

The Politics of Sustainability

Responsibility for future generations is easily postulated in the abstract but it is much more difficult to set it to work in the concrete. It requires some changes in individual and institutional attitudes that are in opposition to what has been called the 'systems variables' of industrial society: individual freedom, consumerism, and equality.

The Politics of Sustainability from Philosophical Perspectives seeks to examine the motivational and institutional obstacles standing in the way of a consistent politics of sustainability and to look for strategies to overcome them. It argues that though there have been significant changes in individual and especially collective attitudes to growth, intergenerational solidarity and nature preservation, it is far from certain whether these will be sufficient to encourage politicians to give sustainable policies priority over other legitimate concerns. Having a philosophical approach as its main focus, the volume is at the same time interdisciplinary in combining political, psychological, ecological and economic analyses.

This book will be a contribution to the joint effort to meet the theoretical and practical challenges posed by climate change and other impending global perils and will be of interest to students of environmental studies, applied ethics and environmental psychology.

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Philosophical Perspectives

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May Thorseth

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12 Parliaments and future generations

The four-power-model

Jörg Tremmel

Democracy, as it has been conceived of and practiced until now, has to a large extent ignored the problem of 'presentism'. The main objective of this article is to suggest an extension of the age-old separation of powers between the legislative, executive and judicial branch. It is argued that in order to make the political system more future-oriented, there is a need for a new (fourth) institution that ensures that the interests of future generations be taken into account within today's decision-making process. The chapter argues in favour of an institution with rights of initiative in the legislative process, integrating the competences of this new institution with those of parliament.

1. Introduction: endemic presentism

Since the 1990s, political scientists have been engaged in a lively debate about the 'presentism' of the democratic form of government, and its most important institution, parliamentarianism (Dobson 1996; Lafferty 1998; Kielmansegg 2003; Eckersley 2004; Schmidt 2006; Thompson 2010; Stein 1998). 'Presentism', the preference towards present-day interests, is a more precise word for what is generally understood as a lack of sustainability. To be sure, the concepts of 'presentism', 'short-sightedness' and 'short-term nature' do not mean the same. The first two, 'presentism' and 'short-sightedness', are in sharp contrast to the noble idea of 'sustainability/intergenerational justice',¹ but the same is not true for the phrase 'short-term.' A generation's long-term commitments, for example with regard to a certain energy system (such as nuclear power, energy from fossil fuels, or renewable energy), necessarily restrict the possibilities of future generations to revise them; in other words, short-term rerouting might not be feasible due to previously made (or not made) investments. The political right of generations to self-determination has been discussed regularly, and at great length, in political philosophy, for example by Jefferson, Madison and Paine during the foundation of the United States.² Jefferson argued that every constitution ought to become invalid after 19 years, so that each new generation, just like its predecessors, would be free to organize the terms of its coexistence however it saw fit. Madison objected by pointing to the insecurity that would thus arise. Thomas Paine took Jefferson's side and famously remarked that 'Every age and generation must be as

free to act for itself in all cases as the age and generations which preceded it' (Paine 1996: 261) This right was even embedded in the French constitution of 1793.³ Article 28 thereof stated that no generation was to force future generations to comply with its laws. (Godechot 1979).

Even though Jefferson's concept did not prevail, his idea that 'short-term' commitments need not necessarily have a negative impact on future generations deserves to be taken seriously. Therefore, this chapter will limit itself to criticize the concept of 'presentism'. What exactly does it mean for present-day democracy to be accused of 'presentism'?

(1)

Voters, as well as the elected, tend to seek advantages that can be realized in the present or the near future, or at the very least within their own lifetimes. From this diagnosis, some studies arrive at conclusions that can be taken as a critique of elected politicians or the political class. This chapter, in contrast, will turn its attention first to the 'presentism' of the electorate (the voters). Faced with the choice between receiving a certain state benefit (or tax concession) either now or at a slightly later point in time – e.g. in a year – most people opt for the present day for what appear to be anthropological reasons. With respect to larger time differences, Kielmansegg finds:

A voter is thus doubly discounted in his political decision, first because the future is the future and not the present, and second because and in so far as it involves the future ... The bottom line is that with regard to their responsibility towards the future, there is no evidence that direct-democratic decision-making procedures are inherently superior to representative democracy.

Kielmansegg 2003: 586

In fact, it would be inappropriate to equate more direct democracy with less 'presentism'. It comes as no surprise that in direct democracies such as Switzerland, a 'presentism' of the electorate can easily be ascertained (Bonoli and Häusermann 2010). The empirical reality thus confirms the assumption that 'presentism' affects representative and direct democracies in pretty much the same way.

(2)

In democracy, opposition politicians take an interest in being elected, as do governing politicians in their being re-elected. This is not to say that as a group, politicians are exclusively motivated by power, positions and privileges. Even those who seek to shape sensible policy have to exert power to do so; and the only way to obtain that kind of power is by holding an office (or mandate). Therefore, during campaigns, political parties have to focus on the current

preferences of the current electorate. Future people cannot vote today, and they cannot be included in the calculus to maximize votes. Political competitions between two politicians, one of whom promises some benefits to occur in the near future, while the other one pledges the same but in the further future, will not end in favour of the latter – at least not as long as the electorate is presentist.⁴ The fact that some political decisions lean towards ‘presentism’ is not primarily due to a lack of future-awareness amongst politicians; rather, it is a structural consequence of majority rule. For this reason, appeals to the conscience of politicians, asking them to consider the interests of future people more deeply, are likely to go unheard. It is only natural for democracy that its rhythm conforms with the timing of election periods (i.e. periods of four to five years). Therefore, it exhibits structural incentives for a politics of ‘glorifying the present and disregarding the future’ (Richard von Weizsäcker, cf. Friedrich *et al.* 1998: 53). Mutatis mutandis, John Stuart Mill’s insight from 1861 still holds true today:

Rulers and ruling classes are under a necessity of considering the interests and wishes of those who have the suffrage; but of those who are excluded, it is in their option whether they will do so or not; and, however honestly disposed, they are, in general, too fully occupied with things which they must attend to have much room in their thoughts for any thing which they can with impunity disregard.

