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BETWEEN A ROCK AND A HARD PLACE: CONSTITUTIONAL THEORY AND INTERGENERATIONAL EQUITY

ENTRE A ESPADA E A PAREDE: TEORIA CONSTITUCIONAL E JUSTIÇA INTERGERACIONAL

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Abstract: Constitutional theory may approach the subject of intergenerational equity from two main and quite different directions. The first is the so-called intergenerational paradox of constitutionalism, which concerns the authority of a constitution-making generation to bind future generations to its political choices through a combination of justiciable constitutional provisions and a relatively rigid procedure of constitutional amendment. The second is a plea to use constitutional law to protect the rights of future generational cohorts or to secure the commitment to sustainable development, given the diagnosed short-termist bias of ordinary processes of collective decision-making. Alas, these two are on an ever-recurring collision course: while the most promising way to dissolve or at least manage the intergenerational paradox is to limit the scope of constitutional choices, particularly when it comes to substantive matters of rights and policy that are deeply divisive in a pluralist society, the short--termist bias of democratic arrangements implies that intergenerational equity can only be realized through robust constitutional safeguards. In a nutshell, addressing one of the sides of the problem increases the size of the other. I shall argue that the only way out of this dilemma is to think of future generations as an endangered minority for the purposes of judicial review of majoritarian legislation and to conceive an architecture of decision-making that enables the correction of generational externalities.

Keywords: intergenerational equity, constitutionalism, short-termism, generational paradox, reasonable pluralism, democratic legitimacy, judicial review, protection of minorities, heightened scrutiny, evidence-based policy.

1. Judge of the Constitutional Court of Portugal. Professor of Law at Universidade Católica Portuguesa. Sections 2, 4, and 5 of this paper draw heavily on what I wrote in Gonçalo de Almeida Ribeiro, "A Constitutional Theory of Intergenerational Equity", *in* Luís Brites Pereira, Maria Eugénia Mata & Miguel Rocha de Sousa (org.), *Economic Globalization and Governance: Essays in Honor of Jorge Braga de Macedo*, Springer, 2020, pp. 281-301. I am grateful to an anonymous reviewer for some helpful suggestions.

1. Introduction

Constitutional theory may approach the subject of intergenerational equity from two main and quite different directions. The first is the so-called intergenerational paradox of constitutionalism, which concerns the authority of a constitution-making generation to bind future generations to its political choices through a combination of justiciable constitutional provisions and a relatively rigid procedure of constitutional amendment. The second is a plea to use constitutional law to protect the rights of future generational cohorts or secure the commitment to sustainable development, given the diagnosed short-termist bias of ordinary processes of collective decision-making in representative democracies. Alas, these two are on an ever-recurring collision course: while the most promising way to dissolve or at least manage the intergenerational paradox is to limit the scope of constitutional choices, particularly when it comes to substantive matters of rights and policy that are deeply divisive in a pluralist society, the short-termist bias of democratic arrangements implies that intergenerational equity can only be realized through robust constitutional safeguards. In a nutshell, addressing one of the sides of the problem increases the size of the other.

It seems almost pedantic to stress that these worries, in spite of their grand theoretical appearance, are of obvious interest for any serious engagement with climate change from a constitutional perspective. Indeed, climate policy is in many ways the paradigm issue of intergenerational equity, for addressing it implies a trade-off between, on the one hand, the present-day interest in maintaining a carbon-dependent lifestyle or avoiding the undoubtedly heavy costs of speeding towards a carbon-neutral economy and, on the other hand, the longer-term – although not by any means all that far-removed in time anymore – consequences of letting things run their course, imposing on future generations the astronomic burden of drastic changes in lifestyle and of coping with the predictably catastrophic effects of a substantially warmer climate. In a recent landmark ruling to which I shall return in the concluding section of this paper, the Federal Constitutional Court of Germany remarks that "[…] environmental protection is elevated to a matter of constitutional significance because the democratic political process is organized along more short-term lines based on election cycles, placing it at a structural risk of being less responsive to tackling the ecological issues that need to be pursued over the long term. It is also because future generations – those who will be most affected – naturally have no voice of their own in shaping the current political agenda" (BVerfG, 2021 § 206). The underlying issue – addressed in the ruling under various guises – is how to reconcile, in the vast and intricate domain of climate policy, the rightful worry about the short-termist bias of the political process with democratic legitimacy over time.

The rest of this paper is organized as follows. In section 2, I briefly characterize the short-termist bias of ordinary political arrangements and the associated claim that these create negative generational externalities. In section 3, I turn to the intergenerational paradox of constitutional safeguards and the associated claim that the latter demote the political self-determination of future generations. In section 4, I will explain the dilemma at the heart of my inquiry: one horn of the dilemma is that the more politically open or inclusive a constitution is, the less it will encroach upon the political rights of future citizens; the other horn is that the less

constitutional law redresses the short-termist bias of ordinary democratic arrangements, the more it will compromise the freedom and welfare of future individuals. In section 5, I sketch a way out of the dilemma: to think of future generations as an endangered minority for the purposes of judicial review of majoritarian legislation and to imagine an architecture of decision-making that enables the correction of generational externalities. In section 6, I take by way of conclusion the recent ruling of the *Bundesverfassungsgericht* on climate change policy as a paradigm of proper constitutional management of intergenerational equity.

2. The Short-Termist Bias of Democratic Politics

What does the *constitutional* protection of future generations bring to the table of intergenerational equity? The usual assumption underlying the elevation of an individual right or a policy choice to the constitutional level is that constitutions are endowed with extraordinary normative force: *normative* here in the sense that their prescriptions, to the extent that they are justiciable, are not proclamations serving a rhetorical or expressive function, but standards against which the validity of ordinary laws and other decisions of public authority is measured; *extraordinary* in the sense that constitutional laws cannot be changed through the ordinary legislative process, but only through a qualified procedure of constitutional amendment, typically comprising the requirement of a supermajority (see generally García de Enterría E, 1994). It follows that the constitutional elevation of a particular decision – say, a public debt ceiling – limits the political freedom of ordinary law-making agencies empowered by the electorate. The constitution plays an *inhibiting* or *constraining* role (see Holmes S, 1995: 134-77).

