

Do we owe them a future?

The opportunities of a representation for future generations in Europe

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Our proposal in this book is still far from the final version, the publication was rather intended to provoke thoughts and promote discussion on the topic. Therefore we are open and glad to receive any comments, critics or ideas regarding the proposal. Please do not hesitate to contact us!

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Foreword

The dual change in the second half of the 20th century caused by the explosive development of technology and the democratisation of globally determining economic-political power centres, has yielded a specific new imbalance. Humanity has become able to change our natural environment, the physical-chemical-biological system in which our societies are functioning at a rate never before seen, as well as our social structures and engagements themselves. Yet in the meantime, due to the shortness of democratic cycles, the time horizon for political decision-making has radically shortened. The space and especially the time-span for the effects of our decisions has become distinct from the time which can be rationally taken into consideration in the decision-making process. Short political cycles of 4-7 years encourage the political sphere to analyse advantages and disadvantages of all decisions only in terms of this short period, which makes it barely possible for long-term interests to play a role and be represented, even if backed by rational, scientific argumentations or by the personal conviction of decision-makers.

Meanwhile, as Hans Jonas¹ has pointed out, our ability, provided by technological development, to cause natural or social effect which exceed the time-span of human life has opened up new dimensions of responsibility. We have become capable of influencing fundamentally the natural life-conditions of coming generations, and we can redistribute most of the expenses needed for our societies to function both inter- and intragenerationally by shifting an increasing proportion of these expenses onto our descendants through financial and social structures like permanent and high-level state debts, pension systems and social distributive systems (e.g. child and family subsidies). As we are make decisions that will have a long-term effect (e.g. big infrastructural investments), we unavoidably bear the responsibility to include elements of intergenerational justice in current decision-making. Jonas also warns us that this historical change does not only mean that more coming generations should also be taken into consideration morally and that the time-dimension of ethical responsibility has been extended, but also that the subjective of ethical deliberation has been changed. As the effects of our actions

¹ Jonas, Hans (1984): *The Imperative of Responsibility*, Chicago: University of Chicago Press

will be expressed more and more in the future, those who are in a position to affect the future should also bear responsibility. But who shapes the future? Can we identify who has caused the rise in sea-level which will lead to global climate change within 20 years? Clearly we cannot. Technology, and its extended range of effects have also changed the question of who bears responsibility. Instead of the self, the individual, or a clearly identifiable group of individuals, collective action and the collective agent are now the focus of ethical consideration. And collective action is nothing other than politics. Politics has an ethical responsibility towards future generations.

In order to deal with the moral obligations of politics, we need tools in line with the logic of collective action. To make this moral imperative lead not to a guilty conscience but to concrete actions, it must be translated into the code of social activity that is the language of law and politics. We need legal-institutional solutions that are able to appropriately carry out the representation of long-term interests in the intricate system of social and political decision-making. The importance of such institutional solutions is referred in the New Delhi Declaration of the International Law Association: *„The principle of integration reflects the interdependence of social, economic, financial, environmental and human rights aspects of principles and rules of international law relating to sustainable development as well as of the interdependence of the needs (...) of current and future generations of humankind.(...) States should strive to resolve apparent conflicts between competing economic, financial, social and environmental considerations, whether through existing institutions or through the establishment of appropriate new institutions.“*

Although our democratic systems face extremely strong pressure to serve short-term interests, representing long-term interests is still possible. We can say that the institutional or legal solutions designed to defend these interests are minimally sufficient for their just and fair representation. Environmental regulations, sustainable development strategies, development plans, institutions to control financial equilibrium (e.g. national banks, audit offices) of states or the opportunities available for civil society to represent basic social values outside traditional political decision-making processes are on the whole suitable to set the delicate balance between the interests of future and present generations. Theoretically we could say that present structures and institutions are able to fulfil these tasks, and that there is no need to rack our brains over new institutional or legal solutions.

Nevertheless, the reality confutes this optimistic assumption. All the surveys, monitoring the state of our natural environment show the continuous degradation of the global and the European ecosystems (e.g. Living Planet Report 2004, European Environmental Agency Report 2005, etc.). Instead of emission decreases, targeted in the Kyoto Protocol, most of the EU member states have produced a significant (some states more than 20%) increase in the emission of green-house gases, and the EU as a whole has also not met its burden-sharing targets. The continent is facing an increasingly serious demographic crisis, and in connection with this, the rate of state indebtedness is mainly increasing as a result of unsustainable pension systems. The revision of the Sustainable Development Strategy of the EU, accepted in Gothenburg in 2001 clearly shows that the Union has been responsible for grave failures in the implementation of its own strategy and targets. This is indicative of the lack of present structures that can effectively enforce the principles of sustainability and intergenerational justice, and proves that the welfare of our present societies is increasingly being assured at the expense of future generations.

The question unavoidably needs to be raised of what kind of solutions, legal or institutional changes could give an adequate response to the above mentioned problems? There are a number of proposals in Europe and all over the world to make the implementation of the principle of intergenerational justice more effective. One approach focuses on constitutional rights, proposing that our responsibility towards future generations should be framed in our constitution. The other approach calls for institutional solutions, proposing new democratic institutions that are capable of representing the interests of succeeding generations within the present decision-making mechanisms.

Naturally we cannot do without national-level solutions, and working towards them, yet due to the deepening European integration process, we have to take account of the fact, that an increasing proportion of decision-making competences and thereby responsibility towards succeeding generations is concentrated in the supranational structures of the European Union. We cannot neglect this shift of decision-making and power centres when talking about the protection of future generations. It is unsatisfactory if we construct counter-balances and mechanisms to restrict the burdening of future generations only within national decision-making

processes. Instead we have to find a way to create appropriate and effective guarantees for the representation of the interests of our descendants in the sometimes overcomplicated and bureaucratic structures of the European Union - even if it means including normative and enforceable obligations in the Constitution of the Union, or the creation of institutional solutions which are able to represent the viewpoint of future generations in the complex decision-making structure of the EU.

Based on these considerations and our work in the last six years for the establishment of the Ombudsman of Future Generations in Hungary, the Hungarian NGO Védegylet - Protect the Future! launched an initiative for establishing the European representation of future generations. In co-operation with other NGOs (e.g. Foundation for the Rights of Future Generations, Germany), and organising a wide international expert group we set the aim of drafting a concrete proposal, or possible proposals for the institutional representation of our descendants in the EU. In the last year we contacted dozens of international experts, philosophers, lawyers, political scientists, and EU-specialists, and asked them to contribute individual studies to our work, or to participate in the evaluation, improvement and finalisation of the proposal prepared by a smaller circle of experts on the basis of the received studies. We are sure that the work and contribution of our friends and colleagues has resulted in a professional, valid, inventive but still realistic proposal which can be put on the table of European decision-makers.

This publication is the result of this work. We aimed to initiate a lively professional and political debate on the institutional protection of future generations in the EU by giving practical proposals to its possible realisation. We hope that this work will be successful and that in the not too distant future we can address the establishment of a new structure or institution for the representation of the interests and viewpoints of future generations in the European Union.

Budapest, June 2006

Benedek Jávor

Contributors

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Rachel Taylor was born in 1977. She studied law at Oxford University (Pembroke College) from 1995-1998. Having practiced as a solicitor at Simmons & Simmons in London, she returned to Oxford University (St Catherine's College) in 2002 to obtain a BCL in European and Comparative Law. She was elected as Tutor in Law at Christ Church, Oxford University in 2003. She teaches and researches widely within the field of human rights law. She is a member of the research panel at Matrix Chambers in London.

Dr Paula Tiihonen was born in the middle of Finland, studied administrative sciences and after graduation moved to Helsinki. For 30 years besides work she continued studies, as well as took care of her "3-children and a husband" family. She doctorated in 1986 in administrative sciences, at the time she was working as a Counsellor of

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Robert Unteregger was born in 1962. He studied philosophy at the Universities of Bern and Fribourg, Switzerland. In 1997, together with some friends, he founded the Swiss Future Council Foundation. The Foundation's aim is to initiate and to promote the institution of future councils. Corresponding to the huge powers – technical as well as economical and organisational – of our modern society, future councils do the long term work and bring in their work into today's decision preparing and decision making. They bring in into the the traditional short term work of parliament and government the long term dimension on institutionalized ways, so that its influence is assured. Robert Unteregger is director of the Future Council foundation and directs the center shaping the future in Cudrefin at the Lake of Neuchâtel.

I. Philosophical background

A European Ombudsman for the Rights of Future Generations

EMMANUEL AGIUS

Introduction

Throughout human history, a sense of responsibility for the immediate future, namely the future of our own children and grandchildren, has always been an inherent part of human nature. The next generation has always represented hope, continuity, and progress. Each generation has taken pride in leaving a heritage which the next generation could use to advance society.

This was possible for many people in earlier generations. The future appeared stable and predictable. During the last century, the human population was too small and human technology not powerful enough to alter planetary systems radically. It was not until we gained access to vast energy resources that we acquired the power to destroy the ecosystem.

At the dawn of this new millennium, the future no longer appears either stable or predictable. We do not know what life will be like for coming generations. We all recognise the signs of the global crisis now approaching. Global warming, depletion of the ozone layer, continued population growth, massive loss of species and biological diversity, acceleration of deforestation and desertification - these are all threats which will soon lead to breakdowns in vital support systems for life on Earth.

What Lies Ahead for the Future Generations of the European Union?

According to the Treaty establishing the Constitution for Europe, the Union's objective is "to promote peace, its values and the well-being of its peoples". Reflecting the will of the citizens and States of Europe to build a common future, the Treaty also refers to justice and solidarity between generations as one of the main objectives of the EU. The Union's objective is not only to foster "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities" among current generations, but also to transmit these fundamental values to coming generations. The peoples of Europe, in creating an ever closer union among them, are committed to share a peaceful future based on these common values. As the preamble of the Charter of Fundamental Rights states, it is therefore the Union's moral duty to preserve, develop and transmit these common values to generations yet to be born, while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the member states.

Looking toward the future, the EU is facing many uncertainties concerning international peace, security and stability on the international stage. Moreover, the EU is facing fundamental socio-economic and political challenges regarding the achievements of its targets, goals and objectives. Reflecting on these challenges and uncertainties, it is natural to raise questions and concerns about the future of the EU. What is the future of the EU? What quality of life will be enjoyed by future generations living in the member states? Who can guarantee human rights, democracy, security and peace of the future generations of the EU? The EU has 450 million inhabitants living in 25 countries. Do current generations living now in Europe have any obligation at all to coming generations? Can future generations who will live in the member states of the EU in the future claim anything from us as their right?

What will be Europe's place among the superpowers of tomorrow and what alliances will emerge? How can Europe contain nuclear proliferation and the use of

weapons of mass destruction by unreliable and unpredictable regimes? What will be the effect of biotechnology and life-sciences on the future of Europeans? How can Europe defend its citizens against new threats of terrorism, organised crime or uncontrolled migration? What can Europe do to prevent a clash of civilizations or dangerous divisions between rich and poor countries?

To meet these challenges, close international cooperation is required, in which Europe can play an important role. The EU is resolved to be more actively involved in meeting the concerns of its current and future residents, who definitely all aspire to live in peace and security, to meet their social needs, to enjoy economic opportunities and to preserve a healthy environment for themselves and future generations.

Evidently, these apprehensions indicate that it is not only the issue of globalisation which needs to be given top priority by European institutions, but also widespread concerns about the unprecedented consequences which current decisions and policies could have on the quality of life of far-distant unborn generations. In subsection five of the preamble to the Treaty establishing a Constitution for Europe, we read that this scenario entails “responsibilities and duties with regards to other persons, to the human community and to future generations”. An increasing awareness of intergenerational relationships is also reflected in the EU's aim to enhance prosperity, solidarity and security for all Europeans living now and in the future. The present generation has the responsibility not to pass burdens on to posterity unnecessarily and to secure the enjoyment of the same freedoms and choices that we have to future generations. The challenges facing us are so wide and so complex that they can only be tackled in partnership, not only by involving the active participation of as many European citizens living now as possible, but also by setting up of an institution or mechanism to represent the yet unvoiced claims and interests of posterity.

Towards a sustainable Europe

The EU is firmly committed to sustainable development and wants to set a positive agenda for change. Sustainable development - meeting the needs of the present generation without compromising the ability of future generations to meet their needs - is a fundamental objective of the EU, but it is also a global challenge faced by all nations around the world. It raises the question of how to reconcile economic development, social cohesion, North/South equity and protection of the environment. Its importance is reflected in the EU Treaty and taken up by the Constitution, which challenges the Union "to work for the sustainable development of Europe based on balanced economic growth and price stability, a high competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment."

It is an overarching concept which underpins all EU policies, actions and strategies and requires economic, environmental and social policies to be designed and implemented in a mutually reinforcing way. Sustainable development offers the EU a positive long-term vision of society that is more prosperous and more just and which promises a cleaner, safer, healthier environment; a society which delivers a better quality of life for us, for our children and for our grandchildren.

That is the main reason behind the EU's bold decision taken at the start of this millennium to engage itself in a compelling agenda for change, to ensure that we face up to unsustainable economic, social and environmental trends. In 2000 the Lisbon Strategy set out an ambitious agenda of economic and social reforms to create a highly dynamic and competitive knowledge-based society. In 2001 a broad Strategy for Sustainable Development was launched by the European Council in Gothenburg and in 2002 its external dimension was defined in Barcelona, ahead of the UN's World Summit on Sustainable Development in the summer of 2002. Each of these steps has been accompanied by important decisions and actions to fulfil the commitment made. Article II-97 of the Charter of Fundamental Rights of the Union states that "a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in

accordance with the principles of sustainable development". The fact that the European Constitution attaches such importance to sustainable development reflects European citizens' widespread awareness of the importance of high environmental standards for their health, well being and overall quality of life. Current generations are demanding these standards both in their own interests and the interests of future generations. Europe's future requires long-term vision and action across a wide range of politics. Though growth and more jobs are needed to improve and secure future prosperity, a cleaner and healthier environment is also required. Europe's future prosperity and quality of life will depend on the capacity and commitment of current generations to change their production and consumption patterns and to decouple economic growth from environmental degradation.

With rapid demographic changes, the next decades will put enormous and increasing pressure on the world's resources, whether in terms of climate change, natural resources, biodiversity, or the wealth gap between North and South. Member states must take action today in order to preserve for tomorrow the delicate economic, social and environmental balance governing the globe. Europe's future can only be seen in this global context. Action on these issues cannot be confined to the Union alone. Sustainability remains a global challenge. This requires an integrated approach and reflects the fact that with globalisation and increasing interdependence, the EU can only deliver fully on its key internal priorities if it also succeeds on the world scene.

The EU's successful approach to sustainable development depends on the achievement of the following three goals: firstly by setting a broad vision of what is sustainable; secondly, the EU should seek to improve the way in which we make policies, focusing on improving policy coherence and making people aware of possible trade-offs between contradictory objectives so that informed policy-decisions can be taken; thirdly, it addresses a limited number of trends that are clearly not sustainable, such as the issues of climate change and energy use, threats to public health, poverty and social exclusion, ageing societies, management of natural resources and land use and transport.

Understanding the importance of and the interrelationship between these three pillars of sustainable development is crucial.

The Precautionary Principle and Future Generations

The precautionary principle's main objective is to offer a guideline for risk management. This principle was enshrined in the 1992 Rio Conference in its principle 15, which states that: "where there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. Environmental protection requirements must be integrated into the definition and implementation of other policies." The Maastricht Treaty gives specific indication on the Community policy on the environment, by saying that: "It shall be based on the precautionary principle and on the principles that preventative action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay." The European Community officially endorsed the precautionary principle in Article 174 of the EC Treaty.

The precautionary principle applies where scientific evidence is insufficient, inconclusive or uncertain and preliminary scientific evaluation indicates that there are reasonable grounds for concern that potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the high level of protection chosen by the EU. It is clear that the applicability of the precautionary principle is not limited only to environmental risks.

This principle can alternately be applied in an active sense, through the concept of "preventative anticipation", or a willingness to take action in advance of scientific proof of the need for the proposed action on the grounds that further delay will prove ultimately most costly to society and nature, and, in the longer term, selfish and unfair to future generations. The precautionary approach ought to be central to current thinking and policy-making regarding health, safety and environmental issues for the benefit of both present and future generations. The precautionary principle embodies more than any other legal principle the spirit of sustainability. It provides legal tools to restrict potential risk exposure to future generations. It also provides incentives for developing less harmful substitutes and less pervasive waste or emissions.

The importance given to the precautionary principle by EU institutions and policy-makers at all levels needs to be institutionalised and backed by an appropriate mechanism. Since this principle is mainly concerned with the future impact of today's decisions and policies, time is ripe enough to set up a mechanism within EU institutions to speak on behalf of future generations. Concern for posterity is already reflected in many principles and values which are endorsed in the European Constitution. What remains to be done now is to take the courageous step of giving a voice to the voiceless in EU institutions.

Transmitting Values to Future Generations

The EU is sometimes identified as only a geographical entity or common market, established to enhance intra-European economic integration. While the EU is certainly both of these, it is in reality much more. Since its inception in the 1950s until the present day, the EU has been a community based on the shared values that guide member states and their citizens as they live, work, and interact with each other, with their neighbours, and with the wider world. In fact, one can say that the Constitutional Treaty is truly a treaty of values. Over the past half-century, the EU has enlarged its membership from six member states to 26. But while the EU has assumed new responsibilities in a range of policy areas, the fundamental values embraced by its founding fathers have not changed.

The EU, which is a knowledge society, requires understanding of values which were its most precious characteristic. The present generation has the responsibility to transmit these values to posterity. Europe must nurture its values and ensure that education is designed in such a way as to transmit these values to coming generations. For example, tolerance, respect and generosity must be central to education systems. They are essential both to promote peoples living together in the EU and to ensure that they act in solidarity with the rest of the world.

Future generations have a right to live in dignity and to enjoy freedom, peace,

security, justice, democracy, equity and respect for human rights. They need to voice their concerns and interests in order to maintain the moral consciousness and conscientiousness of the current generation, to continue preserving these values and to transmit them from one generation to another in order to be enjoyed by all posterity. The setting up of a mechanism where future generations will be represented now in our discussions on the importance and safeguarding of these fundamental values would be a step in the right direction.

Founding the EU on Intergenerational Solidarity and Justice

It is a well known fact that nature's resources are limited and will be needed also by future generations. Environmental deterioration too will limit the possibilities for future generations to attain an acceptable quality of life. The yet-unvoiced claims of future generations must therefore be taken into account in the distribution of the world's resources.

Solidarity is the soul of the EU. In its draft constitution, the European Convention has established solidarity as a key value. Solidarity means providing assistance to others out of an awareness of being linked to others. This belonging together is not based solely on economic or geographical factors. Values and culture are at the heart of Europe's sense of unity.

The Charter of Fundamental Rights of the Union linked the concern for sustainable development with the principle of solidarity. Sustainable development cannot be implemented with a sense of intra- and intergenerational solidarity. As Article II-97 states: "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development". This principle reflects

a sense of solidarity with future generations. However, account must also be taken of solidarity to all humankind by its contribution to the sustainable development of the whole of humanity.

The EU has obligations of solidarity among member states. The Union has responsibility to eliminate the inhumane differences in living standards which currently exist within Europe. As a power influencing the world economy, the EU has universal obligations. The EU has a duty towards the poorest countries and regions in the world.

Human beings have differed greatly in the accounts they have given of the concept of 'justice'. They have spelt out the meanings and the practical implications of such phrases as 'giving everyone his due' in many different ways. But they have always agreed on a number of basic points.

The first is that justice is essential to human conviviality; secondly, that justice is not merely a matter concerning the relations between one individual and another; in traditional terms, "commutative justice". It also implies duties of individual towards the community or communities to which they belong; in traditional terms, "social justice". Thirdly, the concept of justice is logically connected with the concepts of "equality" and "proportion"; hence the requirement that an individual contribute to the welfare of the community has particular relevance to the question of proper conduct towards the needier and weaker members of humankind.

Social justice refers both to the duty of every member to contribute to the common good of the community, and to the responsibility of the community to all its members, with particular regard to those in a disadvantaged situation. Social justice demands the respect of everyone's right to share in the common good.

Social justice appeals to the principle that a community has the moral duty to give particular help to its handicapped or weaker members - not in terms of 'desert' or 'reward' for their contribution to the productive process, but simply because of human solidarity. Future generations can also be seen as 'handicapped', and the claim to reserve resources for their quality of life is based on similar grounds to

that on which it is argued that the State is bound in justice to make welfare provisions for the aged, the physically and mentally handicapped, and so on.

The resources of the earth belong to all generations. No country, continent or generation has an exclusive right to the natural resources of the earth. These resources have been handed over from past generations; it is therefore our responsibility to pass them on in good and enhanced condition to posterity. We have an obligation grounded on social justice to share the common heritage with all the present population as well as with future generations. Social justice forbids any generation from excluding other generations from a fair share in the benefits of the common heritage of humankind. In other words, social justice demands a sense of solidarity with the whole family of humankind. We have an obligation to regulate our current consumption in order to share our resources with the poor and with unborn generations.

The Participation of Future Generations in EU's Governance

It is a fact that economic, technological, cultural, environmental and political changes are taking place so rapidly that it is very difficult to predict what kind of world we shall have in 10 or 20 years' time, let alone in the far-distant future. Nonetheless, we must prepare for the future and try to find solutions to problems at as early a stage as possible. Otherwise we shall merely be unable to cope with the new challenges. Prediction, preparation and taking matters in hand are virtuous things. We must grasp the helm of the future. This is a goal which all member states of the EU had adopted to ensure success in the coming millennium.

At the Millennium Summit General Assembly of the United Nations in September 2000, world leaders, including EU heads of states, committed themselves to the Millennium Declaration of the United Nations that sets key objectives for the 21st

century. The Declaration embodies an unprecedented consensus, outlining a common vision of peace and security, development and poverty eradication, securing human rights, democracy and good governance. While controversies rage as to which of these objectives must come first or which is more important, most would agree that all of these elements are needed and that none of these factors would be effective without improved 'governance' which shapes how resources are used and who has a say in decision-making.

It is evident that good governance is essential for successful development. Governance is defined as the manner in which power is exercised in the management of a country's affairs at all levels. It comprises mechanisms, processes and institutions, through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences.

Some critics claim that the concept of 'good governance' is too narrow for the purpose of achieving the goals of the Millennium Declaration. They claim that the concept of 'humane governance' or 'democratic governance' is more adequate because it is more people-oriented, focused on human rights and global security, and more suitable to redress 'inhumane governance' reflected in five major problems, namely, the failure to meet basic human needs; discrimination and denial of human rights to women, indigenous people and others; failure to protect the environment and to safeguard the interests of future generations, lack of progress in abolishing war; and failure to achieve the spread of "transnational democracy". Humane governance is a set of social, political, economic and cultural arrangements that is committed to making rapid progress in these areas.

It is interesting to note that the concept of humane or democratic governance maintains that the needs of future generations should be reflected in current policies. As Amartya Sen has stated, democracy is one of the great values that the current generation will hand over to future generations. However, posterity will appreciate more and more our democratic heritage that will be handed over them if we give them the opportunity to be represented now in our institutions of governance in order to voice their opinions and concerns about decisions and policies that will affect their wellbeing. Avoiding short-term perspectives in policy-making is a key

challenge for governance. Globalisation demands governance. The problems are interrelated and cannot be dealt with in isolation, even by the most powerful countries. However, since our relationships extend to coming generations, coming generations also have the right to participate in the governance of EU institutions and local governments because our actions have far-reaching consequences into the future. All relevant stakeholders, including future generations, should be involved in managing the development process.

Extending the Role of the European Ombudsman

Our responsibilities towards future generations have already been endorsed in many treaties, resolutions and declarations of the EU. However, recognition of our responsibilities to far-distant unborn generations alone is not enough! There must be an implementation of this moral principle. Time is now ripe enough to translate words into concrete actions. The appointment of a "Guardian" to alert the European Community of threats to the well-being of future generations would be the most appropriate step in the right direction to safeguard the quality of future life.

It is a long-established tradition in almost all civilised societies of the world that persons who are declared legally incompetent, such as minors and the mentally infirm, are protected by a set of institutions from those who might exploit their disadvantage either advertently or inadvertently. For instance, some other individual or group is charged with the responsibility of acting as proxy or an advocate, on behalf of the person whose ability to represent his or her own interests is non-existent or impaired.

In this respect future generations are similar to those that our society has declared legally incompetent. The same consideration that presently supports proxies for the incompetent among our contemporaries also gives credence to the idea of a proxy for future generations in cases where contemplated policies could impose substantial long-term risks. One of the institutions of the EU which could take the role of a 'Guardian' for future generations is the European Ombudsman which was created by the Maastricht

Treaty in 1992. Its role is to defend the rights and interests of current generations in European institutions. The basic philosophy underlying the mandate of this institution could be reinterpreted to extend its mandate in time to include in its mechanism the defence of the rights and interests of future generations.

The European Parliament elected the first European Ombudsman in 1995. The Charter of Fundamental Rights of the Union, in Article II-103, states that any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union acting in its judicial role.

Its role is to investigate and report on complaints about maladministration in the activities of institutions and bodies of the EU, such as the European Commission, the Council of the European Union and the European Parliament. Its role is also the promotion of good governance in general. The Ombudsman usually conducts inquiries on the basis of complaints but can also launch inquiries on its own initiative. The Ombudsman has wide powers of investigation. The Community institutions and bodies must supply the Ombudsman with the information requested and allow access to the files concerned. The member states must also provide the Ombudsman with information that may help to clarify instances of maladministration by EU institutions and bodies. If the case is not resolved satisfactorily during the course of the inquiries, the Ombudsman will try to find a friendly solution which rectifies the instance of maladministration and satisfies the complainant.

Many of the complaints lodged with the European Ombudsman concern administrative delay, lack of transparency or refusal of access to information. Some concern work relations between the institutions and their agents, recruitment of staff and the running of competitions. Others are related to contractual relations between the institutions and private firms, for example in case of abrupt termination of a contract. The Ombudsman cannot deal with complaints concerning national, regional or local administrations of the member states. Maladministration means poor or failed administration. This occurs if an institution fails to act in accordance with the law,

fails to respect the principles of good administration, or if it violates human rights. Some examples are: administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal of information and unnecessary delay.

The European Ombudsman could be transformed to include in its mandate the protection of the rights and interests of future generations. From investigating only complaints of maladjustments in the institutions and bodies of the EU presented by current citizens, the Ombudsman could also extend its role to protect the 'common heritage' of Europeans. With this extended mandate, this European institution would act as the moral conscience and the 'guardian' or trustee of the future generations. This European institution should hold in trust the common heritage and common interests of the Europeans, in particular: the environment, sea, rights of peoples and human rights, as well as tracking implementation of the decisions adopted and directions taken in these areas by other European institutions. The dynamic transformation of the mandate of the European Ombudsman is stimulated by a world vision which no longer concentrates solely on present-day situations but transcends self-interest and examines issues beyond our immediate human condition. The notion of an Ombudsman for future generations informs the logic necessary for wider parameters in the assessment of the here and now for it brings the notions of space and time together. It is a measure of the inter-generational solidarity for which we all strive in the creation of a truly dignified humanity.

Thus, I believe that the philosophical and moral bases of the European Ombudsman are very broad, and that the proposed extension of its competence would be perfectly in line with these bases. It would be an opportunity to respond to novel demands. The authorised person or organ ("Guardian") appointed in the institution of the European Ombudsman to represent future generations at various EU forums, would be entitled in particular:

- to appear before institutions whose decisions could significantly affect the future of the species to argue the case on their behalf, hence bringing out the long-term implications of proposed action and presenting alternatives. Its role would not be to determine, but to promote enlightened decisions. Thus, the Guardian would have the power of advocacy, to plead for future generations. It would only have the right to put forward arguments on behalf of future generations.

- to introduce a new dimension - that of the time horizon - into the resolution of issues traditionally confined to the here and now. The greatest danger to future generations is that living resources essential for human survival and sustainable development are increasingly being destroyed and depleted. Future generations are seriously threatened with the prospect of inheriting a poor quality of life. The Guardian would take on the task of opposing the firmly established attitude of our civilization in discounting the future.

The appointment of a Guardian would be a true achievement for the interests of those generations yet to be born in the European Union!

How can future generations be protected by changing constitutions?¹

Dr. JÖRG TREMMEL

Introduction

Today's generation has the capacity to affect the future more than ever before in the history of mankind. This article justifies the need to institutionalise Intergenerational Justice, focusing on changes in national constitutions. In this context, a “matrix of the institutionalisation of intergenerational justice” is developed. In terms of wording, Beckerman's argument that we cannot attribute “rights” to future generations is rejected. Next, some concrete proposals to institutionalise ecological and financial generation protection clauses are drafted. They apply both to national constitutions as well as the European Constitution. Finally, current initiatives by young members of parliament are portrayed although their proposals are not bold enough.

¹ This paper appeared first in Joerg Chet Tremmel (2006): Handbook of Intergenerational Justice (Cheltenham: Edgar Elgar Publishing). It was slightly extended for the publication by “Protect the future!”.

The structural problem of democracy: future individuals have no votes

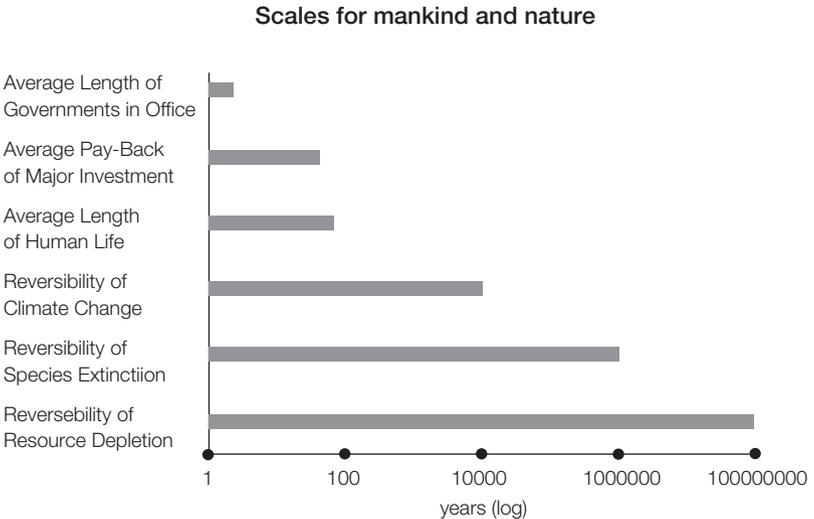
The principle of democracy, in its traditional and narrow form, can conflict with the maxim of intergenerational justice. The need to appease the electorate every four or five years means that politicians direct their actions towards satisfying the needs and desires of present citizens - their electorate. This has the effect that the interests of future generations are all too often neglected.

Due to their limited time in office, politicians will not have to take responsibility for the consequences of their actions and also cannot be made liable for them. Today's technological advancements mean that the consequences of our present undertakings, such as the instalment of nuclear energy plants, will have far-reaching effects and a potentially deeply negative influence on the quality of life for numerous future generations.

Nuclear power stations in a country like Germany have produced 7196 tonnes of plutonium waste products (PU-239) to date. Plutonium has a half-life period of 24 110 years, meaning that there will still be one gram of today's plutonium remaining in 789 471 years. Yet, even one single gram poses a threat to human health. If we consider that the history of mankind only began to be recorded 10 000 years ago, it becomes clear for how long the impact of our current actions will be felt by future generations. Relevant time scales for human and environmental development differ widely (see figure 10.1). Today's generation thus has the power to shape the future as never before. Yet, unfortunately, increases in technological possibilities have not gone hand in hand with an increase in the morality and far-sightedness of today's decision -makers.¹

Figure 10.1: Relevant time scales for human and environmental development

Source: own source



In the words of the former German president, Richard von Weizsäcker,

Every democracy is, generally speaking, founded on a structural problem, namely the glorification of the present and neglect of the future. It is an indisputable fact that we cannot and do not want to be ruled other than by representatives elected for a fixed amount of time - with no more leeway at their disposal than precisely their legislative terms of office for what they offer as solutions to our problems. I am not saying that all politicians are unconcerned with the future. They are only faced with the problem of having to acquire a majority. (Friedrich 1998, p. 53)

How can future generations be protected by changing constitutions?

In today's elections those individuals who will be born in the future cannot participate. They are not included in politicians' calculations, while they are trying to ensure their re-election. If future individuals could make their interests heard in the political decision-making process, then majority conditions for important political decisions would be different. Policy on energy may serve as an example here: at present, the form of power production, based on fossil fuels, as utilised by today's generation, facilitates a uniquely high standard of living, but today's generation is thereby creating serious disadvantages for itself and future generations in the medium-term for the next 50 to 100 years. We already know today - and having this knowledge is the crucial point - that such an energy policy leads to increased levels of carbon dioxide in the atmosphere. As a consequence, the natural greenhouse effect is strengthened and temperatures rise worldwide. More frequent and stronger hurricanes, inundations, streams of refugees and new conflicts will be the future results of this short-sighted policy. If only these future individuals, who will be born in the next 200 years, could vote on energy policies, this would create a huge majority which would facilitate a quick shift to renewable sources of energy. If only these future individuals could vote on financial policy, public debt would be significantly lower than today.

This fundamental dilemma of democracy leads to a preference for the present and to oblivion with regard to the future. Hence, succeeding generations are confronted with a structural disadvantage if democracy is not improved (Tremmel 1996). Generational justice affects the distribution of resources and life opportunities between generations. In view of the voicelessness of future generations, it is not surprising that there will be insufficient resources left for them due to the competition for resources between present individuals and groups. Even if nature and mankind are not endangered as a whole, but "only" parts of mankind and determined elements of nature (Renn and Knaus 1998, p. 18), the right of future generations to spend their life on an ecologically intact, biologically diverse planet, is nevertheless threatened as never before in the history of mankind. The "futurisation" of ecological problems means an existential danger for future generations.

In the face of present and future problems we cannot afford to turn a blind eye anylonger: we first need new future ethics. This significant change of consciousness must then be codified in written law. The first step has been taken, but the new future ethics is, as yet, not sufficiently reflected in positive law. It is precisely this that is necessary. The term “institutionalisation” of intergenerational justice describes measures to safeguard the interests of future generations through institutions or written law. It is naive to hope that politicians will act in the interests of future generations in the same way as they act for those citizens who are alive today. The reason is not purely the self-interest of today's politicians; it lies rather in the political framework of every democracy. Every party tries to obtain votes, and therefore must concentrate on the short-term perspective, i.e., the preferences of the present electorate and the present interests of influential groups. Politicians of all parties, who want to look further ahead than the next election (or even the next 30 years), are at a disadvantage in the competition with their short-term thinking political rivals. Hence, ambitious politicians who strive for many terms of political office cannot act in favour of future generations if there is a trade-off between the interests of the present and future generations.

Therefore the framework of political action and responsibility needs to be changed. Of course this must happen in such a way that the core principles of democracy remain intact. It is absurd to believe that doing away with liberal democracy is the solution to resolving the structural problem of democracy, as described above. Democracy is one of the most important social institutions that we can pass on to future generations; for this and many other reasons its abolishment is inconceivable. Additionally, such an abolishment would cause irreparable damage in relation to the maxim of generational justice for generations to come. If the influence of the electorate in politics, which is the very essence of liberal democracy, is to be maintained, terms of political office must be short, with frequent elections.

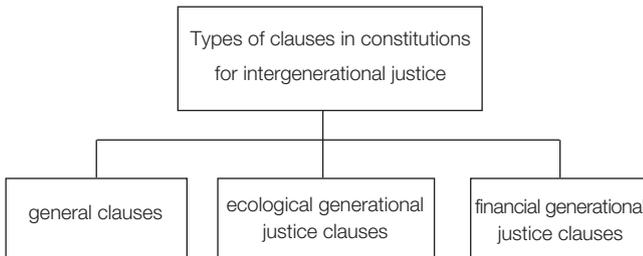
Three types of clauses for Intergenerational Justice in national constitutions

In order to solve the structural problem of democracy, different countries have chosen different approaches. Discussions revolved firstly around whether the protection of posterity should be ensured in substantive law by enshrining it in the constitution itself, or by establishing a new institution; and secondly around which policy fields the protection of posterity should concern.

Clauses in national constitutions

Let us first collect examples of clauses in constitutions. The increasing acceptance of future ethics has resulted in the fact that constitutions and constitutional drafts, worldwide, especially those adopted in the last few decades, refer to generations to come. These clauses can be grouped into three categories: general clauses for intergenerational justice, ecological generational justice clauses and financial generational justice clauses. Obviously, the fields of ecology and finances were deemed by many states so prone to intergenerational misconduct that they wanted to mention them explicitly.²

Figure 10.2: Typology of clauses in constitutions



A few examples of constitutions that include general clauses for the protection of future generations, usually in the preambles.

Table 1: General clauses in constitutions for intergenerational justice

Country	Lieu	Wording	Year of adoption
Estonia	Preamble	“Unwavering in their faith and with an unswerving will to safeguard and develop a state; [...] which shall serve to protect internal and external peace and provide security for the social progress and general benefit of present and future generations; [...] the Estonian people adopted [...] the following Constitution.”	June 1992
Czech Republic	Preamble	“Resolved to jointly protect and develop the inherited natural and cultural, material and spiritual wealth, resolved to abide by all time-tried principles of a law-observing state.”	16 December 1992
Czech Republic	Charter of Fundamental Rights and Freedoms Preamble	“The Federal Assembly, [...] recalling its share of responsibility towards future generations for the fate of life on this Earth, [...] has enacted this Charter of Fundamental Rights and Freedoms.”	16 December 1992
Poland	Preamble	“Recalling the best traditions of the First and the Second Republic, obliged to bequeath to future generations all that is valuable from our over one thousand years' heritage.”	April 1997
Switzerland (federal constitution)	Preamble	“In the name of God Almighty! Whereas, we are mindful of our responsibility towards creation; [...] are conscious of our common achievements and our responsibility towards future generations.”	18 April 1999, amended 15 October 2002
Ukraine	Preamble	“Aware of our responsibility before God, our own conscience, past, present and future generations.”	June 1996

Other constitutions explicitly mention the environment or sustainable development, either solely or cumulatively by a general clause.

