

## Constitutions and Future Generations

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### A Double-Edged Sword

Any attempt at thoroughly exploring issues of green constitutionalism requires a close look at the interactions between constitutions and our concern for justice towards future generations. It is crucial to understand at the outset that, far from a convergence, there is a fundamental *tension* at work between two types of concerns for future generations as they translate at the constitutional level. On the one hand, by incorporating substantive and/or procedural guarantees in the constitution, one may well aim at *reinforcing* the protection of the coming generations against actions of generations preceding them and deemed problematic. Yet, on the other hand, the more we rely on constitutions—as opposed to less rigid legal instruments—the more we *threaten* the generational sovereignty of future generations. Taking seriously the renewal in theories of justice as well as the development of environmentalism in the 1970s and 1980s, one may be tempted to assume that constitutions can only *serve* future generations. Yet, exactly two centuries earlier, in the late 1780s and early 1790s, the concern of authors such as Jefferson (1789) and Paine (1791) was just the opposite.<sup>1</sup> Constitutions can thus constitute double-edged swords from the perspective of intergenerational justice. The tools used in a constitution to offer even stronger guarantees to the rights of future people simultaneously restrict the sovereignty of coming generations. Constitutionalization is thus not straightforwardly compatible with the demands of intergenerational justice.

Let me be more specific. Constitutions, through a variety of amendment restrictions (e.g. requiring a prior declaration of revisability by the previous parliamentary assembly before the elections, requiring special quorums, sometimes going as far as non-revisability),<sup>2</sup> reduce the freedom of each generation to adopt its own rules on a simple majority basis. In the face of this *prima facie* case against constitutional rigidity, there are at least three questions to be addressed. First, do constitutions actually bind future generations at all?<sup>3</sup> If a country were claiming to apply its laws to the citizens of other countries residing outside its territory and on grounds that don't benefit from any special degree of recognition elsewhere, other countries would simply dismiss such claims. Why can't a generation simply do the same and decide to enact a new constitution from scratch?<sup>4</sup> Second, if it makes sense to claim that constitutions actually bind future generations, are there good reasons for that weighing heavier than the concern for generational sovereignty expressed above? Third, if it can be fair to bind the next generations, on which

issues can or should this be done—e.g. on *all* issues that we generally consider as constitutional essentials? Hereinafter, we will only address the second of these three issues.

Before doing so, consider the other side of the debate—the idea of relying on constitutions to protect future generations. This takes various forms. First, one may want to translate substantive concerns for future generations in constitutions. Some constitutions actually refer to the interests of future generations and sometimes even explicitly grant them rights, such as in the case of the Japanese constitution, which extends some of the rights already granted to present people to future ones (1946, art. 11), and with a more specifically environmental focus in the Norwegian (1992 amendment, art. L110b) and the Bolivian ones (2002 amendment, art. 7(m)).<sup>5</sup> Recognizing rights to future people raises specific challenges, including constraints on how to phrase them. Yet, these challenges are not insurmountable.<sup>6</sup> What matters however is how flesh is given to such rights. We will explore below one way of doing so - through setting up a representative for future generations, with a properly defined mandate.<sup>7</sup>

### Can Constitutional Rigidity be Justified?

*“A people always preserves the right to revise, reform and change its constitution. A generation is not entitled to subject future generations to its own laws.”<sup>8</sup>*

Thomas Jefferson is probably the most emblematic author among those who emphasized the fact that constitutional rigidity—which should not be confused with unrevisability—raises a problem of intergenerational fairness.<sup>9</sup> He essentially relies on three intertwined lines of argument. First, “the dead have no rights. They are nothing; and nothing cannot own something.”<sup>10</sup> If the dead cannot have rights, they cannot have the rights or power to impose anything on the living. Second, Jefferson relies on table of mortalities to identify the periodicity of 19 years at which a constitution would expire and need to be re-enacted to continue being in force. The underlying logic becomes clear when he writes that “a generation may bind itself as long as its majority continues in life; when that has disappeared, another majority is in place, holds all the rights and powers their predecessors once held, and may change their laws and institutions to suit themselves”.<sup>11</sup> Third, he claims that “by the law of nature, one generation is to another, as one independent nation is to another.”<sup>12</sup>

These three lines of argument suggest three possible diagnoses as to the key intergenerational difficulty involved in constitutional rigidity. The first one points at the inability of dead people to have any entitlements at all. The second one suggests that the difficulty arises instead from the fact that a minority (the constituting generation) imposes its views on a majority of people (all the subsequent generations). The last line rather points at a problem of generational sovereignty.