Mill 1958: 131

In order to ‘outwit’ the presentist part of the electorate, as it were, the future-orientated part of the political class should take a genuine interest in amending the rules of the game so as to include a self-commitment of the entire political class.

(3)

The scarce representation of future generations means that conflicts of interest are decided upon by the majority of eligible voters and not by the affected party. The normative justification of democracy actually includes the promise that all those ruled by a government and affected by its decisions have a say on the laws that rule their lives.⁵ Due to their divergence in time, effects brought about by the current generation will affect only future generations. Thus, a special form of ‘representation gap’ comes into being. This gap is entirely different from the lack of electoral representation for societal minorities or other groups whose lack of representation is often lamented, such as women, the elderly, foreigners, and minors. These groups are present in the here and now; they can take part in political discourse, write letters, appear on talk shows, and in many cases vote in elections. None of this applies to future generations. If future generations were able to claim their interests in the political decision-making process, the majority stakes in important political decisions would be different. Consider the

example of energy policy: the current form of energy production, with its emphasis on fossil energy sources, enables a high standard of living in the present. However, with such an investment comes grave disadvantages in the mid-term (50–100 years) future. Post-1990 – the year in which the IPCC's *First Assessment Report* assessed a connection between anthropogenic carbon dioxide emissions and climate change with a 90 per cent probability – presently living generations can no longer legitimately claim ignorance of the consequences of their actions. Scientific analyses indicate that current energy policy intensifies the natural greenhouse effect and causes the global average temperature to rise. Even to date, anthropogenic climate change has cost hundreds of thousands of human lives. And this number of casualties among future people is expected to be a multiple. Assuming that only those born within the next 200 years from now were to have a say on energy policy in the next general election, all political parties would have to rewrite their programs in order to facilitate a much faster reduction in greenhouse gas emissions. State debt would also be reduced much faster than is currently foreseen.⁶

It is only since the twentieth century that the pace of humankind and the environment have started to fall apart. In environmental issues, more than elsewhere, the effects of current actions reach far into the future and can have a deeply negative impact on the quality of life of numerous future generations (for examples, see Tremmel 2009: 2). Prompted by humanity's unprecedented ability to influence its geophysical surroundings, scientists have recently begun to speak of the beginning of a new geological period, the anthropocene.⁷ Naturally, this transition into a new phase of geology also necessitates a further advancement of our form of government.

2. Lack of liability for inadequate performance in office

There is yet another issue that amplifies the orientation towards the present: in democracies, the governmental responsibility borne by politicians is limited in time. Indeed, this is one of the advantages of the democratic type of government. However, it also means that an elected official does not have to assume that her own short-sighted decisions will catch up with her twenty or thirty years later. As soon as a new government comes into power, she is no longer liable.

It is quite a novelty that, and for what reason, a lawsuit was brought against the former prime minister of Iceland Geir Haarde in June 2011. Haarde was the prime minister in office when the country's financial system broke down. The *Althing*, Iceland's parliament, voted in favour of a lawsuit against Haarde because he had failed to take action during the financial crisis of 2008 that led to the collapse of the country's economy.⁸ He was actually convicted in 2012 on one of four counts, namely for not holding cabinet meetings at the height of the crisis. However, he was acquitted from the heavier charges of neglecting his duties.⁹ Regardless of one's take on the question of guilt concerning the financial crisis, such a case is a unique approach that has not been considered even remotely by other countries affected by the financial crisis (Greece, Portugal or Ireland). The

introduction of a criminal offence statute that would make political decision-makers liable for knowingly creating policies that put future generations at a disadvantage has no chance of being implemented on a broader scale.¹⁰ Such thinking would pose too much of a risk by inviting partisan-motivated reckoning with the policies of deselected incumbents.

3. Democracy as a political legacy for future generations

After the failed UN climate conference in Copenhagen in 2009 and the divisive follow-up conferences in Cancun 2010, Durban 2011 and Warsaw 2013, there was an increase in contributions to the debate, giving rise to the question of whether democracy is in general the best form of government to cope with ecological challenges (see, for example, Shearman and Smith 2007; Pötter 2010; Leggewie and Welzer 2009 a, b). This provocative question is misleading, however, whether it is answered in the affirmative or not. At any rate, the international climate conferences are a bad case in point, given that not only democratic, but also non-democratic states contributed to the failure of the negotiations (Saretzki 2011: 42). Comparative studies have shown that the environmental performance of authoritative regimes is far worse than that of democracies.¹¹ Reforming democracy, to be sure, does not mean putting it into question. Churchill's famous line 'Democracy is the worst form of Government except all those other forms that have been tried from time to time', points to the heart of the matter. Democracy as a form of government is one of the most valuable legacies that future generations can inherit from present generations.

4. Insufficient posterity protection clauses in constitutions

The growing acceptance of future responsibility has led to the trend of including posterity protection clauses in constitutions. Insofar as constitutions were newly adopted, for example in Eastern Europe and Central Asia after 1989 or in South Africa after the end of apartheid, a regard for generations was inscribed in almost all of these cases. Even well-established constitutions were changed, thus reflecting an increasing prominence of future ethics.¹² Around 30 constitutions exhibit such a generational regard, including those of France, Germany, Argentina, Brazil and South Africa. Only five constitutions speak explicitly of 'rights of future generations': Norway (Article 110b), Japan, Iran (Article 50), Bolivia (Article 7) and Malawi (Article 13) (Article 11). In other cases, the interests of future generations (e.g. Georgia) or, alternatively, their needs (e.g. Uganda) are addressed.

