established to protect the interests of future generations. Furthermore, reference to future generations is burgeoning in national constitutions and supranational legal texts. Maja Göpel and Malte Arhelger's article sets out to reflect on this growing trend and how it can inform the creation of a European level institution for the protection of the rights of future generations. This, our first article in this issue, uses set criteria and characteristics to adjudicate between existing types of institution. As such, it evaluates, amongst others, the Israeli Commission for Future Generations, the Hungarian Commissioner for Future Generations and the New Zealand Parliamentary Commissioner for the Environment. To conclude, the authors make the suggestion that a 'European Guardian for Future Generations' could be adopted at the European level.

The second peer-reviewed article in this issue is entitled "Crimes against Future Generations: Implementing Intergenerational Justice through International Criminal Law". In this piece, Sébastien Jodoin, a legal research fellow with the Centre for International Sustainable Development Law, identifies relevant aspects of the Rome Statute that can be used to protect future generations through the harm committed to present individuals as members of groups. Ultimately, this innovation has a number of objectives, including demarcating appropriate behaviour while also deterring and punishing certain conduct. While many may feel that the objective here is too large, the author points to the similar assessment of the original Nuremberg Charter. Indeed his is a profoundly challenging proposal, one that would surely have dramatic implications if implemented. As followers of the recent Review of the Rome Statute in Kampala will have noticed, reform in international criminal law is a slow process. Nevertheless, Jodoin marks a clear way forward for all future discussions on this possibility. Ms. Éva Tóth Ambrusné's non peer-reviewed article is an insightful review of the work of the Parliamentary Commissioner for Future Generations of Hungary where she works as a legal advisor. The Hungarian Commissioner has been of much inspiration to activists and scholars throughout the world as a potential transferable model. As such, this description of how this body came to be and an establishment of its workings is of much value. The central involvement of the civil society organisation, Protect the Future, is revealed and specific examples of the Commissioner's success in exercising his competencies are presented. Notably, the Commissioner is shown to go beyond a narrow mandate of environmental protection to a wider concern with future generations. The piece also goes into detail on the challenges faced by this young institution with respect to other actors and political processes. Ending on a positive note, the author sees no reason why a similar institution could not be established elsewhere.

This issue of the journal is the result of an innovative venture for the Foundation for the

Rights of Future Generations, by integrating the proceedings of a hugely successful international conference. 'Ways to Legally Implement Intergenerational Justice', held in Lisbon on the 27th and 28th of May, 2010 was envisioned by Marisa Q. dos Reis. She organised a wide-ranging and thought-provoking two days in the beautiful setting of the Foundation Calouste Gulbenkian in Lisbon, Portugal. As such, our issue includes summaries of the presentations made during this event. Unfortunately, we cannot capture all the energy and progressive suggestions that occurred but hopefully the conference material contained here will provide readers with a sense of the occasion and inspire a commitment to future collaboration and research in this area.

In this spirit, we would call upon all readers of the journal to pay attention to the upcoming conference, 'What type of legal responsibility towards future generations?', which is to take place on December 10 and 13, 2010 in Poitiers and Guyancourt, France. Further information can be found in the announcements section of this issue.

Finally, we would like to thank our reviewers for their most helpful criticisms and advice in the preparation of this issue, which we hope provides the basis for much further discussion and thinking on the legal implementation of intergenerational justice.



Jörg Tremmel, LSE



Marisa dos Reis, FRFG



Joseph Burke, FRFG



Raphaele Schwarzberg, FRFG

# How to Protect Future Generations' Rights in European Governance

by Dr. Maja Göpel and Malte Arbelger

**A**bstract: Given that future generations are right-bearing citizens of tomorrow, legislative systems should secure these rights through appropriate institutions. In the case of the European Union, reference to intergenerational justice can be found in various fundamental legal texts, but, paradoxically, no institutions exist to defend it. The structural short-termism inscribed into representative democracies means that present interests easily trump future concerns. We argue that the best way to overcome this problem is a system of temporal checks and balances. By comparing a selection of existing instruments with regards to their impact on the legislative process, we propose the creation of a European Guardian for Future Generations as the most effective measure to protect the rights of future generations and provide an overview of recent developments in this direction.<sup>1</sup>

## The rights of future generations

In the philosophical debate, it is still unclear how normative concepts like 'obligations', 'rights' or 'harm' may be interpreted, when applied to the intergenerational context. This is mostly due to the fact that future people do not exist yet and that, consequently, their number, identity and interests remain unclear.<sup>2</sup> At the same time, even in the absence of a coherent ethical theory, most people attribute moral importance to the lives of future generations, and the discourse on the matter is typically a rights-based one. If we declare universal human rights for every individual, why should in-

It was never the people who complained of the universality of human rights, nor did the people consider human rights as a Western or Northern imposition. It was often their leaders who did so.

/ Kofi Annan /

dividuals born tomorrow not impose obligations on present individuals? It therefore seems appropriate to consider future people as rights-bearers – even in the absence of a clear definition of what this implies for present people, practically and legally.<sup>3</sup> This article will not be concerned with the question of *what* exactly to transmit to fu-

ture generations, but focus on *how* to protect options and opportunities for similar freedom of choice in the development of societies. We believe that the present generation is obliged to avoid and intervene with trends that threaten these options and opportunities, such as biodiversity loss, climate change, resource depletion, perpetuation and aggravation of extreme poverty and inequity, to name a few. By means of regulation, political institutions play an important role in the execution of these responsibilities. Given the increasing authoritative and legislative power of the European Union, this article explores how the European institutions may improve the protection of future generations and concludes with the recommendation of a new body with an explicit mandate for just that purpose.

## Future generations in European legislation

To derive the institutional imperative for the representation of future generations for which we argue, we provide a brief historical overview of the status of future generations in European policies with reference to the most significant developments in international treaties and conventions.

Generally, it is important to distinguish between explicit and implicit reference to future generations. Implicit formulations include 'heritage', implying that something is handed on to posterity, and the principle of 'sustainable development', as it is defined by the 1987 Brundtland Report: "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."<sup>4</sup> Reference to future generations in the European context has gone from explicit and non-binding to implicit and binding while taking an increasingly prominent place in European legislation.

## Future generations and European environmental policy

In terms of official recognition, the declarations and recommendations of the United Nations Stockholm Conference on the Human Environment in 1972 mark the be-

ginning of institutionalised environmental politics. The wording of its final declaration<sup>5</sup> influenced the first formulations of European environmental policies. In the European context, future generations are mentioned for the first time in the 1973 Programme of Action of the European Communities on the Environment. When explaining the need for awareness of environmental problems, the document states that "educational activity should take place in order that the entire Community may become aware of the problem and assume its responsibilities in full towards the generations to come."<sup>6</sup> The Commission's 1974 Recommendation concerning the protection of birds and their habitat also contains an indirect reference to future generations, when it notes that "[p]ublic opinion is coming to consider migratory birds more and more as a common heritage."<sup>7</sup> However, these formulations were hardly of binding character and appear rather randomly.

Meanwhile, with the adoption of the first pieces of binding European environmental legislation, normative reference to future generations disappears almost completely. This is also certainly due to the much narrower-legislative mandate of the European Communities at that time. The objectives then were the creation of a common market and included neither reference to future generations nor to the environment. Accordingly, the 1975 Waste Framework Directive, among the first legally binding texts in the environmental field, while calling for the "recovery of waste (...) to conserve natural resources,"<sup>8</sup> referred to the functioning of the common market and to Article 235 of the Treaty of Rome, regulating Community action in the case of absence of any further legal basis.

The 1976 Bathing Water Directive presented a similar situation. While arguing that the surveillance of bathing water is necessary in order to attain the objectives of the common market, it applies a relatively large definition of 'bathing water'.<sup>9</sup> Similarly, the 1979 Bird Directive describes the protection of wild bird species in the EU as a means to fulfil the objectives of the common market –

although, exceptionally, it also states that “species of wild birds naturally occurring in the European territory of the Member States (...) constitute a common heritage” and views “the long-term protection and management of natural resources as an integral part of the heritage of the peoples of Europe.”<sup>10</sup> Additionally, the preamble of the 1985 Environmental Impact Assessment Directive states that the effects of human intervention on nature must be observed “to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life”. It also states that cultural heritage shall be taken into account in this assessment.<sup>11</sup> Overall, however, European environmental legislation has only referred to future generations randomly and implicitly.

**For a successful technology, reality must take precedence over public relations, for nature cannot be fooled.**

/ Richard P. Feynman /

#### *International treaties: future generations through the backdoor*

It is mainly through conventions of the United Nations (UN) that reference to future generations finds its way back into European legislation, primarily via preambles. This is the case, first, for the 1982 Convention on the conservation of migratory species of wild animals, according to the preamble of which “each generation of man holds the resources of the earth for future generations and has an obligation to ensure that this legacy is conserved and, where utilized, is used wisely.”<sup>12</sup> Second, in the 1993 European Council decision on the 1992 Convention on Biodiversity, which refers to future generations in its preamble,<sup>13</sup> the European environmental policy agenda adapts again to that of the UN. The European Council decision states that the reason for the EU to adhere to the convention is the fact that “conservation of biological diversity is a global concern and it is therefore appropriate for the Community and its Member States to participate in international efforts.” The preamble continues that the “conservation and sustainable use of biological diversity” are appropriate means to attain this goal.<sup>14</sup> Third, the United Nations Educational, Scientific and Cultural Organisation’s Declaration on the Responsibilities of the Present Generations Towards Future Generations in 1997 contains twelve

Articles defining issues regarded as relevant to protect for future generations, including non-environmental ones like education, peace, common heritage and cultural diversity.<sup>15</sup> The declaration is however not legally binding.

Fourth, and from a legal perspective most notably, the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, a regional UN convention, contains a concrete description of how rights of future generations transform into present duties. Also known as the Aarhus Convention, it states that “every person has the right to live in an environment adequate to her or his health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.”<sup>16</sup> Especially when arguing for an institution protecting future generations, it should be noted, the preamble obliges the State to support citizens in exercising their rights and duties. It states that “to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters”, and that “citizens may need assistance in order to exercise their rights.”<sup>17</sup> But it was not until 2006 that this path-breaking Convention became European law.<sup>18</sup>

#### *From Rio to Brussels*

Since the publication of the 1987 Brundtland Report, future generations have received attention in the European Council, implicitly and explicitly, albeit only in non-binding declarations. Nevertheless, this fact indicates how intergenerational justice has become a growing concern for European policy makers. The first declaration taking up the prominent implicit formula of sustainable development is the 1988 Rhodes Summit Declaration on the Environment, which states that “sustainable development must be one of the overriding objectives of all Community policies.”<sup>19</sup> Another notably explicit example is the 1990 Dublin Summit Declaration on the Environmental Imperative, which states that “[m]ankind is the trustee of the natural environment and has the duty to ensure its enlightened stewardship for the benefit of this and future generations.”<sup>20</sup> But it is equally notable that, given its boldness, this declaration remains with only few consequences. The principle of sus-

tainable development gains further momentum after the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, in the form of the Fifth Environmental Action Programme: *Towards Sustainability*.<sup>21</sup>

#### *Sustainable development: future generations in the treaties*

Future generations make their first implicit appearance in the European treaties through a principle of sustainable development in the 1997 Amsterdam Treaty.<sup>22</sup> The 2000 Charter of Fundamental Rights of the European Union is the first fundamental legal text mentioning future generations explicitly. Its preamble states that the rights ensured by the Charter entail duties with regards to future generations.<sup>23</sup> The document becomes legally binding with the adoption of the 2008 Lisbon Treaty. Several articles of the Treaty contain references to future generations in the form of the principle of sustainable development, namely in Articles 3 and 21, and Article 37, which states that “[a] high level of environmental protection and the improvement of the quality of the environment must be integrated into politics of the Union and ensured in accordance with the principle of sustainable development.”<sup>24</sup> Ever since the 1997 Amsterdam Treaty, the principle of sustainable development has become the predominant wording to frame environmental policies in European discourse. This is true not only of the Council declarations urging the implementation of the principle (namely Luxembourg 1997, Cardiff 1998, Vienna 1998, Cologne 1999 and Helsinki 1999), but also for various policy programmes of the European Commission. These include, most prominently, the 2001 European Sustainable Development Strategy *A Sustainable Europe for a Better World*<sup>25</sup> and its 2005<sup>26</sup> and 2009<sup>27</sup> revisions, and also the 2004 Action Plan on Environmental Technologies.<sup>28</sup> It may also be worth noting that references to intergenerational justice can be found in various member-state constitutions. Eight constitutions contain explicit references to future generations (Belgium, the Czech Republic, Estonia, France, Germany, Luxembourg, Poland, and Sweden), and five constitutions make indirect reference to future generations via the concept of heritage (Finland, Italy, Portugal, Slovakia, Slovenia). Almost all texts contain references to the role of the state concerning the protection of the environment.<sup>29</sup>

Despite ample references to intergenera-

tional justice in constitutive legal frameworks at the European and national levels, and notwithstanding the fact that since the 1998 Cardiff summit, attempts have been made to institutionalise European sustainable development policies – and three more summits were dedicated to the issue (Helsinki 1998, Gothenburg 2001 and Barcelona 2002) – there is neither an institutional mechanism to ensure that self-imposed obligations in sustainable-development issues are in fact respected, nor a clear reference to establish such a mechanism. The respective legislation would have to rely on Article 352 of the Lisbon Treaty; the Council may adopt appropriate measures to attain objectives set out in the treaties, which cannot be attained with the powers provided by the treaties.<sup>30</sup>

The credit crunch is about borrowing from our children; the climate crunch is about stealing from them.  
/ David Pencheon /

### Existing intergenerational checks and balances

Unlike present people, future people cannot themselves protest against present political decisions or argue how these will inflict upon their lives and wellbeing. Several countries around the world have acknowledged this representational omission and established institutions to protect the interests of future people. In this paper we only discuss institutions that can engage in the legislative process.<sup>31</sup> Our primary purpose is to evaluate how such institutions could be important governance innovations in representative democracies, so that core mandates and functions can be defined for the European governance level.

It is necessary to clarify the terminology used to distinguish the various sorts of temporal checks and balances existing in national political systems. We will distinguish institutions according to the way their holders are appointed and the status of their legal basis.

We will call *Parliamentary Committee* an institution consisting of directly elected parliamentarians, operating on the basis of parliamentary rules of procedure, *Parliamentary Commissioner* an institution held by an appointed or indirectly elected non-parliamentarian, operating on the basis of parliamentary rules of procedure and *Commissioner* an institution consisting of an appointed or indirectly elected non-parliamentarian, operating on the basis of an independent legislation. Several other possible mechanisms of temporal checks and balances are discussed in the academic literature, including reserved seats in parliament,<sup>32</sup> deliberative control mechanisms<sup>33</sup> and specialized second chambers.<sup>34</sup> We will limit our discussion to existing cases.

#### A few remarks on methodology

We will attempt to determine which model best suits our goal to identify a strong mechanism of temporal checks and balances.

Table 1. Examples of institutional mechanisms of temporary checks and balances in comparison.

| Institution                       | Country  | 1) independent  | 2) proficient  | 3) transparent  | 4) legitimate   | 5) having access   | 6) being accessible  |
|-----------------------------------|--|---|--|---|---|--|--|
| <i>Parliamentary Committee</i>    | Finland (Tulevaisuusvaliokunta, 1999), Germany (Parlamentarischer Beirat für Nachhaltige Entwicklung 2006)   | Separate body inside the legislative, consisting of elected parliamentarians. Flowing from parliamentary rules of procedure. Separate budget (Finland). <sup>35</sup> | Body publishes reports and advises other standing committees. <sup>36</sup> Members have voting rights in plenary.   | Bound by mandates to follow-up on governmental long-term strategies. Body publishes general reports on regular basis and specific reports and statements on topical issues.         | Body established by government (Germany) or emerged in parliamentary debate (Finland). Members elected in direct elections.                                 | Members may obtain governmental information by the procedure of written or oral questions. Members can initiate research on future scenarios in various policy fields (Finland).                       | Body shall improve communication among relevant political actors and include general public in the debate on sustainable development. <sup>37</sup>              |
| <i>Parliamentary Commissioner</i> | Israel (Israeli Commission for Future Generations, 2001-2006)  | Flowing from parliamentary rules of procedure. Separate budget, which is part of the Parliament's budget. <sup>38</sup>   | Body publishes statements. May ask for delaying legislative decisions to present statements. <sup>39</sup>   | Bound by mandate to report on bills with "significant consequences for future generations." <sup>40</sup> Body publishes general report on regular basis.                           | Body conceived by parliamentary vote on parliamentary rules of procedure. Holder appointed on merit-base. <sup>41</sup>                                     | Body has access to state institutions defined under the State Comptroller Act. <sup>42</sup> Body may express opinions on laws and advise parliamentarians. It may appear in parliamentary committees. | Body receives all bills and secondary legislation treated in Parliament. De facto, it also became a gateway for economic and civil-society actors. <sup>43</sup> |
| <i>Commissioner</i>               | Canada (Commissioner for Environment and Sustainable Development, 1995), Hungary (Parliamentary Commissioner for Future Generations, 2006), New Zealand (Parliamentary Commissioner for the Environment, 1986) | Flowing from separate legislation. Separate budget determined in the State budget, which is passed by the Parliament.   | Body may initiate suspension of administrative or other acts potentially causing irreversible environmental damage. It may therefore appear in court. It may initiate judicial reviews, when improprieties occur, i.e. when laws violate fundamental rights. <sup>44</sup> | Bound by mandate to "ensure the protection of the fundamental right to a healthy environment", <sup>45</sup> which is a fundamental right. Body regularly publishes general report. | Body conceived by parliamentary vote on respective legislation. Holder selected on merit-base, confirmed by parliamentary majority (Hungary). <sup>46</sup> | Body may investigate any activity, limited only by state secrecy, not by business secrecy. It may urge the Parliament to discuss grave improprieties. It may appear in Parliament. <sup>47</sup>       | Anybody has the right to petition. Body may also investigate on its own initiative.  |

The ideal institution should respond to two sorts of requirements. Firstly, it should address the requirements of the separation of powers. This means it should be independent and its function should be to increase political efficiency by reducing the abuse of political power. The abuse of political power can impose political and economic costs for present and future generations. Costs to the present generation include the costs caused by friction in the political process, for example legitimacy gaps through lack of consultation, or short-term delivery gaps through tactical procrastination of agreement. Costs to future people include the costs of, for example, climate change, biodiversity loss, or other risky technology choices, in particular if they are not addressed at an early stage because of short-term interest dominance. Secondly, the institution should be capable of integrating the high level of uncertainty related to long-term developments and accommodate the possibility of technological and social innovations in its considerations.

Based on this reasoning, we can define six criteria for comparative analysis. For the institution to be able to limit the abuse of power of present institutions, it has to be 1) independent and 2) proficient. For the institution to increase the efficiency of policy making, it needs to be 3) transparent and 4) legitimate by democratic standards. While the interests of present and future generations may be opposed in particular issues, the institution as such should be democratically legitimate so that its existence derives from the general importance people attribute to future generations. Analogously, a complainant may be opposed to a legal decision contrary to her or his interest but still attribute legitimacy to judicative institutions with the mandate to protect the general interest. To enable the institution to cope with uncertainty, it should 5) have access to all the relevant information and 6) be widely accessible to expert assessments and citizens' concerns so that well-informed and broad argumentation becomes possible. In practice, activities falling under 6) may be identical with activities falling under 3). However, transparency is an output-related quality, accessibility is clearly input-related. The more the institution is accessible, the sooner it may adapt to change and the lower the risk its focus remains systemically limited to particular issues.

How shall these criteria be treated when comparing institutions? Any institution ful-

filling any one of the six criteria can function to some extent as a mechanism of temporal checks and balances. But the more an institution fulfils several criteria, the better it seems equipped for this task. With these remarks in mind we may begin our comparative assessment (See Table 1).

#### *Indicative conclusions*

What conclusions can be drawn from this comparison? First, we may consider how existing bodies rank in relation to the defined criteria. If a body functioning as a mechanism of temporal checks and balances is supposed to be 1) independent, according to the logic of the division of powers, then a post in this body should not be held by the same person holding a post in another branch of political power. Ideally, this body shall also rest on an independent legal basis, in order to increase the independence of the respective body. The Hungarian Commissioner enjoys most independence, even

**Maturity is the capacity to endure uncertainty.**

/ John Huston Finley /

though its budget depends on the decision of the Országgyűlés (Hungarian Parliament). If a body is supposed to be 2) proficient, then it should have legally binding competences. The Hungarian Commissioner is the only body with legally binding tools. It may be added that the Israeli Commission enjoyed a *de facto* veto power: it could use the right to deliver statements in a tactical way, so that decisions could be postponed and eventually dropped, when the parliamentary schedule allowed no delays.<sup>48</sup> But this power is risky to use, since it is likely to destroy the trust-based cooperation between deputies and the Parliamentary Commission. If a body is supposed to be 3) transparent, it needs a clear and direct mandate and should report regularly about its results. While all examined bodies provide regular reports, the Hungarian Commissioner has the most direct mandate for action. The influence of the other bodies' mandates depends on the activity of third, either executive or legislative, bodies. If a body is supposed to be 4) legitimate, it should enjoy large public support or even have emerged as a response to citizen action. While the Israeli Commission was established top-down, the results of its work were communicated widely through good relationships with the media.<sup>49</sup> The Hungarian Commis-

sioner was established after a grassroots initiative by the Civil Society Organisation Védegylet (Protect the Future).<sup>50</sup> The Parliamentary Committees, on the other hand, have most impact on political actors.<sup>51</sup> If a body is supposed to have 5) the necessary access to compile information, it needs extensive authority to request the information. The mandate of the Hungarian Commissioner is most generous, in this sense. Finally, if a body is supposed to be 6) accessible, it should allow for institutionalised and inclusive input. Again, given that the Hungarian Commissioner may be petitioned like an ombudsman, its mandate seems the most developed in comparison.

Second, we need to be clear about the heuristic value of this comparison: while there is some evidence that the model of the Hungarian Parliamentary Commissioner can be effective in protecting future generations from present abuse of power, this article does not suggest that the Hungarian model is a blueprint to be transposed to the European level. Rather, it suggests that if our objective is to establish an effective mechanism of temporal checks and balances at the European level, the Hungarian case can serve as the most notable precedent. Yet, its mandate is limited to the protection of the environment, while the Israeli Commissioner oversaw twelve policy areas, therefore being closer to a holistic protection of living conditions for future generations, similar to the UNESCO Declaration cited above.

Since the fundamental rights adopted with the Lisbon Treaty do not include the right to a healthy environment anyway, the mandate for a European body could be to build on the aim of the European Union as defined in Article 3 of the Treaty: "to promote peace, its values and the well-being of its peoples."<sup>52</sup> The objectives listed in Article 3 to reach this aim range across many issue areas from economics to security and culture and could provide the lens to decide which policy decisions need to be scrutinized regarding their impact on future peoples' wellbeing. Such a mandate would directly support the commitments made on sustainable development, as it would improve coherence and efficacy of European policies drafted in single-issue departments and would provide the principle of intergenerational solidarity with teeth. In addition, it would be helpful to avoid the term 'Commissioner' in order to avoid confusion with existing European commissioners. A 'European Guardian for Future Generations' could be a solution.



## Dear Reader, Your opinion matters!

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IGJR-Editors  
Postfach 5115  
61422 Oberursel  
GERMANY  
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### Initiatives for a European representation of future generations

This final section will discuss past initiatives for establishing an institutional representation of future generations and indicate some strategies for further action. During the past decade, all of these initiatives originated from civil society.<sup>53</sup>

The most important initiative was once again organised by Védegylet. When the law establishing the Hungarian Commissioner for Future Generations was adopted in Hungary in 2006, Védegylet decided to move onto the European level.<sup>54</sup> The activists gained support from the conservative Member of the European Parliament (MEP) Kinga Gál, who gathered three other MEPs behind the initiative. In June 2008 the group organised a public event at the European Parliament, and in September it started to collect signatures for the Written Declaration on the need to establish a Representation for Future Generations in the European Union. The text demanded that the Commission and the Council should investigate three possibilities to protect the rights of future generations. Firstly, protection of future generations might become part of the responsibilities of the existing European Ombudsman. Secondly, questions of intergenerational justice could be integrated into the portfolio of a European Commissioner. Thirdly, the European Fundamental Rights Agency might be charged with the enforcement of future generations' rights.<sup>55</sup> However, without civil society support in Brussels and at the end of the legislative period, the necessary number of signatures for adoption of the declaration was not achieved.

Yet, the new legislative period provides a new opportunity to reinvigorate the initiative for future generations' rights and this article sought to investigate characteristics that would promise the highest effectiveness. The options proposed in the 2008 Declaration of MEPs may seem to be politically easier and economically cheaper solutions, but only a Guardian with the explicit mandate to defend the rights of future genera-

tions will operate without the conflict of short- versus long-term interests within it. It would provide a solid mechanism of temporal checks and balances in decisions on infrastructure, energy, ecosystem protection, production technologies and materials, conflict resolution strategies and investment priorities that will significantly impact the quality of life in the century to come.

### Notes

1. We are indebted to Benedek Jávor. Furthermore we would like to thank Peter Roderick, Alice Vincent and several anonymous referees.
2. The debate on this question has become too extensive to be listed. See, for example: Schwartz 1978: 11-12; Parfit 1984: 351-361. For an overview of recent arguments, see: Tremmel 2010: 43-46.
3. On the legal situation in the United States, see: Bach/Weston 2009: 28-53.
4. United Nations General Assembly 1987: 54.
5. The concept of 'future generations' figures prominently not only in the preamble, but also in principles 1 and 2, see: United Nations Conference on the Human Environment 1972: 3.
6. European Communities 1973: 1-2.
7. European Commission 1975: 24-25.
8. European Communities 1975: 39-41.
9. European Communities 1976: 1-7.
10. European Communities 1979: 1-18.
11. European Communities 1985: 40-48.
12. European Communities 1982: 10-22.
13. European Union 1993: 1-20.
14. European Union 1993: 1-20.
15. UNESCO 1997.
16. UNECE 1998: 2.
17. UNECE 1998: 2.
18. European Union 2006: 13.
19. European Communities 1988: 11.
20. European Communities 1990: 24.
21. European Union 1998: 1.
22. European Union 1997: 7, 24.
23. European Union 2000: 8.
24. European Union 2008: 15, 17, 29.
25. European Commission 2001.

26. European Commission 2005.
27. European Commission 2009.
28. European Commission 2004.
29. An overview, including the wording of the respective passages, may be found in: Earthjustice 2007: 126-147; Tremmel 2006: 192-196.
30. European Union 2008: 196.
31. For example, we shall not discuss the strictly consultative French Council for the Rights of Future Generations, established by République Française (1993) and abolished by République Française (2003) after the council stopped functioning when its president stepped down as a reaction to renewed French nuclear testing. See: Mathieu 1999.
32. Dobson 1996: 133-134.
33. Ekelı 2009: 449-451.
34. Stein 1998: 439-441.
35. Tiihonen 2006: 79.
36. Deutscher Bundestag 2009: 2.
37. Deutscher Bundestag 2009: 3.
38. An unofficial translation of the Knesset law and its initial bill may be found in: Jávor/Rácz 2006: 197.
39. Jávor/Rácz 2006: 193.
40. Jávor/Rácz 2006: 192.
41. Jávor/Rácz 2006: 195-196.
42. Jávor/Rácz 2006: 197. Compare with Shlomo/Lamay 2006 92-93.
43. Shlomo/Lamay 2006: 109.
44. Magyar Köztársaság 1993.
45. Magyar Köztársaság 1993.
46. Magyar Köztársaság 1993.
47. Magyar Köztársaság 1993.
48. Shlomo/Lamay 2006: 95.
49. Shlomo/Lamay 2006: 96-98.
50. Gosseries/Jávor 2008.
51. Tiihonen 2006: 87.
52. European Union 2008: 17.
53. See also: Collins 2009: 323.
54. Gosseries/Jávor 2008.
55. Gál/Alvaro/Vigenin et al. 2008.

### References

Bach, Tracy and Weston, Burns (2009): Recalibrating the Law of Humans with the Laws of Nature: Climate Change, Human Rights, and Intergenerational Justice.

- [http://international.uiowa.edu/centers/human-rights/documents/CLI\\_Policy\\_Paper.pdf](http://international.uiowa.edu/centers/human-rights/documents/CLI_Policy_Paper.pdf). Viewed 5 June 2010.
- Collins, Lynda (2007): Environmental Rights for the Future? Intergenerational Equity in the EU. In: *Review of European Community and International Environmental Law*, Vol. 16 (3/2007), 321-331.
- Deutscher Bundestag (2009): Antrag der Fraktionen CDU/CSU, SPD, FDP und BÜNDNIS 90/DIE GRÜNEN. Einrichtung eines Parlamentarischen Beirats für nachhaltige Entwicklung. Drucksache 17/245, 17.9.2010.
- Dobson, Andrew (1996): Representative Democracy and the Environment. In: Lafferty, William M. and Meadowcroft, James (eds.): *Democracy and the Environment*. Cheltenham, Edward Elgar, 124-139.
- Earthjustice (2007): Environmental Rights Report 2007. <http://www.earthjustice.org/library/references/2007-environmental-rights-report.pdf>. Viewed 27 March 2010.
- Ekeli, Kristian (2009): Constitutional Experiments: Representing Future Generations through Submajority Rules. In: *The Journal of Political Philosophy*, Vol. 17 (4/2009), 440-461.
- European Commission (2010): Europe 2020. A strategy for smart, sustainable and inclusive growth, COM (2010) 2020 final.
- European Commission (2009): Mainstreaming sustainable development into EU policies, COM (2009) 400 final.
- European Commission (2005): On the review of the Sustainable Development Strategy, A platform for action, COM (2005) 658 final.
- European Commission (2004): Stimulating Technologies for Sustainable Development: An Environmental Technologies Action Plan for the European Union, COM (2004) 38 final.
- European Commission (2001): A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development, COM (2001) 264 final.
- European Commission (1975): Commission Recommendation of 20 December 1974 to Member States concerning the protection of birds and their habitats (75/66/EEC). In: OJ L 021, 28 January 1975.
- European Communities (1990): Conclusions of the Council, Dublin, 25-26 June 1990, SN/60/1/90.
- European Communities (1988): Conclusions of the Council, Rhodes, 2-3 December 1988, SN/4443/1/88.
- European Communities (1985): Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (85/337/EEC). In: OJ L 175, 05 July 1985.
- European Communities (1982): Council Decision of 24 June 1982 on the conclusion of the Convention on the conservation of migratory species of wild animals (82/461/EEC). In: OJ L 210, 19 July 1982.
- European Communities (1979): Council Directive of 2 April 1979 on the conservation of wild birds (79/409/EEC). In: OJ L 103, 25 April 1979.
- European Communities (1976): Council Directive of 8 December 1975 concerning the quality of bathing water (76/160/EEC). In: OJ L 031, 05 February 1976.
- European Communities (1975): Council Directive of 15 July 1975 on waste (75/442/EEC). In: OJ L 194, 25 July 1975.
- European Communities (1973): Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment. In: OJ C 112, 20 December 1973.
- European Parliament/ European Council/ European Commission (2000): Charter of Fundamental Rights, JO C 364 of 18 December 2000.
- European Parliament (2000): European Parliament resolution on the conclusions of the European Council meeting in Feira on 19 and 20 June 2000 (B5 0590/2000).
- European Union (2009): Regulation of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (EC 1367/2006). JO L 264, 25 September 2009.
- European Union (2008): Treaty of Lisbon. In: JO C 115/01 of 9 May 2008.
- European Union (1998): Decision of 24 September 1998 on the review of the European Community programme of policy and action in relation to the environment and sustainable development 'Towards sustainability' (2179/98/EC). In: JO L 275, 10 October 1998.
- European Union (1997): Treaty of Amsterdam. In: OJ C 340 of 10 November 1997.
- European Union (1993): Council Decision of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity (93/626/EEC). In: OJ L 309, 13 December 1993.
- Gál, Kinga / Alvaro, Alexander / Vigenin, Kristian et al. (2008): Written Declaration on the need to establish a Representation for Future Generations in the European Union (0070/2008), 1.9.2008.
- Gosseries, Axel / Jávör, Benedek (15 July 2008): Un ombudsman pour les générations futures. In: *Le Soir* (163/2008), 12.
- Jávör, Benedek / Rácz, Judit (eds.) (2006): Do we owe them a future? The opportunities of a representation for future generations in Europe. Budapest: Védegylet - Protect the Future.
- Magyar Köztársaság (1993): Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights (Ombudsman). Unofficial Translation. [http://jno.hu/en/?menu=legisl\\_t&doc=LIX\\_of\\_1993](http://jno.hu/en/?menu=legisl_t&doc=LIX_of_1993). Viewed 28 March 2010.
- Mathieu, Serge (1999): Question écrite n° 17086 de M. Serge Mathieu, Journal Officiel du Sénat, 15 July 1999, 2407.
- Parfit, Derek (1984): *Reasons and Persons*. Oxford: Oxford University Press.
- République Française (2003): Décret 2003-758 du 30 juillet 2003 abrogeant le décret 93-298 du 8 mars 1993, portant création du

Conseil pour les droits des générations futures, Journal Officiel 6 August 2003.

République Française (1993): Décret 93-298 du 8 mars 1993 portant création du Conseil pour les droits des générations futures, Journal Officiel 8 March 1993.

Schwartz, Thomas (1978): Obligations to Posterity. In Sikora, R. I. and Barry, Brian (eds.): Obligations to Future Generations. Philadelphia: Temple University Press, 3-13.

Shoham, Shlomo / Lamy, Nira (2006): Commission for Future Generations in the Knesset: lessons learnt. In: Jávör, Benedek/Rácz, Judit (eds.), Do we owe them a future? The opportunities of a representation for future generations in Europe. Budapest: Védegyelet - Protect the Future, 89-113.

Stein, Tine (1998): Does the Constitutional and Democratic System Work? The Ecological Crisis as a Challenge to the Political Order of constitutional Democracy. In: Constellations Vol. 4 (3/1998), 420-449.

Tiihonen, Paula (2006): Committee for the Future - a new institution to discuss the Future in Finland. In: Jávör, Benedek / Rácz, Judit (eds.), Do we owe them a future? The opportunities of a representation for future generations in Europe. Budapest: Védegyelet - Protect the Future, 72-88.

Tremmel, Joerg Chet (2009): A Theory of Intergenerational Justice. London: Earthscan.

Tremmel, Joerg Chet (2006): Establishing

intergenerational justice in national constitutions. In: Tremmel, Joerg Chet (ed.): Handbook of Intergenerational Justice. Cheltenham/ Northampton, MA: Edward Elgar, 187-214.