That suggests an immediate analogy with individual *precommitment*.[2] The classical paradigm is the episode in Book XII of the *Odyssey* in which Ulysses, knowing the siren's chant to be irresistible, has the sailors bind him tightly to the ship's mast (Homer; Wilson E, translator, 2018: 301-15). Everyday life furnishes many examples. Take the case of the gambler who asks to be put on a list of individuals barred from entering casinos. Consider as well the glutton on a weight loss regimen who eats a light and healthy meal before a dinner party. These situations seem to embody a paradox: a free and rational individual – an *agent* – deliberately limits her freedom of choice. But the paradox is only apparent. For the agent is aware that she is afflicted by the deliberative pathology classically labelled *akrasia* – incontinence or weakness of the will – whose effect is to prevent action upon grounds that the agent herself acknowledges as reasonable or adequate (Aristotle; Ross WD, translator, 2001: 1036-1058). Precommitment is hence a *warrant* of freedom because it enables *self*-control, the ability of the agent to affirm reason against passions, impulses, inclinations, and the like. Indeed, that is an indispensable precaution in those typically akratic states – such as intoxication, addiction, lust, hysteria, laziness, depression, and jealousy – in which rationality loses its way. In spite of its inhibiting or constraining nature, then, precommitment turns out to be an assurance of *autonomy*.

2. On the rationality of precommitment, see Elster J (1984: 36-110).

Here is how the *constitutional* appropriation of individual *precommitment* looks like. Taking stock of the multiple prejudices and distortions that *may* pollute popular deliberation in the ordinary political process – such as racism, misogyny, homophobia, xenophobia, fundamentalism, populism, and alarmism – we must acknowledge the wisdom of the people binding itself to the mast of constitutional precommitments endowed with extraordinary normative force. Hence, there is a good reason to raise a decision to the constitutional level – say, proscribing discrimination on grounds of race and gender, requiring just compensation for takings of property or protecting the freedom to worship of religious minorities – if a solid case can be made that ordinary democratic deliberation is pathological in that regard. The particular deliberative pathology that vindicates the constitutional protection of future generations is what we may call *short-termism* – the predisposition of the current generation, which controls the ordinary political process, to *disregard* the impact of its decisions on future generations (MacKenzie MK, 2016: 24-45).

Cultural factors may go a long way into explaining the short-termism of contemporary politics. Maybe in our societies dominated by individualism and materialism – as opposed to notions of personal excellence and the common good – there is no room for any serious concern with the future (McIntyre A, 2007). If that is all there is to say, the honorable thing to do is to enlist in the old-fashioned but surprisingly ever-renewed jeremiad about the moral bankruptcy and apocalyptic fate of modernity, liberalism, and capitalism.

Yet there is quite a bit more to be said. For short-termism is built into the *structure* of representative democracy as we know it – it is a pervasive *institutional bias* of our regimes. It stems from four characteristic features (Silva JP, 2015: 418-21). The first is *representativeness*: since future individuals cannot participate in current elections, they are not represented in any meaningful electoral sense by elected officials. The second is *accountability*: since they cannot vote, future individuals cannot hold current officials accountable for any decisions that have a negative impact on them. The third is *majoritarianism*: the *intra*generational legitimating force of majority rule, which is based on political equality, does not hold *inter*generationally, as a majority of the current generation could very well turn out to be a minority in a hypothetical intergenerational vote. The fourth is *temporality*: there are no intergenerational surrogates for the mechanisms that mitigate the power of temporary majorities – such as periodic renewal of mandates, limits on renewability, and lame duck restrictions – for the obvious reason that it falls necessarily on the current generation to rule.

Therefore, skepticism about the ability of the ordinary political process to dispense fair treatment to future generations seems to be vindicated by an analysis of the structure of representative democracy. Moreover, this *a priori* judgment – *a priori* because it is based on conceptual analysis – resonates with the casual observation of many democratic systems, afflicted by chronic fiscal imbalances, excessive consumption of non-renewable energy sources, high levels of carbon dioxide emissions, unsustainable social security systems, and policies that hurt the long-term competitiveness of the economy.

It seems to follow that our constitutional arrangements ought to incorporate clauses of environmental protection, financial sustainability, fiscal moderation, and the like (Häberle P, 2006: 215-29). Some already explicitly do so at least to some extent (consider Article 20a of the German Basic Law on the protection of the natural foundations of life and animals, which gets off with the assertion "mindful of its responsibility towards future generations…"; or paragraph *e)* of Article 66-2 of the Portuguese Constitution, which, following the dramatic and pioneering entrenchment of a fundamental right to the environment and quality of life, prescribes a rational use of resources and ecological stability with "respect for the principle of intergenerational solidarity"). Such provisions should hence be construed quite liberally. Other constitutional documents that are silent on the issue should be updated through a combination of reform and creative interpretation. More importantly, constitutions should go beyond majestic generalities and programmatic language in this domain. They should contain explicit, detailed, effective safeguards against short-termism. That is the argument from short-termism to constitutionalism.

3. The Generational Paradox of Constitutional Democracy

Let me turn now to *the generational paradox*.[3] How can it be that a constitution-making generation binds future generations to its political choices? Thomas Jefferson wrote that "no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation" (Thomas Jefferson, 1958: 392-8). History teaches us that, while constitutions are most certainly not perpetual, their drafters invariably aspire to give them a very long life. In the debate over the draft of what would eventually become the French Constitution of 1791, a member of the National Assembly, Monsieur Thouret, declared passionately that "a fundamentally good constitution" (*une constitution fondamentalement bonne*) would have to be amended only with respect to "minutia" (*détails*) because it would be "founded upon the immutable bases of justice and the eternal principles of reason" (*fondée sur les bases immuables de la justice et les principes eternelles de la raisón*).[4] His optimism turned out to be misguided: France had a baffling sixteen constitutions in the period of sixty nine years following the French Revolution. Jefferson's own suggestion was that constitutions should expire after 19 years (Thomas Jefferson, 1958). But that is at once a very rough index of generational cohorting in constitutional matters and a source of the very political instability that constitutional arrangements are expected to thwart.