I would submit that the central difficulty has to do with sovereignty, or “boundary” as is now commonly referred to in democratic theory, rather than with a tyranny of the minority or with a meaninglessness of dead’s rights issue.<sup>13</sup> To see the difference between claims two (minority) and three (sovereignty), consider a hypothetical world involving two non-overlapping generations: a constituting one followed by another twice smaller. The problem of generational sovereignty would still arise regardless of the fact that the first generation would remain a majority. A generation decides for itself, but also for others that will follow. In line with Jefferson’s analogy, this is as if the Republic of Ireland were to adopt certain rules on abortion for which it would unilaterally claim jurisdiction all over the British Isles, unless the Brits were able to repeal its applicability in Britain by a majority of two-third. The true problem, as this example illustrates, is that the Irish would seek to impose rules on people who would not have been even consulted. And what makes the intergenerational case even stronger than the extraterritorial jurisdiction one, is that not only will some of those affected not have a say: those taking the initial decision will seek to guarantee its applicability beyond the moment (death) when it cannot actually affect them anymore.

Of course, positions such as Jefferson’s were part of a rich exchange of arguments at the time.<sup>14</sup> Note however that, given the possibility of differential rigidity, a key challenge for any attempt at justifying constitutional rigidity is to provide reason(s) that would hold as much as possible for all the types of items usually found in a constitution (institutional setting, bill or rights, etc). Let me mention here two possible ways in which constitutional rigidity can be balanced or even reconciled with a concern for intergenerational sovereignty.

Consider first an “unavoidable side effect”—justification. Imagine that we have a good case for *intragenerational* rigidity. Such a case typically rests with the need to protect minorities against abuses from the majority, to preserve fundamental rights even if there is a near unanimity at a given moment against some of them, etc. Consider now the hypothetical case of “mayfly” generations. They would never overlap. The members of each

would all be born at the age of electoral majority and die at the same time. We could thus easily imagine the enactment of constitutions that would have the required rigidity while coming to an end at the death of those who adopted it. In that case, rigidity within a generation would not necessarily need to entail any intergenerational rigidity.

In a real world however, generations do overlap. If we want to preserve intragenerational rigidity without leading to intergenerational rigidity, we can consider two theoretical options. The first is Jefferson’s own proposal of a constitution coming to an end at terms equivalent to the average life expectancy of a generation.<sup>15</sup> Alternatively, we may subject the applicability of constitutional provisions to the age of those involved, leading to the coexistence of several constitutions applying on the same territory to different cohorts. However, each of these solutions—succession of short-lived constitutions or coexistence of lifetime overlapping constitutions—would lead, respectively, to significant risks of instability and time-consuming debates, and to intractable problems of conflicts of laws in situations involving two agents from different birth cohorts. The overlap thus makes it practically unavoidable that those committed to *intragenerational* rigidity should accept intergenerational rigidity as a side-effect.

In addition, there is a more specific, and stronger, form of an “unavoidable side-effect” argument focusing directly on generations and applying both to specifically intergenerational provisions as well as to general constitutional provisions. Here, the idea is not so much that if we want intragenerational rigidity, we have to accept intergenerational rigidity. It is rather that the price to pay for intergenerational protection is intergenerational rigidity. A constituting generation, in enacting a constitution, will bind itself—at least until it manages to find a supermajority later in time to amend it. If the content of such a constitution provides general guarantees to a democracy as well as a protection for basic rights, this will automatically constrain the constituting generation in its relations with the coming ones. This is even more so if specific provisions are enacted out of concern for intergenerational justice as such, be it with regard to budgetary policy or the protection of the environment. Finally, the constituting generation can also be seen as aiming at binding not only itself (G1), but also future generations (G2) to the benefit of later ones (G3). G1 would not only bind itself to the benefit of G2 and G3. It would also bind G2 to the benefit of G3 and so on and so forth.<sup>16</sup>