Table 2: Clauses in constitutions for ecological generational justice

Country	Lieu	Wording	Year of adoption
Argentina	Article 41, Clause 1	"All inhabitants are entitled to the right to a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations; and shall have the duty to preserve it. As a first priority, environmental damage shall bring about the obligation to repair it according to law."	1994
Brazil	Article 225, Clause 1	"All persons are entitled to an ecologically balanced environment, which is an asset for the people's common use and is essential to healthy life, it being the duty of the Government and of the community to defend and preserve it for present and future generations."	1988
Czech Republic	Article 7	"The State shall attend to a prudent utilisation of natural resources and to protection of national wealth."	16 December 1992
Finland	Article 20	"Nature and its biodiversity, the environment and the national heritage are everybody's responsibility. The public authorities shall endeavour to guarantee for everyone the right to a healthy environment and for everyone the possibility to influence the decisions that concern their own living environment."	11 June 1999
Germany	Article 20a	"Mindful also of its responsibility toward future generations, the State shall protect the natural bases of life by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order."	23 Mai 1949, adopted 27 October 1994

Country	Lieu	Wording	Year of adoption
France	Charter for the Environment 2004	“Considering that, [...] In order to ensure sustainable development, choices designed to meet the needs of the present generation should not jeopardise the ability of future generations and other peoples to meet their own needs.”	2004
	Article 6 of the Charter for the Environment	“Public policies shall promote sustainable development. To this end they shall reconcile the protection and enhancement of the environment with economic development and social progress.”	2004
Greece	Article 24, Clause 1	“The protection of the natural and cultural environment constitutes a duty of the State. The State is bound to adopt special preventive or repressive measures for the preservation of the environment.”	9 June 1975
Hungary	Article 15	“The Republic of Hungary recognises and shall implement the individual's right to a healthy environment.”	20 August 1949
Italy	Article 9	“The republic promotes cultural development and scientific and technical research. It safeguards natural beauty and the historical and artistic heritage of the nation.”	27 December 1947
Netherlands	Article 21	“It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.”	1987
Latvia	Article 115	“The State shall protect the right of everyone to live in a benevolent environment by providing information about environmental conditions and by promoting the preservation and improvement of the environment.”	15 October 1998

How can future generations be protected by changing constitutions?

Country	Lieu	Wording	Year of adoption
Lithuania	Article 54, Clause 1	"The State shall look after the protection of the natural environment, its fauna and flora, individual objects of natural resources be used moderately and that they be restored and augmented."	25 October 1992
Poland	Article 74, Clause 1	"Public authorities shall pursue policies ensuring the ecological security of current and future generations."	April 1997
Portugal	Article 66, Clauses 1 and 2	"Everyone has the right to a healthy and ecologically balanced human environment and the duty to defend it. It is the duty of the State, acting through appropriate bodies and having recourse to or taking support on popular initiatives, to: [...] d)Promote the rational use of natural resources, safeguarding their capacity for renewal and ecological stability. [...] h)Ensuring that fiscal policy renders development compatible to the protection of the environment and the quality of life."	2 April 1976
Slovakia	Article 44, Clauses 2 and 4	"Every person shall have a duty to protect and improve the environment and foster cultural heritage." "The State shall be responsible for the economical use of natural resources, ecological balance and an effective environmental policy."	1 September 1992
Slovenia	Article 72, sentences 1-3	"Everyone has the right in accordance with the law to a healthy living environment. The state shall promote a healthy living environment. To this end, the conditions and manner in which economic and other activities are pursued shall be established by law."	23 December 1991

Country	Lieu	Wording	Year of adoption
South Africa	Article 24	<p>“Everyone has the right</p> <p>a) to an environment that is not harmful to their health or well-being; and</p> <p>b) to have the environment protected, for the benefit of present and future generations, through reasonable legislature and other measures that prevent pollution and ecological degradation promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”</p>	1994
Spain	Article 45, Clause 2	<p>“The public authorities shall concern themselves with the rational use of all natural resources for the purpose of protecting and improving the quality of life and protecting and restoring the environment, supporting themselves on an indispensable collective solidarity.”</p>	29 December 1978
Sweden	Chapter I Article 2, Sentence 4	<p>“The public institutions shall promote sustainable development leading to a good environment for present and future generations.”</p>	1 January 1975, amended 1976
Switzerland	Article 73	<p>“The Confederation and the Cantons shall strive to establish a durable equilibrium between nature, in particular its capacity to renew itself, and its use by man.”</p>	April 1999
Uruguay	Article 47	<p>“Environmental protection is in the interest of all.</p> <p>Water is a natural resource essential for living.</p> <p>1.) Water and drainage/cleaning up national policies shall be based upon:</p> <p>a) [...]</p> <p>b) sustainable management of water resources and protection of the hydrological cycle; those</p>	amended 31 October 2004

How can future generations be protected by changing constitutions?

Country	Lieu	Wording	Year of adoption
		are issues of general interest and will be run in support of future generations. Civil society and single consumers will participate in every step of the organisation, management and monitoring of water resources, after declaring every water basin a basic unit."	

Clauses for financial intergenerational justice are found in a smaller number of constitutions and often they are more "hidden". Mostly, the word "generation" is not even mentioned but only "financial policy" "balanced budget" and so on. Normally, these clauses come cumulatively with a general clause or a clause for ecological intergenerational justice.

Table 3: Clauses in constitutions for financial generational justice

Country	Lieu	Wording	Year of adoption
Estonia	Article 116	"Proposed amendments to the national budget or to its draft, which require a decrease in income, an increase of expenditures, or a re-distribution of expenditures, as prescribed in the draft national budget, must be accompanied by the necessary financial calculations, prepared by the initiators, which indicate the sources of income to cover the proposed expenditures."	28 June 1992
Finland	Article 84	"The revenue forecasts in the budget shall cover the appropriations included in it."	11 June 1999
Germany	Article 109, clause 2	"In managing their respective budgets, the Federation and the Länder shall take due account of the requirements of the overall economic equilibrium."	23 May 1949 adopted 12 May 1969

Country	Lieu	Wording	Year of adoption
	Article 115	“Revenue obtained by borrowing shall not exceed the total of investment expenditures provided for in the budget; exceptions shall be permissible only to avert a disturbance of the overall economic equilibrium. Details shall be regulated by a federal law.”	
Poland	Article 216, clause 5	“It shall be neither permissible to contract loans nor provide guarantees and financial sureties which would engender a national public debt exceeding three-fifths of the value of the annual gross domestic product. The method for calculating the value of the annual gross domestic product and national public debt shall be specified by statute.”	2 April 1997

Of these examples, we will explore Article 115 of the German constitution in more detail later. Another interesting example is the ongoing fight for a “Balanced Budget Amendment” in the USA. The Constitution of the United States does not require the Congress to pass a budget which equals the projected income to the government and the proposed expenditure. As a reaction to increasing deficits, more than a dozen attempts have been started to include a provision that stops deficit spending. Public support has ebbed and flowed, yet it seems to have been constantly over 50 per cent. Nevertheless, it never became strong enough to change the US constitution. To win passage, the amendment would have to clear both the House and Senate by two-thirds margins and then be ratified by three-quarters of the state legislatures. The latest attempt (but surely not the last one) took place in February 2003 when a group of Republican house members introduced a balanced budget amendment to the US Constitution, arguing that recent deficits demonstrate that Congress does not have the discipline to balance the budget on its own. Like most previous proposals, it included exceptions for the case of war.

The European Constitution

Another important aspect is the upcoming European constitution³:

Developments in the constitutional texts of the national member states will often influence supranational law. One outcome is the EU constitutional text. Häberle writes: "In the contracts of Maastricht (1992) and Amsterdam (1997) the great topic of 'generations' has not yet developed into a constitutional text. Nevertheless, statements on environmental protection are to be found: thus in Article 2 EUV ('sustainable development'), thus in Article 2 EGV ('high degree of environmental protection and improvement of the environment quality') and in Title XIX 'Environment' with a detailed goal catalogue (for example 'prudent use of natural resources')." This changed significantly in the Nice Treaty 1999/2000 which sets the tone in the preamble: "Responsibilities and obligations both towards the fellow men and towards the human community and future generations." Surprisingly enough, the new catchword "Sustainable development" also found its way in the treaty (Article 37). The draft constitutional treaty for Europe of June/October 2004 underlines in the preamble "in the consciousness of its responsibility towards future generations and the earth." A "high extent of environmental protection and improvement of the environment quality" (Part I Article 3 Paragraph 3) is mentioned, and further statements pertaining to the environment can be found in Part III Article 129.

Institutions

Other countries like Israel, Hungary, or Finland have set up or are currently discussing new institutions for the protection of future generations instead of enshrining clauses for the protection of future generations into their Constitutions (see the articles of Shoham and Lamay, van Opstaal and Timmerhuis, Jávör, Agius in this volume). The new institutions are designated "Ombudsman for Future Generations", "Committee for Future Generations", "Ecological Council", "Future Council", or "Third Chamber".

But what can maintain the protection of future generations more effectively, changes to the constitution or the creation of new institutions? In the solution provided by written law, the Constitutional Court becomes the institution which watches over a balance of the interests of present and future generations. In the case of a new

institution, the institution itself becomes the watch-dog.

These kinds of new institutions make sense if they really have the competences to protect future generations. This means, for instance, that these institutions can veto or at least freeze laws or that they can propose laws themselves. Without this responsibility the advisory system is merely extended. In Germany, for instance, there are already four institutions: the German Advisory Council on the Environment (Sachverständigenrat für Umweltfragen, www.umweltrat.de), the German Advisory Council on Global Change (Wissenschaftlicher Beirat der Umweltregierung für Globale Umweltveränderungen, www.nachhaltigkeitsrat.de), the German Council for Sustainable Development (Rat für Nachhaltige Entwicklung, www.nachhaltigkeitsrat.de) and the Parliamentary Advisory Council on Sustainable Development (Parlamentarischer Beirat für nachhaltige Entwicklung, www.bundestag.de/parlament/parl_beirat/) which was appointed in 2004. None of them have the necessary power to stop laws which threaten the well-being of future generations.

The question of how an institution with real power would be staffed also requires special attention. Conceivable options are that the members be nominated by parliament, be provided by associations and NGOs or be elected by the people. These proposals - apart from the latter one - are democratically problematic. Just consider the House of Lords in Great Britain, which is under heavy criticism for having too much power for an unelected body. For similar reasons, the Senate in Bavaria was abolished (Tremmel and Viehöver 2001, p. 21). It could start legislative initiatives as a so-called "Second Chamber" and was a place of refuge for association lobbyists. On the other hand, very mighty institutions like the European Central Bank are also not staffed through democratic elections and still enjoy a high level of public support.

How can future generations be protected by changing constitutions?

The matrix of the institutionalisation of Intergenerational Justice

If the first question is “written law versus new institution”, a second fundamental decision is “range of coverage”. Both clauses in constitutions and new institutions can be conceived to deal with either ecological questions and financial questions or posterity in general. In the latter example the Constitutional Court or the new institution would have to decide case by case which needs of future generations should be prioritised.

The possible combinations are shown in the matrix below with examples in the fields.

Table 4: The matrix of the institutionalisation of Intergenerational Justice

	Only ecological generational justice	Only financial General protection	General protection of posterity
Written Law Solution	Article 24 of the Constitution of South Africa	Article 115 of the German Constitution	Preamble of the Swiss Constitution
Institution	Ombudsman for Future Generations in Hungary	Audit courts	Commission for Future Generations in Israel

Source: own source

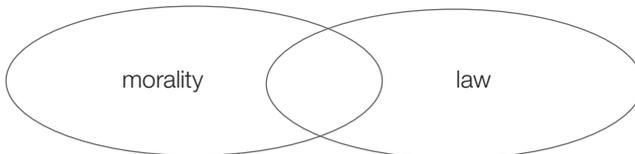
The wording: do future humans have “rights”?

When it comes to changes of the constitution, wording is crucial. Hence, it is first necessary to assess whether one can rightfully write: “Future generations have rights”.⁴ At the beginning of the debate about future generations it was frequently argued that future generations had no rights, but instead that present generations were merely morally obliged to them (Brown-Weiss 1989, p. 96; Beckerman 2004). Because of Edith Brown-Weiss's intervention, the UNESCO resolution which was originally entitled “Declaration for the Rights of Future Generations” was renamed as “Declaration on the Responsibilities of Present Generations towards Future Generations”.

Moral and codified rights

What is the relationship between moral and codified (“written”) rights? An obligation according to written law and a moral obligation are factually connected but not identical. In general, the relationship of morality and law can be characterised as follows. Firstly, there are moral commandments, or respectively obligations, that are not codified; secondly there is an intersection between both fields; and thirdly, legal norms may exist that are not moral.

Figure 3: Morality and written law



Source: own source

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For instance, many obligations towards animals and plants as well as towards future generations belong to the first category, since they are not yet codified within legal order. Particularly during the past few decades, the growing acceptance of ethics concerning the future has led to the fact that worldwide constitutions that have been adopted and draft constitutions verbatim refer to future generations. Conceptually, the idea of rights of future versus succeeding generations is preceded by another thought which arose much earlier. We are talking namely about the development of the idea of human- and civil rights. Important documents were the Magna Charta (1215), the British Bill of Rights (1689), the Declaration of Independence of the United States of America (1776) and the Declaration of Human and Civil Rights in the course of the French Revolution (1789) and finally the UN General Declaration on Human Rights (1948) whereby human rights, which at first only applied at the national level, then found their way into public international law. But who would agree with the statement that men and women had no human rights before 1215?

If the obligation of today's generation towards the future was, for example, already anchored in the Dutch constitution, but not in the Belgian constitution until the following year, then we could hardly claim that in this year the Belgians would not yet have moral obligations towards posterity. That would repeat the mistake some people made when they claimed that people in a specific state have no human rights just because their government is opposed to the Charter of Human Rights. Moral norms that are at the same time legal norms and vice versa belong to the second category. Most legal norms in democratic, liberally organised states are also moral norms (for example "Thou shall not kill").

Last but not least, there is a third category: those laws of dictatorial states that are deemed unjust everywhere else, for example the Nuremberg Racial Laws of Hitler's Third Reich.

Hence, it can be stated that it is enough to justify that future people have moral rights. Taking a bird's eye view, written law is always adjusted according to the changes in moral convictions within a society.

Semantic investigation of the term “to have (moral) rights”

The position of the fathered but still unborn child is acknowledged in certain fundamental rights. It has the legal capacity to hold rights, for instance the right not to be killed if the conditions for a legal abortion are not fulfilled. But below we will exclusively deal with non-fathered, “potential” individuals. According to Beckerman, the general proposition that future generations cannot have anything, including rights, follows from the meaning of the present tense of the verb “to have”. “Unborn people simply cannot have anything. They cannot have two legs or long hair or a taste for Mozart”, Beckerman writes in the Intergenerational Justice Review (Beckerman 2004; 1999; 1994). Beckerman's argument is correct, but of minor importance. It reminds us to use the future tense instead of the present tense, that is, to say: “Future Generations will have rights” instead of “Future Generations have rights”. It is important to understand that Beckerman's argument cannot be used to denounce the term “rights” and to replace it by “needs”, “interests”, “wishes” and the like. If future generations cannot have “rights”, nor can they have “interests” and so on, either. They will have interests, just as they will have rights. If we want to favour the term “interests” over “rights”, we must find other arguments. The hint about using the future tense instead of the present tense in the wording of constitutional amendments is just a minor aspect. It is more important which nouns, verbs or adjectives are chosen. Beckerman claims that his argument denounces the term “rights of future generations” (Beckerman 2004; 1999), but he is incorrect.

Having rejected Beckerman's claim does not mean that we have proven that it is more appropriate to use “rights” instead of another noun in constitutional amendments.

The figure of “conditioned” rights

Some scholars admit that future generations have rights, but they still differentiate. Callahan argues that our obligations towards future generations are weaker than our obligations towards present generations, because the claims of future individuals are conditioned claims. “The claim of future generations against us is a conditional claim, in the sense that it depends upon their existing to make the claim [...] over against that situation are presently living human beings, whose claims are actualised claims, whose rights are in no sense conditional.” (Callahan 1980, p. 82; Hösle 1997, p. 808)

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Birnbacher holds the opinion that rights always imply obligations: "A right can only exist when someone else has an obligation towards the legal subject." (Birnbacher 1988, p.100). The reversed conclusion is as follows: anywhere where a party A has an obligation in relation to another party B, B has a right in relation to A. But according to Birnbacher, for this statement to be true, the following condition must be fulfilled: the obligation will be demanded in the name of A. If a presently living, malnourished person has the right not to die of hunger, he does not have to wait for others to remember that they ought to not let him starve. He himself can demand that others not let him starve. But if the starving person is so weak that he cannot express himself anymore, he has by no means forfeited his right. Thus, if someone cannot assert a right himself, assigning a right to him means demanding from others that they fulfil the corresponding obligation. (Birnbacher 1995, p. 100)

Sometimes it is argued that a substantial characteristic of the term "right" (related to codified and moral rights) is attributed to the possibility to renounce them. According to this definition, one can indeed understand that future generations cannot have rights because they are not able to renounce them. However, this understanding of the term "right" is problematic because neither animals, nor children, nor any minors would then have rights. "The situation in which future subjects are prevented from asserting their rights against those alive today due to logical reasons, and where present subjects do not assert their rights because of contingent reasons cannot be a conclusive reason to withhold moral rights from one group and not the other." (Birnbacher 1988, p. 98)

Who can decide on definitions?

The resulting question that follows from the formulation "future humans will have rights", concerns the definition of the term "rights". Winfred Beckerman defines the term "rights" in such a way that from the proposition that all rights imply obligations it is not possible to deduce that all obligations imply rights. Many philosophers (for example Birnbacher or Dierksmeier) define rights in a way that all obligations imply some kind of rights. For them, "rights" and "obligations" are just two sides of a coin. Other philosophers even denounce that a right does not necessarily imply an obligation. Gosepath (2004) uses the example of an orphan who has a right to be

raised in a family. But that does not imply the obligation for a concrete family (or any family) to adopt the orphan.

By which criteria can the dispute about the definitions of “rights” and “obligations” be decided? Words can and often do change their meanings over time. Despite or precisely because of the terrific career of the term “rights”, it has not yet been possible to reach an agreement regarding its meaning. Scarcely any scientist denies that scientific terms must be well-defined and precise. The possibility to criticise theories in a constructive way becomes more difficult, if theories contain terms that stay permanently imprecise and plurivalent. Notwithstanding, the community of scientists should not regard a definition on which they have agreed as being definite. Every definition is preliminary, so that the definition process for future scientific criteria has to be re-launched occasionally. Max Weber expresses it in the following way:

“The history of social sciences is a constant change and remains a constant change between efforts to arrange facts in proper order by composing definitions, [...] and the regeneration of definitions on a modified basis. [...] The terms are not aims but means to the end of cognition regarding the important coherences from individual standpoints: due to the fact that the content of historical definitions could change necessarily, it is important to formulate them exactly.” (Weber 1904, p. 207)

To find out if the meaning ascribed to a word by a specific user at a given moment in time is correct, we have to apply different criteria, including:

- 1.) the term's utilisation by scientists,
- 2.) meaning at first usage,
- 3.) fertility,
- 4.) necessity (for an extensive study see Tremmel 2003a).

The most important criterion is the term's utilisation by the majority of scientists. A great deal of philosophers and law scholars have become convinced that potential humans receive something for which the expression “rights” is appropriate. This example illustrates how convictions about the appropriate attribution of the word “rights” are reached: during the construction work of a nursery school a terrorist hides a bomb. We assume that the bomb is configured in such a way that it will

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explode exactly 40 years later. We also assume that at this time only teachers under 30 and children are in the building. If the terrorist's plan was revealed today, would he have to be punished? Whatever the answer, he can only be punished if he has violated the rights of others. Whoever feels that this terrorist has committed a crime must also logically hold the opinion that future individuals will have rights (Birnbacher 1988, p. 59; Unnerstall 1999, p. 98). A further example is as follows: imagine a manufacturer who manufactures porridge for up to two-month-old babies and has a technical defect at his production centre. The result of this is that the products which will be on the market in three months are contaminated with fragments of glass. Almost everybody would consider him worthy of punishment even though the victims are not yet born. But in tort law this is only possible if someone has been harmed, i.e. if her rights are infringed. It is from a moral perspective that in this sense we believe that future generations will have moral rights.⁵ For an autonomous rational human being there is no transcendental authority who decides if such attributions are correct or incorrect. If by now a majority of scientists attribute rights to animals - which was considered inconceivable in earlier epochs - animals have "received" these rights. Materially nothing has changed. Nevertheless, in the collective consciousness of mankind these "rights" now exist. According to Kant, man can and must decide by himself what is morally correct and rightful. Thence the attribution of (moral) rights is only a semantic step and not a step that regards content. Therefore I will continue to speak of "rights of future people".⁶ But at the same time I think that this quarrel is quite futile. There are much more important features in the field of intergenerational justice than the question of whether future people will have "rights" or merely "needs".⁷ Imagine a freshly married couple who are talking about discontinuing their use of contraceptives to conceive a child. The wife says: "But remember that you must not work too long hours in your office. Our baby child has a right that you spend time with him." Is it worth the effort of arguing here whether or not the woman should have used "need" instead of "right" (or "will have" instead of "has") in her phrase? Not likely. It makes far more sense to discuss how much time devoted to work and hobbies the father should give up in the interests of his child. For the theory of intergenerational justice the situation is just the same. Therefore I will turn to more important questions.

The establishment of Ecological Intergenerational Justice in national constitutions

Some states have already taken action and implemented some clauses for the protection of the ecological interests of future generations. However, Poland, Germany, France, Switzerland, South Africa, the Czech Republic and all the other countries named in table 10.1 and 10.2 have not become ecologically sustainable states. In fact, all academic disciplines which are concerned with this subject agree that these states, albeit to a differing extent, are still breaching the fiats of ecological sustainability. How come? The clauses which were mentioned in table 10.1 and 10.2 share several weaknesses: firstly, most of them do not lay down a public right for each individual citizen. Instead they formulate a state objective which is legally something different than a public right.⁸ Secondly, they are too vague.

A state objective, unlike an individual right, obliges above all the legislature but also the executive power, the administration and the jurisdiction to consider it in executing each state activity. Admittedly, the individual citizen has no right to prosecute a claim for certain adjudications of environmental protection if the legislature, executive power and jurisdiction are not acting. That does not mean that lawsuits are impossible; they can occur if a state organ becomes the litigator in a complicated procedure. In Germany, for instance, the Federal Constitutional Court (FCC) can be occupied with Article 20a by way of a judicial review of the constitutionality of laws. That can be, for example, a litigation between the federal republic and a state (Article 93 I No.3 Constitution associated with Paragraph 13 No.7 and 68 et seq. FCC) and the litigation between public bodies (Article 93 I No. 1 No. 3 Constitution associated with Paragraph 13 No. 5 and 63 et seq. FCC). However, so far Article 20a has not been the subject of a lawsuit before the Federal Constitutional Court.

There is a second and more important problem with Article 73 of the Swiss, Article 74 of the Polish, Article 24 of the South African, Article 20a of the German

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Constitution and the other clauses listed in table 10.2. They do not include what the concrete responsibility is that present generations have towards future generations in terms of ecological sustainability. Article 24 of the Greek Constitution or Article 54 of the Lithuanian Constitution merely stipulate the “protection of the natural environment”. But what level of protection? At the moment, these articles only contain an undetermined demand. Their legal character would be radically different if they demanded that concrete rules of management for ecological sustainability were applied.

Law Courts can only reprehend the legislature and executive authorities when they transgress their obligations. The norms raise hope for an ecological, sustainable policy that the state does not want, or has, to fulfil. In their current version they conceal the fact that the principle of ecological sustainability has not, as yet, been incorporated in the constitutions and therefore that people will carry on living at the expense of future generations.

Proposal for a general clause on ecological intergenerational justice

Drawing lessons from this example, what can we say about an effective clause in general, be it in the constitution of South Africa or Germany. The following proposal would establish ecological sustainability and therewith generational justice into constitutions.

Article: Protection of the Ecologic Needs⁹ of Succeeding Generations

- (1) The state protects the rights and interests of succeeding generations within the bounds of constitutional order through the legislature and according to law through executive power and the jurisdiction.
- (2) It guarantees that harmful substances will pollute nature, soil, air, water and the atmosphere only to such an extent as these can decompose due to their natural regenerative capabilities in the respective period of time.
- (3) It guarantees that renewable resources are not exploited to a greater extent than they are capable of renewing themselves. Non-renewable raw materials and energy resources must be used as economically as possible by a justifiable expenditure.
- (4) It guarantees that no sources of danger are constructed which could lead to harm that cannot be undone or only undone by unjustifiable expenditure.
- (5) It guarantees that the existing variety of fauna and flora as well as ecological

systems is not diminished by human activity.

(6) Offences against Paragraphs 2 and 5 are allowed when they are compensated for by a quantitatively and qualitatively comparable compensation abroad.

Explanation of this proposed article

The clauses 2 to 5 are based on criteria which were developed at the beginning of the 1990s regarding the operationalisation of ecological sustainability (Pearce and Turner 1990; Daly 1991). The criteria received worldwide approval and are used in slightly modified formats in almost all papers up to this day. It is therefore only important to further explain the point on compensation which is expressed in Clause 6. This clause considers the fact that environmental pollution is often, but not always, a global phenomenon regardless of national borders. However, the scope of each national constitution ends at the national borders. Finally, ecological sustainability on a global rather than national level is the ultimate aim. But this does not mean that each country should not carry on striving for it at the national level. Even though it would be highly desirable for concrete sustainability aims to be determined on a continental or worldwide level, few signs can be observed that suggest that such agreements will be accomplished in the near future.

Clause 6 arranges the proposed norm of a constitution in flexible manner so that, for instance, a worldwide solution for trade on the rights of emissions or a prior European solution would remain an option.

“Succeeding” instead of “Future” Generations

It does not make any difference for a transgenerational theory of a just distribution of resources and life chances if a child was born yesterday or will be born tomorrow. In both cases, it has still a life to live and should be protected against intergenerational injustice. Close future generations and today's infants and adolescents are materially on an equal level, thus one should talk about “succeeding” instead of “future” generations. In contrast to the term “future”, the term “succeeding” generations comprises not only unborn generations but also present children and adolescents. By this new wording children and adolescents

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or their parents would have the right to sue. The clause would then have a level of protection that is concrete and therefore judicially guaranteed. Then the achievement of the Filipino lawyer Antonio Oposa could be repeated who successfully sued the government because of inactiveness towards the destruction of the rain forest in the Philippines. Forty three children appeared (as representatives of succeeding generations) as petitioners. The Federal Constitutional Court of the Philippines admitted the claim of the petitioners on 30 July 1993:

"We find no difficulty in ruling that they (petitioners-children) can, for themselves, for others, in their generation and for succeeding generations, file a class suit. Their personality to sue on behalf of succeeding generations can only be based on the concept of inter-generational responsibility [...] [to make the natural resources] equitably accessible to the present as well as to future generations." (Oposa 2002, p. 7)

Which counter-arguments can be brought forward against the proposed clause for Ecological Intergenerational Justice?

At first glance, numerous objections against the proposed clause can be asserted. In the following the most important ones will be discussed.

The protection of the natural basis of life is less an affair of constitutional execution than a matter of political, arbitrary decision-making

The aim of the proposed clause is the protection of the rights and interests of succeeding generations. The article cannot be left to the discretion of politicians because of the structural problem of democracy. The everyday competition of government and opposition parties averts - as is seen in practice - the effective protection of posterity for structural reasons.

The constitution must always remain open to development

A constitution must remain flexible enough to adjust to changes in reality. But a more open formulation would not ensure ecological sustainability anymore. Moreover, the clause would formulate the aim in relatively concrete terms, yet, concerning the way

these aims are implemented, the jurisdiction, the legislature and executive power would all be left with imaginable freedom.

The proposed clause is too long and would overload the text of law with moral demands

On the one hand, it is right that not all which is morally demanded can or may be implemented through the constitution. But on the other hand the following is also the case: laws are necessary when central moral demands are greatly counteracted without court intervention due to political and economic pressures. It is not “a matter of overloading” if a constitution tries to achieve what politics evidently does not. The new clause protects the ecological rights of succeeding generations and therefore can hardly be underestimated. It is an extension of the range of human rights in the future. In spite of its importance, in comparison to other similar declarations, it only requires six clauses and a small number of words. If we create a new institution with real competences - as an alternative to the establishment of the protection of posterity - the constitutions would have to be modified in many more passages.

Such a large modification of the constitution cannot be dogmatically derived from the norms of codified and applicable law

Positive law must adjust to the prevailing concepts of morality in a society. Human history testifies to a slow and by no means continuous approach of positive law towards the demand of the idea of law. A step in this direction was the Declaration of Human Rights of the United Nations (1948) which was a pioneering document at the time. Today we are in a comparable situation. The idea of generational responsibility, after all, has already found its way into the law books in recent times. It is necessary to establish the idea of protecting the rights of succeeding generations more effectively in constitutions to make it a political reality.

Constitutional judges are also trapped in today's line of thinking

Of course constitutional judges are also members of today's generations. However, they are not under the compulsion to be re-elected in most countries. Therefore, more future-orientated actions can be expected.

Introducing Financial Intergenerational Justice into constitutions

Alongside the ecological question, protection of future generations from excessive public debt is the most salient problem. The dilemma of financial short-termism within our democracy has already been realised by some nations (see table 10.3). The strictest proposal, brought forward by some US congressmen, provides no exception clause from a balanced budget but for war.¹⁰ But it has few chances to be passed, including because it is not in line with economic wisdom. If the state finances goods that will benefit future generations as well (for example expensive bridges), it then makes perfect sense that they should pay their share of the burden, too. The devil is in the details, however (for an extensive study see Boettcher and Tremmel 2005). The German constitution, for instance, enunciates the problem by Article 115 Basic Law (“Revenue obtained by borrowing shall not exceed the total of investment expenditures provided for in the budget.”) However, during the heyday of Keynesianism in 1969, an exception clause was also included in Article 115: “exceptions shall be permissible only to avert a disturbance of the overall economic equilibrium.” But here also, even if the idea of Intergenerational Justice has some tradition within financial constitutional law, then it has not yet been satisfyingly standardised. “The current wording in Article 115 Paragraph 1 of the Constitution has proved to be insufficient to stop the growing debt of the state budget”, writes the German Federal Court of Auditors. Therefore, it is necessary to re-adjust the problem of generationally acceptable state debt by a change of the constitution in this respect. I will focus on Germany, but I guess that most of the reasoning and the argumentation applies to other cases, too. There are several possibilities.

Suing the Government at the Federal Constitutional Court

Unlike a breach of an ecological clause, suing the government is not promising when it comes to a generationally unfair budget. The German Conservative Party (CDU) and the Liberals (FDP) together went to the Federal Constitutional Court in November 2004 to take legal action against an infringement of Article 115 by the then-government of Social Democrats (SPD) and Greens. The case is still pending. The Federal Constitutional Court had already been invoked before. It had to decide whether exceeding of the capital investment in 1981 by the credit income of about one billion Euros (1869 billion DM) was in accordance with Article 115 BL. The trial

took its time, thus the judgment was not made before 18 April 1989! If the Federal Constitutional Court declares a budget to be unconstitutional, then there are no immediate consequences. The budget year has then long been over. An unconstitutional budget is not subject to sanctions; at best, it is politically embarrassing. A re-adjustment of the financial constitution should thus be formulated in a way that it does not leave any room for interpretation on whether the budget is still constitutional or not.

Exceptions for recessions?

A crucial but difficult question is whether or not a balanced budget clause should include an exception for recessions. In a recession, the revenue of a state (through fees, fines, but mostly taxes) declines. Now, cutting back expenditure would completely stall the engine of the economy. On the other hand, a generation protection clause with too many exceptions becomes far too soft.

The exception clause of Article 115 BL in Germany is particularly problematic, as it facilitates a rising of credit to unlimited height. In Paragraph 1, Sentence 2 of the Stability and Growth Law, a macroeconomic equilibrium is defined by four economic objectives: stability of the price level, high rate of employment, import / export balance, as well as constant and adequate economic growth. For the state budgets of 2002 until 2006, the German Parliament asserted a disturbance of the macroeconomic balance and significantly increased the public debt at the expense of future generations. The problem about the German clause is that until now the budgetary legislator itself asserts a disturbance of the macroeconomic balance after the respective draft by the government - often when 1.5 or 2 per cent of economic growth is reached. This is an absurd situation. The German government claims that the high unemployment rate of the last years justifies a disturbance of the macroeconomic balance. In its decision of 1989, the Federal Constitutional Court pointed out that for macroeconomic balance the complete accomplishment of all four objectives is not necessary. That means that we cannot automatically speak of a disturbance if only one objective is not met. Thus, the application of the exception clause for the budgets of 2002 until 2006 was illegitimate.

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For a decision on whether the macroeconomic balance is disturbed, an independent institution would be the right addressee. A promising approach would be to transfer the competence to assert such a disturbance to the German Federal Court of Auditors, or to the German Central Bank.

A possibility would thus be the following amendment of balanced budget proposals regarding the inclusion for recession exceptions: "The identification of a disturbance of the macroeconomic equilibrium is incumbent upon the Central Bank."

The question relates to other exception clauses also: should they be eliminated or narrowed down? In my opinion, a debt that exceeds the sum of investment would only be tolerable in the following cases: a) in case of defence, b) in case of tensions between states, and c) in case of serious natural disasters or particularly severe accidents.

Discount on the sum of investment

Due to bitter experiences, it is well-known that not every public investment leads to the yield that was hoped for. The list of investment ruins is too long to be ignored. The debt permission tied to investment fixed in Article 115 assumes up to now that every investment is profitable. The measures to encourage investment are especially insecure in their effect on private investment behaviour. Within every economically acceptable proceeding, they may not be completely counted to the investment sum. Ultimately, an exact measurement of the macroeconomic investment effects that result from the measures to encourage investment is not possible, so that a flat discount becomes suitable. In order not to impose on future generations the share of unsuccessful investment projects, a flat discount of, for example, 33 per cent on the investment sum could be calculated. New debts of at most 66 per cent would then only be permissible. Sentences in articles for financial intergenerational justice could be amended, so that they read: "The amount of public investment may not exceed the value of two thirds of the new debt as fixed in the budget plan."

There are different alternatives for a concrete constitution change, thus each country may have its own preferences here. All variations that were discussed here would render a budget policy that is harmful for future generations more difficult.

To walk the talk: campaigns of young members of parliaments

Even in a scenario in which everybody maximises their own self-interest there is an important difference between young and old MPs: the younger generation stands to inherit the debt. Therefore one can assume that the chances for a change of the constitution are high, where the percentage of young MPs soars. Table 10.5 shows the average age of members of the parliament, the share of MPs under 30 as a percentage and the share of MPs under 40 as a percentage (of November 2005).

Table 10.5: Share of young member of parliament / average age in the parliaments of OECD countries

Country	no. MPs	Share u30 in %	Share u40 in %	Average age/ average birth year
Austria	183	1.1	9.8	50 Years/ 1955
Belgium	229	3.9	17.9	48 Years/ 1957
Canada				
(House)	307	1.6	12.1	52/1953
(Senate)	105	0	0	62/1943
Denmark	123	5.7	24.4	49 Years/ 1956
Finland	200	3	16.5	50 Years/ 1955
France	572	0.1	3.1	57 Years/ 1948
Germany	601	2.5	10.1	52 Years/ 1953
Great Britain	644	0.6	13.2	51 Years/ 1954
Italy	618	0	5.2	54 Years/ 1951
Japan	241	0	6.6	57/ 1948
Luxemburg	60	0	11.7	53 Years/ 1952
Netherlands	224	0.8	18.75	50 Years/ 1955
Portugal	229	5.2	22.3	47 Years/ 1958
Spain	349	2.3	14	44 Years/ 1961
Sweden	349	1.7	16.6	51 Years/ 1954
United States of America				
(House)	437	0	3.4	61 Years/ 1944
(Senate)	100	0	0	61 Years/ 1944

Source: internet sites of national parliaments

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Scientists like those from the Foundation for the Rights of Future Generations may have a lot of ideas, but in the end it matters what politicians are willing to do. Usually, the “pure” concepts are watered down; maybe this is an unavoidable process to gain majorities. After unsuccessfully pursuing its own campaign, the Foundation for the Rights of Future Generations took a new role as a moderator of MPs. Encouraged by the fact that the number of young MPs was higher in the parliamentary term 2002-2005 than ever before in German parliamentary history (Tremmel 2005), it sent a letter to all MPs under the age of 40 and managed to find some supporters in all of the political parties. This was the kick-off for the “initiative” of young MPs’ in summer 2003. The feeling that intergenerational justice and sustainability should be institutionalised was widespread among them. In total, 14 workshops took place until spring 2005. Numerous experts in constitutional law were involved and helped to formulate a concrete bill in order to change the German constitution. Two delegates of all four factions (the socialist party, SPD; the conservatives, CDU / CSU; the Greens; the liberal party, FDP) soon built a core group that interlinked the results to their respective faction. Eight young delegates of each party should be within the record of proceedings before the judgment of the proposal itself, so that the public would perceive it as a project of the young generation (of parliamentarians). Various suggestions were discussed and often rejected. The FRFG had all suggestions revised by renowned experts in constitutional law, for instance Prof. Dr. Eckard Reh binder (Frankfurt), Prof. Dr. Michael Ronellenfitsch (Tübingen) and Prof. Dr. Peter Häberle (Bayreuth). The MPs finally agreed on the following. A new Paragraph 20b should be added to the German constitution, reading:

“The state must observe the principle of sustainability and safeguard the interests of future generations.”

Moreover, the existing Paragraph 109 of the German Constitution shall be sharpened to constrain public debt making (changes italicised).

“When making decisions with regard to the budget, the Federal Republic of Germany and its states must pay attention to the macroeconomic balance, to the principle of sustainability and the interests of future generations.”

The proposal for a change to the constitution in favour of future generations has found 50 supporters from different parties. It was very important for successful negotiations that the idea of this change to the constitution was first withheld from the public. At some point, the public were informed of this amendment and many notable press articles were written about it, following a report of the weekly *Der Spiegel*. Even more journalists had to be rebuffed because of the premature elections. The premature elections in 2005 forced the group to postpone the release of this campaign until 2006.

But such campaigns pop up somewhere else, too. In the European Parliament a new initiative had their first meeting just when this article had to be submitted. To be continued.

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“When making decisions with regard to the budget, the Federal Republic of Germany and its states must pay attention to the macroeconomic balance, to the principle of sustainability and the interests of future generations.”

The proposal for a change to the constitution in favour of future generations has found 50 supporters from different parties. It was very important for successful negotiations that the idea of this change to the constitution was first withheld from the public. At some point, the public were informed of this amendment and many notable press articles were written about it, following a report of the weekly Der Spiegel. Even more journalists had to be rebuffed because of the premature elections. The premature elections in 2005 forced the group to postpone the release of this campaign until 2006.

But such campaigns pop up somewhere else, too. In the European Parliament a new initiative had their first meeting just when this article had to be submitted. To be continued.

Notes

¹ This is not contradictory to the fact that Birnbacher describes the growing range of moral demands regarding time in this volume. Rather it signifies that the present actions of policy-makers become more and more immoral concerning generations to come.