It is undoubtedly true that constitutions can be repealed. As Jefferson noticed, however, that is hardly the same as each generation having an equal chance to adopt its own constitution. In his words: "the power of repeal is not an equivalent. It might be indeed if every form of government were so perfectly contrived that the will of the majority could always be obtained fairly and without impediment. But this is true of no form. The people cannot assemble themselves. Their representation is unequal and vicious. […] [A]nd other impediments arise so as to prove to every practical man that a law of

3. I elaborate on this theme in Almeida Ribeiro G, 2022, *forthcoming*.
4. *Reimpression de Ancien Moniteur Tome Neuvième:* 575.

limited duration is much more manageable than one which needs a repeal" (Thomas Jefferson, 1958).

The generational paradox is closely associated with what might called the *democratic paradox*. How can it be that a minority favorable to a political choice entrenched in the constitution prevails over the majority? Imagine a constitutional provision that reads "no person shall be obliged to pay retroactive taxes", interpreted as a categorical prohibition, as opposed to a principle that merely operates as a *prima facie* prohibition or a *pro tanto* reason to be balanced against countervailing considerations relevant in the circumstances. The Portuguese Constitution contains such a provision, and the case law tends to conceive it as a categorical prohibition of so-called genuine retroactivity or retroactivity in the narrow sense.[5]

The adoption of such a rule expresses the choice of the constitutional lawmaker. But once the constitution is enacted, the constitutional lawmaker is no more – all we are left with are the branches of government, including the legislative body.[6] Now imagine the majority in the legislature wishes to get rid of the constitutional rule, arguing that while retroactive taxes are in principle unfair, since they frustrate the legitimate expectations of the taxpayers, they may be justifiable, all-things-considered, in outrageous cases of tax avoidance or in sovereign debt crises. One may or may not agree with this position, but it is undoubtedly reasonable. Yet, so long as there is a minority in a position to veto an amendment to the constitution, the rule will stand. From a *diachronic* perspective, that reveals the generational paradox – the dead ruling over the living. From a *synchronic* perspective, it reveals the democratic paradox – the few ruling over the many.

You may tell me at this point that nothing prevents the current majority from amending or reforming the inherited constitution. Surely that puts the matter to rest? Well, I do not think it does. For when we consider any regime of amendment carefully, we encounter two more paradoxes – close relatives, as it were, of the generational paradox. First, there is *the amendment paradox*. How can it be that a constitution may be enacted by a simple majority while requiring a qualified procedure to be amended? Constitutions may be adopted in a variety of ways documented in political history: monarchical concession, popular referendums, foreign imposition, corporatist bargaining, among others. Nevertheless, the most democratic procedure is usually taken to involve a constitutional assembly elected specifically for that purpose. When that is the case, the constitution is usually enacted by a simple majority – half of the votes plus one in the constitutional body. It may be, of course, that the proposed draft is supported by more than half of the members; from a legal standpoint though, half plus one is all

5. As opposed to mere retrospectivity. A tax law is said to have a genuinely retroactive effect when it applies to circumstances that have taken place before the law came into force, such as an increase in the personal income tax rates referring to the previous year. Conversely, a tax law is merely retrospective when it applies to a stream of events that began before the law came into force but continues afterwards, such as an increase in the personal income tax rates referring to the current year. See, e.g., Acórdãos n.ºs 128/2009, 85/2010, 399/2010, 617/2012, 85/2013, and 751/2020. For the dissenting view that the prohibition against retroactive taxes is both wide reaching and merely *prima facie*, see Acórdão n.º 171/2017. These rulings are available at https://acordaosv22.tribunalconstitucional.pt/.

6. As Thayer JB, 1893: 5, puts it: "The sovereign himself, having written these expressions of will, had retired into the clouds…".

that is required for the adoption of the constitution. Moreover, a possibly broad consensus on the constitution as a whole does not necessarily extend to each of its parts – it may be that a general vote yielded robust support for the constitution while a particular provision made it to the final version with the support of a simple majority.

That generates the paradox of amendment. The procedure to amend the constitution is typically more stringent than the procedure for its adoption. Even in the simplest case, that of a constitution that can be amended solely by a qualified majority in a single chamber, it is typically harder to change than to make a constitution. A simple majority is all that is required to entrench a political choice that can never be repealed by a simple majority. That discredits the notion that, from a procedural standpoint, the constitution-making power is democratically superior to ordinary legislative power.[7] It also puts a question mark over the claimed authority of the constitutional lawmaker to demand a qualified procedure for constitutional amendment (see Schmitt C, 2012: 38-57).

You may tell me that the practical response to the amendment paradox is to make the constitution amendable by a simple majority in the legislature or any other procedure that mimics that which led to the adoption of the constitution itself. That, however, is tantamount to making the constitution *flexible* – and procedural rigidity is precisely one of the two principal mechanisms, the other being judicial review of ordinary state action, put in place to protect the constitutional order.[8] Thus, the paradox of amendment cannot so easily be set aside.

To make things worse, we also face the reverse problem. This is where what I like to call *the identity paradox* enters the picture. The point of enabling constitutional amendments is to prevent the constitution from wearing down. Yet nothing prevents the amendment power, so long as the procedural requirements are met, from subverting the very constitutional order that it was instituted to safeguard (see Schmitt C, 2012: 16-20, 25-26). Over time, a whole new substantive constitution may be established in this

7. Schmitt C, 1993: 20-28 asserts that making and changing a constitution are *qualitatively* different powers and draws a fundamental distinction between *the constitution* – a sovereign decision over the form and type of political unity of the people – and *constitutional law* – an instrumental decision that presupposes the constitution and is by nature amendable. The opposite view is epitomized by the jurisprudence of Hans Kelsen. The constitution is, according to the strictures of the *Reine Rechtslehre*, "the rule that determines the genesis of statutes, of the general norms whose execution constitutes the activity of the organs of state, namely of the courts and administrative agencies". That is "the essential, original, and narrow concept of constitution'. Moreover, 'nothing stands in the way of using this form also for norms that do not fall under the concept of constitution in the narrow sense…". It follows that "[i]f one wants to distinguish […] between the material and the formal unconstitutionality of a statute, one should be mindful that this is permissible only with the qualification that […] a statute that, by virtue of its content, comes into conflict with the relevant provisions contained in the constitution will lose the defect of unconstitutionality once it is enacted as a constitutional statute" (Kelsen H, 2010: 1485-531).

