

10. The Concept of Intergenerational Justice in German Constitutional Law

Meinhard SCHRÖDER*

Intergenerational justice has been subject to ongoing discussions. In the beginning mainly philosophers and political thinkers¹⁾ discussed the topic; however, intergenerational justice has become increasingly popular among jurists²⁾. Before going into details of the content of the German constitution, the *Grundgesetz*, it is necessary to elaborate on the concept of intergenerational justice in general.

1. From Generational Sovereignty via Sustainability to Intergenerational Justice

In the legal context, the origins of the debate date back to the 18th century, then under the headline of generational sovereignty. It is mainly related to the famous saying by *Thomas Jefferson* “the earth belongs in usufruct to the living”³⁾. At that time the biggest threat to intergenerational justice was seen in restrictions imposed by the current government on future governments.⁴⁾ Intergenerational justice therefore meant leaving the future governments (or, considering a more narrow timeline, the next government) a wide room for action – at least legally. *Jefferson* even went so far as to demand the expiry of any law after a certain time.⁵⁾ Generational sovereignty meant that effects of legislative measures should be limited to a certain time, e.g. the respective term in office, or, at least, law should be open to amendment by the next government.

However, this very technical approach proved insufficient to achieve intergenerational justice in a real sense. At least nowadays it is generally accepted that the sovereignty of a generation can be affected not only by legal boundaries, especially by a constitution, which reduces the

* *Meinhard Schröder*, Senior Research Fellow at the Institute for Politics and Public Law (Chair of Professor *Dr. Dres. h.c. Hans-Jürgen Papier*) at the Ludwig-Maximilians-Universität in Munich.

1) Cf. *Gosseries/Meyer*, Introduction, in: *Gosseries/Meyer* (eds.), *Intergenerational Justice*, 2009, p. 1.

2) Cf. e.g. the discussions at the annual conference of the *Staatsrechtslehrer* in Erlangen in October 2008, *VVDStRL* 68 (2009), p. 246 seq.

3) *Jefferson*, Letter to James Madison on 6 September 1789, in: *The Works of Thomas Jefferson*, Federal Edition (New York and London, G.P. Putnam’s Sons, 1904/5), vol. 6, p. 3 seq.

4) Cf. *Muñiz-Fraticelli*, *The Problem of a Perpetual Constitution*, in: *Gosseries/Meyer* (eds.), *Intergenerational Justice*, 2009, p. 377 seq.

5) *Jefferson*, Letter to James Madison on 6 September 1789, in: *The Works of Thomas Jefferson*, Federal Edition (New York and London, G.P. Putnam’s Sons, 1904/5), vol. 6, p. 9.

legal capacities of a government, but also and perhaps even more by factual circumstances. The most evident example: if the current government borrows money, a future government will have to pay it back, plus interest.⁶⁾ Thus, the future government's budget is already partly determined by the present government. The hiring of government staff will have similar effects. Apart from that, sovereignty of a generation insinuates an exclusive focus on the present time, which always implies the risk of neglecting the needs of future generations.⁷⁾ The reasons can be either ignorance of these needs or recklessness. Actions leading to positive effects, but only in the more or less distant future tend to be postponed, especially if they cause interim disadvantages. This psychological phenomenon of overweighing a small but sudden advantage against a bigger, but more distant and maybe uncertain one, is aggravated by the understandable but deplorable desire of politicians to be re-elected, leading them to avoid anything that might affect the present voters negatively.⁸⁾

To cope with these difficulties at least to a certain extent, generation sovereignty has been outweighed by the concept of sustainability, which aims in the opposite direction. According to the traditional definition, sustainability means a proportionally balanced pursuit of economical, ecological and social targets,⁹⁾ not only with regard to the presently living people but also the future generations.¹⁰⁾ Therefore sustainability frequently demands actions which have to be taken right now and which are eventually disadvantageous – in most cases meaning expensive – at least for the present and at first sight. However, the term “sustainability” is often used in a more limited, ecological context to describe a considerate use of natural resources, leaving them at least partially to future generations.¹¹⁾