United Nations Conference on the Human Environment (1972): Only One Earth. Geneva: Centre for Economic and Social Information at United Nations European Headquarters.

UNESCO (1997): Declaration on the Responsibilities of the Present Generations Towards Future Generations. [http://portal.unesco.org/en/ev.php-URL\\_ID=13178&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13178&URL_DO=DO_TOPIC&URL_SECTION=201.html). Viewed 3 June 2010.

United Nations Economic Commission for Europe (1998): Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998. 38 ILM (1999).

United Nations Environmental Program (2003): Convention on the Conservation of Migratory Species of Wild Animals. [http://www.cms.int/pdf/convtxt/cms\\_convtxt\\_english.pdf](http://www.cms.int/pdf/convtxt/cms_convtxt_english.pdf). Viewed 3 June 2010.

United Nations General Assembly, 42nd session (1987): Report of the World Commission on Environment and Development: Our Common Future (A/42/42), 4 August 1987.

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Maja Göpel is a political economist with a focus on institutionalism. Since November 2006 Maja works for World Future Council Foundation as Director Future Justice.

Contact details:

World Future Council, Bei den Mühren 70, 20457 Hamburg, Germany

Email: [maja.goepel@worldfuturecouncil.org](mailto:maja.goepel@worldfuturecouncil.org)

Web: <http://www.worldfuturecouncil.org/>



Malte Arhelger is a political philosopher interested in questions of intergenerational ethics. He is currently working for the World Future Council as a Policy Advisor.

Contact details:

Head Office, Bei den Mühren 70, 20457 Hamburg, Germany

Email: [malte.arhelger@worldfuturecouncil.org](mailto:malte.arhelger@worldfuturecouncil.org)

Web: <http://www.worldfuturecouncil.org/>

## Crimes against Future Generations: Implementing Intergenerational Justice through International Criminal Law

by Sébastien Jodoin

*I*ntergenerational justice not only requires the adoption of best practices and policies, but also the prevention and repression of deleterious and morally blameworthy human behaviour which has severe impacts on the long-term health, safety and means of survival of groups of individuals. While many international crimes have indirect consequences on the well-being of present and future generations, it cannot be said that existing international criminal law is currently

well-placed to directly and clearly protect intergenerational rights. As such, the development of a new type of international crime, crimes against future generations, may be a promising avenue for implementing intergenerational justice. Such a crime would penalise acts or conduct that amount to serious violations of existing international law regarding economic, social and cultural rights or the environment.<sup>1</sup>

### Introduction

Intergenerational justice remains a largely abstract concept in international policy – it is not recognised in any binding instrument of international law. Although the notions of the rights or interests of future generations are referenced in a few non-binding international instruments, the legal means for directly enforcing or protecting these rights are non-existent. Given that international law tends to develop in an incremental and

progressive manner, I would argue that the indirect use of existing international legal obligations which are of relevance to future generations is probably the most viable way of effectively implementing intergenerational justice at the international level.

Although the development and application of a number of areas of international law could have beneficial impacts on the well-being of future generations, I consider that two such areas that are particularly critical for the rights of future generations: international economic, social and cultural rights and international environmental law. Indeed, there is little doubt that the urgent challenges experienced by vulnerable populations and communities living in conditions of squalor and denied the levels of nutrition, water, shelter, health, physical safety and livelihood required for basic survival as well as those associated with widespread environmental degradation have significant and lasting consequences for future generations.

A new approach is therefore required for addressing these threats to future generations. In this article, I discuss one such novel approach: the potential for protecting the rights of future generations through international criminal law.<sup>2</sup> My basic premise is that intergenerational justice not only requires the adoption of best practices and policies, but also the prevention and repression of deleterious and morally blameworthy human behaviour. I argue that certain acts or conduct which have severe impacts on the long-term health, safety and means of survival of groups of individuals are of such scale and gravity that they should be recognised as international crimes. To ensure consistency with existing international criminal law, I focus on acts or conduct that amount to serious violations of existing international law (regarding economic, social and cultural rights or the environment).

The idea of using international criminal law in this way thus seeks to build upon the considerable successes of the field of international criminal justice in the past fifteen years. Following the initial experience of setting up *ad hoc* international criminal tribunals for

Life can only be understood backwards; but it must be lived forwards.  
/ Søren Kierkegaard /

the conflicts in the former Yugoslavia and Rwanda in the mid-1990s, the international community established a permanent Inter-

national Criminal Court (ICC) based on the Rome Statute of the International Criminal Court (Rome Treaty) which was negotiated in 1998, entered into force in 2002 and had 111 parties as of 2010.<sup>3</sup> There exists, as a result, an established set of rules and mechanisms at both the national and international levels for holding individuals criminally accountable for breaches of fundamental norms of international law, which form a promising avenue for implementing intergenerational justice. Of course, the success and effectiveness of the ICC should not be over-

I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind.  
/ Thomas Jefferson /

stated, but as explained in the conclusion, the benefits of creating a new international crime are not by any means exclusively tied to its eventual prosecution by the ICC.

I proceed as follows. I first review the potential for using existing international crimes to protect the rights of future generations. I then focus on the creation of a new category of international crime, crimes against future generations, which would prohibit acts and conduct that have severe impacts on the long-term health, safety and means of survival of human groups and collectivities. I conclude by discussing the advantages and prospects of implementing intergenerational justice through international criminal law.

### Existing international crimes and the rights of future generations

In many ways, most international crimes have long-term consequences for affected persons or populations. By punishing and deterring the commission of crimes against humanity, war crimes and genocide, international criminal courts and tribunals can help protect successive generations from the future occurrence of such atrocities. In addition, international criminal justice also seeks to contribute to the peace and reconciliation of divided nations and regions, punishing as well as memorialising past harms and wrong-doing.<sup>4</sup> However, as will be seen below, existing international crimes, namely war crimes, crimes against humanity and genocide,<sup>5</sup> are of limited application to violations of economic, social and cultural rights and severe environmental harm.

#### War Crimes

War crimes are serious violations of international law applicable in situations of armed

conflict. There are, of course, a number of such violations which could infringe upon the rights of future generations, including violations of the principle of distinction, which protects civilians and civilian objects from attack,<sup>6</sup> and the principle of proportionality, which prohibits attacks which would have disproportionate effects on civilians or civilian objects in relation to the anticipated concrete and direct military advantage.<sup>7</sup>

Any number of the numerous provisions relating to war crimes in the *Rome Statute* could thus be used to prosecute conduct vio-

lating the rights of future generations.<sup>8</sup> One particular type of war crime is particularly relevant for the purposes of protecting the rights of future generations: the war crime of “[i]ntentionally launching an attack in the knowledge that such attack will cause [...] widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”<sup>9</sup> This crime is the only crime in the *Rome Statute* which specifically and directly covers harm caused to the environment and is based on Articles 35(3) and 55(1) of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I)*. The scope of this war crime is unfortunately rather restrictive as it excludes from criminalization judgments made within a reasonable margin of appreciation, in good faith, in difficult situations and often with incomplete information.<sup>10</sup> In addition, the crime requires the presence of all three elements of environmental damage which must be “widespread, long-term and severe.”

In any case, while this war crime could conceivably be used to prosecute one type of conduct which violates the rights of future generations (military acts which cause widespread, long-term and severe damage to the natural environment), like all war crimes, it could only be prosecuted if it was committed in connection with an armed conflict and as such it does not apply in peace-time.

#### Crimes against Humanity

Article 7 of the *Rome Statute* defines crimes against humanity as a series of prohibited acts, such as murder, extermination or tor-

ture, “committed as part of a widespread or systematic attack directed against any civilian population.” There are two prohibited acts in particular that could be used to prosecute acts or conduct that might also violate the rights of future generations: persecution<sup>11</sup> and other inhumane acts.<sup>12</sup>

The *Rome Statute* defines the offence as “[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.”<sup>13</sup> Other inhumane acts are defined in the *Rome Statute* as including any act which is of “a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”. As such, whether a given act falls within the category of other inhumane acts is a question to be assessed on a case-by-case basis.<sup>14</sup> The elements of the act that should be ‘comparable’ to enumerated acts are severity, character, infliction of mental or physical harm in fact, intent to cause harm, and nexus between act and harm.<sup>15</sup>

Using these two crimes to prosecute violations of the rights of future generations would require interpreting the elements of these crimes to cover violations of economic, social, and cultural rights. There is limited case law that supports such an expansive approach to the interpretation of these crimes. With respect to persecution, the *Kupreskic* Trial Chamber has held that “the comprehensive destruction of homes and property” constitutes “a destruction of the livelihood of a certain population” and thus “may constitute a gross or blatant denial of fundamental human rights, and, if committed on discriminatory grounds, it may constitute persecution.”<sup>16</sup> Most interpretations of the scope of persecution and other inhumane acts however have, in practice, been largely limited to violations of civil and political rights causing severe mental or physical harm.

Ultimately, the greatest impediment to prosecuting conduct harming the rights of future generations is the general legal requirement of crimes against humanity which requires that they be “committed as part of a widespread or systematic attack directed against any civilian population.”<sup>17</sup> The requirement of an attack against any civilian population encompasses any mistre-

atment of the civilian population of the same gravity as crimes against humanity.<sup>18</sup> The term “attack” refers to “a course of conduct involving the multiple commission of acts” amounting to crimes against humanity. The attack against any civilian population must moreover either be widespread or systematic in nature. The *Rome Statute* also introduces a policy element to the attack requirement as the acts must be committed “in furtherance of a State or organizational policy”.<sup>19</sup> As such, the *Rome Statute* requires for crimes against humanity that a State or organization, whether by its actions or exceptionally by its deliberate failure to take action, actively promote or encourage an attack against a civilian population.<sup>20</sup>

#### Genocide

Article 2 of the *Genocide Convention* defines genocide as a number of acts, such as killing or the forcible transfer of children, “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” Three of the underlying acts amounting to genocide could be used to prosecute conduct harming the rights of future generations: causing serious bodily or mental harm to members of the group (*Rome Statute*, Article 2(b)); deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (*Rome Statute*, Article 2(c)); and imposing measures intended to prevent births within the group (*Rome Statute*, Article 2(b)).<sup>21</sup>

It is the job of thinking people not to be on the side of the executioners.

/ Albert Camus /

In order to use these crimes for the purposes of protecting the rights of future generations, it would be necessary, as it was for the case for crimes against humanity, to expand the scope of these crimes to encompass violations of social, economic and cultural rights. The quintessential examples of acts causing serious bodily or mental harm include “torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs” and “the infliction of strong fear or terror, intimidation or threat.”<sup>22</sup> Likewise, the *ICC Elements of Crime* provide that these acts “include, but are not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.”<sup>23</sup> With respect to the deliberate infliction of condi-

tions of life calculated to bring about a group’s physical destruction, an ICTR Trial Chamber has held that it includes “circumstances which will lead to a slow death, for example, lack of proper housing, clothing, hygiene and medical care or excessive work or physical exertion” as well as “rape, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodations for a reasonable period”.<sup>24</sup> The *ICC Elements of Crime* largely reiterate the above definition, providing that conditions of life “may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.”<sup>25</sup> Finally, the offence of imposing measures intended to prevent births within the group has been defined as including sexual mutilation, sterilization, forced birth control, the separation of the sexes, the prohibition of marriages and rape.<sup>26</sup> Again, the possibilities of interpreting the material element of these crimes in a manner that would cover the types of human rights violations of concern to the rights of future generations are limited.

In any case, even if these crimes of genocide could be interpreted to cover acts that violate the rights of future generations, the general legal requirement of genocide would remain a serious barrier to its use for this purpose, requiring proof of “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.” Moreover, it should be noted that the definition of a group is limited to one of the enumerated grounds of nationality, ethnicity, race, or religion and does not encompass groups defined on other grounds.

#### Conclusion

The analysis above demonstrates that it might indeed be possible to use existing international criminal law to prosecute conduct having severe consequences on the rights of future generations. Most notably, the war crime of an attack which causes widespread, long-term and severe damage to the natural environment is of direct relevance to the rights of future generations. However, as this crime could only be used to prosecute acts which had been committed in connection with an armed conflict, it does not cover damage caused to the environment in peace-time. As for using crimes against humanity and genocide, this would require certain innovations in the applica-

tion of these crimes to cover the types of human rights violations and environmental harm which are of most concern to the rights of future generations. That said, the greatest impediments to the use of these two crimes are their general legal requirements which essentially restrict their application to situations involving mass violence or gross violations of civil and political rights.

In sum, while many international crimes have indirect consequences on the rights and interests of affected future generations, it cannot be said that existing international criminal law is currently well-placed to directly and clearly protect intergenerational rights.

### Crimes against Future Generations

#### *The Concept of Crimes against Future Generations*

Given the limitations of using existing international criminal law for prosecuting conduct harmful to the rights of future generations, in 2006, the Expert Commission on Future Justice of the World Future Council tasked the Centre for International Sustainable Development Law to provide advice and research on the development of a new international crime against future generations.<sup>27</sup> The definition of this crime presented below was further refined during workshops, consultations and meetings held with leading international judges and lawyers working in international criminal law, international human rights law and international environmental law from 2007 to 2010.<sup>28</sup> It is important to note that the initiative of developing crimes against future generations sought to produce a definition which would be consistent with the language and principles of the *Rome Statute*. The analysis below does not therefore discuss issues relating to standards of proof, defences and modes of liability as these are all governed by existing provisions in the *Rome Statute*.

The definition of crimes against future generations developed through this initiative reads as follows:

1. Crimes against future generations means any of the following acts within any sphere of human activity, such as military, economic, cultural, or scientific activities, when committed with knowledge of the substantial likelihood of their severe consequences on the long-term health, safety, or means of survival of any identifiable group or collectivity:

(a) Forcing members of any identifiable group or collectivity to work or live in con-

ditions that seriously endanger their health or safety, including forced labour, enforced prostitution and human trafficking;

(b) Unlawfully appropriating or acquiring the public and private resources and property of members of any identifiable group or collectivity, including the large scale embezzlement, misappropriation or other diversion of such resources or property by a public official;

(c) Deliberately depriving members of any identifiable group or collectivity of objects indispensable to their survival, including by impeding access to water and food sources, destroying water and food sources, or contaminating water and food sources by harmful organisms or pollution;

(d) Forcefully evicting members of any identifiable group or collectivity in a widespread or systematic manner;

(e) Imposing measures that seriously endanger the health of the members of any identifiable group or collectivity, including by impeding access to health services, facilities and treatments, withholding or misrepresenting information essential for the prevention or treatment of illness or disability, or subjecting them to medical or scientific experiments of any kind which are neither justified by their medical treatment, nor carried out in their interest;

(f) Preventing members of any identifiable group or collectivity from enjoying their culture, professing and practicing their religion, using their language, preserving their cultural practices and traditions, and maintaining their basic social and cultural institutions;

(g) Preventing members of any identifiable group or collectivity from accessing primary, secondary, technical, vocational and higher education;

(h) Causing widespread, long-term and severe damage to the natural environment, including by destroying an entire species or ecosystem;

(i) Unlawfully polluting air, water and soil by releasing substances or organisms that seriously endanger the health, safety or means of survival of members of any identifiable group or collectivity;

(j) Other acts of a similar character intentionally and gravely imperilling the health, safety, or means of survival of members of any identifiable group or collectivity.

2. The expression “any identifiable group or collectivity” means any civilian group or collectivity defined on the basis of geographic, political, racial, national, ethnic, cultural, religious or gender grounds or other grounds

that are universally recognized as impermissible under international law.

As the definition makes clear, crimes against future generations are not future crimes, nor crimes committed in the future. They apply instead to acts or conduct undertaken in the present which have serious consequences in the present and which are substantially likely to have serious consequences in the future. For all but one of the crimes, the immediate victims would be individuals alive at the time of the commission of the crime. The only exception is sub-paragraph (h) which would penalise severe environmental harm, without requiring harm to individual victims in the present. Just as crimes against humanity are not directly committed against all of humanity, crimes against future generations would not be directly committed against future generations either. Rather, they would penalise conduct that is of such gravity that it can be characterized as injuring the rights of future generations belonging to an affected group or collectivity. Evidently, the requirement of harm to victims or the environment in the present does not capture other acts or conduct which affect future generations without affecting present generations.

Like other international crimes, crimes against future generations are comprised of two parts: an introductory paragraph which sets out a general legal requirement that serves to elevate certain prohibited acts to the status of an international crime and a list of prohibited acts. The establishment of a crime against future generations would thus require the commission of one of the prohibited acts listed at sub-paragraphs 1(a) to (j) of the definition with knowledge of “the substantial likelihood of their severe consequences on the long-term health, safety, or means of survival of any identifiable group or collectivity.” This does not imply that the prohibited act must affect each and every member of the identifiable group or collectivity in question, but only that it must be committed against the members of the identifiable group or collectivity and be of such magnitude or scale that it is substantially likely to have the prohibited consequences on this identifiable group or collectivity in the long-term. Moreover, it is clear that a crime against future generations could be committed before these prohibited consequences listed in the general legal requirement materialised. This is similar to the crime of genocide, which does not require that each and every member of a group be eliminated

before an underlying act of genocide directed to this goal can be prosecuted.

That said, in the context of crimes against future generations, this requirement is a knowledge element, as for war crimes and crimes against humanity. It is not a special intent requirement, as for genocide, in order to avoid difficulties in proving that certain activities were undertaken with the intent to cause long-term harm to an identifiable group or collectivity. The knowledge element in the general legal requirement of the crime would be met if it were shown that a perpetrator knew of the substantial likelihood of the prohibited consequences listed in the general legal requirement or if they knowingly took the risk that these prohibited consequences would occur in the ordinary course of events.<sup>29</sup> Moreover, knowledge could be inferred from the relevant facts and circumstances of a given case,<sup>30</sup> such as, *inter alia*, the perpetrator's statements and actions, their functions and responsibilities, their knowledge or awareness of other facts and circumstances, the circumstances in which the acts or consequences occurred, the links between themselves and the acts and consequences, the scope and gravity of the acts or consequences and the nature of the acts and consequences and the degree to which these are common knowledge. The language of 'substantial likelihood' is drawn from the customary international law standard for the mental element of the mode of liability of ordering. It requires that the perpetrator knew that his or her acts would be substantially likely to have the prohibited consequences listed in the general legal requirement; the perpetrator need not know, therefore, that his acts or conduct are likely to be the *only* cause or the *sine qua non* cause of the prohibited consequences.<sup>31</sup>

Crimes against future generations would have a fairly broad scope of application. The introductory paragraph explains that they are intended to cover a wide range of acts or conduct and can be committed in peacetime and in war-time. In addition, the second paragraph adopts a broad definition of "any identifiable group or collectivity." This definition, drawing on a similar expression included in article 7(1)(h) of the *Rome Statute*, means that crimes against future generations would apply to a wide variety of discrete or specific human populations defined on the basis of shared geographic, political, racial, national, ethnic, cultural, religious, gender or other grounds.

### *Acts prohibited as crimes against future generations*

The table below sets out the purpose and sources for the prohibited acts listed in subparagraphs 1(a) to 1(j) of the definition of crimes against future generations. The table shows that crimes against future generations would penalise conduct that is already prohibited as a violation of international human rights law<sup>32</sup> or other international conventions or would extend the scope of application of conduct that is already prohibited as a crime against humanity and or a war crime.

### Conclusion

Although there is some potential for using

international criminal law to prosecute conduct having severe consequences for the rights of future generations, the limitations with the definitions of existing international crimes makes this option of limited utility. This is why the World Future Council initiated the project of creating crimes against future generations as the means for explicitly and clearly protecting the interests of future generations.

The creation of crimes against future generations would have two important benefits. First of all, it would make mechanisms and processes of individual criminal liability available at both the domestic and international levels for serious violations of eco-

| Sub-paragraph | Purpose  | Interpretative Sources  |
|---------------|--|---|
| 1(a)          | Penalises serious violations of the rights to liberty and security of the person and to freedom of residence and movement ( <i>International Covenant on Civil and Political Rights (ICCPR)</i> , arts. 9 and 12) and the rights to work of one's choosing and to work in safe and healthy conditions ( <i>International Covenant on Economic, Social and Cultural Rights (ICESCR)</i> , arts. 6(1) and 7(1)). | Draws on the crimes of forced labour and human trafficking found in the crime against humanity of enslavement ( <i>Rome Statute</i> , art. 7(1) (c)) and the crime against humanity of enforced prostitution ( <i>Rome Statute</i> , art. 7(1) (g)).    |
| 1(b)          | Penalises grave violations of the customary international law principle of permanent sovereignty over resources, which provides that the citizens of a state should benefit from the exploitation of resources and the resulting national development. <sup>33</sup>   | Extends a similar war crime of pillaging to the context of peace-time ( <i>Rome Statute</i> , art. 8(2) (b) (xvi)) and is also based on the crime of corruption as set out in article 17 of the <i>UN Convention against Corruption</i> . <sup>34</sup> |
| 1(c)          | Penalises serious violations of the right to life, referring in particular to the rights to food and water ( <i>ICESCR</i> , art. 11).   | Extends a similar war crime to the context of peace-time ( <i>Rome Statute</i> , art. 8(2) (v) (xxv)) and draws on the underlying act of genocide ( <i>Rome Statute</i> , art. 6(c)).   |
| 1(d)          | Penalises one of the most serious violations of the right to housing ( <i>ICESCR</i> , art. 11(1)).  | Draws on the general comment of the U.N. Committee on the <i>ICESCR</i> relating to the right to housing (General Comment no. 7).   |
| 1(e)          | Penalises one of the most serious violations of the right to health ( <i>ICESCR</i> , art. 12).  | Draws on the general comment of the U.N. Committee on the <i>ICESCR</i> relating to the right to health (General Comment no. 12) and extends a similarly worded war crime to the peace-time context ( <i>Rome Statute</i> , art. 8(2)(b)(x)).           |
| 1(f)          | Penalises serious violations of the right to culture ( <i>ICCPR</i> , art. 27 and <i>ICESCR</i> , art. 15).  | Draws on the previous drafts of the <i>Genocide Convention</i> which included the crime of cultural genocide. <sup>35</sup>   |
| 1(g)          | Penalises one of the most serious violations of the right to education ( <i>ICESCR</i> , art. 13).   | Draws on the general comment of the U.N. Committee on the <i>ICESCR</i> relating to the right to education (General Comment no. 13).  |
| 1(h)          | Penalises serious violations of the customary international law duty to prevent grave environmental harm and damages. <sup>36</sup>  | Based on a similarly worded war crime ( <i>Rome Statute</i> , Article 8(2) (b) (iv)).   |
| 1(i)          | Penalises serious violations of the right to life, particularly the rights to health, housing, food, and water ( <i>ICESCR</i> , arts. 11 and 12).   | Draws on the general comments of the UN Committee on the <i>ICESCR</i> relating to the rights to health, housing, food, and water (General Comments no. 12, 14 and 15).   |
| 1(j)          | Penalises serious violations of the rights protected by other sub-paragraphs.  | Draws on a similar catch-all provision for crimes against humanity ( <i>Rome Statute</i> , art. 7(1) (k)).  |

conomic, social and cultural rights and international environmental law. Indeed, an amendment to the *Rome Statute* of the ICC would impose an obligation on those States

**If there is no struggle, there is no progress.**

/ Frederick Douglass /

that ratify the amendment to investigate, arrest and prosecute perpetrators under their domestic criminal legal systems. This is in fact the primary obligation of states under the *Rome Statute* and whatever criticisms can be made of the ICC's effectiveness thus far, the ICC is an institution which is meant to complement domestic efforts to end impunity for international crimes. Indeed, it is only if a state party was unwilling or unable to investigate crimes against future generations, that the ICC would be granted the power to do so in the place of domestic authorities. In this regard, it is important to note that the ICC has the power to sentence a convicted person to a term imprisonment, to impose a fine and the forfeiture of proceeds, property and assets deriving directly or indirectly from a crime<sup>37</sup> as well as order an award of damages against a convicted person, entailing restitution, compensation, and rehabilitation.<sup>38</sup>

Second of all, beyond its immediate benefits in terms of potential prosecution at the national and international levels, the creation of crimes against future generations would give advocates and law-makers a new tool and concept for upholding the importance of certain norms and values and for criticising conduct in breach of these norms and values. The notion of an international crime is indeed one of the most important means through which the international community can condemn morally opprobrious behaviour. As such, whatever its faults may be, the fledging system of international criminal justice forms a stronger regime for penalising conduct harmful to the rights of future generations than what is currently available under international law.

The *Rome Statute* explicitly provides for the possibility of amending the provisions dealing with the crimes within the jurisdiction of the ICC.<sup>39</sup> Of course, there is no doubt that an effort to create a new international crime along the lines of crimes against future generations would have its detractors and critics. It is also obvious that this effort would likely take a number of years to bear fruit. Notwithstanding these serious

obstacles, there are two reasons to be optimistic about the prospects of a campaign to create crimes against future generations in the long-term.

The first reason is that the features and history of the field of international criminal law are broadly encouraging. Existing international criminal law includes certain elements which are of conceptual significance to the notion of a crime against future generations. To begin with, the harm caused by international crimes can often be collective in scope, as is the case for groups in the crime of genocide and civilian populations in crimes against humanity. Moreover, the history of international criminal law, particularly the development of crimes against humanity, demonstrates that expanding the scope of the application of international criminal law is not without precedent. Crimes against humanity emerged in international law in the wake of the Second World War as a creation of the *Charter of the International Military Tribunal at Nuremberg (Nuremberg Charter)*.<sup>40</sup> During the negotiations which led to the *Nuremberg Charter*, it became apparent that certain crimes committed by the Nazis did not fall within the purview of existing law, most notably those atrocities perpetrated by German forces against their own nationals. In order to resolve this lacuna, the Allies conceived of a third category of crimes, crimes against humanity, to fill the gap left by the provisions pertaining to crimes against peace and war crimes.<sup>41</sup> Initially, crimes against humanity were closely linked to other categories of international crimes as the *Nuremberg Charter* conferred jurisdiction over this category of crimes only to the extent that they were committed in execution of or in connection with war crimes and crimes against peace. Today, crimes against humanity consist of acts which can be committed in peace-time and which rise to the level of an international crime, not because of their connection with an armed conflict, but because of their level of gravity.<sup>42</sup> Just as crimes against humanity were developed in response to a gap in existing law, the creation of a crime against future generations seeks both to fill a gap in the law and to strengthen existing taboos regarding acceptable human conduct. As well, similarly to the evolution of crimes against humanity, many crimes against future generations also seek to criminalize in peace-time conduct which currently constitutes a war crime.

It is important to note that crimes against

future generations can be distinguished from other potential candidates for inclusion in the *Rome Statute*, such as drug trafficking or terrorism. In Rome, a majority of states opposed the inclusion of the latter crimes for three principal reasons: the different character of these crimes, the danger of overloading the ICC with less important crimes and the existence of effective systems of international cooperation in repressing these crimes.<sup>43</sup> It is certainly the case that agenda overload will pose an obstacle to the creation of crimes against future generations. On the other hand, unlike these crimes, crimes against future generations are of a similar character to other international crimes (i.e. they are violations of customary or treaty norms that are intended to protect values considered important by the international community and for which there is a universal interest in repressing)<sup>44</sup> and existing mechanisms for sanctioning violations of economic, social, and cultural rights and serious environmental harm are clearly inadequate.

The second reason to be optimistic is that while the idea of creating a new crime for protecting the rights of future generations certainly seeks to move international law forward, it does so in the spirit of attaching the appropriate penal consequences for behaviour which the international community has already recognised as being reprehensible. Indeed, crimes against future generations build upon international law by seeking to extend the scope of application of existing international crimes from war-time to peace-time or establish criminal liability for existing prohibitions in international law. In this second regard, given the principle that all human rights should be treated equally,<sup>45</sup> there is little justification for restricting the scope of international criminal law to the category of serious violations of civil and political rights only. In other words, the very creation of crimes against future generations is consistent with a key principle of international human rights law: that all rights are equal, interrelated and indivisible. It should be noted moreover that crimes against future generations, in seeking to protect economic, social and cultural rights, avoids the principal criticism which states and corporations have made in relation to these rights, namely that they are vague and impose positive obligations (to adopt certain conduct) rather than negative obligations (to refrain from certain conduct). Indeed, by focusing on the deliberate

commission of serious violations of economic, social and cultural rights, crimes against future generations provide a clear and 'negative' approach to these rights.

In any case, there are good reasons to think the dissemination and use of the concept of crimes against future generations might be beneficial regardless of any success in amending the *Rome Statute*. The concept of crimes against future generations could play a crucial role in demonstrating that serious breaches of international law, including violations of economic, social, and cultural rights and severe environmental harm, are morally wrong and deserving of condemnation in the strongest possible terms. Ultimately, the idea of using international criminal law for the implementation of intergenerational justice is therefore as much about punishing and deterring morally wrong conduct as it is about strengthening existing taboos about appropriate behaviour. On the whole, advocates and policy-makers concerned with intergenerational justice may want to increasingly consider the role that criminalization of certain actions could play in deterring, punishing and condemning reprehensible conduct harmful to future generations.

#### Notes

1. The views presented are the author's and do not represent the views of any organisation with which he is affiliated. This article shares some thoughts with Sébastien Jodoin, 'Crimes against Future Generations: A New Approach to Ending Impunity for Serious Violations of Economic, Social, and Cultural Rights and Severe Environmental Harm,' WFC & CISDL Legal Working Paper (March 2010). This and other relevant materials will soon be available at : [www.crimes-againstfuturegenerations.org](http://www.crimes-againstfuturegenerations.org).

2. I acknowledge the existence of other proposals for an international environmental court and or an international environmental criminal court. These are fundamentally different projects than the approach discussed here for a number of reasons. First of all, these projects focus on environmental crimes only while this article looks at violations of economic, social and cultural rights. Second, they are not consistent with existing international criminal law. For instance, while the project of Adolfo Perez Esquivel (Perez Esquivel / The Dalai Lama 2007) refers to new environmental crimes as crimes against humanity, the concept of crime against humanity has a specific definition in international

criminal law, which does not in fact cover environmental crimes and could not, as explained below, be amended to do so in a manner that would in fact address the problem of environmental harm. Likewise, the project of the International Court for the Environment Foundation (see International Court for the Environment Foundation. <http://www.icef-court.org/>.) refers to both State and individual responsibility for international crimes. However, the concept of a State crime simply does not exist in international law and international criminal law includes individual criminal liability only.

3. United Nations General Assembly 1998: arts. 15 and 17-19.

4. See generally on these different objectives of international criminal law, Drumbl 2007.

5. Although the crime of aggression is also included in the *Rome Statute*, its elements have not been defined and is not yet in force.

6. International Committee of the Red Cross 1977: arts. 51-52.

7. International Committee of the Red Cross 1977: arts. 51(5)(b), 57(2)(a)(iii) and 57(2)(b).

8. United Nations General Assembly 1998: arts. 8(2)(a)(ii)-8(2)(a)(iv), 8(2)(b)(ii), 8(2)(b)(iv), 8(2)(b)(x), 8(2)(b)(xx) and 8(2)(b)(xxv).

9. United Nations General Assembly 1998: art. 8(2)(b)(iv).

10. Pfitzer 1999: 149-151.

11. United Nations General Assembly 1998: art. 7(1) (h).

12. United Nations General Assembly 1998: art. 7(1) (k)).

13. United Nations General Assembly 1998: art. 7(1)(h).

14. *Prosecutor v. Kordic and Cerkez* 2001: paras 271-272.

15. *Prosecutor v. Kayishema* 1999: paras. 148-51.

16. *Prosecutor v. Kupreskic et al.* 2000: para. 631.

17. In addition to the general legal requirement, the *Rome Statute* requires with respect to persecution that it be committed in connection with another international crime and that it be committed with specific discriminatory intent.

18. *Prosecutor v. Kumarac* 2002: para. 86.

19. United Nations General Assembly 1998: art. 7(2)(a).

20. United Nations Preparatory Commission for the International Criminal Court 2000: art. 7(3).

21. United Nations General Assembly 1998: article 2(b); United Nations General Assem-

bly 1998: article 2(c); United Nations General Assembly 1998: art. 2(b).

22. *Prosecutor v. Seromba* 2008: para. 46.

23. United Nations Preparatory Commission for the International Criminal Court 2000: art. 6(b), fn. 3.

24. *Prosecutor v. Kayishema* 1999: paras. 115-16.

25. United Nations Preparatory Commission for the International Criminal Court 2000: art. 6(c), fn. 4.

26. *Prosecutor v. Akayesu* 2001: paras. 507-508.

27. The Expert Commission was set up by the World Future Council to develop new laws and policies in order to guarantee human security, ecological integrity and social equity in the interest of future generations (see [www.worldfuturecouncil.org](http://www.worldfuturecouncil.org)). The Centre for International Sustainable Development Law aims to promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law (see [www.cisd.org](http://www.cisd.org)).

28. For a complete analysis and commentary, see reference in introductory endnote to this article.

29. United Nations General Assembly 1998: art. 30(3) and *Prosecutor v. Kunarac* 2002: para. 102.

30. United Nations Preparatory Commission for the International Criminal Court 2000: para. 3.

31. *Prosecutor v. Blaskic* 2004: para. 42.

32. The references below are to United Nations General Assembly 1966 a or the United Nations General Assembly 1966 b.

33. Schrijver 1997: 390-392.

34. United Nations General Assembly 2003.

35. Economic and Social Council 1948: art. HI.

36. See United Nations Conference on the Human Environment 1972: principle 21. See also United Nations Yearbook of the International Law Commission 1991: at 107.

37. United Nations General Assembly 1998: art. 77.

38. United Nations General Assembly 1998: art. 75.

39. United Nations General Assembly 1998: arts. 121(5) and 1231(1).

40. Cassese 2003: 70.

41. Bassiouni 1992: 17, 22-24; Cassese 2003: 68-69.

42. Cassese 2003: 64-65; Robinson 2001: 57.

43. Hebel and Robinson 1999: 81, 86.

44. Cassese 2003: 23.

45. World Conference on Human Rights 1993: para. 5: "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."

## References

Bassiouni, M. Cherif (1992): *Crimes against Humanity in International Criminal Law*. Dordrecht: Martinus Nijhoff Publishers.

Cassese, Antonio (2003): *International Criminal Law*. Oxford: Oxford University Press.

Centre for International Sustainable Development Law. <http://www.cisd.org/>. Viewed on 25 May 2010.

Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 284.

Drumbl, Marc (2007). *Atrocity, Punishment, and International Law*. Cambridge: Cambridge University Press.

Economic and Social Council (1948): Report of the Ad Hoc Committee on Genocide, 5 April- 10 May 1948. Official Records of the Economic and Social Council, Third Year, Seventh Session, Supplement No. 5 (E/794).