8. The classic treatment of the distinction between flexible and rigid constitutions is by Dicey AV (1982: 65-72, 317-25).

way, its only continuing element being the regime of amendment.[9] If we use all the stones of the Milan Cathedral, one by one, to build a massive wall to keep migrants at bay, is it still the Milan Cathedral? If the amendment power is used to turn a liberal democratic regime into a fascist dictatorship or a dictatorship of the proletariat, is it still the same constitution? Of course, some constitutional texts contain clauses setting substantive limits to the power to amend. But these clauses are themselves paradoxical. For either the limits are regarded as absolute, in which case they exacerbate the paradox of amendment, or they are regarded as disguised procedural limits, in the sense that the amendment power may be used to change the provision that establishes the limitation clause, clearing the way for the subversion of the constitutional order. One way or another, the aporia is seemingly inevitable.

The bottom line in all of this, I think, is that by writing a constitution and protecting it from ordinary politics, the drafting generation limits considerably the political freedom of future generations. It sets the ruling of the dead over the living, of the few over the many, and of form over substance.

4. Between a Rock and a Hard Place

This leads us into the dilemma or conundrum of the constitutionalization of intergenerational policies. The idea of precommitment – whether individual or collective – is premised on the contrast between two first-person agents: "The Rational I" and "The Akratic I". The former knows what is best and has the will to do it. The latter might or might not know what is best, but, in any case, lacks the will to do it. Rational-Ulysses knows that it is best not to respond to the chant of the sirens, and wills to avoid it. The problem he faces, in that thoughtful moment, is how to secure the right course of action in akratic circumstances in which freedom of choice is likely to produce bad outcomes. This problem is *technical* or *instrumental* in nature: it concerns the selection of the means suitable to keep the effects of akrasia under control.

The problem is quite different and more complex if instead of a conflict *between* "The Rational I" and "The Akratic I" the agent experiences a conflict *within* the former – not a conflict between reason and inclination but within reason itself. Take the following example. Imagine a scholar named Carl who decides to write a book on the issue of whether generational cohorts can have rights. Following a great many hours of careful research and study, he is torn between the view that only identifiable subjects – such as natural persons, non-human animals, artificial entities, and verifiable groups – can

9. Not everyone sees a problem here. Thoma R, 2000: 163, writing about the Weimar Constitution, cavalierly advocates the contrary view: "The opinion that the double *pouvoir constituent* regulated by Article 76 [concerning the amendment of the Weimar Constitution] cannot be without limits […] fails to appreciate the idea – daring, perhaps, but sublime in its consistency – of free, democratic self-determination. Certainly this freedom can be demagogically misused. But how would it be freedom otherwise? However, from the standpoint of democracy and liberalism […] it would be impossible to evaluate what the resolute and undoubted majority of the people wills and decides in a legal way as a coup d'état or rebellion, even if it subverts the basic pillars of the present Constitution!".

have rights and the view that anything can be a bearer of rights – an estate following the death of the deceased, an endangered species, a language nearing extinction, and generational cohorts – so long as there are good reasons to grant them rights.[10]

Consumed by the flames of doubt and pressed by the publisher's deadline, our man Carl commits to the positive view, according to which generational cohorts can have rights. To seal the commitment, he informs his publisher about the central thesis of the book. The reasons to do so are intelligible and compelling. Yet they have nothing to do with a conflict between Rational-Carl and Akratic-Carl – that is to say, with limiting the possibility of irrational choices. On the contrary, the whole point of Carl's precommitment is to *inhibit* the continuing exercise of his rational powers, because the more he delves into the problem the more aware of its complexity he becomes, making it even harder for him to take a stance on it (Waldron J, 1999: 269-70). In other words, he takes steps to control the rational affluence, as opposed to the indigence, of his future self. That is the only way of making sure that his book will see the light of day.

Now, with respect to a broad range of issues, as Jeremy Waldron has forcefully argued (Cruft R, 2019: 266-75) the people in a constitutional moment finds itself in a situation at least as close to that of Carl as that of Ulysses. That is so because of the *reasonable pluralism* characteristic of our liberal and democratic societies. People disagree reasonably and obdurately not only about religious, metaphysical, and ethical issues that modern social arrangements largely confine to the private realm but also about matters of unavoidably public concern, such as the scope of basic liberties, the demands of social justice, the direction of economic policy, the design of collective institutions, and the like. Library bookshelves, academic seminars, public debates, social networks, and other *fora* of discussion provide eloquent testimony to the loud and interminable cacophony. The disagreement comes in all shapes and sizes, from more or less articulated conceptions of justice to the relatively mundane realm of public policy in areas such as taxation, health, education, culture, social security, and environmental protection. Moreover, the diversity of views is headquartered everywhere in civil society, from the dinner table to the lecture room, such that it cannot be explained away as a symptom of thoughtlessness. It is, in the famous words of John Rawls, the "normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime" (Rawls J, 2005: xvi).

In the constitutional realm, reasonable pluralism manifests itself in the following way: there is a broad consensus over a small set of basic principles – equal protection, due process, legal certainty, the separation of powers, and a few others – and over human rights – civil and political rights, surely, but to a large extent over so-called second and third generation rights as well – accompanied by persistent controversy over the concrete implications of those principles and the scope and relative weight of these rights. In other words, a shared core of foundational platitudes supports a wildly diverse repertoire of rival political agendas more or less explicitly informed by disputed moral, economic, psychological, and historical

10. See the distinction between natural rights and conventional rights in Cruft R (2019: 71-79).

assumptions. To give but a few examples, consider the controversies over the legalization of surrogate motherhood, the criminalization of abortion, the role of the market in the provision of social goods such as health and education, the correct macroeconomic policies in the wake of a sovereign debt crisis, the sustainability of pay-as-you-go social security in aging societies, the magnitude, consequences and policy implications of climate change, and affirmative action in access to higher education, the labor market, and public office (see Ribeiro GA, 2020: 11-12).