More generally, it has become common knowledge that the presently living generation must not live at the expense of the next generations and that a fair balance between the “old” and the “young” has to be established. Today it is more and more the problem of public debt and (though not to the due extent yet) the deficits of the “intergenerational contract”¹²⁾ which

6) *Jefferson's* idea of limiting the maximum time for debts (Letter to James Madison on 6 September 1789, in: *The Works of Thomas Jefferson, Federal Edition* (New York and London, G.P. Putnam's Sons, 1904/5), vol. 6, p. 6 seq.) does not work since at that time the money has to be acquired by new debts.

7) Indeed, political decisions show this tendency even today, cf. *Kahl, Staatsziel Nachhaltigkeit und Generationengerechtigkeit*, DÖV 2009, p. 1.

8) Regarding short-term effects in democracy see *Tremmel/Laukemann/Lux, Die Verankerung von Generationengerechtigkeit im Grundgesetz*, ZRP 1999, p. 432 (433); *Kahl, Staatsziel Nachhaltigkeit und Generationengerechtigkeit*, DÖV 2009, p. 1 (10).

9) *Kahl, Staatsziel Nachhaltigkeit und Generationengerechtigkeit*, DÖV 2009, p. 1 (6); *Ekardt, Grundgesetz und Nachhaltigkeit*, in: *Kritische Justiz – Beiheft 1/2009*, p. 224 seq., therefore criticizes the concept and pleads for intergenerational and global justice.

10) *Kahl, Staatsziel Nachhaltigkeit und Generationengerechtigkeit*, DÖV 2009, p. 1 (6).

11) This ecological interpretation is the one article 20a of the *Grundgesetz* is based on. Due to the expansive use of the term it has been considered almost not operationable, cf. *Tremmel/Laukemann/Lux, Die Verankerung von Generationengerechtigkeit im Grundgesetz*, ZRP 1999, p. 432 (433).

12) The term goes back to *Schreiber, Existenzsicherheit in der industriellen Gesellschaft*, 1955, p. 28, who called it „Solidar-Vertrag zwischen jeweils zwei Generationen“.

are dominating the debate. This virtual contract is the basis of the German as well as other social security systems and implies a fictitious consensus that the cost of social security is borne by the currently working generation (pay-as-you-go system). Demographic change¹³⁾ with less than expected people working and thus contributing to the system and more than expected people receiving its benefits leads to financial problems and the questioning of this contract.¹⁴⁾ Intergenerational justice in this context must aim at a fair distribution of the advantages and cost of the welfare state.

Therefore, the idea of sustainability has been expanded to an overall concept of intergenerational justice. This terminology not only implies the above-mentioned thematic expansion, but also a shift of perspective: While sustainability is a procedural way of acting and not an aim in itself, intergenerational justice is the aim to be achieved by acting sustainably. Moreover intergenerational justice can be seen as a right – albeit one whose bearer in many cases does not exist yet – and has no vote¹⁵⁾.

2. The Problem of Defining Intergenerational Justice

The challenge of intergenerational justice can only be met after defining what intergenerational justice is. This requires definitions of the terms of generation and justice.

It is already difficult to describe a “generation”: On the one hand a generation could be considered the average time in which children turn into parents and parents into grandparents, on the other hand it could mean the entirety of people living at present or in the future.¹⁶⁾ Intergenerational justice is of importance in both understandings: Among the living people it implies a fair balance of the rights and obligations within a society (especially as far as the young are concerned, who do not yet take part in the democratic process). With regard to future generations, intergenerational justice means that the presently living people must not live at the expense of the next generations.

However, the question remains what is “just” or “fair”, especially concerning future generations.¹⁷⁾ Considering technical progress and other unexpected events, it cannot be

13) For details, see *Kluth*, Demografischer Wandel und Generationengerechtigkeit, VVDStRL 68 (2009), p. 246 seq.; *Rüfner*, Rechtsfragen alternder Gesellschaften, R.L.R 2000, p. 75 (76/79). For the Japanese perspective on demographic change, cf. *Tamura*, R.L.R. 2000, p. 65 (66).

