

Prologue

On the eve of September 15, 1787, the Philadelphia Convention approved the final draft of the Federal Constitution of the United States of America. Only 39 delegates out of 55 signed it and, according to a harshly critical contemporary scholar, they wrote «a constitution that was very different from the one most Americans expected and wanted them to write», since the Framers «designed the federal government to be insulated from» democratic politics (Klarman 2016: X, 606). Many voices, however, have focused on the long-term standing of the constitutional project: as per this view, «the delegates were acutely conscious of history», and specifically «of their place in its ongoing flow», but in the meantime they looked so much to the future that «they introduced an entirely new concept to the [political] discourse, that of federalism, and in the doing, created a *novus ordo seclorum*, a new order of the ages» (McDonald 1985: 6, 262). A commitment to what we might call “the politics of future”, in fact, resurfaced in the words of James Madison, who told his colleagues that they «were now digesting a plan which, in its operations, would decide forever the fate of republican government» (Farrand, ed., 1937: 423), but also in the preamble of the Constitution itself:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America (quoted in McDonald 1985: 299).

The future of republican government and collective responsibility towards upcoming generations were not, however, mere constitutional issues: they called into question the very foundations of the body politic, just like in contemporary debates (Meyer, ed., 2012; Thompson, 2013). What kind of motives should drive us to recognise the existence of moral and political obligations towards those who aren't born yet? Are these commitments to be grounded on rational assumption over the nature of institutions, or may they rely on an intergenerational version of solidarity conceived, according to the taxonomy proposed by Sally Scholz, not only as the most basic *social* solidarity, i.e. «the bonds of a community united by some shared characteristic», but *political* solidarity, that is, a «sort of solidarity [which] indicates political activism aimed at social change», and *civic* solidarity, or «the obligations of civil society to protect citizens against vulnerabilities» (Scholz 2008: 5) as

well? I will argue that Thomas Jefferson and James Madison, but also Thomas Paine and his English opponent, Edmund Burke, tried to solve such dilemmas throughout a passionate debate focused precisely on those crucial topics and wonder whether we might consider their dialogue as a fresh look to the role of solidarity within the context of a theory assessing the relevance of future in the shaping of a modern public sphere.

Jefferson and the rights of the living

In 1789, Thomas Jefferson was living in Paris, where he had been engaged on a diplomatic mission for five years. On September 6, he decided to write a letter to his friend James Madison, not only to make him aware of the latest events but to deal with a normative issue, which was evidently the result of long reflections inspired by the making of the French revolutionary process and would have marked his political theory for a long time (Chelsey 2019: 83-124). He asked his comrade «whether one generation of men has a right to bind another» and found it so astonishing that a crucial question alike seemed «never to have been started either on this or our side of the water» (Jefferson 1984 [1789]: 959).

This statement is quite unfair since John Locke, in his *Second Treatise on Civil Government*, had already addressed the issue and provided an answer that was not free of ambiguity, but which, nevertheless, paved the way for subsequent reflections. Locke, in fact, on one side stated very frankly that «whatever engagements or promises any one has made for himself, he is under the obligation of them, but cannot, by any compact whatsoever, bind his children or posterity: for his son, when a man, being altogether as free as the father, any act of the father can no more give away the liberty of the son, than it can of any body else»; on the other, though, he made crystal-clear that «every man that hath any possession or enjoyment of any part of the dominions of any government doth hereby give his tacit consent, and is as far forth obliged to obedience to the laws of that government, during such enjoyment», the last clause applying to future generations as well, at least as long as they please to enjoy the property they have inherited (Locke 1823 [1690]: 156-157).

Locke's ideas had significant impact over American political and constitutional thought (Smith 1985: 13-33, 63-166). Jefferson, however, deemed them incoherent and in need of revision, since intergenerational relations were «a question of such consequences as not only to merit decision, but place also, among the fundamental principles of every

government» - and his position was immediately clear and unequivocal: «no such obligation can be so transmitted» (Jefferson 1984 [1789]: 959).

Jefferson set his course assessing the axiom, «which I suppose to be self-evident» that «the earth belongs in usufruct to the living, that the dead have neither powers nor rights over it». What does it mean? That, according to natural law, God has granted the planet and the lands it contains to all men and therefore, upon the death of any usufructuary, the land he owned «ceases to be his when himself ceases to be, and reverts to the society». It is true that he can pass on his usufruct to his heirs, or to his creditors in case he has incurred into debts, if allowed by positive laws; however, heirs and creditors «take it, not by any natural right, but by a law of the society of which they are members, and to which they are subject» (Jefferson 1984 [1789]: 959).