Besides such “unavoidable side-effect” views, there is also a second type of argument that insists on the fact that the object of a constitution is so fundamental that no state, no democratic

life, no distributive choices between generations can take place without having such institutional rules in place first. Rather than rigidity as a constraint, the idea is that constitutions set up preconditions for the very possibility of a democratic debate.<sup>17</sup> The intergenerational division of labor is such that it should be done first, which requires that the first generations do the job. This tells us of course why we need constitutions. It does not tell us however why they should be so rigid.

There are many other types of arguments relied upon in defense of constitutional rigidity. Some deny it in a sense by relying on the idea of tacit, or even hypothetical, consent being given by each successive generation. Or at least they define—and sometimes call for guaranteeing—a set of conditions under which tacit consent could legitimately be inferred.<sup>18</sup> Others claim that what is at stake is a true self-commitment, once we consider a people and the generations it goes through as if it were a single person going through various ages. Still others claim that constitutions are a precondition not only for a properly democratic debate, but even for the very existence of a people. The debate is far from being settled. However, what we can see, especially insofar as constitutions explicitly incorporate a concern for intergenerational justice, is that we are far from being left with no argument at all in defense of constitutional rigidity and of why subsequent generations should feel bound by constitutions adopted earlier.

### Why *Special* Representation?

*“The non-existent has no lobby, and the unborn are powerless.”<sup>19</sup>*

So far, we looked at possible avenues to defend the need for constitutional rigidity while taking the challenge of generational sovereignty seriously. Let us now assume that we have a good case for relying on a rigid constitution for certain purposes. One thing that we can do so with respect to future generations is to set up a body aimed at giving them a voice in the regular political process.<sup>20</sup> We know of at least three real experiments aiming at representing future generations: the Knesset Commissioner for future generations—an Israeli experiment that lasted from 2001 to 2006, the Finnish parliamentary committee for the future set up in 1993, and the Hungarian ombudsman for future generations, appointed in May 2008. Interestingly enough, these experiments show that such institutions can be set up through mere legal change, without the need for constitutional amendment. However, doing it through a constitutional avenue would probably give them more weight. The question we need then to address is whether there is a good case for setting up such forms of special representation. Notice that what is at stake here

is not whether there is generally a good case for limiting each generation’s sovereignty through rigid constitutions. It is rather about whether a specific case also obtains for limiting it through setting up a representative for future generations. Let me examine three potential objections.

The first objection is the “why extra power?” one, which claims that there is nothing unfair in future generations not being represented today. This is so because *in the future*, when they *will* come to existence, they will in turn benefit from full generational sovereignty. The objection could even go as far as claiming that setting up a special representative for future generations would give them an unfairly large power as compared to what earlier generations benefited from. How to answer such an objection? On the latter aspect, except for unavoidable transitional inequalities arising from rule change and except for the fact that later generations will have more generations preceding them than earlier ones, *each* generation would benefit from an extra power on earlier generations, without thus generating any significant intergenerational inequality.

As to the very need for a special representation, it can be defended as follows. Consider the principle that all (and only) those affected by a set of decisions should have a say in such decisions.<sup>21</sup> Many of our decisions will have a major impact on the future (whereas the reverse is far less obvious).<sup>22</sup> Therefore, the voice that future people will have in the future will come *too late* in many cases, to the extent that practically *irreversible* consequences are often attached to our decisions. This is why future people should also have a voice *today*. By analogy, in asking ourselves whether nationals residing abroad should still hold their right to vote in their home country, the fact that they are more likely than non-national non-residents to come back and reside home in the future is relevant. Decisions taken at home today are thus likely to affect them *in the future*. This can be a reason not to cancel their right to vote, even temporarily, even if this may appear as a form of plural vote.