² There are, of course, more types of clauses conceivable, for instance those that pertain to education or to the social security system, but those are rarely found.

³ The section draws heavily on Haerberle (2006)

⁴ "In the debate which has been going on since the 1970s, academics have spoken almost exclusively about the "rights of future generations" (compare Callahan 1980, p. 82; Birnbacher 1988, pp. 96-100; Posner 1990; Saladin and Zenger 1988; Beckerman 1994; Höhle 1997, p. 808; Unnerstall 1999, p. 63 et seq.; p. 117 et seq.; Acker-Widmaier 1999, p. 53; Beckerman 1999; Tremmel 2003b, pp. 353-357). But we actually have to think about replacing the term "future generations" by "future humans" because only few theoreticians explicitly regard generations as legal entities (Unnerstall 1999, p. 63 et seq. and 117 et seq.). Future generations are composed of future humans. Each one of them possibly has individual rights. Can this justify the use of the term "rights of future generations"? Since we cannot go into greater detail here, both terminologies will be used.

⁵ Most people would, for instance, also talk about the rights of extraterrestrials (although it is unclear if they exist). If one imagines that such a "potential living being" would come down to earth most people would argue that they have the right not to be arbitrarily slaughtered if they behave peacefully. One can point out that a creature like Steven Spielberg's E.T. made millions of people cry.

⁶ Like many others. In our country there are for instance the French presidents who appointed a Committee for the Rights of Future Generations (Conseil pour les Droits des Générations Futures) and last but not least, Germany's former minister of justice, Mrs. Prof. Dr. Däubler-Gmelin (2000, p. 27).

⁷ Beckerman's second premise ("any coherent theory of justice implies conferring rights on people") is obviously subject to the same definition quarrels. But to apply the above mentioned criteria to the term "justice" is beyond the scope of this paper.

⁸ General opinion, compare BverwG, NVwZ 1998, p. 1080; Schink DÖV 1997, pp. 221-222; Badura 1996, Rdnr. D 44.

⁹ It does not change any content of the following six paragraphs if "needs" is replaced by "interests" or "rights" here.

¹⁰ For instance the latest proposal for a balanced budget amendment in the US Congress:
Section 1. Total outlays for any fiscal year shall not exceed total receipts for that fiscal year, unless three-fifths of the whole number of each House of Congress shall provide by law for a specific excess of outlays over receipts by a roll call vote.

Section 2. The limit on the debt of the United States held by the public shall not be increased, unless three-fifths of the whole number of each House shall provide by law for such an increase by a roll call vote.

Section 3. Prior to each fiscal year, the President shall transmit to the Congress a proposed budget for the United States Government for that fiscal year in which total outlays do not exceed total receipts.

How can future generations be protected by changing constitutions?

Section 4. No bill to increase revenue shall become law unless approved by a majority of the whole number of each House by a roll call vote.

Section 5. The Congress may waive the provisions of this article for any fiscal year in which a declaration of war is in effect. The provisions of this article may be waived for any fiscal year in which the United States is engaged in military conflict which causes an imminent and serious military threat to national security and is so declared by a joint resolution, adopted by a majority of the whole number of each House, which becomes law.

Section 6. The Congress shall enforce and implement this article by appropriate legislation, which may rely on estimates of outlays and receipts. The appropriate committees of the House of Representatives and the Senate shall report to their respective Houses implementing legislation to achieve a balanced budget without increasing the receipts or reducing the disbursements of the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund to achieve that goal.

Section 7. Total receipts shall include all receipts of the United States Government except those derived from borrowing. Total outlays shall include all outlays of the United States Government except for those for repayment of debt principal.

Section 8. This article shall take effect beginning with the later of the second fiscal year beginning after its ratification or the first fiscal year beginning after 31 December, 2009.

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II. Institutional representation of future generations: four case studies

Committee for the Future - a new institution to discuss the Future in Finland

Dr PAULA TIIHONEN

Starting point: Politics is responsible for the Future

In 1906 Finland was the first country in the world to give full voting and candidature rights to women, which can explain why, after 100 years of this kind of great social innovation, the same Finnish Parliament was the first in the world to decide that our common future is so important that politicians also have to take real responsibility for it. The Committee for the Future was established at the beginning of the 1990s and functioned on a temporary basis from 1993 until 2000. Then, on 17 December 1999, in conjunction with its adoption of new Rules of Procedure compatible with the new constitution, Parliament decided to grant the Committee for the Future permanent status.

Giving a standing committee within the Finnish parliamentary system a new, future-oriented role of this kind was not at all easy, for many reasons. What has been remarkable in light of this is that the initiative came from the legislators themselves. As early as 1986, 133 of Parliament's 200 members presented a citizen's initiative proposing the creation of a futures research unit within the legislature. The proposal did not lead to measures being taken. Again in the early 1990s, a number of members realised that Parliament needed a new type of forum for discussion, a new means of guidance, a mechanism which would not be tied to the Government's detailed, separately submitted, and, in most cases, narrowly focused bills. The 1992 legislative proposal, which, like the earlier one, had majority support (166 MPs of 200), was likewise rejected. Nevertheless, a process of maturation towards

acceptance of a new kind of task had gotten under way, because the Constitutional Law Committee itself expressed support for the matter in its own submission. It wrote:

“The Committee requires, however, that in the course of the current parliamentary term the Government already provide the Eduskunta with a report containing perceptions, which have been shaped by means of futures research, of essential features and alternatives in future development as well as outlining the goals set by the Government, i.e. a general outline of the kind of model of society the Government aspires to achieve through its own actions during its term of office. Drafting a report of this nature will call for interdisciplinary material of a kind not necessarily available to the Government. Therefore it would be advisable to organise within the Government administration a system of information procurement that would also make use of, in addition to traditional economic forecasts, the means that futures research offers.”

In the same year (1992) Parliament adopted a resolution requesting that the Government provide it with a report on national long-term development trends and related options. The legislature appointed a special Committee for the Future for the purpose of evaluating the Government's views and responding to them.

Resistance continued. The complete reform of the Constitution in 2000 served as a good example of the difficulty involved in changing the traditional thinking patterns of politicians, and especially civil servants, in bringing about an understanding that politicians bear more responsibility for our shared future. None of the preparatory groups even noted the Committee for the Future, which, by that time, had been in existence for nearly ten years. Only after the Constitutional Law came up for parliamentary reading did the Members of Parliament in the Committee for the Future propose granting permanent status to the committee. Parliament's Constitutional Law Committee opposed the proposal, which was defeated in voting. The decision was then transferred to Session Hall where the issue was decided in favour of the Committee for the Future. It may be presumed that this is the first time that Finnish legislation has been passed in a manner that reverses the position of the Constitutional Law Committee. Nowadays the Committee for the Future in the Finnish parliament has the same status as the other standing committees.

The reasons for resistance are many, but the most important was power. It is an adage of political life at any level that the first step to power is to take the initiative and put yourself in a position where you can set the agenda. In the Finnish Parliament, the Committee for the Future has taken this adage seriously from the very beginning. Having a mission and working hard during these 12 years, the committee has taken its place in the Finnish parliamentary system as an innovative political body and, over the years, has created a new forum that works at the core of the parliamentary system and - even more importantly - has demonstrated that parliamentary measures can still be used to take the initiative within democracy.

The committee has also made active use of its power of initiative in defining its own work. After every election, the agenda of each new committee takes shape in the minds of the 17 parliamentarians elected onto it. The topics discussed by the committee have ranged from the global to the local, from values to the practical efficiency of the machinery of State, from left to right, from history to the future, from structural long-term economic problems to the everyday difficulties that families have in arranging child care, from statistics to weak signals. The only rule in setting an agenda has been that it has to be something that is new and important to people. Topics in the information society development that the Committee for the Future have highlighted include the future of work in Finland, the future of the Finnish knowledge society and regional innovation systems.

Dialogues with the Prime Minister's Office and Government on future-related issues

All members of the Committee for the Future are MPs, and like most of the other standing committees it has 17 members. It neither concentrates on preparing legislation nor reviewing the government's annual budget proposal, but in other respects it resembles the other committees. Its task is to conduct an active and initiative-generating dialogue with the government on major future problems and the

means of solving them. Each of the standing committees has its corresponding ministry, and in the case of the Committee for the Future this is the Prime Minister's Office. Since the problems of the future, and, above all, its opportunities, cannot be studied through traditional parliamentary procedures and work methods alone, the committee has been given the specific task of following and using the results of research. Indeed, the committee can be said to be making policy on the future, because its goal is not research but rather policy.

Five Government Reports, with five responses from Parliament, have been handled in this dialogue on the future. The first, presented by the government in 1993, dealt with Finland and its relationship to changes in its operating environment. The next government submitted two reports: one in 1996 on the future of Finland and Europe and another in 1997 on Finland's economy, the Finnish employment situation, science and technology in Finland, the Finnish environment, and the country's general wellbeing. In 2001 the Government formed after the 1999 elections submitted a report on the future with regard to regional development. The outlook for demographic development, production and employment over the next fifteen years were the particular foci of examination in this report. The last Governmental Future Report at the end of 2004 was named Finland for people of all ages, dealing with demographic trends, population policy, and preparation for changes in age structure. Parliament gave its answer on 1 June 2005.

The Committee for the Future has drafted a relatively lengthy report (over 100 pages) of its own in response to each of the five Government Reports. Each of the committee's response documents, with minor additions, was adopted by Parliament after a debate at a plenary session.

Dialogue between the Government and Parliament in the case of reports on the future largely follows the same lines as the associated legislative drafting. After a general debate in the chamber, the matter is referred to the relevant special committee for deliberation. The committee hears the views of experts and drafts a report, which is presented in session. There it is either adopted as such or amended, but rarely totally rejected. The response to the Government can contain demands for action on the part of the Government, which are presented either

unanimously or after a vote. A re-port cannot lead to a motion calling for a parliamentary vote of confidence in the Government. When the measures proposed in the Committee for the Future's report have been approved at a plenary session, the progress of their implementation is followed by means of the annual reports, which the Government must submit to Parliament. Thus the dialogue is constant. Through its deliberation of the five Government Reports on the future and its own reports in re-sponse to them, the Committee has significantly deepened and expanded the Government's view of the future. It has also initiated technology assessment in Parliament. Both of these new parliamentary tasks have represented a lot of work on the level of public opinion - the level of values and attitudes - such as organising seminars, regional and Internet conferences, and so on. For example, the committee has emphasised that globalisation and modern technology are not isolated phenomena in our society. They are not simply problems faced by businesspeople or engineers; they are factors that permeate the whole of society and affect us all.

Issues in concrete handled by the committee

It is important to remember that the committee has the power of initiative in defining its own work. The agenda takes shape after every election. At first the committee was most interested in global threats to the environment. The next major theme was economic globalisation and Finland's opportunities therein. Energy is an issue that has come up in one form or another during every parliamentary term.

The current committee, which was formed after the elections in March 2003, started with five special issues: The Future of the Finnish Information Society Model, The Future of Public Health Care, Human Security as an Extensive Long-term Phenomenon, Regional Innovation Systems, and Social Capital in View of Future Risks for Children and Young People.

The following is a cross-section of the issues that the Committee for the Future has highlighted in Finnish democracy:

I Reports on the future, i.e. responses to government reports on these themes:

- Major global environmental and other structural problems (1994)
- The effects of European economic and other development on Finland (1997)
- Factors in Finland's competitiveness and success (1998)
- Balanced, regional development (2002)
- Demographic trends, population policy and preparation for changes in the age structure (2005)

II Topical themes taken up on the committee's initiative for discussion at plenary sessions

- Plant gene technology in food production (1998)
- Ten pain points in the future of work (2000)
- The future of work in Finland - outlines of policy on the future (2001)
- The future of the Finnish knowledge society: "A caring, encouraging and creative Finland - review of challenges facing our knowledge society" (2004)

The first of these was a project to assess technology and other general political themes.

III Technology assessment

The assessment projects carried out by the Finnish Parliament to date can be grouped into three generations.

The first-generation projects were completed during the 1995-98 term. They included the following:

- 1) Plant gene technology in food production
- 2) Information and communications technology in teaching and learning
- 3) Preliminary study of gerontechnology

The assessment projects completed during the 1999-2002 term can be grouped into two generations. The second-generation projects were decided on by the committee towards the end of 1999 and completed in 2001. They were as follows:

- 4) Developing and Implementing Knowledge Management in the Parliament of Finland
- 5) Futures Policy Promoting Independent Living of Elderly People and Gerontechnology
- 6) Energy 2010

In the second-generation assessment projects, the full committee, rather than its technology section, was the steering body. However, the actual steering work was done by a group comprising Mem-bers of Parliament chosen from several different permanent committees. The chairs of the steering groups were members of the Committee for the Future. The parliamentarians' participation in the assessment work was appreciably closer during the second-generation projects than during the first-generation ones.

In the autumn of 2001 the committee decided to launch third-generation assessment projects. With the exception of one on the theme of new and non-renewable energy sources, which did not go beyond a preliminary study, the final reports on these projects were published in the course of the spring of 2003.

- 7) Social Capital and ICT, pre-report
- 8) Regional Innovation Activities in Finland
- 9) Human Genome and Stem Cells
- 10) Renewable Energy Sources in Finland by 2030

Of the third-generation projects, the parliamentarians had particularly active involvement in the one dealing with regional innovation systems. For example, they organised meetings with companies and discussion events for members of parliament and authorities representing four regions. They also contributed texts for use when writing the final report. Participation in the other projects was through active involvement in the work of the steering groups. In the human genome and stem cells project, the parliamentarians visited research institutes working in the field in Heidelberg, but un-like the Energy 2010 project they did not take part in the Delfoi expert panel discussions.

Incidentally, when talking about results, Finland is the only Western country to build nuclear power plants at a time when other Europeans are closing their stations. The Committee for the Future had a special role in this big policy turn in Finland. The new nuclear technology is safer and cleaner than ever and the risks of climate change by continuing to rely on hydrocarbons are much greater than the risks of nuclear power. Climate change is believed to be real.

Four technology assessment reports have been completed by the committee that began its work in 2003:

- 11) Challenges of the Global Information Society
- 12) The Future of Finnish Health Care - Strategies and scenarios to secure health care services in Finland in the future, pre-report (continues).
- 13) Social Capital and IT
- 14) Leadership of innovative environments and organisations.

This committee has also started to study New Options of Russia. In the spring of 2005 the committee even started to analyze the Future of Democracy. It will be part of the 100 year Jubilee of the Finnish Parliament.

Sometimes, dealing with a theme means no more than arranging an international or national seminar or a series of meetings in various regions, but it can also mean years of constant study-based work with an expert institution in such a way that the steering group is either the Committee for the Future or part of it in collaboration with representatives designated by other committees. The committee has its own small research budget for these commissioned studies. The committee's aim is to avail itself of the latest methods that futures research has provided. Each committee both chooses its themes and decides how they are to be dealt with.

In politics going among people is always important. Next summer the whole Committee (17 members) will have a meeting, a hearing on "Future of Democracy" at a jazz festival, at Finland's most famous Jazz Festival in Pori (a city on the western coast). The committee meeting will be broadcasted directly in prime time in the evening. There will be two background reports also given to audiences, one of which is totally international and even handles the futuristic issue "Democracy in year 2100". This offers a good opportunity to reach people of all generations.

Next generations: Population Policy

As mentioned above, the latest big issue in this parliamentary future-oriented dialogue was demo-graphic challenges. The committee's response consisted of seven issues:

1. Child and family-oriented approach as a starting point
2. Working life needs to be flexible, not families
3. Active immigration and foreigner policy
4. Senior citizens as a resource
5. High employment rate is important
6. Threat: polarisation
7. Environments that encourage innovation and entrepreneurship.

The secretariat wrote the background memorandum, which explains more detailed discussions among the committee. The titles tell something of the basic problems the committee had on the table:

KEEPING UP WITH CHANGE

STARTING POINTS

Value-based contradictions in the starting points

Bold debate on population policy

Finland will be the first country with a majority of the voting population over 50

Follow-up to the Government Report on future prospects of regional development

The EU Commission's weak initiative on population change

The IMF's advice on population policy is old: work, increased retirement age and immigration

The OECD also proposes old medicine for Finland

A connection with the globalisation debate spurred by the Prime Minister

DEFINITIONS OF POLICY

Time and consideration required for building and changing institutions

Life span and innovations as a basis for new population policy

The Finnish family is surprisingly stable

The reasons for a low birth rate are not clear

On the possibility of natural renewal of the population

Finland cannot afford to lose any young people or children

An active immigration policy does not come without problems

Gardening for institutions

Also an ethical challenge

Finland's situation

An active adoption policy in parallel with a labour-based immigration policy

Finland's success is based on productivity

Innovative economy based on an ageing labour force: the spiral of misery and boredom must be broken

The Nordic countries are best prepared - the result also depends on people's choices

Rational problem solving without blame or intimidation

Facing old age with dignity - learning from other cultures

A small but humanly large issue: alcoholism in connection with the ageing of the baby boomers

The report lacks an important part of population policy: capital and financial markets

The significance of international flows of capital

Pension assets and pension funds - a force creating the future

Finland must be involved in growth

PATHS FOR POPULATION POLICY IN THE FUTURE - does the feast get better with fewer people?

NEW INNOVATIONS ARE RARE IN POPULATION POLICY

Social innovations are important but difficult to implement

Institutional reforms crossing the system

Rights and obligations: the life span concept

Employment: the Danish model

Taxation: flat rate tax

Civil capital: child trust funds

Ageing: Tying pensions to success and abolishing a retirement age

Just as an example from this broad open-minded and value-oriented discussion in the committee, these are some openings taken from the background paper.

Starting points. Population policy is a future policy in its most genuine form. Population development is one of the slowest changing phenomena in history. The political decisions and economic stimuli that influence it only take full effect after decades - sometimes centuries - have passed. Population policy is a subtle field of politics, and its devices touch the basic values of people and the oldest and most permanent institutions of each nation and society, the most important of which is the family. Institutional researchers have compared the building of institutions with gardening: it takes time and care. This particularly concerns population policy. As a result, changes in population policy must be very carefully considered before their implementation. Of course caution is particularly important when dealing with reforms that penetrate deep into the structures of Finnish society and people's lives. Although decisions that reach far into the future are always uncertain, it is a fact that population is necessary.

Population policy, which is linked to the most fundamental values of mankind and society, is a topic that includes contradictions right from the start. Some examples follow. First of all, is the family model and number of children a private or public issue? If it is public, a decision must be made on the level at which these issues should be handled. Secondly, what family concept forms the basis for the targets and measures - the ideal or the reality, today, in the near future or in the long-term? Thirdly, is ageing of the population the desired objective of a long and healthy life or a problem that has arisen and must be solved? Fourthly, are the problems of population development primarily economic? If so, are they universal problems related to reforms in the global economy and can long-term sustainable solutions be implemented purely as national government measures? Fifthly, to what extent does the responsibility for newborn and unborn children belong to all of us as members of mankind, regardless of country, and to what extent can national objectives conflict with the accepted international targets of mankind in the short and long-term?

Until now it has been easy for Finns to address population policy and other politically sensitive issues because we are an unusually unified and homogenous society. In

addition to a relatively com-mon heredity and language, we share a national awareness that dates back to the beginning of the country. This also includes the same religious and values base. Furthermore, our governmental judi-cial system has survived from the days of Swedish rule through Russian rule and nearly 100 years of independent democracy into the 21st century.

In the future, this tradition of congruity is likely to change for several reasons. The globalising world economy means that many economic and other related social phenomena are going to have a stronger and faster effect on Finns. It will no longer be possible to conduct business, exchange in-formation, do research, make investments, fight terrorism or negotiate human rights in groups made up of people of similar size, opinion and religion. Modern communications have made the world a smaller place. The world has entered everyone's living room, both positively and negatively. It has been said that the world became flat again during the change that began with the fall of the Berlin Wall in 1989. Columbus sailed west and, upon his return, explained that the world was round. At the beginning of 2004, Thomas L. Friedman (Columnist for The New York Times) consciously headed east to Bangalore and China and predicted that his globally successful books on globalisa-tion would become outdated in just a few years. He called his latest book *The World is Flat* (2005).

Global population development is also a common issue, and we have to share the problems of change that it inflicts upon our values. Even if the expected population explosion does not occur, more uncertain population forecasts still indicate that the focus of the world's population will ir-revocably move in the direction of poor developing countries in future decades. Departing World Bank President James Wolfensohn was in the habit of illustrating the direction of this development in the following manner when, for example, addressing the leaders of the world's greatest economic powers at recent G7 Summits: "Your customer base will increase by 100 million over the next 20 years, while mine will grow from six to eight billion." The growth that Wolfensohn spoke of refers not only to population or an increased number of poor people but to the movement of world markets from rich to poor countries. The billions of people being born do not belong to the Judaeo-Christian world; they are part of Islamic, Hindu and Buddhist cultures.

As they are implemented, the government's population policy strategies and proposed measures will also change Finland in many ways. For example, if Finland, alone or as a part of Europe, tries to solve structural problems resulting from a shrinking and ageing population by increasing immigration, we have to initiate a proper discussion of values. We need to analyse the Finnish identity and how it would manifest itself or change if immigration increased significantly. The experiences in European countries with a long tradition in foreign policy have not always been encouraging. The process would require a lot of changes in the way of thinking and policies to support those changes, as well as research and information to form the basis for the whole process.

Global responsibility. Developed industrial countries have always been able to benefit from globalisation. Their governments and companies are overwhelming in comparison with developing countries. This direction cannot change without conscious decisions. If developed countries do not shift the focus from short-term national advantage to long-term structural global interests - in other words to global public commodities - global problems will continue to worsen and the price of solving them will rise. The governments of rich countries should adopt certain principles of fairness at the global level, and then transfer them to the national management of globalisation. For their part, developing countries have to integrate with the international system. It must be accepted that in order to guarantee human rights and ensure economic and social development the global battle against disintegrated countries and the construction of good national administrations are the minimum requirements for a more just world. Michael Porter's observation that "in the long-term, a nation's standard of living depends on its capacity to achieve high and increasing productivity in those industrial sectors where its companies compete" must be accepted.

The market serves as a tool for ensuring the efficient allocation of economic resources. However, instead of distributing resources equally, it gives rise to inequality. Redistribution of income is a political task, and this applies on the national and international level. Global administration is required to steer global markets. Market players do not believe in this possibility, but the Finnish Government considers global administration an important issue. The basic principle of global ad-

ministration is that everyone should be capable of improving their position and no one's benefits can be allowed to deteriorate.

In terms of global administration, Finland emphasises the conditions that are necessary for economic development in developing countries. In terms of managing globalisation, Finland strives to safeguard the realisation of national benefits. The benefits in these two points often conflict with one another, but it is also worth remembering that globalisation is a process that can benefit all parties.

In Finland, the next re-evaluation of globalisation management will be necessary when large numbers of companies transfer their product development offshore and outsource services that require a high level of education (accounting, insurance, tax planning, architecture, medical services) to India, for example. What are fair rules in this competition for high competence services? If transferring product development or a service to a developing country increases the profitability of a Finnish company, decreases world poverty and reduces product prices for Finnish consumers, is it not right from the global administration perspective, despite the fact that the process may be problematic in terms of the future of Finnish work.

Population development is, like globalisation, a question of great changes in the world economy and human welfare. These problems affect almost every national economy, and because they have developed over a long period of time, they also require long-term solutions. This is not a matter of a specific problem in Finland that can be solved by a ten-point proposal for action presented by the Government.

As a result of globalisation we have to bear more responsibility. Each one of us has to take a stand and monitor how our representatives in various democratic forums - including global administration - solve the problems of the future. We need to consider what kind of mandate we give our country's political leaders concerning the management of common global problems. A few examples of taking global responsibility follow:

1) World poverty and distribution of work: Finland is part of the movement by the World Trade Organization (WTO) to remove agricultural subsidies, but

simultaneously the European Union approves them. Which is right from the perspective of Finnish, European and world citizens now and in the future? The WTO strategy has serious consequences for agriculture, regional structure and population development.

2) Youth unemployment: Every young person that has no hope for the future is likely to be a common problem. Every second unemployed person in the world (about 186 million in all) is young, and there are 130 million young people that work but are still unable to support themselves or their families. Youth unemployment grew explosively during the 1990s. Where have these young people spent their energy? Should we protect ourselves against them or offer them education, jobs and the opportunity for immigration?

3) World tax: Let's assume that the world agreed that we need a worldwide tax (for example, Tobin's tax) and, furthermore, an agreement on how to calculate and collect the tax. How would we ever reach agreement on its fairness and wise distribution? For example, the airport tax now being prepared in the EU would affect Finland, as a geographically remote country, more than Central European countries. Remote regions are net payers (Finland opposes this tax).

4) The participation of Finns in peacekeeping and peace-building, and global administration: Peacekeeping and human rights are good things, but they are not simple to implement. Should we accept interference in another country's issues and infringement of their freedom in, for example, cases of clear human rights violations that involve 100,000 people? What if 100,000 children in the same country die of starvation in a situation that is clearly the result of the wrong decisions that people have made?

These concrete examples show how globalisation has permeated not only economic action but also Finnish policy. The most important issue in terms of human welfare is to ensure the favourable development of an open global economy. It is also the best way to guarantee peace and stable population development. It is very likely that despite similar threats - the rise of protectionism, nationalism and prejudice, worldwide recession, the battle for world leadership -

the open global economy of the 21st century will not experience a catastrophe like that of the early 20th century.

Has it been a success?

I have been working in the Committee for the Future from the very beginning, so perhaps it is not fair for me to say anything about success. One thing is certain however: the committee has taken its place in the Finnish parliamentary system as an innovative political body. It has created a new forum that works at the inner circles of the parliamentary system and - still more important - it has demonstrated that parliamentary measures can be used to take the initiative within democracy. Secondly, it is an excellent vantage point. When the main task is dialogue with the Prime Minister's Office and Government on future-related issues, it has been said of the Committee for the Future that it is a good forum where parliamentarians can broaden their views beyond everyday politics and their own country's problems. The committee's work has become quite international in character. It has been a model for other parliaments, and also during both last year and this year for Unesco/Isesco with the organisation of future forums and technology development platforms. Quite a large proportion of the Ministers in the present cabinet are former members of the committee. They include the Prime Minister and the Ministers of Finance, Labour and the Environment. The present chair of the committee was chosen as the leader of the biggest opposition party in the summer of 2004, one year after the elections. He enjoys his work on the Committee for the Future so much that he has continued to chair it.

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Commission for Future Generations in the Knesset-Lessons learnt

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The Commission for Future Generations of Knesset, the Israeli parliament¹ constitutes the only establishment in the world designed to protect, by definition, the rights of future generations at the parliamentary and governmental level.

Introduction: A top-down process

It is not surprising that the “rights of future generations” narrative has developed over the past 20 years mainly with an environmental focus, introducing ideas deriving from a worrying situation of vanishing resources.

Thus, most documents relating to the subject are derived from the 1987 report titled “Our Common Future” which introduced the concept of sustainability and led to the Rio declaration and the international process of networking that followed.

On another level, narratives have developed in the field of moral disciplines and academic research such as those of the University of Malta Cathedral for Future Generations. At this level, ideas have expanded to religious and ethical aspects of the concern for future generations and for the abstract aspects, beyond immediate communities². Caring for future generations as an issue of morality was also dealt

with from a theological viewpoint. Thus, it is suggested that men and women who believe in God, the creator, should feel called upon to address the problem. This is based on the conviction that God created the Earth for the benefit of all generations and therefore, no generation enjoys an exclusive right to the resources of the Earth.³

The establishment of the Israeli Commission was not preceded by a public campaign or even a public discussion arising outside parliament. It was not a result of a bottom-up process, but a totally top-down process imposed directly from parliament. The Commission was established at the initiative of a politician in the centre of the political arena. It was the result of a personal revelation by the then leader of the middle-class liberal party, "Shinui" [literally: change] - MK Joseph (Tommy) Lapid.

From the explanatory notes of the bill proposing the establishment of a Commission for future generations:

"Every legislative act is overshadowed by the risk of unforeseen consequences, i.e. the legislator may intend to achieve a specific goal, while in fact the result is some other outcome, sometimes negative, that was not taken into account.

It is sometimes difficult to calculate the effect of a particular legislative act in a few years time, not to mention its effect in a generation or two. This is infinitely more likely in such a dynamic society as our own, where the fast technological developments accelerate processes of change.

Furthermore, politicians have a tendency to seek resolution to problems that are currently of concern to their electors, in the hope that in the long term, the matters will resolve themselves and in any event will become the problem of a different government and a different Knesset.

In light of all this, the need has arisen for the appointment of an ombudsman to represent in the legislature the generations yet unborn - a "Commissioner for Future Generations". He will be given the opportunity to examine each legislative act and to appear before the relevant Knesset committee wherever there is suspicion of

possible prejudice against future generations. This may take the form of soil or air pollution, harm caused to pension funds, the implications of genetic biology or the results of a technological development.

A recent example, even though not from the world of legislation, may be found in the problem of the millennium bug, that would have been prevented if the process had at the time been examined in relation to the future."

The explanatory notes reveal that behind the establishment of the Israeli Commission for Future Generations, there was indeed a concept of amending a repetitive flaw, a blind spot, in the parliamentary decision-making process. This flaw mainly manifested itself in the parliamentary legislative process, which the initiator of the bill appreciated, on becoming a member of the parliament just a year and a half earlier.

The fact that the initiative to set up the Commission originated within the Establishment itself, was probably what made it possible to formalise the protection of the rights of future generations. It is not at all clear, that this would have been a realistic option had the initiative come from an NGO - as was the case in Hungary where the NGO "Protect the Future!" initiated a bill for an Ombudsman for future generations. Yet, some amendments made to the original bill show that even a strongly-positioned politician like Tommy Lapid could not create an institution that would have authority over both parliament and government. The maximum that the coalition government at that time, and probably a coalition of any time, would agree to was to permit the Knesset to have its own internal body, that would advise it regarding the legislation process and would be funded from the Knesset's own budget.

As a result of the amendments to the original bill⁴, the future Commission will be confronted with some fundamental difficulties of definition and efficacy in fulfilling its role of defending the rights of future generations.

Comparing the versions of the original bill with that of the law that was actually enacted shows us that the Commission was originally planned to be a more independent body with a broader range of responsibilities and authorities.

Comparing the two versions show us the following:

Commission for Future Generations in the Knesset-Lessons learnt

	Original bill	Current law
Status of the establishing law	A new, separate and specific law	A chapter within the Knesset Law
Legal definition	Statutory corporation (sec 5)	A unit within the parliament
Main function	To represent the special interests of future generations in the parliament and government	1) Express opinion regarding the implication of laws on the interests of future generations 2) Advise the members of Knesset on issues of particular relevance to future generations
Election of the Commissioner	By the majority of members of parliament in a secret vote	By a public committee part professional and part political. Final decision by the Speaker
Fields of authority	Open list of any subject that is of special interest for future generations. Examples of areas included are: economy, environment, demography, science, quality of life.	A closed list of 12 fields including nearly all subjects, but excluding defence and foreign affairs.
Status vis à vis the government	1. Authority to demand relevant information of any minister 2. Obligation upon every minister to consult with the Commissioner prior to any issuing of regulations, according to the authority invested in him, that relate to a law that was found by the Commissioner to have special interest to future generations.	Authority to demand information of any controlled establishment under the State Comptroller Act
Commission's budget	To be determined by the Knesset Finance Committee, according to the Commissioner's suggestion. To be published with the State budget.	Part of the Knesset budget, determined by the Knesset administration.
Definition of "future generations"	Those who will become part of the state's population at any time, and that have not yet been born.	Not defined.

Intervention in the legislation process	General instructions regarding appearance by the Commissioner in different committees, after informing chairman.	Detailed instructions of the process.
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The differences between the original bill and the enacted law had considerable impact on the Commission-to-be, as will be reviewed here. This is mainly in regard to the relationship with the Executive Branch, the Government. With the new law, the Commission would act mainly within the Knesset legislative process, however, it was still necessary to develop content and values under this law.

Moreover, the scope of the Commission's roles as an establishment within the parliament also had to be determined. Should the Commission only relate to the legislative work of the parliament, acting within a parliamentary democracy? How was the role of the parliament as a monitor of the government and as a house of representatives supposed to be reflected in the Commission's work? Indeed, one of the first questions raised was whether the Commission should focus on the legal aspects of the legislative process, namely reacting to bills and giving opinions, or also deal with policy issues.

Prof. Naomi Hazan, then member of the Knesset, who was appointed to chair the Knesset sub-committee on the Commission for Future Generations, could not see any option other than to choose one of the two paths. She explained this in view of the poor budget the Commission received from the Knesset, which did not allow it to employ more than 4 professionals⁵. This issue, that turned out to be a cardinal one in the life of this establishment, will be discussed later in this article.

Starting off with special authorities

The Commission has been given two major authorities that made its work and action more significant:

1. The authority to demand information from any controlled establishment under the State Comptroller Act;
2. The authority to request a parliamentary committee that discusses a bill, for reasonable time to prepare an opinionated position by the Commissioner.

The authority to demand information from all governmental entities, such as ministries, public companies, state institutions or government corporations and so on, is similar to the authorities of the State Comptroller.

This authority grants the Commissioner an advantage over members of parliament and government ministries, which are often left in the dark regarding their colleagues' work. The Commissioner often uses this authority to get information that is not otherwise available or that the authority has no interest or obligation to publish. That was the case with data regarding water resources pollution monitoring results demanded from the Water Commissioner functioning within the Ministry of Infrastructure. Another one had to do with internal protocols of the Helsinki Committee deciding on whether to approve experiments made on humans that involve genetic interventions. A recent demand was for information regarding medical files of employees of the governmental plant of Electrochemical Industry. The plant, that closed down in 2004, was discovered to contain hazardous materials that have been contaminating its surroundings and its employees, the majority of whom turned out to be sick with related diseases for many years. Along with the medical files, the Commissioner requested to see the safety regulations for employees used by management since the establishment of the plant in the 1970s. The details of the doctors that attended the employees and the environmental inspection reports made throughout the years, by the ministry of Environment, were also demanded. Since the government did not attend to the subject, the commissioner presented the information to the media and through these means he brought about a public campaign and eventually legal attention to the matter.

The right to be given enough time to prepare an opinion is an implied authority to create a delay in the legislative process. Such a delay may be crucial for the parliamentary work when it comes to bills discussed within the framework of the State's Budget. In that case, the time factor is vital since the implication of not voting on the state's budget for the next year by March of that year, is that the parliament must dissolve itself and go to elections. Yet, by using that authority the Commissioner risks creating antagonism from both coalition and opposition parties. Neither side of the house desires the dissolution of parliament. Therefore, this authority is scarcely used and when it had been used it was done implicitly, behind the scene, rather than in a formal manner. The Commissioner used this authority in the case of the law concerning the integration of children with special needs in the formal education system. The government wanted to postpone the enacting of the law for a few years in order to maintain the planned budget frame for the coming year. This meant thousands of children with special needs losing the chance to be integrated in society as "normal" in the future. The Commissioner confronted the ministry of finance with the lack of long-term thinking and miscalculation of externalities, by current "saving" on the expense of these children. This minor saving of less than 1% of the budget was calculated to cost society much more in the future. Denying these children the chance to be part of society and rather, sentencing them to become a burden on it as adults with special needs can hardly be considered economically effective. Along with the open confrontation held in the committee, the commissioner explained to the government officials that if necessary, he would come forward and demand from the chairman a reasonable time to give a more elaborated opinion, which meant a delay of the law. Scheduled just a few days before voting on the 2003 state budget, the government withdrew from its position and allowed the law of integration to be enacted.

Thematic Milestones of the Journey

The Commission has struggled along its public and parliamentary path, with several issues to be dealt with:

1. Creating a status for the Commission both in the parliament and in public opinion.
2. Defining “future generations”.
3. Defining and determining “special interest to future generations” and relating this to specific legislation.
4. The implications of acting in a political environment.
5. Determining the scope of action with related establishments - government and non-governmental entities.

Creating public status

Naturally, for an establishment with no precedent, designed to act for the public, although with a slightly different meaning - a public that does not yet exist, creating public status was one of the first issues and a fascinating one. The fact that the Commission's authority is mainly advisory means that its status in parliament and with the public is vital for its success. Not having been elected - the Commissioner cannot stop legislation created through a democratic process. It can only raise awareness in a way that puts pressure on the committee discussing the legislation and on the voting parliamentarian. For this purpose, it must have the authority to participate in all discussions, receive all information, and accompany the legislation all the way to the final voting in the plenum. This is done in the Knesset by attaching the Commissioner's opinion to the bill about to be voted.

Coming up with a title that symbolises hope, an optimistic view of the future and, above all removing the spotlight from the dimension of survival where Israel exists - led to a fair amount of cynicism. Appointing the Commissioner on the edge of the new controversial budget-year (2002) was another issue that added to the bad atmosphere at the start. The parliamentarians, somewhat surprised at the public protest regarding the increase in the parliament budget and the cutting down of expenditure on welfare, did not manage to defend the new, unknown Commission, established by the vote of the majority of the Knesset.

The media, looking for a “headline of the day” and not familiar with the new body with the abstract title - joined the chorus of criticism against the Knesset and the “luxury” it affords itself by taking care of future generations.

The rather “bad publicity” the Commission started with indicated more profound difficulties - the need to justify its existence in terms of economic utility and the need to justify the priority given to future generations rather than the existing ones (in a country where environment is not a high priority).

The Commission was then at risk of having public opinion go against it. At such an early stage this could have marked the end of what had not yet begun. This was strengthened by two legislative initiatives, one, proposing the reduction of the authorities of the Commission and the other - to eliminate it altogether.

Responses from the public followed. Surprisingly enough the public was not drawn into the circle of criticism, but rather showed interest in the promising title and its various possible applications.

The ones who seemed to be drawn to the criticism were, in fact, the parliamentarians, the potential customers of the Commission. Thus, there was a need to re-position the Commission in the media, in order to regain recognition inside the parliament itself. Since the media has a major task in determining the public agenda of the country, it could be used as a platform to promote the concept of future generations.

Exposing the Commission to the media brought about two main results:

1. Parliamentarians started to appreciate the Commission as an establishment that creates public interest, and thus, a body to be recognised and taken into consideration within parliamentary work.
2. The public started to show interest and to relate to the concept, mainly in terms of suggesting input. The focus was on environment and education issues. Apparently people in Israel were disturbed about the future and found the new, still unknown Commission, a support to lean on. This was the opportunity to define terms and conditions and to introduce to the public the Commission's main prerogatives in the Knesset.

3. Information started reaching the Commission, mainly from academics, introducing to the Commission research relating to future generations to the Commission.

4. The mere existence of the concept of future generations that had not been introduced before to the public started a trend of relating to it in public life. It has since often been used in parliamentary debates and in decisions of the Supreme Court.