In these vast and convoluted matters, the people in a thoughtful moment is no agent confident about the right course of action; it is a deeply conflicted soul. Bringing one of the views in contention to the constitutional level is hence not simply a technique to inhibit the akratic degeneration of the political process – i.e., an effective means against collective irrationality – but a way of foreclosing the democratic management of our political differences, an alienation of the reasonable pluralism characteristic of an open society. Just as Carl commits to a particular thesis not out of conviction but out of expedience, suspending along the way the exercise of his intellectual powers, the people in its constitution-making capacity ties the whole of society – including, of course, future generations – to the mast of a controversial decision, preventing its revocation as a result of public debate and democratic deliberation.

Here is our dilemma then. On the one hand, we are right to think that representative democracy has a systematic short-termist bias that leads to collective choices that disregard or at least underestimate the interests of future generations affected by them. On the other hand, intergenerational equity is a controversial subject, reasonably dividing public opinion, which makes it an appropriate object for democratic deliberation. In other words, we have good reasons both to accept and to reject the democratic management of intergenerational problems. The challenge when it comes to the constitution of intergenerational equity is thus how to address the worry of short-termism without squashing the political rights of future generations.

5. A Way Out: Heightened Scrutiny and Beyond

Let me introduce here an important distinction for constitutional theorists – that between rules and principles (see, generally, Dworkin R, 1977: 22-31, 71-80; Alexy E, 2018: 71-157; Sieckmann J-R, 1990: 52-87; Atienza M, Manero JR, 2007: 23-50). Leaving aside the many subtleties that have become commonplace in the enormous literature on the subject, the distinction comes to the following. If a norm is a *rule*, it applies mechanically or in an all-or-nothing fashion; so long as the conditions that are specified in the antecedent clause of the rule obtain, it provides a definitive outcome to the case at hand. If a norm is a *principle*, it is a consideration to be balanced in proportion to its strength; so long as it is applicable to the case at hand, a principle furnishes a *pro tanto* reason to be weighed against countervailing reasons before an all-things-considered judgment is reached. As an illustration of the distinction in the domain of the constitutional protection of future generations, consider two *interpretations* of a constitutional provision to the effect that 'the public deficit on the government budget cannot exceed 3 p.p. of the GDP'. According to one possible interpretation,

the provision simply rules out a public deficit higher than 3 p.p. of the GDP; according to an alternative interpretation, whether a deficit above that threshold is tolerated in a given context depends on the strength of the underlying reasons. The same distinction applies to a constitutional provision setting the goal of carbon-neutrality by a specified year – say, 2050. It may be read as a rule, in which case no departure from the goal can be constitutionally justified; or as a principle, in which case it sets a reason to be balanced contextually against constitution-sensitive countervailing considerations.

The distinction should not be overstated. On the one hand, notwithstanding their categorical semblance, rules are *not absolute*, even if their scope of application is not explicitly limited by exceptions (See Ribeiro GA, 2017: 226-32). In abnormal circumstances, when the reasons not to apply a rule are evident and massive, so as to make its application self-defeating or plainly absurd, it may be cast aside; the provisions against an excessive deficit and setting the goal of carbon.neutrality, for instance, could presumably be cast aside in the event of a public calamity. On the other hand, principles are not symbolic or programmatic expressions, but genuine reasons binding on their addressees, such that they ought to be observed, subject to a *balancing constraint*, to all cases that fall within their scope of application. The principle that carbon-neutrality should be achieved by 2050 and kept from then on places the government under a duty to honour it unless it can offer a plausible argument that countervailing reasons justify discarding it – and even then the sacrifice ought to be kept at the minimum required by such reasons.

In spite of these relativizing remarks, there is an obvious affinity between rules and mechanical arrangements, on the one hand, and principles and fiduciary arrangements, on the other. Within a model of rules, the constitutional lawmaker decides on certain issues in advance. The people in its presumably thoughtful constitutional moment makes decisions that cannot be revoked in the akratic circumstances of the ordinary political process, decisions that are to be mechanically enforced by an institution such as a constitutional court. Within a model of principles, the constitutional lawmaker entrusts the decision to a third-party – typically a constitutional court. The people in its presumably thoughtful constitutional moment delegates on an institution insulated from the akratic circumstances that tarnish the ordinary political process the authority to balance the competing reasons at stake and to issue a final all-things-considered decision.

The pros and cons of rules and principles are fairly obvious: rules have the advantage of preventing errors and abuses carried out by the guardian of the constitution; principles have the advantage of flexibility, preventing outcomes that are unreasonable in the actual circumstances. This distinction furnishes a promising starting point to work ourselves out of the dilemma between collective akrasia and democratic illegitimacy. Indeed, the democratic objection against the constitutional protection of future generations is on a much stronger footing when it takes the form of rules. That is so because principles may be balanced in different ways by ordinary lawmakers, reflecting their divergent political judgments, perhaps even the skeptical judgment that future generations are only worthy of protection as long as we are talking about already existing individuals, notably persons under voting age. In fact, it is plausible to argue that the constitutional

entrenchment of *intergenerational principles* – say, a principle of sustainability – is justified along the exact same lines of other constitutional principles: consent only breaks down once we move from the principle to its application. Insofar as it remains a *matter of principle*, then, the constitutional protection of future generations is seemingly unproblematic.

The application of principles is subject to a balancing proviso. The technical expression of that notion is the *doctrine of proportionality* in the broad sense of the term, also known as the "prohibition of excess" (*Übermaβverbot*).[11] It establishes that the sacrifice of a principle cannot be *excessive*. When the principle embodies a reason to act instead of a limitation to action – a positive instead of a negative duty –, proportionality takes the form of a "prohibition of deficit" (*Untermaβverbot*), meaning that the legislature cannot fall below a threshold of *sufficient* protection or promotion of the principle at stake That translates into the requirement that any law that infringes upon a principle fulfills *four conditions*. The first condition is *legitimacy*: the goal pursued must be some other principle to which the legislature is bound, such that the sacrifice may be justified. The second condition is *suitability*: the sacrifice must be a suitable means to promote a legitimate goal, or it would be incurred in vain. The third condition is *necessity*: the sacrifice must be the least costly of the means suitable to attain the goal, or it would be wasteful. The fourth condition is the balancing test properly so called, *proportionality* in the narrow sense of the term: the sacrifice must be worth having in light of the goals or reasons underlying the law, that is to say, the overall benefits must outweigh the costs.