Perez Esquivel, Adolfo / The Dalai Lama (2007): *Appeal on Environmental Crimes*. [http://www.adolfoperesquivel.com.ar/Adolfo%20IAES/SUPPORT\\_APPEAL.pdf](http://www.adolfoperesquivel.com.ar/Adolfo%20IAES/SUPPORT_APPEAL.pdf). Viewed on 25 May 2010.

Pfirter, Didier (1999): Article 8(2)(b)(iv) – Excessive Incidental Death, Injury, or Damage. In: Roy S. Lee, (ed.): *The International Criminal Court: The Making of the Rome Statute*. Boston: Kluwer Law International, 149-151.

Prosecutor v. Akayesu, ICTR-96-4-T, Appeal Judgment, 1 June 2001.

Prosecutor v. Blaskic, IT-95-14-A, Appeal Judgement, 29 July 2004.

Prosecutor v. Kayishema, ICTR-95-1, Trial Judgment, 21 May 1999.

Prosecutor v. Kordic and Cerkez, IT-95-14/2, Trial Judgment, 26 February 2001.

Prosecutor v. Kunarac, Case No. IT-96-23, Appeal Judgment, 12 June 2002.

Prosecutor v. Kupreskic et al., IT-95-16-T, Trial Judgement, 14 January 2000.

Prosecutor v. Seromba, ICTR-2001-66-A, Appeal Judgment, 12 March 2008.

International Committee of the Red Cross (1977): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.

International Court for the Environment Foundation. <http://www.icef-court.org/>. Viewed on 25 May 2010.

Robinson, Darryl (2001): *The Elements of Crimes Against Humanity*. In Roy S. Lee (ed.): *The International Criminal Court: Elements of Crime and Rules of Procedure and Evidence*. Ardsley, NY: Transnational Publishers Inc., 80-108.

von Hebel, Herman / Robinson, Darryl (1999): *Crimes within the Jurisdiction of the Court*. In Roy S. Lee (ed.): *The International Criminal Court. The Making of the Rome Statute. Issues. Negotiations. Results*. The Hague: Kluwer Law International, 79-124.

Schrijver, Nico (1997): *Permanent Sovereignty over Natural Resources. Balancing Rights and Duties*. Cambridge: Cambridge University Press.

United Nations Conference on the Human Environment (1972): Stockholm Declaration on the Human Environment, UN Doc. A/C.48/14 (1972), 11 ILM 1461.

United Nations General Assembly (2003): *United Nations Convention against Corruption*. 31 October 2003, 2349 U.N.T.S. 41.

United Nations General Assembly (1998): *Rome Statute of the International Criminal Court*, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Crimi-

nal Court, July 17, 1998, U.N. Doc. A/CONF.183/9.

United Nations General Assembly (1966 a): *International Covenant on Civil and Political Rights*, December 16, 1966, 999 U.N.T.S. 171.

United Nations General Assembly (1966 b): *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, 993 U.N.T.S. 3.

United Nations Preparatory Commission for the International Criminal Court (2000). *Report of the Preparatory Commission for the International Criminal Court, Addendum: Finalized Text of the Elements of Crimes*, U.N. Doc. PCNICC/2000/INF /3/Add.2.

United Nations Yearbook of the International Law Commission (1991): *Draft Code of Crimes against Peace and Mankind*. Vol. II, Part Two, UN Doc. A/CN.4/SER.A/1991/Add.I (part 2).

World Conference on Human Rights (1993): *Vienna Declaration and Programme of Action*, as adopted by the World Conference on Human Rights on 25 June 1993, U.N. Doc. A/CONF.157/23.

World Future Council. <http://www.worldfuturecouncil.org/>. Viewed on 25 May 2010.

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Sébastien Jodoin is a Legal Research Fellow with the Centre for International Sustainable Development Law, an Associate Fellow with the McGill Centre for Human Rights and Legal Pluralism and a Public Interest Law Fellow with Amnesty International Canada.

Contact details:

Centre for International Sustainable Development Law (CISDL), Chancellor Day Hall, 3644 Peel Street, Montreal, Quebec H3A 1W9, Canada.

Email: [sjodoin@cisd.org](mailto:sjodoin@cisd.org)

# The Parliamentary Commissioner for Future Generations of Hungary and his Impact

by Éva Tóth Ambrusné

**A**bstract: *The Parliamentary Commissioner for Future Generations of Hungary is a fairly new and unique institution that was established in 2008. The Commissioner is provided with strong and very specific competences and powers to protect the interests of future generations. The publication of his first annual report<sup>1</sup> to Parliament is a great opportunity to assess the effectiveness of the tools he can apply to facilitate intergenerational equity.*

## Establishment of the Office of the Parliamentary Commissioner for Future Generations<sup>2</sup>

The idea of institutionalizing the representation of future generations in Hungary first emerged more than twenty years ago. The idea became reality in the summer of 2008 when the Office of the Parliamentary Commissioner for Future Generations (hereinafter: the Commissioner) of Hungary started operating. The road to victory was, however, not easy. “Protect the Future”, a Hungarian civic organisation, invested over the years substantial efforts into convincing political parties of the importance that future generations be heard in the present. The first round of negotiations between 2000 and 2002 was not successful. Two Members of Parliament (MPs) submitted a bill to Parliament, two parliamentary committees even discussed the draft, but the major opposition party did not support the bill. Reaching political consensus, a two-thirds majority in Parliament,<sup>3</sup> seemed very distant at this point. Protect the Future intensified its campaign again in 2006 after it started promoting the idea of European level representation for future generations. The organization made an excellent strategic decision when it chose the year of 2006 for its renewed activities. Political parties were more willing to stand behind the proposal in an election year, because lending support to a noble initiative such as representation of future generations was assumed to resonate well with most voters. Two Parliamentary committees again discussed the bill and passed the initiative this time. Unfortunately, the parliamentary term ended without a final vote.

Protect the Future realized in 2007 that an all-party deal was indispensable. The initiative gained important momentum when the organization succeeded in convincing all the five parliamentary parties. One party, the Alliance of Free Democrats, considered inexpensive state administration particularly important, therefore, it did not support the bill as long as it entailed the establishment of an additional state institution. The conflict was resolved by proposing the elimination of the Deputy Civil Rights Commissioner position from Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights<sup>4</sup> (hereinafter: ‘the Ombudsman Act’). The major opposition party was convinced by emphasizing the strong powers of the new ombudsman to investigate state authorities. The governing party supported the bill since its two MPs submitted it to Parliament originally.

Two further circumstances contributed to the success of Protect the Future in striking the all-party deal. First, every actor in Hungarian politics needed some relief from the political tension in the country due to the leaking of the Prime Minister’s speech on withholding national budget information before the election. The initiative of Protect the Future provided a great opportunity to show voters that the parties were still capable of cooperation. Second, sensitivity of politics towards environmental protection issues gained strength due to intensified international activity in the field; both the Fourth IPCC Assessment Report and the Stern Report were released around this time.

All government, indeed every human benefit and enjoyment, every virtue, and every prudent act, is founded on compromise and barter.

/ Edmund Burke /

Protect the Future made another excellent strategic decision when it organized a press conference immediately following a round-table discussion of political parties. Once the all-party deal was released to the press, none of the parties could afford to back down from it. Nor could they afford to fight over

the most important competences of the new ombudsman laid down in the original proposal of Protect the Future. Fortunately, 85 percent of the originally proposed competences remained in the text.

The Hungarian Parliament passed the amendment of the Ombudsman Act<sup>5</sup> with near unanimity in December 2007, thereby establishing the institution of the Parliamentary Commissioner for Future Generations. The new Commissioner was elected only in May 2008, after three failed rounds of voting.<sup>6</sup> The Office of the Parliamentary Commissioner for Future Generations has been operating with a full staff of 35 including 19 lawyers, two economists, one engineer, two biologists, a climate change expert and a medical doctor since the last quarter of 2008. The Office comprises of four units: Legal Department, Strategy and Science Department, Department for International Relations and Coordination Department.

## Impact of the Parliamentary Commissioner for Future Generations

Several criteria can be applied to measure the impact of the Commissioner. The following five criteria are only preconditions of the future impact. First, the Commissioner must be free of any political influence. Second, the Commissioner must have the right competences which enable him to affect the lives of future generations in a positive way. Third, the Commissioner must actively use these competences, i.e. concrete efforts must be demonstrated. Fourth, the concrete measures that the Commissioner has the power to initiate must be effective in theory at least. Fifth, the institution must receive proper funding. If these five preconditions are met then there is a chance that the Commissioner can have a positive impact on the lives of future generations. Determination of whether the Commissioner’s actions will or will not have a real impact in the future is rather difficult for several reasons. There are several complex and interacting factors that impact the lives of future generations even in smaller fields of actions. Finally, it is very difficult to determine the right methodology for the measurement of long-term impact.

## Independence and long-term vision

Long-term thinking requires freedom of any political influence. Most political parties have a tendency to plan from one election to another. The Commissioner is responsible only to Parliament. Only a two-third majority of Parliament can terminate his mandate upon certain exceptional reasons. His long-term vision and independence is also ensured by the length of his term of office, which exceeds the election cycle by two years, six years altogether. The Commission

A leader is someone who steps back from the entire system and tries to build a more collaborative, more innovative system that will work over the long term.

/ Robert Reich /

ner reports to Parliament annually, while the formal acceptance of the report is not a condition of his further operation. Furthermore, funding of the institution is also determined only by Parliament. The Office of the Parliamentary Commissioner for Future Generations is provided funding from the state budget annually. It received 266.8 million HUF in 2009 and 259.2 million HUF in 2010, which can be considered as adequate support. It can be stated that the institution meets the first precondition, i.e. independence and long-term thinking, of the potential to impact future generations.

Independence of the institution has encouraged numerous organizations to seek our partnership. For instance, the Association of Administrative Judges and the Commissioner organized a workshop for judges where colleagues of the Commissioner and the European Commission gave presentations on EU environmental law. Civic organizations and even ministries often rely on our team of lawyers to help with legal analyses. The Commissioner has also played the role of a mediator several times between civic organizations and ministries or headed their working group. The working group on access to information held by nuclear power plants or the ad hoc expert group working out Hungary's strategy against the European Union's authorisation of Genetically Modified Organisms (GMOs) must be mentioned as eloquent examples.

The Climate Outlook Project (See Section V.3.2.) and the Project on Sustainable Communities (See Section V.3.4.) are excellent examples of the Commissioner's long-term strategic pro-active work plan. Both projects

develop and promote sustainable future scenarios and models.

## Competences of the Parliamentary Commissioner for Future Generations

The Hungarian Constitution provides for the right to a healthy environment but it does not contain any references to future generations. The Constitutional Court, however, in its decision<sup>7</sup> interpreted the Constitution as obliging the state to preserve the quality of the natural environment for future generations. In another decision,<sup>8</sup> the Constitutional Court also stated that the fundamental right to life and human dignity creates the obligation for the state to provide institutionalized protection for the living conditions of future generations. The Ombudsman Act, therefore, satisfies this obligation by creating a new institution not only for the protection of present but also the future generations' right to a healthy environment.

The Hungarian ombudsman system consists of the 'general ombudsman' responsible for civil rights in general and three special ombudspersons in charge of ethnic and minority rights, privacy and freedom of information and representation of future generations. Establishment of a special ombudsman institution is justified when the identity of those whose constitutional right is violated can not be determined unambiguously or the informational unbalance between those who violate the right and whose right is violated can not be resolved by providing state assistance to representation in court. The Commissioner met both of these criteria.

The reasoning of the amendment of the Ombudsman Act provides a good point of departure for introducing the competences of the Commissioner. The aim of the legislation is to protect the nature-related conditions of the life and health of present and future generations; to preserve the common heritage of mankind and provide solutions to the common concerns of mankind; to preserve freedom of choice, the quality of life and the unobstructed access to natural resources for future generations. Therefore, it must be the Commissioner's duty to represent future generations when long-term decisions are made significantly affecting their living conditions and to facilitate enforcement of laws related to the state of the environment.

Accordingly, Section 27/B. (1) of the Ombudsman Act lays down the following com-

petences for the Ombudsman: monitoring, assessment and control of the enforcement of legal provisions ensuring sustainability and improvement of the environment and nature as well as investigation of any improprieties he becomes aware of relating to these. The term '*legal provisions ensuring sustainability*' extends the competences of the Commissioner further than monitoring enforcement of strictly defined environmental protection cases. It is difficult to precisely define and determine the boundaries of the concepts of environmental protection law and sustainability. Therefore, it was crucial to decide on the main functions and competences of the Commissioner within the limits of the Constitution and the Ombudsman Act immediately after commencing operations. Moreover, the Commissioner included in its internal Rules of Investigation<sup>9</sup> mandatory determination of its competence as a very first step of the investigation procedure. However, the Commissioner sometimes still faces resistance with regard to his competence when he investigates cross-cutting issues.

Three factors affected the Commissioner's decision on the details of his competences: environmental protection laws and principles (especially the integration principle and precautionary principle), the scientific and public discourse leading to the establishment of the institution and expectations of the public.<sup>10</sup>

## Competences determined by law

The above mentioned decisions of the Constitutional Court set the broadest framework of the Commissioner's work. Article 4 of Act LIII of 1995 on the General Rules of Environmental Protection provides a more precise definition of an 'environmental case': any activity, omission of activities, decision, measure etc., relating to the elements of the environment (land, air, water, biodiversity and their components), their system or structure. The same Act determines all the following areas that must be regulated with respect to environmental protection, such as energy, land and soil protection, transportation, spatial development, water and waste management, nature and landscape protection and the protection of historical monuments. These cross-cutting issues establish the Commissioner's competence as long as they affect the relationship between man and the environment, the protection of the environment, and the conditions of sustainable development.

In addition to the narrowly defined environmental protection cases, the Commissioner considers certain economic, social and institutional issues relevant to the sustainability of nature and the environment, therefore, he plays an active role in these areas as well. Integrating environmental protection aspects into state budget planning process stands out of the sustainability related economic issues. That is why the Commissioner issued a statement that analyzed the draft state budget with regard to the implications for sustainability. Sustainability of state subsidies provided to the transportation, energy or agricultural sectors are also closely followed.

If the fairest features of the landscape are to be named after men, let them be the noblest and worthiest men alone.

/ Henry David Thoreau /

Awareness raising, environmental education and support for sustainable communities all contribute to the social aspects of sustainable development and represent such additional fields where the Commissioner is also actively involved. The joint commission on environmental education and awareness raising with the National Sustainable Development Council demonstrates the Commissioner's efforts very well in this area. The joint commission has already issued a statement on environmental high school and secondary school education and organised meetings with environmental journalists.

The Commissioner addresses the institutional requirements of sustainability as well, such as access to and the quality of environmental information and the framework of public participation.

The Ombudsman Act mandated the Commissioner with rather significant competences<sup>11</sup> in relation to the European Union decision-making process, that is, the participation in the elaboration of the Hungarian positions represented in the institutions of the European Union. Unfortunately, the Commissioner has not been able to fulfil this obligation yet because he has not been provided with the necessary documents by the Government. Monitoring and facilitating proper application of European Union law is also particularly important in the work of the Commissioner since 80-90 percent of the Hungarian environmental legislation is transposed from European Union

law. In the field of international law, the Commissioner monitors and assesses the domestic enforcement of international conventions in the following areas: environmental and nature protection, the common heritage and the common concerns of mankind (such as world heritage).

#### *The scientific and public discourse facilitating the establishment of the Commissioner and public expectations*

As a secondary source for the interpretation of the Commissioner's competences, one cannot overlook the preparatory work of Protect the Future and scientific contribution of President László Sólyom and Prof. Boldizsár Nagy. The first proposal for the establishment of the new institution envisaged broader competences for the Commissioner. From the broader concept of intergenerational equity, only protection of the environment of the present generation remained in the adopted legislation which nevertheless inevitably contributes to the preservation of living conditions of future generations. However, the Commissioner still feels an obligation to pursue his activities in the field of environmental law with the greatest consideration for the interests of future generations in line with expectations of the public.<sup>12</sup>

#### *A case when the Commissioner's competence was debated*

The proposal of the Hungarian State Holding Company regarding reorganization of the management of public water utility and wastewater systems generated numerous complaints. The petitioners were concerned about the necessity of the decision and the reasons provided by the company. They raised more general problems as well, such as safety of the drinking water supply and water management.

Operation of water utility companies and strategic decisions relating to them significantly affect the state of water reserves and the safety of healthy drinking water supply. The Commissioner declared his competence in the case because water is a national asset and part of the natural heritage. Its preservation and protection are critical to human health and satisfactory life conditions. The absence of protection jeopardises the health of present generation as well as the existence of future generations.

#### *Conclusion*

Competences of the Commissioner are not

as comprehensive as the list of fields in the UNESCO Declaration on the Responsibilities of the Present Generations Towards Future Generations but a reasonable number of areas are covered. They are also capable of moving forward all the Planetary Obligations<sup>13</sup> of present generations towards future generations as determined in the doctrine of Intergenerational Equity developed by Professor Edith Brown Weiss. Therefore, the second precondition of possible impact<sup>14</sup> on future generations is also met.

#### **Activities and the impact of the Commissioner**

The third precondition of future impact besides long-term vision and the right competences is the Commissioner's actual activity. Activities of the Commissioner in the above mentioned fields can be broken down into three categories: investigation, parliamentary advocacy, scientific and strategic research.

#### *Investigation*

Investigation of constitutional improprieties constitutes the primary duty of the Commissioner. The framework of the procedure is laid down in the Ombudsman Act and the details are elaborated by the internal Rules of Investigation.

The basis of the Commissioner's investigation is the same as the General Ombudsman's procedure<sup>15</sup> but his powers are stronger. The official reasoning of the Ombudsman Act explains this difference with the special nature of environmental and nature protection cases: the delayed or illegal actions of the administrative authorities often result in extremely high or immeasurable costs and irreversible damage to the environment.

Anyone can submit a petition to the Commissioner's Office and investigations may even be launched *ex officio*. Only two restrictions apply: cases where the final administrative decision was made more than one year ago, and where a court procedure has been launched for the review of the resolution or a final court decision was taken. The investigation starts with drafting an investigation plan and organizing an investigation team, consisting of lawyers, including an international lawyer if necessary, and an expert scientist of the investigated environmental field (e.g. biologist, environmental engineer). The method of cooperation between the different fields and departments reflects the principle of integration. The Commissioner and his colleagues must be allowed to

enter any premises and to have access to any documents during their fact finding without the court's permission. The investigation concludes in the statement of the Commissioner. The final version of the statement is drafted in an iterative process; every interested party is invited to comment the drafts of the statement.

The Commissioner has received 422 complaints in the second half of 2008 and in 2009. Investigations have been launched in 271 cases and completed in 97 cases. In 37 cases the Commissioner issued a statement and found improprieties in 26 cases. Unfortunately, there is a substantial backlog. It can be explained by the fact that we are a very new institution, the structure and methodologies of the office had to be established simultaneously with the training of staff.

The Ombudsman Act provides the Commissioner with very specific measures<sup>16</sup> he can take in order to protect the environment and facilitate sustainable development. Measures at his disposal are included in the statements concluding the investigations. The investigated authorities, organizations and private persons must respond to the Commissioner's statement within a certain period of time. This is the first point in the procedure where the Commissioner receives feedback on his work and can measure the direct effect of his statements.

The different measures available to the Commissioner can have very different impacts, therefore, it is reasonable to analyse them separately:

#### 1. Recommendations

The Commissioner issues recommendations, when constitutional improprieties are discovered, to the authority having brought about the impropriety or to the supervisory authority thereof as well as to private persons and organizations. In addition to specific recommendations for remedy, the Commissioner may also issue general recommendations. Recommendations do not have *direct* legal effect, i.e. they are not binding, which reduces the probability of their impact. The Commissioner must convince addressees of his recommendations that statements are correct and recommended measures are necessary and reasonable. Careful fact finding and sound legal analyses are therefore crucial to the acceptance of recommendations. In order to increase the probability of compliance with recommendations, the

Commissioner often takes advantage of media publicity, which has proved to be an effective tool of applying pressure on authorities and organization addressed in the statements.

#### 2. Measures of direct legal effect

In addition to 'soft' recommendations the Commissioner may also undertake measures of direct legal effect. First, the Commissioner may seek the suspension of the execution of administrative decisions if *prima facie* it appears illegal and its implementation may result in irreversible damage to the environment. Second, the Commissioner may call on any person or organisation to stop any activity that harms the environment. The person addressed has to respond within a deadline set by the Commissioner. In the case of an unsatisfactory response, the Commissioner may seek the suspension of the activity in court. Third, the Commissioner may initiate or participate in all applicable administrative and judicial review procedures. He may appeal against any environmental administrative decision and/or seek the judicial review thereof. He may intervene in court procedures on behalf of any party seeking the review of administrative decisions relating to the environment.

The above measures demonstrate that the Ombudsman Act has provided the Commissioner with strong powers. In fact, the Commissioner stands out from the other three ombudsmen (the Commissioners for data protection, national and ethnic minority rights, and civil rights) with respect to his powers. It can be concluded that these tools are capable of having a profound impact on the environment and the lives of present and future generations as well.

Provisions of the internal Rules of Investigation ensure mandatory monitoring of the enforcement of statements. This enables the Commissioner to take the necessary further steps in case of non-compliance despite positive first responses to the statement. A follow-up investigation has been launched in the case of the Green Investment Scheme administered by the Ministry of Environment and Water. The Commissioner will review if the Ministry remedied improprieties related to the allocation of Kyoto units sale revenues.

Examples of cases where the Commissioner's investigation and statement generated direct positive impact:

1. The municipality of District XV. in Budapest planned to amend its spatial plan in order to allow higher building density. The area of the intended development is located near a crowded motorway and experiencing substantial environmental pressure already with noise and air pollution levels exceeding the limit values. The Commissioner came to the conclusion that further increasing the number of residential units and decreasing the exceptionally high ratio of green areas in this location would be the source of further environmental problems. The Commissioner stated that the development would not be compatible with the principle of sustainable development. The statement emphasized the importance of considering environmental aspects in spatial planning procedure. The municipality did not pass the spatial plan and decided to have an impact assessment prepared in line with the Commissioner's conclusions.

2. The preliminary spatial plan of the municipality of Piliscsaba foresaw the construction of an underground water reservoir on a karst site for drinking water and bottling water for commercial purposes. Since the water balance of the area is already negative, the planned exploitation of water was therefore deemed unacceptable. The municipality assembly ordered the review of the planning measure.

3. The Commissioner reviewed the draft smog alert plan of the city of Miskolc. A smog alert plan is a local ordinance laying down emergency measures to decrease air pollution. The draft plan did not include clear definitions of crucial terms, such as 'smog situation'. The Commissioner stated that unclear terms prevent effective implementation and might result in delayed action. The assembly of the municipality accepted the Commissioner's recommendations and revised its draft.

4. Two petitioners complained about the excessive noise level generated by a neighbouring fibre-board factory in the city of Mohács. The investigation established that operation of the factory caused excessive noise pollution, therefore, the environmental inspectorate should have ordered the operator to submit an action plan for noise reduction. The Commissioner also found that the inspectorate omitted to impose any fines. As a result of the Commissioner's statement the authorities carried out a noise

level measurement and decided to take the necessary measures.

Examples of cases of no direct impact:

1. A civic organisation submitted a complaint against a planned and authorised power plant in the buffer zone of a world heritage site in the city of Szerencs. The Commissioner's investigation determined that the power plant would have a negative effect on the site. Traditional wine growing and the cultural landscape that had earned the title of World Heritage would be endangered by energy grass production. Energy efficiency and impacts on traffic were also among the numerous problems the Commissioner found. Nevertheless, no authority assessed the impacts of the project on the world heritage site in the authorisation procedure. The supervisory authority rejected the Commissioner's recommendations and the court also decided in favour of the authority. One aspect of the case was successful however. The investigation found that the World Heritage Convention was not implemented properly in Hungary, therefore, the Commissioner made recommendations on the preparation of a World Heritage Act. The Ministry of Culture and Education accepted the recommendation and even involved the Commissioner in the drafting procedure.

2. The assembly of the municipality of Páty passed an ordinance allowing development of a large golf course, a hotel, and 1,400-1,600 residential units. The Commissioner concluded in his statement that the development does not comply with the Budapest Agglomeration Act<sup>17</sup> since the construction intrudes into the protected zone between settlements. Furthermore, it was viewed with concern that solely the interests of the developer governed the spatial planning procedure and were treated as superior over public interest. Cumulative impacts were not properly assessed either. Finally, the development would worsen environmental problems in the agglomeration of the capital city of Budapest. The assembly refused the Commissioner's statement, therefore, the Commissioner will turn to the Constitutional Court for review.

### *Policy Advocacy*

The Commissioner must be consulted on every draft legislation and governmental initiative effecting the environment and sustainable development.<sup>18</sup> Moreover, he may express his opinion on long-term municipal development and spatial plans or

other plans and concepts of municipalities directly affecting the lives of future generations.<sup>19</sup> He may even present his position to the parliamentary committees and he is one of those few who may take the floor during plenary sessions of Parliament.<sup>20</sup>

The Commissioner might find in the course of an investigation that a legislative provision violates the right to a healthy environment or his comments in the legislative consultation procedure were neglected. In these cases the Commissioner may initiate constitutional review of the legal norm with the Constitutional Court.<sup>21</sup> He may also suggest the national or municipal legislator to amend existing or adopt new legislation.<sup>22</sup>

The Commissioner received 119 government initiatives and participated in 81 consultation procedures concerning legislative proposals in 2008 and 2009. He initiated the adoption or amendment of 17 legislative proposals in these two years. He initiated one constitutional review with the Constitutional Court and is planning on filing four further petitions in the near future. The Commissioner presented most of his substantial proposals to the relevant parliamentary committees (Committee on Environmental Protection, Committee on Budget, Finance and Audit Office, Committee on Agriculture) but has not taken the floor in the plenary session of Parliament. Members of the Commissioner's team actively participated in 130 conferences in 2008 and 2009. The Commissioner organised three conferences to address greening the budget, indicators of sustainability and the Climate Summit in Copenhagen and beyond.

The Commissioner appeared in 353 press articles on 473 pages. The online and printed media appearances are estimated to reach 84 million readers. 258 radio and television programs discussed the work of the Commissioner.

The Ombudsman Act provided the Commissioner with a very powerful tool when it allowed his participation in the legislative consultation procedure. He has the chance to shape long-term decisions and prevent complaints at the root. This is especially true for the spatial plans of fast growing settlements that set the road for environmental complaints if drafted without careful attention to environmental and sustainability aspects.

Unfortunately, the Commissioner cannot

exercise this power to its fullest potential. Sometimes he is not provided with the draft legislation soon enough to be able to make a substantial contribution. Furthermore, he is completely excluded from the adoption of negotiating positions in the national EU decision-making process.

Cases where the Commissioner's advocacy activity generated direct positive impact:

1. The Commissioner was successful in advocating for state financing of agricultural gene banks. In his letters, he called the attention of the Agricultural Minister and Parliament to the risks that lack of financing and privatisation of gene banks carried. Hungary has the third richest agricultural gene pool in the European Union. The importance of gene banks is evident when considering new ecological and economical challenges as a result of climate change. Decreasing diversity of agricultural plants irreversibly increases vulnerability of the food supply.

2. The Commissioner identified several provisions in the draft Forestry Act laying down less stringent rules on forest management. He pointed out that reducing the power of nature protection authorities and supervision in forestry matters endangers the protection of forests. The Commissioner presented his statements to the Committee on Environmental Protection of Parliament

If you cut down a forest, it doesn't matter how many sawmills you have if there are no more trees.

/ Susan George /

as well. This case can be regarded as a success story because several MPs submitted proposals for amendments to the bill identical to the Commissioner's comments as a result of his statement.

Examples of cases of no direct impact:

The Commissioner came to the conclusion that the 2010 State Budget Bill did not support an economic model that would guarantee positive opportunities for future generations. By missing the opportunity to transform the financial regulation system along environmental protection objectives, Hungary has not been among those countries that consider support to green investment as one of the possible solutions to the economic crisis that pays back in the mid- and long- term. The Commissioner also highlighted some of the most problematic points of the draft state budget in his

statement, such as ineffective application of environmental taxes, reduction of funding for public transportation, reduction of the subsidies to sustainable agricultural and regional development policy. His statement, letter to the Prime Minister and a conference organised by the Commissioner did not have any impact on the adoption of the 2010 State Budget Act.

### *Strategy and research*

As previously mentioned, the Commissioner interprets his competences as comprehensively as possible in order to facilitate intergenerational equity. He acts not only as a complaints investigator but as a proactive guardian of the rights of future generations as well. In order to provide the legislator and society with sustainable models of development, the Commissioner carries out research and promotes long-term thinking.

Strategic planning and research are essential to determine the areas where society needs to improve in order to secure the interest of future generations. Decision-makers must be reminded to think further than their terms of office. Long-term effect, however, is difficult to be measured. The more specific the models that research provides are and the deeper they affect our current materialistic values, the more impact they will have on future generations' lives.

The Climate Change Project carried out by the Strategy and Science Department aims to examine necessary restrictions and possibilities deriving from the desired 80 percent greenhouse gas reduction target until the year of 2050. The project intends to raise questions and call attention to the need for long-term scenarios and timely response to the challenges of climate change. The Commissioner has asked parliamentary parties in a letter to include a 'green minimum' in their election campaigns which must target an 80 percent greenhouse gas reduction by 2050. As a result of the project the greenhouse gas emissions budget of Hungary has already been determined. It will also set clear targets with regard to greenhouse gas emissions and provide several possible scenarios for development. Explicitness is a great advantage of the project, which improves the likelihood of positive impact.

In order to promote sustainable values and ways of life, the Sustainability Project investigates and introduces to society com-

munities committed to the implementation of all aspects – environmental, economic, and social – of sustainable development in their settlements. The project involves more than 30 local communities with innovative solutions in the field of sustainable agriculture, waste management, energy and heat production, food security and even education. The Commissioner provides professional and coordinative support to these initiatives. The impact of the project cannot be determined yet at this stage.

### **Obstacles**

The most important challenge the Commissioner must face is the competing interest of economic development. When the Commissioner starts an investigation of a project involving substantial financial investment, his competence is usually questioned and numerous formal legal problems are demonstrated by the developer or municipality. In these cases the Commissioner places even more emphasis on cooperation with the developer and every stakeholder in the case. He tries to make the developer understand the importance of sustainability and why he must investigate the case.

Interaction with ministries has also been problematic; they do not always consult the Commissioner on legislative proposals. The Commissioner politely but firmly reminds the ministries of their obligation in these cases. There are also cases when he is not provided with access to documents related to an investigation, in these cases his most effective tool is reference to the court.

The Commissioner tries to change the approach of environmental protection authorities as well. He promotes systems thinking and the obligation to comply with EU law even when it is not transposed properly. In order to achieve these goals he collects several cases demonstrating the same problems and issues comprehensive statements e.g. on compliance with EU law.

### **Conclusions**

The Commissioner has been provided with adequate and effective competences to protect the interests of future generations. Competences and measures of the Commissioner are determined with an adequate level of explicitness, which enables authorities and organizations to comply with his statements and the Commissioner to measure his direct impact. The Commissioner has demonstrated in his first cycle of reporting that he uses these competences actively in the in-

terests of future generations. Reception and impact of the Commissioner's activities shows a promising picture.

The model is successful, especially in those areas where environmental protection must compete with several other interests and the decision-makers are not environmental authorities or required to follow the opinion of environmental authorities (such as spatial planning by municipalities). The other field where we can feel that our existence is essential is budgetary planning. Decision-makers need a constant reminder that the right of future generations to a healthy environment must be respected even in times of global financial crisis. The Commissioner is also successful in the role of mediator between different branches of the government or decision makers and NGOs. Sometimes it is enough that the Commissioner announces the launch of his investigation to trigger the recognition of environmental protection interests. These conflict areas exist in every country; therefore, the model would move forward the interests of future generations anywhere. Furthermore, the institution of ombudsman is common to many countries, thereby providing the framework necessary for the widespread establishment of an office similar to that found in Hungary.

### **Notes**

1. Annual Report of the Parliamentary Commissioner for Future Generations, 2008-2009 (available only in Hungarian). <http://beszamolo.jno.hu/>
2. Source of information: interview with Benedek Jávör, former member of the NGO 'Protect the Future' on 26 March, 2010.
3. Section 2. (2) of Act LIX on the Parliamentary Commissioner for Civil Rights (hereinafter: 'the Ombudsman Act').
4. [http://jno.hu/en/?menu=legisl\\_t&doc=LIX\\_of\\_1993](http://jno.hu/en/?menu=legisl_t&doc=LIX_of_1993)
5. Act CXLV of 2007 on the Amendment of Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights.
6. The Commissioner is elected by a majority of two-thirds of the votes of the Members of Parliament, upon the nomination of the President of the Republic. The President did not consult the parliamentary parties on his candidates. The parties referred to this fact when they did not support the first three nominees.
7. Decision 28/1994.
8. Decision 64/1991.
9. Rules of Investigation of the Office of the Parliamentary Commissioner for Future Ge-

nerations (available only in Hungarian).

<http://jno.hu/hu/?&menu=vizsgrend>

10. These three factors were identified and elaborated on in the Annual Report of the Parliamentary Commissioner for Future Generations, 2008-2009, 33.

11. Article 27/B. (3) g)-h).

12. See Section IV.1.2.

13. Brown Weiss, Edith (1989): In Fairness to Future Generations. International Law, Common Patrimony, and Intergenerational Equity. New York: United Nations University.

14. A more detailed discussion of preconditions of impact can be found in section dedicated to the Impact of the Parliamentary Commissioner for Future Generations.

15. Article 18 of Act LIX of 1993.

16. Articles 27/B-F of Act LIX of 1993.

17. Act LXIV of 2005 on the Spatial Plan of

the Budapest Agglomeration.

18. Article 27/B. e) of Act LIX of 1993.

19. Article 27/B. f) of Act LIX of 1993.

20. Resolution 46/1994 (IX.30.) OGY on the Standing Orders of the Parliament of the Republic of Hungary, Standing Order No. 45 (1) *The President of the Republic, a member of the Government, the President of the Constitutional Court, the President of the Supreme Court, the Chief Public Prosecutor, the Ombudsman, the President of the State Audit Office, persons obliged to give an account for Parliament during the discussion of the report submitted by them and, when matters related to European integration are discussed by Parliament, Hungarian Members of the European Parliament, may attend and take the floor during plenary sessions of Parliament.*

21. Article 22. of Act LIX of 1993.

22. Article 25. of Act LIX of 1993.

*This article did not undergo peer-review.*



Éva Tóth Ambrusné is a legal advisor at the Department of International Relations, Office of the Parliamentary Commissioner for Future Generations. She is specialised in international environmental law and European environmental law.