The number of constitutions with posterity protection clauses is already considerable, and it continues to grow. But has it made any difference? A sobering conclusion seems in order. The introduction of such clauses resulted neither in the phasing out of nuclear power nor in serious climate action in the respective countries. Constitutional courts are obviously not optimal to serve as the guardians of future generations' interests. They cannot represent such interests with full commitment for the simple reason that they have no mandate to do so.

It makes a substantial difference whether a new institution is created with its own budget, whether people come to hold new positions and whether new office spaces and logos are required – or whether, by contrast, existing courts are entrusted with new tasks by legal extensions. The approach advocated below is based on the need to create a new organization or institution for the representation of interests of future generations.¹³

5. Paradigm shift from a three- to a four-power-model

What is required in the anthropocene is nothing less than a paradigm shift. The new paradigm would entail a ‘future branch’, representing the interests of future generations in the legislative process, and regard it as a legitimate and necessary part of a democratically constituted community.¹⁴ The linchpin of this paradigm would be that the age-old separation of powers into legislative, executive and judicial branches is no longer appropriate today. The present-day demos of the twenty-first century can affect the living conditions of a future demos far more than it used to do in former times. Just like in the eighteenth century, when in the course of first establishing a democracy in a large territorial state, the *Federalist Papers* considered a system of ‘checks and balances’ to protect minorities against the ‘tyranny of majority’ (Tocqueville), so today, we are in need of ‘checks and balances’ against the tyranny of the present over the future.

According to Jellinek’s three-element doctrine, a state is constituted by state territory, state population and state power. The basic idea of the separation of powers is that they should be distributed between several institutions so as to prevent each one of them from becoming too powerful. Article 20 II of the German Basic Law protects the separation of powers in Germany. The new paradigm would require that Article 20 be amended as follows (new words in italics):

All state authority emanates from the people. It is exercised by the people through elections ... and through specific legislative means, executive power, jurisdiction *and the representation of future generations.*

These are just a few more words on paper – but they would be associated with many prerequisites and consequences. There would be many prerequisites because the purpose of such a constitutional amendment would have to be justified by extensive considerations before work on it could get started. Such a constitutional amendment would also be almost revolutionary and entail far-reaching consequences. The separation of powers into legislative, executive and judiciary – the ‘trias politica’ – was conceived by thinkers in the seventeenth and eighteenth century and is now universally established in Western democracies.¹⁵ Scholars speak of a common ‘commitment of *all* democratic constitutional states to three-power structured constitutional order’ (Möllers 2008: 13). If a fourth institutional level were to be added now, this would not only be a major qualitative development of democracy. Due to the necessary coordination of the

competences of all powers, this would also necessitate a revision of numerous articles of the constitution, at least in some versions of the four-power-model.

The idea of extending the separation of powers model provides an answer to the so-called problem of motivation in the context of intergenerationally just policies. This problem is understood by philosophers, psychologists and political scientists as the hitherto unresolved question of how to motivate individuals and our society as a whole to act in intergenerationally just and sustainable ways. The extension of the separation of powers model solves this problem. In adopting such an extension, a constitutive people coerces itself into acting sustainably. The German term 'Vierte Gewalt' (literally 'fourth force', identical with the less martial English concept 'Fourth Branch') speaks for itself.

6. The historical roots of the separation of powers and the extension of the concept in the present

The historical roots of the separation of powers are usually associated with the political theorists John Locke and Charles de Montesquieu. However, even a thinker as early as Aristotle already recommended a mixed constitution, or, more specifically, a mixture of democracy and oligarchy designed to prevent an excessive concentration of power, which he called 'polity'. According to Aristotle, a constitution is more durable the more it is mixed because the mixture keeps the different forces in balance (Strohmeier 2004: 32). In his *Two Treatises of Government*, published in 1690, John Locke distinguishes between legislative and executive, but leaves no room for an independent third judicial power. Locke introduces a clear hierarchy of powers when he writes that 'this *legislative* is not only the *supreme power* of the common-wealth, but sacred and unalterable in the hands where the community has once placed it' (Locke 1924, 183–184). Charles de Montesquieu, the actual 'father' of the separation of powers doctrine, applies the classical tripartite division of legislative, executive and judiciary power in his *De l'esprit des lois* of 1748. In the sixth chapter of the 11th book, which mainly deals with the English constitution, he is concerned with the sharing and balancing of powers. Montesquieu writes: 'In every government there are three sorts of power: *the legislative; the executive, in respect to things dependent on the law of nations; and the executive, in regard to things that depend on the civil law*' (Montesquieu 2001: 173. Emphasis in original) Following this statement, Montesquieu explains that this latter power is to be referred to as the judiciary. This brings us to the classic tripartite division of legislative, executive and judicial power (Mastronardi 2007: 268).

While the idea of a 'horizontal' separation of powers with its three-pillar principle has a long history, more attention has been directed recently towards the 'vertically' directed separation of powers. In Germany, for example, the federalization of political systems means the division of labour between federal states and from a local level upwards, complemented by the European Union. The term 'separation of powers' is therefore in need of interpretation. In order to obtain at least a core in terms of a working definition, the term shall be used here primarily for the horizontal separation of powers. This seems to offer the most options for

an extension that institutionalizes the interests of future generations. Lest it be misunderstood: this horizontal separation of powers can be found on quite different federal levels – in Germany, the *Länder* have state governments, parliaments and constitutional courts. But overloading the term ‘separation of powers’ is of little use. Neither the separation of powers according to Harrington into an advisory and a decision-making body, nor the separation of power according to John Locke into legislative, executive and federative forces, has prevailed historically. The media is also often referred to colloquially as ‘the fourth power’. To some extent, interest groups such as trade unions or employers’ associations act as a ‘fifth power’ because they try to influence politicians through lobbying. The terminology I use counts only the ‘branches of government’ (not society) and adds a fourth such branch to the existing three. What some modern scholars (e.g. Steffani 1997: 98) call ‘additional levels of power separation’ may be readily referred to as subsystems of society. Needless to say, the power of the political system does not penetrate all other areas such as business, science, media, religion or private relationships. Since these systems are autonomous, political power is limited. However, the term ‘separation of powers’ should continue to refer to the organization of state power to prevent confusion.

