

MODEL INSTITUTIONS FOR A SUSTAINABLE FUTURE:

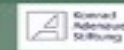
a Comparative Constitutional
Law Perspective

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25th of April 2014: “Individual vs. Collective Rights. The differences between the protection of future individuals and future generations”

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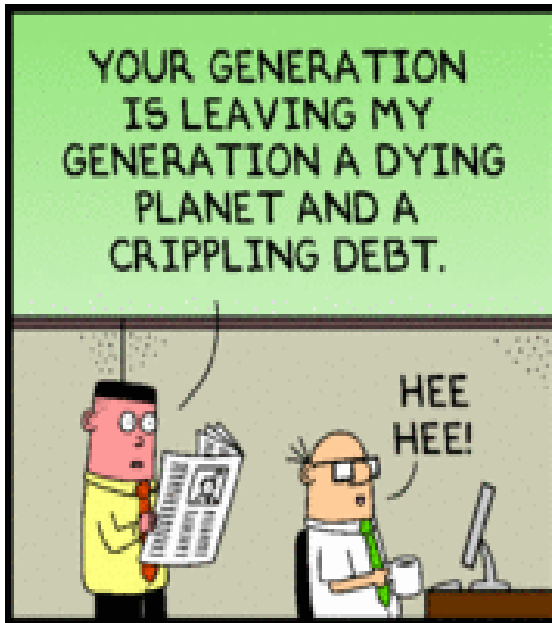
I – The Portuguese experience

II – Friendly principles (UNESCO, Gomes Canotilho / Emilie Gaillard)

III – The legal protection of future individuals

IV – The legal protection of future generations

V – Possible conflicts



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Article 66 - Portuguese Constitution

(Environment and quality of life)

Everyone shall possess the right to a healthy and ecologically balanced human living environment and the duty to defend it.

In order to ensure enjoyment of the right to the environment within an overall framework of sustainable development, acting via appropriate bodies and with the involvement and participation of citizens, the state shall be charged with:

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- a) Preventing and controlling pollution and its effects and the harmful forms of erosion;
 - b) Conducting and promoting town and country planning with a view to a correct location of activities, **balanced social and economic development** and the enhancement of the landscape;
 - c) Creating and developing natural and recreational reserves and parks and classifying and protecting landscapes and places, in such a way as to guarantee the conservation of nature and the preservation of cultural values and assets that are of historic or artistic interest;
 - d) Promoting the rational use of natural resources, while safeguarding their ability to renew themselves and maintain ecological stability, with respect for the principle of inter-generational solidarity;***
 - e) Acting in cooperation with local authorities, promoting the environmental quality of rural settlements and urban life, particularly on the architectural level and as regards the protection of historic zones;
 - f) Promoting the integration of environmental objectives into the various policies of a sectoral nature;
 - g) Promoting environmental education and respect for environmental values;
 - h) Ensuring that fiscal policy renders development compatible with the protection of the environment and the quality of life.



In the 80's, only two rulings referred to future generations and both were linked to eugenic abortion (Cases n. 25/84 and n. 85/85) .

In 2007, the expression “future generations” was mentioned in a popular action case (Case n. 163/2007) with regard to Urban Planning Law and later (Case n. 387/2012) in a similar context.

From 2010 on, “intergenerational justice” arises mainly within the socio-economic context linked to other broader principles such as solidarity and sustainability (Cases n. 353/2012, 187/13, 474/13, 862/13).

Besides these ones, “intergenerational solidarity/justice” may be found in Cases n. 3/10, 176/09, 188/09, 174/08, 437/06, but these references are occasional.

Case n. 2/2010 (pensions and social security)

“The sustainability of the social security system is an objective that reflects an idea of intergenerational justice that stems from our Constitution”

Case n. 2/2010 (pensions and social security)

“(…) The second structuring principle that derives from the historical context surrounding this legislation is the one of intergenerational justice. (...); although the Constitution does not establish quantitative limits to the State’s debt , it implicitly recognises qualitative limits which coincide with the limits of the burden that the present generation may impose on future generations without seriously constraining their autonomy.

In a republic based on the idea of human dignity (Article 1), **the proper limits that are exceeded when future generations are unable to make decisions, thus limiting their freedom of choice, are structural principles and components of the constitution itself.**

The solidarity (Article 1) between those who are alive cannot be lived in order to exclude solidarity with the future.”

Case n. 187/2013 (Extraordinary Contribution of Solidarity) - Catarina Sarmento's concurring opinion

“(…) I do not accept the argument that the ECS [Extraordinary Contribution of Solidarity] is also justified by a duty of intergenerational solidarity: such a goal can never be pursued by a merely *ad hoc*, isolated measure. ECS was designed as extraordinary income, it is not a structural measure, designed for the solvency of the system and cannot therefore be regarded as a measure for the purpose of reducing burdens on future generations.”

Case n. 474/2013 Maria Lúcia Amaral's concurring opinion

“Let's be clear: no constitutional order lasts beyond the sustainability of the state, as there is no constitution that rationally elects irresponsibility as a guiding principle of public policy of the present generation towards the autonomy of future generations.”

WE WANT TO
THANK OUR GRAND-
CHILDREN, WITHOUT WHOM
THESE RESCUE PLANS
WOULD NOT HAVE BEEN
POSSIBLE

Public
Debt



Chapman
Lad's Herald Tribune



UNESCO Declaration 1997

Article 1 – Needs and interests of future generations

The present generations have the responsibility to ensure that the needs and interests of present and future generations are fully safeguarded .