To conclude, the media that introduced the Commission as a controversial establishment and was the first to question its necessity - soon became a crucial tool in positioning the Commission and the concept of future generations

Who are the “Future Generations”?

As the identity of the “protégés” was not defined in the enacted law, one of the main issues faced by the newly born Commission, was the scope of the protected group under the term “future generations”. The preliminary question was that of protecting children's rights.

It was undisputed that one of the first issues the Commission should handle was the establishment of a Committee for National Infrastructures, designed by the government as a quick by-pass legislative process. The committee was supposed to approve large-scale national infrastructure projects, by-passing the regulative process of constructing and planning and particularly the discussion on the environmental and ecological implications of the projects. Environment is the first of the Commissioner's fields of authority mentioned; it involves the issue of future resources and was therefore a natural immediate issue to be dealt with. Nevertheless, dealing with the rights of children raised a more difficult question of how immediate the interests to be protected should be. On March 2002 the Commissioner was called upon by the then chairperson of the Knesset Committee on the Rights of the Child, MK Tamar Gozansky, to support a bill ordering that all legislation discussed in the parliament, regardless of whether it is initiated by a private Member or by the Government, should specify the effect of the proposed

law on children, under certain guidelines.

Although the role of the Commission had not yet been defined or published within the Knesset, MK Gozansky, considered it imperative for the Commission to act on behalf of children.

Turning the spotlight onto issues concerning children, raised some other questions that the newly born Commission had to confront:

1. What is the range of intervention in issues concerning children? Since children constitute a cardinal part of the population, issues of almost any kind will concern them
2. What is the role of the Commission in protecting and promoting children's interests, within the existing organisational framework protecting children?

Due to the awareness that children do not have the power to represent themselves - their interests are often protected by various rules and establishments designed for that purpose. The court in Israel, for example is considered the "guardian of minors" whenever issues concerning minors are discussed. Also, the Commission was not designed, in terms of resources, to supply constant support to children's issues. It was therefore important not to attempt to try to replace the existing governmental, semi-governmental and non- governmental organisations that act solely for that purpose.

Taking the path of children's interests

The Commission for future generations chose to participate in and promote the bill regarding the effect of legislation on children. It participated in the different discussions and supported the bill when it was brought to vote in the plenum. Moreover, after the law was enacted, the Commissioner supervised its application in the Knesset, which involved an amendment to the Knesset Rules of Procedure.

This act paved the way for a future role of the Commission as protector of the current generation of children. The Commission preferred to consider future generations as the next baby to be born tomorrow morning, a definition that relates to the immediate future generation, consisting of currently existing children.

This particular legislation made it an easy case to deal with for two reasons:

1. It could have been characterised as framework legislation, and therefore suitable. Not engaging a particular issue concerning children, but setting procedural guidelines to protect the interests of children as a whole.
2. The legislation involved was about to assimilate a whole new concept of relating to human rights in the very preliminary and high levels of parliamentary work by the state legislator. Being a new inhabitant of the parliament and a new chain in the legislative process - the Commission was obliged to state its position.

Over the following years, the Commission has related to various acts of legislation concerning children, at different levels of intervention. Resources were usually directed to legislation and executive actions that are characterised by policy frameworks, such as a national task force for a reform and re-definition of the education system.

Children's issues became a platform for cooperation with parliamentarians and government and were welcomed by the media. The fact that other public initiatives were also set up to deal with some of the issues was no problem. Apparently, children's rights are far from receiving adequate protection by government and the Commission is obliged to participate in this effort.

What really interests future generation?

The concept of "special interest to future generations" that appears in the Knesset Law is not defined. The areas of interest the Commission is supposed to relate to are specified and include: environmental resources, natural resources, science, development and technology, education, health, national economy, demography, planning and construction, quality of life, law, and any other matter that the Constitution, Law and Justice Committee determines to have a considerable influence on future generations.

The Commission started gathering information and receiving advice from individuals and academic organisations dealing with the concept of future generations.

Academic research regarding this has been conducted in Israel in the area of Political Science. The researches focused on the political-institutional problem of the blind spot in the democratic process that does not enable representation of those who are not born yet. This was studied mainly from the political aspect of strategic planning by governments under populist pressure, the demographic implication of current politics and the costs of a lack of long-term policies ⁶. Prof. Yehezkel Dror advised the Commission to respond to issues such as pension funds ⁷. Prof. Dror considered the institutional location in the parliament as an advantage, being as close as possible to the political quagmire.

True to the original intention of the legislator, the Commission did start to look into issues such as the deficiencies in the national pension funds and the need to re-structure the whole system from management and actuarial aspects. This is a problem recognised world-wide, where the future generations are being forced, in advance, to carry the burden of current generations' pensions, thus making this a classic issue for the Commission to deal with.

However, the Commission was still searching for a systematic definition for "special interests of future generations" in order to choose and justify the issues it chose to deal with.

At this point, the assistance of an expert of futurology who introduced us to four methodological trends in forecasting of the future was an eye-opener.

The futurology expert, Dr. David Passig ⁸, helped enable the Commission to justify its moves scientifically.

Apparently, the most acceptable methodology used is that of BACKCASTING. This means outlining the goals that we wish to reach in the future, or in other words: making a sketch of how we wish our future to be, and then derive from that what actions need to be undertaken in the present time, in order to reach those goals.

That is a reliable way of justifying the work of an establishment dealing with future interests - meaning, not attempting to predict the future, even with methodological means of extrapolation, but rather assisting in CREATING IT and giving advice

regarding the paths to reach there. Moreover, this could give the Commission an effective definition of action in the present time, in order to forge the shape of the desired future.

However, such a methodology could still not provide the Commission with the value content of interests of future generations that it wishes to protect.

The most massive input came from the direction of the environmental field.

Apparently, the concept “future generations” was already being used by activists in that area - operating at both governmental and non- governmental levels.

It was only when it was introduced to the concept of sustainable development, that the Commission found a systematic definition that embodied values and specific areas of reference:

“Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” ⁹

“Sustainable Development” was adopted by the Commission as a conceptual platform, delivering a number of advantages:

1. It relates directly to future generations, thus creating a very relevant link. Examining it thoroughly makes us understand that it is really a means of planning the future.
2. Although the concept originated in environmental issues, it stands on two additional pillars - society and the economy - thus giving comprehensive attention to nearly all issues. This also enabled the Commission to relate to all the areas of authority vested in it by law. Almost all these areas can be included either in environment (environmental resources, natural resources, planning and construction), economy (national economy) and society (health, education, demography, quality of life), whilst science, development and technology, as well as law - would be general areas that have a cross-effect on all other areas. Certain institutional frameworks that must exist in order to fulfil its defined goals (according to the international commitments articulated¹⁰) also derive from the concept. These frameworks are designed to constantly take into consideration the interests and narratives of future generations.
3. Since the orientation is development, it is easier to approach politicians and other

interested stakeholders that are opposed to the environmental aspect. Since environment is often grasped as a concept that annuls development, presenting a concept that takes into consideration development as an inherent part of its definition - makes it much more powerful, holistic and easy to assimilate.

4. The concept provides a systematic rule, or measurement of action that needs to be carried out in the present time in order to do justice to future generations - leaving them the space for choice.

5. Principles such as good governance and accountability that were added to the concept apply to the basic level of public administration, and are very easy to disseminate so as to reach the public and the media.

6. The concept has already been recognised worldwide as the new rule for action at all levels - international, national and local. The rights of future generations have become one of the top priorities declared by the UN and most countries of the world are now committed to protecting them. This concept was already adopted in 1992 and became especially central towards the UN Earth Summit in Johannesburg. Research centres and institutional frameworks were set up - e.g. the UN Commission on Sustainable Development and guidelines were set for putting words into actions. Even the OECD (Organization for Economic Co-operation and Development) initiated a resource book aimed to assist in building national strategies for Sustainable Development¹¹. Moreover, the State of Israel reported to the UN before the Johannesburg Summit in August 2002 regarding the establishment of the Commission for Future Generations as part of Israel's actions to create institutions and frameworks to promote sustainable development according to Agenda 21.

Sustainable development, was, then, a perfect fit for action in protecting future generations' interests.

And indeed, one of the Commission's first activities on returning from the Johannesburg Summit was to initiate legislation that will set Sustainable Development as a constitutional right to be protected¹².

The bill, that was originally designed as a Basic Law - meaning that the rights protected within the law are constitutional, i.e., they are accorded higher protection in the event they may be in conflict with other rights. A basic Law can be amended only by a large majority of the members of parliament, thus creating long-term legislation.

Since Israel has no formal constitution, mainly due to ideological differences, the Basic Laws serve as substitute for a constitution. Thus, the bill that was submitted by two parliamentarians as a private initiative - could not make it through the parliamentary coalition, which insisted on converting the law from a Basic Law into a regular one.

The bill has been re-submitted and is now being discussed with the government in order to reach a consensual version.

There is no doubt that incorporating sustainable development into legislation will set a whole new standard for the rights of future generations and of the state's commitment to it. Governments will have to consider the rights of future generations, and court will have to respond to appeals against infringements of those rights. This is a situation from which there is no return, especially when it has been assimilated into public awareness as have other human rights over the years.

It is crucial to take advantage of the momentum thus created in the world, validating the concept at all levels and creating political pressure.

The OECD, for example, by setting sustainable development as an imperative for national economic growth, exerts considerable political pressure on countries that seek the prestigious membership in that organisation. This is indeed the situation in Israel, where Minister of Finance Binyamin Netanyahu, set Israel's joining the organisation as one of its main goals.

Nevertheless, some characteristics of the concept and the evolving of its scope create negative correlations with the rights of future generation and their protection.

On the one hand, the concept of the rights of future generations is much more fundamental, thus much wider than sustainable development. Thinking about the future and designing it is more than a human instinct and a moral imperative- it is a value in itself.

Sustainable development may be the closest applicable concept for guidance in efforts to protect future interests, but it is just not enough, no matter how comprehensive it may seem to be.

Certain issues that have a direct effect on the future simply cannot be dealt with through sustainable development, nor should they be. An example is the

implications of technological development on society and ethics, in a way that may affect future generations. One issue of that kind is human reproductive cloning, a technology that has the potential to change the face of the world we live in. The ethical and social debates to be conducted today are crucial to what will eventually happen with the development of such technologies. The issue ceases to be a scientific or even a merely moral one - in such a rapidly changing world it becomes a political issue.

On the other hand, it seems that the concept is applicable to nearly every development issue. Sustainable development is a leading and central concept in virtually all development plans. This widespread agreement stems from the generality of the concept, the flowery language used to describe it, and the lack of clear and detailed statements defining the properties of sustainable development. More specifically - the question is what distinguishes sustainable development from something which is not sustainable? Amongst planners, for example, there is a sense of bewilderment in regard to this distinction¹³.

Besides the bewilderment it might create, there are two dangers that derive from that situation. One is that the concept will be abused and misused to validate non-sustainable development. The second is that the concept will be torn apart by the wide range of issues it is being stretched to cover. The concept is directed at governing entities, but also at their satellite establishments, such as corporations and the World Bank. Poverty eradication for instance, is indeed a noble value in itself and something that all of humanity should strive for. However, setting poverty eradication as a cross-cutting principle of development, takes the concept of Sustainable Development beyond its expected boundaries. It should be expected, then, that some establishments will develop antagonism to the concept and start paying it lip-service instead of creating a genuine reform regarding the earth's vanishing resources.

Enabling mechanisms - an interest for Future Generations

In view of all this, it seems that a governmental institution designed to protect future generations' interests, should look into every government activity separately, in order to decide upon its position regarding each issue.

In the framework of protecting future generations' options for choice, the Commission cannot inspect each of the many decisions made and executed by the authorities that might influence future generations and be motivated by short-term interests.

One of the Commission's main goals, therefore, is to install mechanisms that are designed to consider long-term interests and ensure that they are protected by law.

The main rule in this regard is keeping the decision-making mechanisms set by law away from the political establishment or the direct influence of political interests. In the reality of strong government coalitions and an administrative culture of appointing familiars, that means also avoiding homogenous governmental representation in decision-making mechanisms.

The Law for the Protection of the Coastal Environment, 2004, aims to protect the coastal environment and its natural and heritage assets and to prevent and/or reduce damage to them; to preserve the coastal environment and the coastal sand for the benefit and enjoyment of the public in present and future generations; and to establish principles and limitations for the sustainable management, development and use of the coastal environment.

Yet, most of the rights protected in the law were given to the consideration of a designated committee composed of relevant ministry representatives and other professionals. The Commission for Future Generations advised the Knesset Internal Affairs and Environment Committee about the crucial need to create a balanced committee. The natural tendency of nearly all government ministries, excepting the Ministry of Environment, will be to ease restrictions on coastal construction. The same goes for representatives of local authorities that usually benefit from the coast. It was thus crucial to have professional planners, marine biologists, environmental NGO's and public representatives in a balanced number.

Another aspect of enabling mechanisms is the existence of professional/ academic slots in policy-making frameworks, in order to scientifically emphasise future trends. For example, the research committee that allocates money to private sector industrial R&D under the Industrial Research and Development Act, 1984, has a major part in steering future technological developments to be conducted in Israel over the next few decades. This committee was composed of government and

some business sector representatives. It was, thus, crucial that the committee also include a scientist, an academic expert on future scientific technological trends, who will make sure that the money is allocated to companies that are headed in the right direction in regard to future technologies.

Another enabling principle is the political and financial independency of executive units that by definition have long-term influence.

Defining these bodies as Authorities that are not subordinate to or budgeted within a certain ministry's budget, but are budgeted directly and independently of the state's budget, is vital. This reduces the chance that the authority will be influenced by the political agenda of a transitory minister, but will rather be able to make rational, professional decisions.

Implications and costs of acting in a political environment

Situating an institution that is supposed to protect future generations in the core of the political establishment of a country, i.e. the parliament - carries with it some inherent difficulties along with some advantages.

The parliament is indeed at the cutting edge of political determinations in every country. Also, it is where public debate is conducted regarding the national agenda. Being located in the same premises as the parliament, gives the advantage of proximity and access to information and to the main players - the politicians. (Access to information should be endorsed by law.)

Information regarding parliamentary work means not just what debates are being held in the committees and in the plenum. This also includes knowledge of the mood of politicians and how they think, views of the ministers' representatives and other government officials that appear regularly before parliament, and last, but certainly not least, opinions expressed by the various stakeholders that are invited to appear before the committees.

The physical proximity to politicians creates an outstanding opportunity to personally influence their agenda in order to recruit them to the protection of future generations.

However, acting in a political arena also means that the players react to activities that may grant them a political advantage. For the same reason politicians need advising regarding the effects of their actions on future generations, meaning that politics often deals with the very short-term interests of current voters. The Commissioner for Future Generations in the parliament must therefore provide positions that politicians feel it is worthwhile for them to support.

For these purposes, an institution within the parliament must adjust itself to lobbying, while taking into consideration coalition-opposition matters, political trends and the political climate. Due to strong coalition discipline, lobbying conducted in the backstage of the government is another imperative, in order to make sure that the Commission's opinion is considered when attached to a bill that is brought to the plenum for a vote - even if it had been accepted in an earlier legislative stage in the relevant Knesset committee.

These facts project also on the type of figure suitable to lead such an institution. Regardless of the professional background - environmental, scientific or juristic, the person at the head of the institution must have the public prestige that can be appreciated by politicians, appreciated not only for their professionalism, but also for their ability to grasp political nuances. In this sense, the appointing of a retired judge, the former legal advisor of one of the Knesset's principal committees, enabled the Commission for future generations to be seen as an organic unit of the parliament.

As mentioned before, defence and foreign affairs issues are excluded from the authority of the Commission. In a country where politics revolve almost completely around defence issues this might be an alienating factor. Nevertheless, this very fact, that allows the Commission to remain politically unaligned, gives the Commission the great advantage of neutrality and professionalism.

From the knowledge gathered so far, it seems that political differences of ideology might actually become synergetic in the future. Lack of natural resources, financial

deficits and social gaps will probably be the real problems for future generations. That, of course, is assuming that efforts towards peace will not stop until it is achieved. Not achieving peace brings into question the very existence of future generations in the Middle East. But when it is achieved - we hope they will still have air to breathe, water to drink and natural resources to benefit from.

Determining the scope of action and interim conclusions

Getting up in the morning with the task of assuring the wellbeing of future generations makes one prone to measure the scope of one's activity on a daily basis. The Commission has been experiencing this over the past three years.

The Commission started off with clear legal instructions regarding the focus of its action - the legislative process. Soon enough it turned out that, even under the rules and definitions adopted, when acting in defence against offensive legislation the Commission finds itself siding with certain NGO's, public initiatives, governmental ministries and even groups from the business sector that are already campaigning to promote or prevent specific legislation.

As much as this fact may call into question the exclusivity of the Commission - it is not discouraging. The Commission has seized the advantage of its unique institutional location to become a facilitator, channelling information and ideas into the parliament, information it scarcely had the resources to gather on its own. This fact obliges us to thoroughly scan this information in order to eliminate foreign interests that might sneak in. The Commission's power to change is partly founded on its being an official establishment. Even in an era when civil society is strongly recognised and taken into account, an institution that is committed to ministerial responsibility will still hold more weight.

The promotion of sustainable development cannot be done exclusively by the Commission. The Commission therefore had to develop positions and activities with

added value for other existing establishments it cooperates with in this area. The emphasis was on supplying professional legal advice regarding legislation especially within the various parliamentary committees that handle legislation as well as initiating legislation. Initiating legislation also creates links to the members of parliament that often seek new directions for public action. Legislation by individual members also requires that the government state its position on the bill at an early stage of legislation - thus speeding up the process.

Nevertheless, acting within the parliament is not nor should it be limited to initiating and preventing legislation.

The powers influencing legislation come into play at a much earlier stage. It starts with omissions and actions of the executive branch that call for legislation or that lead to irresponsible legislation. These trends can be detected before they reach the parliamentary stage - mainly in the executive process of governmental activity.

A holistic and ethical vision of the task of protecting future generations cannot allow us to overlook this political fact. Some of the issues may be resolved through creating public awareness or through making the government aware of the implications of its actions and the necessity to act differently in order not to harm future interests. The authority that was denied the Commission in the law that was actually enacted - the authority to directly advise the government - was certainly one that would enhance the flow of its influence.

Therefore, the legal scope of action of a parliamentary institution for future generations must include a gate through which it will be possible to act *vis à vis* the government, as the original bill for the establishment of the Commission suggested.

Nevertheless, this gate certainly exists in the current law establishing the Commission.

Firstly, as mentioned above, the Commissioner has the authority to demand information from all governmental entities;

Also, the section in the law authorising the Commissioner to advise the members of Knesset on any issue of particular relevance to future generations also constitutes

an expansion of the legislative authorities. In order to provide such advice, the Commissioner must be familiar with the work of the executive branch and its influence on society. This places the Commission at the heart of public action at all levels, having to keep in direct contact with the public as the parliamentary representative.

The situation is even more notable in reality. Professional government officials, frustrated by the lack of coordination in government actions and with the difficulties of creating a change for the future within bureaucracy, find in the Commission the address to create influence through legislation. Unable to approach the Knesset independently - the Commission provides these officials with an appropriate platform for the enhancement of government activities and a bypass of bureaucracy. This is one of the wonderful and unique benefits brought by creating a state body to protect future generations.

After all, looking out for its own posterity is one of the basic instincts of each human being, both as an individual and as a member of society.

Ironically enough, this instinct seems to get lost in the process of climbing up the democratic pyramid - all the way to becoming an elected representative.

However, there is much more to the scope of this concept than a single institution with no operative authorities and a minor budget can deal with.

Indeed, the concept of future generations has found its way to all levels of governance as a result of the Commission's activities. Yet, this assimilation also commits the Commission to participate in and react to countless executive activities. Operating with meagre resources creates considerable frustration. Would it be helpful if the Commission was an independent statutory corporation as initially planned? The budget would surely be helpful. Hiring more people would surely enable a larger scope of activities. However, could it really deal with all government activities itself? This might be possible if the Commission was located in the State Comptroller's office and granted a larger staff. Such a location, however, would not enable positive action of training and educating as the State Comptroller focuses on inspection and auditing.

The Commission's most crucial role is thus to create enabling frameworks and to pass on values and knowledge as well as a different dimension of "thinking future". This will enable the conceptual "baby" that has been born to walk independently, so that, in time, theoretically there will be no need for a separate institution to represent the concern for future generations.

In this respect, the bill originally proposed and the now existing law do not differ a lot in regard to the institutionalisation of future generations.

There is only one direction, and it must be comprehensive and holistic - incorporating all governing levels to make this nearly impossible mission both possible and effective.

Notes

- 1 http://www.knesset.gov.il/sponsorship/future/data/About_E.asp. Rev. 2005-05-23
- 2 Bonnici, Ugo Mifsud (1998): Monotheistic Religions and Intergenerational Ethics. In: Agius, Emmanuel/ Chircop, Lionel (Ed.):Caring for Future Generations-Jewish, Christian and Islamic Perspectives. (1. edition 1998). United Kingdom/Twickenham: Adamatine Press Limited. p. 3-5.
- 3 Merieca, Joseph (1998): God as the Guardian of Future Generations. In: Agius, Emmanuel/ Chircop, Lionel (Ed.):Caring for Future Generations-Jewish, Christian and Islamic Perspectives. (1. edition 1998). United Kingdom/Twickenham: Adamatine Press Limited. p. 6-8
- 4 Annexed to this article.
- 5 Knesset protocol, Fifteen's Knesset, Fourth Session: "Brain Storming on the Vision of the Commission for Future Generations", June 18th, 2002, p. 3 (Held in the Hebrew University of Jerusalem) (in Hebrew).
- 6 Dror, Yehezkel (2001): The Capacity to Govern.: A Report to the Club of Rome. Paperback edition, 2002 (1st edition 2001). London and Portland, OR: Frank Cass
- 8 <http://www.passig.com>. Rev. 2005-05-23
- 9 Our Common Future Report of the World Commission on Environment and Development (the Brundtland Commission).(1987). <http://www.un.org/esa/sustdev/documents/docs/htm> Rev. 2005-05-20
- 10 The Rio Declaration, 1992; The Johannesburg Summit Plan of Implementation, 2002. <http://www.un.org/esa/sustdev/documents/docs/htm> Rev. 2005-05-20
- 11 Dalla Clayton, Barry/ Bass, Stephen (2002): Sustainable Development Strategies- A Resource Book. (1st edition 2002). London/USA: Earthscan Publications Ltd. (The International Institute for Environment and Development, OECD, UNDP)
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A proposal on the representation of future generations in Hungary - The ombudsman bill of Protect the Future!

BENEDEK JÁVOR

The existence of our moral obligations towards future generations may be approached in several ways. The moral responsibility to provide coming generations with the conditions for life can be justified through the broadening interpretation of general human rights, through the general comprehension of democratic principles, through the concept of the common heritage of human kind or based on Rawls's theory of justice. Whether or not we have moral responsibility for our descendants, for the future generations, goes without question. To make this moral imperative lead not to a guilty conscience but to concrete actions, it must be translated into the code of social activity that is the language of law and politics. In cases where our descendants are not able to raise their voice in their own interests, someone else must do it for them. The institution able to represent the future generations in community decision-making, in politics, has to be built on the three pillars mentioned above: on the fundamental human rights of future generations, on the right of participation and the right of free choice. Of course, these rights are in some sense symbolic, and speaking of rights in connection with future generations is largely metaphoric. As László Sólyom puts it: "The rights of those who will be born in the future mean obligations for us today. International law presumes that future generations have rights so our present obligations can be construed since rights go together with obligations."¹ These rights, however metaphoric they are, do exist. And our obligations that derive from them are very concrete.

The protection of future generations in international law

The concept of commitments towards future generations has spread to the field of law, as well. Most national law systems, like the Hungarian system, refer to the rights of future generations in many points. The legal development in international law, owing to which the rights of our descendants have gradually gained ground and acceptance, is even more apparent. Future generations were first mentioned in the preamble of the United Nations' Charter where one of the aims of establishing the UN was "to save succeeding generations from the scourge of war". The International Convention for the Regulation of Whaling, 1946, also referred to succeeding generations, and "recognizing the interest of the nations of the world in safeguarding for future generations the great natural resources" represented by the whales' livestock, created the international convention aimed at their protection. After these early references, the interests of future generations began to spread in relation to the sustainability concept drawn up in the report entitled "Our Common Future" in 1987. According to the Rio Declaration, "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."² Subsequent to the Rio meeting, several international agreements referred to the interests of the succeeding generations, such as conventions on climate, marine ecosystems, international waterways, protection of freshwaters and water bases or agreements on the protection of cultural heritage. The effects also appeared in legal practice: in 1993 the Philippines Supreme Court announced that, "Children and succeeding generations had standing claiming that the forestry practice was hurting their and the future generations' rights".³ In 1997 the UNESCO released a declaration on the protection of future generations.⁴ This document emphasises the responsibility that present generations have for future generations in assuring free choice, protecting and maintaining humankind, preserving terrestrial life, protecting the environment, preserving human genome and biodiversity, cultural diversity, the common heritage of humankind, peace and the possibilities of education and development one by one. Future generations are very definitely referred to in a lesser-known document, the New Delhi Declaration of the

International Law Association⁵ which deals with the connection between international law and sustainable development. The document not only states that:

“States are under a duty to manage natural resources, including natural resources within their own territory or jurisdiction, in a rational, sustainable and safe way so as to contribute to the development of their peoples, with particular regard for the rights of indigenous peoples, and to the conservation and sustainable use of natural resources and the protection of the environment, including ecosystems. States must take into account the needs of future generations in determining the rate of use of natural resources. All relevant actors (including States, industrial concerns and other components of civil society) are under a duty to avoid wasteful use of natural resources and promote waste minimization policies.”

But also makes it clear in relation to this duty that:

“The principle of integration reflects the interdependence of social, economic, financial, environmental and human rights aspects of principles and rules of international law relating to sustainable development as well as of the interdependence of the needs of current and future generations of humankind.(...) States should strive to resolve apparent conflicts between competing economic, financial, social and environmental considerations, whether through existing institutions or through the establishment of appropriate new institutions.” (italics my own)

Thus within less than half a century, international law went from dimly mentioning future generations to the possibility of introducing new institutions serving their rights.

Is it possible to institutionalise the representation of the rights of future generations?

The rights of future generations and our implied duties provoke the demand of the establishment of an institution (or institutions) able to resolutely represent these rights in democratic decision-making. Since we are talking of a group which itself cannot choose the best way of representing its interests, and cannot, given that they are neither voters, nor consumers, exert any political or economic influence, the classic ways of interest enforcement are unfeasible. Therefore, a special legal institution is necessary in order that it be possible to represent the rights of succeeding generations in decision-making, avoiding these legitimacy problems. The idea of the representation of future generations is definitely present in public opinion both internationally (Earth Council, UNESCO Future Generations' Program, Maltese Initiative for a "Guardian" in the Mediterranean region, etc.) and nationally (Israel: Knesset Commissioner for Future Generations; Poland: proposal for a Commission on the Future Generations; England: Green Party speaker for Future Generations; France: Council of Future Generations, nominated by the President; Finland: Committee for the Future, etc.). All these charge the tasks to a unique body standing outside the system of traditional interest enforcement and political representation and established with the purpose of protecting the rights and interests of future generations. The advantage of this solution is that no doubt arises concerning the legitimacy of representation. On the other hand, however, the creators of these institutions, to avoid practical problems and difficulties in solving questions of competence and legal contradictions, strictly limited their competences because of the unclear relation of the new institutions to state administration and the democratic institutional system as well as their standing outside the traditional political and democratic institutional system. They play instead a consultative role and cannot participate in effective decision-making processes. They are "heads" that think and speak but without real "punch", i.e. competence and authority by which they could really enforce the rights of future generations.

There is, however, an existing democratic institution which offers ways of enforcing the rights and interests of defenceless groups, and methods that are alternative yet integrated into the existing legal and institutional system: the ombudsman institution, otherwise known as the parliamentary commissioner. One of the advantages of the ombudsman institution is that its establishment and its nomination does not require the participation of those represented by it, therefore this institution could readily be set up to represent future generations without any legitimacy problems, and could fulfil the tasks that derive from the state's responsibility for future generations, as stated in UNESCO's Declaration, 1997. According to a decision brought by the Hungarian Constitutional Court, Article 54 of the Hungarian Constitution, which deals with the right for life and human dignity, also includes the duty of the state to “ensure the conditions of life for future generations”.

The roots of the ombudsman go back to the early 19th century Swedish governmental system, but in the second half of the 20th century, the institution has had an outstanding carrier. Presently the ombudsman institution at the national level of government exists in approximately 120 countries around the world, protecting very different fields of human rights. In several states (e.g. Canada, Italy, India, Australia, Spain), ombudsmen at the sub-national level have been added to the system⁶, and the European Union has established the ombudsman institution on an international level through the European Ombudsman, founded in 1995 to deal with complaints about maladministration by the institutions and bodies of the European Community.⁷

The ombudsman concept has also appeared in non-official initiatives, namely the International Ombudsman Centre for the Environment and Development (OmCED), founded in July 2000 by the IUCN and the Earth Council.⁸

The Hungarian proposal on the Ombudsman for Future Generations

Protect the Future! initiated the establishment of the institution of Parliamentary Commissioner for Future Generations in spring 2000. The bill was submitted by László Sólyom, the first president of the Hungarian Constitutional Court subsequent to regime change, who became the President of Hungary in August 2005. He endeavoured to harmonise the unique features of our obligations towards future generations with the regulations on Parliamentary Commissioners. As a legal “framework” he took Act LIX. of 1993, on Parliamentary Commissioners and the positions of the Ombudsman for Data Protection established by Act LXIII. of 1992 on Data Protection. The operation of the planned institution has three basic points that are indispensable for the effective work of the Ombudsman for Future Generations. These are: independence, wide competence and pro-activity.

The Ombudsman's independence raises some practical requirements. The Commissioner must be independent of state administration since a part of its investigations must be conducted precisely within state institutions. Consequently, an institution subordinate to any of the state organs, such as the nomination of a Ministerial Commissioner within the Ministry of Environment or the establishment of a committee or council within the Prime Minister's Office or any other governmental institution, is unacceptable.

According to our original conception, the Ombudsman for Future Generations must be independent of the present Ombudsman Offices. This means that we deemed the creation of a substitute position within the Office of the Parliamentary Commissioner for Civic Rights or the delegation of the competences and tasks of the proposed Commissioner to the General Ombudsman unacceptable. The protection of the rights of future generations cannot be ensured within the present structure, alongside the general protection of civic rights. The reasons for wishing to solve the protection of the rights of future generations within the present ombudsman system are based on the idea that should environmental protection

be given its own commissioner, then sooner or later an ombudsman for the protection of each constitutional primary right would inevitably have to be nominated. This would lead to a sudden growth in the number of Ombudsmen which would burst the existing ombudsman system. This reasoning, however, is faulty in several respects.

On the one hand, the Commissioner for Future Generations would not be a Commissioner for the Environment. Since we threaten our descendants' life conditions mainly by ruining the global environmental system, the Commissioner would primarily act in environmental cases, however, the background principle would not be environmental care but the rights of future generations to life, a healthy environment and free choice. Beside direct environmental cases the Commissioner would need to pay attention to the protection of cultural heritage, the operation of large social systems (e.g. systems of pensions or social insurance), long-term development concepts, infrastructural investments, the rate of state indebtedness and all decisions made in the state or private sector that concern periods of time bridging generations or which could influence the life conditions of the succeeding generations durably and irreversibly. Thus, the Parliamentary Commissioner for Future Generations would not be a Commissioner for the Environment, i.e. not a commissioner for a particular sector, but instead the executor of a democratic basic principle and the representative of sustainability. The Commissioner for Future Generations would therefore play a special role, and the establishment of this institution would not start an avalanche of new ombudsmen.

There are further arguments, too, in support of an independent commissioner. László Majtényi, who was the first Ombudsman for Data Protection, drew up three main criteria for establishing an ombudsman's office independently of the General Ombudsman.⁹ Should a confidence crisis evolve between the state sector and society concerning the vindication of a fundamental right, society's ability to defend itself and enforce its rights, which is low anyway, becomes weaker faced with strong economic, political or perhaps social pressure in favour of violating the given right. These were the arguments used as a basis by the Hungarian Parliament when establishing the offices of the Ombudsman for Data Protection and the Ombudsman for National and Ethnic Minority Rights which are independent of the General

Ombudsman. Concerning the prevalence of the rights of future generations, the above criteria are fulfilled since we cannot speak of our descendants' ability to enforce their rights while there are weighty economic - and social - interests exercising a strong influence in favour of violating their rights and destroying their life conditions. In this situation, it is inevitable for society to try to counterbalance this overwhelming pressure, giving the possibility of interest enforcement for the succeeding generations. In fact, an independent and self-reliant ombudsman's office is still too weak an institution, compared to the task it is facing. There are also those who argue that an institution far stronger than an ombudsman's office and charged with authoritative competence should be established.

Finally we concluded that the Parliamentary Commissioner for Civic Rights could not be responsible for the protection of the rights of future generations since this would lead to contradictions. The Commissioner for Civil Rights is neither a commissioner for human rights, nor that of general human rights and least of all a commissioner for human rights extended in time. It protects citizens, whilst succeeding generations make up a group of "non-existing" citizens. Their rights and interests may in many fields and in many respects overlap with those of current citizens. If I do not leak cyanide into a river, or I do not operate worn oil tankers in the oceans, I am not only ensuring the rights of future generations to get to know and use a more or less natural hydro-sphere, but am also preserving a more healthy and aesthetic environment worthy of human kind for present generations. Therefore, the rights of our descendants can, to a certain extent, be protected by the representation of the interests of others (present generations) and by the protection of civic rights. However, as future generations are not able to put pressure on today's decision-makers in favour of their own special interests, they will necessarily have to bear a considerable portion of the costs and destructive effects of our society's operation. And on this point the interests of present generations are opposed to those of future generations; their rights are contradictory in many respects. It is theoretically impossible for the same institution to represent both, since in many cases it is precisely the present generation which is in conflict with future citizens, their own descendants, the future generations.

The Ombudsman's wide competence must primarily be realised in the field of investigations. The decisions ruining the terrestrial life conditions of our descendants

are not only made within the governmental sector but also in the economic sector. That is why the investigations of the Commissioner for Future Generations - similarly to those of the Hungarian Ombudsman for Data Protection - would necessarily have to be extended to economic actors. If the Ombudsman were to have no authority in this field, it would be like a detective not allowed to visit a crime scene or question suspects. The wide competence of the Ombudsman, however, should mean only a strong investigatory competence, not a decision-making competence. The Ombudsman's proposals should be worthy of consideration. The Ombudsman should be able to exert pressure through public statements and represent the interests of future generations through its moral weight, but would not become an authority, as some people have feared in relation to the proposal on the new Ombudsman. In this respect the new Ombudsman would be in line with the classic ombudsman model, albeit in a stronger version, similar to that of the Hungarian Commissioner for Data Protection.

Pro-activity means that, unlike the usual agenda in environmental conflicts, the Commissioner should not only subsequently investigate the violation of the rights of future generations but must be active in preventing these violations. In practice this means two things. Firstly, the preliminary examination of bills introduced to the Parliament so that the MPs cannot accept laws and rules at odds with the fundamental interests of our descendants (the Israeli Commissioner for Future Generations, for instance, plays such a role). Secondly, the Commissioner could actively initiate the creation of laws and legal rules promoting the enforcement of the rights of succeeding generations, and could harmonise the legal system of the Hungarian Republic with the principle of sustainability.

The bill

The bill elaborated by Protect the Future! on the Ombudsman for Future Generations proposes the establishment of an institution that, while striving to interpret the

unsure and “soft” outlines of the protection of the succeeding generations as widely as possible, sets the reference base of its interventions in the effective Hungarian legal system so that the Commissioner’s recommendations and procedures be built on a “hard” legal base and it not be possible to query their validity. Under this dual pressure we outlined an institution possessing extremely strong competences in some fields as compared to the ombudsmen’s usual competence, in other cases its task stands closer to the role of the ombudsman as “advocate” or its status as a “guardian”, described well in international legal literature.¹⁰ This duality appears in Article 1 of the Bill:

“In order to ensure the representation of the interests of the future generations in long-term decisions fundamentally affecting their life conditions and to give effect to the laws on the right for a healthy environment and the protection of nature and the environment that are acknowledged and ordered to be enforced in Article 18. of the Constitution, the Parliament elects the Parliamentary Commissioner for Future Generations.”¹¹

The responsibility of the Ombudsman as an “advocate” or a “guardian” includes the representation of the interests of future generations in any decisions influencing their life conditions, but also protecting the right of succeeding generations to a healthy environment by ensuring that environmental laws and rules are observed. In this way the Ombudsman would possess effective legal means with which to not only influence the conscience and goodwill of society and decision-makers, but also to establish the possibility of enforcing legal remedy in the case of decisions concerning the environment. The Commissioner would control the prevalence of the orders of the Constitution and other legal rules that refer to preservation of the natural bases of the lives and health of growing and succeeding generations and the sustenance of environmental conditions. In this sphere the Ombudsman would be able to conduct official investigations and probes into the received notices (Section 1 (1)). In the case of the environment being endangered actively or by default, the Ombudsman would be able to summon the user of the environment to terminate the damage. If the necessary measures are not carried out, the Commissioner could initiate authorial measures, take legal proceedings, and could establish a summary offence or criminal information. The Ombudsman could summon the authorities to

carry out environmental measures, whose execution would have to be reported within 60 days, and the Commissioner could also turn to the superior organ of the authority. Whilst fulfilling its tasks, the Ombudsman would be entitled to request information and data on any questions possibly related to the condition, endangerment and impairment of the environment. These tools would ensure the strength of the Ombudsman so that it be possible to act effectively against the violation of the rights of future generations. The vertical aspect of its competence would allow the Ombudsman to investigate in depth activities threatening these rights. The Ombudsman, however, would only be able to act based on existing and effective legal regulations, therefore its activities would necessarily concern a relatively narrow field of decisions influencing the fate of succeeding generations, within protection of environmental conditions. The Ombudsman's competence, however, would also have a horizontal aspect. It would express its opinion in a sphere much wider than environmental care, in the case of every decision influencing the life conditions of future generations. For example, the Ombudsman would report on bills, the international covenants of the Hungarian Republic and governmental measures which exercise an effect on succeeding generations (e.g. the national development plans). Although the Ombudsman's recommendations would not be obligatory, they would serve as guidance for decision-makers, and the experiences of the last ten years of the Hungarian ombudsman system have shown that the Parliament and the state administration make considerable efforts to put recommendations into practice.