For Jefferson a fundamental inference can be drawn from all this, namely, that «no man can, by natural right, oblige the lands he occupied, or the persons who succeed him in that occupation, to the payment of debts contracted by him», for this would imply that he had been allowed to «eat up the usufruct of the lands for several generations to come, and then the lands would belong to the dead, and not to the living, which would be the reverse of our principle» (Jefferson 1984 [1789]: 959-960).

Even more transparently, Jefferson wrote Madison that «the earth belongs to each of these generations, during it's course, fully, and in their own right»; which means that the previous generation cannot «charge it with a debt», since then «the earth would belong to the dead & not the living generation». But if this is true of private individuals, the same applies to institutions, «since the rights of the whole can be no more than the sum of the rights of the individuals». It follows that «no generation can contract debts greater than may be paid during the course of it's own existence» (Jefferson 1984 [1789]: 960), a severe limit to the emission of public debt but, in the meantime, a clear sign of social and civic solidarity (in Scholz's terms) for it should have granted, in Jefferson's view, a full exercise of freedom of choice to future generations. In sum, he «knew that public debts were dangerous, that they brought corruption and threatened republicanism» (Sloan 1995: 3).

On the other hand, though, this measure could bind more closely the living generation, limiting its freedom in contracting debts and investing to enact policies aimed to ensure, for

instance, concrete solidarity towards both its less fortunate members and future generations, something James Madison noted very thoroughly - as we shall see soon. In fact, if one looks more closely to Jefferson's complex argument, many problems seem to arise when it comes to his belief, restated even 24 years later in a letter to John Wayles Eppes, that «we may consider each generation as a distinct nation with a right, by the will of its majority, to bind themselves, but none to bind the succeeding generation, more than the inhabitants of another country». And since Jefferson, relying on the tables of the French biologist Louis Buffon, determined in 19 years the average life of a single generation, any legal act intended to last longer would violate the principles of natural justice, together with the set of rules designed to «give an artificial continuance» to «the will and the power of man» while, according to natural law, they «expire with his life» (Jefferson 1984 [1813]: 1280).

The same logic applied to laws and constitutions alike, Jefferson tried to maintain in his letter:

On similar ground it may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct. They are masters too of their own persons, and consequently may govern them as they please. But persons and property make the sum of the objects of government. The constitution and the laws of their predecessors extinguished then in their natural course, with those who gave them being. This could preserve that being till it ceased to be itself, and no longer. Every constitution then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, and not of right (Jefferson 1984 [1789]: 963).

The logical consequence of Jefferson's whole reasoning is to recognize that each generation holds the right (and the duty) to write the constitution and the most fundamental laws anew. This would not, however, be a mere power of repeal since, in this case, serious practical obstacles could cyclically arise:

The power of repeal is not an equivalent. It might be indeed if every form of government were so perfectly contrived that the will of the majority could always be obtained fairly and without impediment. But this is true of no form. The people cannot assemble themselves.

Their representation is unequal and vicious. Various checks are opposed to every legislative proposition. Factions get possession of the public councils. Bribery corrupts them. Personal interests lead them astray from the general interests of their constituents: and other impediments arise so as to prove to every practical man that a law of limited duration is much more manageable than one which needs a repeal (Jefferson 1984 [1789]: 963).

Jefferson was deeply persuaded of the positive and progressive nature of man, in which he always believed (Matthews 1984: 53-63). He endorsed a vision of the future where a permanent change would improve dramatically the political outcomes of republicanism, «a republicanism no longer at the mercy of the forces of debt and corruption» (Sloan 1995: 9). To grant every generation the chance to join the process of acting freely and making this dream come true meant, for him, gifting them with the most relevant amount of solidarity (social, political and civic). He put his faith, ultimately, in future generations of republican citizens, sure as he was they would better democratic politics and share his belief that «nothing is unchangeable but the inherent and unalienable rights of man» (Jefferson 1984 [1824]: 1494). On a similar ground, however, Madison shaped his reasoned reply, which would result in quite a disappointment for his long-time ally.

Madison and long-term solidarity

In his long-pondered letter of February 4, 1790, Madison acknowledged that his friend's contribution could be, theoretically speaking, «a great one» and stimulate «many interesting reflections to legislators; particularly when contracting and providing for public debts», but in the end it seemed to him a «doctrine...not in all respects compatible with the course of human affairs» (Madison 2006 [1790]: 189-190).

Madison found Jefferson's perspective on both debt and legal acts highly challenging, but his focus was directed primarily on the latter. And this is precisely where the peculiarity of the Madisonian approach lies: so much Jefferson dreamed of applying a new (intergenerational) principle of justice and solidarity to society, so much Madison doubted that that same principle, once adapted to real life, would have spread the desired effects. And, most of all, he feared that it would bring with it a general delegitimization of republican politics and economics.