14) However, changes in the system, e.g. into a funded system in which contributions are accumulated and paid out later together with the interest on it, meet various challenges, especially related to fundamental rights. Details *infra* 4.

15) See *Tremmel*, Establishing intergenerational justice in national constitutions, in: *Handbook of Intergenerational Justice*, 2006, p. 187.

16) Cf. *Kahl*, Staatsziel Nachhaltigkeit und Generationengerechtigkeit, DÖV 2009, p. 1 (7); *Schuler-Harms*, Demografischer Wandel und Generationengerechtigkeit, DVBl. 2008, p. 1090 (1092).

17) Regarding this problem, see *Isensee*, Gerechtigkeit - zeitlose Idee im Verfassungsstaat der Gegenwart, in: *Schmidinger* (ed.) *Gerechtigkeit heute. Anspruch und Wirklichkeit*, 2000, p. 278 seq.; *Stecker*, Was ist Generationengerechtigkeit?, DRV 2004, p. 111.

said for sure what their interests and needs will be. As Mark Twain is said to have put it in words: “It is difficult to make predictions, especially about the future”. For example, how can we tell how much debt a state can live with until it collapses? Is it maybe fair to let a country drown in the ocean due to the rising of the sea-level for the sake of development and progress, as long as you offer the people affected a place to live somewhere else? The last example points to an aspect which increases the difficulties around the term “justice” even more. Must intergenerational justice only be accomplished within a nation, or worldwide?

Facing these problems the social sciences have given up the idea of finding a universal definition of justice.¹⁸⁾ Instead, there are concepts of local justice¹⁹⁾ or spheres of justice²⁰⁾. With regard to intergenerational justice it is often considered accomplished when the fact of being born into a certain generation does not mean a disadvantage.²¹⁾ It is not the intention of the author to elaborate on this in the present context. What is important is the positivity of the laws²²⁾ created by the majority in a democracy. They reflect a society’s opinion on the subject of intergenerational justice.

3. Legal Aspects in General

Having outlined these basic parameters of intergenerational justice, the role of law in this context has to be examined. Intergenerational justice is primarily a factual problem and a political task. Therefore it can only be achieved politically, not legally. Law cannot relieve the political side of its task of creating the future and can merely serve as an agent to achieve certain objectives, whereas – as always in democracy – each objective as well as the way of achieving it have to be supported by the majority. Therefore law can only constitute a framework.

To ensure the continuity of the efforts for sustainability and to avoid the risk that today’s sacrifices for a good cause are spoiled by the interests of the next generation (or government), that maybe does not support them anymore, the current generation strives for limitations of the next generation’s sovereignty – generational sovereignty must be sacrificed for intergenerational justice. The only way of doing this is to develop a set of regulations which is binding for future legislators and cannot be changed easily. The appropriate instrument for this purpose is a constitutional amendment, since it is among the distinct characteristics of a constitution that it binds the legislator²³⁾ and that there are special requirements for its

18) *Raiser*, Max Weber und die Rationalität des Rechts, JZ 2008, p. 853 (859).

19) *Elster*, Local Justice. How Institutions Allocate Scarce Goods and Necessary Burdens, 1992.

20) *Walzer*, Spheres of Justice, 1983.

21) *Kluth*, Demografischer Wandel und Generationengerechtigkeit, VVDStRL 68 (2009), p. 246 (249 seq.).

22) *Raiser*, Max Weber und die Rationalität des Rechts, JZ 2008, p. 853 (859).