The history and prospects of the bill

Protect the Future! submitted the bill drawn up in spring 2000 to decision-makers, whilst we also initiated a public debate on the text. In order to win political support, we brought the concept of the rights of future generations and the proposal itself into the public domain. The written and electronic media have dealt with the proposal more than a 100 times during the past years, and the rights of our

descendants have become part of public opinion in Hungary.. However, the political reception was far from a clear success. The parties and MPs appealed to did not even react for a long time in spite of the fact that Protect the Future! organised a conference at the Hungarian Academy of Sciences in August 2000 to discuss the topic in depth, to which the political players concerned were also invited. Whilst more than 100 civil activists, experts, scientists and journalists came together at the meeting, the political sphere was represented by less than half a dozen MPs and officials. Seeing the restrained political interest in November 2000, Protect the Future! established the Representation of Future Generations (REFUGE), an initiative aiming to implement the contents of the bill within a civil frameworks, as well as undertaking to keep the topic and the bill on the agenda. The efforts made for the codification of the bill were also not given up. Protect the Future! conducted negotiations with the representatives of the political parties several times, trying to convince them to support the bill and submit it to Parliament. Finally, two Socialist members of the Parliament, Katalin Szili, then vice-president of the Parliament and Gyula Hegyi, who became the representative of the European Parliament in June 2004, submitted the bill to the Parliament as an individual motion, i.e. without their party's support. In accordance with the proceedings of the Hungarian Parliament, the bill was put on the agenda of the appointed parliamentary committees prior to the general debate. Although the representatives of Protect the Future! attended the committees' debates, urging heavily for the bill to be put to plenary debate. The Committee for the Environment deemed that the bill should be put to plenary debate, however by a small margin it failed in the other two committees. These developments were not very promising, yet the coming parliamentary elections (in spring 2002) gave us a gleam of hope. Katalin Szili, one of the submitters of the bill, promised to resubmit the bill to Parliament again should the Socialist Party became part of the government after the elections. Following the elections the Socialist party became the leading constituent of the new coalition, and Protect the Future! drew the submitters' attention to their former promises in a letter. Consequently, the two representatives resubmitted the bill on the Ombudsman for Future Generations to Parliament in June 2002. It appeared that the conditions for the bill being accepted were better under the new government.. However, soon it became clear that the initiative of the two representatives was not backed by the effective support of the Socialist Party. Not much later, in the autumn of 2002, two of the appointed

parliamentary committees, the Committee for the Environment and the Committee for the Economy put the bill on their agenda, and found it suitable to be taken to the stage of plenary debate, but the other committees, despite the reiterated urging of Protect the Future! have not discussed the bill for three years. The talks conducted with the new government's Ministry of Environment and Water Management and the Ombudsman for Civic Rights were aimed at dispelling the fears drawn up by the leaders of these institutions concerning interference into the interests their office and the planned ombudsman institution, however, we could not succeed in properly winning their support of the bill. Certain representatives - of all the Parliamentary parties - supported the initiative, but none of the political powers stood behind it institutionally. The representatives, who originally submitted the bill, also seem to have withdrawn their support for the proposal. Gyula Hegyi, who was more resolute in supporting the bill, became a representative of the European Parliament, Katalin Szili's attention, as one of the key figures in fights within the Socialist Party, was occupied with skirmishes concerning the change of government, the party leaders' succession and the election of the new President of the Hungarian Republic.

This was followed by three years of deep silence concerning the proposal. In November 2005 Protect the Future! and the Foundation for the Rights of Future Generations organised a meeting in the European Parliament in Brussels, where we introduced the work of the two organisations, and our proposal for the European representation of future generations. After this meeting Protect the Future! held a press conference in Budapest, to report the results of the workshop in Brussels, and also to publicly raise the question of the ombudsman bill, and to ask Ms. Katalin Szili, who originally submitted the bill, what she is willing to do in favour of the proposal's acceptance. This was accompanied with letters to the parliamentary committees concerned and to the head of the parliamentary factions.

As a result of this campaign, the other parliamentary committees put the bill on their agenda, and in December both committees accepted it, and recommended it for plenary discussion. During the debates in the commissions, some criticisms from the ombudsmen in office occurred concerning the bill (for example they raised the possibility of integrating the new institution into the existing ombudsmen's office) were raised and a discussion on the bill was initiated. Unfortunately, this negotiation

was not continued, and in spite of the serial promises of Ms. Katalin Szili that the bill would be sent to plenary debate, this did not happen until the end of the parliamentary cycle.

Although our proposal failed in this cycle, by the end of it general attention turned to the bill, within the political sphere as well as the media. At least, instead of general refusal, we gained precise textual criticism of the proposal, which can form the basis for further negotiations and development of the proposal. This gives us the hope that now that the new government and the Parliament have come into office, these negotiations will be continued, and finally that the office of the ombudsman for future generations will be set up.

During the negotiation process, there was one point on which we radically changed our original standpoint. This is the integration of the new institution into the existing ombudsmen office. We accepted, that in the present political environment there is a lack of will to create new institutions, and deregulation and cutbacks to the state administration are on the agenda. In the current situation we regard it as acceptable to set up the office of the Ombudsman for Future Generations inside the existing office and institutional system of the ombudsmen in Hungary.

The Hungarian proposal and EU-level representation of future generations

Some lessons can be drawn from the processes concerning the bill and from the bill,, which are also useful for the present initiative on the EU-representation of future generations.

Firstly, it seems to be evident that the claim for such an institution should and could be maintained for years, because political support for it can only be built up very slowly. Secondly, we have to accept that there is a greater chance of integrating new

functions into an existing institution than to set up a brand new office, in a situation where there are strong calls for deregulation, a “smaller state” or less administration (which is the situation both in Hungary and in the European Union).

Thirdly, we can convince ourselves that what is important is not ultimately a new institution, but new and appropriate competences to defend the rights of future generations.

Finally, we learned through our negotiations, that it is worth proposing a clearly defined institution, with both soft and hard tools, which are able to complement each other. This gives us a clear basis for negotiations, sets the basic working principles and the necessary competencies of the representation of future generations, which are crucial for its appropriate functioning, whatever the technical solution for its realisation shall be.

Notes

- ¹ Sólyom, László (2000): The rights of future generations and representing them in the present. In: Jávör, Benedek (Ed.): Rights of Future Generations. Budapest: Védegylet. p. 35-45
- ² UNCED Rio Declaration, 1992, Principle 3.
- ³ Minors Oposa vs. The Secretary of the Department of Environment and Natural Resources; The Philippines Supreme Court, 30 July 1993,
http://www.lawphil.net/judjuris/juri2003/jul2003/gr_131442_2003.html
<http://www.elaw.org/resources/text.asp?id=278>
More on the decision: <http://www.inece.org/4thvol1/oposa2.pdf>
- ⁴ UNESCO Declaration on the Responsibilities of the Present Generations Towards Future Generations, Paris, 1997
- ⁵ ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development, 2002, [http://www.ila-hq.org/pdf/Sustainable Development/Sus Dev Resolution + Declaration 2002 English.pdf](http://www.ila-hq.org/pdf/Sustainable%20Development/Sus%20Dev%20Resolution%20and%20Declaration%202002%20English.pdf)
- ⁶ International Ombudsman Institute: <http://www.law.ualberta.ca/centres/ioi/>
- ⁷ The European Ombudsman: <http://www.euro-ombudsman.eu.int/home/en/default.htm>
- ⁸ International Ombudsman Centre for the Environment and Development: www.omced.org
- ⁹ Majtényi, László (2000): Reflections on the representation of the rights of future generations. In: Jávör, Benedek (Ed.): Rights of Future Generations. Budapest: Védegylet. p. 46-51
- ¹⁰ Two inspiring works on the topic: Agius, Emmanuel - Busuttill, Salvino (Ed.) (1998): Future Generations and International Law. London: Earthscan; and Stone, Christopher (1996): Should we establish a guardian for future generations? In: Stone, Christopher: Should Trees Have Standing? - and other essays on law, morals and the environment, Dobbs Ferry: Oceana
- ¹¹ Full english text of the draft law in: Jávör, Benedek (Ed.): Rights of Future Generations. Budapest: Védegylet p. 65-74; available at: <http://www.zpok.hu/vedegylet/doc/rights.pdf>

Future Councils - an institutional tool to make long-term politics possible

by ROBERT UNTEREGGER

“Or, c'est cette perception claire de l'avenir, fondée sur les lumières et l'expérience, qui doit souvent manquer à la démocratie.”

Alexis de Tocqueville, De la démocratie en Amérique, 1835

Understanding the problem

In Switzerland the area filled with houses, roads and covered with cement and other construction materials has doubled within the last fifty years. Household waste has multiplied 3.6-fold, the output of CO₂ 4.5-fold, the consumption of gasoline 13-fold, the number of private cars 20-fold, the consumption of fuel for aeroplanes 38fold, and the goods transported through the country on the road by lorries about 1,000-fold. These figures illustrate the huge impact of modern human society on nature. There are other fields of action where human activity has transformed and is transforming our world profoundly within just a couple of years: households have been filled with all kinds of electrical tools - useful, pleasant and superfluous ones. Industrial over-production has led to the question: “How can people be led to ask

for things they don't actually use?" Progress in medicine has made possible the prolongation of human life and the treatment of many diseases that previously led to death. On the other hand, modern life has created new diseases as well and confronts us with the question of what a dignified life and a dignified death look like. Even goods for daily consumption are imported from all over the world. An example is food. The chive I bought last Saturday in a shop at one of the big Swiss food distributors came from South Africa, at the same price as if it had been of local origin. To find out which vegetables and fruits are currently available locally, you have to go to a nearby farmer as you are hardly likely to find this information by checking the food available at a typical grocery shop. There are no (food) seasons any more, as even food trading becomes a worldwide enterprise. The basis of the country's energy household has been changed from coal, water and wood to petrol, water and atomic technology within just a few years.

With the present tools of scientific knowledge, technological know-how and organisational power in economics and communication, it is possible to create huge new institutions that involve many people, technical know-how, materials, and are able to profoundly change our daily life and our society and its functioning. Those tools have been used to make a part of our world faster, a part of our ways wider and higher. But once the industrial means of production have been reached and exceeded, we cannot go on making the same things faster, wider and higher. If going on that way consequently, it comes to self-destruction. Our world, including human beings, is not designed for this kind of stressful programme.

Facing the risks and chances of the tools of scientific knowledge, technological know-how and organisational power in economics and communication, a new task arises: To conceive ways of living and of human societies and organisation that do not lead to self-destruction, but make use of those tools -if necessary - to support human life and to ensure its long-term future.. Until now, our western society and culture has by far missed that point.

How is it possible for a society to develop this way decade after decade? It is not lacking insight. Clear-thinking men and women have named and analysed the power of the aforementioned tools and the problems to which their impact on our

society leads again and again. In a small booklet titled *achtung: die schweiz*, Lucius Burkhardt, Max Frisch and Markus Kutter wrote in 1955 that, faced with the powers of industrial production and human organisation, there arises an urgent need for long-term planning. New ways of living and forms of society have to be invented that correspond to those powers and make use of them in an intelligent way. We cannot go on producing the same things and new things faster and faster. Max Imboden, professor of law and philosophy, in his booklet *Helvetisches Malaise*, written in 1964, called for a new institution to be created: its members, a team of scientists of different branches, should formulate various long-term aims for our society and develop corresponding options for strategic political action. Only on the basis of that strategic thinking and planning, would politicians be able to deal with long-term issues reasonably and in time, and not only when the results of problematic developments become all too obvious. In 1977, Denis de Rougemont published his book *L'avenir est notre affaire*, stressing the point that our future will not happen by itself, but that it has to be conceived and planned beforehand. If not, our future would become a non-future rather than a viable state of society. In the following year, a team of thirty Swiss scientists of various branches analysed the environmental and economic development of Swiss society from their different perspectives and proposed ways out of the “growth trap”. Unfortunately, they did not propose concrete practical, political and institutional measures, so their effort in thinking was not followed up by corresponding practical steps. These are only a few examples of texts written by clear-thinking men and women among several dozens that have been published in Switzerland since 1950. Obviously, knowledge does not lead automatically to action, and even less so, when the actions in question concern a whole society. What, then, are the mental and institutional factors that enable a human society to do the necessary long-term thinking, to conceive corresponding measures and to implement them in time, anticipating a sustainable future?

A question of political organisation: decision-drafting and decision-making

The main lines of our actual political organisation can be found in the first constitution of the Swiss Federation, written in 1848. At that time, the task was to find a political form that had to be both democratic and to find a balance of power between the more populous cantons of the bigger towns, most of them with a majority of citizens of Protestant confession, and the less populous cantons, most of them with Catholic majorities and less developed industry. Therefore, two councils were created: The National Council, where every member represents the same amount of citizens and election corresponds to the democratic principle of “one man, one vote”; and the Council of the Cantons, where every canton, regardless of its number of citizens, is represented by two members, elected in their own canton. The members of the Councils are elected for a period of four years and can be re-elected for several periods. In the second half of the 20th century, women were also granted democratic political rights. So the most important aspects of this political system of participation were the democratic rights to vote, to elect and be elected, and at the same time the balance of power between smaller and bigger cantons. In 1848 it was possible thereby to prevent a threatening civil war.

Today's challenges are very different: Serious civil wars between Cantons do not seem to be an actual threat, and basic democratic rights have a long tradition by now. But the technological, economic and organisational powers advancing the development of our society have multiplied and produced a speed of change unknown in former days, as shortly described at the beginning of this article. That speed combined with the worldwide network of trade, information, communication, and travelling has led to a new complexity that is very hard to deal with and to plan beforehand on a long-term basis. In accordance with this new situation, the traditional tasks of politicians have multiplied, and an immense new task has arisen: taking into account the long-term consequences of today's decisions, and making a wise, long-term use of the options that are offered by the driving powers at disposition in our society. When faced with these challenges, our political system

seems hardly fit to deal with them. There are several factors that make the way of working short-term in the current political system. There is an ever increasing number of daily affairs that have to be dealt with within very short deadlines. There is no longer any time left to work on long-term issues. Even when work is done on these issues, as soon as it comes to decision-making and voting this work is generally lost. The activity of parliaments and governments is strongly connected with the current development of public opinion, mass media and a preoccupation with being elected again for the next four-year-term. So long-term issues hardly have a place in today's decision-drafting and decision-making.

How would one conceive a political system that has to guarantee traditional democratic rights, be able to deal with the actual driving powers of our sophisticated society in an anticipatory way and shape and prepare a viable future on a long-term basis?

Since the development of human society is based to a certain degree on continuity, I do not propose a revolution to make everything anew. Our democratic institutions are far from perfect, but normally they do not lead to self-destruction or wars and instead offer space to develop and reform society in a more or less peaceful way. That, I think, is far from insignificant and worthy of being protected and cultivated. So the traditional democratic requirements are quite well provided for by the current democratic system - nevertheless this should not be reason not to try to make the system better.

On the other hand, it is obvious that there is an absence of institutional tools enabling our society to reflect on its development on a long-term basis, to give shape to a viable future, to work on concrete measures and to introduce them into today's decision-drafting and decision-making. To illustrate the dimension of action and future shaping that is at stake, there are some questions below that it would be worth considering and dealing with until well- founded answers are found and the first measures can be introduced:

- Should we try to reduce the consumption of petrol, used for heating our rooms, by new ways of house-building and technical measures on the same scale as when the system of national highways was constructed within 30 years during the last century? - Today, in Switzerland more petrol is used for house heating than fuel

for cars. It is quite probable that within 20 years we could more than halve the consumption of petrol for heating.

- Should we create a new generation of atomic plants or rather invest those billions of francs into measures economising energy consumption, freeing us from the problem of how to deal with the old atomic plants and where to place the radioactive waste?
- Half of the ever rising costs of our medical institutions arise from the treatment of patients within the last year of their life. Technically, many complicated measures are by now at the disposal of many citizens. Could we start to consider death as a natural part of our life again, seeking a good life while we are alive, so that we would not think it necessary to fight for a respite of some more days at the end of our earthly time?
- What kind of mobility is likely within twenty years?
- What kind of information and communication is likely, and how much?
- What kind of food is likely, and from where?

Our culture and our society produces long-term consequences, but our political system lacks the means to deal with these consequences in a transparent and anticipatory way. We therefore have to create the necessary institutions for that task and give them the necessary competences, so that they can carry out their work efficiently. Every institution has to be shaped according to the task that it is created for. When new tasks arise and the traditional ways of dealing with them do not fit any more, the institution has to be reshaped or a new one has to be created. Because our traditional political organisation is not prepared to deal with long-term issues and consequences of our complicated high-speed society, we must foster it with new institutional tools for that rather huge task. In short, I propose the creation of a new institution besides Parliament and Government

- to deal effectively with the long-term issues of our society, to think out propositions and options for a viable future on a long-term basis, to propose effective measures to realize those propositions;
- to strengthen it with the necessary competences, so that its work has an institutionally assured and effective impact on today's decision-drafting and decision-making.

This new kind of institution - let's call it future council - is to be understood as an institutional creation of a democratic society. Realising that it isn't able to deal with

its own long-term issues within the frame of its traditional political organisation, it institutes a new institutional tool for that task. People can vote about instituting such a future council. Its tasks, way of working and competences can be written down by law. If the proposition gets a majority, it will have democratic legitimacy. I do not think it makes much sense to discuss the question of whether the members of such a council represent future generations or not. They cannot be elected by future generations, and as a result cannot represent them in an operative way. The conceptual frame of representation is a wrong one for future councils. The initial question has been and is:

How can the decision-drafting and decision-making of our complicated society be organised so that it can deal with its long-term issues at all? And how can this be done in an anticipatory and transparent way?

Some conceptual propositions on future councils at a constitutional level

By now, quite a lot of thinking has been done about the ways future councils should work, what their competences could be, how their members would be elected and what their relations to government, parliament and public should be like. It is not the place here to discuss single concepts in detail, but rather to give the reader an overview and some concrete insights.

One task of a future council is to reflect on paths of development for our society that are also viable in the long-term. So the council should think about and conceive long-term paths for all the fields of action that are deemed important by its members. It should formulate measures that lead towards long-term aims and could be realised right now. It should not represent only one way of thinking, but offer room for many and different options. On this basis, a future council could provide a prospect for our society within the next twenty years, with key concepts and convincing pictures, so that it becomes possible to discuss in public the long-term

dimension of our society in an interesting and precise way. We should not go beyond a timeframe of more than around 20 years, since shaping and imagining the future would become too inaccurate. 20 years are a notion of time most of us have already experienced, and we have an idea of what and how a human society can change within this time.

What kind of people are fit for such a task? What kind of procedure would allow us to find them? We suggest forming a team which would propose the members of the future council. On the proposing team, the Government, the Parliament, non-profit-organisations, youth-organisations, universities, churches and some other institutions would have the right to delegate one person. In addition, the proposing team would prepare a list with the candidates that should form the future council. Then, the proposition would have to be confirmed by the government. This way quite a capable team could be formed. It would not be possible to elect the members for a second term so they would not be concerned about their re-election. They would be elected for a longer term, for example of nine or 12 years. To assure continuity, the council could partly be renewed every three to four years. Further conditions could be added, such as the proportion of younger and older members or of men and women.

A future council needs institutionalised competences, to ensure that its work enters today's decision-drafting and decision-making in an efficient way. Such competences could be:

- Discussing its propositions in public.
- The right to bring in its long-term view about issues dealt with by government and parliament in advance (decision-drafting), when those issues have a long-term impact.
- The right to make propositions of its own.
- The right to set a delay until an issue has to be dealt with by Government or Parliament, if the issue has been voted for by the people but has not been dealt with correspondingly for years.
- The right to fill in the “constitutional windows”, one window for each chapter, with its long-term aims for our society within 20 years. This window-work would fill the gap between the articles of the Constitution, often too generally formulated to ever become operative, and the laws, often resulting from daily discussions and urgent

issues and therefore lacking long-term reflection. Those windows would be the basis for the discussions between members of the future council and Members of Parliament and Government. Becoming accustomed to this system,, the Government and Parliament would learn more and more to take into account the long-term considerations of the future council.

- To give more power to the window-work of the future council, the council could be given the right for a qualified veto: If the discussions of the council did not lead to an agreement with government or parliament, the council could bring forward its veto and ask for a majority of, for example, two-thirds or three-quarters.

The work of the Swiss Future Council Foundation

future

When the Swiss constitution was rewritten in the 1990s, a small group of citizens proposed that a third chamber be created for preparing the future, in addition to Government and Parliament. The proposition was refused, but the idea led to the foundation of the small Swiss Future Council Foundation. It was founded in 1997 by around 200 private Swiss citizens. Its legal form is that of a foundation, but in practice it corresponds most closely to a movement.

We started by developing concepts about the tasks, ways of working, electoral procedures and competences of councils. And together with interested organisations and adolescents we organized the first future-council-days. This enabled us to test various procedural elements of possible future councils and develop our concepts in a dialectical way, as well as on a practical basis. Several Swiss Cantons were and some are still preparing new constitutions. So we have met and still meet the members of those constitutional assemblies and propose that they allow a place for a future council in their new constitutions. We also work with political communities, towns, regions and enterprises.

By now, some steps have been completed:

- Article 72 of the new constitution of the canton of Waadt prescribes the institution of a “prospective organ”. Its function will be to support the state in the task of preparing the future. Members of the constitutional assemblies of the cantons of Zurich and of Basel introduced the idea of a future council, but their propositions did not find majority support. In the canton of Graubünden, a parliamentary commission for strategic tasks was established in 2004. Liechtenstein has had a future office as part of the presidential department since 2004. The Austrian County of Vorarlberg also set up an office for future questions as part of the presidential department several years ago. Actually, in several Swiss cantons, the creation of future offices or councils is being discussed. Those small institutions do not (yet) correspond to the frame of a powerful future council as described above. But they are first steps into the right direction and they provide an institutionally assured place for the task of long-term future-shaping.
- In several political communities, there are groups, sometimes offices or even associations with a public mandate to do long-term future work.
- The youth-work of our Foundation started in 1997 with first youth future-councils. The adolescents develop ideas for our society in twenty years times, based subjects they are interested in, and formulate preliminary measures. Then they implement small projects of their own or together with interested adults, or they try to reach an agreement about first measures with local decision makers. By now, we have created the national-wide permanent action called “noW future!”. Throughout the whole year, school classes can carry out local future projects and send us their documentation. On the annual Future-Day, the best projects are presented in public, and the adolescents can discuss their ideas with national decision-makers and future-pioneers. At Cudrefin, on the shore of Lake Neuchâtel, we are setting up a first centre for future shaping and sustainable development. School classes can go there and spend future weeks and start preparing our future by thinking as well as by doing.
- Internationally, Jakob von Uexkull and Herbert Girardet have started an initiative for a world future council. Last year, we were able to publish a small booklet with the title *Creating the World Future Council*. Now they are trying to form a first council, based on a worldwide network of non-profit-organisations.

· Conceptually, the Foundation has developed various tools and procedures, so that future councils can be instituted in schools, political communities, counties, states and also enterprises.

In order to prepare a viable future, we have to add future councils to our list of traditional democratic institutions: in schools, political communities, counties, states and on an international level. That process has already begun. The faster the better.

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III. Legal and institutional background for setting up an institution for the representation of future generations in Europe

The Rights of Future Generations in International Law

By *KATE COOK* and *RACHEL TAYLOR*

Introduction

1. The theory of intergenerational equity holds that “each generation has an obligation to future generations to pass on the natural and cultural resources of the planet in no worse condition than received and to provide reasonable access to the legacy for the present generation”.¹ There are frequent references to intergenerational equity in international law. Nevertheless, whilst this approach can be traced throughout many of the most important treaties on environmental law and sustainable development, there remain a number of distinct problems in founding rights of future generations in international law and in translating these interests into binding standards.

2. There are three particular problems in founding a right of future generations in international law. Firstly, whilst many sources of international law place responsibility, or even an obligation, on the current generation to consider the interests of those in the future, few explicitly provide for a correlative right of those future generations. Whilst some international lawyers consider that the current law does provide for such rights, this is a controversial topic and there are also many who disagree. Secondly, even if it is accepted that intergenerational rights do exist, the precise content of those rights, and particularly the extent to which the activities of the present

generation should be constrained to protect those rights, remains unclear. Finally, action on behalf of future generations, particularly direct representation in legal proceedings, remains rare.

3. In this paper, we begin by outlining the foundations of intergenerational equity in international law. We then assess the current legal status of intergenerational equity, in particular whether it possesses the character of a binding legal norm or a legal right. Finally we will consider the extent to which future generations are represented in international law, particularly in court proceedings.

Intergenerational Equity: Foundations in International Law

Treaties

4. The idea that the environment, or particular resources, should be preserved for the benefit of future generations has a relatively long history in international environmental law. The first reference to the concept in an international treaty appears to have been in the preamble to the 1946 International Convention for the Regulation of Whaling, which started with recognition of:

“...the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks...”

5. Following on from the Whaling Convention, a large number of other international instruments have referred to what would now be termed intergenerational equity within their preambles. Whilst the Whaling Convention is concerned with the protection of a “natural resource”, further international instruments have recognised the inherent value of the natural environment for future generations, as well its utility value. For example, the preamble to the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) recognises that:

“Wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come.”

6. Similarly, the 1992 UN Convention on Biological Diversity (CBD) states in its preamble that the state parties are: “Determined to conserve and sustainably use biological diversity for the benefit of present and future generations.”

7. There are numerous further examples of references to intergenerational equity within the preambles of international instruments². Such references do not, of themselves, create legally binding obligations although they do assist in ascertaining the purpose of a treaty and in its subsequent interpretation. A treaty's preamble defines, in general terms, the purposes and considerations that led the parties to conclude the treaty. In addition to setting forth the parties motives, the preamble also sets forth the object and purpose of the treaty. The legal effect of a preamble has been considered by various international tribunals. In the Beagle Channel Arbitration, the tribunal stated:

*“Although Preambles to treaties do not usually-nor are they intended to-contain provisions or dispositions of substance-(in short they are not operative clauses)-it is nevertheless generally accepted that they may be relevant and important as guides to the manner in which the Treaty should be interpreted, and in order, as it were, to “situate” it in respect of its object and purpose.”*³

8. In the context of intergenerational equity therefore, preambular references may potentially serve to expand the scope of substantive obligations contained within the treaty. It has to be said however that this remains a relatively untested possibility thus far.

9. Express commitment to intergenerational equity is rarely found within the substantive provisions of a treaty. One important treaty that does contain such an obligation is the 1992 United Nations Framework Convention on Climate Change, Article 3 of which states that:

“The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.”

This is a clear recognition of intergenerational equity within the text of the treaty itself.

10. Although rare, further examples of treaty commitments can be found. For example the 1992 Convention on the Protection and Use of Transboundary Watercourse and Lakes, Article 5(c) states that:

“...water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs.”

11. It is clear then that a number of widely ratified binding legal instruments have recognised the importance of intergenerational equity albeit that this recognition is most frequently found within the preamble to the instrument.

Non-binding Instruments

12. Further support for intergenerational equity can be found in a number of key non-binding instruments. For example, the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment contains in Principles 1 and 2 the statements that:

Principle 1: *“[Man] bears a solemn responsibility to protect and improve the environment for present and future generations”* and

Principle 2: *“The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations.”*

13. Further, the principle of intergenerational equity was explicitly recognised as one of the core principles of sustainable development in the 1992 Rio Declaration which states at Principle 3:

“The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.”

This principle was repeated in identical terms in paragraph 11 of the 1993 Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights.

14. Similarly paragraph 8.7 of Agenda 21 states that:

“Governments, in cooperation, where appropriate, with international organizations, should adopt a national strategy for sustainable development... [Its] goals should be to ensure socially responsible economic development while protecting the resource base and the environment for the benefit of future generations.”

15. In addition to these documents, which have considered the interests of future generations as part of a broader project, some attention has been given to the interests of future generations in their own right. The UNESCO Declaration on the Responsibilities of the Present Generations Towards Future Generations adopted by the General Conference of UNESCO on 12 November, 1997 provides further consideration of the responsibilities towards future generations. The Declaration is a broad document covering inter alia the interest of future generations in the protection of the environment, cultural heritage, peace, development, education and non-discrimination. The statement is important as recognition of the intergenerational context of the problems faced by the international community and the interests of future generations in those solutions. The Declaration is a mere 12 articles long and is very much concerned with aspirations as opposed to a detailed consideration of the interests of future generations. This is perhaps inevitable for such a brief consideration of such a broad range of issues. A further point to note is that the declaration is not phrased in terms of rights. Instead it is concerned with the “responsibilities” of the present generation and the “needs and interests” of future generations. This is clear from the first article of the Declaration which states:

“Article 1: The present generations have the responsibility of ensuring that the needs and interests of present and future generations are fully safeguarded.”

General Assembly Resolutions

16. The General Assembly has passed a series of resolutions that recognise the interests of future generations and the responsibilities of states to preserve the environment for future generations. For example on 20 October, 1980 the Assembly adopted resolution 35/8, concerning the arms race, which at paragraph 1:

“Proclaims the historical responsibility of States for the preservation of nature for present and future generations.”

17. The General Assembly has subsequently produced a large number of resolutions and decisions that recognise the importance of future generations in the protection of the environment. Examples of such resolutions and decisions include: resolution 50/115 of 20 December 1995; resolution 51/184 of 16 December 1996; resolution 52/199 of 18 December 1997; resolution 54/222 of 22 December 1999; decision 55/443 of 20 December 2000; resolution 56/199 of 21 December 2001; resolution 57/257 of 20 December 2002; resolution 58/243 of 23 December 2003; resolution 59/234 of 22 December 2004; and most recently resolution 60/197 of 6 March 2006.

18. Each of these resolutions has concerned the protection of the environment for present and future generations. Nevertheless, the resolutions do not go further in defining what the interests of future generations might be. Instead the references to future generations are usually confined to the title and preambular provisions.

Judicial Recognition

19. The most important international judicial recognition of the principle of inter-generational equity is probably to be found in Judge Weeramantry's dissenting opinion to the Order of the International Court of Justice on 22 September 1995 in *New Zealand v France*⁴.

20. Judge Weeramantry considered that intergenerational equity was “an important and rapidly developing principle of contemporary international law”, although he acknowledged that it was not to be found in the judgments of the court to date. Judge Weeramantry's opinion is a dissenting judgment of a sole judge and is not binding, but nevertheless it is important as a statement of high level judicial recognition of the principle of intergenerational equity.

21. The International Court of Justice, in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, referred to the environment as including the health of unborn generations and went on to refer to the potential of nuclear weapons to cause damage to generations to come. The Court stated that it must take this factor into account in addressing the issues before it.⁵

Status of Intergenerational Equity in International Law

22. The above outline survey of intergenerational equity and international law suggests that there is considerable acceptance of an obligation to protect the interests of future generations. This obligation is recognised in a large number of instruments, including multilateral treaties and other instruments that have been accepted by a large number of states. Whilst it is clear that the principle of intergenerational equity has been widely recognised in international law, there are still considerable doubts as to its precise status.

23. The first question to be addressed is whether intergenerational equity has yet reached the status of a binding norm in international law. Although the principle has been widely recognised, there are a number of arguments that suggest that it has not yet acquired this binding status.⁶ First, whilst there are numerous references to intergenerational equity, there are very few examples of accepted legal obligations to comply with the principle. The references in international documents to intergenerational equity are almost all non-binding. Even where intergenerational equity is referred to within a binding legal instrument, the principle is almost always confined to the preamble and so has status as an interpretive principle rather than a binding legal obligation. In the few cases where the principle of intergenerational equity does appear within the treaty text, most notably in Article 3 of the 1992 United Nations Framework Convention on Climate Change, the principle is expressed in hortatory terms with little explanation as to what the principle will require.

24. A second reason for doubting that the principle has achieved the status of a binding norm is that considerable doubt remains as to the exact requirements of the principle. The principle of intergenerational equity raises serious questions such as to how to determine the sacrifices which each generation is required to make for the sake of other generations; how to define a generation; how the wants and needs of future generations can be determined; and how uncertainty over future environmental changes and development of knowledge should be accommodated. Whilst the principle may well be important despite these questions, there is a strong argument that the principle is not capable of achieving normative status whilst such uncertainties remain. Vaughan Lowe makes this argument considering that:

"The principle of inter-generational equity is, in normative terms, a chimera. It is hard to see what legal content inter-generational equity could have..."

and that given these uncertainties:

*"inter-generational equity can scarcely be more than a weak injunction to take into account the interest of future generations when engaging in, or permitting others to engage in, present activities. It lacks normative status."*⁷

25. For these reasons, it is perhaps too early to suggest that intergenerational equity has achieved the status of binding law in international law, save in those instances where states have accepted specific legal commitments.

26. Some of the difficulties become clearer when one considers specific potential applications of the principle. A number of treaties recognise the interest of future generations in biodiversity, both as a whole and in relation to individual species. If one argues from this that intergenerational equity requires that states take action to prevent the loss of a particular species for example, the question arises as to whether this requirement is qualified by the conflicting interests of current generations in economic development (a specific project which threatens a remaining habitat); whether such a requirement in fact adds anything to the interests of current generations in preserving the species concerned and whether the requirement applies in equal measure to all species or more pressingly to those with

strong cultural significance (the tiger or the whale) or potential utility (as yet unidentified plant species which may have medicinal applications). Is the key distinguishing factor for the rights of future generations, the inability of future generations, as opposed to current generations, to press their case through the democratic process (where available). How do we define the content of a right without access to the choices and preferences of the rights holders? One might presume that there are at least core environmental goals which any generation would want to possess e.g. clean water and the maintenance of biodiversity but even these can be measured against security and economic objectives which may also bring great benefits to future generations, even arguably securing their existence if they serve to combat extreme poverty.

27. The argument that international law recognises a legal right possessed by future generations is also controversial. Firstly, where the principle of intergenerational equity appears in international texts it tends to be phrased in terms of interests rather than rights. For example, in none of the treaties mentioned above is there any reference to the rights of future generations, as opposed to their interests.

28. Although there may be doubts as to whether intergenerational equity has achieved the formal status of a binding norm or a binding right, nevertheless the principle has been widely recognised and is of considerable importance as a principle in international environmental law. As such intergenerational equity may be used as a powerful tool to interpret existing obligation or to develop new ones. To achieve this potential considerable work needs to be done on the principle. Broadly the two areas that require further work are (1) the content of the principle of intergenerational equity and (2) its use in practice.

Content of Intergenerational Equity

29. At present the references to intergenerational equity within the international sources have tended to be aspirational in character with few attempts to elaborate on the meaning of those terms. Instead the principle seems to have been adopted with little discussion as to precisely what it might entail. As Sands notes in considering the use of the principle in the UNCED instruments (quoted above):

*“There was little, if any, discussion in the negotiations of the language here referred to which indicates what practical consequences might flow from a recognition of the needs of future generations. In each case the principle appears to have been accepted as an article of faith, drawing on pre-existing language in earlier treaty and other soft law developments.”*⁸

30. This reluctance to consider the implications of intergenerational equity is evident in other instances too. For example, no reference to the concept can be found in the Plan of Implementation of the World Summit on Sustainable Development.

Representing Future Generations: The Courts

31. A useful potential use of the principle of intergenerational equity is the possibility of using the principle to give standing to petitioners on behalf of future generations. If such standing is recognised, the principle will give widespread ability to use the courts to challenge actions with potentially detrimental effects on the environment.

32. The most famous example of such a case is *Minors Oposa v Secretary of the Department of Environmental and Natural Resources (DENR)*, a decision of the Supreme Court of the Philippines. In this case 44 minors and an NGO were granted standing to challenge logging permits that threatened the remaining virgin rainforest

within the country. Importantly the petitioners did not assert standing simply on their own behalf but on behalf of generations yet to be born. The Court recognised such standing noting that:

“We find no difficulty in ruling that they can, for themselves, for others and for the succeeding generations, file a class suit. Their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility in so far as the right to a balanced and healthful ecology is concerned.”

33. The Minors Oposa case clearly illustrates the potential of the intergenerational equity principle to act as a practical tool to achieve environmental protection. Nevertheless, it should be noted that the case was decided in the specific context of the law of the Philippines and does not represent a precedent that would allow standing for all petitioners in similar cases. In particular, the “right to a balanced and healthful ecology” was specifically located within the Constitution of the Philippines and the intergenerational right was derived from an interpretation of that right, rather than from international law.

34. Whether the decision of the Philippines Supreme Court will be followed in other jurisdictions will depend on the substantive and procedural law of the country in question. Certainly representative proceedings are recognised in other contexts such as litigation on behalf of future beneficiaries of a trust.

35. Representation of future generations in international proceedings is also perhaps a possible area for development, although there remain difficulties in viewing individuals or groups, let alone future unascertained individuals or groups, as subjects of international law. At present no such example can be found although there are examples of states suing on behalf of current generations in respect of past wrongs.

Representing Future Generations: Other Forms of Representation

36. Although there is no widespread recognition of representative standing for future generations in legal proceedings as yet, there is also a role for the representation of future generations before other international bodies. In particular there is a need for the representation of future generations in the creation of new legal obligations and the interpretation of existing obligations.

37. There have been calls for a formal representative on behalf of future generations although as yet none have come to fruition. Perhaps the most important proposal to date was that of Malta to the 1992 Rio Conference (UNCED). Malta proposed that:

“An authorized person (‘guardian’) should be appointed to represent future generations at various international forums, particularly the United Nations. The “guardian” would be entitled to appear before institutions whose decisions could significantly affect the future of the species to argue the case on behalf of future generations, hence bringing out the long-term implications of proposed action and presenting alternatives. His role would not be to decide, but to promote enlightened decisions. Thus, the guardian would have the power of advocacy, to plead for future generations.”

38. This proposal was not accepted, instead a brief note within Agenda 21 at Chapter 38.45 states that the proposal was noted but not acted upon. Further similar proposals have also failed to date.

39. If the interests of future generations are to move beyond the broad, non-binding statements of principle that are currently found in international law, it is essential that those interests are taken account of in international forums in the development and creation of new standards. Such a role does not have to be performed by an intergovernmental institution; indeed there are many who argue that it would be better performed by NGOs working within their areas of expertise and independent from the funding of member states.⁹

Conclusions

40. Intergenerational equity has an established and widely recognised place as a principle within international environmental law. There remain, however, difficulties in establishing that principle as a binding legal obligation or legal right. Many of the references within international documents are non-binding in nature and aspirational in character. Few attempts have been made by states or treaty bodies to develop the requirements of the principle. Although much has been written on this subject it has not yet received serious detailed attention in treaties or from international organisations. In particular, there remain serious questions as to how intergenerational equity relates to other principles or theories of international law such as the intragenerational equity or state sovereignty over resources. In this context it is perhaps not yet possible to state that intergenerational equity takes the form of a binding legal principle.