As to the application of Jefferson’s theory, Madison detected three levels: constitutional norms, «laws involving stipulations which render them irrevocable at the will of the Legislature», and, lastly, «laws involving no such irrevocable quality». The first troubles, in his view, were to appear on the pure institutional ground:

However applicable in Theory the doctrine may be to a Constitution, it seems liable in practice to some very powerful objections. Would not a Government so often revised become too mutable to retain those prejudices in its favor which antiquity inspires, and which are perhaps a salutary aid to the most rational Government in the most enlightened age? Would not such a periodical revision engender pernicious factions that might not otherwise come into existence? Would not, in fine, a Government depending for its existence beyond a fixed date, on some positive and authentic intervention of the Society itself, be too subject to the casualty and consequences of an actual interregnum? (Madison 2006 [1790]: 190).

If democracy was to be handed down to posterity and possibly enlarged, Madison wondered, why did one need to prescript periodic revisions and expiring laws that would destabilize political order? Not to mention the undoubted obstacles brought with it by the procedures for convening and exercising the popular will at the given time.

The will of those who had lived in the past, moreover, was not to be dismissed as quickly and painlessly as Jefferson wished; indeed, as to the generational handover of land and debts, it would prove wise to refer to it. For even assuming that «the earth be the gift of nature to the living, their title can extend to the earth in its natural State only», since «the improvements made by the dead form a charge against the living who take the benefit of them». In other words, this inheritance could not otherwise be acquired «than by executing the will of the dead accompanying the improvements» (Madison 2006 [1790]: 190).

These improvements could also include debts, «incurred for purposes which interest the unborn, as well as the living»; such debts could, in turn, consist of loans opened to defend a nation against an invasion or public investments made «principally for the benefit of posterity». In contemporary terms, Madison is arguing that social and civic solidarity could be implemented also by means of long-term policies which imply both spending money on behalf of the generations to come and, therefore, creating moral, political and economic obligations that would be almost impossible to repeal within «the term of 19 years»

(Madison 2006 [1790]: 190-191).

Herein lies the reversal of the Jeffersonian view, founded, however, on an alternative vision of equity and solidarity between generations and not its denial. In fact, in his perspective «there seems then to be a foundation in the nature of things, in the relation which one generation bears to another, for the descent of obligations from one to another»; it would be required by justice, since «mutual good is promoted by it». For this very reason, a free commonwealth should find and respect the fairest «account between the dead and the living», so that «the debits against the latter do not exceed the advances made by the former» (Madison 2006 [1790]: 191).

A further danger noticed by Madison, and all but ignored by Jefferson, concerned positive rights (chiefly, *property* rights) protected by ordinary laws. If the non-enforceability clause were applied without any particular amendment, such as a provision to keep the same laws «in force by new acts regularly anticipating the end of the term», he feared that «all the rights depending on positive laws, that is, most of the rights of property would become absolutely defunct», triggering the risk to witness «the most violent struggles...between those interested in reviving and those interested in new-modelling the former State of property». A similar uncertainty was likely to produce substantial economic damage, on the one hand discouraging «the steady exertions of industry produced by permanent laws» and, on the other, granting «a disproportionate advantage to the more, over the less, sagacious and interprising part of the Society» (Madison 2006 [1790]: 191).

At first sight, Madison’s concern may seem to relate to his celebrated theory of factions, that is, the need to contain, through the adoption of constitutional checks and balances, the destructive drives of parties, organized opinions, and more or less prominent interest groups ready to conquer power and dominate the citizenry - issues he dealt with in the celebrated *Federalist* n. 10 (Hamilton, Madison and Jay 2006 [1788]: 42-49; Sheehan 2009: 84-123). But much more was at stake, here: first, the negative role of political emotions, which were likely to subdue the weak (or less active) ones throughout the period of interregnum, if any form of intergenerational solidarity were excluded. While Jefferson thought, as we have seen, that passions and chaos were doomed to burst and forbid each generation to write constitutions and laws anew, in case no expiring date had been fixed, this was precisely the issue which worried Madison, since it would overthrow any attempt to

preserve civic fairness and a reasonable equality of opportunities (even though, just to mention the point, he seemed to neglect - at least in that specific moment - the legitimate will to change the distribution of positive rights in the life of a given political community).