23) *Hesse*, Verfassung und Verfassungsrecht, in: Benda/Maihofer/Vogel, Handbuch des Verfassungsrechts, 2nd edition 1994, § 1 MN 14, therefore names it the basic legal order of the community. See also *Kägi*, Die Verfassung als rechtliche Grundordnung des Staates, 1945.

amendment²⁴⁾ such as a qualified majority²⁵⁾. However, these distinct qualities of constitutions at the same time mark the main barriers for the undertaking: First, the special majority is not only needed for amendments in the future, but also for the amendment intended to limit the future sovereignty. Therefore a wide consensus is required, mostly involving the political opposition. This initial barrier is heightened by the fact that political parties tend to avoid limitations for the future, since they may form the government when these limitations become effective. Any constitutional amendment serving the purpose of intergenerational justice will therefore only take place when the concrete objective is widely acknowledged, and moreover, it will be so flexible and vague that it leaves exits and backdoors open.

Thus, the direct intention of serving intergenerational justice with such “constitutionally guaranteed objectives” is contradicted by a rather declaratory effect. Due to their generality they leave a wide scope of action, thereby also reducing their litigability.²⁶⁾ In other words, they are rather non-committal and hardly able to force the legislator into taking certain measures. Additionally they do not constitute a “right” which can be pursued in court. In consequence constitutionally guaranteed objectives have even been named “constitutional poetry”²⁷⁾. Considering this very limited effect of provisions specifically intended to serve intergenerational justice, it is even more important to analyse how and to which extent existing constitutional provisions in the classical understanding can contribute to intergenerational justice. The only thing which can be emphasized generally, i.e. without a country- and constitution-specific approach, is the fact that the constitution limits the power of the majority,²⁸⁾ thereby at least punctually serving intergenerational justice and inhibiting a “dictatorship” of one generation.

When examining legal answers to the challenges of intergenerational justice in general, one important aspect must be stressed again: the national boundaries of law. For several reasons, this limitation is of particular importance in the field of environmental intergenerational justice: First, the use of natural resources is depending rather on the world market than on national legal provisions. Second, the effects of one state’s actions might affect other states, i.e. a different legal system. Public international law is trying to cope with these aspects, however, the results of the Copenhagen Climate Conference in 2009 show that it is even more difficult to reach the required consensus than in the domestic area.

24) Cf. *Stern*, Staatsrecht I, 2nd edition 1984, § 3 II 2 c).

25) Cf. Art. 79 II GG, which requires a 2/3 majority in the *Bundestag* and the *Bundesrat* for constitutional amendments.

26) See for the environmental article 20a of the Grundgesetz *Schulze-Fielitz*, Art. 20a GG MN 71 seq., in: Dreier (ed.), Grundgesetz-Kommentar, vol. II, 2nd edition 2006.

27) For criticism on these sort of provisions see *Papier*, Die Entwicklung des Verfassungsrechts seit der Einigung und seit Maastricht, NJW 1997, p. 2841 (2848); *Scholz*, Grundgesetz zwischen Reform und Bewahrung, 1993, p. 24 seq.

28) Cf. *Stern*, Staatsrecht I, 2nd edition 1984, § 3 III 7.

4. Legal Answers in German Constitutional Law

In the German constitution, the *Grundgesetz*, we find some provisions directly aimed at intergenerational justice.

The acceptance of the concept of sustainability led to the creation of the “environmental article” 20a in 1994.²⁹⁾ This was actually the first time that the term “generation” was mentioned in the constitution at all.³⁰⁾ Despite merely stating a target which the state must pursue in its actions, article 20a is binding for the legislator since then.³¹⁾ However, binding in this context just means a need for consideration.³²⁾ Article 20a does not grant any subjective right to the citizens.³³⁾ Moreover, experience with article 20a of the *Grundgesetz* also shows that in the absence of a detailed normative programme constitutionally guaranteed objectives can hardly force the legislator into taking certain measures. The Federal Constitutional Court therefore only determines if the legislator’s measures are evidently insufficient to fulfil the task.³⁴⁾ The prime importance of article 20a lies in environmental law. But even there, the provision mainly shows that the state accepts the importance of environmental protection (constitutionally). In processes of consideration, however, and especially in political ones, one position may be of minor importance.