Now with respect to each of these conditions, and particularly the last two, there is a question concerning the proper degree of *judicial scrutiny* of legislative choices. Judicial scrutiny is a variable, ranging from a perfunctory "rational basis" test on the lower end of the spectrum, which merely determines whether the law subject to review is not manifestly disproportional, to full-blown judicial second-guessing of the legislature on the higher end of the spectrum (see Ribeiro GA, 2020: 86-87).

If we are serious about democratic rule, we must be supportive of the notion that judicial scrutiny should remain as close as possible to the lower end of the spectrum, and repudiate any suggestion that the normal procedure to settle political disagreements is to subject the matter to voting by a handful of nonelected and unaccountable judges. A democracy is a self-governing community of equals, meaning that the decisions by public authorities should ultimately be traced back to the authorship of the very people to whom they are addressed. On the many issues of principle that divide the citizenry, that translates into a requirement that each citizen's opinion, either about the issue itself or about who should decide it, be given the exact same weight as that of any other. Hence, the political branches representative of and directly accountable before the electorate enjoy a presumption of legitimacy when they take a side in the ongoing dispute within society about matters of common concern (see Ribeiro GA, 2017: 77-86).

11. The jurisprudential literature on proportionality is enormous. Considering only the last decade, see, e.g., Schlink B, 2012: 718-737; Barack A, 2012; Klatt M, Meister M, 2012; Canas V, 2019.

Thus, special circumstances must obtain for the opinion of a majority of judges to prevail over that of a majority of elected officials – circumstances that evince a failure of the political process. Indeed, courts may only deploy *heightened scrutiny* when reviewing laws that draw on suspect classifications of race, gender, sexual orientation, age, and others that may serve to oppress political minorities or disenfranchised social groups (see Ely JH, 1980: 135-80); the discrimination against future generations is another instance where tighter control is warranted. This is all the truer when it comes to environmental policy, for what is at stake is not only the welfare of future generations considered holistically, but even more dramatically that of poor people who lack the means to adapt to a warmer climate and often have little voice in the political process. Both categories – future and poverty – are robust proxies for discrimination. In this domain of collective akrasia, therefore, a public authority that is electorally unaccountable, yet bound to offer arguments for its decisions, such as a constitutional court, is more representative of reasonable pluralism than the rule of little more than "Aye!" and "Nye"; it embodies a form of "argumentative representation" (Alexy R, 2005: 578-81), a virtuous synthesis of pluralism and thoughtfulness. How plural and thoughtful that type of representation actually is depends on the particular features of judicial arrangements in a society – for instance, one might argue that a specialized constitutional court staffed by judges appointed by a robust parliamentary majority or by a mix of political institutions for a non-renewable term in office offers better assurances of pluralism than an ordinary supreme court staffed by judges appointed for life (Kumm M, 2017: 55-56). In any case, these institutional worries should not distract us from the basic point that under conditions of collective akrasia strict judicial review of legislative choices serves the vital task of preventing democratic government from degenerating into a tyranny of the many – the rule of majority *deliberation* from decaying into the rule of majority *prejudice* (see Ribeiro GA, 2017: 86).

Let me wrap my argument up. The citizens of a liberal democracy may entrust intergenerational equity to the few among them who serve as judges because judicial deliberation is a more trustworthy method of securing a fair treatment of future generations than casting ballots in general elections and voting in the parliamentary process of legislation. Following some twists and turns, the way out of the dilemma between collective akrasia and democratic illegitimacy seems finally straightforward: protect future generations under the form of constitutional principles and subject the laws that infringe upon them to strict judicial scrutiny within the framework of proportionality analysis. Since the composition of a high court changes over time and purportedly reflects the reasonable pluralism proper to each generation, robust judicial review appears to reconcile the two horns of the dilemma – justice and legitimacy.

Alas, it is not as simple as that. The problems of intergenerational equity implicate quite a bit more than the balancing of rights and interests that is the bread and butter of constitutional justice. They involve complex empirical prognoses and technical judgments regarding the future impact of current decisions. Judges are not cut out for these tasks. Imagine a constitutional court scrutinizing, on account of the principle of sustainability, the macroeconomic assumptions of the overall state budget or the accuracy of competing accounts of the impact of greenhouse gases in climate change.

We would not just have a variety of constitutional philosophies represented at the apex of the judicial system but also a variety of half-baked economic ideas and scientific theories. That sounds crazy. The same applies to decisions in areas such as social security, the labour market, and energy policy. It seems highly unlikely that pushing the courts into the thick of the woods of public policy will create much added value in collective deliberation. Indeed, things usually take a turn for the worse when the agent selected to execute a fiduciary arrangement is incompetent to decide in the relevant domain. Judges know this all too well. Therefore, we should not be surprised that in most cases intergenerational constitutional clauses are dead parchment.

These worries reintroduce and reshape our dilemma. On the one hand, short-termism debases the democratic authority of ordinary political actors in areas where their decisions have a significant impact on the future. On the other hand, the traditional checks and balances of constitutional democracies are ill-suited to adequately protect future generations. There is only a way out as I see it: even if we commit to the judiciary – particularly constitutional judges – the task of enforcing intergenerational equity, we need the sort of advisory and expert institutions that belong in the so-called novel fourth branch of government to produce the knowledge indispensable to the wise fulfillment of that task (see, generally, Tushnet M, 2021). That recommends the careful study of the experience with institutional innovations in this domain that took place in some countries – e.g., the Hungarian Parliamentary Commissioner for Future Generations or Israel's Commission for Future Generations – and a greater focus on the activity of transnational expert bodies that report the state-of-the-art among experts in a particular area, enabling the design and review of evidence-based policies – the Intergovernmental Panel on Climate Change being perhaps the most prominent example in this category. Relying on the information generated by these institutions, judges – particularly those sitting in constitutional courts – can go a long way into assessing the credibility of the empirical assumptions of legislative packages with significant intergenerational effects and detect potential blind spots or cynic silences in them. The combination of scientific knowledge supplied by these institutions with the deliberative virtues of a properly fashioned system of judicial review might be the only hope of reconciling our deep-seated commitment to democratic legitimacy with the imperative of protecting the freedom and welfare of those who lack a political voice proportionate to the stakes they have in current policy choices.