Article 2 – Freedom of choice

It is important to make every effort to ensure , with respect for human rights and fundamental freedoms , that present and future generations enjoy full freedom of choice in relation to their political, economic and social system and are able to preserve its cultural and religious diversity.

Article 10 – Development and education

1. The present generations should ensure the conditions of equitable, sustainable and universal socio-economic development of future generations, both in its individual and collective dimensions, in particular through a fair and prudent use of available resources for the purpose of combating poverty.

Professor Gomes Canotilho – Principle of Sustainability

“Like other structuring principles of a constitutional state, such as democracy, freedom, legality, equality – the principle of sustainability is an open principle lacking some embodiment.

One can, however, draw the categorical imperative which is the genesis of the principle of sustainability and sustainable development: humans should behave and act so as not to:

- (i) exploit nature;
- (ii) other human beings;
- (iii) other nations;
- (iv) other generations.”

In legal and political terms, the principle of sustainability has three basic dimensions:

- (1) Sustainability amongst states by imposing equity between poor and rich countries;
- (2) Generational sustainability pointing to the fairness among different age groups of the same generation (eg, young and old);
- (3) Imposing the sustainability of intergenerational equity between people living in the present and those who will be born in future.

Professor Emilie Gaillard

She developed a new principle: The principle of temporal non-discrimination

“Recognition of a non-discrimination principle that transcends time, based on which the absence of temporal existence no longer results in an absence of rights or legal safeguards, may truly be considered an intellectual conversion. Thus, the implementation of crimes against future generations becomes possible by rendering more complex traditional legal concepts. Formulating crimes against future generations is also an impressive feat in that it upholds a principle of dignity of the future generations. Such a principle has the further potential of propelling forward the domain of human rights law by opening it to discussions of a transgenerational perspective.”

Future individual rights – beyond legal personhood. Inspiration from civil law

Despite the fact that deceased persons and unborn/unconceived people do not possess legal personhood, most civil codes provide legal protection to certain fundamental rights after death (*post mortem* protection) as well as they guarantee some rights to unborn persons (including the capacity to inherit)

Portuguese law – civil code

Article 2033 says:

(General principles)

“1. 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”**

German law- civil code

Section 1923: 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 conceived, 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. (...)**

***Post Mortem* protection – a recognised case of legal protection beyond legal personhood**

It is the ***Principle of Human Dignity*** which is behind the *post mortem* protection of certain fundamental rights. (for instance, the protection of the deceased person's memory, the right to name and image, copyright, etc.)

***Post Mortem* protection of fundamental rights**

The Portuguese criminal code foresees a crime of offences to the deceased person's memory, setting a limit of 50 years for its prescription:

Art. 185 (offences to the deceased person's memory): "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.

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. (Marisa Q. dos Reis' thesis, 2011)

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

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. So if we might just have found a way to imagine the recognition of rights to future individuals, we still need to think of other strategies for the recognition of rights to future generations as a group.

In this second case, it seems more plausible and effective to think of ***collective rights or diffuse interests*** (together with the principles we've approached before), which do not concern to specific and determined individuals.

Types of rights	Examples	Comments
Civil and political rights (individual rights)	Right to live Equality before the law Freedom of speech, thought, etc.	«first generation» HRs classical freedoms Art 2-21 UDHR
Social and economic rights and Cultural rights (individual rights)	Right to work Right to adequate standard of living Right to education Right to membership trade unions etc.	«second generation» HRs basic social rights Art 22-28 UDHR ICESCR
Collective rights	Right to self determination Right to development Right to share in common heritage of mankind	«third generation» HRs, not yet elaborated Art 1, 55 UDHR (see also Art 28)

Sources: UN Declaration of Human Rights, 1948; International Covenant on Economic, Social and Cultural Rights, 1966; International Covenant on Civil and Political Rights, 1966; UNGA Declaration on the Right to Development, 1986.

Collective rights – Miodrag Jovanovic

Jovanovic's major claim is that collective rights are conceived in terms of the inherent value of collectivism. Jovanovic argues that collective entities can have inherent value, which is independent of the well-being of its individual members.

He argues that we should recognise collective interests of the group itself as the distinctive element of collective rights, rather than think of collective rights in terms of who are their right-holders. Jovanovic defends that this approach may lead the states to promote efforts in order to implement democratic representative mechanisms to pursue groups' interests. This way, we might attain a balance between collective and individual rights based on a proportionality analysis. He stood for the possible universal status of some collective rights, based on the universality of human rights.

Collective rights vs. diffuse interests

Diffuse interests are different: they are a type of transindividual or metaindividual interest, ie, they belong to an **indeterminable** group, class or category of persons that are gathered for the same reason. They are indivisible in nature, shared in equal measure by all group members. Examples: the residents of a region affected by environmental pollution, or the recipients of a deceptive propaganda disseminated by television **or even future generations.**

Conflicts:

In certain cases, protecting a future person does not follow the collective interests of a whole future generation.

For example: natalist policies may lead to an increase of population and, therefore, to a decrease of the quality of life of future generations; eugenic abortion is controversial; the safeguard of the environment, sustainability and the welfare state may restrain individual rights etc.

THE ANSWER IS TO FIND THE BALANCE BETWEEN INDIVIDUAL AND COLLECTIVE RIGHTS/DIFFUSE INTERESTS IN SPACE AND TIME – PRINCIPLE OF PROPORTIONALITY



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**THANK YOU SO MUCH
FOR YOUR PATIENCE!**

