

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 interlocutors¹. 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.² 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’.³ 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 juristic 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-

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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

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.



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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 Campos¹*

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-