Contact details:

Éva Tóth Ambrusné, Office of the Parliamentary Commissioner for Future Generations, PO Box 40, Budapest H-1387, Hungary

Email: [future@obh.hu](mailto:future@obh.hu)

Web: <http://jno.hu/en/>

## Documentation – International Conference “Ways to Legally Implement Intergenerational Justice”

*Lisbon, 27th and 28th of May, 2010*

Intergenerational justice is becoming one of the central issues of our time. Questions of what justice requires between older, younger, and future generations are increasingly recognised alongside more traditional considerations of social justice. Present generations ought to take responsibility for the far-reaching consequences of their actions. Consequently, it is urgently required to legally recognise intergenerational principles and, above all, to create an architecture with enforceability through which the rights of future generations can be made effective. In the course of this project, important partnerships were forged with the World Future Council, the Portuguese Society of International Law, the Portuguese Association for the United Nations and the Jacques Delors European Information Centre.

During the conference, speakers approached several ways of implementing principles of intergenerational justice principles via inter-



*Marisa dos Reis is a research fellow and editor at the Foundation for the Rights of Future Generations since September 2009. She conceived of organising an international conference in Lisbon on the topic intergenerational justice and law. Beginning in December 2009, she was in charge of managing the conference and preparing for the publication of conference materials.*

national law, European law and at the national level. In the course of debate and conversation between our speakers and participants, obstacles were described with unprecedented clarity and longstanding intuitions were challenged.

Furthermore, innovative solutions were formulated and a path was set for ongoing consideration of intergenerational justice and the law.

Below, you will find the full programme of the Lisbon conference, followed by the conference papers. Some speakers, namely Dr. Maja Göpel and Sébastien Jodoin have made their presentations based on the articles published in the first part of this issue. For that reason we did not add a summary of their speeches to this section. Sándor Fülöp's presentation was based on the Annual Report of the Parliamentary Commissioner of Future Generations of Hungary discussed in Éva Tóth Ambrusné's article earlier in the journal.

Thursday, 27<sup>th</sup> May 2010

**Introduction/Presentations**

09h40 - 10h00 **The project “Ways to legally implement intergenerational justice“ – significance of the theme**  
Marisa dos Reis  
Project Leader of the Conference, Foundation for the Rights of Future Generations, Germany

**Partners and Sponsors**

10h00 - 10h10 Dr. Maja Göpel  
Director Future Justice  
World Future Council

10h10 - 10h20 Prof. Dr. Armando Marques Guedes  
University Nova de Lisboa – Faculty of Law  
President of the General Assembly of the Portuguese Association of International Law

10h20 - 10h30 Prof. Dr. Manuel Almeida Ribeiro  
Steering Committee of the Portuguese Association for the United Nations  
High Institute for Political and Social Sciences (ISCSP)

10h30 - 10h40 Clotilde Camara Pestana  
Director Jacques Delors European Information Centre

10h40 - 10h50 Paula Viegas  
Coordinator Brand Management and Sustainability  
Caixa Geral de Depósitos

11h00 -11h30 **Key note speech: Our Intergenerational obligations**  
Prof. Dr. Axel Gosseries  
University of Louvain, Belgium

**FIRST PANEL DISCUSSION – WHAT IS INTERGENERATIONAL JUSTICE?**

11h30 - 11h50 **Input Statement: Intergenerational Justice - Scope and Limits**  
Prof. Dr. Jörg Tremmel  
University of Tübingen, Germany

11h50 - 12h10 **Input Statement: Ontological debt and Intergenerational Justice - The Case of Climate Change**  
Prof. Dr. Viriato Soromenho-Marques  
University of Lisbon  
Scientific Coordinator of the Gulbenkian Environment Programme, Portugal

12h10 - 12h30 **Input Statement: Democracy and its Boundaries. Can there be such a thing as a bona fide intergenerational social contract?**  
Prof. Dr. Armando Marques Guedes  
University Nova de Lisboa – Faculty of Law  
President of the General Assembly of the Portuguese Association of Intergenerational Law, Portugal

12h30 - 13h00 **Debate**  
Moderator: Prof. Dr. Axel Gosseries  
University of Louvain, Belgium

13h00 – 14h30 **Lunch time**

**SECOND PANEL DISCUSSION – INTERGENERATIONAL JUSTICE IN THE EUROPEAN LAW**

14h30 - 14h50 **Input Statement: The Community Environmental Policy as a contribution to intergenerational justice**  
Pedro Barbosa  
European Commission Directorate – General for the Environment, Portugal

14h50 - 15h10 **Input Statement: The European Convention on Human Rights and the Right to a Healthy Environment**  
Abel de Campos  
Head of Legal Division of the European Court of Human Rights

15h10 - 15h30 **Input Statement: On How to Represent Future Generations in European Governance**  
Dr. Maja Göpel  
Director Future Justice, World Future Council, Belgium

15h30 - 15h55 **Debate**  
Moderator: Prof. Dr. Manuel Almeida Ribeiro  
Steering Committee of the Portuguese Association for the United States  
High Institute for Political and Social Sciences (ISCSP)

15h55 - 16h20 **Coffee break**

**THIRD PANEL DISCUSSION – INTERGENERATIONAL JUSTICE AND INTERNATIONAL LAW**

16h20 - 16h45 **Input Statement: Implementing intergenerational justice: Children at the heart of policy making**  
Lucy Stone  
Climate Change Manager, Unicef UK

16h45 - 17h10

**Input Statement: Crimes Against Future Generations**  
Sébastien Jodoin  
Legal Research Fellow  
Centre for International Sustainable Development Law/World Future Council, Canada

17h10 - 17h35

**Input Statement: The Failure of Copenhagen and its consequences for international relations**  
Dr. Marisa Matias  
Deputy of the European Parliament, Belgium

17h35 - 18h00

**Debate**  
Moderator: Patrick Wegner  
Managing Director of the Foundation for the Rights of Future Generations, Germany

18h00

**Free Evening**

**Friday, 28<sup>th</sup> May 2010**

9h30 - 10h00

**Key note speech: The institution and practice of the Parliamentary**  
Commissioner for Future Generations of Hungary  
Sándor Fülöp  
Ombudsman Future Generations, Hungary

**FOURTH PANEL DISCUSSION – INTERGENERATIONAL JUSTICE IN NATIONAL CONSTITUTIONS**

10h00 - 10h30

**The Role of the State in the Protection of Future Generations**  
Judge (ret.) Shlomo Shoham  
Former Commissioner for Future Generations of the Israeli Parliament – Israel

10h30 - 10h55

**French Constitutional Law and Future Generations – Towards the implementation of transgenerational principles?**  
Dr. Emilie Gaillard Sebilleau  
Centre de Recherche Juridique Pothier, Université d’Orléans, France

10h55 - 11h20

**Ways to legally implement intergenerational justice in Portugal**  
Prof. Dr. Francisco Pereira Coutinho  
Universidade Autónoma de Lisboa, Portugal

11h20 - 11h50

**Debate**  
Moderator: Sándor Fülöp  
Ombudsman Future Generations, Hungary

11h50 - 12h05

**Coffee break**

**CLOSING EVENT**

12h05 - 12h15

**Final speech/considerations**  
Prof. Dr. Jörg Tremmel  
University of Tübingen, Germany

12h15 - 12h25

**Final speech/considerations**  
Dr. Maja Göpel  
Director Future Justice, World Future Council, Belgium

12h25 - 12h35

**Final speech/considerations**  
Prof. Dr. Armando Marques Guedes  
University Nova de Lisboa – Faculty of Law  
President of the General Assembly of the Portuguese Association of International Law, Portugal

12h35 - 12h45

**Final speech/considerations**  
Moderator Prof. Dr. Manuel Almeida Ribeiro  
Steering Committee of the Portuguese Association for the United Nations  
High Institute for Political and Social Sciences (ISCSP)

12h45 - 12h55

**Presentation – Future Intelligence and Sustainability**  
Judge (ret.) Shlomo Shoham  
Former Commissioner for Future Generations of the Israeli Parliament – Israel

12h55 - 13h00

**Moderator and final speech**  
Marisa dos Reis  
Project Leader of the Conference, Foundation for the Right of Future Generations, Germany

**END OF CONFERENCE, CERTIFICATES DISTRIBUTION (Counter/Secretariat)**

## Our Intergenerational Obligations

by Prof. Dr. Axel Gosseries

### Three meanings of generation

The concept of a generation can be used in three different ways to identify *what* each generation owes other ones, and *why*. In line with Jefferson, one may first want to look at a generation as a “nation”.<sup>1</sup> Rather than putting forward the idea of an intergenerational community, it stresses instead the need to take generational *sovereignty* seriously. An illustration of such a concern is the discussion as to the extent to which constitutional rigidity can be defended, since it restricts the sovereignty of subsequent generations. More generally, the question arises as to whether the past should be allowed to bind us, either through commitments made in our name, necessarily without our approval (e.g. a government contracting an external debt that will need to be repaid over decades), or out of past wrongful actions that would require compensation (e.g. reparations for slavery). Here, I share Jefferson’s intuition. If we consider that a person should not be bound by - or be held responsible for - (in)actions that took place before its birth, we face a fascinating challenge. What we need to do is to come up with alternative accounts for e.g. the need for constitutional rigidity, for the intuition that mere debt cancellation may be unfair and/or counterproductive, or for the need to do something about the current impacts of past slavery. To put it differently, considering the principle of ‘common but differentiated responsibility’ in the environmental realm (e.g. in the climate change debate), we need to be able to argue for differentiated obligations without implying differentiated responsibility. While it is not possible to go into details here, I think that this can be achieved.

There is a second meaning of generation that raises specific challenges for theories of justice. It consists in treating generations as ‘age-groups’.<sup>2</sup> Here, the key focus point is the ‘complete-life’ view. Age is special when compared to e.g. gender or race. We cannot change our age. Yet, our age changes. This matters. For if we consider that e.g. egalitarians should care about complete-life inequalities as opposed to inequalities obtaining

at a given moment in people’s life or in time, it may well be that if certain conditions are met, age discrimination will not lead to a differential treatment over complete-lives. In the end, we may thus end up having all benefited from the same access to power, to health care or to employment. Theories of justice need to identify the conditions under which this would arise. They also need to find out whether complete-lives should always be seen as the relevant unit of moral concern. And they should even ask themselves what (if anything) justice between age-groups has to say about what specific age groups owe to one another. For instance, what do parents owe their children - and conversely - and what do teenagers owe the elderly - and conversely.

The third meaning is the one of a ‘birth cohort’, i.e. a set of people who were born between time  $x$  and time  $y$  (e.g. all those born after Jan 1st, 2000 and before Dec. 31, 2001). Here, we use the word ‘generation’ simply to refer to people located at different moments in time. In fact, treating cohorts as a ‘nation’ is a specific instance of this third cohortal approach. We may then begin to explore the various ways in which time and justice relate to one another, impacting potentially on the justification and content of our intergenerational obligations. Investment requires time. People at two different locations in time that are far apart are unable to meet and properly interact. Time has a direction such that some come first and others later. And so on and so forth. Each of these features has significant implications on how we should conceive of our intergenerational obligations.

Hereinafter, I will refer to generations as birth cohorts - as opposed to ‘nations’ or age-groups, or even richer notions that sociologists tend to rely upon. We will simply focus on a twofold issue: *what* does each generation owe the next generation and *why*? This is a specific way of framing things that leaves aside many issues, including the three following ones. First, our current actions may affect the very identity of future people, i.e. *who* will be born and who will not. This ‘non-identity problem’, on which there is a

huge philosophical literature, is a challenge to the very *possibility* of having intergenerational obligations.<sup>3</sup> Second, there are further complications when it comes to trying to identify whether choices can be made regarding optimal population.<sup>4</sup> Is it better to bring to existence a generation constituted of a vastly larger population that is slightly poorer on average, or should we go instead for demographic choices leading to the existence of a smaller and much better off population on average than the former? Is there any sense in which we can say that it is *better for them*, knowing that some people will only exist under one of the two options? Finally, if we consider that the number of future generations is indefinite, if not infinite, this raises in turn specific problems. For how are we supposed to divide fairly the various types of pies that make our existence possible, enjoyable and meaningful if we have no way of knowing how many people are sitting around the table. We will leave these three issues aside here.

### Why and what?

Let us thus focus on a simple and restricted setting. One generation asks what it owes the next one. I assume that this has a lot to say about the broader intergenerational set of issues, including when very remote generations are involved, when large uncertainties are at stake... In asking ourselves *why* we owe something to the next generation, theories of justice have very different stories to tell us.<sup>5</sup> A mutual advantage contractarian will tell us that if a generation is to owe anything to the next one, it needs to be on grounds of mutual advantage. In contrast, a reciprocity-based view will tell us that we owe something to the next generation because we have a debt towards the preceding generation. In this case, the intuition is that net transfers need to be erased out. No one should end up having received more than what it gave back. An egalitarian or a utilitarian theory will not rely on ideas of mutual advantage or of debt towards the past. They will instead simply insist on being impartial. For an egalitarian, we owe something to the next generation, not because it is at

our well-understood advantage to cooperate or because we inherited a debt from the previous generation. Rather, it simply results from a concern for not leaving the next generation in a worse situation than ours, due to no fault of its own. The obligation neither results from a prior action from an earlier generation, nor necessarily leads to a net benefit to all parties involved. We owe it to them simply because an impartial approach to what it means to treat persons as persons requires it. These are just three examples of possible justifications of our obligations towards the next generation. Other ones could be explored. For example, the fact that as genitors, we *cause* the very existence of the next generation could in itself be a distinct source of obligations.

It is one thing to account for the *reasons* why we owe something to a generation. It is another to account for the *content* of our obligations. Again, there is more diversity in this respect than what we might expect at first sight. Consider a very simple ‘quantitative’ approach to our obligations towards the next cohort. It involves *dis-savings* (i.e. the fact for a generation to transfer *less* to the next one than what it inherited from the previous one) and *savings* (i.e. the fact for a generation to transfer *more* to the next generation than what it inherited from the previous one). I am not claiming here that deciding about the appropriate composition of the basket of ‘things’ that needs to be transferred to the next generation is irrelevant or uninteresting. To the contrary. I do not endorse (naïve) materialism here. The composition question raises serious challenges for anyone concerned with some form of neutrality towards the various conceptions of the good life. Similarly, the debate between defenders of ‘strong’ and ‘weak’ sustainability clearly revolves around the difficult issues of the physical and normative limits to substitutability. Here, I am simply assuming that even with an oversimplified setting that leaves this ‘composition’ problem aside, we are able to identify very different contents of obligations that translate differences in underlying logics.

Consider a few examples of such a diversity of views. Most theories will prohibit generational dis-savings in principle. What about generational savings? A theory of indirect reciprocity is unable to justify an *obligation* to save. The concern here is to avoid net transfers between people and generations. However, once a generation has given back at least as much to the next one as what it inherited

from the previous one, justice will not require anything further. Contrast this mere *authorisation* to save, endorsed by reciprocity defenders, with the idea of an *obligation* to save. Utilitarians will typically defend such an obligation to the extent that savings may increase the total amount of welfare over the whole generational path. This is so whenever the gains from current investment – in terms of future welfare – overtake the losses in current welfare – due to the fact that people will not be able to consume as much as what they otherwise could. Rawlsians will also advocate an accumulation phase to a more limited extent, requiring from the least well off generations to save to the benefit of the next – and hence richer – generations. As we can see, these are examples of theories that will not simply authorise but even *require* generational savings.

I believe that beyond a limited accumulation phase, savings should be neither authorised, nor required.<sup>6</sup> I would rather advocate the view that savings should be *prohibited*. The intuition is the following: consider, along Rawlsian lines, the leximin requirement according to which we should identify an intergenerational path such that the least well off people along this path are better off than the least well off people under any alternative scenario. Leximin involves a special form of egalitarianism, one that is concerned with improving the situation of the least well off, even at the cost of growing inequalities if needed. What does leximin require in terms of general intergenerational rule of thumb? It demands that if a generation anticipates that at the end of its life, it will end up with a surplus, the latter should benefit to the least well off members of the *current* generation, rather than to the next generation(s). It amounts to a prohibition on savings. This is not at all in breach of the requirement of impartiality. It does not translate any moral preference for the members of our own generation. It simply flows from the fact that if each generation were to adopt this strict rule, the least well off – whichever the generation they are part of – would end up being better off than under any alternative rule.

### Population change and cleronomicity

As we can see, not only do various theories provide us with different *justifications* of our obligations. They also advocate very different policies. If we consider only savings, some will *authorise* it, others will *impose* it, and still others will *prohibit* it. This is of

course a very general claim and specific exceptions could be considered. However, there are further complexities that should be considered here. Let me point at two of them in particular. The first one has to do with *population change*. Imagine a cohort that collectively decides to double the population. Each couple would have slightly more than four kids on average. The question is whether the size of our intergenerational obligations should be adjusted accordingly. According to a theory of indirect reciprocity, it shouldn't. For the logic of that theory is to empty one's debt, whatever the number of beneficiaries. If I received ten, I need to give ten back, regardless of the fact that there will be twice as many people among which it will have to be divided up. Contrast this with a theory that is demo-sensitive, such as egalitarianism. Here, the intuition is that even if we were not causally responsible for the size of the next generation, the mere fact that they are twice as numerous should modify our obligations upward. For there is no reason why they should be twice as poor as we are, simply because they happen to follow us. Hence, not all theories are demo-sensitive. And I also think that we underestimate what demo-sensitivity, once taken seriously, would demand. Before concluding, let me mention another property of theories of intergenerational justice, i.e. *cleronomicity*. A theory is cleronomic when, in order to define what we owe the next generation, it bases itself on *what we inherited from the previous one*. It does not mean that we necessarily have to transfer the *same*. Whether we should transfer more or we could transfer less, etc. what matters is that the reference transfer is the one linking our parents to us. Almost all theories of intergenerational justice are cleronomic. There is one exception: sufficientarianism. The latter will require that we transfer to the next generation enough for them to cover their basic needs, *regardless* of what we actually inherited from the previous generation. It allows for massive dis-savings if what we inherited goes well beyond what is needed to cover people's basic needs. This may seem shocking. And yet, non-cleronomic theories may actually have some advantages. One of them is that in case of non-compliance, even if they potentially place a heavy burden on each generation, non-cleronomic views may guarantee that the obligation of each generation will not shrink gradually as cases of non-compliance by preceding generations multiply.

To conclude, I believe that we should think

twice before claiming that intergenerational issues are too radically different to be dealt with on the basis of our standard moral and political theories. The intergenerational context raises specific challenges. Of course, it is often tempting, in the face of major *practical* challenges, to assume the need for paradigm shifts at the *conceptual* level. This temptation should be resisted, at least initially. Let us make the effort to understand first what standard theories have to offer us. They have things to tell us. They mobilize intuitions that are shared by various segments of the public. They exhibit some degree of robustness because their properties have been tested for a while. Moreover, relying on standard theories allows us to relate our intuitions in the intergenerational realm with those in the intragenerational one. And if it were to turn out that a paradigm shift is needed in the end, let us make sure that we justify such a need. And let us try and give enough flesh to such a new paradigm, to ensure each of us do not engage in new avenues without minimally understanding what it is about.

#### Notes:

1. Jefferson, T. (1789): Letter to J. Madison, 6 of September.
2. Daniels, N. (1988): Am I My Parents'

Keeper? An Essay on Justice Between the Young and the Old, NY/Oxford: OUP.

3. Parfit, D. (1984): *Reasons and Persons*. Oxford: Clarendon Press.
4. Arrhenius, G. (2000): An Impossibility Theorem for Welfarist Axiology. *Economics & Philosophy*, p. 16, pp. 247-266.
5. Gosseries, A. and Meyer, L.(eds.) (2009): *Intergenerational Justice*, Oxford: Oxford University Press, p. 419.
6. Gaspard, F. and Gosseries, A. (2009): Are Generational Savings Unjust? In: *Politics, Philosophy & Economics*, 6 (2), 2007, pp. 193-217.

#### Biography:

Axel Gosseries is a philosopher (PhD, Louvain, 2000) and law scholar (LL.M., London, 1996). He is a permanent research fellow of the FNRS (Belgium) and a Professor at the University of Louvain where he is based at the Hoover Chair in economic and social ethics. He has been spending time doing research in various parts of the world (Oxford, Canberra, Montreal, Collegium Budapest, Bergen) and has been lecturing abroad in various universities (Krakow, Bern, Montevideo, Bucharest, Prishtina, Braga, and Lille). He is a specialist of intergenerational justice issues. He is the author of *Penser la justice entre les générations* (Au-

bier, Paris, 2004) and the editor of *Intergenerational Justice* (with Lukas Meyer, Oxford University Press, 2009). He is the author of about 50 chapters and articles in books and journals, in philosophy (e.g. *Canadian J. of Philosophy*; *J. of Political Philosophy*; *Politics, Philosophy and Economics*; *Stanford Encyclopedia of Philosophy*; *Oxford Handbook for Practical Ethics*), law (e.g. *Loyola of Los Angeles Law Review*; *New York University Environmental Law Journal*) and economics (e.g. *International Economic Review*, *Economics and Philosophy*).



First Panel "What is Intergenerational Justice?": Prof. Dr. Dr. Jörg Tremmel, Prof. Dr. Viriato Soromenho-Marques, Prof. Dr. Almeida Ribeiro and Prof. Dr. Marques Guedes

## CONFERENCE PAPERS

### Intergenerational Justice – Scope and Limits

by Prof. Dr. Dr. Jörg Tremmel

*The presentation is based on the speaker's new book:*

*Tremmel, J. C. (2009): A Theory of Intergenerational Justice. London: Earthscan.*

Ever since Greek antiquity, the notion of justice has been at the centre of intense philosophical debate. Nevertheless, systematic concepts and theories of justice between non-overlapping generations have only been developed in the last few decades. This delay can be explained by the fact that the impact of man's scope of action has increased. Only since the twentieth century has modern technology given us the potential to irreversibly impair the fate of mankind and nature into the distant

future on a global scale. In Plato's or Kant's days, people did not have the same problems with regard to the environment, pension schemes, and national debts as we have today. Therefore, there was no objective need for theories of justice that were unlimited in space and time. According to Hans Jonas, the new territory man has conquered by high technology is still a no-man's-land for ethical theory which lives in the Newtonian age.

#### Comparisons between 'generations'

Statements on generational justice require comparisons between generations. Yet, the term 'generation' is ambiguous. Distinctions can be drawn between 'societal', 'family-re-

lated', and 'chronological' meanings of the term 'generation'. Statements on generational justice normally refer to the chronological meaning of 'generation'. They can also refer to the family-related meaning of 'generation', but not to its societal meaning. We can also distinguish various comparisons between chronological generations: vertical, diagonal, horizontal, and overall-life courses. Diagonal comparisons as well as comparisons of overall-life courses are decisive. Other comparisons are of only limited use for statements on generational justice.

#### Arguments against theories of generational justice

The non-identity problem coined by

Schwartz, Kavka, and Parfit says that we cannot harm potential individuals if our (harmful) action is a precondition for their existence. According to this argument, we would not harm future people by using up resources, because these particular people would not exist if we would preserve the resources. But the non-identity paradox is irrelevant for the kind of problems that are usually discussed in the intergenerational context such as wars, environmental pollution, or national debts. The 'butterfly-effect argument' states that a monocausal relationship cannot be construed on the basis of a weak multicausal connection. The causality between actions that are hostile to posterity, e. g. non-sustainable resource management, and the genetic identity of the next generation is not greater than the famous butterfly effect, according to which the beat of a butterfly's wing in Asia can set off a tornado in the Caribbean. A phrase like 'because of a war or a certain environmental policy, x percent of all children were conceived at a different time' is contestable because of the 'because of' in it.

There is also the objection that future generations cannot have rights. However, no logical or conceptual error is involved in speaking about rights of members of future generations. Whom we declare a rights-bearer with regard to a moral right is a question of convention. Whom we declare a rights-bearer with regard to a legal right is an empirical question.

### **What to sustain? Capital or wellbeing as an axiological goal?**

Most accounts of intergenerational justice focus on *how much* should be sustained. But the axiological question of *what* should be sustained is of equal importance. *What* is ultimately the valuable good that should be preserved and passed on to the next generation? 'Capital' and 'wellbeing' (in the sense of need-fulfilment) are examined as two alternative axiological objectives of societal arrangements. Capital can be divided into natural, real, financial, cultural, social and knowledge capital. The many facets of 'wellbeing' require extensive discussion, and subjective methods of measuring are to be compared with objective ones. Ultimately, the axiological objective 'wellbeing' is superior to 'capital' because capital is only a means of increasing wellbeing. Many utilitarian accounts have only a weak conception of the axiological good, and refrain from operationalising it. A closer look at such

concepts as wellbeing, happiness, and utility reveals that the so-called 'repugnant conclusion' is an erroneous concept, based on misleading terms.

### **How much to Sustain? The Demands of Justice in the Intergenerational Context**

Three conceptions of justice are established in the intragenerational context: 'justice as impartiality', 'justice as the equal treatment of equal cases and the unequal treatment of unequal cases' and 'justice as reciprocity'. How can they be applied to the intergenerational context? For 'justice as impartiality', it is worthwhile to use Rawls' 'veil of ignorance' for determining principles of justice between generations. Rawls himself did not complete this train of thought. In my book, I conclude after a long discussion that the individuals in the 'original position' would not opt for all generations to be equal, as it would mean that later generations would have to remain on the low level of earlier generations. In this context, the 'autonomous progress rate' is of particular importance: Later generations will inevitably benefit from the experiences, innovations, and inventions of earlier ones. There is no way earlier generations could benefit from future technology and medicine, because time is one-directional. Justice as 'equality' is not an option, unless the participants behind the veil of ignorance ordered each generation to burn down all its libraries and destroy all innovations and inventions before its death. But then, progress becomes impossible for all times, and all later generations of mankind would be doomed to vegetate on the low level of the Neanderthals.

On account of the inequality of all generations, only the second part of the formal justice maxim 'treat the equal equally and the unequal unequally' can be transferred to the intergenerational context. The second part of this maxim requires treating different generations in a differentiated manner. Each generation should have the right to fully exploit its potential and reach the highest wellbeing attainable for it (and only it). On account of the 'autonomous factors of progress', each generation has a different initial situation. The initial situation of later generations is normally better than that of earlier ones. So, opportunities are never equal in an intergenerational context. No generation has the right to spoil this initial advantage of its successors with reference to an ideal of equality. Instead of a savings rate in the sense of sacrificing consumption, a 'preventive savings

rate' should be imposed on each generation, i.e. an obligation to avoid ecological, societal, or technical collapses.

Whenever the principle 'justice as reciprocity' legitimises egoism, its consequences are purely and simply immoral, be it in the intergenerational or in the intragenerational context. In such cases, the wellbeing of the acting person is increased at the cost of another person (win/lose situation). But not every principle of reciprocity requires the assumption of an egoistic nature of man, thus many versions still can be applied as a moral concept. A variation of 'justice as reciprocity', namely the 'principle of indirect reciprocity', can even be applied to the intergenerational context and sensibly justify our actions affecting posterity. The core element of a convincing theory of generational justice, however, is the demand for making improvement possible for the next generation. Our duties to posterity are stronger than is often supposed. Intergenerational justice has only been achieved if the opportunities of the average member of the next generation to fulfil his needs are better than those of the average member of the preceding generation. This does not imply that today's generation must sacrifice itself for the next one. If a good has to be distributed among two generations with the same number of members, it is just for each generation to receive one half. How can equal distribution produce an improved standard of living? This is not a paradox because we have to take into account the autonomous progress factors. The members of today's generation A need not give more than they have received to the members of the next generation B. But if they give them as much of it, they will provide their descendants with the possibility to satisfy their own needs to a higher extent than A. Thus, I label my concept 'intergenerational justice as enabling advancement'.

The normative setting of our ethical obligations must not be confused with the empirical prognosis of whether future generations will have an equal or even higher welfare. The normative and empirical level must be strictly distinguished. To cut a long story short: while our normative obligations to future generations are greater than we commonly assume, the empirical probability that we will leave behind a world with better or at least equal opportunities for future generations has dropped over the past decades. Today's generation lives in a particularly decisive age. Just now, more and more states have nuclear weapons, there is man-made global warming, and we have huge amounts of toxic waste. So today's

generation has the potential to irreversibly reduce the wellbeing of numerous future generations. We have a great responsibility to avoid this.

#### Biography:

Joerg Chet Tremmel is Assistant Professor at

the Eberhard Karls-University Tübingen, Germany. He holds a PhD in philosophy from the University of Düsseldorf (2008), and a second PhD in sociology from the University of Stuttgart (2005). He completed his studies with a MA in political sciences from the Johann-Wolfgang-Goethe-University of

Frankfurt (2003), and an MBA in economics from the European Business School, Oestrich-Winkel (1998). Research interests: 'Shorttermism' of Political and Business Systems; Applied Ethics (esp. Intergenerational Justice, Climate Ethics); Epistemology.

## CONFERENCE PAPERS

### Ontological debt and Intergenerational Justice –

### The Case of Climate Change *by Prof. Dr. Viriato Soromenho-Marques*

John Rawls accurately described the problem of intergenerational justice (IJ) as an almost impossible test to any theory of justice.<sup>1</sup> Nevertheless, the way Rawls dealt with the extremely complex IJ problem was very much in the line of the classical framework in which the idea saw the first light of the day, in the late 18th century.

In 1784, Immanuel Kant explained that the idea of progress towards a cosmopolitan society was the only rational device that could allow any future generation to judge the contribution of previous generations.<sup>2</sup> Therefore, Kant introduced the model of a contract between generations, where, in spite of the temporal asymmetry in the reciprocity of duties between the living and those waiting to be born, we were able to identify a common endeavour, amidst a chain of efforts in time and space. No one was better able to depict than Edmund Burke the "partnership...between those who are living, those who are dead, and those who are to be born."<sup>3</sup> The compact between generations raised the question of knowing what would be the real evaluation, either positive or negative, regarding the heritage brought within the timeline of succeeding generations.

The question about the "burden of history" (*die Last der Geschichte*), voiced by Kant in 1784, echoed by Burke in 1790, was transformed by Thomas Jefferson in his correspondence with James Madison (1789-1790) in what I call the 'standing debt paradigm' of the intergenerational justice principle (IJP).<sup>4</sup> We may easily identify the same debt paradigm in Rawls (1971) who tries to explain the duties of each generations regarding the continuity and enhancement of the material and cultural flows of history's fabric.<sup>5</sup>

The main point this presentation wishes to sustain, however, brings the debt paradigm to its

own limits. Putting this IJP paradigm under test, within the contemporary landscape underlined by the huge challenges caused and brought by climate change and the global environmental crisis.

Climate change, under the perspective of the intergenerational justice principle (IJP) both precedes and goes beyond the debt paradigm: a) it precedes the debt paradigm because its ontological nature takes into consideration the basic pre-conditions of justice, namely the existence of a planet able to accommodate human beings; b) beyond the debt paradigm, because the implications of climate change are unable to be framed in a cost benefit analysis, given the risk of collapse.<sup>6</sup> Therefore, I conclude that in order to have the expectation of a real legal implementation of international justice in the sphere of climate change, we will need to combine a double approach: a) the intergenerational justice principle (IJP), seen in the framework of the ontological debt prospect, may be understood as a meta-justice principle, more as a guide for practical reason, than a tool to concrete action; b) The key for workable justice will be the acting combination between the IJP and the Principle of Common but Differentiated Responsibilities (PCDR).

The future of climate change negotiations will depend dramatically on the right hierarchy between the rational priorities of IJP, as a meta-justice concept, over the PCDR, understood as a vital workable justice device. Only through that strong combination will we be in conditions of avoiding a legal vacuum after the expiration of the Kyoto Protocol, by the end of 2012.

#### Notes:

1. Rawls, John (1971): *A Theory of Justice*, New York: Oxford University Press, ed. 1990,

§44, p. 284.

2. Kant, Immanuel (1784): *Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht* [1784], *Gesammelte Schriften*, Berlin: Königliche Akademie der Wissenschaften, ed. 1902, vol. VIII, pp. 30-31.

3. Burke, Edmund (1790): *Reflections on the Revolution in France*, Selected Works of Edmund Burke, Indianapolis, Liberty Fund, 1999, vol. 2, pp.192-193.

4. Banning, Lance (ed.) (1995): *Jefferson and Madison. Three Conversations from the Founding*, Madison: Madison House, 1995, p. 166.

5. Rawls, John (1971): *A Theory of Justice*, New York: Oxford University Press, ed. 1990, §44, p. 285.

6. "Perhaps in the end the climate-change economist can help most by not presenting a cost-benefit estimate for what is inherently a fat-tailed situation with potentially unlimited downside exposure...", Weitzman, Martin L. (2009) *On Modelling and Interpreting the Economics of Catastrophic Climate Change*, *The Review of Economics and Statistics*, Vol. XCI, February, p. 18.

#### Biography:

Prof. Dr. Viriato Soromenho-Marques (\*1957) teaches in the Departments of Philosophy and European Studies of the University of Lisbon, where he is Full Professor. He was Chairman of Quercus (1992-95). He was Vice-Chair of the European Environmental and Sustainable Development Advisory Councils network (2001-06), being member of the Portuguese Council (CNADS). He is the scientific coordinator of the Gulbenkian Environment Programme. He is member of the Advisory Group on Energy and Climate Change by invitation of the President of the European Commission

# Democracy and its Boundaries. Can there be such a thing as a bona fide intergenerational social contract?

by Prof. Dr. Armando Marques Guedes

In an atmosphere of ever-louder discussions on ‘intergenerational rights and obligations’, or ‘intergenerational justice’ – mainly led by the pull of systemic interdependencies of all sorts (environmental, demographic, economic and financial, security and defense related ones, etc.) – we often overlook the implicit political *impensés* inherent in these formulations; or, instead, use them as agendas for change in a sort of philosophical gambit. If and when we do embrace those notions, we are doing so outside the core scope of the illuminist liberal democratic ‘grammar’ – one in which a short time-frame of an ‘immediate-return’ logic is a basis for the gestation of social ties. One in which short-termism usually prevails. It need not be so: to be sure, notions such as those of humanity, responsibilities, rights and obligations do hold especially close links to democracy. Unfortunately, however, the linkages are far from linear – but that should by no means lead us to throw down our hands and place notions such as those of intergenerational justice as beyond the pale.

In what follows, I wish to suggest how we may overtake such limitations of ‘classic’ democracy by somehow returning to basics. In trying to do so, I want to stress that, beside the patent and often pointed out limits imposed by the principles of democracy, namely their potential collision with the pre-requisites needed for the positive manifestation of an intergenerational ‘political community’, the very idea of an intergenerational social contract brings out a series of boundaries which are implicitly built into it – into the ‘classical’ notion of democracy itself.

