

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 Llompart, 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.

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,¹ 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*² 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 Reis¹

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)² 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."³

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-