The second objection claims that future generations are already represented: why an *extra* representative? The claim is not that future people should not be given a voice. What is alleged is that they already *do have* a voice: they speak through the mouth of all of us. The current constituency as a whole and its representatives are the best possible defenders of future generations. No need then for a *special representative* for future generations. To counter this, let me draw a comparison with the old debate as to whether women and children should be granted the right to vote as well as whether we should make sure to have enough female MPs. James Mill’s view on whether women and children should be enfranchised reads as follows:

One thing is pretty clear, that all those individuals whose interests are indisputably included in those of other individuals,

may be struck off without inconvenience. In this light may be viewed all children, up to a certain age, whose interests are involved in those of their parents. In this light, also, women may be regarded, the interests of almost all of whom are involved either in that of their fathers or in that of their husbands.<sup>23</sup>

The exclusion of women from the franchise as well as from parliaments is unacceptable for various reasons. In contrast with the cases of children and of future generations, their permanent disenfranchisement is problematic at the level of principles in terms of equal treatment. However, there are two further reasons pleading for their enfranchisement and for making sure to actually have women among our representatives. The first reason is epistemic: women are likely to know better about women's distinct experience and interests than men. The second one is motivational: women are more likely to show real commitment to the defense of women's interests, especially when they conflict with those of men. These epistemic and motivational concerns are central to a *realistic* theory of democracy.

The case of children differs at both levels. The distinctness and potential conflictuality of their interests with those of adults is often perceived as less strong in the case of children and parents than in that of men and women. To paraphrase Louis Aragon, it could be that men perceive more vividly that children are their future, than they do it for women. Moreover, children are clearly less politically competent than adults. Even defenders of the right to vote of children actually accept that they be exercised by their parents up to a certain age. This means that, in the end, the debate opposes those who consider parents as better representatives than adults in general of the interests of children, and those who object to granting such extra power to parents.

What does this tell us about the idea of a *special representative* for future generations? The representation of women by women themselves is both possible and desirable. Representing children through children is possible but not desirable. Representation of future people *by themselves* is simply impossible. Is there a specific group among us that could qualify as what James Mill refers to as "natural representatives" of future generations as it could be the case for children?<sup>24</sup> Environmentalists are probably not better equipped than others to balance the relative importance of the environmental dimension as compared with other aspects (such as cultural or social ones).<sup>25</sup> As to parents, while they are likely to be motivationally turned towards future generations, their views both on demographic policy and on the proper

weight to give to present and future generations may not be fully balanced. A special representative would thus be more appropriate than a specific group within the current constituency.

There is a third possible objection: why a special representative for future generations, and not one for other unrepresented groups such as ethnic minorities or children?<sup>26</sup> This Pandora box objection can be disposed of in several ways, depending on the other group claiming special representation as well. First, future generations are a *voiceless* group. With the exception of young children and the deceased, other non-specifically represented groups can still demonstrate in the street or express their

disagreements in other ways. Future generations cannot. Second, future generations are no minority at all since they constitute a huge group of people still to come. Third, in comparison with children, the degree to which we care about remote generations is looser, hence requiring special attention.<sup>27</sup> These are three reasons why even those concerned about the multiplication of special representatives or of various

types of guaranteed representation in parliaments for minority groups should still support the idea of a representative of future generations.

In the end, none of the objections to the idea of a special representative of future generations hold. There is a *realistic* case in favor of having one, along the lines of motivational and epistemic concerns emphasized in the case of women. The change in perspectives that such a representative may bring about can be significant. Those unconvinced on the possible impact it can make to give a voice to a representative of future people could for example spend a few minutes listening to and reflecting on the reasons for the impact of Severn Suzuki's famous 1992 speech in Rio. There may of course be room for discussing the proper understanding of such a representative's role.<sup>28</sup> Whereas the case for setting it up through a constitutional amendment is not provided here, we have a clear example of what a constitution *could* do in terms of procedural changes when it comes to future generations.