A similar, but more recent provision is the debt limit introduced in articles 109, 109a and 115 of the *Grundgesetz* in 2009.³⁵⁾ Already in 2010, more than 12% (about 40 out of 325 billion Euros) of the federal budget are bound by the payment of interest. Following the worldwide economic crisis and the current policy of deficit spending the figures are likely to increase in the future. The intention of the debt limit, also called “brake”, is to stop this development. However, articles 109 and 115 of the *Grundgesetz* contain exceptions and terms which need interpretation.³⁶⁾ Moreover, as a symptom of the aforementioned political reluctance, the debt limit will only be fully effective in 2016 for the federal government and in 2020 for the *Länder*. Considering these aspects, it remains to be seen whether the debt limit will share the lack of litigability with other provisions serving intergenerational justice.³⁷⁾ To realize its aim,

29) Gesetz zur Änderung des Grundgesetzes vom 27.10.1994, BGBl. I, 3146.

30) Steiner, Generationenfolge und Grundgesetz, NZS 2004, p. 505.

31) Schulze-Fielitz, Art. 20a GG MN 24 and 67 seq., in: Dreier (ed.), Grundgesetz-Kommentar, vol. II, 2nd edition 2006.

32) Schulze-Fielitz, Art. 20a GG MN 46 seq., in: Dreier (ed.), Grundgesetz-Kommentar, vol. II, 2nd edition 2006; sceptical about the effects of article 20a also Lux-Wesener, Generationengerechtigkeit im Grundgesetz, in: Handbuch Generationengerechtigkeit, 2003, p. 405 (417).

33) Kahl, Staatsziel Nachhaltigkeit und Generationengerechtigkeit, DÖV 2009, p. 1 (8).

34) Kahl, Staatsziel Nachhaltigkeit und Generationengerechtigkeit, DÖV 2009, p. 1 (8).

35) Gesetz zur Änderung des Grundgesetzes vom 29.7.2009, BGBl. I, 2248. For details on this amendment, cf. Seiler, Konsolidierung der Staatsfinanzen mithilfe der neuen Schuldenregel, JZ 2009, p. 721 seq.

36) Seiler, Konsolidierung der Staatsfinanzen mithilfe der neuen Schuldenregel, JZ 2009, p. 721 (726).

37) For criticism on the limited access to the Federal Constitutional Court to complain about the inconstitutionality of the budget law see Lenz/Burgbacher, Die neue Schuldenbremse im Grundgesetz, NJW 2009, p. 2561 (2566 seq.).

future budgets must reflect the intention and not only the words of the debt brake.³⁸⁾

The problem of public debt leads to another, politically still comparatively unexplored field, the stability of the social security systems. In 2009, the pension fund system had to be supported by the federal government with more than 57 billion Euros. However, money from the state does not prevent the premiums for current payers from rising and the payments to the payees being reduced.³⁹⁾ Therefore, radical reforms will be necessary in the future. Article 20 of the *Grundgesetz*, which declares that the state is a “social state”, is not able to give any advice how to perform the necessary changes.⁴⁰⁾ On the contrary, it is rather focussed on satisfying the needs of the presently living generation.⁴¹⁾

However, in this case other classical constitutional rules can provide directions. The most important rules in this respect are the fundamental rights. For instance, the Federal Constitutional Court has ruled several times that pension expectations are “property” in terms of article 14 of the *Grundgesetz*, because they were (at least partially) acquired by previous payments.⁴²⁾ Following these decisions it is foreseeable that the development of the pension fund (run in the pay-as-you-go system) will come into conflict with the guarantee of private property of the current contributors once they cannot even expect the payback of their premiums in the future. Their fundamental rights require that they have at least the chance to get approximately the amount back which they have paid before (with zero interest).⁴³⁾ However, possible reforms solving this problem by reducing the premiums have to consider the rights of the present retired persons. They have paid their premiums in the past, which results in a legitimate (and constitutionally protected) expectation of them getting at least that amount back. All in all, deliberate consideration processes are necessary,⁴⁴⁾ and one-sided solutions are (despite their political unlikeliness) prevented by the fundamental rights. Of course, this means that the financial shortfall of the annuity system can only be solved by