41. Despite these limitations, intergenerational equity nevertheless has the potential to act as an influential principle within international environmental law. The experience of the *Minors Oposa* case illustrates that the principle can be used to gain standing to challenge environmental damage through the courts. Although such actions will depend on the procedural and substantive rules of the jurisdiction in question, the case shows that the principle of intergenerational equity can act as a powerful tool.

42. Similarly, there is a clear need for development of the meaning of intergenerational equity and its (distinctive) implications both for existing legal standards and the development of new obligations. Such clarification may only be possible if there is specific (although not necessarily separate) representation of the interests of future generations in legal proceedings.

Notes

¹ Weiss 'In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity' pp37-38

² In addition to those referenced here, further preambular references to intergenerational equity include the following instruments: the 1968 African Convention on the Conservation of Nature and National Resources; the 1977 Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques; the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals; the 1979 Berne Convention on the Conservation of European Wildlife and Natural Habitats; the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources; the 1992 Paris Convention for the Protection of the Marine Environment of the North-East Atlantic; the 1992 Framework Convention on Climate Change; the 1992 Convention on the Transboundary Effects of Industrial Accidents; and the 1994 Convention to Combat Desertification.

³ Case concerning a dispute between Argentina and Chile concerning the Beagle Channel (1977), United Nations, Reports of International Arbitral Awards, Vol. XXI, p. 187, para. 169

⁴ 'Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests Case ' (1995) ICJ Reports 288.

⁵ Legality of the Threat or Use of Nuclear Weapons (1996) ICJ Reports 226, paragraphs 29-36 of the Opinion.

⁶ See, for example Redgwell Intergenerational trusts and environmental protection, Chapter 5, for an argument that intergenerational equity has not yet achieved binding status.

⁷ Lowe 'Sustainable Development and Unsustainable Arguments' in Ch 2 Alan Boyle and David Freestone (eds.) International law and sustainable development : past achievements and future challenges

⁸ Sands 'Protecting Future Generations: Precedents and Practicalities' Ch 8 Emmanuel Agius and Salvino Busuttil (eds.) Future generations and international law.

⁹ See e.g. Sands 'Protecting Future Generations: Precedents and Practicalities' Ch 8 Emmanuel Agius and Salvino Busuttil (eds.) Future generations and international law.

The possible approaches and possibilities of institutional representation of future generations in Europe A Guardian/Ombudsman of Future Generations

DOCUMENT FOR DISCUSSION PURPOSES

MAURICE SHERIDAN

Possible Factors Determining Institutional Approaches and Possibilities

1. It may be thought that the potentialities for institutional representations depend on identifying certain key elements or parameters for any such representation. Some possible main factors are set out below. The relevance of any given factor depends on what importance is applied to another. The factors are not intended to be seen as independent of each other, but together may be used to form a matrix for assisting in or contributing to resolution of options and possibilities for institutional representation.

2. Origin?

A.1 How is the Guardian/Ombudsman to come into being?

A.2 Is it to be self-creating? If so, how and by whom?

A.3 Is it to be created by a legally binding decision or by a statement of commitment? In either event, how and by whom?

3. Composition?

A.1 Is it to be self-creating, appointed, nominated or elected? In whichever event, by whom?

A.2 Is it to be a person, an office, a commission, agency or some other entity?

A.3 If more than one person, of whom or which entities is it to be composed?

4. Legal personality?

A.1 Is it intended that the Guardian/Ombudsman have its own legal personality?

A.2 If so, should that personality be such as to provide for its operation within or by affiliation with a larger body (for example the EU) or separately?

A.3 Is any such status to be national-based, and if so, where, or internationally and if so, where?

B.1 If it will not have its own legal personality, what status should the Guardian/Ombudsman have?

B.2 Also, if it will not have its own legal personality, within which, if any, other body is it to be located?

5. Location?

A.1 Is the Guardian/Ombudsman to be self-standing with no particular location, or is it to have a national or regional base? If so, where?

6. Geographical scope?

A.1 The question posed refers to "Europe", but Europe is an uncertain concept. What does "Europe" mean here?

A.2 Is its intended geographical remit to be geographical Europe (if so what are the limits), or political Europe, and if so, what are the limits?

A.3 If located within or created by a European-based entity, which should apply - the EU, the Council of Europe, the OECD, the UNECE, OSCE, the European Environment Agency (EEA) or some other entity?

7. Substantive scope?

A.1 The reference to “future generations” is undefined as to scope of operation. What is intended to be covered?

A.2 Is it intended, for example, that it have a key focus, such as on environmental issues, economic, social, political, development or some other area, or is it intended that the remit be general as to impact on future generations?

A.3 In what respect is the Guardian/Ombudsman acting? For example, is it in respect of policies, plans, programmes, legal acts, administrative acts or other?

A.4 In respect of what actions taken by which other persons is the Guardian/Ombudsman acting? For example, regional bodies (such as the EU, Council of Europe), national (which?), local authorities (to which level?), corporate (which?), associations of persons (which?) or also individuals?

8. Authority of its actions?

A.1 Is it intended that the Guardian/Ombudsman should take decisions that are legally binding, if so, how and concerning whom?

A.2 Is its role to be consultative, advisory, adjudicative, cooperative, participatory in decisions of others (if so, whose decisions and how), or to carry out reviews?

A.3 Is it intended to act a priori or post-event?

9. Locus standi?

A.1 Is the Guardian/Ombudsman intended to have legal standing, if so, how, where and for what purpose?

10. Funding?

A.1 How is the Guardian/Ombudsman to be funded - self-funding, own-resources (which?), funded by participants (who, how and why?) and/or externally funded?

11. Difference?

A.1 Is the Guardian/Ombudsman to be an add-on to something else, to some other existing operations or skills-base or to contribute something different? In whichever event, how, what and why?

Analysis

Making the difference

12. It may be considered that the role of Guardian/Ombudsman will have a greater impact or reception if it is intended that it adds something that is not happening at present. The fact that this role may concentrate minds or attention on issues that are dealt with but not with the required attention and focus will not detract from the positive contribution and difference that such a role may bring.

13. One good example of such an additional role in a field of activity where there are necessarily many entities involved is The Commission for Democracy through Law (otherwise known as the Venice Commission), set up under the auspices of the Council of Europe. Its constituent document is attached in Appendix 1.

14. It is well known that constitutional law, a key focus of the Venice Commission, has many practitioners and many participating entities across many countries, yet the Venice Commission identified a species of activity that was deemed to merit the creation of a specialist body. Its success may be measured by the fact that a number of countries joined its operations after its creation.

Origin, location, geographical and substantive scope

15. It is important to identify what geographical and substantive scope is intended for the Guardian/Ombudsman.

16. There are various bodies active in Europe in the area of sustainable development and concern for protection of future generations.

The European Union

17. A brief consideration of the general activities of the EU may be sufficient to illustrate the participation and contribution to this subject matter of the body.

18. Sustainable development is an overarching Treaty objective for the EU. To that extent it is a formative concept in all that the EU is legitimised to do. The substantive scope of the EU is sufficiently wide to encompass all likely various elements of what might be regarded as relevant to protecting future generations - that is, it includes a legal authority to act with regard to the environment, social change, economic consequences, is inherently political, and intimately concerned with development.

19. A review of recent environmental directives (from the last decade) shows repeated reference to the concept of sustainable development and the importance of integration of relevant policies (and intrinsically, it might be argued, the protection of future generations).

20. The EU has legal authority under the Treaty to create an entity such as a Guardian/Ombudsman for Future Generations. Depending on what constituent document is intended, no Treaty amendment is necessary for its creation - see further below.

21. The EU is thus clearly an entity within which or by which a Guardian/Ombudsman might be created. The EU also has legal capacity to create such an entity with a European geographical scope and with broad substantive scope for protecting future generations.

22. Note that the EU comprises only 25 member states and therefore does not extend to the whole of a potential geographical or political Europe. However, that need not be a barrier to creation of a body by/within the EU such as the Guardian/Ombudsman with a wider geographical or political remit, although the fact of it being based within the EU might be considered to fundamentally limit its effective ambit to the EU membership, subject to a constituent document providing otherwise of course. The EEA is a useful case study here.

The European Environment Agency

23. The EU has created the EEA to which states other than EU member states may adhere. The EEA currently has some 31 participating states, with others waiting for membership (see Appendix 2).

24. Its constituent document (Council Regulation 1210/90/EEC) (in Appendix 3) holds the potential to be a vehicle for an entity such as a Guardian/Ombudsman (see Article 2(iii), (vi), Article 3(1), but any such role is likely to be limited by the breadth of the EEA's own remit - which is, however, a predominantly information gathering role. It does not appear to have any power to adopt acts which are binding on its participatory member states. Its role appears effectively limited to discussion, review and consultation. That role has no binding legal consequence - compare the EU Treaty obligations on, for example, consulting the European Parliament, where failure to consult renders the resulting legal act invalid.

25. Notwithstanding, the EEA's Strategy 2004-2008 states that "it is the aim of the [EEA] to expand [its] capacities further by producing a series of integrated assessments on the interactions between the major sectors and environment, and a range of horizon-scanning and scenario studies to help anticipate potential threats and opportunities to establish a viable, secure and stable pattern of sustainable development".

26. Note, however, that the EEA is expressly required to "avoid duplicating the existing activities of other institutions and bodies". This may also prove a barrier to association of the Guardian/Ombudsman with the EEA.

The United Nations Economic Commission for Europe

27. The remit of the UNECE (a body established by the UN and subject to the General Supervision of the Security Council - Article 1 of its Terms of Reference - Appendix 4) is wide enough to allow for an active role regarding protecting future generations. Its membership includes all EU member states but has a wider membership than that (see the Terms of Reference, Article 7, and the attachment to Appendix 4).

28. Article 1 of its Terms of Reference allows it *inter alia* to "initiate and participate in measures for facilitating concerted action for the economic reconstruction of Europe". It also has authority to "establish such subsidiary bodies as it deems appropriate for facilitating the carrying on of its responsibilities" - Articles 5 and 50-53 of its Terms of Reference. Such subsidiary bodies may establish their own rules of procedure.

29. The UNECE is an entity within which or by which a Guardian/Ombudsman might be created. It has legal capacity to create such an entity with a European geographical scope and with a substantive scope for protecting future generations. However, its legal authority is less than that of the EU and restricted principally to promoting action, not requiring action to be taken.

30. The UNECE has a commitment to protecting future generations as may be seen in its recent statement on Sustainable Development in the UNECE Region (website updated in March 2006). That statement seeks to implement, inter alia, Agenda 21, with particular emphasis put on the Johannesburg Declaration on Sustainable Development and a Plan of Implementation. The Johannesburg Declaration, section XI addresses expressly the “Institutional Framework for Sustainable Development”. This aims to lead inter alia to integration of the economic, social and environmental dimensions of sustainable development in a balanced manner; strengthening coherence, coordination and monitoring and promoting the rule of law and strengthening governmental institutions.

The Organisation for Economic Development

31. The OECD has a remit wide enough to encompass protection of future generations - see its constituent document, Articles 1 and 2 (Appendix 5). Its current membership appears limited to only 19 of the EU member states, with other non-EU states members (Appendix 6).

32. It has a competence to establish “such subsidiary bodies as may be required for the achievement of the aims of the Organisation” - Article 9.

33. It has also adopted a series of acts, by way of Decisions, Recommendations and Declarations which are capable of being understood as also addressing protection of future generations (Appendix 7).

34. The OECD stated quite clearly its own commitment to protecting the interests of future generations in its Environmental Strategy for the First Decade of the 21st Century - Towards Environmentally Sustainable Development. In that document, the OECD stated that OECD countries “have an important role to play by building

capacity in non-member countries and working with other countries to develop effective and equitable burden sharing arrangements for addressing global environmental problems, recognising their common but differentiated responsibilities". And again, "The state of natural goods and services should be viewed from a long-term perspective of at least several generations, focusing in particular on irreversible changes and taking into account indirect effects and complex causal chains, including relatively inconspicuous phenomenon that may trigger large harmful effects". It suggests that (in relation to the UNFCCC) the OECD should "contribute to increased institutional capacity for policy design and implementation that takes the multiple environmental benefits of policies (ancillary effects) into account".

35. The OECD is an entity within which or by which a Guardian/Ombudsman might be created. It also has legal capacity to create such an entity with a European geographical scope (although note its limited European membership) and with substantive scope for protecting future generations. However, its remit is limited mostly to inter-governmental activity, and subsidiary bodies may be limited to an advisory role, with any outcome still only operative at most on the inter-governmental level.

The Council of Europe

36. The Council of Europe has a remit sufficiently wide to encompass concerns for protecting future generations (see its constituent document, Articles 1 and 2 (Appendix 8). Its membership includes all 25 EU member states, as well as many others (Appendix 9).

37. The Council has authority (through its Committee of Ministers) to set up "advisory and technical committees or commissions for such specific purposes as it may deem advisable" - Article 17 of its constituent document; as well as authority through its Consultative Assembly to "establish committees and commissions to consider and report to it any matters that falls within its competence under Article 23" - Article 24. Article 23 grants a competence to "discuss and make recommendations on any matter within the aim and scope of the Council...as defined in Article 1, as well as on any matter referred to it by the Committee of Ministers with a request for its opinion".

38. In its Resolution of May 1951 (Appendix 10), the Council was authorised by the Committee of Ministers to “take the initiative of instituting negotiations between members with a view to the creation of European specialised authorities, each with its own competence in the economic, social, cultural, legal, administrative or other related fields”.

39. An example of a body created by the Council has been given above with the Venice Commission. This has the status of an “independent consultative body”, set up by the Committee of Ministers - see Appendix 1, Article 1.1.

40. The Council of Europe is an entity within which or by which a Guardian/Ombudsman might be created. It also has legal capacity to create such an entity with a European geographical scope (note its extended European membership) and with substantive scope for protecting future generations. Its remit is not limited to inter-governmental activity in the sense that it can promote international treaties, thus creating obligations binding on the participating signatory states. Its subsidiary bodies need not be limited to an advisory role, with any outcome still only operative at most on the inter-governmental level, but may have binding authority - cf. the European Court of Human Rights.

The United Nations Commission for Sustainable Development (UNCSD)

41. This has been set up as a “functional commission” of the UN Economic and Social Council (Appendix 11). Its reach is global and high level. It does not appear to have independent legal authority to create its own subsidiary or advisory bodies. Its activities are not specifically directed to Europe.

“Self-created” and self-standing

42. An entity such as a Guardian/Ombudsman might also be created as an entirely new entity outside existing structures. Such an example may well be the European Environmental Bureau (EEB) (Appendix 12). This is a legal association created in essence under Belgian law, composed of NGOs from some 31 countries, particularly concerned with the protection and defence of the environment - Article 4 of its constituent document. It has consultative status at and relations with inter alia the Council of Europe, the European Commission and European Parliament, the OECD and UN CSD.

43. If intended to be of an “international” statute, it needs to be created by international persons, either states and/or international organisations.

44. If national, or international only in the sense that constituent members are based in a number of states, an appropriate vehicle needs to be identified for this purpose.

Legal personality and locus standi

45. It is possible, as the example of the EEA shows, that any such creation of a Guardian/Ombudsman might have separate (and international) legal personality. This compares with, for example, a subsidiary consultative body, perhaps such as the Venice Commission. Although the latter is a separate body, it is to be doubted whether it has separate legal personality, as opposed merely to having its own personality in the sense of being a separate, independent consultative body. It may have a separate national-based legal personality as the EEB example illustrates.

46. Not having separate legal personality does not eliminate the importance of the tasks that such an entity may undertake. It may, however, mean that it lacks the independence of position to enforce its resultant work.

47. Benefits of separate legal personality include the ability to take steps to ensure that its remit is respected and its powers acknowledged. This touches also on locus standi and the ability to take legal action for the protection of its own interests.

Composition

48. Relevant options here include:

- (i) as an individual person/office - such as the European Ombudsman;
- (ii) as a subsidiary entity - such as a UNECE subsidiary body;
- (iii) as a subsidiary, but independent consultative body - such as the Venice Commission;
- (iv) as an agency - such as the EEA;
- (v) as a separate legal entity within an international organisation such as the Economic and Social Committee (ESC) within the EU;
- (vi) as a separate independent office within an international organisation such as the former Commission for Human Rights; or
- (vii) as a separate national-based legal entity such as the EEB.

49. If other than an individual, composition of a Guardian/Ombudsman entity may be drawn from:

- (i) representatives elected directly to that body - such as the European Parliament;
- (ii) drawn from elected representatives from another body - such as the EU's Committee of the Regions (drawn from elected local authority members);
- (iii) nominated by participating states - such as the ESC or Venice Commission;
- (iv) nominated by participatory stakeholders - such as with competent bodies and the Consultation Forum for the Eco-Labeling Board; or
- (v) by simple membership of the entity itself such as with the EEB.

Authority of its actions

50. A Guardian/Ombudsman may have as sole or overlapping competences such as:

- (i) a purely advisory role - that is, where there is no obligation either to consult or to take into account its decisions or opinions - such as for subsidiary bodies of the OECD or the EEA, or even the EEB;
- (ii) an advisory role where there is an obligation to consult, and inherently an obligation to take into account its opinions- such as with the ESC;
- (iii) a formal consultation role - such as with certain functions of the European Parliament;
- (iv) a formal cooperation role, such as with the European Parliament's right to suggest amendments to legislative drafts;
- (v) a formal binding decision-making role such as with the OECD Decisions;
- (vi) a determinative role such as opinions that are expected to be followed - such as with the European Ombudsman; or
- (vii) authoritative opinions worthy of attention such as with the EEB, WWF, Friends of the Earth or Amnesty International, for example.

Funding

51. Options here include as sole or overlapping cases:

- (i) self funding - that is, it arranges its own finances - for example through membership fees, project work and donations;
- (ii) funded directly by participatory states;
- (iii) funded directly by participatory stakeholders; or
- (iv) funded from a budget of the organisation within which it is based, such as with the Venice Commission.

Making a difference?

52. It may be argued that there is scope for a separate specialised body such as the Guardian/Ombudsman for Future Generations. It could provide a specialised advisory/consultative role within an international organisation with relevant breadth of competences or to such an organisation. The prime candidate for this is the EU. Such a role would arguably be better carried out through a formal existence created by or sponsored by such an organisation. A key task may be considered that of ensuring that any separate entity is marked by sufficient difference from existing arrangements so that it merits the time and effort needed to support its creation and operations.

IV. Proposal for the institutional representation of future generations in Europe

Concept paper proposing an institutional solution to guardian-activity for the next generation¹

Dr. JÁNOS MIKÓ

Preliminary

The current proposal has been drafted as a concept paper and not as a bill. This is the preference of the drafter following the work-shop in Budapest in May 2006: as before, it is reasonable to make a draft of a bill later, and so to allow room to integrate the relevant input resulting from the discussion of a broad circle of experts. Probably a legally formulated draft, due to its special definitions, could cause difficulties for participants without a legal background. Finally: certain components of a common bill (e.g. preamble, entry into force, technical adaptation) are actually of no relevance to the discussion of the issues during the workshop.

Objectives²

1. *The general objective* of this work is to find a practicable institutional solution for a guardian-activity (only) for the next generation.

Because the proposal is targeting a practical solution at legal/institutional level and it does not deal with theoretical issues particularly, *hic et nunc* it speaks about the rights of one generation, i.e. about the rights of the next (one) generation and not about the rights of further generations.³

The application of the categories of two or even more generations activates discussion on “the dilemma of numbers”: if we are dealing with the rights of more generations then we have to take a decision about the category of two or three or even more generations. (Otherwise my opinion is that discussing this dilemma is not superfluous. On the contrary, it is very important because of the possible support it gives to the issue of “time-limitation of future generations as subject-at-law”.)

Furthermore: The usual wording of “(one) future generation” is not an exact definition because verification is lacking for which one of (countless) future generations we are talking about.

2. *Additional objectives* (partly as consequences of the general objective) of the proposal are -

2.1 the character of the proposed institution should match the political and legal character of the existing regulated (drafted) basis for sustainable development

2.2 the impact of the institution should originate from an international body in its own right (and not, for example, from a network or agreement of national bodies)

2.3 the proposed institution should have an inbuilt-mechanism politically, legally and geographically for self-development without undertaking any legal measures in the fields of its constitution or competency

2.4 the aim and nature of the institutional activity should be as clearly and widely understandable and acceptable as possible

2.5 it should be possible to fund the implementation of the proposal at a low cost level.

Consequences/Principles

1. Based on the objectives mentioned above, the proposal suggests an institutional solution at the level of the European Union (and not at the level of any other international organisation)

2. Based on the institutional structure and the current difficulties of restructuring the European Union the proposal seeks to integrate guardian-activity for the next generation into an existing body of the European Union as an absorbent body (and not to create a new organ for it)

3. The absorbent body should belong to or be near the monitoring power of the European Union and not to the others (organs mainly with legislative or executive or judicial powers)

4. In terms of sustainable development, the components of regulated activities of the European Union and its Member States are developing rapidly and organically⁴ and sustainable development as a guiding principle is constantly becoming established in more and more sectors of the European Union's policies (horizontal integration of the issue) and the nature of regulations is moving forward from political statements to regulations with legal character (vertical integration of the issue)

5. As the proposal targets a practical solution and does not deal with theoretical issues (mentioned above) it does not give answer for a discussion on components of sustainable development, on horizontal integration of environmental principles into

other sectorial policies, on indicators to monitor the implementation of both (sustainable development and horizontal integration), and on impact assessment etc.

Furthermore: from our point of view there is no need to define in detail the content of “sustainable development” and the content of “rights of next generation”:

“Sustainable development” is defined by the European Union itself through its policymaking and legislation⁵. The duty of an institute like an Ombudsman for the next generation should be to follow this policymaking and legislation actively and the Ombudsman should have the legitimacy to form its own opinion of possible relevance to the topic. It is obliged to interpret the relevant content of related categories and principles (e.g. sustainable development or biodiversity).

Also there is no need to define in detail the content of “rights of next generation”. It should be the duty of the Ombudsman to form an opinion on relevant issues as his/her own right continuously and as determined by the necessity of the actual process in this field.

Summa summarum: the proposal is based on a model of mentioned components which are determined by practicability: the aim of the new regulation is to serve the rights of the next generation through focusing on sustainable development with special instruments: horizontal integration of environmental principles into other sectorial policies, indicators to monitor implementation, impact assessment etc.

6. The proposal is based on the assumption⁶ that the existing basis of regulations with binding character⁷, which has developed rapidly in the past 15 years, will be developed further in the next decade in relation to our issue.

7. The focus on sustainable development⁸ is the most important but not the only field of activity for serving the rights of the next generation: beyond ecological relations there is also a necessity to serve the rights of the next generation in terms of other values, e.g. cultural values (the issue of sustainable development or diversity of cultural values), the right for space of decision-making⁹, etc.

The conceptual proposal

1. The proposal is based on the statement of integrating guardian-activity for the next generation into a working body of the European Union and not based on establishing a new body for this activity. In the current crucial situation due to restructuring of European Institutions and the current enlargement process (which probably will continue in the next decade) the proposal shares the (pessimistic) opinion on the opportunity for creating a new institute (as a brand-new organ of the European Union) for guardian-activity¹⁰.

2. The current proposal contains *three options* concerning the integration of guardian-activity for the next generation into a working organ of the European Union:

- A. Integration of guardian-activity for the next generation into the Office of the European Ombudsman's duties or
- B. Integration of guardian-activity for the next generation into the Committee of the European Parliament's duties or
- C. Integration of guardian-activity for the next generation into the duties of the European Union Agency for Fundamental Rights Agency's (the creation of this body is in progress!)

In the case of Option A and Option B turning guardian activity into an established, effectively-working and highly respected body does not need special political and long-term performance of professional practice for acknowledgement. Of course it requires fewer legal modifications and last but not least requires lower financial costs.

The detailed proposal (the options)

Option A: Integration of guardian-activity for the next generation into the Office of the European Ombudsman's duties

1. The Ombudsman's duties belong to the field and nature of monitoring (with some exceptions): this meets the nature of the regulations of the Communities on sustainable development and meets his/her observation of matters concerning the rights of the next generation.

2. For the implementation of the proposal some legal modifications are needed. The required core-modifications and supplemental regulations to the current legal basis are related to -

2.1 Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties¹¹;

2.2 Decision of the European Ombudsman adopting implementing provisions¹²;

2.3 The Treaties of the European Union;

(The Maastricht Treaty, in Article 138e /actual Numbering: Article 195/ introduced the office of the Ombudsman, who deals with complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Community institutions or bodies.)

2.4 The Charter of Fundamental Rights¹³ (Article 43) declared the right to refer cases of maladministration to the Ombudsman of the Union(as mentioned above: Point1.3).

3. For the implementation of this proposal in legal fields the most difficult challenge seems to be the necessity to modify the European Union Treaty. It is necessary to supplement the Ombudsman's duties with rules for observing, reporting and initiating actions.

4. It is also assumed to be a great work to integrate guardianship into the Charter of Fundamental Rights (Article 43) and with this modification the current Ombudsman's duties concerning cases of maladministration would be extended.¹⁴

5. The duties of the European Ombudsman shall be extended with guardianship for the rights of the next generation:

5.1 In accordance with the powers conferred on the EU institutions and bodies by the Treaties to safeguard fundamental rights of the next generation, the Ombudsman shall perform his/her duties by observing, reporting, preliminary opinion-expression, consulting and initiation on actions concerning sustainable development or concerning long-term interests of future generation.

5.2 (The duties of the Ombudsman:)

The Ombudsman is empowered -

5.2.1 to report his/her observations concerning the European Union's policy-making and legislation on issues with long-term consequences for the next generation;

5.2.2 to report his/her observations on the implementation and enforcement of policies and legislation of the European Union related to sustainable development;

5.2.3 to receive and to evaluate claims, opinions, petitions and proposals on sustainable development or proposals concerning the interests of the next generation referred by any natural or legal person residing or with registered office in a member state of the European Union;

5.2.4 to conduct inquiries on his/her own initiative in cases concerning member states of the European Union should he/she find relevant cause concerning the interests of the next generation;

5.2.5 to observe and to make statements on policies with long-term consequences for European Union's Member State;

5.2.6 to express a preliminary opinion on the draft of the European Union's international agreement with a long-term obligation in the field of sustainable development and common human cultural heritage;

5.2.7 to consult with bodies and institutions of the European Union or its Member States, with public organisations that deal with issue of sustainable development or issues of long-term interest to the next generation;

5.2.8 to submit recommendation and initiate actions for better understanding of sustainable development or on issues of long-term interest to the next generation;

5.2.9 to issue annual reports on his/her activities to the bodies and institutions of the European Union and its Member States.

Option B: Integration of guardian-activity for the next generation into the duties of the Committee of the European Parliament

Currently the number of committees is 20 and they cover the total field of the European policies in 24 fields. The number and related competences of the committees are regulated in the Parliament's Rules of Procedure.

The main task of the permanent committees is to debate proposals for new legislation put forward by the European Commission (draw up, amend and adopt legislative proposals) and to draw up ex officio reports. They consider Commission and Council proposals and, where necessary, draw up reports to be presented to the plenary assembly. For any proposal for legislation or other initiative, a rapporteur is nominated according to an agreement between the political groups which make up the Parliament. The members of the Commission or their representatives must appear in front of the relevant committee, in order to provide clarification about Commission decisions, documents for the Council and the position adopted by the Commission in the Council. This gives the committees a wide-ranging insight into the activities of the Commission and, given that the details of Commission meetings are not usually made public, the Parliament thus acquires full access even to what

is sometimes confidential information. The committees are thus able to monitor the Commission effectively. The committees regularly consult independent experts or representatives of the organisations or economic sectors concerned.

The committees meet once or twice a month in Brussels. The Parliament can also set up sub-committees and temporary committees to deal with specific issues, and committees of inquiry under its supervisory remit. The committees also keep contact directly with the parliaments of member states and the parliaments of third parties.

1. Related to our proposal for representation of the next generation, currently the following (standing) committees are potential absorbent bodies:

- 1.1. Committee for Environment, Public Health and Food Safety
- 1.2. Committee for Employment and Social Affairs
- 1.3. Committee for Women's Rights and Gender Equality

1.1 *The Committee for Environment, Public Health and Food Safety*¹⁵

This committee is responsible for environmental policy and environmental protection measures, for public health and for food safety issues.¹⁶

1.2 *Committee for Employment and Social Affairs*

This committee is responsible for employment policy and all aspects of social policy and (amongst other issues) for social dialogue. Currently the Committee for Employment and Social Affairs is creating a European Social Model for the future¹⁷ and has issued a Report on demographic challenges and solidarity between the generations¹⁸.

The European Social Model reflects a common set of values, based on (among others) social justice and solidarity and considers social development one of the pillars for sustainable development and sees demographic evolutions in Europe with major consequences for prosperity and for the relations between the generations.¹⁹

In the report on demographic challenges and solidarity between the generations the Committee notices that the Commission in its Green Paper²⁰ “does not systematically incorporate the gender perspective at either the macro or micro level

of analysis, although this is essential to develop comprehensive reflections and actions”²¹. For the Committee the demographic change is a horizontal task and it is necessary to take it into account in an appropriate manner, in the form of mainstreaming, in all the Union's activities.²² The report advocates a new solidarity across generations and further development of existing social models in the European Union.²³

1.3 *Committee for Women's Rights and Gender Equality*

This Committee is responsible for the protection of women's rights in the Union and related EU measures. Its reports frequently deal with social issues and the social policy of the Union. The Committee contributed actively to the European Social Model and demographic challenges and solidarity between the generations.

2. Should guardian activity for the next generation be integrated into a parliamentary committee, its duties include (1) debating proposals for new legislation put forward by the European Commission (draw up, amend and adopt legislative proposal) and (2) draw up ex officio reports (monitoring).

3. To implement the proposal only small legal modifications are needed to the Parliament's Rules of Procedure.

4. The duties of the Committee shall extend to guardianship for the rights of the next generation: In accordance with the powers conferred on the EU institutions and bodies by the Treaties to safeguard fundamental rights of the next generation, the Committee shall perform its duties by discussing proposals for new legislation and drawing up ex officio reports, giving preliminary opinions, consulting and initiation on actions concerning sustainable development or concerning long-term interests of future generation.

Option C: Integration of guardian-activity for the next generation into the duties of the European Union Agency for Fundamental Rights

1. Based on the decision of the meeting of the member states within the European Council on 12 and 13 December 2003 and after calling the European Parliament

to submit a legislative proposal concerning the Agency, the Commission presented its proposal for a council regulation establishing the European Union Agency for Fundamental Rights and a proposal for a council decision empowering the Agency to pursue its activities (hereinafter: proposals).²⁴ Under the adopted proposals the mandate of the European Monitoring Centre on Racism and Xenophobia /EUMC/ will extend to include fundamental rights.

The Agency shall fulfil its tasks in complete independence²⁵ and its operations are supervised by the European Ombudsman.²⁶

2. The aim of the Agency is to strengthen freedom, security and justice in the European Union and the tasks of the Agency in relation to -

- information and data (e.g. collecting, recording, analysing and disseminating relevant materials; monitoring; developing methods to improve quality of data; carrying out or promoting scientific research and surveys)

- giving advice (e.g. formulating conclusions and issuing opinions for the European Union and its member states; putting its expertise at the disposal of the Council; issuing an annual report on the situation of fundamental rights; highlighting examples of good practice; issuing thematic reports)

- cooperation with civil society (e.g. networking, promoting dialogue at European level; organising conferences, campaigns, seminars and meetings at European level)

- awareness-raising (e.g. developing a communication strategy aimed at raising the awareness of the general public; making documents and resources accessible to the public and preparing educational materials)

3. The Agency has no legislative or executive powers to examine, for example, individual complaints, to issue regulations or carry out normative monitoring.

Based on the proposals, a centre of experts on fundamental rights issues will be established at the EU level.

4. The Council will carry out negotiations on the proposals and the European Parliament will be consulted. According to the proposals, the Agency should operate from 1 January 2007 onwards.

5. As emphasised, the Charter of Fundamental Rights is considered as the primary (but not only) reference document for the functioning of the Agency. The creation of an Agency will make the Charter more tangible. The thematic areas of the Agency's activities will be defined by a Multi-annual Framework (adopted by the Commission for a five year time-frame). The Multi-annual Framework will also set limits for the Agency's work.²⁷

6. To implement Option C there is no need to extend the duties of the Agency to guardianship for the rights of the next generation.

7. As (1) the Charter of Fundamental Rights of the European Union, as a part of the European Constitution in its current state, has no legal binding (it is not in force) and because (2) the proposals - as an alternative solution - give no possible access to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)²⁸ and because (3) the rights of the next/future generation(s) are not detailed concerning either (the Charter of Fundamental Rights of the European Union and ECHR), implementing this option would mean a huge challenge to incorporate these rights.

Evaluation of the options

In terms of practicability, Option A and Option C involve more difficulties regarding the implementation of the proposal (both politically and legally) that guardianship of the rights of the next generation be integrated into the Charter of Fundamental Rights. In the case of Option B political work and lobby-activity are needed ("only") from the part of parliamentary political groups and slight legal modifications to

Parliament's Rules of Procedure. Option B also seems to be feasible in terms of financing.

In terms of the power of the institutions there is not a great difference: the Ombudsman's power covers monitoring and reporting and the powers of committees are determined by the actual power of the Parliament. NB: the committees discuss proposals for new legislation (draw up, amend and adopt legislative proposals) put forward by EU bodies.

In terms of "nature of matter" (guardianship of future generation/s) Option A and Option C seems to be more suitable because such a horizontal task is well-matched to the profile of an Ombudsman institute or the profile of the Agency for Fundamental Rights. The committees deal with sectorial issues regarding the Parliament's Rules of Procedure. As a "horizontal instrument" the committee chairs coordinate the work of the committees in the Conference of Committee Chairmen.

In terms of independence the options do not differ greatly: the Ombudsman is appointed and empowered by the Parliament and submits reports to the Parliament - but he/she is completely independent in the performance of his/her duties. The Committees are part of the Parliament. The Agency for Fundamental Rights shall fulfil its tasks in complete independence and its operation is supervised by the European Ombudsman.²⁹

Evaluation of current field of activity: the field of activity of the Ombudsman Office is as far from the proposed issue as that of the committees. The Ombudsman Office deals with cases of maladministration and although the presented aforementioned committees frequently face the issues of "intergeneration" or "solidarity between the generations", in all documents issued by these committees the categories only cover current generations and never future generations.(!) In the case of the Agency for Fundamental Rights, the profile of the proposed duties in the horizontal sense is not so far from the rights of future generations: the fundamental rights are not listed according to their priority.

However, in terms of the time dimension (planning and implementation), paying attention to the broad field of activity and taking into account the variety of required

measures - we should calculate with a significant difference ("vertical differences") between all of three Options.

Overview of related international organisations as possibilities for an institutional solution to guardian-activity for the next generation³⁰

In general:

The proposal rejects the possibility of establishing a brand new international body for guardian-activity by states or international organisations at European or at wider level.

The main argument for the rejection is that the related organisations focusing on environmental issues operate without any or only with a significantly less developed basis for policies or legal regulations on sustainable development or rights of the next generation compared to the European Union's activities in these fields. And without such policies or legal regulations a monitoring activity has no enforcement power, it can only articulate opinions to report for political discussions.

Further arguments are that international organisations have no inbuilt-mechanisms (political, legal and geographical) for self-development without taking any legal measures to modify their statute -unlike the European Union -, and because they have no organ such as an Ombudsman or Guardian it is much more difficult to establish such an institute.

The possible variations:

1. Establishing a common new international body by states

The present concept paper rejects the possibility of establishing a brand new international body for guardian-activity by states at European or at wider level. States at European or at a wider level are facing difficulties of current accession processes or political and financial crises (etc.) In any case, establishing a new body with international competences could only be achieved through international agreements among related states.

2. Establishing a common new organ (or institute) for guardian-activity at European or at a wider level by (more) international organisations

The present concept paper also rejects the possibility of establishing a common new organ (or institute) for guardian-activity at European (or at wider level) by more international organisations. The related international organisations have to deal with cooperation among themselves and partly they are also to deal with integration of their parallel structures to maximise the efficiency of their ongoing activities. Some of them (e.g. The Council of Europe) are facing restructuring difficulties. In any case, the establishment of a new body with international competences could only be achieved through international agreements among the related international organisations. In some cases special authorisation by the members is also needed.

3. Establishing a new organ (or institute) for guardian-activity at European or at a wider level by an international organisation

The present concept paper also rejects the possibility of establishing a new organ (or institute) for guardian-activity at European (or at wider level) by an international organisation. Some of the international organizations (e.g. European Environmental Agency; European Environmental Bureau) focus on environmental issues and are determined structurally. The common basis of regulation of the United Nations Commission for Sustainable Development (UNCSD) has no legal character and has less binding force in comparison to the European Union. The activity of the Organisation for Economic Cooperation and Development (OECD) is strongly determined by economic viewpoints. In any case, establishing a new body with international competences could be achieved only through international agreements among related states. In some cases it would also require the special authorisation of the members.

Notes

¹ Here and after: Proposal or Concept paper

² The objectives cover indirectly a quasi priority list (as a “check-list”) for evaluating the other possibilities (mentioned later) taken into consideration for this proposal to create an organ or institute for guardian activity

³ In the political sense and from the point of view of public perception such a dilemma has no relevance. I also share the opinion that “it would be more accurate to speak not of generations but of a constant flow (...) or to speak not about future generations, but future humanity as the holder of right”. (UNITAR programme of training for the application of environmental law, Course VI., International environmental law: General Framework, UNITAR, 1998., p. 106. Concerning this issue see further: Documentation of Environmental Law Programme of the United Nations Institute for Training and Research (UNITAR), www.unitar.org/training_materials_publication.htm

⁴ “Rapidly and organic”: since the Rio Earth Summit in 1992 the integration of environmental policy into other EU-policies has been a priority permanently for the Community and therefore one of the key mechanisms for implementation of sustainable development policy (5th Environmental Action Programme, “Towards Sustainability” 1993-2000; and for the 6th Environmental Action Programme (until 2010) integration is one of the strategic approaches. One of the consequences is organic development: units are obliged to develop and extend the issue to other sectors (horizontal development) and to give the topic a more concrete legal character (vertical development). Currently policymaking has a self-dynamic through regulated duties, structural changes, legal competencies, working force, etc.