Even the most cursory overview brings these limits out: given its built-in time-shal- lowness, ‘pure’ classic democracy, *a se*, merely allows us to consolidate ‘promissory compacts’ with one another, even if we proclaim to lay them up for the sake of ‘the yet unconceived’ or of the ‘very young’ – i.e. for ‘the benefit of virtual persons’. The reasons for this are readily apparent: pure, ‘classic’, Democracy appears not to permit us to ce-

lebrate *bona fide* contracts with those whom we can not have as possible interlocutors<sup>1</sup>. In contemporary legal thought, this has received many different formulations. But they do seem to have the same rootings: against the background of older discussions, and beyond recent polemics among authors like D. Parfit, W. Beckerman, A. Gosseries, and J. Tremmel, to name only the few of the most obvious authors who have of late been writing about these matters, the issue remains of a deep-seated uneasiness between the ‘contractualist’ template of writers like Immanuel Kant (or/and their ‘contractarian’ kin models, like that of Thomas Hobbes, if we want to operate a now often common distinction) and its many early or modern variants, on the one hand and, on the other, the idea that any sort of ‘contract’ may be celebrated, in any but a moral and metaphorical sense, with the not-yet born – or even with those still too young to really engage us in the shaping of a political community.

I contend that this, however, does not mean we should just discard ideals such as those of forms of intergenerational justice, rights, or obligations. Nevertheless, it does spell that if and when we do embrace them, we are doing so outside the scope of the illuminist liberal democratic ‘grammar’ of old, so to speak – though not necessarily undemocratically, I want to argue, as we can do this by blazing a trail open in the very conceptual infrastructural rootings of democratic thinking. Indeed, one could argue that one of the implicits of the ‘modular’ notion of individuals (as Anthony Giddens called the principle upon which is ultimately founded the permutability of people in contemporary democratic polities) postulated by the modern ‘democratic turn’ is precisely one manner of bringing in an essential time-depth to an otherwise timeless notion of ‘individuals’ – as it may cogently be contended there is an ‘elective affinity’ between both choices since both give body to the ‘meta-democratic’ assumption of a prior humanity (and of its dignity) for the ordering of which

our ‘classical’ limited take on democracy is but one of various possible formats – and a particularly poor one at that.<sup>2</sup> This opens up a window of opportunity, so to speak.

Allow me to focus briefly on how this window of opportunity operates and on how it may be used for the production of new normative frameworks not constrained by structural short-termism. To be sure, I would argue that in order to embrace within the ‘democratic fold’ the rights and obligations of, say, and to use a limit-case, the as yet unborn or even yet unconceived, a re-vamping of the venerable concept is indeed required – but merely one which adds notions of community to notions of individuality, tightly linking these up, ‘umbilically’, surely, but without eroding their ultimate separateness; this is what I thus call the ‘democratic elsewhere’, a point to which I shall briefly return. In other words, we can go beyond the ‘classical’ immediate-return limitations of short-termism by means of an addition, even though one which amounts to little more than a tweaking. This is nothing new: the likes of Immanuel Kant, Edmund Burke and Thomas Jefferson saw this clearly. To touch upon but one example: Kant saw a means to this in his concept of a “cosmopolitanism” pictured as a ‘rational’ generalisation of aggregate choices and decisions of ‘human’ agency. Such a construct is ultimately rooted on the reified projection of normative ties among present subjects, with both the freedoms and constraints these embody. They are built analogically, so to speak. Like family, lineage, clan, tribe, or nations of old, a concept such as that of “cosmopolitanism” does certainly afford us a plateau beyond mere individual wills, interests, ‘ties that bind’, and other facile – and therefore highly risky for democracy – primordialistic identity-appeals. What is more, it does so while avoiding the often steep asymmetries and slippery pitfalls built into these earlier and intrinsically hierarchical entities. The ‘ecumenical Catholicism’ of cosmopolitanism (let me call it that) allows us to stretch the limited time-frame typical of

democracy without bringing into the equation structural and permanent inequality by the very effort of so doing – that is, it endeavours to thus, not by design, liquidate democracy while engaged in the process itself of analogically trying to broaden it.

To be sure, the operation does bring to the fore an implicit limit, or boundary, of democracy – while also showing it is not a terminal one, but rather the locus of a conceptual phase-shift of sorts, to coin a notion. Out comes a watershed fringe area of it: although only ‘community’ brings in the time-depth needed for such a ‘delayed return’ embrace, this does not mean we should discard ideals such as those of intergenerational justice, rights, or obligations, in liberal democracies, as a robust ‘elective affinity’ may be set up between the two conceptions, the autonomic and the communitarian one. Rather than irreducible, each of them lives off the other; and, indeed, an ‘egalitarian’ bridge is as a rule tacitly built between them via constructs like that of a ‘cosmopolitan’ all-embracing ‘humanity’ – even if only as an a-historical idealized community or, instead, as the subject of an all-encompassing History of a ‘universal’ humanity.

A strong formulation of this – a higher intensity one, if you will – is both possible and desirable. Contrary to conventional wisdom, communitarianism and individualism are far from mutually exclusive formulae: the notion of ‘individual’ is largely a social construction, and ‘communities’ are also aggregates of people. Such a perspective on the mutual constitutiveness of individualism and communitarianism, as far as what the contemporary reformulations of what Democracy is coming to be about are, fairly robustly belies the common contrast established between communitarian and individualist takes – or, at the very least, it renders it a rather minor affair, as it recasts this supposed irreducible opposition into essentially twinned sides of one and the very same coin. A weaker version of this is the following: democracy *a se* and this supplementary ‘democratic elsewhere’ may be drawn into a cluster – ‘autonomy’ in its ‘ecosystem’, or context and its expression. A cluster deeply inscribed in our *episteme*: even if with reservations, we are led to ponder – by both (analogical) reason and ethics – on what we do bestow as legacies to the ‘virtual persons’ thus recast as ‘upcoming humans’ by this a broader ‘democratic tract’.<sup>3</sup> Faced with global issues as we are today, most of us already do, so what is at issue is little more than coherently bring-

ing democracy into line with our growing demands on it.

History shows us that given the implications the fact might have for a reformulation of the boundaries of what we mean by democracy, we should nevertheless be extremely cautious when moving ahead on such routes. Surely there is a breed of a ‘democratic principle’ at work here: but it is fundamentally one which links us first and foremost to one another now, in our shared present, and not really one that we in any comparable sense celebrate with our descendants. The painful experiences of the 20th Century totalitarianisms warn us rather loudly that we should beware of ethical or jurial reifications of present concerns, as this tends to form a recipe for political disaster. And what the equation of the ‘democratic elsewhere’ suggests is one recasting of what we mean by democracy that only really works if universalism is built into it, rather than more restrictive (and thus implicitly exclusionary) modelings such as those of family, lineage, clan, tribe or nation, to repeat but the few examples given. This is where ‘good faith’ comes in as a pre-requisite. So jurists and constitutionalists beware – and by no means do I mean to suggest we should avoid the exercise. We should most certainly not: in the contemporary world, when faced with high-impact decisions, on the environment, genetics, or huge capital-intensive decisions leading to runaway indebtedness, all of them delayed-return dealings and events, it is hard not to envisage such a wider-ranging democracy as a welcome secondary elaboration which arose as an ethically induced response to the perceived risks entailed by the limitations flowing from the very short time-depth allowed for by the illuminist formulations of old. If built thoughtfully and circumspectly enough, the novel, thicker, format of democracy to be found at the end of our efforts of construction by judicious addition and careful extension of the ‘classical’ one may well show itself as having been well worth the effort.

#### Notes:

1. These limits are patent the democratic world over, with small differences in local formulation. As, for example, Émilie Gaillard put it, “[extant French] law can only regulate relationships between people who share the same space in time and life” As a result, “it is impossible to have future generations in perspective in [French] Law and in particular in Private Law”. Emilie Gaillard Sebileau

(2008), in *Génération futures et droit privé*, th., dir. C. Thibierge, Université d’Orléans, (to be published, *Bibliothèque de droit privé, Éditions L.G.D.J.*, 2010) With minor variations, such clearly flows from the implicit contractualism of our legal systems.

2. Very much the same argument was put forward using an alternative but largely isomorphous (or at least functionally equivalent) etymological contrast between democracy and liberalism. Neither a great believer in nominalism nor an adept of essentialism, I believe Kant and the Founding Fathers of the US Constitution should be seen as in more nuanced terms, mixing ‘liberalism’ with ‘democracy’ in variable doses.

3. Indeed, let me repeat I would argue that both democracy and this ‘democratic elsewhere’ constitute a meta-cluster in which we may embed a sea of alternative shapes of political community; so that, notwithstanding convictions we may hold as to the ultimate unpredictability of the future, or its radical discontinuities with the present, we do indeed feel bound to carefully ponder what we shall leave as a bequest to future generations, and thus we are thereby pushed to preemptively act accordingly. Perhaps a better formulation of this phase-shift is the following: it is one which pushes us firmly toward a widening of the scope of what we mean by Democracy, by somehow digging into its preconditions. Principles like those of “*temporal non-discrimination*” and “*dignity of future generations*” of Emilie Gaillard Sebileau (2008), op. cit., could be important paths to change, particularly if embedded in an all-embracing and unbounded concept of humanity and its intrinsic, because constitutive, dignity – a step for which various partial and analogical precedents do exist.

#### Biography:

Prof. Dr. Armando Marques Guedes studied politics at the *Instituto Superior de Ciências Sociais e Políticas* (ISCSPP), and social anthropology at *The London School of Economics and Political Science* (LSE), and the *École des Hautes Études en Sciences Sociales* (EHESS), in Paris. He received his doctorate in anthropology at the *Faculdade de Ciências Sociais e Humanas* (FCSH), Universidade Nova de Lisboa, and his *Agrégation* in law at the *Faculdade de Direito da Universidade Nova de Lisboa* (FDUNL). He is a tenured professor of the latter, of the *Instituto de Estudos Superiores Militares* (IESM), Mini-

stério da Defesa, and at the *Instituto Superior de Ciências Policiais e Segurança Interna* (ISCPSI), Ministério da Administração Interna. Among other posts held, he was Presi-

dent of the *Instituto Diplomático*, at the Portuguese Ministério dos Negócios Estrangeiros and Director of *Policy Planning* there, and is the President of the General Assembly of

the Portuguese Society of International Law (SPDI). He is the author of fifteen books and some seventy articles, and the member of more than a dozen scientific societies, both in Portugal and abroad.

## CONFERENCE PAPERS

# The Community Environmental Policy as a contribution to intergenerational justice

by Pedro Barbosa

Environmental issues nowadays play a central role in European policy formulation and implementation. A well consolidated body of legislation covers areas as diverse as climate, air quality, chemicals, land use, industrial installations, noise, nature and biodiversity protection, waste management, water, soil, etc. Common to all activities in these fields is an over-arching principle of sustainable development with a strong intergenerational dimension: our societies must be able to satisfy their needs without jeopardising the ability of future generations to satisfy their own needs.

*This speaker was not able to provide us with a summary of his presentation. This text corresponds to the abstract published on the website of the conference [www.futuregenerations-law-conference.com](http://www.futuregenerations-law-conference.com)*

### Biography:

Pedro Barbosa has been working on European affairs for the last 12 years, as a consultant and then as a European civil servant. Within the European Commission he has worked for the Employment and Fisheries departments before joining the Environment department in 2004.



Currently on mission at the Commission's Representation in Portugal, he deals with the implementation of community environmental legislation.

Pedro studied economics at the University of Porto and European Affairs at the College of Europe in Bruges.

*Second Panel: "Intergenerational Justice in European Law": Dr. Maja Göpel, Abel de Campos, Pedro Barbosa and Prof. Dr. Axel Gosseries*

## CONFERENCE PAPERS

# The European Convention on Human Rights and the Right to a Healthy Environment

by Abel de Campos<sup>1</sup>

One cannot find the right to a healthy environment in the European Convention of Human Rights (ECHR). Furthermore, it cannot be found in its additional protocols, which have added other rights to the original text, such as the protection of property, the right to education or freedom of movement. Nevertheless, there is indirect judicial enforceability for the human right to a healthy environment,

as I will illustrate.

### Human rights as enforceable rights

It is widely known that the main contribution of the European system of protection of human rights lies in the then unprecedented judicial machinery that it has created. More than a 'simple' human rights catalogue, the European Convention created a system of judicial enforcement of human

rights at the international level. In 1950, this idea was indeed a revolution: for the first time, the individual was put at the heart of international law; he was no longer a mere object of international law, which dealt with States rather than individuals.

The ECHR is not designed to protect collective rights. It is by the protection of individual rights of European citizens that the European Convention system fulfils its fun-

damental aim: to improve the standard protection of human rights across all of the 47 member States of the Council of Europe who are Parties to the ECHR.

Moreover, it is the judicial character of the European system that makes it so rich. As society has evolved, the European Court of Human Rights (hereafter: European Court), which is competent to examine the individual complaints submitted for violations of a Convention right, has adopted a dynamic interpretation of the catalogue of the rights enshrined in the ECHR. In other words, when we speak of the ECHR we are mainly referring to European Court case-law; how the European Court has interpreted and applied those rights in specific cases.

### European Court case law

We can turn to specific European Court case law to see how the human right to a healthy environment has been protected in an indirect way. We will focus on examples around Article 2 (Right to Life) and Article 8 (Right to Respect for Private and Family Life).<sup>2</sup>

#### *Right to Life*

Article 2, as well as providing protection for the right to life resulting from actions of State agents, lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction. The European Court has found that this obligation may apply in the context of dangerous activities related to environmental issues, such as nuclear tests (*L.C.B. v United Kingdom, 1998*) and the operation of chemical factories with toxic emissions or waste-collection sites, whether carried out by public authorities or by private companies (*Öneryıldız v. Turkey, 2004*).

The European Court has said, in relation to these obligations, that particular emphasis should be placed on the public's right to information, as established in its case law. The Grand Chamber stated that this right, which has already been recognised under Article 8, may also, in principle, be relied on to protect the right to life. The relevant regulations must also provide for appropriate procedures, taking into account the technical aspects of the activity in question, to identify shortcomings in the processes concerned and any errors committed by those responsible at different levels.

As well as this requirement to regulate and inform the public about dangerous activities, there is also an obligation on the State to provide an adequate response, judicial or

otherwise, to a potential infringement of the right to life. This includes the duty to promptly initiate an independent and impartial investigation, which must be capable of ascertaining the circumstances in which the incident took place, and identify shortcomings in the operation of the regulatory system.

In the leading case of *Öneryıldız v. Turkey*, the European Court found a violation of Article 2. In this case, an explosion occurred on a municipal rubbish tip, killing 39 people who had illegally built their dwellings around it. Nine members of the applicant's family died in the accident. Although an expert report had drawn the attention of the municipal authorities to the danger of a methane explosion at the tip two years before the accident, the authorities had taken no action. The European Court found that since the authorities knew, or ought to have known, that there was a real and immediate risk to the lives of people living near the rubbish tip, they had an obligation under Article 2 to take preventive measures to protect those people. The European Court also criticised the authorities for not informing those living next to the tip of the risks they were running by living there.

#### *Private and Family Life*

The European Court has held that “*where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8.*”<sup>3</sup> Furthermore, the European Court has stated that “*Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private industry properly.*”<sup>4</sup> Therefore, there are two issues relating to the environment that could potentially arise under Article 8: the State's responsibility not to subject citizens to an unclean environment, and the positive obligation of the State to ensure a clean environment through proper regulation.

These issues have been examined in a number of cases. The European Court has given clear confirmation that Article 8 of the Convention can be used to guarantee the right to a healthy environment. It found, unanimously, violations of Article 8 in two cases. *López Ostra v. Spain* (1994) concerned nuisances (smells, noise and fumes) caused by a waste-water treatment plant close to the applicant's home which had affected her daughter's health. Secondly, *Guerra and Others v. Italy* (1998) concerned harmful

emissions from a chemical works which presented serious risks to the applicants, who lived in a nearby municipality.

Further elaboration of the European Court's approach to this issue occurred in *Fadeyeva v. Russia* (2005). Here, the European Court observed that in order to fall under Article 8, complaints relating to environmental nuisances have to show, firstly, that there has been an actual interference with the individual's ‘private sphere’, and, secondly, that these nuisances have reached a certain level of severity. Moreover, the nature of the State's positive obligation was examined by the European Court in *Hatton and Others v. the United Kingdom* (2001), which concerned aircraft noise generated by an international airport (Heathrow). The European Court considered that whilst the activity was carried on by private parties, Article 8 nonetheless applied on the grounds that the State was responsible for properly regulating private industry in order to avoid or reduce noise pollution. However, in this case the Grand Chamber did not find a violation of Article 8, stating that the State could not be said to have overstepped their margin of appreciation by failing to strike a fair balance between the right of the individuals impacted upon by those regulations to respect their private life and home, and the conflicting interests of others and of the community as a whole.

Most recently, the case of *Tatar v. Romania* (2009) concerned serious pollution in the year 2000 in Romania with the discharge of approximately 100,000 cubic meters of cyanide-contaminated tailings water into the environment. In holding a unanimous violation of Article 8, the European Court referred to the precautionary principle in its judgement. As such, they stated that the lack of scientific consensus was not a sufficient justification for inaction following recommendations of a 1993 preliminary impact assessment carried out by the Romanian Ministry of the Environment.

Interpretations of Article 2 and Article 8 can also be considered in light of Recommendation 1885(2009) of the 30th September 2009 which has urged the Committee of Ministers (the political organ of the Council of Europe) to “*draw up an additional protocol to the ECHR, recognising the right to a healthy and viable environment.*”<sup>5</sup> In its Recommendation, the Council of Europe Parliamentary Assembly (PACE) underlines that it is a “*duty of society as a whole and each individual in particular to pass on a healthy and viable environment to future generations.*”<sup>6</sup>

## Fair balance

There remains the question of how can we reconcile the inevitable tension between the complaint of an actual individual who claims to be victim, here and now, of a violation of his human rights and the rights of future generations? Furthermore, where should governments stand with regard to their obligation to provide the greatest good to the greatest number?

The difficulty is shown in *Hatton and Others v. the United Kingdom* (2001), concerning complaints of nuisances caused by the increase of night flights in Heathrow airport in London. The European Court stated in its judgment that “*the State can be said to have struck a fair balance between [the interests of the economic well-being of the country] and the conflicting interests of the persons affected by noise disturbances, including the applicants. Environmental protection should be taken into consideration by States acting within their margin of appreciation and by the European Court in its review of that margin, but it would not be appropriate for the European Court to adopt a special approach in this respect by reference to a special status of environmental human rights.*” Taking into account the measures taken by the domestic authorities to mitigate the effects of aircraft noise and the fairness and transparency of the decision-making process, the European Court concluded that there was no violation of Article 8. However, a minority of five judges (against twelve) considered on the contrary that “*reasons based on economic arguments referring to ‘the country as a whole’*

*without any ‘specific indications of the economic cost of eliminating specific night flights’ are not sufficient. Moreover, it has not been demonstrated by the respondent State how and to what extent the economic situation would in fact deteriorate if a more drastic scheme – aimed at limiting night flights, halving their number or even halting them – were implemented.”* The minority pointed out that “*concern for environmental protection shares common ground with the general concern for human rights*” and concluded that there was a violation of Article 8 of the ECHR.

## Conclusion

While the right to a healthy environment is, as such, not protected by the ECHR, it is possible to protect it indirectly if an individual (not *actio popularis*) alleges that another ECHR right was violated. The right to a healthy environment is therefore a judicially enforceable right, at least in some of its aspects. Nevertheless, it has to be compatible with the general interests of the community: a fair balance between all competing interests has to be found.

## Notes:

1. The views presented here are the author’s and do not represent the position of the European Court of Human Rights.
2. ECHR Article 1 of Protocol No. 1, regarding the protection of private property, and ECHR Article 10, concerning freedom of information, could be seen to further support such a environmental human right but we are limited by space to these two.

3. *Hatton and Others v. the United Kingdom*, Application No. 36022/97, judgement of 8 July 2003 [GC], paragraph 96.

4. *Hatton and Others v. the United Kingdom*, Application No. 36022/97, judgement of 8 July 2003 [GC], paragraph 98.

5. Parliamentary Assembly of the Council of Europe (Bota, José Mendes) (2009): Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment, Doc. 12003 11 September 2009.

6. Parliamentary Assembly of the Council of Europe (Bota, José Mendes) (2009): Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment, Doc. 12003 11 September 2009.

## Biography:

Abel Campos has a degree in Law and in Economic and Legal Sciences from the University of Coimbra. After a period in the European Commission in Brussels, he worked for a law firm in Lisbon. Since 1991 he has been in Strasbourg, first with the then European Commission of Human Rights and from 1998 with the European Court of Human Rights, where he is currently Senior Lawyer and Head of Legal Division. He has published various articles and lectured on European Convention themes, particularly in the University of Coimbra and in the Institut des Hautes Etudes Européennes (University of Strasbourg).

## CONFERENCE PAPERS

### Implementing intergenerational justice: Children at the heart of policy making

by Lucy Stone

Focusing on children and their future is a powerful way to transform the confused attempts to tackle climate change into renewed implementation of sustainable development. Protecting children’s rights to health and education for example, and planning ahead for children’s future, is not a hugely controversial idea. But when applied to climate change it renews efforts to focus decision making not on the short

term but on long term, more sustainable decisions.

Climate science indicates that even the most conservative predictions will have considerable impacts on children, particularly those in countries least responsible but most at risk; the least developed nations. The window of opportunity to prevent the worst scenarios of climate change is fast closing and many of the potential environmental

impacts are likely to be irreversible. Therefore, the current generation of adults alive today will decide the fate of many generations to come. UNICEF UK explored how focusing on child rights provides an opportunity to implement intergenerational justice in the context of climate change.

The United Nations Convention of the Rights of the Child (CRC) is the most widely ratified international human rights

treaty in history. The CRC enshrines specific rights of all children with principles of respect for the views of the child, best interest of the child, non-discrimination and the right to life, survival and development. This provides a useful framework for guiding decisions about the scale and speed of the transition from fossil fuel based economies to low carbon modes of development. It also provides a framework for international payments from countries with historical responsibility for greenhouse gas emissions to countries bearing the brunt of the impact but with little contribution to the problem.

Intergenerational principles have been used in the UK to argue for greater spending by the current generation rather than delaying spending for future generations (who it is argued may be better able to pay, or have better technological means of adapting to the changes). Lord Stern was commissioned by the previous UK government to conduct an analysis of the economics of climate change. He concluded that the economic decisions on climate change (how much to spend on a low carbon transition now, and how much the future costs of inaction may be) have such great potential impact that it is essentially an ethical decision: *“Questions of intra- and inter-generational equity are central. Climate change will have serious impacts within the lifetime of most of those alive today. Future generations will be even more strongly affected, yet they lack representation in present day decisions.”*<sup>1</sup>

A social contract based on intergenerational justice agrees that each generation passes on the land, country or world in a better or no worse state than it was received. Options and opportunities should be the same or increa-

sed for children as it was for their parents and grandparents. This principle can be found in the creation of a Trust for future beneficiaries, in conservation and land managed on behalf of the nation (e.g. National Trust).

A child rights approach to climate change would ensure that the views of children are heard on key policy decisions, and that government decisions are made in the best interests of the child. Considering the huge risk of climate change to child health and development both in the UK and internationally, this should mean action on mitigating greenhouse emissions, investing in a low carbon economy and adequate support for children in developing countries. A first step to a child rights approach has been taken with the establishment of a ‘youth panel’ by the Department for Energy and Climate Change, to consult young people on key policy decisions. But action on support for low carbon industry, penalties for greenhouse gas emissions, and financing for adaptation in developing countries, is not yet happening at the



*Third Panel “Intergenerational Justice and International Law”: Sébastien Jodoin, Lucy Stone, Dr. Marisa Matias and Patrick Wegner*

scale required to avert the impacts on child rights that has been forecast.

The new UK coalition government has already stated that: *“we need to protect the environment for future generations, make our economy more environmentally sustainable, and improve our quality of life and well-being.”* A child rights framework could ensure this vision becomes reality.

#### Notes:

1. Stern, N. (2006): Stern Review on the Economics of Climate Change. London: HM Treasury: p. 23.
2. <http://ww2.defra.gov.uk/about/>

#### Biography:

Lucy Stone leads the climate change programme for UNICEF UK based in London. This involves advocating for a child-centred approach to climate policy, and innovative funding for climate adaptation in countries most vulnerable to climate change. With expertise in climate change policy, behaviour change and community participation, she has worked as a policy advisor and researcher for UK-based think tanks. She has contributed to international conferences, such as the Global Environmental Change and Human Security conference in Oslo, the British German Environment Forum in Berlin and the UNFCCC Conference of the Parties in Copenhagen. She has an MSc in Environmental Technology at Imperial College and a degree in philosophy and religion from Newcastle University. Recent publications include a policy briefing on climate change and intergenerational justice with the Institute for Development Studies.

## CONFERENCE PAPERS

### The Failure of Copenhagen and its consequences for International Relations *by Dr. Marisa Matias*

Almost everything has been said about the Copenhagen Summit: its failure, the disappointment, the unrealised goals, a new global order, the re-configuration of power relations, the new ‘maps’ for inter-relations, the role of the United States and China, the news spaces generated by the counter-summit and the organization of the Cochabamba meeting on the rights of Mother Earth, the emer-

gence of a new civil society. Without unanimous agreement, the problems emerging from climate change raise important questions that demand reflection and action. One of the key issues is the role of the United Nations in the governance of climate change and the renewal of discussions regarding a dedicated commission inside its structure. Another important matter involves the attempts, mainly by some Latin American

countries, to create an International Court to deal with climate ‘crimes’. Finally, there is a transversal debate that cuts across all aforementioned dimensions: what is the role of politics in dealing with climatic problems and climate justice. How can our politics deal with a possible new global order together with issues of climate justice and issues of redistribution?

*This speaker was not able to provide us with a summary of her presentation. This text corresponds to the abstract published in the website of the conference [www.futuregenerations-law-conference.com](http://www.futuregenerations-law-conference.com)*

### Biography

Marisa Matias is a researcher at the Centre for Social Studies and has a PhD from the School of Economics, University of Coimbra. Her areas of interest are the relationships between environment and public

health, science and democracy. She became a member of the European Parliament in 2009 and is currently Vice-Chairwoman of the Delegation for Relations with the Maghreb countries. She also sits as a full member on the Committee on Industry, Research and Energy.

## CONFERENCE PAPERS

# The Role of the State in the Protection of Future Generations

*by Judge (ret.) Shlomo Shoham*

Facing the future that awaits us beyond the horizon, taking responsibility for the generations to come, it is time for all states to find the most effective way to create a desired future on planet earth.

I will focus on the need for Sustainability Units to be part of the constitutional structure in democracies, and how to establish such units within the governance structures. The most important goal of foresight bodies is to influence the state and its institutions, prompting each to act in a visionary way and to take long-term considerations into account. Yet this kind of long-term thinking is too often precisely what decision-makers lack – indeed, the lessons of future-oriented thinking are frequently neglected in favor of pressing political interests. Any discussion on the correct model for a sustainability unit must thus take the following factors as practical constraints:

a) Decision-makers and policymakers may seem to agree that conduct based on vision and foresight is desirable. However, foresight is sometimes in opposition to the hidden interests and motives (both personal and political) of the political system and its leading figures. It is these less obvious themes that determine the political agenda.

b) Decision-making and implementation processes in democratic systems are not rational, striving to reach and manifest logical, optimal solutions. Rather, they fluctuate between a model of “finding a satisfactory solution” and one of “organic chaos.” The precise balance will be determined by each country’s social and political structures, cultural tradition, and leaders’ ability to govern.

c) Our experience in Israel perhaps showed an extreme example of both constraints. Despite phenomenal progress in Israel’s mere 60 years of existence, the country’s democratic

government is subject to a multiplicity of fragmented and conflicting interests. The ability of the government and the political system to rule and act is relatively low. I learned that a successful sustainability unit must be modelled in a way that allows it to address this present-day political reality as well as to think about the future.

d) To this end, I claim that the secret to success is behavior emphasizing both of these goals. I therefore suggest a model in which sustainability units of all kinds are composed of two sub-units, one for content and another for impact management.

e) The rationale for this division is grounded in the often-imperfect processes of political decision-making. A sustainability unit will be influential only if it meshes with the way decisions are actually made.

f) All democracies, virtually by definition, show some level of fragmentation, conflict of interest, and resource constraints. Political pressure often pushes leaders to act from short-term, compromise goals rather than long-term vision. Orderly decision making is very rare.

g) Sound decisions are made and good policy is carried out only when the three elements – problem, solution, and incentive – appear or are exposed simultaneously. Sustainability units in governmental bodies should be constructed so they can recognize and address each element in a way that maximizes the influence of their recommendations.

h) A successful sustainability unit will have a specific relationship to all of these elements of decision-making, each of which is worth examining:

i) Problems: The unit should serve as an auditing body that forms an integral part of the legislative branch’s supervisory authority over

the executive branch. It should express its opinion on decisions that are in some sense damaging in the long-term view. In addition, the unit should be able to describe or anticipate problems that may occur in the absence of futures thinking – especially since crucial decisions are often a product of short-term thinking.

j) Solutions: The unit should serve as an advisory body that creates contingency plans and offers solutions created through futures thinking and long-term consciousness (not necessarily as a response to existing problems).

k) Incentives: The unit should be able to manage political stimuli in order to create incentives for decision-makers to act. It should draw attention to problems and its own solutions, thereby sensitizing decision-makers to the long-term consequences of their actions or, alternately, their inaction. In so doing, the unit facilitates timely change and helps prevent extreme situations from evolving into a crisis.

l) A body that addresses only a subset of these elements will have difficulties in carrying out its task. The most exquisite sensitivity to problems and the most brilliantly conceived solutions will be useless if the incentives to act are not in place.

m) Legal authority of the unit: The legal authority of the sustainability unit naturally has great significance in determining the way it operates. Any implementing law should thus be designed to give the unit sufficient range of action and authority – all in accordance with a given country’s regime and governing system. This said, I believe there is advantage in positioning the sustainability unit in the legislative branch, as an integral part of parliament (or at least an established part of the State Comptroller’s Office, which deri-

ves its authority from parliament). This makes the unit independent of the executive branch, allows it to audit government policy with respect to issues of sustainability, and allows for direct influence on legislation. Creating this kind of unit as an independent authority within the government structure might seem an advantage, providing greater influence over the executive branch's daily activity. However, under this model, the unit is apt to be worn down by the bureaucracy that rules in government offices, and to lose its power when faced with the survival behavior of the executive authority.

n) Ability to influence decision-makers: Content units should choose issues that have the potential to create a change in decision-makers' awareness, inspiring a desire to act with consideration of the future. The unit's greatest challenge will be in changing politicians' tendency to act and think of the short term. Choosing the right subject will help create a slow, cumulative change in awareness, which will ultimately change the character of decision-makers' activity.

### **Resistance to change**

A sustainability unit dedicated to future thinking, and thus to beneficial policy transformation, will inevitably meet resistance to change. Research literature on public administration deals extensively with this subject, deriving motives that can be characterized as:

- organizational and governmental conservatism;
- structured concern and fear of change;
- the fear of loss of authority, prestige, or power;
- the desire to avoid unnecessary turmoil.

An assimilation unit must understand these various components of resistance to change, and work to create an environment of incentives that overcome them. In practice, policy implementation will largely take place in one of two ways: either top-down, driven by a senior policymaker with the power to effect change; or in a "garbage can" sense, in which an unusual set of problems, solutions and incentives must be supplemented by a change of consciousness in the public and media. Both models are worth examining in some detail, as they will require the assimilation unit to pursue different approaches.

### **Top-down change: Working with change agents**

The public administration ranks of any country will contain few true change

agents – decision-makers with the ability to understand the need for, and the power to implement change. The role and classification of these figures will change from country to country, and from time to time, depending heavily on the personalities of the staff active at any given time.

During the Israel Commission's tenure, we learned that the number of decision-makers who are anxious to use their authority to make change is inestimably greater than the number who use their authority appropriately, and even more than those who overuse their authority. This is even truer for non-elected civil servants, who serve in their positions for many years.

I suggest a values-driven approach to developing an infrastructure for influencing change agents. Helping these individuals see the linkage or harmony that exists between future-oriented interests and their own true interests is a crucial component of this infrastructure. The key to this is the understanding that long-term considerations are crucial for good management practices in the present, and that ignoring these considerations will ultimately harm those most dear to us, including our children and grandchildren.

### **Incentives for change: Leveraging alliances**

Often, decision-makers will prove reluctant to implement change, or the dynamics of political power will keep specific change agents from being effective. In these cases, the Commission assimilation unit's role will be as a catalyst, helping to create a broader environment in which change becomes possible.

In some cases, this can mean enlisting the support of influential bodies to which the government is obligated by geopolitical forces. In others, it might mean turning to solutions that have been successfully implemented in other countries.

By developing working relations with parallel bodies elsewhere in the world, a sustainability unit can gain status and world recognition that can help attract the attention of its own governmental decision makers, and mobilize public opinion in support of an idea the government refuses to accept. Today's technology makes it possible to recruit substantial world support, even for ideas beneficial primarily to the sustainability unit's own country or society.

Decision-makers, and particularly politicians who must seek re-election, often pay

close attention to public feelings. If broad public support for a given solution has been cultivated (or even if decision-makers just think that such support exists), this can afford the opportunity to enlist decision-makers' support or help change their thinking on a subject they rejected in the past.

### **Incentives for change: Gaining legitimacy and public attention**

The creation of public discourse around an issue, examining future-oriented problems and solutions, is a critical tool in the development of public support. This public discourse itself provides a setting for public criticism, which becomes an important stage in the recruitment of public opinion.

The development of joint projects with the public or with public opinion makers is a good platform for creating connections that lead to public trust. Civil society has developed quickly and powerfully in recent years, and more and more non-profit organizations are carving out spheres within which civil society can evolve and express influential opinions.

As much as possible, the sustainability unit – through its assimilation sub-unit – must work in harmony with civil society on every subject it addresses. This increases the power of its statements, and provides a significant channel of influence for civil society itself.

In parallel, the unit must develop an orderly system of consultation with academia, scientists and universities. One of the greatest absurdities of the democratic state in the 21st century is that the wealth of knowledge generated within academic settings, is often left outside the decision-makers' circle of influence.

In our experience with the Israeli Commission, we found this resource to be extraordinarily fruitful, precisely because of its traditional underuse. Academic researchers and scientists are often frustrated that their knowledge and research results have such small influence in the decision-making process. The sustainability unit can become their mouthpiece, bringing previously untapped knowledge to policymakers before critical decisions are made.

While it is true that many parliaments have science and research units, these units are sometimes sterile. Their role within the legislature is often pro forma, making it difficult for them to take a stand, and their opinions are often ignored in favor of populist measures.

