

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 inexistent. 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, internacional 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-

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.”⁴

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.”⁵

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,⁶ 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.”⁷

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.⁸ 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, 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.