38) Very sceptical therefore *Korioth*, Das neue Staatsschuldenrecht – zur zweiten Stufe der Föderalismusreform, JZ 2009, p. 729 (735 seq.); Tappe, Die neue „Schuldenbremse“ im Grundgesetz, DÖV 2009, p. 881 (889 seq.); cf. also *Seiler*, Konsolidierung der Staatsfinanzen mithilfe der neuen Schuldenregel, JZ 2009, p. 721 (728).

39) This problem has been discussed for ages, however, reforms that deserve this name have not yet been implemented, cf. *Rüfner*, Rechtsfragen alternder Gesellschaften, R.L.R 2000, p. 75 (79 seq.).

40) Cf. *Lux-Wesener*, Generationengerechtigkeit im Grundgesetz, in: Handbuch Generationengerechtigkeit, 2003, p. 405 (418).

41) *Kahl*, Staatsziel Nachhaltigkeit und Generationengerechtigkeit, DÖV 2009, p. 1 (3).

42) BVerfGE 53, 257 (289 seq.); BVerfGE 58, 81 (109).

43) Otherwise the payment of premiums would have to be considered disproportional, cf. *Papier*, Der Einfluss des Verfassungsrechts auf das Sozialrecht, in: v. Maydell/Ruland, Sozialrechtshandbuch, 4th ed. 2008, § 3 MN 57; *Kufer*, NZS 1996, 559 (561). *Kluth*, Demografischer Wandel und Generationengerechtigkeit, VVDStRL 68 (2009), p. 246 (261 seq.) considers a loss of 5-10 % still proportional.

44) Cf. *Schuler-Harms*, Demografischer Wandel und Generationengerechtigkeit, DVBl. 2008, p. 1090 (1093 seq.); *Kluth*, Demografischer Wandel und Generationengerechtigkeit, VVDStRL 68 (2009), p. 246 (260 seq.).

funding the system with tax revenue, thereby aggravating the problem of public debt.

5. Constitutional Openness and Legislator's Discretion

The limited effect of constitutional provisions is mainly caused by their linguistic openness leaving room for interpretation to the legislator. However, constitutional provisions must be drafted in a general way in order to be operationable under changing circumstances; norms which are too detailed (such as articles 13 and 16a of the *Grundgesetz*) are widely considered inappropriate for a constitution. This generality grants the legislator a huge amount of discretion, while judicial review is limited.⁴⁵⁾ The legislator is allowed to make mistakes – from the constitutional side there is only the requirement of adjusting such mistakes if they are perceptible.⁴⁶⁾ Moreover, the legislator is obliged to observe whether the results envisaged by a certain measure are achieved; otherwise there can be a need for amendment of the legal framework.⁴⁷⁾ This obligation is of particular importance in the field of intergenerational justice, which is characterised by measures with effects only in the more or less distant future. Legislative discretion reaches its climax in decisions which are not subject to judicial review at all, especially the evaluation of the risks and benefits of certain technologies such as the non-military use of nuclear power, nanotechnology or the use of genetically modified organisms (GMOs). Although the risks of such technologies can be reduced to a minimum by science and technology, there is always a remaining risk which is especially relevant for future generations. However, in the case of nuclear power the Federal Constitutional Court has left the decision whether the remaining risk is acceptable to politics;⁴⁸⁾ similar decisions would have to be expected in similar cases.

Besides the granting of discretion, law reaches its limits when dealing with other disciplines of science, as it is the case e.g. in environmental law. Thus, the legislator has no choice but to rely on other sciences when making decisions. However, as mostly in science, there is rarely a unique opinion on every subject. This leads to the legislator picking one opinion which he considers most convincing or suitable for his purpose. The question resulting from this is whether there are any criteria for making this choice. In its recent decision about the constitutionality of Germany's participation in the particle accelerator project at CERN in Geneva, the Federal Constitutional Court has established high requirements to refute the "scientific majority opinion" considering the experiment safe⁴⁹⁾.

