

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.¹ 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.² 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.³ 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.⁴ 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*,⁵ 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.⁶ 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.⁷ 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.⁸ 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 Llompарт, 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). 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.