6. A Landmark Ruling on Intergenerational Equity

In a recent judgment, the Federal Constitutional Court of Germany (FCC) ruled on a number of complaints issued, among others, by German residents of young age and individuals residing in Bangladesh and Nepal against provisions of the Federal Climate Change Act setting a schedule for reducing greenhouse gases emissions by 2030 as part of a prior commitment undertaken by the Federal Republic of Germany in the Climate Action Plan for achieving carbon-neutrality by 2050, in line with the goal of limiting the increase in average global temperature to well below 2ºC and preferably to

1.5º established by the Paris Agreement.[12] In a nutshell, at stake were the issues of whether the state created a legal framework sufficiently robust to achieve the set target – required to fulfill constitutional duties to protect life and health, as well as the environment – and whether the emissions scheduled until 2030 consume a disproportionate fraction of the CO2 budget consistent with the aim of achieving carbon-neutrality by 2050, thus offloading a heavy burden on people of young age, who would later on be bound to make an urgent and tragic choice between undertaking drastic measures to reduce emissions swiftly or abandoning the set target with all its deleterious consequences (BVerfG, 2021, §§ 1-15).

The FCC relied on the assessment reports and special reports published by the Intergovernmental Panel on Climate Change (IPCC) to paint a grim picture of reality. The IPCC is an intergovernmental committee established by the United Nations Environment Programme and the World Meteorological Organization in 1988, and endorsed by the United Nations General Assembly. Its task is to report the state of scientific research on climate change, summarizing the key findings in the literature and assessing their implications. The ruling draws from such reports the governing notion that "[a]ccording to virtually unanimous scientific opinion, the rapid acceleration of global warming that is currently observable in comparison with historical levels is essentially due to the change in the material balance of the atmosphere caused by anthropogenic emissions. The increase in CO2 concentrations is deemed to play a particularly significant role here" (BVerfG, 2021, at § 18). Indeed, "human-induced increases in concentrations of greenhouse gases in the atmosphere change the Earth's radiation balance and thus lead to global warming" (BVerfG, 2021, at § 19). This, in turn, has "a wide range of impacts on the environment and the Earth's climate", notably rising sea levels and disruptions of tipping point elements, meaning those "components of the Earth system that have special significance for the global climate and which, when placed under increasing stress, undergo abrupt and often irreversible change", such as "the Siberian and North American permafrost, the ice masses in the polar zones, the Amazonian rainforest, and major wind and current systems" (BVerfG, 2021, at §§ 20-22).

The consequences of global warming for human beings are widely believed to be dire. "If the global temperature rises by more than 3.ºC by 2100 – the judgment asserts –, which is considered likely unless additional measures to combat climate change are taken, the consequences of global warming and climate change are expected to be drastic" (BVerfG, 2021, at § 22). Among these are shortages of food and water, damage to infrastructure, proliferation of infectious diseases and respiratory ailments, displacement of entire populations, submersion of coastal settlements, long periods of drought, and impairments to agricultural production (BVerfG, 2021, at §§ 22-30). The only way to significantly slow-down climate change is by reducing CO2 emissions, a greenhouse gas that does not naturally leave the atmosphere within a relevant period of time. Although in theory there are other strategies to cope with anthropogenic climate change, such as carbon removal technologies and social adaptation to a warmer climate, their present-day limited effectiveness and exorbitant cost determine that it is

12. For an excellent analysis of the intergenerational dimensions of the judgment, see Winter G (2022: 209-221).

only by reducing carbon-intensive activities, namely those which involve the burning of fossil fuels, that climate change can be adequately tackled (BVerfG, 2021, at §§ 31-37). It follows that, "[i]n order to achieve climate neutrality in our current way of life – including activities as common and mundane as the construction and utilization of new buildings or the wearing of clothes – fundamental changes and restrictions are needed in patterns of production, consumption and everyday activity" (BVerfG, 2021, at § 37).

Once again on the basis of the scientific evidence amassed and presented by the IPCC, the FCC asserts that there is an "almost linear correlation" between the concentration of CO2 in the atmosphere and the global average temperature. Since the current volume of concentrated CO2 is approximately known, "it is possible to determine roughly how much CO2 can still be released into the Earth's atmosphere and remain there permanently without causing the desired temperature to be exceeded. If the (currently small) amounts of negative CO2 emissions (i.e. emissions that never reach the atmosphere or are subsequently removed) are also factored in, the result is the total (global) amount of CO2 that can still be emitted if the resultant warming of the Earth is not to exceed the temperature limit. Within the climate policy and climate science discourse, this amounts to as the 'carbon budget' or 'CO2 budget'" (BVerfG, 2021, at § 36). The constitutional issues raised by the contested provisions of the Climate Change Act largely revolved around the carbon budget – both as to whether the legislative framework was sufficiently robust to meet the ultimate target of carbon-neutrality by 2050 and whether the schedule of emissions up to 2030 embodied a fair distribution of the burden of CO2 emissions over time. The former issue concerns the duties of the state to protect life, health, and property, as well as the duties arising from the environmental and intergenerational clause contained in Article 20a of the German Basic Law. The latter could be framed either as a matter of proportionality or of equality – balancing the freedom of individuals over time or distributing the burden evenly among generational cohorts; the ruling opted for the first course of reasoning.