### Incentives for change: Working with the media

The media has a decisive role in 21st century democracy. Its influence on decision-making processes is extremely strong, and quite often, it disturbs the proper balance among the authorities. It is important to remember that from time to time, the media determines its own positions and is not satisfied with simply delivering the objective news. This obligates any sustainability unit to invest considerable thought in its own media relationships.

On the one hand, broad, positive media coverage of the unit's work will help expand its influence. On the other, sustainability units will by nature seek to deepen public discourse, and to bring long-term considerations and externalities into the decision-making process. This poses a problem for any such unit, however, as many of these things are not easily rendered in the visual language of the media.

To improve ratings, the media focuses on immediate drama and anxiety. By contrast, sustainability units should deal with implications for the future, with finding creative solutions not in the realm of danger and

drama, but in the thoughtful creation of our own future. We are rarely speaking about a cocked gun at a person's head, but of future dangers.

However, through creativity, daring and original thinking, these structural difficulties can be overcome. A way can be found to tell the story of our children and grandchildren in a life-embracing and heart-warming manner.

### Biography:

Judge (ret.) Shlomo Shoham served as the first Commissioner for Future Generations and as a legal advisor to the Constitution Law and Justice Committee in the Israeli Parliament.

Shoham was a lecturer in the Law Faculties of the Universities of Tel Aviv, Jerusalem and

Bar Ilan on range of subjects on Human Rights and Criminal Law. He also taught Emotional Intelligence at the executive MPA program at the Hebrew University in Jerusalem and Meditation and Bio-energy for thousands of people worldwide.

In recent years, Shlomo was an honorary fellow of the Bertelsmann Foundation, within this framework he wrote his book on Future Intelligence.

Shoham teaches future-oriented Educational Leadership at the Lewinsky College and Holistic Leadership to teachers of the Reidman College in Tel Aviv.

He is the founder of the Centre for Sustainable Global Leadership which will train promising young leaders with the greatest potential to create global transformation.



*Fourth Panel "Intergenerational Justice and Constitutional Law: Prof. Dr. Francisco Pereira Coutinho, Dr. Emilie Gaillard Sebileau, Sándor Fülöp and Judge (ret.) Shlomo Shoham*

## CONFERENCE PAPERS

### French Constitutional Law and Future Generations – Towards the implementation of transgenerational principles?

*by Dr. Emilie Gaillard Sebileau*

In 2005, an Environmental Charter was adopted in order to integrate new fundamental rights and duties for the environment and future generations. In 2008, an official committee presided by Mrs Simone Veil was commissioned to examine whether or not, the preamble should be reformed so as to take bioethical issues into account.<sup>1</sup> Even though the Committee decided not to change the preamble, this was rather due to the fact that French constitutional law has a large spectrum of possibilities in order to adapt to bioethics issues. Nevertheless, as many members of the executive clearly expressed their will to protect future generations, the question of implementing justice through constitutional principles now clearly has to be examined.

Are there, in French constitutional law, suffi-

cient provisions to provide a juridical defence of future generations? Should they be considered as a new entity protected by constitutional law? Are new revisions really necessary? Last, but not least, are there transgenerational principles capable of implementing a juridical protection of future generations?

Contrary to widespread opinion, the implementation of justice towards future generations may be possible, in many ways *de lege lata*. However, from the constitutional imaginary to the normative implementation of French constitutional law, it is an epistemological break that must first be described. We have inherited a limited temporal matrix in which the social contract is supposed to take place.<sup>2</sup> This philosophical perception has been inserted deeply into the heart of the

French constitutional imagination. If Article 6 of the 1789 Declaration of the Rights of Man and Citizen states that "*Law is the expression of the general will*", it is evidently that of actual people. Moreover, it involves the notion that drafters of the constitution and legislative powers do not have the legitimacy to endow laws for future generations. If not, the fundamental law would be synonymous with illegitimacy. In this context, no law for the future may be formulated as it would be contrary to the freedom of individuals. The full cycle has occurred when reading Article 5 of the 1789 French Declaration of the Rights of Man and Citizen which sets out that "*The Law has the right to forbid only actions which are injurious to society*". Given that the XIXth century's society was not in touch with future generations,

the concept of law could not be conceived of in another way that of reciprocity between human beings. In other words, there is a paradigm of juridical reciprocity that has expanded from our constitutional imagination to the implementation of laws.

Since the XXIst century is characterised by new actions of humankind that are harmful for future generations (directly by posing a threat on their human condition or indirectly by mortgaging their natural resources in particular), wouldn't it be legitimate to take the future into account? Undoubtedly, our historical context requires a new approach to the concept of democracy. The very first step has to be done at the ends of our common juridical imagination in order to move away from the juridical reciprocity paradigm. Two transgenerational founding principles could help the implementation of justice toward future generations. From our point of view, they can already use French constitutional law *de lege lata* in support.

I. First, a *Temporal Non-Discrimination Principle* would legalise a new ethical approach of social relationships, throughout generations.<sup>3</sup> The validity of values or rights must not be limited in a temporal frame excluding future generations nor the environment. By virtue of this founding principle, the actual human beings would no longer have the right to mortgage the future only because of their temporal condition.<sup>4</sup> In French constitutional law, there are enough provisions in order to implement this founding principle. But a main distinction may be first made: *the temporal non discrimination principle may be differently applied contingent on the knowledge context*,<sup>5</sup> that is to say, whether the context is that of uncertainty or not. Since the French Environmental Charter has been adopted, the precautionary principle has been held at the constitutional level. Surprisingly, according to some author's point of view, the formulation has been totally reviewed in order to limit and to confuse its range.<sup>6</sup> Whether Article 5 has denatured the original principle or not, there is still a constitutional cornerstone for implementing the law for protecting future generations in a context of uncertainty. Now, it is totally permitted to imagine a legislative power that sets out laws in order to protect our society from irreversible and serious threats to the environment. Concerning respect for the future, the French constitutional court now has a foundation to exercise its constitutionality of the law or conventionality controls against serious or irreversible environmental

damages. This article provides strong support in order to initiate the defence of a public order now considered as open to the purpose of protecting future generations. Thus, it logically appears that this protection is likely to be applied in other fields than the environmental ones. The implementation of the temporal non-discrimination principle, implies new juridical logics and also new incriminations. Article 5's main virtue is to permit to overtake the human generational timeframe in a context of uncertainty. Nevertheless, time provides us with a sense of certainty. In a context of certainty, French constitutional law should all the more provide a juridical protection to future generations. Yet, the constitutional ways have still to be defined. Many provisions could be invoked. First, the seventh recital of the preamble of the French Environmental Charter aims at respecting future generations towards the concept of sustainable development. Now, even though the Constitutional Council has to pronounce whether the whole Charter has a constitutional value or not, it is possible to say that future generations are, at least, a new entity that have to be protected by French constitutional law. Indeed, if the temporal non-discrimination principle may be implemented by French constitutional law in a context of uncertainty, it has to remain the same all the more in a context of certainty. The Constitutional Council may also invoke Article 5 of the Human Rights Declaration of 1789 or Article 1382 of the French Civil Code.<sup>7</sup> In fact, it will have to be precise whether the protection of future generations has become a new constitutional objective, a new component of the public order, a new principle particularly necessary to our time or a full constitutional principle. Now that a "*priority constitutional question*" has become effective (since March 2010, new Article 61-1 of the constitution), the hypothesis may be realised (in GMO's or Chloredacone's cases for example).

II. Second, with regard to comparative law, a *Future Generations' Dignity Principle* would complete the reshaping of the juridical landscape. The concept of dignity tends to protect the very humanity of human beings, in every human being and beyond. It is an open concept that may permit a mobilization of consciousness. The Committee presided by Mrs Veil proposed to inscribe the terms of 'equal dignity of everyone' in Article 1 of the French constitution. In comparative law, one cannot fail to notice that the

dignity principle tends to be extended to future generations.<sup>8</sup> In any case, new revisions are not really necessary: constitutional case law, others constitutional principles may permit its development. It would initiate a reshaping of the human rights landscape. Various projects of declaring future generations' human rights tend to confirm the increasing power of the Future Generations' Dignity Principle. It would integrate into the system the four human rights generations and also transgenerationalise them. The influence of international human rights confirms also a clear tendency to give rights to humanity. Juridical creativity can now be liberated.

#### Notes:

1. Official report to the President, *Redécouvrir le Préambule de la Constitution*, ed. *La Doc. française*, p. 100.

2. Indeed, implicitly, Rousseau's social contract theory has turned out to be in a limited temporal frame. According to the philosopher and jurist F. Ost, it is clear that Rousseau had a current conception of the social time, F. OST (1999): *Le temps du droit*, Paris: ed. O. Jacob.

3. In fact, E. Burke had already formulated a transgenerational lecture of the social contract which was, to his point of view a: "*partnership between those who are living, those who are dead and those who are to be born*", *Reflections on the Revolution in France*, Chicago Press, 1955, p.140 (quotation from F. OST, *La nature hors la loi, L'écologie à l'épreuve du droit*, éd. *La Découverte/Poche*, 2nd ed., (2003), esp. p. 299.

4. That is precisely what professor Visser't Hooft says: "*The main point of justice between generations is to denounce generational egoism as an abuse of power*", H. P. Visser't Hooft, (1999): *Justice to Future Generations and the Environment*, Kluwer, Academic Publishers, col. Law and Philosophy Library.

5. This distinction has been proposed in philosophy by professor D. Birnbacher, *Verantwortung für zukünftige Generationen*, P. Reclam, (1995).

6. It is true that there has been strong forces of resistance to the constitutionalisation of the Precautionary Principle. The current Article 5 states: *Lorsque la réalisation d'un dommage, bien qu'incertaine en l'état des connaissances scientifiques, pourrait affecter de manière grave et irréversible l'environnement, les autorités publiques veillent, par application du principe de précaution et dans leurs do-*

maines d'attributions, à la mise en œuvre de procédures d'évaluation des risques et à l'adoption de mesures provisoires et proportionnées afin de parer à la réalisation du dommage.

7. This article (which sets out the Principle of Civil Torts) has been held at the constitutional level.

8. Constitution of Japan Art. 11 and Art. 97; Art. 20 A, German Fundamental Law; Article 141 of the Bavarian Constitution. See, J. M. Rojo Sanz (1992): *Los derechos humanos de la futuras generaciones*, in *Derechos humanos : Concepto, Fundamentos, Sujetos*, coord. J. Ballesteros Llompant, ed. Tecnos.

#### Biography:

Emilie Gaillard Sebileau holds two Master degrees in business law (DESS *Droit des affaires et fiscalité*, Bordeaux and DEA *Droit économique et des affaires*, Orléans, Law school). From 2001 to 2006, she taught: contract and torts law, introduction to private law and corporate insolvency. In December 2008, she was awarded a PhD for her thesis *Future Generations and Private Law* (currently being published). Her works highlight the emergence of a new temporal paradigm which renews the legal framework but also initiates a new legal logic. From International to Private Law, across traditional

French boundaries between Public and Private Law, this work is highly inspired by Comparative Law. She strives for a revitalised juridical humanism. As such, she has written a theoretical article entitled *La force normative du paradigme juridique* (see [www.forcenormative.fr](http://www.forcenormative.fr)). Furthermore, she is currently writing an article entitled *Vers une démocratie transgénérationnelle directe?* In November 2010, the *Prix Charles Dupin* for the best legal work, will be awarded to her by the French *Académie des Sciences Morales et Politiques*, for her thesis *Generations Futures et Droit Privé. Vers un droit des générations futures* (Future Generations and Private Law. Toward a Law for Future Generations)

## CONFERENCE PAPERS

### Ways to legally implement intergenerational justice in Portugal

by Prof. Dr. Francisco Pereira Coutinho

The principle of intergenerational justice has been granted constitutional protection in Art. 66 of the Portuguese Constitution, where it is stated that natural resources must be explored with due regard for this principle. Moreover, Art. 5 of the law on urban and territorial management also refers to the intergenerational justice principle to assure that future generations are granted a well managed territory.

It is not surprising that it was within this framework that the constitutional concretization of the principle of intergenerational justice occurred. Indeed, it was within environmental law that the complex theoretical question of collective rights was first addressed and solved. Since no one can claim to be the sole owner of the environment, this right could not be judicially enforced. The theory of the 'diffuse interest' was then created to overcome this problem. Nowadays Portuguese courts unanimously recognize the environment as a diffuse interest. This has obviously led to the recognition of ever increasing rights to organizations devoted to the protection of the environment, such as the right of popular action, which finds its constitutional ground on Art. 52 of the Constitution.

The possibility of extending the principle of

intergenerational justice over financial issues is now one of the hottest topics on the political agenda in Portugal. Just recently the Portuguese Minister of Foreign Affairs came forward with the idea of introducing a 3 percent limit to the public deficit in the Constitution. Several other commentators have also expressed their belief that the soaring public debt has to be stopped in order not to jeopardize the country's future.

One can infer from the principle of intergenerational justice that our decisions should not radically condition the power that future generation will have to make policy decisions. In other words, we cannot deplete the country's resources in such a way that future generations cannot make relevant decisions. As it is well known, the concretization of social policies is fundamentally dependent on the financial health of the State. Social security, housing or even education policies for future generations can be limited by the financial decisions of today. Therefore, one must find legal instruments that can limit government powers to financially deplete the countries resources through the accumulation of loans or debt.

The problem is that some of the solutions given to implement some kind of generational equity within our community simply do not seem to be able to solve this problem.

For instance, introducing a constitutional limit to the deficit may create the perception that the problem is solved magically, but it will probably lead to a simple violation of the constitution, either directly or indirectly through imaginative and non-transparent budgets. In this matter, there are no constitutional silver bullets that could kill the werewolf that is our current deficit problem right now.

However, there are some measures that could be implemented: one example is to introduce in the Constitution a general financial intergenerational justice clause similar to the one found in Art. 115 of the German Constitution that states that "*revenue obtained by borrowing shall not exceed the total of investment expenditures provided for in the budget; exceptions shall be permissible only to avert a disturbance of the overall economic equilibrium*"; another is to adopt transparent budgets that incorporate generational costs. That means that the governments must internalize additional costs that are their own responsibility. Modern budgets should, therefore, include intergenerational costs associated with the rise of the expense, as well as a prediction of the social expenses the State may face in the future. That will also mean presenting credible alternative macroeconomic scenarios of public finance.

Beyond these specific concretizations of the intergenerational principle, one must also discuss the possibility of establishing a general legal principle of intergenerational justice in the Constitution. In this regard, one has to discuss whether the principle of intergenerational justice conflicts with the democratic and popular sovereignty principles that shape the Portuguese Constitution.

Today's western democratic regimes stem from 19th and 20th Century constitutional regimes. In these, the constitutional apparatus was separated from the democratic form of government in a way that the general principles of the community could be in no way subverted by popular and social pressures or by democratic decisions of the majority. This classical liberal standpoint – that we can observe in Locke, Kant or the Founding Fathers of the United States Constitution – regarded the independence of the fundamental laws of the state as a prime characteristic of a free society.

That sovereignty of the constitution was questioned by democratic theory. Rousseau contended that the only acceptable origin of a political constitution, and its subsequent constraints on the life of the citizens, is the original will of each citizen. Being 'man made', the democratic constitution implies a shift to a democratic conception of fundamental laws and a clear possibility of a recall of sovereignty by the citizens. For that reason, in a purely democratic framework the possibility of a contract that ranges through generations, with its own particular views,

necessities and purposes, is almost inextinguishable. Since the powers of the citizens within the democratic theory are absolute and removed from the constraints of customs or previous laws, there is no way to enforce a law enacted by a previous generation.

In democratic theory, the post-modern state of 'liquid modernity', as stated by Zygmunt Bauman,<sup>1</sup> is the ability of the community to reinvent itself at any time and free itself from the constraints of past wills. Due to being nothing more than past wills or past constraints, cross-generational justice principles simply do not have applicability within a community that decides to free itself from the weight of past conceptions of future generations.

In constitutional frameworks such as ours, the interpretation of the constitution is a mixture of liberal constitutionalism and the idea of a democratic ownership of the state's fundamental laws. It is essential, therefore, to assure that the latter interpretations do not get a fundamental advantage over the liberal constitutional interpretations, in which there is a place for independent representation of electors and for principles to stand above the personal views and wills.

As Fareed Zakaria notes in *The Future of Freedom: Illiberal Democracy Home and Abroad*<sup>2</sup> to obtain freedom for present and future generations, the idea that democracy is no more than an administrative power delegation submitted to the episodically will of the citizens must be rejected. In its place one must adopt a more piercing and lasting per-

ception of principles. Without this paradigm shift, it shall be utterly impossible to grant a strong standing of those principles, preventing them from withholding any value across generations.

#### Notes:

1. Bauman, Zygmunt (2000): *Liquid Modernity*. Cambridge: Polity Press
2. Zakaria, Fareed (2003): *The Future of Freedom: Illiberal Democracy Home and Abroad*, W.W. Norton and Co.

#### Biography:

Francisco Pereira Coutinho has a law degree and a PhD in law from Universidade Nova de Lisboa Law School. He currently teaches constitutional law, international law and European law in Universidade Autónoma de Lisboa and Faculdade de Ciências Sociais e Humanas da Universidade Nova de Lisboa. He is also a legal advisor in the Portuguese Diplomatic Academy (Instituto Diplomático).



*Closing Ceremony: [From left to right] Prof. Dr. Almeida Ribeiro, Prof. Dr. Marques Guedes, Dr. Maja Göpel and Prof. Dr. Dr. Jörg Tremmel*

## Post Conference Conclusions – Some thoughts on the legal nature of future generations: the recognition of an *ante natalem* protection?

by Marisa dos Reis<sup>1</sup>

The non-identity problem and the question of non recognition of legal personhood to people not yet born or at least conceived (depending on the country)<sup>2</sup> can be approached from a new and creative point of view.

Most civil codes provide legal protection of certain fundamental rights after death (*post mortem* protection) as well as guaranteeing some rights to unborn persons (including

the capacity to inherit, as in, e.g., the Portuguese, or the German civil codes or even the Spanish foral civil codes). The Portuguese Article 2033 says: (General principles) "Capable of inheriting are: the State, all persons already born or conceived at the time of the devolution of the inheritance and who are not excluded by law. 2. The following have also capacity to inherit by will or contractual succession: a) the unborn not yet conceived,

who will be descendants of a determined and living person at the time of the devolution of the inheritance b) Legal persons and societies."<sup>3</sup>

The German law (section 1923) reads: "Capacity to inherit (1) Only a person who is alive at the time of the devolution of an inheritance may be an heir. (2) A person who is not yet alive at the time of the devolution of an inheritance, but has already been con-

ceived, is deemed to have been born before the devolution of an inheritance; Section 2101: Subsequent heir not yet conceived (1) If a person not yet conceived at the time of the devolution of the inheritance is appointed heir, then in case of doubt it is to be assumed that the person is appointed as subsequent heir. If it does not reflect the intention of the testator that the person appointed should be subsequent heir, the appointment is ineffective. (2) The same applies to the appointment of a legal person that comes into existence only after the devolution of the inheritance; the provision of section 84 is unaffected.”<sup>4</sup>

Similar legal dispositions (and even stronger, concerning the protection of the non conceived persons) may be found in the foral civil law of Catalunya or Aragon. For instance, the Civil Code of Catalunya says in its Article 412-1: “Physical persons: 1. All those who were already born or conceived at the time of the devolution of the inheritance and have survived to the deceased person. 2. Children who are born under an assisted fertilisation procedure in accordance with the law after the death of one of the parents have the capacity to inherit from the predeceased parent.”<sup>5</sup>

I argued in my thesis, presented on the 14th of June at the Faculty of Law, University of Lisbon, that according to the principles of human dignity and equality, we should treat equal situations equally. It is the *Principle of Human Dignity* which is behind this post mortem protection of certain fundamental rights. I can think of cases for the protection of the deceased person’s memory, the right to name and image, copyright,<sup>6</sup> etc.

Nevertheless, legal personhood ceases with death. The Portuguese penal code, for instance, foresees a crime of offences to the memory of a deceased person, setting a limit of 50 years for its prescription: Art. 185 (offences to the memory of a deceased person) “1 - Who, in any way, seriously offend the memory of a deceased person shall be punished with imprisonment up to six months or a fine up to 240 days. (...) 3 - The offence is not punishable when it has been more than 50 years on the person’s death.”<sup>7</sup>

Thus, it appears that treating equal situations equally, if one should protect a *memory* one should also protect an *expectation* – and thus recognise a so-called *ante natalem* protection to the unborn.

This *expectation* could be tutored by the same people who are entitled to defend the rights of a deceased person (family mem-

bers). This approach may solve the dilemma concerning the legal status of *future individuals* but does not do so in the case of *whole generations*, where it is not possible to identify its members. In this case, it seems more plausible to think of the legal interests of *diffuse* and *collective rights*, which do not concern a specific and determined individual, but are rights that are based on solidarity towards a group of people.

Taking the examples of Portugal and Brazil, the Public Prosecution Service is competent to intervene in court to defend these interests.

In fact, its statutes already ensure the representation of children, the absent, the uncertain, the unable, or the workers in the event of labour disputes. The Portuguese statutes read: Article 3 Jurisdiction 1. “The Public Prosecution Service has special responsibility for the following: a) To represent the State, Autonomous Regions, local authorities, the incapacitated, the unidentifiable or those whose whereabouts are not known; b) To take part in the execution of criminal policy as defined by the organs of sovereignty; c) To carry out penal action according to the principle of legality; (...) e) In cases provided for in law, to assume the defence of collective and diffuse interests(...)”

In Brazil, in 1993 the Complementary Law n. 75 was created, providing the statutes of the Public Prosecution Service in the whole Federation. In its Article 6, (section VII), it is read that the Public Prosecution Service promotes civil and public investigation, as well as public civil action for the protection of diffuse and collective interests, for the indigenous communities, families, children, adolescents, elderly, ethnic minorities and the consumer.<sup>8</sup> Thus, it appears that in its *ratio legis*, the statutes impose that, if we recognise some rights to future people (an *ante natalem* protection, as I suggest), the Public Prosecution Service should represent these collective interests from a generational dimension.

It would be, therefore, possible to have a legal solution which would not lead the States to incur more expenditure with the creation of a political apparatus for the interest of future generations. It would be important, however, to create a Parliamentary Committee in order to evaluate the potential future impact of new laws.

From my point of view, from all the models already existing or suggested in this Conference, the Finnish model seems to be the most comprehensive, functional and dynamic of all institutions so far established to protect the interests of future generations. I firmly be-

lieve that future generations, as a group of uncertain and unidentified individuals whose interests are related to a wide range of fields (economic and social policies, environment, public debt, biomedicine, etc.) are better represented by a collegial body such as a parliamentary committee. This political solution would allow, together with recognising the Public Prosecution Service as the competent institution to represent future generations, a cheap and very efficient way of guaranteeing their rights.

#### Notes:

1. This research does not mean to reflect the official position of FRFG.
2. Like in some of the States of the USA, such as North Dakota, Maryland, Montana, South Carolina and Alabama where the legal personhood of foetuses is recognised.
3. Own translation of the Portuguese Civil Code: Art. 2033.
4. BGB (translated at: [http://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#BGBEngl\\_000G182](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#BGBEngl_000G182), accessed on the 13th of July 2010)
5. Own translation of the foral Civil Code of Catalunya: Art. 412-1
6. In California, USA, this protection can go up to seventy years and in Germany and the UK ten years.
7. Own translation of the Portuguese penal code’s Article 185.
8. Translated at <http://www.gddc.pt/legislacao-lingua-estrangeira/english/8182-law-60-ing.html>, accessed on the 13th of July 2010.

#### Biography:

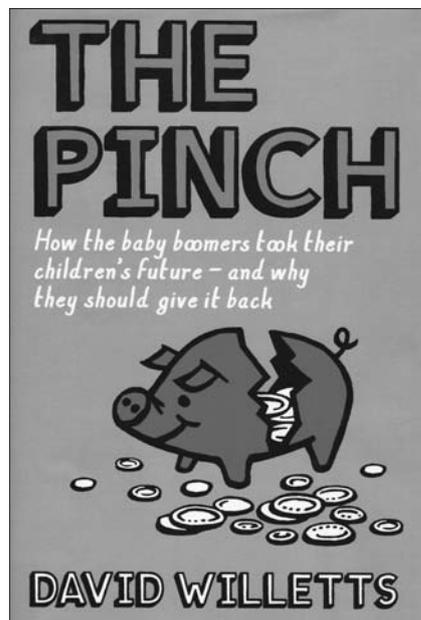
Marisa dos Reis has a *licenciatura* degree (5-year diploma) in Law by the Faculty of Law of the University Nova de Lisboa (1997-2002). From 2003 to 2007, she worked as a deputy district prosecutor attorney in Portugal. In that context, she was responsible for supervising two local Commissions for the Protection of Minors at Social Risk. She achieved a specialist diploma in international law, by the Faculty of Law of the University de Lisboa in 2008. She has recently presented her Advanced Masters’ thesis “*Direito Internacional, Direitos Humanos e Justiça Intergeracional - A protecção jurídica das gerações futuras*” (International Law, Human Rights and Intergenerational Justice – the legal protection of future generations) at the same institution. Marisa dos Reis was the Project Leader of the conference while collaborating as a research fellow and editor at FRFG since 2009.

# David Willetts: The Pinch. How the baby boomers took their children's future – and why they should give it back

*Reviewed by Raphaelle Schwarzberg*

David Willetts' book *The Pinch* could have hardly been published more timely. The context of the current euro-zone crisis over debt management and the election of David Cameron to the office of Prime Minister in the United Kingdom, based on a programme of deficit reduction, have all drawn attention to the alleged excesses of older generations. As suggested by the subtitle, *How the baby boomers took their children's future – and why they should give it back*, the aim of the book is to explain the dues of different generations since the Second World War from a perspective of intergenerational cooperation and equity. This appears to be a novel justification for public policy, but it remains to be discussed how justified or convincing his argumentation is.

The main thesis of the book reads as follows: as a very large generation, the baby boomers (individuals born between 1945 and 1965) have benefited from an exceptional situation. However, that position does and will impose strains on the younger generations' well-being, a situation that is unfair. Not only do the baby boomers dominate culturally, through their power as an extremely large consumption market, but they also have concentrated extravagant amounts of wealth and property in the UK. According to Willetts, they own £3.5 trillion of the wealth of the country out of a total of £6.7 trillion (p. 76). They have mismanaged these assets, for example by a lack of savings in the private sector and unscrupulous investment in the housing bubble. This behaviour has limited the younger generations' capacity to acquire and accumulate. Soon, baby boomers could be imposing their political and economic agendas, especially with respect to pensions and health care spending through democratic votes. Gerontocracy would penalize the youngest by favouring state redistribution towards seniors. Quoted by Willetts, projections based on data by the HM Treasury indicate that age-related spending would increase by £60 billion in today's money, that is a 4.9 percentage points increase of 2007/08 GDP within forty years



(p.164). In other terms, according to the HM Treasury: “The share of age-related spending is therefore projected to increase from around half of total government spending in 2007-08 to around 60 per cent by 2057-58.” (p. 39) These figures remain much below those of other European countries such as France or Germany (p. 41). Still, such a growth of public spending could only be met by raising further taxes according to Willetts: “That would mean tax increases just to carry on delivering programmes which don't change to a population which does. This is a heavy burden for the young generation to bear as they go through their working lives” (p. 165). Based on a 2004-publication by Hills, the baby boomers are expected to receive 18 percent more from the welfare state than they have contributed (p. 162).

What Willetts considers the appropriate level of intergenerational transfers and the main arguments supporting such transfers are explored in chapter 5 ‘The Social Contract’, through both concepts of direct and indirect reciprocity between three generations: grandparents, parents and children. In that chapter, Willetts provides a three-fold support for transfers between generations. These three accounts of intergenerational justice are, however, not always compatible

and consistent with each other, especially given their justifications and implications. The first is a naturalized account of cooperation with biological arguments (neurobiology, Dawkins' selfish gene). The second models cooperation between rational and self-interested agents (game theory). The third is a watered-down Rawlsian contractualist theory. Willetts concludes his reasoning by underlining the centrality of the family to uphold such transfers, thereby echoing the first chapter (discussed below). Around this main argument, Willetts discusses the reasons why the boomers became such an unprecedented generation, including: ultra-individualism, the permissiveness of society, the deregulation of the labour market that allowed access to women and foreigners. The result of these changes is, according to him, an increasingly wasteful disposal of society's resources. The transformation of the family structure (i.e. ever smaller households) has also resulted in more inequality. Increased investment in family ties, including more time devoted to infants but not adolescents, runs parallel with the decline in civic participation, a situation that Willetts greatly deplores following authors like Robert D. Putnam. In chapter 10, Willetts considers that the decrease of social mobility fosters social inequality. Schooling segregation and the importance of “soft skills” restrain the opportunities of the most disadvantaged. Changing admission rules, providing adequate training and more information are the solutions envisaged by the author. Accession to the housing market by younger generations has also been particularly difficult with the housing boom, which has left them repaying extravagant mortgages (chapter 11). In addition to the financial and investment mistakes committed by the boomers, Willetts recognizes that other factors also explain the difficulties faced by the younger generations including greater competition on the labour market (resulting from globalisation) and low inflation rates. The age segregation at each stage of life would also have prevented the baby boomers from realising the difficulties that the younger generations

encounter.

Willetts also discusses the environmental challenges (chapter 7) facing the not-so-distant future generations. There, the author's aim is to make the reader aware of the necessity to adopt a more adequate social discount rate so as to value the future better. This is particularly crucial because future generations will not necessarily be as well off or even better off than current generations given the economic and scientific uncertainties awaiting them within the next forty years.

Willetts' eminent political position, formerly as Shadow Minister for Universities and Skills and now Minister of State for Universities and Science in the UK government, will undoubtedly participate into bringing to the fore of the public debate the issues of intergenerational justice. The richness of sources, the variety of disciplines and themes referred to provide the reader with cutting-edge academic research. We will now try to address the following problematic questions:

- 1) What are the baby boomers responsible for?
- 2) What issues of fairness and equality has the accession of women to the labour market raised?
- 3) What role does 'British uniqueness' play in Willetts' argumentation?
- 4) How does Willetts ground intergenerational obligations?

- 1) What are the baby boomers responsible for?

According to Willetts, "The charge is that the boomers have been guilty of a monumental failure to protect the interests of future generations." (p. xv) However the responsibility of the boomers in this failure is not always clear from the book. Baby boomers are sometimes accused of having taken advantage of their position because of selfish behaviour or of belonging to a very large generation that will thus necessarily dominate smaller generations. They are also considered as capable of abusing their power in the future through gerontocratic behaviour. Alternatively, the bad luck of more recent generations is sometimes attributed to the policies chosen by and benefiting the baby boomers or to the lack of awareness of the baby boomers with regards to the difficulties facing younger generations because of age segregation. The extent to which baby boomers are obligated to younger generations should reflect on how baby boomers can be considered *responsible* for the position the

younger generations is in. However, this is a discussion Willetts shies away from.

The responsibility of the baby boomers is hinted at by Willetts when he discusses lack of private savings (p. 80), unreasonable housing investment (pp. 80 and 255) and the use of financial instruments (pp. 144-5) which are not based on the 'real' economy. "We have either borrowed against the house already or we expect to finance our retirement by borrowing against it in future. And where does this money that we thought we had come from? From our children." (p. 80) Studies on a selection of European countries suggest that the determinants of private savings are multiple, positively affected by "changes in dependency ratio, old-age dependency ratio, government budget constraint, growth of real disposable income, real interest rate and inflation and negatively by the liquidity constraint. The results suggest that deregulation of capital markets resulted in a decrease of private saving while the existing financial pressure on social security systems resulted in an increase of private saving" (Hondroyannis, 2006: 565). Thus, while Willetts seems vindicated in that the deregulation of capital markets is negatively associated with lower savings, such policies are not just a matter of individual behaviour but also of responsible policy making. The focus of Willetts' book is, however, purely centred on the baby boomers as individuals. Such a criticism also applies to Willetts' take on the financial markets, which are now known to have lacked sufficient regulation to avoid numerous malpractices. Second, baby boomers may not be purely short-sighted. Studies such as that of Hondroyannis (2006) observe a positive correlation between demographic factors (aging) and private savings. This effect needs to be discussed for the most recent years for the UK. Third, Willetts suggests that the housing boom was crucial in the reduction of savings, thereby imperilling the future of coming generations: "The rise in asset prices in the last past decade made us feel richer but it favoured the possessors, the baby boomers. (...) This delivered a temporary boost in their living standards financed by a massive reduction in saving and imposed higher costs on the next generation, who have less to inherit. It will be the younger generation who pay the price" (p. 255). It remains to be outlined by Willetts the extent to which the housing boom was limited to specific well-off sections of the baby boomers and the level to which they are the main assets that

are transferred by the baby boomers to their children. Transfers during the lifetime between the generations remain to be assessed. The responsibility of the baby boomers is however questioned by the argument that 'large generations' will automatically benefit from their size. Firstly, it seems implausible to accuse the baby boomers of being a large generation. They have not chosen to belong to such a generation. Secondly, it remains to be discussed whether large generations necessarily benefit from their size. While the boomers are to receive 18 percent more from the welfare state than they have contributed to, the generation preceding the boomers will have obtained between 15 to 22 percent more. Willetts defends the thesis that large generations benefit from their size per se through a model of hunters-gatherers in a closed economy without possible productivity gains for the younger generation. These assumptions are, however, highly restrictive: an upsurge in the productivity of the younger generations would allow them to avoid the poverty they are doomed to in Willetts' model. Empirically, it remains to be argued whether it is size or the conjunction of a large number of economic factors that resulted in the current economic position of the boomers. Accordingly, a study by Slack and Jensen (2007: 729) on the United States shows that "the odds of underemployment to be greatest among members of relatively large cohorts, net of other significant predictors. The results also show that the impact of relative cohort size differs by educational level, suggesting that adverse economic conditions produced by large cohort size can be offset by broader changes in the labor market and other social institutions." A similar analysis for the United Kingdom would prove most useful. As shown by Chauvel (2010) the effect of the institutional setting (type of welfare state) on the success of different generations (for example on the labour market) is important. Finally, a theoretical discussion is needed to assess the obligations of different generations in the context of population change, a question that Gosseries (2010) suggests could be crucial. Thus, it is not even clear that responsibility can be attributed where the supposed culpable actions are not intentional or simply determined.

Suggesting that the baby boomers could abuse their position because of their demographic weight to their sole benefit as they get older is premature. There is an important academic debate on whether population

aging leads to more favourable elderly-centred and elderly-intensive services. Following Tepe and Vanhuyse (2009) it seems important to distinguish the two ways in which overall age-related spending can increase when a large generation is retiring: "But since population aging increases the 'objective' need for pension spending, even a governor who does not confront any electoral pressures would also increase overall pension spending because *any* pension system based on open-ended statutory entitlements will, *ceteris paribus*, lead to increased aggregate expenditure as the number of older people qualified to draw pensions increases. What makes theories of gerontocracy noteworthy is their prediction that population aging significantly affects the generosity of *individual* pensions" [Emphasis in original] (p. 3).