### Representing the Voiceless: How?

The voicelessness of future generations is a special reason for setting up a representative for future generations. However, it also generates a risk of unaccountability. Again, it is unclear how much of the guarantees that this requires should be set up through constitutional amendment or through mere legislation. In either case, the accountability problem should be taken seriously. While invoking future generations is generally perceived as

especially noble, reference to them is too often opportunistically abused. Two examples help to illustrate this point. The first is when George W. Bush declared a few months before the war in Iraq began that: “[Saddam Hussein] is a man who said he was going to get rid of weapons of mass destruction. And for 11 long years, he has not fulfilled his promise.... We owe it to future generations to deal with this problem....”<sup>29</sup> Similarly, consider a defender of Robert Mugabe’s policies who wrote, “everyone bedevils him today, but future generations will positively assess the reforms that he has put in place in Zimbabwe.”<sup>30</sup>

The voicelessness of future generations thus calls for special guarantees. They can be procedural or substantive. Regarding the former aspect, there should be a reference group, acting as a proxy for future people, towards whom the representative of future generations should be accountable. The parliament at large or a parliamentary committee could act as such a reference group. Yet, such a reference group is not enough. A substantive mandate is needed. Granting rights to future generations in the constitution can of course help in this respect. However, there are two further things to do at the substantive level—which again may require developments at the legislative rather than constitutional level.

First, ideally, the scope of the representative’s mandate should be broad. A representative of future generations should be forced to do the difficult job of weighing up the relative importance of various dimensions for future generations, such as transferring them technology, effective drugs, an extensive biodiversity, well functioning institutions, good roads and schools, etc. A representative for future generations caring only about the environment, for example, would be comparable with a single issue political party. Such a narrow scope runs the risks of unjustified biases.

Second, mere reference to “rights” is not enough. Theories of justice propose various formulations of what we owe each other, including at the intergenerational level. At the very least, it is crucial to understand that choosing one or another of such theories may lead to very different policy recommendations. Some of these theories will advocate that early generations be sacrificed for the sake of future ones, while others will insist that it would be unfair to transfer to the next generation *more* than what we inherited from the previous generation. Some justify our obligations through reference to obligations to our ancestors while others don’t. And some make what we transfer to the next generation sensitive to the expected relative size of the next generation. These are significant differences.<sup>31</sup> It is therefore crucial to be aware of them as well as of their intergenerational implications. A debate regarding our obligations to future generations that would ignore such theories of justice would simply not be a properly informed democratic debate; in the same way as one ignoring scientific theories on the natural sciences side would not. Moreover, adopting one of these

general theories of justice as the heart of the mandate of the future generations’ representative would certainly help structure its policy recommendations.

Without denying that agreement on a substantive mandate may be especially difficult to reach, the voicelessness of future generations makes it especially necessary to ground policies on solid substantive principles, as procedural guarantees will necessarily remain mere approximations of what they could be in a strictly intragenerational setting.

## Conclusion

We indicated that while not being unproblematic, constitutional rigidity can be defended, not only because of the value of intra-generational rigidity, but also in the name of protecting future generations. We also showed that while not being straightforward, there is a good case for having a special representative for future generations, which could be introduced through constitutional amendment. Finally, the voicelessness of future generations provides us with a special reason why such a representative should not only have a broad mandate, but also one with at least some precision. In the end, relying on constitutions to protect future generations, while not being sufficient, is certainly once significant piece of the set of measures needed to protect them. And future generations should certainly be a core concern for green constitutionalists.

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## Endnotes

1. Th. Jefferson, *Letter to J. Madison* (Sept 6, 1789); Th. Paine, *Rights of Man* (1791).
2. German Basic Law, art. 79; French Const., art. 89; Turkish Const., art. 1–4.
3. L. Beckman, “Democracy and Future Generations; Why Tomorrow’s People Should Not Vote Today,” (unpublished typescript, 2006).
4. This is independent from another idea that says that while being harder to amend than lower level legal acts, the higher level of generality of constitutional provisions leaves to the succeeding

generations a much wider margin of interpretation than average legal provisions.

5. See J. Tremmel, "Establishing Intergenerational Justice in National Constitutions," in J. C. Tremmel, *Handbook of Intergenerational Justice*, (2006); K. S. Ekeli, "Green Constitutionalism: The Constitutional Protection of Future Generations," *Ratio Juris*, 20(3): 378–401 (2007).