7. Who constitutes the demos?

Are there any counter-arguments against the establishment of a powerful institution for the representation of future generations? The backdrop of this is one of the great questions in political theory: ‘Who constitutes the demos?’¹⁶ The idea of who is part of the electorate is subject to historical change. Two hundred years ago, in most democracies, the demos was formed of those men who paid the ‘right’ tax revenue, had the ‘right’ skin colour, and were of the ‘right’ religion and the ‘right’ age. Today women, for example, vote, but future generations are still left out. It is crucial that for reasons of logic, the issue of the original composition of the demos cannot be decided democratically. Goodin (2007: 47) writes: ‘It is logically incoherent to let the composition of the initial demos be decided by a vote of the demos, because that demos cannot be constituted until after the demos votes.’ To illustrate this point, one might imagine the 1959 vote on women’s suffrage in Switzerland: two thirds of the men refused the extension and thus defined themselves as, alone, the voting demos, at that time and also in the future. Today, hardly anyone would consider this decision to be legitimate.¹⁷ Rather, the consideration of upstream normative principles must form the basis of deciding how the demos should be constituted. The *all-affected principle* leads to the conclusion that both current and future citizens can be considered as bearers of popular sovereignty. But it might make sense to replace today’s principle of *one person, one vote* with a principle of proportionality for future, still unborn citizens. The more the life of a future person will be affected by a particular decision, the more their voice would be taken into account, for example, by 50 per cent per decade. Even if the practical problems of such proportional suffrage seem insurmountable, this could be an interesting theoretical principle to guide the

design of a future branch. For, if the *all-affected principle* is taken seriously, every political decision is thought to affect another circle of people. Given that, for example, the consequences of nuclear waste accumulation extend much further into the future than the issue of sprawling public debt. The future electorate's 'No' against the current electorate's majority in favour of both these presentist policies would be much louder in the case of nuclear waste, if the votes of future people would be anticipated in both cases, respectively.

But, it might be asked, is it not the case that the principle of representation is generally incompatible with the idea of democracy? In a world in which most democracies happen to be *representative* democracies, the struggle for the principle of representation itself (as it prominently features in Kant's distinction between the republic and democracy) has long been settled. According to a dictum ascribed to Abraham Lincoln, democracy is characterized by 'government of the people, by the people, for the people'. However, most democracies today are based on the principle of representation: government of *all* (*with few exceptions*) members of the people, by *some* elected representatives from the people, for *all* members of the people. Thus, in accordance with common knowledge, representation and democracy do not seem to conflict. Extending the principle of representation to future citizens merely amounts to a consistent extension of the principle of representation. 'Representation, in the broadest sense, means making the invisible visible and the absent present', writes Göhler (1992: 109). Taking the same stance, Thaa adds that representation should be understood as the 'visualization of the absent' (2011: 151). Even though these statements might be taken out of their original context here, they resonate nicely with the problem of future generations' lack of representation.

To be sure, unlike the disenfranchisement of living people (such as those living abroad or those of a certain race, gender, nationality, class, or age),¹⁸ the case of unborn citizens raises a number of questions which hitherto have been addressed by philosophers rather than by political scientists:

1. the *uncertainty* or *ignorance* with respect to future developments, the preferences of future people, or the impact of present-day decisions on future generations' quality of life;
2. the *non-identity problem*;
3. the rich-future thesis.¹⁹

Even though (2) and (3) make for complex problems, it is reasonable to assume, in view of the pertinent literature, that both of them are solvable.²⁰ The uncertainty argument, however, is nowhere as easy to refute, as we shall see later in light of some practical examples.

8. Core questions

As justified above, the conception of a four-power-model that includes a future branch is a central task of our time. It should not be forgotten, however, that the

idea of the *trias politica* currently varies from country to country as a result of different traditions of political thought. Take the example of France: to this day, popular sovereignty is equated much stronger with parliamentary sovereignty in France than it is in Germany. The powers exercised by Germany's constitutional court continue to astonish many in France.²¹ Given that the three-power-model varies from democracy to democracy, we might need many different configurations of the fourth branch; that is, for numerous kinds of future branches. There cannot be a *one-model-fits-all* solution for the representation of future generations; rather, it seems apt to conceive differently of such a representative body for each country. Keeping this in mind, the remainder of this chapter will design a representative body for future generations' interests for a specific country, Germany. The core questions about such an endeavour are the following:²²

- Should the representative body for future generations be entitled to propose legislation, to put a suspensive veto on it, or even to quash it for good?
- Should the domain of the new institution be limited to certain areas of policy, and if so, which ones?
- How should the new institution be constituted, who should have the right to convene it, and how often?
- For how long should the new institution's members be in office, how many members should it have and to what kind of resources should they be entitled? Who should determine its members' allowances? Should they enjoy indemnity/immunity, or should it be easy to have them dismissed from office in cases of misconduct? By whom?
- How exactly would the constitution of a particular country have to be amended in order to establish an assertive fourth branch?

Throughout the globe, there is by now a considerable number of organizations with a mandate for sustainability and intergenerational justice. However, most of these enjoy merely consultative status and thus exercise little actual power in a Weberian sense.²³ A decisive touchstone is whether or not such institutions have the right to intervene in legislative procedures. Among the eight institutions mentioned in a UN report,²⁴ only four exhibit these competences. One of the main issues here is whether or not the new institution should be entitled to prevent or propose new legislation: should it rather act as the legislative or the judicative branch? In the first case, for instance, a number of seats in parliament could be reserved for representatives of future generations, or certain organizations outside parliament could be endowed with a right of initiative. In the second case, one might think of introducing either a third senate to the Federal Constitutional Court or, alternatively, a new ombudsperson. This chapter argues in favour of a future branch for Germany that holds a right of initiative. Thus, the question of democratic reform becomes one of reforming parliamentarianism. This is the route that is pursued in the remainder of this chapter. Further characteristics of this proposal include an appeal to consider path dependencies, to prevent another 'veto player', and to render moot the charge of an 'eco-dictatorship'.