⁵ In spite of permanent discussion on certain theoretical issues according to the relevant official Community documents, the sectors, components, indicators, dimensions, etc. of sustainable development are quite transparent. Sectors: 1. Climate change and clean energy; 2. Public health; 3. Social exclusion, demography and migration; 4. Natural resources; 5. Transport; 6. Global poverty and development challenges; Indicators: Large number of indicators (a total of 155!) at Level 1, 2 and 3; Dimensions: Economic, Social and Environmental. (For more information see some recent documents, e.g.: On the review of the Sustainable Development Strategy - A platform for action (Communication from the Commission of the European Communities to the Council and the European Parliament, Brussels, 13.12.2005 COM/2005/ 658 final); Sustainable Developments Indicators to monitor the implementation of the EU Sustainable Development Strategy (Communication from the Commission of the European Communities, Brussels, 9.2.2005 SEC/2005/ 161 final), Evaluation of Approaches to Integrating Sustainability into Community Policies, Final summary report (European Commission Secretariat General, September 2004)

⁶ Of course the assumption is also made that beside policymaking and legislation parallel running discussions on certain theoretical issues should be continued as usual.

⁷ Parts of the *Acquis Communautaire* regarding the Treaties of the Communities

⁸ The proposal takes the view that a focus (only) on the environmental rights of next generation would be a step back: in the last decade policy making and legislation of the Communities has developed rapidly and moved from environmental protection to sustainable development. The concept of sustainable development itself has also changed from a substantial concept to a procedural concept. The activity of the Ombudsman for the next generation could set in motion a further stage of this activity of the European Union.

⁹ An interesting example for serving the rights of the future generation to cultural values and decision-making: after the excavation of 50 % of the archaeological find of Neanderthal man in Germany further excavation was stopped in 2000 with the argument that coming generation should have the possibility to continue it.

¹⁰ Concerning the dilemma (advantages and disadvantages) of creating new European organ see further: Erica Howard (Queen Mary, University of London, UK): *The European Union Agency for Fundamental Rights* (E.H.R.L.R. Issue 4., Sweet and Maxwell LTD 2006) pp. 450-451

¹¹ Adopted by Parliament on 9 March 1994 (OJ L 113, 4.5.1994, p. 15) and amended by its decision of 14 March 2002 deleting Articles 12 and 16 (OJ L 92, 9.4.2002, p. 13)

¹² Adopted on 8 July 2002 and amended by decision of the Ombudsman of 5 April 2004

¹³ Adopted in Nice (France), 7 December 2000, currently it is not in force

¹⁴ Because of the failure ratification process of the new Treaties in some countries there is a stage for new negotiation and it seems to be a chance for the integration of the guardianship.

¹⁵ The Committee for Environment, Public Health and Food Safety set up in 1973 and its subsequent increase in size from 36 to 63 members and in power arose (e.g.) through extended responsibilities in the Union on environmental matters. Its most close Commission interlocutors are the DG Environment and DG Health and Consumer Protection. The Committee has oversight and political responsibility for the activities of the European Environmental Agency (EEA), the European Food Safety Authority (EFSA), the Food and Veterinary Office (FVO), the European Medicines Agency (EMA), and the European Centre for Disease Prevention and Control (ECDC)

¹⁶ Its competences have been changed only slightly from those of the fifth legislature: Horizontal consumers policy issues are now the responsibility of the Internal Market Committee and the Environment Committee has an explicit reference in its responsibility to food safety issues.

¹⁷ "Motion for a European Parliament Resolution on a European Social Model for the future", Draft Report on a European Social Model for the future (2005/2248/INI), 2.3.2006

¹⁸ "Motion for a European Parliament Resolution on demographic challenges and solidarity between the generations", Report on demographic challenges and solidarity between the generations (FINAL, A6-0041/2006), 24.2.2006

¹⁹ The Draft Report sees this development as the result of two factors: the rise in life expectancy and the decreasing birth rate in Europe. (Page 9)

²⁰ Green Paper "Confronting demographic change: a new solidarity between the generations", Communication from the Commission (COM/2005/ 94 final, 16.3.2005)

²¹ Page 4, point 3

²² Page 4, point 4

23 Page 4, point 8

24 Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights and Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union, Brussels, 30.06.2005, COM(2005) 280 final. Before making a proposal, the Commission assessed the impacts of Union measures under different policy options, see: Impact Assessment Report, Brussels, 30.6.2005, SEC(2005) 849, COM(2005)280 final

25 Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights, Article 15

26 Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights, Article 18

27 Proposals, Explanatory Memorandum, Point 3., p.5-6. and Article 5; Impact Assessment Report, Brussels, 30.6.2005, SEC(2005) 849, COM(2005)280 final, Point 9., p.18

28 Accession to the ECHR has been discussed since the mid-nineties

29 For more about this see : Erica Howard (Queen Mary, University of London, UK): The European Union Agency for Fundamental Rights (E.H.R.L.R. Issue 4., Sweet and Maxwell LTD 2006) p. 450

30 The international organisations mentioned in this chapter are related to The Council of Europe; Organisation for Economic Co-operation and Development (OECD); The European Environmental Agency; The European Environmental Bureau; The Regional Environmental Centre; The United Nations Commission for Sustainable Development (UNCSD)

31 This remark on its view doesn't mean that the OECD-publications on sustainable development have no relevance for our project. Anyway: the OECD follows a very broad category on sustainable development.

Appendices

Appendix 1/A: The Knesset Law (amendment on the Commission for Future Generations)

Appendix no. 2927a/MK

UNOFFICIAL TRANSLATION

Knesset Law (Amendment no. 14), 5761-2001

Addition to Section 8 1. The following will be added to Knesset Law 1994¹, following clause 29:
Section 8

Section 8: Knesset Commissioner for Future Generations

Definition	30.	In this Section, "particular relevance for future generations" refers to an issue which may have significant consequences for future generations, in the realms of the environment, natural resources, science, development, education, health, the economy, demography, planning and construction, quality of life, technology, justice and any matter which has been determined by the Knesset Constitution, Law and Justice Committee to have significant consequences for future generations.
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Knesset Commissioner for Future Generations	31.	The Knesset will have a Commissioner which will present it with data and assessments of issues which have particular relevance for future generations. It will be called the Knesset Commissioner for Future Generations.
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¹ Legal Code, 5754-1994, p. 140; 5761-2001, p. 114

The role of the Knesset Commissioner for Future Generations	32.	<p>The Knesset Commissioner for Future Generations:</p> <ul style="list-style-type: none"> i) Will give an assessment of bills debated in the Knesset which he/she considers to have particular relevance for future generations; ii) Will give an assessment of secondary legislation brought for authorisation of one of the Knesset Committees, or for consultation with one of the Knesset committees, which he/she consider to have special relevance for future generations; iii) Will present reports to the Knesset from time to time, at his/her discretion, with recommendations on issues with particular relevance for future generations; iv) Will advise MK's on issues with particular relevance for future generations; v) Will present to the Knesset, once a year, a report on his/her activities in accordance with this law.
Independence	33.	<p>In the performance of his duties, the Knesset Commissioner for Future Generations will be guided purely by professional considerations.</p>
The status of the Knesset Commissioner for Future Generations	34.	<ul style="list-style-type: none"> a) The Knesset Secretariat will pass to the Knesset Commissioner for Future Generations all bills tabled in the Knesset. b) The Knesset Committees will pass to the Knesset Commissioner for Future Generations all secondary legislation tabled for their approval or for consultation with them, excluding only those matters defined by law as confidential. c) The Knesset Commissioner for Future Generations will notify the Knesset Speaker periodically about laws and bills which he/she considers to have particular relevance to future generations; the Knesset Speaker will inform the chairmen of the Knesset committees responsible for the areas covered by the laws or bills. d) The Knesset Commissioner for Future Generations will notify the Knesset Committees regarding secondary legislation passed to him/her in accordance with sub-paragraph (b) in which he/she finds particular relevance for future generations. e) Knesset committee chairmen will invite the Knesset Commissioner for Future Generations to debates on

bills or secondary legislation which he/she has declared to have particular relevance for future generations in accordance with sub paragraphs (c) and (d). The Committee chairmen will coordinate the timing of the debate with the Commissioner, allowing reasonable time - at his/her discretion and in accordance with the issue - for the collection of data and the preparation of an evaluation.

f) Once the Commissioner has given his/her evaluation regarding a bill, a summary of this evaluation will be brought before the Knesset plenum as follows:

- 1) If the evaluation was given prior to the first reading of the bill - in the explanatory notes to the bill;
- 2) IF THE EVALUATION WAS GIVEN AFTER THE FIRST READING -IN THE APPENDIX TO THE PROPOSAL BY THE COMMITTEE PRESENTED TO THE KNESSET PLENUM FOR THE SECOND AND THIRD READINGS.

g) The Commissioner is permitted to participate in any debate of any Knesset Committee, at his/her discretion; If the debate is secret by law, the Commissioner will participate on the authorisation of the Committee Chairman.

h) A report in accordance with clause 32 (3) will be presented to the Committee responsible for the area of that issue, the Committee will discuss it and may present its conclusions and recommendations to the Knesset.

i) An annual report in accordance with clause 32 (5) will be presented to the Knesset Speaker and tabled in the Knesset; the Knesset will hold a debate on it.

Acquisition of information	35.	a) The Knesset Commissioner for Future Generations may request from any organisation or body being investigated as listed in clause 9 (1) - (6) of the State Comptroller Law, 1958 -5718 (consolidated text) ² , any information, document or report (hereafter - information) in the possession of that body and which is required by the Commissioner for the implementation of his
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² Legal Code, 5718, p. 92

tasks; the aforesaid body will give the Commissioner the requested information.

b) If a Minister - whose Ministry is responsible for the area which includes the organisation or body under investigation - considers that passing over the information in accordance with the instructions of sub clause (a) may put at risk the security of the State, the foreign relations of the State, or public safety, he/she is permitted to give instructions not to hand over that information; however if part of that information may be revealed without risk that part would be handed over to the Commissioner as aforementioned.

c) Information in accordance with this clause will not be handed over if this is forbidden by any law.

d) The instructions in this clause do not prejudice the obligation to transfer information to the Knesset and to its Committees in accordance with Basic Law: the Government³, and in accordance with Basic Law: the Knesset⁴.

<p>Appointment of the Knesset Commissioner for Future Generations</p>	<p>36.</p>	<p>The Knesset Commissioner for Future Generations will be appointed by the Knesset Speaker, with the authorisation of the Knesset House Committee from among the candidates recommended by the Public Committee appointed in accordance with the instructions of Clause 38, in accordance with the procedure determined by this Law.</p>
<p>Qualifications</p>	<p>37.</p>	<p>Any Israeli citizen and resident who fulfils the following criteria may serve as the Knesset Commissioner for Future Generations:</p> <ol style="list-style-type: none"> 1. holds an academic degree in one of the areas listed in Clause 30; 2. has at least five years' professional experience in one of the areas listed in Clause 30; 3. over the two years previous to the presentation of his/her candidacy was not active in political life and was not a member of any political party; for this purpose, anyone who did not pay party dues and did not participate in the activities of any party institution will not be considered as a member of a party; 4. has not been convicted of any charge which, by its

³ Legal Code, 5752, p. 214

⁴ Legal Code, 5718, p. 69

essence, severity or circumstances, would make him/her unfit to serve as the Knesset Commissioner for Future Generations.

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38. a) The Knesset Speaker will appoint a Public Committee which will examine the qualifications and suitability of candidates for the position of Knesset Commissioner for Future Generations and will recommend two or more of them to the Knesset, noting the number of committee members who supported the candidacy of each of them; the Committee may include its comments regarding each candidate; the names of the candidates recommended by the Committee will be published in Reshumot.
- b) The Public Committee will have six members to be composed as follows:
- 1) Three members of the Knesset: The Chairman of the Knesset House Committee, who will serve as the Chairman of the Public Committee, The Chairman of the Knesset Science and Technology Committee, and the Chairman of the Knesset State Control Committee;
 - 2) Three faculty members from institutions of higher education, experts in various fields from among those listed in Clause 30, to be selected by the Knesset House Committee; for this purpose, "an institution of higher education" is an institution recognised or having received a permit in accordance with the Council on Higher Education Law, 1958.

The work of the Public Committee	39.	The Public Committee will determine the procedure for the presentation of candidates for the position of Knesset Commissioner for Future Generations as well as the procedures for the work of the committee and for examining candidates, with the stipulation that the decision to recommend a candidate to the Knesset Speaker for the position of Knesset Commissioner for Future Generations is passed by a majority of at least four members.
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The timing of the	40.	<p>a) THE APPOINTMENT OF THE KNESSET COMMISSIONER FOR FUTURE GENERATIONS WILL BE MADE, IF AT ALL POSSIBLE, NOT EARLIER THAN NINETY DAYS AND NOT LATER THAN THIRTY DAYS FROM THE COMPLETION OF THE TERM IN OFFICE OF THE SERVING KNESSET COMMISSIONER FOR FUTURE GENERATIONS; IF THE POSITION OF THE COMMISSIONER IS VACATED BEFORE THE END OF HIS/HER PERIOD IN OFFICE, THE APPOINTMENT MUST BE MADE WITHIN FORTY-FIVE DAYS FROM THE DAY THE POSITION FALLS VACANT.</p> <p>b) An announcement of the appointment of the Kneset Commissioner for Future Generations will be published in Reshumot.</p>
Term of office	41.	The Kneset Commissioner for Future Generations will serve for five years from the day of his/her appointment; and the Kneset Speaker has the right to appoint him/her for a further term of office.
Restrictions on activity	42.	During the period following his/her term in office and during the following year, the Kneset Commissioner for Future Generations will not be active in political life or be a member of any political party; for this purpose, anyone who did not pay party dues and did not participate in the activities of any party institution will not be considered as a member of a party.
Budget	43.	The budget for the Kneset Commissioner for Future Generations will be established in a separate budgetary clause within the Kneset budget.
Conditions of employment and staff	44.	<p>a) The Kneset House Committee will institute instructions regarding appropriate conditions of employment for the Kneset Commissioner for Future Generations and regarding a team of professional and administrative staff to be placed at his/her disposal.</p> <p>b) The Kneset Commissioner for Future Generations is permitted to get help from Kneset employees for the discharge of his duties, as needed.</p>
Completion of	45.	<p>The term of office of the Kneset Commissioner for Future Generations will end:</p> <ol style="list-style-type: none"> 1) at the end of the term of office; 2) with his/her death or resignation 3) with his/her removal from office.

Removal from office	46.	<p>a) THE KNESSET SPEAKER MAY, WITH THE AGREEMENT OF THE KNESSET HOUSE COMMITTEE, REMOVE THE KNESSET COMMISSIONER FOR FUTURE GENERATIONS FROM OFFICE ON ONE OF THE FOLLOWING CONDITIONS:</p> <ol style="list-style-type: none"> 1) HE/SHE HAS COMMITTED AN ACT INAPPROPRIATE TO HIS POSITION; 2) HE/SHE HAS BECOME PERMANENTLY UNABLE TO FULFILL HIS/HER DUTIES; 3) HE/SHE HAS BEEN CONVICTED OF AN OFFENCE, WHICH BY ITS ESSENCE, SEVERITY OR CIRCUMSTANCES, MAKE HIM/HER UNFIT TO SERVE IN THE POSITION OF KNESSET COMMISSIONER FOR FUTURE GENERATIONS. <p>b) The Knesset Speaker will not remove the Knesset Commissioner for Future Generations from office until the Commissioner has been given the opportunity to present his/her case to the Knesset Speaker and to the Knesset House Committee.</p>
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Suspension	47.	<p>a) The Knesset speaker, at the suggestion of the Knesset House Committee accepted by a majority of its members, will suspend the Knesset Commissioner for Future Generations if there are criminal processes against him/her as stated in Clause 46 (a) 3) until the end of the processes.</p> <p>b) The House Committee will not propose, nor will the Knesset Speaker authorise a suspension, until the Knesset Commissioner for Future Generations has been given the opportunity to present his/her claims to them.</p>
Temporary substitute	48.	<p>a) The Knesset Speaker will appoint a temporary substitute for the Knesset Commissioner for Future Generations from among the staff as aforementioned in Clause 44 a).</p> <p>b) If the position of the Knesset Commissioner for Future Generations has fallen vacant, and until a new</p>

Commissioner takes office, while the commissioner is out of the country, has been suspended or is temporarily unable to fulfil his/her duties, his/her substitute will fulfil his duties and use the authority given to him by this clause.

The First
appointment

2. The Knesset Commissioner for Future Generations will first be appointed within six months from the day this law is enacted.

Appendix 1/B: The Fifteenth Knesset

Bill proposed by MK's: Joseph Lapid, Victor Brailovsky, Eliezer Sandberg, Yehudit Naot, Avraham Poraz, Yosef Paritzky

P/1236

Commissioner for Future Generations Bill, 2000 (Unofficial translation)

Definitions	1.	In this law - "The Committee" - The Knesset Constitution, Law & Justice Committee; "future generations" - includes any person, not yet born, destined to be part of the population of the State at any time; "special interest for future generations" - any issue that may have significant effect on future generations including economic, demographic, environmental and scientific issues and quality of life.
Establishment of the Commission for Future Generations	2.	The Commission for Future Generations is hereby established (hereafter the Commission) and will operate via the Commissioner for Future Generations (hereafter the Commissioner) and the Commission staff.
Commission-corporation	3.	The Commission is a corporation, eligible for any legal obligation, right or action.
Commission-a controlled body	4.	The Commission will be a controlled body as stated in section 9 (2) of the State Comptroller Law, 1958 [consolidated version].
Function of the Commission	5.	The function of the Commission will be to represent the special interests of future generations vis-à-vis the Knesset and the Government; The Commission may represent any issue, which, in the opinion of the Commissioner, is of special interest for future generations.
Election of the Commissioner for	6.	a. The Commissioner will be elected by the Knesset by a secret vote. b. The candidate who receives the majority of votes of Members

Future Generations

of Knesset will become Commissioner; in the event that no candidate wins a majority vote - a revote will be held; beginning with the third round of voting, and in every subsequent round, the candidate who received the lowest number of votes in the previous round will be eliminated from the election.

c. The election of the Commissioner will be held not earlier than ninety days and not later than thirty days before the end of the term of office of the serving Commissioner. If the position of Commissioner falls vacant before the end of the current term of office, the election will be held within forty-five days from the day the position becomes vacant; if the time for the election falls when the Knesset is not in session the Speaker will summon the Knesset to a special plenary sitting for the election.

d. The Speaker will determine the date of the election; a notice of this will be published in the Reshumot [official gazette] at least sixty days prior to the election date.

Eligibility	7.	Any Israeli citizen resident in Israel is eligible to be a candidate for Commissioner.
Proposal of candidates	8.	<p>a. Once the election date has been set, any person eligible to be a candidate has the right to propose his/her candidacy; The proposal will be in writing and be handed to the Knesset Speaker no later than ten days before the date of election; the proposal must be accompanied by written support for the candidate from at least ten Members of Knesset; no Member of Knesset may give his/her support to more than one candidate.</p> <p>b. The Knesset Speaker will notify all Members of Knesset, in writing, no later than seven days prior to the election day, regarding each candidate proposed and the names of the MK's who support him/her, and will announce all the candidates at the beginning of the election sitting.</p>
Term of office	9.	<p>a. The term of office of the Commissioner will be seven years.</p> <p>b. The Commissioner will serve one term of office only.</p> <p>c. The term of office of the Commissioner expires:</p> <ul style="list-style-type: none"> i. at the end of the period; ii. with the resignation or death of the Commissioner iii. if he/she is removed from office.
Removal of the Commissioner from office	10.	a. The Knesset will only remove the Commissioner from office following a request in writing presented to the Committee by at least twenty Members of Knesset and following a proposal by the Committee.

b. The Committee will not propose removing the Commissioner from office without giving him/her the opportunity to speak on his own behalf.

c. Knesset debates referring to this section will be held at a sitting for this matter only; the debate will take place not later than twenty days after the decision of the Committee; The Speaker will announce the date of the debate to all Members of Knesset in writing at least twenty days in advance; if the date of the debate falls when the Knesset is not in session, the Speaker will summon a special sitting of the Knesset Plenum in order to hold this debate.

Responsibility vis-à-vis the Knesset	11.	In the fulfilment of his duty, the Commissioner will be responsible to the Knesset alone and will not be dependent on the Government.
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Forbidden occupation	12.	<p>During his/her term in office, the Commissioner will not be active in political life and may not:</p> <ul style="list-style-type: none"> i. be a member of the Knesset or the council of a local authority or stand as candidate for such a post; ii. be a member of the board of any company that is in business for profit; iii. serve in any other paid position or be involved, either directly or indirectly, in any business or profession; iv. participate, either directly or indirectly, in any enterprise, institute, foundation or other body, that has a concession from the Government or is supported by the Government or if the Government is a partner in its management or it has been placed under Government supervision, and thus to benefit, directly or indirectly, from their income; v. buy, lease, receive as a gift, use or hold in any other way state property, whether land or moveable property, receive from the Government any contractual work, concession or any other reward, in addition to his/her salary, excepting land or a loan for settlement or residency.
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Representation	13.	<p>a. The Commissioner may represent the special interests of future generations in any way he/she sees fit, that is not related to instructions from legal proceedings or law of evidence.</p> <p>b. For the requirements of the representation, the Commissioner may:</p> <ul style="list-style-type: none"> i. request any minister to give him/her, within a defined period and in a defined way, any information or document that may, in the
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opinion of the Commissioner, assist him/her in representing the special interests of future generations; any minister, who has been asked to supply such information or document, is obliged to fulfil the request;

ii. Invite the public to give him/her, within a defined period and in a defined way, any opinion, information or document that may, in the opinion of the Commissioner, assist him/her in representing the special interests of future generations.

Representation vis-à-vis the Knesset	14.	<p>a. The Knesset will present to the Commissioner all bills due to be discussed for the first time in any committee.</p> <p>b. If the Commissioner notifies the chairman of the committee which is about to discuss the bill that he/she has found in the bill a matter of special interest for future generations, that committee will invite the Commissioner or his/her representative to all discussions to be held on the said bill.</p>
Representation vis-à-vis the Government	15.	<p>a. Any minister, who is about to set a regulation under the powers invested in him/her in a law requiring consultation, must present the proposed draught of the regulation to the Commissioner and consult with him/her before finalising the regulation.</p> <p>b. In this section - "a law requiring consultation" is a law regarding which the Commissioner has found a matter of special interest to future generations, as stated in sections 14b or 24 b or that is among the list of laws published by the Commissioner as stated in section 24a.</p>
Note in bills	16.	Any bill presented to the Knesset for a first reading, will include a note, in the explanations, on the effect of the proposed law on future generations.
Commission Staff	18.	<p>a. The staff of the Commission will be considered civil servants in all respects; however, as regards receiving instructions and in regard to dismissals they will be under the sole authority of the Commissioner.</p> <p>b. The Commissioner may, for the implementation of his role, make use of people who are not members of his staff in the event that he/she feels this is necessary.</p>
Duty of confidentiality	19.	Members of the Commission staff, and any other person with whose assistance the Commissioner carries out his tasks must maintain secrecy regarding any information that reaches them within the framework of their employment.
Budget	20.	The budget for the Commission for Future Generations will be determined by the Knesset Finance Committee based on a

Appendices

		proposal by the Commissioner, and will be published together with the State Budget. The Finance Committee may, based on a <u>proposal by the Commissioner, authorise changes in his budget.</u>
Acting Commissioner	21.	In the event that the Commissioner is temporarily prevented from fulfilling his role, the Committee will appoint a replacement for the Commissioner for a period not exceeding three months; The Committee may extend the appointment for additional periods, as long as the total period in office of the acting Commissioner shall not exceed six months; in the event that the Commissioner is prevented from fulfilling his role for a period of over six consecutive months, he/she will be considered to have resigned.
Material that may not be used as evidence	22.	Reports, opinions or any other document written or prepared by the Commissioner in the fulfilment of his role, may not serve as <u>evidence in any judicial or disciplinary process.</u>
Salaries and pensions	23.	The salary of the Commissioner and other sums paid to him/her during his/her term in office or subsequently, or to his/her heirs after his death, will be decided by a resolution of the Knesset or of one of the <u>Knesset committees that the Knesset has appointed for this task.</u>
Instructions for the transition	24.	a. Within twelve months from the day of his initial appointment, the Commissioner will publish the names of laws, legislated prior to his appointment, wherein he/she has found matters of special interest for future generations. b. Within two months of the appointment of the Commissioner, he/she will announce the names of bills for which the committee stage has been completed but which have not yet completed the legislative procedure in the plenum at the time of the announcement as stated in this sub section, and in which he/she has found matters of special interest to future generations; The Knesset Speaker may, within 15 days from the date of the announcement as stated in this sub section, issue instructions to recall a bill whose name is included in the said announcement, for further debate in the committee which recently dealt with it, so that the Committee can make a reassessment following consultation with the Commissioner.
Date of the law	25.	This law will come into force at the end of 180 days from the day it is passed by the Knesset

Presented to the Knesset Speaker and deputies and tabled on 10 January 2000

Appendix 1/C: Sixteenth Knesset

Bill proposed by MK's Michael Melchior, Lea Nass, Inbal Gavriely, Avshalom Vilan

P/889

Proposed Basic Law: Sustainable Development

Objective	1.	The objective of this Basic Law is to protect the rights of all people, including those of future generations, by ensuring that all development of the world in the social, economic and environmental realms will be sustainable.
The right to sustainable development	2.	All activity by the State of Israel, or by any State authorities, must be carried out in accordance with the rules of sustainable development, for the advantage of the whole public and the benefit of future generations. In this Basic Law - "sustainable development: is development in the social, economic and environmental realms that does not cause damage to the basic resources it uses, to the quantity of those resources or their potential for renewal; that will take care to nurture the natural systems that, directly or indirectly, supply these resources; that is planned, and that does not cause any irreversible damage to its environment.
Violation of rights	3.	There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose and to an extent no greater than is required.
Stability of the Law	4.	This Basic Law cannot be varied, suspended or made subject to conditions by emergency regulations.
Permanency of the Law	5.	This Law may only be changed by a Basic Law passed by a majority of the Members of Knesset.

Appendices

Indirect amendment 6.
to the Law: The Knesset

In the Law: The Knesset, 1984, at the end of section 32, shall be added the following:

“(6) He/she will give his opinion on any conflict relating to a question as to whether a specific activity is sustainable or not in consultation with relevant government ministries, and with representatives of the non-government organisations concerned with the maintenance of sustainable development, as he/she considers appropriate.”

Appendix 2

The Hungarian proposal for an Ombudsman for Future Generations

Act No./2000

on the Ombudsman of Future Generations

Whereas being aware of its liability for maintaining the natural foundations of life and health of future generations resp. the environmental conditions in harmony with human dignity, the following Act has been issued by the Parliament by virtue of the authority granted to it by §.32/B(4) of the Constitution, in order to uphold for future generations the discretion of options, the quality of life and free access to natural resources.

§.1.(1) With the purpose of representing the interests of future generations in the course of passing long term decisions such generations are essentially affected by, further in order to implement the right to a healthy environment as acknowledged and ordered to be asserted by §.18. of the Constitution, and the Acts on the protection of nature and environment, the Ombudsman of Future Generations shall be elected by the Parliament. The Ombudsman is to be elected by the Parliament from among those Hungarian citizens who have graduated, have an excellent theoretical knowledge or at least ten years professional practice in the field of protection of the environment or nature, who have gained considerable experiences in procedures relating to the protection of nature or the environment resp. in the supervision of such procedures, or in the implementation and enforcement of rights regarding the protection of nature or the environment, or in the scientific research, and are of good standing.

(2) The provisions of Act No. LIX of 1993 on the Ombudsman of Civil Rights shall apply to the Ombudsman of Future Generations, unless otherwise provided by the present Act.

§.2.(1) The Ombudsman of Future Generations will examine and monitor the implementation and enforcement of provisions of the Constitution and other rules of law, relating to the preservation of natural foundations of life and health of present and future generations as well as to the maintenance of environmental conditions of same; he/she carries on inquiries ex officio in this respect and

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examines the reports made to it. The Ombudsman of Future Generations will express his/her opinion on the draft of laws, which would by virtue of the long-term decisions included therein, primarily affect the living conditions of future generations.

(2) Upon endangering of the environment by acts or omission, moreover in the event of pollution or damage of same, the Ombudsman of Future Generations:

- a) will request the user of the environment to cease such endangering or damaging activity. Such user of the environment shall forthwith notify the Ombudsman of Future Generations within 30 days in writing on the measures undertaken by it;
- b) may initiate actions to be taken by the authorities against the user of the environment or may file a lawsuit for injunction against such illegal action and for obligation of preventive measures, or make a complaint for petty offence or a criminal charge against the user of the environment if he/she fails to give information on the measures taken by him/her or if such measures taken were insufficient;
- c) may assert by virtue of the relevant statement of the party so injured, the claim for compensation of damages in favour of the Fund for Environmental Protection, should such party waive its right to assert the claim for compensation of damages;
- d) will request the authority to take the measures relating to environmental protection, if such authority has failed so far to do so. The authority shall within 30 days upon receipt of said request inform the Ombudsman of Future Generations on the measure taken by it. Simultaneously with such request, the Ombudsman of Future Generations may refer the case to the superior organ of such authority. Upon fruitless expiry of the deadline the Ombudsman shall report to the supervisory organ of such authority.
- e) may upon completion of the inquiry publish the fact of jeopardising or damaging the environment and the relevant data, as well as data of the measures made by the authorities; and will do so upon the fruitless expiry of the deadlines specified in subsections a) and d).

(3) The Ombudsman of Future Generations will submit his/her proposal for making and amending the legal rules on environmental protection and will express his/her expert opinion on the relevant bills.

(4) Upon request of the Ombudsman of Future Generations, the data relating to the inquiry, processed by the National Information System for Environmental Protection (§.49. of Act No. LIII of 1995 - the Act itself hereinafter referred to as the Act on Environmental Protection) shall be reviewed and the data established by the inquiry shall be entered in such Information System.

(5) The fact, scale and nature of any lasting environmental damage established by the inquiry of the Ombudsman of Future Generations shall be entered in the Land Register upon request of the Ombudsman of Future Generations. As regards the entry, §.52. of the Act on Environmental Protection shall apply.

(6) The Ombudsman of Future Generations shall be invited to any public hearing to be held according to §.93. of the Act on Environmental Protection, and the minutes taken on such public hearing shall be forwarded to him/her. A public hearing shall, upon the initiation of the Ombudsman of Future Generations, be held beyond cases specified by the Act on Environmental Protection too, and in particular in connection with the development plans of certain regions, as well as with bills relating to such regions, which affect fundamentally the essential conditions of future generations.

(7) The Ombudsman of Future Generations will express his/her opinion, in advance, on international obligations to be entered by the Republic of Hungary, which relate to spaces, resources and phenomena being the common heritage and common concern of mankind, moreover to the protection of the environment and nature, whether or not the interests of future generations were duly considered. The Ombudsman of Future Generations may have recourse to competent organs regarding the implementation of such obligations.

§.3. Each person has the right to report to and request the Ombudsman of Future Generations to conduct inquiries, save in issues with court procedures pending.

§.4.(1) In the course of performing his/her tasks, the Ombudsman of Future Generations may request from any and all natural persons and legal entities as well as from those using the environmental information and data and may become familiar with any data, circumstances, procedures which might relate to the state of the environment, and in particular to the threatened and damaged state of it.

(2) State, official and business secrets may in no way hinder the Ombudsman of Future Generations in exercising his/her rights specified in the present Article. The Ombudsman, however, is bound by provisions relating to the non-disclosure of state and service secrets.

§.5. The Ombudsman of Future Generations will annually report to the Parliament. In connection with extraordinary events affecting the state of the environment, the Ombudsman of Future Generations may request his/her hearing by the Parliament and may suggest examination of the case.

6.§ The Office of the Ombudsman of Future Generations will perform the management and preparatory tasks.

§.7.(1) The Ombudsman of Future Generations will be elected by the Parliament at least two months prior to the Act's coming into force.

(2) Present Act will enter into force on January 1, 2001.

(3) §.39. d) of the Act on Environmental Protection will be invalidated by present Acts coming into force.

Legislative intent

General reasons

As it is established in the 1997 Declaration of the UNESCO, everyone is responsible for the future generations, therefore, states are responsible too. The most important one of the human rights granted by the Constitution of Hungary, is the basic right to life, and human dignity (54.§), which covers the obligation of the state to secure the essential conditions for future generations. (Resolution of the Constitutional Court 64/1991.(XII.17.)AB, ABH [the official publication of the Court] 1991, p. 303.)

A specific occasion is given by the new millennium to the Parliament to express its commitment and responsibility for the fate of future generations by the establishment of an institution that can efficiently contribute to maintaining the essential conditions for our successors and can represent their interests in the course of passing long term decisions, which fundamentally affect their essential conditions; can moreover through further means of the Ombudsman the implementation of laws relating to the state of the environment.

The Parliament is authorised by §.32/B.(4) of the Constitution to elect a special Ombudsman for the protection of a constitutional right. The Parliament already expressed in the course of enactment of the Act No. XIII of 1995 on the Protection of the Environment, that it deems the participation of an Ombudsman necessary in solving problems of the environmental protection. According to §.39. of the Act, "the Parliament determines the responsibilities concerning environmental protection of the Ombudsman for Civil Rights ... in order to protect the environment." The competence of the Ombudsman for Civil Rights covers, however, merely inquiries with the "authorities" , thus the private sector, where most of the contaminating sources can be found, does not belong to his/her sphere of activity. The means at his/her disposal, like recommendations made to the superior bodies, are not properly tailored for issues of the environmental protection either.

Thus election of a special Ombudsman is deemed necessary by the Draft, to perform the obligations towards future generations in the following fields: to protect and sustain the natural foundations of life and to keep progress in harmony therewith. Shaping the spheres of authority and means of the Ombudsman of Future Generations is particularly similar with those of the Data Protection Commissioner, who is protecting the right to privacy vis-à-vis the data processing in the private sector, too.

Reasoning in Detail

§.1. As regards the Ombudsman of Future Generations, the Act on the Ombudsman for Civil Rights shall apply to the following: election, incompatibility, parliamentary immunity, termination of the assignment, and further elements of his/her legal status. The only departure is that a degree of higher

education instead of degree in law is specified by the Draft as a requirement for the election, supposing thus the professional practice in the field of protection nature or the environment accordingly. Through the alternative option for the election, namely “the significant experience gained in the implementation and enforcement of rights regarding the protection of nature and environment”, it is made possible for the Parliament to elect as an Ombudsman significant personalities, who are active in civil movements, let alone, that dispute concerning the “professional practice” of such personalities can thus be avoided.

§.2.(1) According to the Draft, the competence of the Ombudsman of Future Generations is defined by the laws on “environmental protection”. His/her right to inquiry covers thus all the fields which are regulated by Act No. LIII of 1995 on the General Rules of Environmental Protection and by Act LIII of 1996 on the Protection of Nature, as well as by the further Acts specified therein. The right to express his/her opinion, however, is wider than the possibility provided for by the said Acts: it extends to Draft Laws, as well, which might significantly affect the essential conditions of future generations by the long-term impacts implied therein.

(2)-(7) The Ombudsman of Future Generations has all the rights and measures the Ombudsman for Civil Rights may exercise. The Ombudsman has no right to give order to any of the governmental authorities and the Ombudsman of Future Generations shall obviously not instruct any user of the natural resources in the private sector either. The main device of the Ombudsman is publicity. Corresponding therewith, the Ombudsman of Future Generations may upon completion of the inquiry publish the fact of threatening or damaging by acts or omission of the environment and the relevant data. The Ombudsman shall publish the data if he/she has not received information within the deadline set in the act hereto on measures taken against such threatening or damage or if the measures so taken have been insufficient. The same applies to publication of the measures that have been taken by the authorities, either by publishing by the Ombudsman of Future Generations the fines and other sanctions that have been imposed, or by publishing the result of measures taken by an authority or a municipality upon the request of the Ombudsman.

Certain rights, which may, according to the Act on Environmental Protection be exercised by associations involved in environmental protection, or by the Minister or other authorities and fit well into the sphere of activity of the Ombudsman of Future Generations, shall be due to the latter one, too. E.g. the lawsuit initiated for stopping of threatening activity or for damage prevention, the claiming compensation for damages in favour of the Fund for Environmental Protection by virtue of the waiver of the injured party, entry in the Land Register of the lasting damage of the environment (which would be an authentic completion of the information system on the state of the environment, let alone, that it would induce the holder of the real estate to take measures against those contaminating the environment). The rights granted to the Ombudsman of Future Generations will be important motivating factors for the further development and up-to-date state of the National Information System on Environmental Protection. By means of information on public hearings will

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the Ombudsman be in a position to gain knowledge of significant licensing procedures. A public hearing initiated by the Ombudsman is obviously not part of a licensing procedure of the authorities, it is rather a tool in the hands of the Ombudsman for his/her public relations work.

Purpose of making, by the Ombudsman of Future Generations, his/her own opinion known prior to entering international obligations is to have the interests of future generations be represented in this field that may not be less decisive for the environment protection than draft laws. The wording of the Draft follows partly international agreements. The Ombudsman may also turn to the authorities with his/her opinion on the implementation of such agreements. He/she may most obviously publish his/her opinion and the relevant response of the authorities.

§.3. It is sufficient to provide for in the Act that anyone has the right to turn to the Ombudsman of Future Generations. As regards protection of the announcing person, the general rules will apply without any special reference to them.

§.4. Like in case of the other Ombudsmen, the inquiries made by the Ombudsman of Future Generations must be tolerated by everyone, and the Ombudsman shall not be hindered in his/her inquiring work with reference to state or service secrets. The general rules apply to the limits of inquiries to be conducted with the armed forces and organs of the national security.

Since the Ombudsman of Future Generations may, like the Data Protection Commissioner, conduct inquiries outside the governmental sphere, thus with everybody, it is specially emphasised in the Draft that the Ombudsman shall not be hindered in exercising his/her work through making reference to business secrets, either. It is a definitive element of a business secret that a justifiable interest in the nondisclosure of such secret must be shown. Said non-disclosure of data relating to the environment is not justifiable if it is related to hazardous or injurious activity to nature and in particular in the event when the holder of such secret fails to undertake appropriate measures despite the relevant request of the Ombudsman of Future Generations.

§.5. Each Ombudsman shall annually report to the Parliament. The extraordinary hearing as well as the proposal on a parliamentary inquiry are especially pointed out in the Draft because of the nature of environmental protection: it is most likely that extraordinary events requiring measures to be forthwith taken would occur in this field.

§§.6-7. As regards the dates of enactment, election and setting up of the Office, it has been reckoned with an Ombudsman of Future Generations commencing its activity in 2001.