At the European level, results are mixed: Kohli (2010) considers that "the likelihood of gerontocracy is low and support for the public generational contract is still broad among all age groups" (p. 184). On the other hand, Bonoli and Hausermann (2010) found that age was a good predictor of voting behaviour on intergenerational issues in Switzerland and a study on Germany by Wilkoszewski (2009) finds evidence that the stage of the life cycle and age have a strong effect on support for public policies of transfers and on altruism within the family, for example between grandparents and grandchildren. Tepe and Vanhuyse's study on 18 Western countries (2009) demonstrates that while overall spending increases, per pensioner generosity has frozen or hardly increased between 1980 and 2002, thereby giving

more credence to the 'fiscal leakage' hypothesis. Retrenchment patterns have even been witnessed between 1996 and 2002. Thus, the most recent scientific evidence is mixed and should temper the vision proposed by Willetts of the "voting power" (p. 250) of this big cohort. At the same time, the existence of a party for the rights of the elderly, the Senior Citizens Party in the United-Kingdom founded in 2004, may warn us that previous studies were not adapted to describe the large demographic changes that will occur within the next decades.

2) What issues of fairness and equality has the accession of women to the labour market raised?

According to Willetts, access to higher education, especially for women, is an explana-

## Available books and journals of the FRFG

### Books

- Tremmel, Jörg (ed.) (2008): *Demographic Change and Intergenerational Justice. The Implementation of Long-Term Thinking in the Political Decision Making Process*. Berlin: Springer Verlag. €79.95
- Tremmel, Jörg (ed.) (2006): *Handbook of Intergenerational Justice*. Cheltenham: Edward Elgar. €50
- Stiftung für die Rechte zukünftiger Generationen (ed.) (2008): *Wahlrecht ohne Altersgrenze? Verfassungsrechtliche, demokratietheoretische und entwicklungspsychologische Aspekte*. Munich: oekom Verlag. €39.90
- Tremmel, Jörg / Ulshöfer, Gotlind (eds.) (2005): *Unternehmensleitbild Generationengerechtigkeit. Theorie und Praxis*. Frankfurt: IKO Verlag. €25
- Stiftung für die Rechte zukünftiger Generationen (ed.) (2003): *Handbuch Generationengerechtigkeit*. Munich: oekom Verlag. €25
- Stiftung für die Rechte zukünftiger Generationen (ed.) (1999): *Was bleibt von der Vergangenheit? Die junge Generation im Dialog über den Holocaust* (with a preface by Roman Herzog). Berlin: Ch.Links Verlag. €20
- Stiftung für die Rechte zukünftiger Generationen (ed.) (1998): *Die 68er. Warum wir Jungen sie nicht mehr brauchen*. Freiburg: Kore Verlag. €10
- Gesellschaft für die Rechte zukünftiger Generationen (ed.) (1997): *Ihr habt dieses Land nur von uns geborgt*. Hamburg: Rasch und Röhning Verlag. €10

### Issues of the journal "Intergenerational Justice Review" (IGJR)

The following, previously released issues can be purchased from the FRFG:

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- Wege zu mehr Kindern in Deutschland (vol. 7 issue 3)
- Gesellschaftliche Generationen am Beispiel der 89er-Generation (vol. 7 issue 2)
- Nachhaltige Entwicklung in Spanien - German-Spanish edition (vol. 7 issue 1)
- Erneuerbare Energien - 2<sup>nd</sup> German-French edition (vol. 6 issue 4)
- Wahlrecht von Geburt an (vol. 6 issue 3)
- Generationendialog (vol. 6 issue 2)
- Einwände gegen Generationengerechtigkeit - 1<sup>st</sup> German-French edition (vol. 6 issue 1)
- Institutionalisation of Intergenerational Justice - 3<sup>rd</sup> Engl. Ed. (vol. 5 issue 3)

- Partizipation und Kinderwahlrecht (vol. 5 issue 2)
- Unternehmensleitbild Generationengerechtigkeit (vol. 5 issue 1)
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- Generationenbeziehungen und Bildung (vol. 4 issue 3)
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- What is Generational Justice? - 1<sup>st</sup> Engl. Ed. (vol. 2 issue 3)
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tory factor for increasing social inequalities: “The expansion of women’s educational opportunities and women’s earnings has opened up an even greater gap between the well-off households and poor households. The tendency for well-paid, well-educated men and well-paid, well-educated women to marry is one reason why we have a more unequal and less mobile society. (...) No one could possibly wish to reverse these new opportunities for women. But it looks as if increasing equality between the sexes has meant increasing inequality between social classes. Feminism has trumped egalitarianism.” (p. 208). The newly acquired independence of women is, according to Willetts, imposing new costs on society. Women no longer remain in unsatisfactory relationships because of economic dependency, so households become more fragile (p. 42). In addition, due to their longer life expectancy, women represent a larger share of pension spending according to Willetts: “Men get more per person from, for example, the contributory state pension, but as there are many fewer men than women pensioners, the total pensions budget is still skewed towards women - 62 per cent of pension spending goes to women” (p. 159).

The study referred to by Willetts (Blanden, Goodman, Gregg and Machin, 2002) however, must be taken cautiously given that gender differences are not explicitly the main focus of their study. Daughters from wealthy backgrounds have benefited from access to higher education, thereby moving their socio-economic status closer to that of their parents. However, this only brought these women to the level already attained by men of wealthy backgrounds. What is observed, according to a report by Bellamy and Rake (2005) is that “there is now as much economic inequality among women as between women and men.” Framing the discussion as Willetts does implicitly makes women the focus of criticism. The fact is that the market had to undergo structural change to become less unjust.

On the labour market, women are still at a disadvantage with men, at all levels of the income scale. In Britain, the wage gap for women is on average of 24.6 percent (with in the public sector in the tenth percentile a wage gap of 21.3 percent and in the private sector in the ninetieth percentile a wage gap of 31.1 percent) (Arulampalam, Booth and Bryan, 2007). It has been argued that they still face a wage ceiling. Due to the still pre-

dominating model of gendered provision of care, “[w]omen are seven times more likely than men to be out of employment as a result of family responsibilities.” (Bellamy and Rake, 2005). For the Fawcett Society, “[p]overty in the UK has a female face.” (Fawcett Society, 2010).

Although women may be living longer, they are also at a much greater risk of old age poverty, as has been analysed by Falkingham and Rake (2000). The gender wage gap implies that they have much lower earning profiles over their working lives. Their working patterns are interrupted more frequently due to the gendered duties of care, with substantial impact on their pensions. They often work in activities with fewer occupational pensions. Finally, their longevity renders them more vulnerable to the erosion, through inflation, of the pension’s value. Willetts’ book unfortunately does not recognise the difficulties and challenges faced by women. The opposition of women to the poorer classes seems unfair.

### 3) What role does ‘British uniqueness’ play in Willetts’ argumentation?

In the first chapter, Willetts draws out the specificity and long-standing pre-modern features of the English family structure as nuclear families. Such features include: consensual marriage, low fertility, inegalitarian inheritance and early departure of the children for training. Claiming that such a model existed since the thirteenth century, we are unfortunately only provided with seventeenth century evidence. Although Willetts claims such traits are unique to British society, it is well-documented that similar patterns existed in the Low Countries and possibly spread at a later date to other countries in northwestern Europe. Though Willetts gives quiet acknowledgement of this, he fails to appropriately temper his subsequent claims. Seventeenth century figures clearly show a similar low fertility rate and late age at marriage across many Western European areas (Voth and Voigtlaender, 2008). With respect to inheritance, will analysis of the seventeenth century seems to indicate that, even if the nobility still practised this inegalitarian division of inheritance, this was not necessarily the case for craftsmen or individuals in mercantile activities (Ben-Amos, 2008).

The specificity of this family structure is used by Willetts to make several bold claims about the British economy and society both today and in the past such as: the greater li-

keliness to trade and barter, greater mobility, the greater reliance on institutions such as the guilds or civic institutions, the promotion of liberal political institutions or the development of financial services. These claims are problematic, as Willetts does not explain why the ‘acquisitive’ individuals forming households and contracting on the labour markets, supported by national government and law, would need to rely on communal institutions. In addition to the necessity to differentiate between guilds, clubs and civil networks, which did not have the same purposes and probably not the same influence on households, it is useful to remember that guilds membership was limited to a small number of people. Financial services were also certainly not invented in the United Kingdom, and were not very extensive by the thirteenth century. Banking techniques were highly developed in Italy where the family structure was, as acknowledged by Willetts, different. The possible mechanisms between family structures and economic growth are still unclear and it is problematic to argue that they were the main underlying reason for the Industrial Revolution. The exceptionality of the English economic features before the industrial revolution are much debated, especially in comparative work with the Netherlands (Van Zanden, 2002), the latter being called the “first modern economy” by De Vries and Van der Woude. Finally, the positive effect of the family structure in Britain onto its economy is then hastily applied to the economic position of what Willetts calls the Anglosphere in today’s world.

Overall, the first chapter on Britishness and the distinctiveness of the economic and social structure of this society will undoubtedly appear to the reader as politically motivated claims. Published during an election campaign, the book seems to be aiming at providing a certain vision of Britain. Loosely related with the discussion on the baby boomers, it does not explain why smaller families proved beneficial in the pre-modern era and are now the source of a wasteful use of resources. In absence of clear criteria and descriptive mechanisms, the testability of such claims is impossible.

### 4) How does Willetts ground intergenerational obligations?

One of Willetts’ principal aims is to motivate an intuitive understanding of the need for justice between generations. However, there are many hurdles in his use of so many

different theories to appeal to intergenerational justice. With respect to game theoretical models (pp. 93-6), they have been shown to not always be an adequate foundation for cooperation between rational agents. On the contrary, the rational strategy can be defection, as exemplified in the prisoner's dilemma. While some of these game theoretical models (such as repetitive games) can under certain conditions explain how agents arrive at self-enforcing contracts and reputation effects, we can only imagine such games with *overlapping* age groups, a considerable restriction to their application. Indeed, such models require enforcement mechanisms which are not available to non-overlapping generations. With respect to Rawls' theory, it is worth noticing that Rawls' position changed on how to appropriately envisage the original position in the intergenerational context. In the model where he considers that the representatives "should care about the well-being of those in the next generations", he clearly states that "it is not necessary to think of the parties as heads of families, although I shall generally follow this interpretation." (1971, p.128) Willetts' claim about the centrality of the family to ground intergenerational justice through use of a Rawlsian analysis is thus problematic. Furthermore, in *Justice as Fairness: A Restatement*, Rawls (2001) clarifies his theory towards the impartiality of the moral agent: "The correct principle, then, is one the members of any generation (and so all generations) would adopt as the principle they would want preceding generations to have followed, no matter how far back in time." (p. 160). Willetts' literal understanding of "heads of households" is an unfair reflection of Rawls' heuristic usage.

Willetts shuffles a very large number of disciplines and distinct theories, providing the reader with a lively and original account of the economic and social situation we find ourselves in today. Not an academic work, despite extensive reference to the most up-to-date literature, the presence of the political man behind the nib can be easily detected. One may regret that the precision and rigour of the argument's gist is sometimes lost to eloquence and verve, but that will appeal to the reader who does not wish to read the austere studies underpinning this work. We will now have high expectations about how Willetts intends to resolve all such challenges in his new position of Minister for Universities and Science in the United Kingdom government.

Willetts, David (2010): *The Pinch. How the baby boomers took their children's future - and why they should give it back.* London: Atlantic Books. 336 pages. ISBN: 978 1 84887 231 8. Price: £18.99.

#### Also cited in this review:

Arulampalam, Wiji / Booth, Alison L. / Bryan, Mark L. (2008): Is There A Glass Ceiling Over Europe? Exploring The Gender Pay Gap Across The Wage Distribution. In: *Industrial and Labor Relations Review*. Vol. 60, No. 2, 163-186.

Bellamy, Kate / Rake, Katherine (2005): Money, Money, Money. Is it still a rich man's world? An audit of women's economic welfare in Britain today. Fawcett Society. <http://www.fawcettsociety.org.uk/documents/%A3%A3%A3%20Audit%20full%20report.pdf>. Viewed 14 July 2010.

Ben-Amos, Ilana K. (2008): The Culture of Giving. Informal Support and Gift-Exchange in Early Modern England. Cambridge: Cambridge University Press.

Blanden, Jo / Goodman, Alyssa / Gregg, Paul / Machin, Stephen (2002): Changes in Intergenerational Mobility in Britain. Centre for Economic Performance Discussion Paper. No. CEPDP0517. <http://cee.lse.ac.uk/cee%20dps/CEEDP26.pdf>. Viewed 14 July 2010.

Bonoli, Giuliano / Häusermann, Silja (2010): Who Wants What from the Welfare State? Socio-structural Cleavages in Distributive Politics: Evidence from Swiss Referendum Votes. In: Tremmel, Joerg (ed.): *A Young Generation Under Pressure*. Berlin: Springer, 187-205.

Chauvel, Louis, (2010): Comparing Welfare Regime Changes: Living Standards and the Unequal Life Chances of Different Birth Cohorts. In: Tremmel, Joerg (ed.): *A Young Generation Under Pressure*. Berlin: Springer, 23-36.

Falkingham, Jane / Rake, Katherine (2001): Modelling the gender impact of British pension reforms. In: Ginn, Jay / Street, Debra / Arber, Sara (eds.): *Women, Work and Pensions*. International issues and prospects. Buckingham: Open University Press, 67-85.

Fawcett Society (2010): Female poverty.

<http://www.fawcettsociety.org.uk/index.asp?PageID=22>. Viewed 14 July 2010.

Gosseries, Axel (2010): Our intergenerational obligations. In: *Intergenerational Justice Review*. Vol. 10 (1/2010).

Hills, John (2004): Distribution and Redistribution. In: *Inequality and the State*. Oxford: Oxford University Press, 184-205.

HM Treasury Report (2008): Long-term Public Finance Report: An Analysis of Fiscal Sustainability. [http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/bud08\\_longterm\\_586.pdf](http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/bud08_longterm_586.pdf). Viewed 14 July 2010.

Hondroyannis, George (2006): Private savings determinants in European countries: A panel cointegration approach. In: *The Social Science Journal*. No. 43, 553-569.

Kohli, Martin (2010): Age Groups and Generations: Lines of Conflict and Potentials for Integration. In: Tremmel, Joerg (ed.): *A Young Generation Under Pressure*. Berlin: Springer, 169-186.

Rawls, John / Kelly, Erin (ed.) (2001): *Justice As Fairness. A Restatement*. Cambridge/Massachusetts: Harvard University Press.

Slack, Tim / Jensen, Leif (2008): Birth and Fortune Revisited: A Cohort Analysis of Underemployment, 1974-2004. In: *Population Research and Policy Review*. No. 27, 729-749.

Tepe, Markus / Vanhuyse, Pieter (2009): Are Aging OECD Welfare States on the Path to Gerontocracy? Evidence from 18 Democracies, 1980-2002. In: *Journal of Public Policy*. Vol. 29 Part I, 1-28.

Van Zanden, Jan L. (2002): The 'Revolt of the Early Modernists' and the 'First Modern Economy': An Assessment. In: *The Economic History Review, New Series*. Vol. 55, No. 4, 619-641.

Voth, Hans J. / Voigtlaender, Nico (2008): How the West Invented Fertility Restriction. [http://www.econ.upf.edu/~voth/EMP\\_presentation.pdf](http://www.econ.upf.edu/~voth/EMP_presentation.pdf). Viewed 14 July 2010.

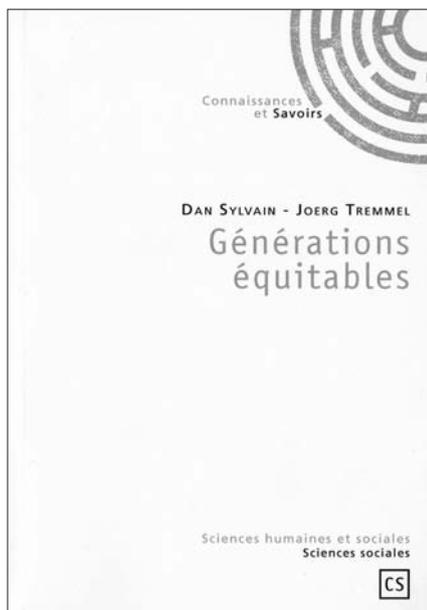
Wilkoszewski, Harald (2009): Age Trajectories of Social Policy Preferences. Support for

## Dan Sylvain and Joerg Tremmel (eds.): Génération Equitables

*Reviewed by Raphaëlle Schwarzberg*

**G**énération Equitables represents a very welcome francophone perspective on the topic of intergenerational justice. The context of an aging European population, consisting largely of baby boomers, coupled with the threat of climate change, appears as the general backdrop of the book, bringing such issues to the fore in the political and academic debate. The articles, from philosophers, economists, demographers and jurists, broadly fall within three main areas of focus. One is concerned with the theoretical challenges of intergenerational justice, a field dominated by the work of Rawls. Another centres around environmental affairs and cultural heritage discussed through case studies both from legal and economics perspectives. The third analyses the consequences of demographic changes, and more specifically population aging, on intergenerational social policy, with a greater focus on current pensions schemes. This very wide-ranging topic thus benefits from being considered by a large array of disciplines and from different and complementing angles. While the articles have clearly not been made available to the authors before publication, this could be a blessing in disguise for the reader; the independence of each of these articles makes divisions and conflicting opinions more salient.

The article by Professor Van Parijs presents a large number of theoretical issues also discussed in the articles concerned with intergenerational social policy. To examine the demands of intergenerational justice Van Parijs considers first, justice between cohorts and thus the question of “just heritage” and second, justice between age groups as envisaged through the question of “just transfers”. A non-utilitarian, Van Parijs is of the opinion that justice is not aiming at the maximisation of the well-being or happiness of individuals but to ensure “to all as much as possible (...) the rights and means allowing them to pursue



the realization of their conception of what a successful life is” (p. 42). His conception of justice relies on the “lexicographic maximin”. It follows that the heritage that a cohort should leave to the next is not one in which the latter receives exactly the same stock of natural resources but one in which it inherits a “productive potential” at least as high as the one the former generation had received. It is thus indispensable that generations invest sufficiently and foster technical progress to preserve the productive potential necessary for the future to be in a position to “promote the real liberty of the least well-off within itself” (p. 49).

With respect to justice among age groups, Van Parijs underlines that two major difficulties in the theory of commutative justice are that it does not specify any minimal level of transfer and is sensitive to life expectancy in a counter-intuitive way. Van Parijs seems to be more favourable to indirect reciprocity. If the productive potential increases or decreases for an age group, the surplus or the deficit should be proportionally born by all, under the constraint of maintaining subsistence for all. The solution to the current pension system crisis

resulting from demographic change lies in the increase of the productive potential for the future generation such as partly financing pensions through capitalization, but also greater investments in infrastructures, R&D and training. In his conclusion, Van Parijs suggests that a coexistence of the demands of intergenerational justice between cohorts and between age groups implies “an obligation of the financing of a basic pension at the appropriate normative level” (p. 59). Thus, “[w]hat matters from the perspective of justice, is the absolute level of basic revenue in each age group and the potential left for each cohort of adults to the next so as to fulfil its obligations.” He can consequently conclude that the benefit ratios are particularly inappropriate as a method of discussing intergenerational justice. Unfortunately, it is not always obvious how Van Parijs reconciles justice between generations and justice between age groups. One other problem is the absence of a criterion to define when the demands of justice start and end for each age group as the model does not allow progression of the adult age group through time. Besides, the author does not explain how the demand from current generations to bequest an at least as high productive potential could constrain the demand to ensure to all and as much as possible the rights and means allowing them to pursue the realization of their conception of what a successful life is.

Professor Bichot’s article on pensions contests the use of indirect reciprocity to evaluate the dues and payments that each age group should receive from and provide others with. Citing a study by Marcilhacy (2009) aimed at assessing the level of reciprocal transfers, he evaluates that the benefits and expenses devoted to younger generations (infants and children) are much larger than what pensioners will receive from them by a ratio possibly as high as four. The benefits that are taken into account to calculate what children have received from their parents seems however re-

strictive. Education, family benefits and the cost of raising children are not the only expenses that will benefit the youth. They will also reap the fruits of research in new technologies, of infrastructure building or even of the efforts to improve the democratic political system. It seems understandable that Bichot may not want to adopt such a methodology given the major accounting difficulties such a definition would entail. A historical comparison of these ratios would also prove most useful, as it would allow us to ask whether the exchanges between different age groups are shifting, and, if that were the case, which age groups are being favoured.

That intragenerational justice can be affected by the demands stemming from intergenerational justice is a crucial issue addressed in Dr. Girard's article. According to him, measures taken in the name of future generations will have strong redistributive effects within current generations. In the case of pensions, capitalization could possibly increase inequalities between individuals of the same age groups and of the same cohort. We can confidently state after reading Girard's article that theories of intergenerational justice theory should be wary of assuming homogeneity within each 'generation'. Group disaggregation can show more clearly the redistributive effects of public policies favourable to future generations. Although this possibility needs to be seriously considered, Girard does not provide empirical data, a detailed analysis of the size of the effect of intergenerational policies on increased intragenerational inequalities or a theoretical justification that intergenerational justice will necessarily lead to greater intragenerational inequalities. Such a conflict between inter- and intragenerational justice may not be necessarily the case.

The question of when the adult age group has fulfilled its obligations towards other age groups and the extent to which such obligations are influenced by group size are key questions that remain after reading the article by demographer Professor Légaré. Légaré seems to believe that greater longevity implies redefining what we understand by 'vieillesse' (old age), possibly by setting it at a certain number of years  $x$  expected to be lived before death, based on life expectancy. However, Légaré, as he himself acknowledges, does not succeed in resolving how to calculate when adults should be allowed, or entitled, to retire. He recognizes that this  $x$  number of years is as arbitrary as setting pension age to 65, as done by Bismarck. Bismarck's decision might not, in fact,

have been so arbitrary according to economic historian Jacques Marseille: it was possibly based on the knowledge that very few would ever be old enough to benefit from such a pension scheme (Marseille, 2005). After an extensive discussion on longevity, Légaré describes the dramatic population changes (i.e. baby boom) that occurred in Canada after the Second World War, and then draws conclusions for pension schemes. The consequences of longevity and population change on the demands of intergenerational justice seem indeed to require a precise analysis both from an empirical and theoretical viewpoint.

The other theoretical articles testify to the hovering presence of Rawls' writings in the field. Dr. Gosseries' article, in particular, illustrates the originality of Rawls' work but also describes the difficulties that he faced: in formulating the original position in the intergenerational context, the justice principles to adopt in the intergenerational context, and the treatment by Rawls of the just savings principle. The possibility to found intergenerational justice based on the model of rational agents is possibly one of the most crucial questions asked by Gosseries, a question to which game theory could well answer negatively. Gosseries' own interpretation of how we should read Rawls should provide a basis for all future discussions of him in this context. Identifying what the original position would entail in the intergenerational context and the circumstances that would support a conception of justice across generations is also taken up by Professor Tremmel. With Rawls as his backdrop, Tremmel's article discusses two cases, one where history is alterable and one where it is not. He argues that in both cases, for different reasons, it is not an egalitarian distribution of the resources that will prevail. Furthermore, Tremmel discusses what principles of intergenerational justice would emerge. The novelty here lies in taking into account human ingenuity, a biological characteristic, as a source of well-being accumulating over the generations and thus satisfying moral obligations to future generations. There are some interesting points of note arising from his thought-provoking chapter. First, we must question if human ingenuity is necessarily *always* positive for welfare, for instance the development of weapons technology. Furthermore, the conception of equality (e.g. equality of resources, of welfare, of opportunities) used to compare egalitarian and non-egalitarian societies, is not fully discussed in Tremmel's article. A rejection of one of these conceptions may not necessarily imply rejection

of another, though this is implied. In addition, the reader is not provided with a detailed decision procedure explaining why egalitarianism is rejected in the intergenerational context. In the case of "Model 1,  $n$  finite and alterable history", Tremmel relies on his readership's intuitions to reject an egalitarian situation whereby all generations have the same HDI as the most ancient generation: "to set everyone to the same level in this way [lowest denominator] is far from being appealing, and will surely not be chosen by the participants." While, in "Model 1,  $n$  finite, inalterable history", egalitarianism is rejected on the grounds that it does not correspond to historic reality. In addition, HDI is bounded between 0 and 1 as it is a scale between countries relative to the pre-set, goal-post levels of longevity, GDP per capita and education. It is therefore unclear what version of HDI Tremmel is using as his numbers extend beyond this range. Lastly, for Tremmel to evaluate whether HDI is increasing or decreasing through time, it would have been useful to know the assumptions he has made with respect to these goal-posts which ultimately determine the curvature of the HDI graph in time.

The second focus of the book is on environmental affairs and presents a wide-ranging selection of case studies from the economic, public policy and legal perspectives. Dr. Romeiro's article points towards the hindrances and the inertia that inhibit the emergence of a 'green revolution', especially in terms of public policies. Such difficulties include multiple levels of decision or the difficulty to set into place the structures that will allow individuals to live less 'energyvore' lifestyles. Dr. Maudet's institutional analysis of the bioprospection agreements does illuminate the challenges of relying on market mechanisms to protect the environment. The usual culprits - limited rationality, asymmetry of information, sequentiality of exchange and issues of trust - can explain such market failures. A case study analysis and a quantitative evaluation of how much bioprospection can participate to environmental protection could have completed the argument. Ms. Doumax's article on biofuels reveals how public policies supporting the development of green sectors will have strong redistribution effects within our current generation. We should be careful to consider the fairness of these. Policies taken under the imperative of imminent action to protect the environment, with results that can not be ascertained to be beneficial to the environment, leave the door open to a clash of

interests between developmental objectives and a concern for future generations. Given scientific uncertainty, future generations may not even benefit from current generations' sacrifices and the latter may be deeply altered by such policies, especially from a distributional perspective. Reflecting on our relationship to future generations, Dr. Pierron indirectly echoes such a concern. According to him, our need to imagine future generations must be neither guided by a "heuristic of fear", nor by that of unalterable idolized future generations.

Ms. Kouadio's very informative article on the legal provisions in Côte-d'Ivoire to protect future generations represents an original case study. The particular circumstances in which developing countries find themselves with respect to environmental protection is noteworthy. Indeed, this article makes it necessary to consider: first, the fairness of restricting the use of natural resources by current generations acknowledged to be impoverished (a difficulty equally faced in setting a just savings principle that would apply to the first and poorest generations), second, the international dimension and share of responsibility by other countries in resource depletion and lastly, the additional difficulties of enforcing environmental protection within a developing country (e.g. due to the fragility of state structure).

Dr. Robichaud and Professor Turmel's article on cultural patrimony enlarges the debate of what type of transfer should be made to fu-

ture generations in a generally environment-centred debate. The article opens up the possibility that the transmission of cultural heritage has ambiguous benefits and costs. While fascinating, the comparability of such public goods with environmental goods, or the nature and extent of the demands needed to appropriately preserve cultural diversity will undoubtedly require more analysis than this short article could allow. Languages have evolved and some have certainly died but it remains to be appraised whether speakers of modern languages today live in a less culturally diverse environment. It also remains to be argued that cultural goods necessarily replace each other: one may love both rock but also classical music. Proposing the "transmission of a sane linguistic context and linguistic diversity" from generation to generation does not define the content of such obligations or by whom they should be borne, whether it entails positive and/or negative demands.

Undoubtedly, this new addition to the literature of intergenerational justice will help to boost the francophone discussion of the topic. Overall, the book's greatest merits lies in its capacity to reveal the tensions inherent to intergenerational justice itself and with other major social and economic objectives such as economic growth and intragenerational justice. We might regret the absence of discussion between the texts, including between the theoretical proposals and more empirical case studies. This allows, however, the

reader to chart the large number of theoretical lines and practical difficulties present in this field. Thematically, the dominance of articles on environmental affairs and pensions reflects industrialised countries' most topical concerns within the field of intergenerational justice. Nevertheless, while politicians are summoned to take decisions very soon for the sake of future generations, the philosophical debate remains fiercely open.

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#### Cited Literature:

Marclhacy, Dominique (2009): De la contributivité en matière de retraites. In: *Droit Social*. No. 681, 846-853.

Marseille, Jacques (26 October 2005): La France est schizophrène. In: *Le Journal du Net*. <http://www.journaldunet.com/management/0510/0510107marseille.shtml>. Viewed on 13 July 2010.

Rawls, John (1997): *Theory of Justice*. Cambridge/Massachusetts. Harvard University Press (Original edition 1971).

## Tim Mulgan: Future People – A Moderate Consequentialist Account of our Obligations to Future Generations

*Reviewed by Joseph Burke*

With *Future People – A Moderate Consequentialist Account of our Obligations to Future Generations*, Prof. Tim Mulgan has given us a book of profound worth on the subject of our duties to future generations and, indeed much more besides. His earlier book *The Demands of Consequentialism* (2002) was described as "powerful and impressive" (Chappell, 2002, p. 897) and "a formidable achievement" (Eggleston, 2009, p. 125). The same can be said for this methodical work, which attempts to show that a 'Combined Consequentialism' can offer a superlative account of what we owe to those not yet living. The author exhibits

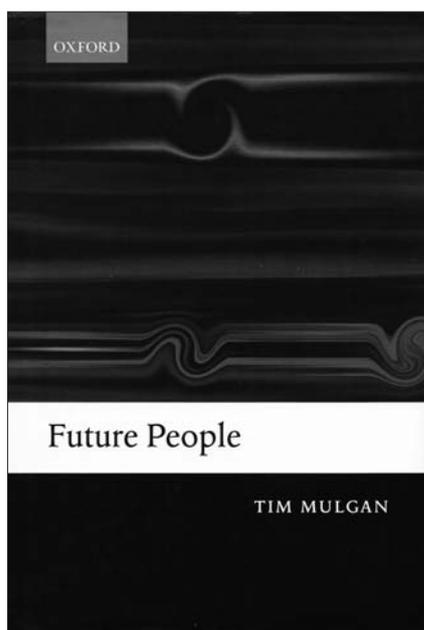
scholarly patience, an openness to acknowledge limitations and a willingness to tirelessly search out difficult problems to confront his own ideas with.

Establishing moral obligations is complicated by the fact that "our actions have little impact on those who are dead, considerable impact on those currently alive, and potentially enormous impact on those who will live in the future" (p. 1). In consideration of this, Mulgan presents three basic intuitions 'The Basic Wrongness Intuition', 'The Basic Collective Intuition' and the 'The Basic Liberty Intuition', which are, in a sense, the launch pad for

the remainder of the book. The first is that it is wrong to gratuitously create a child whose life contains nothing but suffering. The second is that the present generation should not needlessly cause great suffering to future generations. Finally, the third is that reproductive choice is morally open. Accept these plausible claims and one is set to begin mapping out the moral terrain in this area. Yet, as Mulgan is only acutely aware, placing emphasis on intuitions is fraught with danger. Certainly, the use of intuitions, to make "the journey from the familiar to the familiar" as John Wisdom (in Strawson, 1949, p. 259) put it, is unavoidable in moral philosophy.

However, Mulgan has taken great care to guard against the danger of giving too much weight to our intuitions in this book.

The author asks what theory can best fulfil these three intuitions in consideration of future generations? Non-consequentialist theories, he claims, struggle with 'The Basic Wrongness Intuition' and 'The Basic Collective Intuition', for the same essential reason: A person-affecting theory struggles to compare existence with non-existence, no matter how horrendous the possible life. Alternatively, consequentialist theories can easily account for these first two intuitions: "In any plausible Consequentialist theory, considerable weight is attached to the well-being of future humans" (p. 200). The notable strength of the non-consequentialist person-affecting approach is that it straightforwardly accommodates the 'The Basic Liberty Intuition' because parents must be free to make moral decisions in so far as no persons are harmed by their actions. The failure to recognise as of yet non-existing people safeguards the reproductive choice of parents. Meanwhile, a 'Simple Consequentialism' (SC), which states that 'the right action in any situation is the one that, of all the actions available to that agent at the time, produces the best possible outcome' (p. 17) is doomed to oblige parents to continue to have another child if overall welfare is increased. Therefore, SC fails the Basic Liberty Intuition because it is too demanding. The demandingness objection is a close relation of the concept of integrity as used by the late Bernard Williams, who memorably insisted that "we are not agents of the universal satisfaction system" (1973, p. 118). Of course, for some the demandingness objection is erroneous and a symptom of the bourgeois comforts of the intelligentsia. Others, who may have religious inclinations, might say that there should be no limits to what we should give to the poor and needy for the sake of God. However, Mulgan appears to be right to accept demandingness as an objection, especially as we consider future generations, where temporal floodgates open up the possibility of an overwhelming accumulation of moral duty. As Hooker put it: "the demandingness objection may appeal to some disreputable characters [but] the objection retains considerable force" (Hooker, 1990, p. 71). Thus, Mulgan knows that he must find some way for consequentialism to provide for the three intuitions while protecting reproductive choice, establishing justifiable obligations to future people but, also, not be too demanding.



What of "the dominant contemporary rival in the area of intergenerational justice" (p. 24); the social contract tradition? Contractualist accounts, as represented by Rawls and Gauthier are deemed to be problematic for future generations since, amongst other things, they do not appropriately account for the nurturing of the basic needs of present and, indeed, future autonomous moral agents.

After showing these contractarian approaches are not without criticism, Mulgan discusses Scheffler's influential reflection on consequentialist and deontological theories. Scheffler integrated restrictions and prerogatives into what he considered to be the legitimate core of consequentialism in order to acknowledge the integrity of the agent. In what he called the 'Hybrid View', presented in *The Rejection of Consequentialism*, Scheffler identified an 'agent centred prerogative' as having "the effect of denying that one is always required to produce the best overall states of affairs..." (1994, p. 5) and an 'agent centred restriction' as having "the effect of denying that there is any non-agent relative principle for ranking overall states of affairs from best to worst such that it is always permissible to produce the best available state of affairs" (1994, p. 2). These structural features built into consequentialism defend the theory from heavy criticism by respecting the moral significance of the personal point of view. Mulgan recognises this as a promising move towards allowing agents to give preference to their own meaningful endeavours and a means of overcoming the demandingness objection. Ultimately, however, Scheffler's theory has significant failings for a theory of intergenera-

tional justice because it is "insufficient either to ground the broad prerogatives of common sense, or to provide the intuitively necessary restrictions" (p. 104). One central reason for this is the individualist perspective of the Hybrid View, one also pervading SC, that only asks what the individual should do assuming all others continue as they are. Being unable to assess or justify behaviours in their collective consequences is, Mulgan points out, critical in the context of future generations (p.127).