Nowadays, the separation of powers is an important structuring principle in every democratic state under the rule of law. The legislative passes the law, the executive implements it, and the judiciary controls its abidance. The separation of powers is meant to create an internal control mechanism among the government bodies so as to prevent the abuse of power.²⁵ At the same time, the separation of powers better not diffuse the state authority to the effect that the state itself becomes powerless, for a powerless state will find itself unable to guarantee the liberty, security and equality of its citizens.²⁶ In the best case, the separation of powers amounts to a sort of division of labour. In the worst case, the different branches neutralize each other as 'veto players',²⁷ thereby making it impossible for any governing to take place at all. Germany's multi-level parliamentarianism, in particular, features a number of veto players such as the *Bundesrat* (the 'upper house' representing the country's 16 *Länder*), the Federal Constitutional Court, the Federal President, and the people itself, insofar as it makes itself heard through referenda. There is certainly a risk that creating the new institution will also mean creating an additional veto player. What is more, any future branch with veto power would be subject to charges of fostering a democratically illegitimate 'eco-' or 'future-dictatorship.'

In designing the German 'future branch', it is helpful to consult experiences from other countries. There is a large consensus in the literature that Hungary and Israel deserve credit for taking the most serious efforts to realize a representational body for the interests of future generations. In Israel, the institutional makeup of the country has been supplemented in 2001 by a Commission for Future Generations, which lasted until 2006. Hungary installed an Ombudsman for Future Generations in early 2008, but largely deprived him of his powers only three years later. Even though both institutions exerted considerable degrees of influence, controversies arose over their authority to suspend legislation and other governmental activities.

In Hungary, the position of the Parliamentary Commissioner for Future Generations was created after 20 years of discussing the idea, by means of a constitutional amendment. Formally, the Hungarian institution was embodied by a special ombudsperson, the Future Generations Ombudsman (FGO).²⁸ The Hungarian system of ombudspersons originally consisted of the 'general ombudsperson' primarily in charge of civil rights, and two 'special ombudspersons' in charge of ethnical minorities' rights, data privacy, and freedom of information. Hence, the FGO was third in the line of 'special ombudspersons'. The first incumbent was Sándor Fülöp, a lawyer, who (after securing his appointment by the parliament when several other candidates had failed to do so in three rounds of voting) held the office from May 2008 to 2011. In the general election of 2010, the coalition of the national-conservative Hungarian Civil Alliance (Fidesz) and the Christian Democratic People's Party (KDNP) earned a two-thirds majority of seats in the Hungarian parliament. The right-wing populist government under Viktor Orbán passed a constitution that was to become effective on January 1, 2012, and in which the ombudsperson's authority and resources were severely curtailed, causing Fülöp to step down. The

position was not entirely abolished, however, but restructured to the effect of there being only one ombudsperson to remain, and several deputies. One of these deputies is the future generations ombudsman. The new incumbent, Marcell Szabó, a professor of law, was appointed by parliament in September 2012.

The remarks that follow refer to the wide-ranging mandate that the FGO had from 2008–2011. The FGO's office was staffed with 35 employees, among them 19 lawyers, two economists, one engineer, two biologists, an expert on climate change and a physician.²⁹ There were four departments: for legal matters, strategy and science, international affairs and coordination. The office's financial endowment amounted to 260 m Forint, or 858,000 euro (Ambrusné 2010: 19).

The task of the FGO was mainly environmental: to protect the health and living conditions of present and future generations, and to preserve the common heritage of humanity as well as the quality of life and the unhindered access to natural resources. The FGO's tenure of six years exceeded that of the parliamentarians by two years. To be elected, or prematurely discharged from his mandate for exceptional circumstances, a two-thirds majority in the *Országgyűlés*, Hungary's parliament, was required. The bulk of the FGO's activities consisted of mediation and intervention – similarly to his fellow ombudspersons in Germany, who, alongside petition committees, support citizens in asserting their rights against public administration.³⁰ It was not because of these, however, that the FGO got disempowered. In addition to the former, Fülöp was endowed with a number of powerful and very specific authorities reminiscent of those of an Attorney General, comparable to the position of the Federal Prosecutor in the Brazilian *Ministério Público*.³¹ The regulations added to the Ombudsman Act in 2007 authorized the FGO 'to repeal the enforcement of governmental decisional, if otherwise the environment were to suffer from severe damages' (Fülöp 2014: 73). Apart from this powerful weapon, which the FGO used but once, he also had the right to participate in certain civil and administrative trials. This could happen either by his initiating a lawsuit himself, or by joining a lawsuit initiated by a third party as an 'amicus curiae'. During his tenure, Fülöp made use of both options about seven times a year. The courts, however, had the last word, so it remains open to debate whether the institution 'FGO' qualified as an extension of the classical three-power model. But still, the FGO was to be consulted on every draft bill and government initiative that could have an impact on the environment and sustainable development. He could argue his case in parliamentary committees and had the right to speak in plenary sessions. He did both. In this, the FGO came to the conclusion that the 2010 budget represented an economical model of growth that would diminish the prospects of future generations. (Ambrusné 2010: 24)

How did the FGO deal with the problem of uncertainty? How could he know which alternative political action would prove (most) advantageous to future generations? In what was seen as particularly controversial at the time, the FGO deployed all legal instruments at his command in order to prevent a huge biomass facility made up for 50 MW in the buffer zone of Tokay, a wine region and a World Cultural Heritage site. Biomass or rural conservation, which one serves

posterity more? In cases like these, it is almost impossible to determine objectively how the needs and interests of future generations would be served best.³²

Evidence suggests that the ‘uncertainty argument’, as it has been advanced in the literature on intergenerational justice, deserves to be taken seriously. This, however, does not belittle the credit of those states who first installed representatives of future generations, and in doing so, altered the institutional setting of their respective political landscapes in a both spirited and innovative way.