6. See e.g. A. Gosseries, "On Future Generations' Future Rights," *J. of Political Philosophy*, (forth.).

7. We don't discuss here constitutional proposals motivated by another intergenerational issue, population ageing. See Ph. Van Parijs, "The Disfranchisement of the Elderly, and Other Attempts to Secure Intergenerational Justice," *Philos. & Public Affairs*, 27 (4): 292–333 (1998).

8. French Constitution of Year 1 (June 24, 1793), art. 28, our translation from French.

9. Th. Jefferson, *Letter to James Madison*, *op. cit.*

10. Th. Jefferson, *Letter to S. Kercheval*, (July 12, 1816).

11. Th. Jefferson, *Letter to Major J. Cartwright*, (June 5, 1824).

12. Th. Jefferson, quoted in S. Holmes, *Passions and Constraint*, (1995), p. 141.

13. On the boundary problem: R. Goodin, "Enfranchising All Affected Interests, and Its Alternatives," *Philosophy and Public Affairs*, 35(1): 44–68 (2007).

14. See more generally: Holmes, *op. cit.*, chap. 5; M. Otsuka, *Libertarianism without Inequality*, (2003), chap. 7; V. Muniz-Fraticelli, "The Problem of a Perpetual Constitution," in Gosseries & Meyer (eds.), *Intergenerational Justice*, (OUP, forthcoming).

15. See as well B. Manin, *Principes du gouvernement représentatif*, (1995), p. 38, on the practice of yearly reenactment of the code of laws, in 4th century Athens.

16. Holmes, *op. cit.*, p. 162.

17. *Ibid.*, chap. 5.

18. Otsuka, *op. cit.*, p. 146 ff.

19. H. Jonas, *Le principe responsabilité*, (1979), p. 44, our translation from French.

20. See generally: G. Kavka and V. Warren, "Political Representation for Future Generations," in Elliot & Gare (eds.), *Environmental Philosophy* (Open U. Press, 1984), pp. 21–39; B. Javor and J. Racz, *Do We Owe Them a Future? The Opportunities of a Representation for Future Generations in Europe*, (2006).

21. See Goodin, *op. cit.*

22. Those taking the non-identity problem as well as its associated problems in so-called "different number cases" as very significant here will of course challenge this claim. See for example T. Tännsjö, "Future People, the All Affected Principle, and the Limits of the Aggregation Model of Democracy," in *Hommage a Wlodek*, (2007), at <http://www.fil.lu.se/hommageawlodek/site/abstra.htm>

23. J. Mill, "Government," in *Encyclopedia Britannica*, § 97 (1820). For a more feminist reading of J. Mill on this see A. Phillips, *The Politics of Presence*, (1995), p. 66.

24. Mill, *Ibid.*, § 98.

25. Compare A. Dobson, "Representative Democracy and the Environment," in Lafferty & Meadowcroft (eds.), *Democracy and the Environment*, (1996), pp. 124–39. For a critique of Dobson see K. S. Ekeli, "The Principle of Liberty and Legal Representation of Posterity," *Res Publica*, 12: 385–409 (at 389–92), (2006).

26. For an extensive discussion: Kavka and Warren, *op. cit.*, pp. 26–33. See as well J. Mansbridge, "Should Blacks Represent Blacks and Women Represent Women? A Contingent 'Yes,'" *Journal of Politics*, 61(3) (1999).

27. *Ibid.*, p. 27.

28. See Tännsjö, *op. cit.*

29. Bush, George W., *President Bush, Prime Minister Blair Discuss Keeping the Peace*, Sept. 7, 2002, available at: <http://www.whitehouse.gov/news/releases/2002/09/20020907-2.html>

30. L. Mabunda, "Défense et illustration de Robert Mugabe", *Courrier International*, issue 889, p. 40 (15–21 Nov. 2007), our translation from French, original text in Portuguese.

31. See A. Gosseries, "Theories of Intergenerational Justice: A Synopsis," *SAPIENS*, 1:39–49 (2008).