Thus, Mulgan needs a collective theory and he finds one in Rule Consequentialism (RC), where "an act is morally right if and only if it would be judged to follow from the optimal set of rules by someone who had internalized those rules and had grown up in a society where such internalization was the norm" (p. 184). Hence, from the outset, there is an explicit consideration of the wider community in our moral obligations. The aim of RC is not to assess any rule alone but rather to identify the full set of rules, or the code, which society should undertake. RC respects people as fallible, hence the ease with which a code can be internalised by a society and the cost of it being taught are factored into its evaluation. Since RC is concerned with the passing on of the ideal code to posterity, it must necessarily reflect on our forward looking duties, a clear plus in Mulgan's search for an appropriate theory.

If a consequentialist account is to be successful there must be a particular view of the value that is being promoted. Thus, Mulgan moves to defend the Lexical Claim: "If x is lexically more valuable than y, then, once we have a *sufficient* amount of x, no amount of y can compensate for a *significant* reduction in x" (p. 67). This forms a central part of his book. The success of the lexical claim for Mulgan requires that between lives there can be a difference in kind, not just degree. Lives above the level set by the lexical claim are defined broadly "in terms of the successful pursuit of valuable goals" and "certain connections between goals, agency, and community" (p. 70). Since goals are formed in social interaction within a community, one cannot rise above the lexical level in isolation. Lexical levels are culturally dependent, that is there are contextual interpretations of the lexical level, but this is not to be considered a move towards cultural relativism. Different interpretations of the lexical level can exist with varying social frameworks. However, only a certain number of interpretations can be reasonably justified within any social fra-

network, this Mulgan terms the 'lexical threshold' (pp. 270-271). People adopting the ideal code will undertake 'quasi-lexical levels', which means they "knowingly act in a manner best explained by supposing that they adopt something broadly analogous to a quasi-lexical threshold of some unspecified sort" (p. 145). Those who have rejected Mulgan's recognition of the demandingness objection will also no doubt be perturbed by the laxity of this moral guide, with its quasi-lexical level. Nevertheless, it should be borne in mind that a central criticism of RC accounts has been that they reduce moral agents to rule-following automatons. Therefore, it is important for Mulgan to allow room for the agent to act. Consequently, those who have accepted the ideal code, and its quasi-lexical level, "realize that, when they pursue their own goals at the expense of the impersonal good, and especially when they set thresholds (...) they are acting as if there were a morally significant difference in kind between what they pursue and what they forgo, such that the former is not reducible to any available amount of the latter" (p. 144). Thus RC, with a quasi-lexical level, can help overcome some of Mulgan's original worries about what would be asked of us under a consequentialist view of our obligations to future people. Moreover, Mulgan sees it as quite plausible that parental obligations can be part of the ideal code because, for one, the costs of teaching the code would be reduced thanks to our natural inclination to protect our own children and, to a somewhat lesser extent, all children in our society. Consequently, he arrives at the flexible lexical rule which tells one to "reproduce if and only if you want to, so long as you are *reasonably sure* that your child will enjoy a life above the lexical level, and *very sure* that the risk of your child falling below the zero level is *very small*" [Emphasis in the original] (p. 174).

There are, Mulgan acknowledges, grievous problems for RC. In particular, the issue of partial compliance is deeply problematic for the theory as it undermines the code's teaching and uptake by future generations. Mulgan argues that demands become unreasonable when one looks to the obligations one has beyond one's own group (one's group being those with whom one shares the goals that give meaning to our lives). Consideration of posterity, especially far into the future, exacerbates the negative effects of partial compliance and thus the problems for RC. However, instead of abandoning RC, Mulgan argues for something at once conservative and

yet extremely radical. First, he builds upon the sturdiest aspects of the SC, RC and the Hybrid View to provide a 'Combined Consequentialism'. Secondly, he splits morality into two loosely bordered realms. Two classification schemes are brought together to organise these realms. The first separates according to the moral status of the individual who is the object of moral concern; between the spheres of bare humanity and that of the moral community. The second divides according to the effects of one's acts on others' well-being and thus relies on the distinction between needs and goals. The two schemes map onto each other to give the Realm of Necessity where "we, as active members of a moral community, encounter someone who currently lacks the resources or capacities to participate fully in that community" (p. 345) and the Realm of Reciprocity where "we, as active members of our moral community, decide how we will interact in pursuit of our joint and individual goals" (p. 345). This division is required in a world where "no moral based on one route alone can hope to provide a full account of the relationship between values and reasons" (p. 346). Mulgan claims that RC offers the best account in the Realm of Reciprocity, SC works best in the Realm of Necessity and the Hybrid View balances the two realms. Where does this leave our obligations to future generations? Regarding reproductive choices, Mulgan suggests we see these as in the Realm of Reciprocity. Mulgan concedes that determining and fulfilling the obligations we have to future people of my own community "straddles the two realms" because the lack of reciprocity between non-overlapping generations places such obligations in the Realm of Necessity, while rule consequentialist considerations for the passing on of the moral code also suggests that they belong to the Realm of Reciprocity. He concludes that this can be accommodated by the bi-partite schema and does not invoke a need for a third realm (p. 350).

The book is far more nuanced and wide ranging than can be expressed here but to conclude some issues of concern should be raised. *Future People* suggests that there rests in the wings the details of a value theory, pointing as he does to an unpublished manuscript entitled "Valuing the Future" (p. 252). While he admits that "any complete Rule Consequentialism needs a complete account of value" (p. 142), he also hopes that his central arguments can be supported by the sketch of a value theory provided. Nevertheless, how this value theory would be filled in raises questions.

Mulgan acknowledges that he has "assumed that human well-being is the only relevant source of value. Other values, such as environmental values and the well-being of animals, and various possible holistic evaluations of human communities have been put to one side" (p. 79). In fact, intriguingly, his current work is based on an 'Ananthropocentric Purposivism'. This proposed theory promises to outline how the universe has a non-human-centred purpose that supports "a liberal impartial morality built on genuinely objective values" (Mulgan, 2010). Mulgan tells us "a lexical level might feature either in the foundational theory only, or in the agent's theory, or both" (p. 62) but how divergent would a non-human centred foundational theory's lexical level be in relation to that expressed under a rule consequentialist ideal code? There are valid reasons why Mulgan has avoided fleshing out his value theory here but, nonetheless, the query persists how compatible can the projects of value promotion be when they alternatively engage lexical levels based on non-human-centred and human-centred conceptions of value?

There is another question with relation to value. Mulgan recognises the potential circularity of RC: "The purpose of the ideal code is to determine what is morally permissible. Yet we cannot compare competing codes until we have determined which projects are morally permissible, as only then can we know which projects are valuable" (fn 36, pp.157-158). He proposes a viable escape route via an independently construed understanding of 'valuable ends', whereby "...this circle is avoided if we can find an account of the notion of 'valuable ends' which does not presuppose a theory of right action. We can then specify the value to be promoted without circular reference to the content of the ideal code" (fn 36, p.158). However, Mulgan seems to have closed this route off to himself. Of the two ways consequentialists can approach value, that is a foundationalist strategy (a theory of right action is only derived when a full theory of value is determined) and an independence strategy (develop a theory of right action and value theory separately, reuniting them when completed), Mulgan says: "both assume we can construct a theory of value in isolation from our theory of right action. I believe this is a mistake...Attempts to construct an intuitive value theory operate (often implicitly) with a theory of right action" (p.55). Thus, if the possibility of a distinct value theory apart from a theory of right action is not available, how is the circu-

larity that Mulgan correctly fears avoided for a moderate consequentialism, including, in part, an ideal code?

Thirdly, RC gives weight to our psychological make-up in attempting to identify the ideal code. It seems plausible that people could have a disposition towards complete theories, or at least, the veneer of completeness. If people prefer a theory that suggests it can account for everything this may undermine Mulgan's view of RC. His astute discussion of risk and uncertainty argues that their interrelated effect "justifies the Rule Consequentialist reluctance to seek more detailed moral conclusions than the complexity of the subject matter permits" (p. 254). Yet how can this be balanced with the possibility that people may desire not only "more detailed moral conclusions" but the appearance of a theory with all the answers. Giving the false impression of completeness may not be a problem for Mulgan's RC if it could be shown to lead to better results: "transparency [is] not necessarily a virtue" (p. 155). At times Mulgan seems to be advocating an esoteric morality in the vein of Sidgwick who himself said: ". . . on Utilitarian principles, it may be right to do and privately recommend, under certain circumstances, what it would not be right to advocate openly; it may be right to teach openly to one set of persons what it would be wrong to teach to others; it may be conceivably right to do, if it can be done with comparative secrecy, what it would be wrong to do in the face of the world; and even, if perfect secrecy can be reasonably expected, what it would be wrong to recommend by private advice and example" (1907, p. 489). If this is Mulgan's view, he certainly departs from Hooker's (2002, p. 85) perspective of RC: "Such paternalistic duplicity would be mo-

rally wrong, even if it would maximize the aggregate good." Mulgan, at least in this book, seems not to have offered us protection from the Noble Lie.

Lastly, Mulgan admits that the Realm of Necessity and the Realm of Reciprocity are not strictly separated: "The boundaries between moral realms are fluid...Any attempt to separate the two realms neatly and completely is bound to be an oversimplification" (p. 346). Accepting this, one may still query the nature of the division. We are told that RC is applicable in the Realm of Reciprocity, which prevails between members of a moral community whereby "the notion of moral community...is of a society of comparatively equal moral agents who can interact in mutually advantageous ways in pursuit of their goals" (p. 343). It seems to me the ideal moral code that RC would promote must include rules for distinguishing between those who can be considered part of my moral community and those who are not: One must know how to make this distinction in order to appropriately learn and apply the code. Hence the division of realms of morality itself must be acceptable as part of the code. The need to teach to people that there are two realms of morality as a result of two kinds of lives may be prohibitively costly for the code.

These issues aside, in *Future People* we have a solid piece of philosophical analysis which invigorates the debate on intergenerational justice by bringing a long needed robust consequentialist perspective on this topic. Moreover, Mulgan shows that the issue of intergenerational justice has important implications for public policy and the nature of morality itself. His work should take centre stage in further scholarship in this area.

Tim Mulgan (2006) *Future People. A Moderate Consequentialist Account of our Obligations to Future Generations*. Oxford: Oxford University Press. 384 pages. ISBN: 0-19-929220-X. Price £13.25

#### Cited Literature:

Chappell, Timothy (2002): Book Review. The Demands of Consequentialism by Tim Mulgan. In: *Mind* (444), pp.891-897.

Eggleston, Ben (2009): Book Review. The Demands of Consequentialism by Tim Mulgan. In: *Utilitas* (21), pp. 123-125.

Hooker, Brad (1990): Rule Consequentialism. In: *Mind* 99, pp.67-77.

Hooker, Brad (2002): *Ideal Code, Real World. A Rule-Consequentialist Theory of Morality*. Oxford: Oxford University Press.

Mulgan, Tim (2010) Staff Profile: Tim Mulgan. <http://www.st-andrews.ac.uk/philosophy/dept/staffprofiles/?staffid=108>.

Scheffler, Samuel (1994): *The Rejection of Consequentialism*. Oxford: Oxford University Press.

Sidgwick, Henry (1907). *The Methods of Ethics*. London: Macmillan.

Smart, J.J.C. and Williams, Bernard (1973) *Utilitarianism: For and Against*. Cambridge: Cambridge University.

Strawson, Peter (1949): *Ethical Intuitionism*. In: *Philosophy* 24, pp.23-33.

## Richard P. Hiskes: The Human Right to a Green Future – Environmental Rights and Intergenerational Justice

*Reviewed by Joseph Burke*

Richard P. Hiskes is based at the University of Connecticut as a professor of political theory, some one thousand five hundred miles from the BP oil disaster site that began to haemorrhage on April 20th, 2010. Despite the distance, it seems fair to assume that the political implications of the slick black tide have drifted

north as far as the Nutmeg State. In the introduction of his book, *The Human Right to a Green Future – Environmental Rights and Intergenerational Justice*, Hiskes pre-empted the frustration Americans now feel in trying to hold the fourth largest company in the world to account: "Environmentalism needs a new and more muscular political vo-

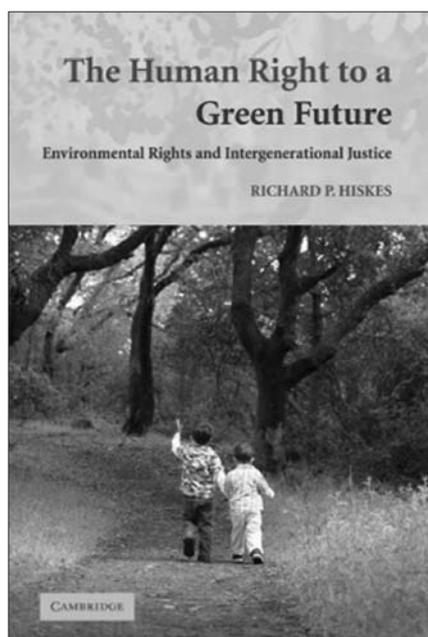
cabulary grounded in today's central political ideas of human rights and justice" (p. 2).

Consequently, Hiskes moves to develop a justification for environmental human rights, which he understands as the foundation for intergenerational environmental justice. This is, as he himself acknowledges, an ar-

duous task: environmental rights have often been seen as rights of less importance, particularly in comparison to first generation civil and political rights; such human rights may be incompatible with other rights; environmental human rights are deemed unable to handle the conflict between universalism and particularism. Trying to establish rights for future generations has equally troubling problems, most notably, their reliance on controversial collective rights and the unavoidable difficulty of reciprocity, or the lack thereof, between present and distant future peoples.

Cognisant of these threats to any attempt to give a rights-based vision of intergenerational environmental justice, Hiskes' main endeavour is to argue for three concomitant standpoints: Emergent Environmental Human Rights, Communitarianism and Reflexive Reciprocity. The common thread through these three is the way in which we understand the formation of human identity. As he is well aware, this is a dangerous move as identity politics has been a quagmire of philosophical unclarity, arguably because many of us do not have the solid sense of identity that theory often suggests we have. Nevertheless, Hiskes hopes that this approach will lead to a global consensus on intergenerational environmental justice. More specifically, this theoretical harvest bow is to ground an entitlement to clean air, water and soil, themselves chosen simply because "it is hard to imagine any rights more basic either to life or to all other rights than the rights to clean air, water, and soil" (p. 39). In order to fashion this, he weaves together a vast array of arguments from other authors. Unfortunately, the sheer number of positions in a book of this size cannot give each sufficient substance. The result is that nuances of individual authors melt away. Nevertheless, this need not be the sole determinant of the book's value.

Looking to human rights to protect us now, posterity and our environment is testament to the perennial appeal of the natural rights tradition of the seventeenth century. As Margaret MacDonald (in Waldron, 1984, p. 21) put it: "[The claim to 'Natural Rights'] tends in some form to be renewed in every crisis in human affairs, when the plain citizen tries to make, or expects his leaders to make, articulate his obscure, but firmly held conviction that he is not a mere pawn in any political game, nor the property of any government or rule, but the living and protesting individual for whose sake all political



games are played and all governments instituted." However, Hiskes wants to suggest that the 'emergent', or relational, character of rights enhances the intuitions of the natural rights tradition, which holds that from the firm, unchanging foundation of our human nature arises our eternal and inalienable rights.

Crucially, Hiskes views our own understanding of 'human nature' as having changed dramatically. He claims there has been a move away from conceiving the individualistic frenzied state of nature context as the source of natural rights. Instead, at the heart of human rights theory is a greater concern for the recognition and protection of human dignity as exemplified in Article 1 of the Universal Declaration of Human Rights: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood" (p. 31). For Hiskes, the implication of this change over the course of four hundred years is to see that human rights are constituted by the social relations that facilitate conscience and dignity. This revitalised conception of 'human nature' follows the relatively recent work of Gilligan, Kristeva, Foucault, Taylor and Habermas. In these disparate thinkers' work Hiskes sees a common effect: the increased acknowledgment of the relational impact on our sense of human identity. What it means to be human, to fulfil the criteria necessary to be able to hold human rights, is formed in our interaction with others. It is not in isolation from society. For the author it is clear that rights are emergent when we consider

that human rights surface in concert with the types of harms that pertain at a particular time when society is at a certain technological level: "Environmental rights are human rights that have 'emerged' in a particular point in human history as the direct result of the growth of human interconnections" (p. 40). The distinct character of environmental human rights results from Hiskes' alleged fact that the most significant aspects of our natural environment shape and mould our interactions with each other and thus our self-understanding.

The duties that must correspond to such emergent rights require a very particular allocation of responsibility. In consideration of environmental harms we must employ collective responsibility among actors and defer from what he refers to as "strict causality" (p. 44). Collective responsibility materializes where there is the willing acceptance of benefits within a group we are a part of, and if the potential for serious harm is the result of accumulated and coordinated individual activities each of which may not, in and of themselves, constitute a harm. However, by enclosing responsibility within a moral community, Hiskes may be neglecting the significance of new types of transnational politico-economic actors.

Arguably, the centre-piece of Hiskes' book is his idea of reflexive reciprocity. A long tradition in political philosophy has viewed reciprocity as defining the cases in which justice is applicable or not. At least as far back as Epicurus, a strong line of thought has proposed that where the possibility of response to another's actions, at least the capacity to return like for like, is absent so too is the notion of justice. This has led some theorists to view some humans and all non-human animals as beyond the bounds of justice. Likewise, a future generation has, prima facie, no recourse to react in any way to the actions of non-overlapping previous generations. Consequently, to defend the plausibility of intergenerational *justice* theorists have had to deny reciprocity as a necessary requirement of justice or illustrate that justice does pertain because there *is* a reciprocal relationship between non-overlapping generations. Those who have taken the former road have had to challenge the weight of, most notably, the contractualist tradition. On the other hand, some have tried to offer suggestions for the grounding of such reciprocity, for example the ability to tarnish or reify the memory of previous generations.

Hiskes undertakes a mixture of both. To begin with he criticises an overemphasis on individualism in the tit-for-tat economic reciprocity attributed to Rawls and Gauthier and the asocial virtue ethics perspective represented by the work of Lawrence C. Becker. With this in mind, Hiskes presents his idea of reflexive reciprocity. The author argues that the environmental interests of present generations are shared with those of later generations and that the protection of the latter is symbiotic with the guarding of the former. A crucial, albeit long, quote illustrates the point: "Consider then that these are interests [to have clean air, water and soil] that by their very nature unite present and future in important ways. They exist, as it were, simultaneously now *and* in the future in one and the same time (...) We cannot protect the future's interests in environmental quality without simultaneously also protecting our own, and we cannot protect our own without protecting the future's. Our action therefore in protecting those interests is not only a duty to the future but also reverberates back on our own interests to protect them. In other words, if we recognise the environmental interests of the future as actual interests that we also share as equally basic to us, then our protection of them reciprocally protects our own interests" (p. 59-60). Again invoking the importance of the community in identity formation, Hiskes claims that human identity is formed in the community and this communal understanding of ourselves depends in part on future generations. Borrowing from De Shalit, Hiskes notes that communal self-identity involves daily interpersonal interaction, cultural interaction and moral similarity. While a present generation is incapable of satisfying the first two conditions with distant future generations, Hiskes concurs with De Shalit that it does in the case of the third: "part of what is shared within a strongly communal association is a sense of collective identity, an identity that can be 'constitutive' of individual identity as a member if it includes consideration of future members" (p. 66). Moreover, it is again the environment that takes a pre-eminent position as "our natural environment is the singular physical manifestation of our connectedness both with our contemporaries and also with those who in their future will inherit our space, our land, our water, and soil" (p. 66). Reciprocal relations between those of the same moral community are, thus, possible given that "we depend on

their environmental human rights to make as strong a case as possible for our own; that, it seems to me, is a degree of interconnection that makes our reciprocal dependence clear, and intergenerational environmental justice possible" (p. 66).

Having suggested that whatever foundations that may exist are found in the changeable currents of human communal interaction, it may appear that Hiskes is diving in for rights particularism and abandoning universalist principles. However, Hiskes rejects the inclination to consider the global/local dichotomy as a zero sum game and tries to integrate the robustness of the former with the reasonableness of the latter. Therefore, on the one hand he states "...we are entitled morally to be *more* concerned with the rights of some future persons than with those of others, and that our preferred future subjects are the future generations of our own moral community" (p. 73). This is defended on the grounds that those within one's community are especially vulnerable to one's actions. Nevertheless, this does not permit full scale local bias because the "moral bindingness of vulnerability" is not absolute (p. 81). Hiskes' use of Goodin's thesis on vulnerability is an interesting one but it does not sit easily with the distinct nature of the environmental harms he warned of us earlier. The significance of these new technologies is precisely because they make us vulnerable to activities beyond our borders, moral or geopolitical, to an unprecedented degree. If local vulnerability is strong enough to prioritise local moral concern, even if not entirely, this seems enough to undercut the claim of distinct environmental human rights.

Hiskes envisages the most appropriate and coherent conceptualisation of the moral community as the nation. Why not the religious group, the sports team or the company as our moral community? There is a pragmatic and theoretical justification of seeing it as the most appropriate category to bolster a human right to a clean environment. The nation(-state) is the best equipped entity to act as the addressee of human rights because human rights are "creatures of national governments" being "both protected and potentially violated at that level" (p. 70). The more developed argument offered by Hiskes leans on J.S. Mill and Rawls to ground a nation focus on a communally held concept of identity and the special obligations arising out of shared citizenship (p. 83). Hiskes argues, following Yael Tamir and David Miller, that the legitimate fears

around extreme nationalism have inhibited a realistic account of the morally obligating features of a milder form, which could be pivotal in securing environmental human rights. In circumventing the chance of encouraging intolerant government through support of nationalism, Hiskes presents democracy as a crucial balancing mechanism (p. 84). Consequently, tempered nationalism can "provide the communal ties that both elevate concern for one's compatriots to the level of moral obligation without at the same time moving the community toward totalitarian commitment" (p. 86). Yet placing such emphasis on the nation state is certainly questionable. Many social activists may claim that the state as arbitrator of our human rights is only possible *because*, and not in spite, of supranational enforcement mechanisms.

How should the nation act to protect such rights? Constitutional provisions, more specifically the incorporation into every national constitution of the environmental human right to clean air, water and soil, are the strongest option (p. 126). Their legal clout, coordinative guidance and capacity to "restrain actions by narrow (or narrow-minded) majorities that might be deleterious to long-term environmental protection..." are all powerful reasons in favour of using constitutions to defend such human rights (p. 132). Building these environmental human rights into constitutions not only helps guard substantive rights but also supports procedural ones to ensure freedom of information and the right to participate in decision-making around the environment (p. 133). As such, this option reinforces the very grounds for a human right to a healthy environment, our democratic communal identity: "democratic politics turns nations into communities and deliver the citizens into a shared realm of meaning within which freedom is possible" (p. 90). It is as a result of this freedom that our moral obligations emerge feeding our sense of self in a community. A virtuous circle.

How strong is this argument of Hiskes? First, Hiskes has defended *that* constitutional provisions are appropriate but, crucially, their content would still require filling in. Also, it is unsure why he places such faith in participatory democracy to respect the environment. Why should we expect greater civic participation to lead to greater protection of our environment for present and/or future generations? Our notorious discounting of the future could be seen as a reason

to avoid such means of protecting our water, air and soil.

The homogeneity of 'community' through time is likewise problematic. The International Organisation of Migration (2010) estimates that there were some two hundred and fourteen million migrants in the world in 2010 and this reflects a sharp increase even since the 1980's to include all regions of the world. Take a more specific example; since the late 1990's, a natural increase has been bolstered by a net international migration into the UK from abroad. Between 2001 and 2004, almost two thirds of the increase in population in the UK was due to net in-migration (UK National Statistics, 2005 (a)). By the period 2028-2033 the UK's increase in population, an estimated 1.8 million, will be 50:50 concerning net migration to natural increase (UK National Statistics, 2009). In 2001, 4.9 million (8.3 per cent) of the total population of the UK were born overseas. This is more than double the 2.1 million (4.2 per cent) in 1951 (UK National Statistics, 2005 (b)). Hence, when we are imagining the members of our future nation, who are we thinking of? It cannot only be my, or my neighbours', great grand children. Maybe the future members of my community will be the posterity of the current citizens of very distant countries. If this is accepted, on Hiskes' framework, then I should be *substantially* concerned with the environmental human rights of those other communities. Yet how am I supposed to know which one(s)? Should I attend to the empirical facts and scientific projections? Should I direct my energies to those who are morally like-minded today, or likely to be tomorrow? Indeed,

how far forward should one envisage? The main point is that, unless one wishes to advocate very tight migration policies, the moral community I conceive of as my future one is unlikely to be made up of people from my moral community today. This would undermine my authority to justify showing greater concern for those with whom I have direct interconnections in the present.

A second point of concern revolves around the nature of the rights that we are left with following this complex theoretical endeavour. Even though Hiskes suggests that we have moved from a natural rights perspective, what we get from this communal identity foundation are three biological needs-based rights, that is, a right to clean air, water and soil. Admittedly, he provides for a set of accompanying procedural rights but we must be careful when justifying the law that it is sufficiently motivating. It may be that in this case there can be greater intuitive appeal to our universally shared biological need for clean air, water and soil.

Lastly, flaring, the burning of gas released as a by-product of oil exploration, in Nigeria results in severe health effects for nearby inhabitants and serious environmental damage both locally and globally. The abhorrent Deepwater Horizon oil disaster has received extensive mainstream media concern. Flaring has not. Hiskes has provided a clear and important book grounding a human right to a healthy environment in communal national identity. He has certainly avoided the chauvinistic excesses people often fear in nationalism. Moreover, he details an argument that will, undoubtedly, be influential for scholars and activists in their efforts towards

achieving recognition of environmental human rights. However, I am still drawn by the intuition that our national biases, both for our own particular nation and certain other ones, while likely representing some natural tendency in human beings, is, nevertheless, appropriately labelled a moral failing. I fear his theory might not be able to fully provide for this intuition.

*Richard P. Hiskes (2009): The Human Right to a Green Future. Environmental Rights and Intergenerational Justice. Cambridge: Cambridge University Press. 171 pages. ISBN: 978-0-521-87395-6. Price £45.00*

#### Cited Literature:

MacDonald, Margaret (1949): Natural Rights. In Waldron, Jeremy (1984) (ed.): Theories of Rights. Oxford: Oxford University Press.

International Organisation for Migration (2010): World Migration Report. The Future of Migration. <http://www.iom.int/jahia/Jahia/world-migration-report-2010>

Office for National Statistics (2009) National Population Projections 2008-Based. Newport: UK Office for National Statistics (05.07.10).

Office for National Statistics (2005 a): UK population grows to 59.8 million. <http://www.statistics.gov.uk/cci/nugget.asp?id=1305> (05.07.10).

Office for National Statistics (2005 b): 1 in 12 in UK born overseas. <http://www.statistics.gov.uk/cci/nugget.asp?id=1312> (05.07.10).

## Announcements and Interna

### Upcoming Conference: What type of legal responsibility towards future generations?

Universities of Versailles and Poitiers are organizing a colloquium about legal responsibility towards future generations on December 10th and 13th, 2010.

At present, there are no existing constitutio-

nal or legal mechanisms to hold present generations liable before a court of law for damage caused to future generations.

Certain scientific disciplines have theorized the responsibility of present generations towards future generations: Philosophy, Economics, Sociology, Bioethics, etc, but not Law. There are a number of obstacles to im-

plementing legal responsibility which will have to be overcome:

- What type of fault can be held against the present generations, while recognising their right to their share of hedonism?

- What type of damage can be taken into account, bearing in mind that if current law allows the compensation of future damage

it is with the proviso that it be certain and assessable.

- What kind of time-line should be considered? Is a time limit imaginable in the future?
- Which court, which authority could legitimately represent and defend future generations, while being part of and responsible to the present generation?

The first step in the chosen methodology will be to ascertain if existing provisions can be interpreted to allow the protection of future generations. In other words, can future generations be seen as coming within the scope of existing protective provisions that would amount to a protection of future generations "on the basis of established law"? In that respect, it seems that the Courts are already including the aim of protecting future generations in their case-law. If this first

step does not yield a satisfactory result, it will be necessary to try to create new legal material.

Lawyers cannot solve the problem alone. They know how to create a legal mechanism, but they lack the background knowledge. That is why the first part of the colloquium is entirely devoted to non-legal aspects: Sociology, Philosophy, Political science, Anthropology, Economy. Comparative, international and historical approaches are also indispensable, before a juridical approach: who is to represent future generations? What type of damage? What legal basis for current generations' liability toward future generations? What type of compensation? What powers would be assigned to the judge?

Jean-Paul MARKUS  
Professor of Public Law  
University of Versailles-Saint-Quentin  
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## Call for Papers for Intergenerational Justice Review

### **"Possibilities and limits of party cooperation in democracies"**

The editors are seeking articles in English for an upcoming issue in 2011 of the *IGJR* with the topic "Possibilities and limits of party cooperation in democracies".

Every democratic system requires the competition of political parties and parliament factions, and to a certain degree it is part of the democratic role play to maintain such competition. Nevertheless, in a democratic system it is important to aim for as much competition as needed and as much cooperation as possible, in order to achieve the majorities for necessary decisions. Democracy is always a struggle to balance between cooperation and competition. Across the globe there are many different approaches to finding this balance; the British Majority system, the concordance system in Switzerland, the coalition system in Germany and the Presidential democracies of France and the USA. All can be said to have their advantages, but do any of these systems ensure that not only the current needs are addressed in order to please voters and win votes, but that long term interests are implemented? Do any of these systems practice sustainable politics?

Take for example the complicated decision making in the political system of Germany, a system that requires the consensus of many actors often recompensing blockades. The non-appearance of costly reforms, for example in climate protection, are examples which illustrate that measures often oriented to the future can and are being blocked by single parties. In this case future generations in particular are disadvantaged by the absence of functional collaboration of parties.

Deadline for the submission of abstracts is 31 December 2010.

Deadline for the submission of full articles is 30 April 2011.

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### **"Intergenerational Justice and the Scourge of War"**

We are looking for articles in English for the upcoming issue in 2011 of the *IGJR* with the topic "*Intergenerational Justice and the Scourge of War*".

The Charter of the United Nations signed in San Francisco on 26 June 1945 starts with the words 'We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to

mankind [...]'. The Charter was obviously formulated and signed under the impression of the recently ended Second World War, which was the single event with the sharpest decrease of human welfare in history. The priorities have since shifted during an era of unprecedented peace in the OECD world and on a global scale. But even though as many as 192 states have signed the UN Charter, starting with an expression of determination to rid the world of the scourge of war, conflicts still ravage large parts of the world, particularly in Africa, the Middle East and Central Asia. According to findings of the AKUF (Working Group on the Causes of Wars) in Hamburg, Germany, the number of conflicts has even steadily risen since the end of the Second World War, while inner state conflicts increasingly dominate the statistics.

The persistence of the institution of 'war' might be the greatest threat of all to future generations. Its negative consequences for the future of societies are obvious. Apart from the people dying, traumatised soldiers and victims pass down the psychological damages they suffered in war times to the future generations as parents. Additionally new forms of inner state conflicts have a much longer duration in comparison to classic interstate wars and leave the economies, state

structures and societies of the states they ravaged in ruins for decades to come. Thus modern inner state conflicts are more likely to affect future generations than classical wars with clearly defined warring parties that usually end with a truce or a peace treaty. Evidently the problem the 'scourge of war' poses to mankind is far from being solved. In this context it is remarkable that studies on intergenerational justice have so far neglected the topic, especially considering that the UN Charter specifically pointed out 'succeeding generations' as the beneficiaries

of its determination to rid the world of wars. The upcoming issue 1/2010 of the *Intergenerational Justice Review* addresses this issue, with the aim to establish the groundwork for a comprehensive discussion of peace policies in the scope of intergenerational justice. The issue aims to clarify the relation between the rights of present and future generations for a peaceful life, the role of humanitarian interventions based on Chapter VII of the UN Charter and interventions in general. This includes interventions for conflict management, peace-

building, peace enforcement, peacekeeping, state and nation building.

Weapons of mass destruction pose an exceptional danger to the future of mankind. Therefore the ban and demolition of nuclear arms as well as the elimination of chemical and biological weapon are important elements of the topic.

Deadline for the submission of abstracts is 30 June 2011.

Deadline for the submission of full articles is 31 October 2011.

## New Editorial Staff

### Joseph Burke

Joseph Burke holds degrees in Sociology and Politics (B.A.), International Development (MSc.) and Philosophy of the Social Sciences (MSc.) from the University of Limerick, University College Dublin and the London School of Economics, respectively. Joseph has worked with Irish Aid, Ireland's national aid agency, with a particular focus on expanding partnership with Malawi and harmonising activities within the European

Union. He has conducted independent primary research in Uganda on economic governance and Syria on human rights issues plus philosophical work on human rationality. His work has been published by peer-review and by Blackwell Publishers. He has presented at conferences in the U.K., Ireland and the Netherlands on issues across the social sciences and philosophy.

### Raphaelle Schwarzberg

Raphaelle Schwarzberg has received a broad-

based undergraduate training in the social sciences at Sciences Po Paris and holds a Double Masters in Economic History and International Development Economics from the London School of Economics and Sciences Po Paris. She has also studied at the University of Chicago in the Economics, Sociology and Political Economy departments. In October 2010, she will start a PhD in Economic History at the London School of Economics.

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#### Editorial staff:

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#### Editorial office address:

Foundation for the Rights of Future Generations, (Stiftung für die Rechte zukünftiger Generationen)

Postfach 5115, 61422 Oberursel  
Germany

Telephone: +49(0)6171-982367,

fax: +49(0)6171-952566

Email: editors@igjr.org

Website: www.intergenerationaljustice.org

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FRFG wholeheartedly thanks our EVS participants Joseph Burke and Marisa dos Reis for their work as our editorial staff members.

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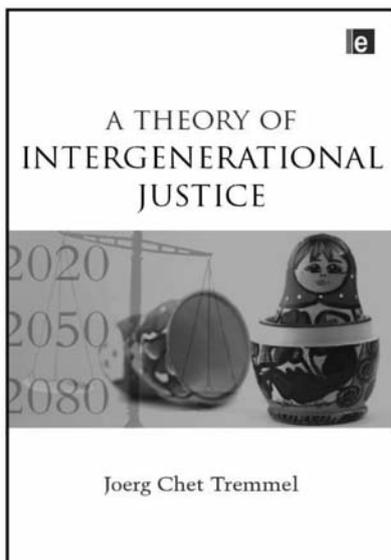
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