9. A practice-oriented proposal for a future branch in Germany

Göpel lists five criteria for a future branch which are ‘universally important for an effective mandate’ (Göpel 2014: 98): independence, right of access, transparency, legitimacy, and effectiveness. Even though these are inspiring test criteria, this chapter takes a different approach. The key criterion suggested here is ‘constructive input’ in the sense of a right to *propose* legislation, as opposed to the possibility of destructive input, that is, all rights intended to suspend laws and activities temporarily or permanently. This approach proceeds from the existing infrastructure of advisory boards and councils of experts as a reservoir for possible new arrangements. Given that conflicts between the interests of present-day and future generations can be most virulent in environmental and financial policy, these two areas are primarily taken into account here. With the Council for Sustainable Development (RNE), the German Advisory Council on the Environment (SRU) and the German Advisory Council on Global Change (WBGU), three councils appointed by the federal government exist simultaneously to offer their advice on environmental and sustainable matters. Added to this is the Parliamentary Advisory Council on Sustainable Development (PBNE), which recruits its members from the *Bundestag* and whose task is to accompany the federal government’s national sustainability strategy. Since the remits of said councils partly overlap – given that, for instance, they are all engaged with the national sustainability strategy – it seems sensible to merge them into one central ‘Ecological Council’.³³ Likewise, there are several independent councils on financial policy. Best known is the German Council of Economic Experts (SVR), whose members are colloquially referred to as the ‘Five Sages of Economy’. Finally, the advisory boards of the federal ministries of finance and economics deserve notice. These councils should be merged into a new body, the ‘Financial Council’. The key innovation for the political system would be to endow both the new ‘Ecological Council’ and the new ‘Financial Council’ with a right of initiative, allowing them to introduce legislation into the *Bundestag*. In order to this, the *Bundestag*’s Rules of Procedure would have to be revised accordingly. Currently, it states that bills have to be signed either by a fraction or by five per cent of all members of the *Bundestag*, unless the Rules of Procedure prescribe or allow something else (cf. § 75, § 76). The new institutions, albeit separated both personnel-wise and organizationally, would jointly form the ‘future branch’, that is, the new fourth power for Germany. By limiting itself to a purely constructive role, the legitimacy of the new institution is ensured. The

charge of an 'eco-dictatorship' only makes sense when talking about organizations with veto rights, for only these can override decisions made democratically by parliament.

To repeat, according to this approach, the PBNE, RNE, SRU and WBGU are all supposed to merge. While the latter three mentioned organizations are purely consultative, the PBNE, at least in theory, already enjoys legislative powers, since its members are simultaneously members of the *Bundestag*. However, it is in fact precisely this doubling which prevents the PBNE from growing into the role of a future branch.³⁴

Insofar as the model suggested here relates to environmental issues (the most important policy area of the anthropocene), it is both compatible to and distinguishable from proposals made earlier in the literature. Tine Stein and Johannes Rux, for example, have both independently called for the establishment of an 'Ecological Council'. Stein proposes to conceptualize the council as a kind of third chamber with a suspensive veto right, 'so as to throw an ecological wrench in the works of norm setting' (2014: 59). Thus equipped, the Ecological Council should be able to block legislation that fails the test of intergenerational justice. Stein dismisses further powers such as granting the Ecological Council an absolute veto or rights equal to those of the legislative bodies: the democratic legitimacy of the council, whose members are to be elected by the legislative bodies (such as the *Bundestag* and the *Bundesrat*), would simply not be strong enough (cf. Stein 2014: 60). According to the proposal made by Rux, the Ecological Council likewise would not only be entitled to put down draft laws and other resolutions in the *Bundestag*, but, agreeing with Stein, would also be empowered to block the decisions of other government bodies with the help of a suspensive veto right (Rux 2003: 473). One last proposal for future branches with a right of veto is put forward by Andreas Troge, a former president of the Federal Environment Agency, who suggests turning the federal president into an 'advocate of sustainability' with the new role to refuse appending his signature to draft proposals which seemingly violate the ideals of intergenerational justice (Troge 2011). While this solution would not create an additional veto player, its disadvantage lies in that an individual would hold an extremely salient position.³⁵ When collective bodies such as the Ecological and Financial Council formulate draft proposals, pitfalls like these are avoided in favour of collective intelligence. Of course, the internal decision process of the 'fourth branch' would have to reflect the majority principle.

Going forward, the question arises as to how the composition of the future branch should be determined, or whether a change in the appointment procedure is called for. While a general election by the entire population would maximize the formal independence of the council's members vis-à-vis the legislative, executive and judicial branches, there also would be several drawbacks. Thus, an appointment procedure similar to what is currently practiced looks more sensible.

It would be naïve to believe that the legislative power will take up and implement every proposal made by the fourth branch. What is rather to be expected is

that parliament will refer most of both councils' draft proposals to committees in order to have them die a silent death by non-treatment.³⁶ But there is a valid hope that the new institution for the representation of future generations will gain the support of both the press and public opinion. The more its voice is heard in public, the less parliamentarians are going to be able to simply ignore its constructive draft proposals. Therefore, when compared with its alternatives, this suggestion is in some ways more modest even if more ambitious in others.

The concept of a separation of powers is not only appropriate for models in which all branches are equally powerful, but also for those in which one branch is significantly less powerful than the others. Maybe the suggestion made above, then, is best characterized by labelling it a 'three-and-a-half-powers-model'.