45) Accordingly, the German Federal Constitutional Court leaves some discretion to the legislator, especially when ruling on the necessity of a certain legal provision, see BVerfGE 25, 1, (17/19 seq.); 50, 291 (332 seq.); 77, 84 (106 seq.); 102, 197 (218); 111, 226 (255); 116, 276 (308 seq.); see also Schröder, *Gesetzesbindung des Richters und Rechtsweggarantie im Mehrebenensystem*, 2010, p. 243.

46) BVerfGE 25, 1 (13); 49, 89 (130); 50, 290 (335); 73, 119 (169).

47) Cf. BVerfG NJW 2009, 2033.

48) BVerfGE 49, 89 (141 ff.).

49) BVerfG, Nichtannahmebeschluss v. 18.2.2010, Az.: 2 BvR 2502/08, noch nicht veröffentlicht.

6. Conclusion

All in all, discussions about creating a constitutionally guaranteed objective of intergenerational justice as article 20b of the *Grundgesetz*, as they were started by a multi-party group of 105 members of parliament in 2006,⁵⁰⁾ are not able to help the cause of intergenerational justice. A constitutionally guaranteed objective would not solve any problem and merely constitute a declaration, in fact a declaration of the inability or reluctance of the government to take action in present but wait for the outcome in the future. Therefore it should not be included into the constitution.⁵¹⁾ The only constitutional change which would have a significant effect would be the creation of a “representative of future generations”, vested with power to veto political decisions or at least challenge them in courts. However, this limitation of sovereignty is most unlikely to happen.

Insofar, other provisions of the *Grundgesetz* such as the fundamental rights serve intergenerational justice in a more stringent way. This is especially the case because they are “real” rights, which can be claimed by the citizens in courts up to the Federal Constitutional Court. Fundamental rights constitute minority rights, i.e. they can prevent the state from neglecting certain positions because the majority considers them not to be important. However, it has to be admitted that this advantage only applies to presently living generations⁵²⁾ and only as far as the protection of the fundamental rights reaches thematically. Further protection as well as a consideration of the interests of the “next generations” depend exclusively on the political choice of the majority. A constitutionally guaranteed objective can neither replace a political decision nor cope with the uncertainties of the future.

Having seen the limited role law can play in enforcing intergenerational justice, the question remains whether intergenerational justice is a legal challenge at all or rather a problem that has to be solved by politics. I tend to support the latter view, considering that due to the high requirements for constitutional amendments, they only take place when the envisaged provision has become so popular that no one really doubts it any more. At that time, however, the need for the constitutional amendment will be overcome anyway. Moreover, the main aim of the “constitutionalization” is to reduce the discretion of the legislator. Considering the fact that all rules, and especially those of the constitution, are open to interpretation,⁵³⁾ this means to shift power from the parliament to the Federal Constitutional Court,⁵⁴⁾ which is in charge of the final interpretation of the constitution. It is a negative sign for democracy to

50) Draft bill to amend the *Grundgesetz*, BT-Drs. 16/3399.

51) See also *Steiner*, Generationenfolge und Grundgesetz, NZS 2004, p. 505 (508 seq.). He is also emphasising the problem that a constitutional objective would move the problem from the legislative to the constitutional court.

52) Some authors have an even wider view granting unborn people the same rights, cf. *Ekardt*, Grundgesetz und Nachhaltigkeit, in: *Kritische Justiz – Beiheft 1/2009*, p. 224 (226).

53) Cf. *Schröder*, Gesetzesbindung des Richters und Rechtsweggarantie im Mehrebenensystem, 2010, p. 67.

54) *Steiner*, Generationenfolge und Grundgesetz, NZS 2004, p. 505 (508 seq.).

expect “just” solutions only from a court composed of 8 people and not from the parliament, especially when it comes to political, and not legal questions.