Appendix 3

Declaration on the Responsibilities of the Present Generations Towards Future Generations

Adopted on 12 November 1997 by the General Conference of UNESCO at its 29th session

The General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris from 21 October to 12 November 1997 at its 29th session,

Mindful of the will of the peoples, set out solemnly in the Charter of the United Nations, to 'save succeeding generations from the scourge of war' and to safeguard the values and principles enshrined in the Universal Declaration of Human Rights, and all other relevant instruments of international law,

Considering the provisions of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, both adopted on 16 December 1966, and the Convention on the Rights of the Child, adopted on 20 November 1989,

Concerned by the fate of future generations in the face of the vital challenges of the next millennium,

Conscious that, at this point in history, the very existence of humankind and its environment are threatened,

Stressing that full respect for human rights and ideals of democracy constitute an essential basis for the protection of the needs and interests of future generations,

Asserting the necessity for establishing new, equitable and global links of partnership and intragenerational solidarity, and for promoting inter-generational solidarity for the perpetuation of humankind,

Recalling that the responsibilities of the present generations towards future generations have already been referred to in various instruments such as the Convention for the Protection of the World

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Cultural and Natural Heritage, adopted by the General Conference of UNESCO on 16 November 1972, the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity, adopted in Rio de Janeiro on 5 June 1992, the Rio Declaration on Environment and Development, adopted by the United Nations Conference on Environment and Development on 14 June 1992, the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, and the United Nations General Assembly resolutions relating to the protection of the global climate for present and future generations adopted since 1990,

Determined to contribute towards the solution of current world problems through increased international co-operation, to create such conditions as will ensure that the needs and interests of future generations are not jeopardized by the burden of the past, and to hand on a better world to future generations,

Resolved to strive to ensure that the present generations are fully aware of their responsibilities towards future generations,

Recognizing that the task of protecting the needs and interests of future generations, particularly through education, is fundamental to the ethical mission of UNESCO, whose Constitution enshrines the ideals of 'justice and liberty and peace' founded on 'the intellectual and moral solidarity of mankind',

Bearing in mind that the fate of future generations depends to a great extent on decisions and actions taken today, and that present-day problems, including poverty, technological and material underdevelopment, unemployment, exclusion, discrimination and threats to the environment, must be solved in the interests of both present and future generations,

Convinced that there is a moral obligation to formulate behavioural guidelines for the present generations within a broad, future-oriented perspective,

Solemnly proclaims on this twelfth day of November 1997 this Declaration on the Responsibilities of the Present Generations Towards Future Generations

Article 1 - Needs and interests of future generations

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

Article 2 - Freedom of choice

It is important to make every effort to ensure, with due regard to human rights and fundamental freedoms, that future as well as present generations enjoy full freedom of choice as to their political, economic and social systems and are able to preserve their cultural and religious diversity.

Article 3 - Maintenance and perpetuation of humankind

The present generations should strive to ensure the maintenance and perpetuation of humankind with due respect for the dignity of the human person. Consequently, the nature and form of human life must not be undermined in any way whatsoever.

Article 4 - Preservation of life on Earth

The present generations have the responsibility to bequeath to future generations an Earth which will not one day be irreversibly damaged by human activity. Each generation inheriting the Earth temporarily should take care to use natural resources reasonably and ensure that life is not prejudiced by harmful modifications of the ecosystems and that scientific and technological progress in all fields does not harm life on Earth.

Article 5 - Protection of the environment

1. In order to ensure that future generations benefit from the richness of the Earth's ecosystems, the present generations should strive for sustainable development and preserve living conditions, particularly the quality and integrity of the environment.

2. The present generations should ensure that future generations are not exposed to pollution which may endanger their health or their existence itself.

3. The present generations should preserve for future generations natural resources necessary for sustaining human life and for its development.

4. The present generations should take into account possible consequences for future generations of major projects before these are carried out.

Article 6 - Human genome and biodiversity

The human genome, in full respect of the dignity of the human person and human rights, must be protected and biodiversity safeguarded. Scientific and technological progress should not in any way impair or compromise the preservation of the human and other species.

Article 7 - Cultural diversity and cultural heritage

With due respect for human rights and fundamental freedoms, the present generations should take care to preserve the cultural diversity of humankind. The present generations have the responsibility to identify, protect and safeguard the tangible and intangible cultural heritage and to transmit this common heritage to future generations.

Article 8 - Common heritage of humankind

The present generations may use the common heritage of humankind, as defined in international law, provided that this does not entail compromising it irreversibly.

Article 9 - Peace

1. The present generations should ensure that both they and future generations learn to live together in peace, security, respect for international law, human rights and fundamental freedoms.
2. The present generations should spare future generations the scourge of war. To that end, they should avoid exposing future generations to the harmful consequences of armed conflicts as well as all other forms of aggression and use of weapons, contrary to humanitarian principles.

Article 10 - Development and education

1. The present generations should ensure the conditions of equitable, sustainable and universal socio-economic development of future generations, both in its individual and collective dimensions, in particular through a fair and prudent use of available resources for the purpose of combating poverty.
2. Education is an important instrument for the development of human persons and societies. It should be used to foster peace, justice, understanding, tolerance and equality for the benefit of present and future generations.

Article 11 - Non-discrimination

The present generations should refrain from taking any action or measure which would have the effect of leading to or perpetuating any form of discrimination for future generations.

Article 12 - Implementation

1. States, the United Nations system, other intergovernmental and non-governmental organizations, individuals, public and private bodies should assume their full responsibilities in promoting, in particular through education, training and information, respect for the ideals laid down in this Declaration, and encourage by all appropriate means their full recognition and effective application.
2. In view of UNESCO's ethical mission, the Organization is requested to disseminate the present Declaration as widely as possible, and to undertake all necessary steps in its fields of competence to raise public awareness concerning the ideals enshrined therein.

12 November 1997

Appendix 4

2005/0124 (CNS)

Proposal for a COUNCIL REGULATION establishing a European Union Agency for Fundamental Rights

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 308 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Parliament²,

Having regard to the opinion of the European Economic and Social Committee³,

Having regard to the opinion of the Committee of the Regions⁴,

Whereas:

(1) The European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, which are common values to the Member States.

(2) The Charter of Fundamental Rights of the European Union⁵ reaffirms the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms⁶, the social charters adopted by the Community and by the Council of Europe and the case law of the Court of Justice of the European Communities and of the European Court of Human Rights.

(3) The Community and its Member States when implementing Community law must respect fundamental rights.

(4) A more thorough knowledge and widespread awareness of fundamental rights issues in the Union are conducive to ensuring full respect of fundamental rights. It would contribute to this objective to establish a Community agency whose tasks would be to provide information and data on fundamental rights matters. Moreover, developing effective institutions for the protection and promotion of human rights is a common value of the international and European communities, as expressed by Recommendation No R (97) 14 of the Committee of Ministers of the Council of Europe of 30 September 1997.

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(5) The Representatives of the Member States meeting within the European Council on 13 December 2003 agreed to build upon the existing European Monitoring Centre on Racism and Xenophobia established by Council Regulation (EC) No 1035/97 of 2 June 1997⁷ and to extend its mandate to make it a Human Rights Agency.

(6) The Commission agreed and indicated its intention of presenting a proposal to amend Council Regulation (EC) No 1035/97 in that respect. The Commission subsequently issued its Communication on the Fundamental Rights Agency of 25 October 2004⁸, on the basis of which a large public consultation was carried out.

(7) A European Union Agency for Fundamental Rights should accordingly be established, building upon the existing European Monitoring Centre on Racism and Xenophobia, to provide the relevant institutions and authorities of the Community and its Member States with information, assistance and expertise on fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights.

(8) When establishing the Agency, due attention will be paid to the operating framework for the European regulatory agencies proposed by the Commission in the draft Interinstitutional Agreement⁹ on 25 February 2005.

(9) The Agency should refer in its work to fundamental rights as defined in Article 6(2) of the Treaty on European Union and as set out in particular in the Charter of Fundamental Rights. The close connection to the Charter should be reflected in the name of the Agency. The thematic areas of activity of the Agency should be laid down in the Multiannual Framework, thus defining the limits of the work of the Agency, which in accordance with general institutional principles, should not set a political fundamental rights agenda of its own.

(10) The Agency should gather objective, reliable and comparable information on the development of the situation of fundamental rights, analyse this information for causes of disrespect, consequences and effects and examine examples of good practice in dealing with these matters. Networks are effective tools for active information collection and assessment.

(11) The Agency should have the right to formulate opinions to the Union institutions and to the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission, without interference with the legislative and judicial procedures established in the Treaty.

(12) The Council should have the possibility of requesting the Agency's technical expertise in the context of proceedings commenced under Article 7 of the Treaty on European Union.

(13) The Agency should present an annual report on the situation of fundamental rights in the Union and the respect thereof by the EU institutions, bodies and agencies and the Member States when implementing Union law. Furthermore, the Agency should produce thematic reports in the topics of particular importance to the Union's policies.

(14) The Agency should take measures to raise the awareness of the general public about their fundamental rights, and about possibilities and different mechanisms for enforcing them in general, without however, dealing itself with individual complaints.

(15) The Agency should work as closely as possible with all relevant Community programmes, bodies

and agencies and Union bodies in order to avoid duplication, in particular as regards the future European Institute for Gender Equality.

(16) The Agency should collaborate closely with the Council of Europe. Such cooperation should guarantee that any overlap between the activities of the Agency and those of the Council of Europe is avoided, in particular by elaborating mechanisms to ensure synergies, such as conclusion of a bilateral cooperation agreement and the participation of an independent person appointed by the Council of Europe in the management structures of the Agency with appropriately defined voting rights as in the current EUMC.

(17) Given the particular functions of the Agency, each Member State should appoint one independent expert to the Management Board. The composition of that Board should ensure the Agency's independence from both the Community institutions and the Member State's governments, and assemble the broadest possible expertise in the field of fundamental rights;

(18) The European Parliament plays a significant role in the area of fundamental rights. It should appoint one independent person as a member of the Management Board of the Agency;

(19) A consultative Forum should be established to ensure the pluralist representation of the social forces of civilian society active in the field of fundamental rights within the structures of the Agency with view to establish effective cooperation with all stakeholders.

(20) The Agency should apply the relevant Community legislation concerning public access to documents as set out in Regulation (EC) No 1049/2001 of 30 May 2001 of the European Parliament and of the Council,¹⁰ the protection of individuals with regard to the processing of personal data as set out in Regulation (EC) No 45/2001 of 18 December 2000 of the European Parliament and of the Council,¹¹ and languages, as set out in Regulation No 1 of 15 April 1958¹² and in Council Regulation (EC) No 2965/94 of 28 November 1994.¹³

(21) Commission Regulation (EC, Euratom) No 2343/2002 of 19 November 2002¹⁴ on the framework Financial Regulation for the bodies referred to in Article 185 of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities¹⁵ applies to the Agency, as well as Regulation (EC) No 1073/1999 of 25 May 1999 of the European Parliament and the Council¹⁶ concerning investigations conducted by the European Antifraud Office (OLAF).

(22) The Agency should have legal personality and succeed the European Monitoring Centre on Racism and Xenophobia as regards all legal obligations, financial commitments or liabilities carried out by the Centre or agreements made by the Centre as well as the employment contracts with the staff of the Centre. The seat of the Agency should remain located in Vienna, as determined by Decision of the Representatives of the Governments of the Member States of 2 June 1997 determining the seat of the European Monitoring Centre on Racism and Xenophobia.¹⁷

(23) Since the measures needed for the implementation of this Regulation are measures of general scope within the meaning of Article 2 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission,¹⁸ they should be adopted by the regulatory procedure provided for in Article 5 of that Decision.

(24) Since the objectives of the action to be taken, namely the provision of comparable and reliable

information and data at European level in order to assist the Union institutions and the Member States in respecting fundamental rights, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the proposed action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(25) The contribution made by the Agency to ensuring full respect of fundamental rights in the framework of Community law is likely to help achieve the Community's objectives. The Treaty does not provide, for the adoption of this Regulation, powers other than those set out in Article 308.

(26) The Council should have the possibility of adopting a Decision pursuant to Title VI of the Treaty on European Union to empower the Agency to pursue its activities also with respect to areas covered by that Title.

(27) As Council Regulation (EC) No 1035/97 would have to be substantially amended for the establishment of the Agency, it should be replaced in the interests of clarity,

HAS ADOPTED THIS REGULATION:

CHAPTER 1

SUBJECT MATTER, OBJECTIVE, SCOPE, TASKS AND AREAS OF ACTIVITY

Article 1

Subject matter

A European Union Agency for Fundamental Rights ("the Agency") is hereby established.

Article 2

Objective

The objective of the Agency shall be to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights.

Article 3

Scope

1. The Agency shall carry out its tasks for the purpose of meeting the objective set in Article 2 within the competencies of the Community as laid down in the Treaty establishing the European Community.
2. The Agency shall refer in carrying out its tasks to fundamental rights as defined in Article 6(2) of the Treaty on European Union and as set out in particular in the Charter of Fundamental Rights of the European Union as proclaimed in Nice on 7 December 2000.
3. When pursuing its activities, the Agency shall concern itself with the situation of fundamental rights in the European Union and in its Member States when implementing Community law, without

prejudice to paragraph 4 and to Articles 4(1)(e), 27 and 28.

4. Without prejudice to Article 27, the Agency shall, at the request of the Commission, provide information and analysis on fundamental rights issues identified in the request as regards third countries with which the Community has concluded association agreements or agreements containing provisions on respect of human rights, or has opened or is planning to open negotiations for such agreements, in particular countries covered by the European Neighbourhood Policy.

Article 4

Tasks

1. To meet the objective set in Article 2, the Agency shall:

- (a) collect, record, analyse and disseminate relevant, objective, reliable and comparable information and data, including results from research and monitoring communicated to it by Member States, Union institutions, Community agencies, research centres, national bodies, non-governmental organisations, relevant third countries and international organisations;
- (b) develop methods to improve the comparability, objectivity and reliability of data at European level, in cooperation with the Commission and the Member States;
- (c) carry out, cooperate with or encourage scientific research and surveys, preparatory studies and feasibility studies, also, where appropriate and compatible with its priorities and its annual work programme, at the request of the European Parliament, the Council or the Commission. It shall also organize meetings of experts and, whenever necessary, set up ad hoc working parties;
- (d) formulate conclusions and opinions on general subjects, for the Union institutions and the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission;
- (e) make its technical expertise available to the Council, where the Council, pursuant to Article 7(1) of the Treaty on European Union, calls on independent persons to submit a report on the situation in a Member State or where it receives a proposal pursuant to Article 7(2), and where the Council, acting in accordance with the procedure set out in these respective paragraphs of Article 7 of the Treaty on European Union, has requested such technical expertise from the Agency;
- (f) publish an annual report on the situation of fundamental rights, also highlighting examples of good practice;
- (g) publish thematic reports based on its analysis, research and surveys;
- (h) publish an annual report on its activities;
- (i) enhance cooperation between civil society, including non-governmental organisations, the social partners, research centres and representatives of competent public authorities and other persons or bodies involved in dealing with fundamental rights, in particular by networking, promoting dialogue at European level and participating where appropriate in discussions or meetings at national level;
- (j) organise, with relevant stakeholders, conferences, campaigns, round tables, seminars and meetings at European level to promote and disseminate its work; and
- (k) develop a communication strategy aimed at raising the awareness of the general public, set up documentation resources accessible to the public and prepare educational material, promoting cooperation and avoiding duplication with other sources of information.

2. The conclusions, opinions and reports formulated by the Agency when carrying out the tasks mentioned in paragraph 1 shall not concern questions of the legality of proposals from the Commission under Article 250 of the Treaty, positions taken by the institutions in the course of legislative procedures or the legality of acts within the meaning of Article 230 of the Treaty. They shall not deal with the question whether a Member State has failed to fulfil an obligation under the Treaty within the meaning of Article 226 of the Treaty.

Article 5

Areas of activity

1. The Commission shall adopt a Multiannual Framework for the Agency in accordance with the regulatory procedure referred to in Article 29(2). The Framework shall:

- (a) cover five years;
- (b) determine the thematic areas of the Agency's activity, always including the fight against racism and xenophobia;
- (c) be in line with the Union priorities as defined in the Commission's strategic objectives;
- (d) have due regard to the Agency's financial and human resources; and
- (e) include provisions with a view to avoiding thematic overlap with the remit of other Community bodies, offices and agencies.

2. The Agency shall carry out its tasks within the thematic areas determined by the Multiannual Framework. This shall be without prejudice to the possibility for the Agency to respond to requests from the European Parliament, the Council or the Commission under Articles 3(4), 4(1)(d) and (e) outside these thematic areas, provided its financial and human resources so permit.

3. The Agency shall carry out its tasks in the light of its Annual Work Programme and with due regard to the available financial and human resources.

4. The Annual Work Programme, adopted in accordance with Article 11(4)(a), shall be in line with the Commission's annual work programme, including its research work and its actions on statistics undertaken in the context of the Community Statistical Programme.

CHAPTER 2

WORKING METHODS AND COOPERATION

Article 6

Working methods

1. The Agency shall set up and coordinate the necessary information networks. They shall be designed so as to ensure the provision of objective, reliable and comparable information, drawing on the expertise of a variety of organizations and bodies in each Member State and taking account of the need to involve national authorities in the collection of data. 2. In pursuing its activities, the Agency shall, in order to avoid duplication and guarantee the best possible use of resources, take account of existing information from whatever source, and in particular of activities already carried out by (a) Community institutions, bodies, offices and agencies;

(b) institutions, bodies, offices and agencies of the Member States; and

(c) the Council of Europe and other international organisations.

3. The Agency may enter into contractual relations, in particular subcontracting arrangements, with other organisations, in order to accomplish any tasks which it may entrust to them. The Agency may also award grants to promote appropriate cooperation and joint ventures, in particular to national, European and international organizations referred to in Articles 8 and 9.

Article 7

Relations with relevant Community bodies, offices and agencies

The Agency shall ensure appropriate coordination with relevant Community bodies, offices and agencies. The terms of the cooperation shall be laid down in memoranda of understanding where appropriate.

Article 8

Cooperation with organisations at Member State and European level

1. To help it carry out its tasks, the Agency shall cooperate with governmental and nongovernmental organisations and bodies competent in the field of fundamental rights at the Member State or at European level.

2. The administrative arrangements for the cooperation provided for by paragraph 1 shall comply with Community law and shall be adopted by the Management Board on the basis of the draft submitted by the Director after the Commission has delivered an opinion. Where the Commission expresses its disagreement with these arrangements, the Management Board shall re-examine and adopt them, with amendments where necessary, by a two-thirds majority of all members

Article 9

Cooperation with the Council of Europe

The Agency shall coordinate its activities with those of the Council of Europe, particularly with regard to its Annual Work Programme pursuant to Article 5. To this end, the Community shall, in accordance with the procedure provided for in Article 300 of the Treaty, enter into an agreement with the Council of Europe for the purpose of establishing close cooperation between the latter and the Agency. This agreement shall include the obligation of the Council of Europe to appoint an independent person to sit on the Agency's Management Board, in accordance with Article 11.

CHAPTER 3 ORGANISATION

Article 10

Bodies of the Agency

The Agency shall comprise:

- (a) a management board;
- (b) an executive board;
- (c) a director;
- (d) a forum.

Article 11

Management Board

1. The Management Board shall be composed of persons with appropriate experience in the field of fundamental rights and the management of public sector organisations, as follows:

- (a) one independent person appointed by each Member State;
- (b) one independent person appointed by the European Parliament;
- (c) one independent person appointed by the Council of Europe; and
- (d) two representatives of the Commission.

The persons referred to in point (a) shall be persons:

- with high level responsibilities in the management of an independent national human rights institution; or,
- with thorough expertise in the field of fundamental rights gathered in the context of other independent institutions or bodies.

Each member of the Management Board may be represented by an alternate member meeting the above requirements.

The list of the members of the Board shall be made public and shall be updated by the Agency on its web site.

2. The term of office of the members of the Management Board appointed shall be five years. It may be renewed once.

However, where a member no longer meets the criteria by reason of which he or she was appointed, he or she shall forthwith inform the Commission and the Director of the Agency. The party concerned shall appoint a new member for the remaining term of the office.

3. The Management Board shall elect its Chairperson and Vice-Chairperson to serve for a two-and-a-half year term, which may be renewed once.

Each member of the Management Board, or, in his or her absence, his or her alternate shall have one vote.

4. The Management Board shall ensure that the Agency performs the tasks entrusted to it. It shall be the Agency's planning and monitoring body. In particular, it shall:

- (a) adopt the Agency's Annual Work Programme on the basis of a draft submitted by the Agency's Director after the Commission has delivered an opinion. It shall be in accordance with the available financial and human resources. The Annual Work Programme shall be transmitted to the European Parliament, the Council and the Commission;
- (b) adopt the annual reports referred to in Article 4(1)(f) and (h), comparing, in particular, the results achieved with the objectives of the annual work programme; these reports shall be transmitted not later than 15 June to the European Parliament, the Council, the Commission, the Court of Auditors, the European Economic and Social Committee and the Committee of the Regions;
- (c) appoint and, if necessary, dismiss the Agency's Director;
- (d) adopt the Agency's annual draft and final budgets;

- (e) exercise disciplinary authority over the Director;
 - (f) draw up an annual estimate of expenditure and revenue for the Agency and send it to the Commission, in accordance with Article 19(5);
 - (g) adopt the Agency's rules of procedure on the basis of a draft submitted by the Director after the Commission has delivered an opinion;
 - (h) adopt the financial rules applicable to the Agency on the basis of a draft submitted by the Director after the Commission has delivered an opinion, in accordance with Article 20(11);
 - (i) adopt the necessary measures to implement the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the European Communities, in accordance with Article 23(3); and
 - (j) adopt the procedures for applying Regulation (EC) No 1049/2001 of the European Parliament and of the Council, in accordance with Article 16(2).
5. The Management Board may delegate any of its responsibilities to the Executive Board, except for the matters referred to in points (a), (b), (c), (d), (g) and (h) of paragraph 4.
6. Decisions by the Management Board shall be taken by a simple majority of the votes cast, except as regards the decisions referred to in points (a), (c), (d) and (e) of paragraph 4, where a two-thirds majority of all members shall be required. The Chairperson shall have the casting vote. The person appointed by the Council of Europe may vote only on decisions referred to in points (a) and (b) of paragraph 4.
7. The Chairperson shall convene the Board once a year, without prejudice to extraordinary supplementary meetings. The Chairperson shall convene extraordinary meetings on his or her own initiative or at the request of at least one third of the members of the Management Board.
8. The Director of the European Institute for Gender Equality may attend meetings of the Management Board as an observer. The Directors of other relevant Community agencies and Union bodies may also attend as observers when invited by the Executive Board.

Article 12

Executive Board

1. The Management Board shall be assisted by an Executive Board. The Executive Board shall be made up of the Chairperson and the Vice-Chairperson of the Management Board and two Commission representatives.
2. The Executive Board shall be convened by the Chairperson whenever necessary to prepare the decisions of the Management Board and to assist and advise the Director. It shall adopt its decisions by simple majority.
3. The Director shall take part in the meetings of the Executive Board, without voting rights.

Article 13

Director

1. The Agency shall be headed by a Director, appointed by the Management Board on the basis of a list of candidates proposed by the Commission. The Director shall be appointed on the basis of

his or her personal merit, administrative and management skills and experience in the field of fundamental rights. Before being appointed, the candidate selected by the Management Board may be asked to make a statement before the competent committee of the European Parliament and answer questions from its members.

2. The Director's term of office shall be five years. On a proposal from the Commission and after evaluation, this may be extended once for a period of no more than five years. In the evaluation, the Commission shall assess in particular the results achieved during the first term of office and the way in which they were achieved, and the Agency's duties and requirements in the coming years.

3. The Director shall be responsible for:

(a) performance of the tasks referred to in Article 4;

(b) preparation and implementation of the Agency's Annual Work Programme;

(c) all staff matters, and in particular exercising powers provided for in Article 23(2);

(d) matters of day-to-day administration;

(e) implementation of the Agency's budget, in accordance with Article 20; and

(f) implementation of effective monitoring and evaluation procedures relating to the performance of the Agency against its objectives according to professionally recognised standards. The Director shall report annually to the Management Board on the results of the monitoring system.

4. The Director shall be accountable for the management of his/her activities to the Management Board and shall participate in its meetings without voting rights.

5. The Director may be dismissed by the Management Board before his or her term has expired, on the basis of a proposal from the Commission.

Article 14

Fundamental Rights Forum

1. The Forum shall be composed of representatives of non-governmental organisations responsible for fundamental rights and efforts to combat racism, xenophobia and anti-Semitism, trade unions and employer's organisations, relevant social and professional organisations, churches, religious, philosophical and non-confessional organisations, universities and qualified experts and European and international bodies and organisations.

2. The members of the Forum shall be selected by an open selection mechanism to be determined by the Management Board. Their maximum number shall be 100. Their term of office shall be five years, which may be renewed once.

3. Members of the Management Board shall not be members of the Forum, but may attend its meetings.

4. The Forum shall constitute a mechanism for the exchange of information in relation to fundamental rights issues and the pooling of knowledge. It shall ensure close cooperation between the Agency and relevant stakeholders.

5. The Forum shall:

- make suggestions for the purpose of drawing up the Annual Work Programme to be adopted under Article 11(4)(a); and

- give feedback and suggest follow up on the basis of the annual report on the situation regarding

fundamental rights adopted under Article 11(4)(b).

6. The Forum shall be chaired by the Director. It shall meet annually, or at the request of the Management Board. Its operational procedures shall be specified in the Agency's internal rules and shall be made public.

7. The Agency shall provide the technical and logistic support necessary for the Forum and provide a secretariat for its meetings.

CHAPTER 4 OPERATION

Article 15

Independence and public interests

1. The Agency shall fulfil its tasks in complete independence.
2. The members of the Management Board, the Director and the members of the Forum shall undertake to act in the public interest. For this purpose, they shall make a statement of commitment. The members of the Management Board appointed under Article 11(1)(a), (b) and (c), the Director and the members of the Forum shall undertake to act independently. For this purpose, they shall make a statement of interests indicating either the absence of any interests which might be considered prejudicial to their independence or any direct or indirect interests which might be considered prejudicial to their independence. Both statements shall be made annually in writing.

Article 16

Access to documents

1. Regulation (EC) No 1049/2001 of the European Parliament and of the Council shall apply to documents held by the Agency.
2. The Management Board shall adopt arrangements to implement Regulation (EC) No 1049/2001 within six months of the commencement of the Agency's operation.
3. Where the Agency takes decisions under Article 8 of Regulation (EC) No 1049/2001, a complaint may be lodged with the Ombudsman or an action may be brought in the Court of Justice of the European Communities, as provided by Articles 195 and 230 of the Treaty respectively.

Article 17

Data protection

Regulation (EC) No 45/2001 of the European Parliament and of the Council shall apply to the Agency.

Article 18

Administrative review

The operations of the Agency are subject to the supervision of the Ombudsman in accordance with the provisions of Article 195 of the Treaty.

CHAPTER 5 FINANCIAL PROVISIONS

Article 19

Drawing up of the budget

1. Estimates of all the revenue and expenditure of the Agency shall be prepared for each financial year, corresponding to the calendar year, and shall be shown in the budget of the Agency.

2. The revenue and expenditure shown in the budget of the Agency shall be in balance.

3. The revenue of the Agency shall, without prejudice to other resources, comprise:

(a) a subsidy from the Community, entered in the general budget of the European Union (Commission section); and

(b) payments received for services rendered.

This revenue may be complemented by

(a) voluntary contributions from the Member States; and

(b) financial contributions from the organisations or third countries referred to in Articles 8, 9 or 27.

4. The expenditure of the Agency shall include staff remuneration, administrative and infrastructure costs and operating expenses.

5. Each year the Management Board, on the basis of a draft drawn up by the Director, shall produce an estimate of revenue and expenditure for the Agency for the following financial year. This estimate, which shall include a draft establishment plan, shall be transmitted by the Management Board to the Commission by 31 March at the latest.

6. The estimate shall be transmitted by the Commission to the European Parliament and the Council (hereinafter the "budgetary authority") together with the preliminary draft budget of the European Union.

7. On the basis of the estimate, the Commission shall enter in the preliminary draft general budget of the European Union the estimates it considers necessary for the establishment plan and the amount of the subsidy to be charged to the general budget, which it shall place before the budgetary authority in accordance with Article 272 of the Treaty.

8. The budgetary authority shall authorise the appropriations for the subsidy to the Agency. The budgetary authority shall adopt the Agency's establishment plan.

9. The Agency's budget shall be adopted by the Management Board. It shall become final following the adoption of the general budget of the European Union. Where appropriate, it shall be adjusted accordingly.

10. The Management Board shall, as soon as possible, notify the budgetary authority of its intention to implement any project which may have significant financial implications for the funding of its budget, in particular any projects relating to property such as the rental or purchase of buildings. It shall inform the Commission thereof.

Where a branch of the budgetary authority has notified its intention to deliver an opinion, it shall forward its opinion to the Management Board within six weeks from the date of notification of the project.

Article 20

Implementation of the budget

1. The Director shall implement the Agency's budget.
2. By 1 March at the latest following each financial year, the Agency's accounting officer shall communicate the provisional accounts to the Commission's accounting officer, together with a report on the budgetary and financial management for that financial year. The Commission's accounting officer shall consolidate the provisional accounts of the institutions and decentralised bodies in accordance with Article 128 of Council Regulation (EC, Euratom) No 1605/2002 ("the Financial Regulation").
3. No later than 31 March following each financial year, the Commission's accounting officer shall transmit the Agency's provisional accounts to the Court of Auditors, together with a report on the budgetary and financial management for that financial year. The report on the budgetary and financial management for that financial year shall also be transmitted to the European Parliament and the Council.
4. On receipt of the Court of Auditors' observations on the Agency's provisional accounts, pursuant to Article 129 of the Financial Regulation, the Director shall draw up the Agency's final accounts under his own responsibility and forward them to the Management Board for an opinion.
5. The Management Board shall deliver an opinion on the Agency's final accounts.
6. The Director shall, no later than 1 July following each financial year, transmit the final accounts to the European Parliament, the Council, the Commission and the Court of Auditors, together with the Management Board's opinion.
7. The final accounts shall be published.
8. The Director shall send the Court of Auditors a reply to its observations no later than 30 September. He/she shall also send this reply to the Management Board.
9. The Director shall submit to the European Parliament, at the latter's request, any information required for the smooth application of the discharge procedure for the financial year in question, as laid down in Article 146(3) of the Financial Regulation.
10. The European Parliament, on a recommendation from the Council acting by a qualified majority, shall, before 30 April of year N + 2, give a discharge to the Director in respect of the implementation of the budget for year N.
11. The financial rules applicable to the Agency shall be adopted by the Management Board after the Commission has been consulted. They may not depart from Commission Regulation (EC, Euratom) No 2343/2002 of 19 November 2002, unless specifically required for the Agency's operation and with the Commission's prior consent.

Article 21

Combating fraud

1. In order to combat fraud, corruption and other unlawful activities, the provisions of Regulation (EC) No 1073/1999 of the European Parliament and of the Council shall apply without restrictions to the Agency.
2. The Agency shall accede to the Inter-institutional Agreement of 25 May 1999 concerning internal

investigations by the European Anti-fraud Office (OLAF) and shall issue, without delay, the appropriate provisions applicable to its entire staff.

3. The decisions concerning funding and the implementing agreements and instruments resulting from them shall explicitly stipulate that the Court of Auditors and OLAF may carry out, if necessary, on-the-spot checks on the recipients of the Agency's funding and the staff responsible for allocating it.

CHAPTER 6

GENERAL PROVISIONS

Article 22

Legal status and location

1. The Agency shall have legal personality.
2. In each of the Member States, the Agency shall enjoy the most extensive legal capacity accorded to legal persons under their laws. In particular it may acquire and dispose of movable and immovable property and may be a party to legal proceedings.
3. The Agency shall be represented by its Director.
4. The Agency shall legally succeed the European Monitoring Centre on Racism and Xenophobia. It shall assume all legal rights and obligations, financial commitments or liabilities of the Centre. Employment contracts concluded by the Centre before the adoption of this Regulation shall be honoured.
5. The seat of the Agency shall be Vienna.

Article 23

Staff

1. The Staff Regulations of Officials of the European Communities, the Conditions of Employment of Other Servants of the European Communities and the rules adopted jointly by the European Community institutions for the purpose of applying these Staff Regulations and Conditions of Employment shall apply to the staff of the Agency.
2. In respect of its staff, the Agency shall exercise the powers conferred on the appointing authority.
3. The Management Board shall, in agreement with the Commission, adopt the necessary implementing measures, in accordance with arrangements provided for in Article 110 of the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the European Communities.
4. The Management Board may adopt provisions to allow national experts from Member States to be employed on secondment at the Agency.

Article 24

Language arrangements

1. The provisions of Regulation No 1 of 15 April 1958 shall apply to the Agency.
2. The translation services required for the functioning of the Agency shall be provided by the Translation Centre for the Bodies of the European Union.

Article 25

Privileges and immunities

The Protocol on the Privileges and Immunities of the European Communities shall apply to the Agency.

Article 26

Jurisdiction of the Court of Justice

1. The contractual liability of the Agency shall be governed by the law applicable to the contract in question. The Court of Justice shall have jurisdiction pursuant to an arbitration clause contained in a contract concluded by the Agency.

2. In the case of non-contractual liability, the Agency shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by the Agency or its servants in the performance of their duties.

The Court of Justice shall have jurisdiction in disputes relating to compensation for any such damage.

3. The Court of Justice shall have jurisdiction in actions brought against the Agency under the conditions provided for in Article 230 or 232 of the Treaty.

Article 27

Participation of candidate or potential candidate countries

1. The Agency shall be open to the participation of those countries which have concluded an association agreement with the Community and have been identified by the European Council as candidate countries or potential candidate countries for accession to the Union where the relevant Association Council decides on such participation.

2. In that event, the modalities of their participation shall be determined by a decision of the relevant Association Council. The decision shall specify the expertise and assistance to be offered to the country in question and indicate in particular the nature, extent and manner in which these countries will participate in the Agency's work, including provisions relating to participation in the initiatives undertaken by the Agency, to the financial contribution and to staff. The decision shall be in line with this Regulation and with the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the European Communities. The decision shall provide that the participating country may appoint an independent person fulfilling the qualifications for persons referred to in Article 11(1)(a) as observer to the Management Board without right to vote.

3. The Agency shall concern itself with the situation of fundamental rights in the countries, which participate in accordance with this Article, to the extent it is relevant for the respective association agreement. Articles 4 and 5 shall apply by analogy to that effect.

Article 28

Activities under Title VI of the Treaty on European Union

This Regulation shall be without prejudice to the possibility for the Council, acting in accordance with Title VI of the Treaty on European Union, to empower the Agency to pursue its activities under this Regulation also with respect to the areas covered by Title VI of the Treaty on the European Union.

CHAPTER 7
FINAL PROVISIONS

Article 29

Procedure

1. The Commission shall be assisted by a committee, composed of representatives of the Member States and chaired by the representative of the Commission.
2. Where reference is made to this paragraph, the regulatory procedure laid down in Article 5 of Decision 1999/468/EC shall apply, in compliance with Article 7(3) thereof.
3. The period provided for in Article 5(6) of Decision 1999/468/EC shall be one month.

Article 30

Transitory arrangements

1. The current term of office of the members of the Management Board of the European Monitoring Centre on Racism and Xenophobia shall terminate on 31 December 2006. The Commission shall take the necessary measures to ensure that a Management Board established in accordance with Article 11 shall start its term of office on 1 January 2007.
2. The Commission shall start the procedure for appointing a Director of the Agency as provided for in Article 13(1) without delay after the entry into force of this Regulation.
3. The Management Board, acting on a proposal from the Commission, may extend the current term of the Director of the European Monitoring Centre on Racism and Xenophobia for a maximum period of 18 months, pending the appointment procedure referred to in paragraph 2.
4. If the Director of the Centre is unwilling or unable to act in accordance with paragraph 3, the Management Board shall appoint an interim Director on the same conditions.

Article 31

Evaluations

1. The Agency shall regularly carry out ex-ante and ex-post evaluations of its activities when these necessitate significant expenditure. It shall notify the Management Board of the results of these evaluations.
2. The Agency shall forward annually to the budgetary authority any information relevant to the outcome of the evaluation procedures.
3. No later than 31 December 2009, the Agency shall commission an independent external evaluation of its achievements during the first three years of operations on the basis of terms of reference issued by the Management Board in agreement with the Commission. This evaluation shall take into account the tasks of the Agency, the working practices and impact of the Agency on the protection and promotion of fundamental rights and shall include an analysis of the synergy effects and the financial implications of any extension of the tasks.

The evaluation shall take into account the views of the stakeholders at both Community and national levels. The evaluation shall also assess the possible need to modify or extend the Agency's tasks, scope, areas of activity or structure, including in specific structural modifications needed to ensure compliance with horizontal rules on regulatory agencies once they enter into force.

4. The Management Board, in agreement with the Commission, shall determine the timing and scope of the following external evaluations, which shall be carried out periodically.

Article 32

Review

1. The Management Board shall examine the conclusions of the evaluation referred to in Article 31 and issue to the Commission such recommendations as may be necessary regarding changes in the Agency, its working practices and the scope of its mission. The Commission shall transmit the evaluation report and the recommendations to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions and make them public.

2. After having assessed the evaluation report and the recommendations, the Commission may submit any proposals for amendments to this Regulation which it considers necessary.

Article 33

Commencement of the Agency's operation

The Agency shall become operational by 1 January 2007.

Article 34

Repeal

1. Regulation (EC) No 1035/97 is repealed with effect from 1 January 2007.

2. References to the repealed Regulation shall be construed as references to this Regulation.

Article 35

Entry into force and application

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Council

The President

Notes

¹ OJ C , , p. .

² OJ C , , p. .

³ OJ C , , p. .

⁴ OJ C , , p. .

⁵ Proclaimed in Nice on 7 December 2000, OJ C 364, 18.12.2000, p. 1.

⁶ Signed in Rome on 4 November 1950.

⁷ OJ L 151, 10.6.1997, p.1. As amended by Regulation (EC) No 1652/2003, OJ L 245, 29.9.2003, p. 33.

⁸ COM (2004)693final, 25.10.2004.

⁹ COM (2005)59final, 25.2.2005.

¹⁰ OJ L 145, 31.5.2001, p. 43.

¹¹ OJ L 8, 12.1.2001, p. 1.

¹² OJ 17, 6.10.1958, p. 385/58. Regulation as last amended by the 2003 Act of Accession.

¹³ OJ L 314, 7.12.1994, p. 1. Regulation as last amended by Regulation (EC) No. 1645/2003, OJ L 245, 29.9.2003, p. 13.

¹⁴ OJ L 357, 21.12.2002, p. 72, with Corrigendum in OJ L 2, 7.1.2003, p. 39

¹⁵ OJ L 248, 16.9.2002, p. 1.

¹⁶ OJ L 136, 31.5.1999, p. 1.

¹⁷ OJ C 194, 25.6.1997, p. 4.

¹⁸ OJ L 184, 17.7.1999, p. 23.