Apart from the decision on the merits, the judgment is of great importance for what it says about the procedural standing of two groups of complainants. In relation to the residents in Nepal and Bangladesh, the FCC acknowledged their standing on the basis that "it cannot be ruled out from the outset that the fundamental rights of the Basic Law also oblige the German state to protect them against the impacts of global climate change" (BVerfG, 2021, at § 90). Although it does not take a definitive position as to whether "duties of protection arising from fundamental rights also place the German state under an obligation vis-à-vis the complainants living in Bangladesh and Nepal to take action against impairments caused by global climate change", the Court states that "it is conceivable in principle", adding that "the complainants are particularly exposed to the consequences of global warming caused by global greenhouse emissions" and the Basic Law "does not explicitly restrict [the] binding effect [of fundamental rights] to German territory" (BVerfG, 2021, at §§ 173-81). With respect to the complainants of young age, who based their claims on fundamental rights to life, health, property, and others, the Court was careful to note that "[t]he complainants are not asserting the rights of unborn persons or even of entire future generations, neither of whom enjoy subjective fundamental rights"

but "their own fundamental rights". Moreover, "[t]he possibility of a violation of the Constitution cannot be negated here by arguing that a risk of future harm does not represent a current harm and therefore does not amount to a violation of fundamental rights", for "[e]ven provisions that only begin posing significant risks to fundamental rights over the course of their subsequent implementation can fall into conflict with the Basic Law" (BVerfG, 2021, at §§ 108-09). Nevertheless, the judgment speaks of an "objective duty" to protect the life and health of future generations – including unborn people –, particularly "where irreversible processes are at stake" (BVerfG, 2021, at § 146). This is a very bold assertion indeed, even if it is ingeniously wrapped in the language of caution and modesty (BVerfG, 2021, at § 151).

When it comes to the merits, the judgment addresses first the issue of whether the challenged provisions fall short of the constitutionally required level of protection of the fundamental rights imperiled by climate change, notably the rights to life, health, and property. The Court concluded somewhat ambiguously that "[i]t is not presently ascertainable that the duty of protection arising from fundamental rights has been violated", an assertion that opens to door to a fresh assessment in the future if more information is available. The judges faced the challenge of finding a delicate balance between the duty to deploy heightened scrutiny of policies potentially polluted by a short-termist bias and the duty to defer to the legislature in a domain where epistemic and structural discretion loom large. They concede that "[t]he question of whether sufficient measures have been taken to fulfill duties of protection arising from fundamental rights can only be reviewed by the Federal Constitutional Court to a limited extent […]", for "duties of protection are essentially unspecified", leaving it "for the legislator to decide how risks should be tackled, to draw up protection strategies and to implement those strategies through legislation" (BVerfG, 2021, at § 152). The Court "will find a violation of a duty of protection is no precautionary measures whatsoever have been taken, or if the adopted provisions and measures prove manifestly unsuitable or completely inadequate for achieving the required protection goal, or if the provisions and measures fall significantly short of the protection goal" (BVerfG, 2021, at § 152). Put briefly, that would only be the case if the legislator allowed climate change to run its course, if the adopted policy disregarded the precautionary principle, if it did not aim for climate neutrality, if no adaptation measures to climate change were available, or if the framework ruled out future adjustments required by further developments in knowledge or reality (BVerfG, 2021, at §§ 154-81).

Much the same reasoning is used by the Court to dismiss the challenge grounded in the environmental and intergenerational clause of Article 20a of the Basic Law. In spite of acknowledging that the clause would be deprived of normative force if "[its] material content […] were fully determined by the day-to-day political process with its more short-term approach and its orientation towards directly expressible interests" and that "Art. 20a GG may not be drained of substance as an obligation to take clime action", the judgment insists that the constitutional provision "does leave the legislator considerable leeway to design" an appropriate policy course, such that "[i]t is not, in principle, for the courts to translate the wording […] into quantifiable global warming limits and corresponding emission amounts or

reduction targets" (BVerfG, 2021, at §§ 206-07). Reviewing the legislative framework under the light afforded by the scientific evidence contained in the IPCC reports, the judges conclude that "the legislator has set the fundamental course of national climate change law in a direction that gives the German state an opportunity to effectively fulfil its constitutional mandate to take climate action through its own efforts embedded within an international framework" (BVerfG, 2021, at § 210).

These were the arguments given in the judgment to reject the claim made by the complainants that the challenged provisions of the Climate Change Act were not sufficiently robust to meet the ultimate target of carbon-neutrality by 2050. Yet the Court did decide that the schedule of emissions up to 2030 imposed a disproportionate burden on younger generations. In a critical passage of a very long and laborious ruling, one reads that "[since] the emission amounts until 2030 […] significantly narrow the emission possibilities available after 2030, the legislator must take sufficient precautionary measures to ensure that freedom is respected when making the transition to climate neutrality. […] As intertemporal guarantees of freedom, fundamental rights afford the complainants protection against the greenhouse gas reduction burdens imposed by Art. 20a GG being unilaterally offloaded onto the future" (BVerfG, 2021, at § 183). Indeed, "[w]hen Art. 20a GG obliges the state to protect the natural foundations of life – partly out of responsibility towards future generations – it is aimed first and foremost at preserving the natural foundations of life for future generations. But at the same time, it also concerns how environmental burdens are spread out between different generations. […] [That] encompasses the necessity to treat the natural foundations of life with such care and to leave them in such condition that future generations who wish to carry on preserving these foundations are not forced to engage in radical abstinence" (BVerfG, 2021, at § 193).

I cannot think of a better illustration of the role that my account of intergenerational equity ascribes to constitutional adjudication than this landmark ruling of the *Bundesverfassungsgericht*. It is exemplary of the delicate balance between democracy, expertise, and justice that any conscientious engagement by a judge with the enormous complexity of climate policy requires. The judgment repudiates both the conservative impulse to fall back on some vague notion of institutional incapacity to give the legislature free ride to tackle climate change as it sees fit and the activist temptation to invoke the failures of the democratic process to turn the judiciary into the compassionate savior of the species and herald of distributive justice. One hopes that, styles of judgment and procedural variations apart, this measured approach takes root in other jurisdictions facing similar challenges, all the more so as climate change is a matter of global significance that can only be addressed by the coordinated efforts of many national governments. Perhaps even more ambitiously, the same approach can be taken, with the necessary adaptations, in other areas of policymaking where intergenerational equity ought to be a major concern. In so doing, constitutional judges would not be usurping political power, but acting as stewards of self-government; the government of the people, by the people, and for the people – the old and the young, the born and the unborn – that constitutes the essence of modern democracy.

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