Notes

- 1 For an overview of these partly overlapping terms, see Tremmel 2014a; 2012; 2009.
- 2 Kley 2003 retraces this debate nicely.
- 3 This very progressive constitution never came into being. It was boycotted by the Jacobins, who kept a terrorist rule over France from autumn 1793 until summer 1794.
- 4 Alleged tools of political education such as the German *Wahl-o-Mat* play their part in this. For their seeming objectification of the vote decision lead to a concentration on one's own interests ("What would your purse choose?"), and not to an increased consideration of the common good.
- 5 For different versions of the so-called 'all-affected principle', see Beckman 2013: 778; Dryzek 1999: 44; Dobson 1996: 124; Shapiro 1996: 232 and above all Goodin's ground-breaking article (Goodin *et al.* 2007). Goodin's question of whether people in other states, which are also affected by a decision in State A, should be considered in an election in State A can be omitted here. This chapter is about the lack of participation of unborn citizens who will come into the world according to the demographic forecasts of State A.
- 6 The problem of 'presentism' in democracies is not limited to environmental issues. Long before the advent of the modern environmental movement, excessive public debt was a prime example of the careless use of the future. In a letter to John Taylor, Thomas Jefferson wrote on May 28, 1816: 'Funding I consider as limited, rightfully, to a redemption of the debt within the lives of a majority of the generation contracting it; every generation coming equally, by the laws of the Creator of the world, to the free possession of the earth he made for their subsistence, unencumbered by their predecessors, who, like them, were but tenants for life ... And I sincerely believe ... that the principle of spending money to be paid by posterity, under the name of funding, is but swindling futurity on a large scale' (Jefferson 1816). Underinvestment in education or lack of adjustments to social security systems are other examples of a lack of future orientation in political systems.
- 7 The term 'anthropocene' was coined by the ecologist Eugene F. Stoermer and effectively elaborated on by the climate researcher and Nobel Prize winner Paul Crutzen (see Crutzen 2011).
- 8 Haarde was the first person having to answer to the *Landsdomur*, an Icelandic special court created in 1905 for lawsuits against Icelandic ministers of state.
- 9 Haarde pleaded 'not guilty' and had called his case the first politically motivated lawsuit in the history of Iceland (BBC 2012).
- 10 A corresponding, but immature, proposal can be found in Jodoin 2011.
- 11 Weidner and Jänicke 2002. Jänicke 1992, 1996 is right to consider democracy a premise for solving the global environmental problems.

- 12 For overviews of posterity protection clauses, see Earthjustice 2008; Tremmel 2006: 192–196; Weiss 1989. On the question of whether the German Basic Law also takes into account the interests and needs of future citizens, in addition to the interests of living people, see Häberle 1998; Lux-Wesener 2003; Boelling 2003; Tremmel 2005, 2004. Regarding the European level, see Göpel and Arhelger 2011.
- 13 In much of the literature, the bodies described below (e.g. the ‘Commission for Future Generation’ in Israel, or the ‘Parliamentary Commissioner for Future Generations’ in Hungary) are referred to as ‘institutions’. In the social sciences, there are a variety of conflicting definitions of the term ‘institution’. Some theories define the term so as to not cover organizations. In the following, however, a concept of institutions is employed which also includes organizations or permanently organized associations of individuals.
- 14 Neither citizens nor politicians are aware of the idea of a new branch in the separation of powers model, nor is it much discussed within political science. At least, the 2011 main survey of the WBGU also argued for a fundamental paradigm shift. It coined the heuristic concept of ‘Great Transformation’ which describes a paradigm shift that would be substantial in size and comparable to only two previous transformations in the history of mankind, the Neolithic Revolution in 12,000 BC and the Industrial Revolution (WBGU 2011: 87). Even though the WBGU has not called for a four-power-model, both approaches agree that the transformation of our society today must go beyond marginalia.
- 15 The view of our present three-power-model changes when we learn about the evolution from a two- to a three-power-model in the approaches of Locke and Montesquieu. The most important lesson from the history of ideas seems to be that even the supposedly definitive present is only a stage between past and future.
- 16 Goodin (2007: 40) prefers this framing of the question to a formulation such as ‘inclusion problem’, since the latter might lead us to think of an existing authorized decision group and thereby block out the more decisive question of how the original composition of an authorized group can be justified. The question of the constitution of the demos was already central to political thinkers in ancient and medieval times. In modern times, it has still occupied generations of political scientists. It is reminiscent of Robert Dahl’s still relevant quote: ‘[The problem of inclusion] is an embarrassment to all normative theories of democracy, or would be were it not ignored’ (1982: 98).
- 17 In Germany, a contradictory provision is still in force: section 2 (2) of the Scrutiny Act (*Wahlprüfungsgesetz*) specifies that only eligible voters are able to challenge the validity of an election. Thus, the part of the German people to whom the right to vote is denied on grounds of age is unable to challenge its situation by taking legal action.
- 18 On the last question, see Tremmel 2014b.
- 19 A counter-argument put forth by the opposing side holds that nation-state institutions are rather useless for getting a grip on global problems. This objection, however, is refuted convincingly by Tine Stein (2014: 48). The most important decisions about day-to-day life continue to be made on a national level. This also holds true for global problems such as climate change.
- 20 See Tremmel (2012: 72–92, 119–212) or Tremmel (2015) for an in-depth discussion with more sources.
- 21 In the midst of the euro crisis, many French rubbed their eyes in disbelief when the European Stability Mechanism (ESM) threatened to fail at the hands of the Federal Constitutional Court.
- 22 An attempt to give a more detailed answer is made in Tremmel 2015a. This chapter merely seeks to ask the right questions, and to give some preliminary answers at best.
- 23 ‘Power means every chance in a social relation to have one’s own will even against the resistance of others’ (Weber 1972, § 16).

- 24 On the UN level, the report brings the creation of a 'High Commissioner for Future Generations' into discussion. On a national level, the most influential future institutions worldwide are said to be the following: Finland, Committee of the Future; Germany, Parliamentary Advisory Council on Sustainable Development; Israel, Commissioner for Future Generations; Hungary, Ombudsman for Future Generations; Canada, Principal for Sustainable Development Strategies; Wales, Commissioner for Sustainable Futures; Norway, Ombudsman for Children; New Zealand, Parliamentary Commissioner for the Environment. See UN 2013.
- 25 A purely horizontal separation of powers without subsequent re-entanglement exists only in theory and has proven unsuitable in practice. Germany's parliamentary democracy relinquishes a strong separation of powers in many regards – first by having the chancellor (executive branch) elected by the *Bundestag*. Moreover, the *Bundestag*, by virtue of being a legislative body, can remove the chancellor from office by means of a 'constructive vote of no confidence.' The *Bundestag* also takes part in electing the Federal President and the judges of the Federal Constitutional Court. In addition, many members of government are simultaneously members of parliament, which makes for a personnel entanglement of powers and thus for a softening of the 'classical' separation of powers. Another striking disruption of the principle of separation of powers follows from the constitutional court's authority to enact decisions with the force of law, thereby interfering with the realm of the legislative branch. In general, the classical branches are separated more strongly in presidential systems than in parliamentary democracies. In the United States, for example, the president and Congress are elected separately. Both the president (by virtue of his veto power) and Congress (by way of an impeachment trial) exert only limited influence over the respective other. See Mastronardi 2007: 268.
- 26 The models of Locke and Montesquieu were primarily engaged with limiting the abundance of power held by an absolutistic ruler. The constitutional authors of the late eighteenth and nineteenth century struggled with more complex constraints on basic liberties. They were also concerned with the tyranny of legitimate institutions, namely the parliamentary majority (in the US) or the courts (in France). This shows that the basic idea behind the separation of powers cannot only be held against the executive branch, but against all three powers.
- 27 Cf. Tsebelis 2002. Tsebelis's approach is an interesting theory of the inability to reform political systems. Traditionally, institutionalists examine dichotomous classifications (unitary vs. federalist, parliamentarian vs. presidential etc.). By contrast, Tsebelis regards all political competitions as equal and asks how many actors must consent to a decision or are able to veto it and thus count as 'veto players'. This enables Tsebelis to predict the further development (or gridlock) of a political system in the terms of game theory.
- 28 Owing to the better literature available, and for reasons of space, the following is limited to a presentation of the FGO. For more information on the CfG, see Shoham and Lamay 2006, Shoham 2010 and Utler 2010. The CfG's sharpest weapon was a right to delay, not unlike the Filibuster.
- 29 For a very good account on the scope and limits of the competencies, see Ambrusné 2011. Even though the competencies of the FGO were laid out in full detail in the Ombudsman Act of 1993 and, respectively, in its specific amendment of 2007, they had to be concretized time and again by the courts, and remained disputed until his disempowerment in 2011. For example, the FGO declared itself competent in the case of a reordering of the public water supply, while his opponent, a state holding, denied this very competence (Ambrusné 2011: 23).
- 30 Apart from the FGO's very far-reaching right of access to information, such as his being entitled to access all premises and records during his inquiries without adjudication.

- 31 In an interview with the German magazine *DER SPIEGEL*, Fülöp himself characterized his task as follows: 'I am, so to speak, a state prosecutor for the citizens, called into action whenever the government fails' (Utler 2010: 2). With regard to the environment department, Fülöp was quoted as follows: 'Environment ministers don't always meet the requirements of professional independence; it is common for them to represent the politics and economic interests prevalent in their ministries rather than the eco-political stances of the government. Hence, independent state institutions, such as parliamentary commissioners, could be a useful supplement to the governmental system' (Fülöp 2014: 70).
- 32 Likewise, the Israeli commissioner once exhausted his far-reaching competencies in a case in which the perspective of intergenerational justice could be claimed by both sides. Simply put, he advocated a law for the inclusion of handicapped young people, which the finance minister had rejected for cost reasons. See Shoha and Lamay 2006: 248.
- 33 Likewise, the final report of the finding commission *Growth, Wealth, Quality of Life – Paths Towards Sustainable Economics and Societal Progress in the Social Market Economy* (Enquete-Kommission 'Wachstum, Wohlstand, Lebensqualität – Wege zu nachhaltigem Wirtschaften und gesellschaftlichem Fortschritt in der Sozialen Marktwirtschaft') takes a critical stance towards the current myriad of councils and advisory boards, each of which exhibits only a limited efficacy (Deutscher Bundestag 2013: 285).
- 34 The PBNE was first constituted in 2004. In the current 18th parliamentary term, the PBNE consists of 17 full and 17 deputy members, of which, respectively, eight belong to the CDU/CSU, five to the SPD and two to each the Left and the Greens. It is presided over by Andreas Jung (CDU/CSU), whose deputy is Lars Castellucci (SPD). Its tasks are laid down in its appointment resolution, dating from 19 February 2014 and backed by all factions of the *Bundestag*. Among these tasks are the parliamentary support of the national sustainability strategy and the support of sustainability measures on the UN level. The PBNE is entitled to give advisory opinions, for example to other parliamentary committees. In addition, the PBNE assesses the sustainability evaluation of the Federal Government. In doing so, it submits the result of its assessment to the committee in charge. Currently, the PBNE does not enjoy rights equal to the other parliamentary committees, mainly because it is not entitled to draft bills.
- 35 Another suggestion, made by the World Future Council (www.worldfuturecouncil.org), envisages the creation of an ombudsperson. This suggestion might be sensible for many countries, but not so for Germany. This statement should not be misunderstood as opposing existing or conceived institutions for the representation of future generation in countries other than Germany, and which are (or used to be) endowed with a suspensive or absolute right of veto.
- 36 It was in this manner that an attempt to adopt a stronger reference to future generations in the Basic Law also failed – an attempt that had been undertaken in the years 2003–2009 by young members of parliament and which had been initiated by the Foundation for the Rights of Future Generations. For further readings on the initiative for an Intergenerational Justice Act, which had considered several formulations, but never a direct intrusion into the separation of powers model, see Tremmel 2009 (57–59), 2005 and Wanderwitz *et al.* 2008.

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