But the second, and foremost, principle brought into the scene by Madison was nothing less than the legitimacy of republican institutions: and here, quite surprisingly, the theory of tacit consent already outlined by Locke is taken out of his hat. However weak and inconsistent it might have been, he couldn't see any other solution available, to safeguard the stability of the body politic:

I find no relief from these consequences, but in the received doctrine that a tacit assent may be given to established Constitutions and laws, and that this assent may be inferred, where no positive dissent appears. It seems less impracticable to remedy, by wise plans of Government, the dangerous operation of this doctrine, than to find a remedy for the difficulties inseparable from the other (Madison 2006 [1790]: 191).

A similar position seems strictly connected with his idea of man and society: in William Lee Miller's words, «Madison's view of human nature was mixed and realistic, not relentlessly negative...alongside self-love there was a virtue that it was the task of state-makers to encourage» (Miller 1994: 223). My guess is that one of the most relevant components of virtue was an intergenerational version of both social and civic solidarity, grounded as much on rational arguments than a call to empathy. This is why Madison, in the end, rejected Jefferson's dreams stating that «a limitation of the validity of national acts to the computed life of a nation, is in some instances not required by Theory, and in others cannot be accommodated to practice» (Madison 2006 [1790]: 192).

Burke vs. Paine; or, how many solidarities are there?

The seeds planted by Jefferson and Madison were not left unnoticed. A great struggle on intergenerational autonomy and solidarity, within the context of a wider dispute on French revolution and the rights of man, took place between Edmund Burke and Thomas Paine (Fennessy 1963). It is presumed that Burke was not familiar with the Founders' perspective on intergenerational justice, while Paine knew quite well Jefferson's stance; nonetheless, their contrast shed new light on the topic of solidarity between generations and the political

tools to make it real (Levin 2014: 205-222).

Burke published his *Reflections on the Revolution in France* (1790) in order to warn the Englishmen against the temptation to import the pernicious (in his view) philosophy of the rights of man into their homeland (Bourke 2017: 676-738). But, all along his rhetorically proficient invective, he also dwelt on the origins of institutions and, while not rejecting at all contractarianism, he sought to downplay the scope of the Lockean theory of the origins and continuity of the body politic, which were to be traced back to a primeval connection that ran through the great chain of beings and bound them together:

Society is indeed a contract. Subordinate contracts for objects of mere occasional interest may be dissolved at pleasure—but the state ought not to be considered as nothing better than a partnership agreement in a trade of pepper and coffee, calico, or tobacco, or some other such low concern, to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties. It is to be looked on with other reverence, because it is not a partnership in things subservient only to the gross animal existence of a temporary and perishable nature. It is a partnership in all science; a partnership in all art; a partnership in every virtue and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born. [...] This law is not subject to the will of those who by an obligation above them, and infinitely superior, are bound to submit their will to that law (Burke 1969 [1790]: 194).

Burke's perspective seems, at first glance, antithetical not only to Jefferson's positions, as widely expected, but also to Madison's, so much emphasis is placed on the union of the dead, the living and the unborn within civil society. However conservative his aims might have been, he nonetheless contributed to shaping an almost romantic principle of intergenerational social solidarity: it is not surprising, then, that he reaffirmed his duty «to claim and assert our liberties as an entailed inheritance derived to us from our forefathers, and to be transmitted to our posterity—as an estate specially belonging to the people of this kingdom» (Burke 1969 [1790]: 119). The principle of inheritance, then, enabled the defence of liberty and its pursuit by the unborn. The bonds that connected past, present and future generations almost into a living organism meant, though, not only that each generation was expected to move within the path shaped by the previous ones, but also that any change and

progress - however small and gradual - would have to be judged in the light of the ancestors' inheritance. In Scholz's term, political solidarity enabling positive change had to be sacrificed onto the altar of an emotionally driven, and politically vague, social solidarity.

These shortcomings were duly noted by Burke's epic foe. In his reply to the English philosopher, *The Rights of Man* (1791-92), which soon gained him celebrity on both sides of the Atlantic, Paine defended the political fruits of French revolutionary experience (or, at least, of the first phase of it) and tried to refute the legitimacy of the hereditary principle which Burke had so vividly outlined. Thus, for Paine, it was an inviolable axiom that «every age and generation must be as free to act for itself in all cases as the age and generations which preceded it» and he deduced from this principle that «there never did, there never will, and there never can, exist a Parliament, or any description of men, or any generation of men, in any country, possessed of the right or the power of binding and controuling posterity to the “end of time”». Consequently, «all such clauses, acts or declarations by which the makers of them attempt to do what they have neither the right nor the power to do, nor the power to execute, are in themselves null and void» (Paine 1999 [1791-92]: 9).

But Paine went way beyond that. In his reply to Burke, he openly declared, with words which cannot fail to echo Jefferson's letter, that he was «contending for the rights of the living, and against their being willed away and controuled and contracted for by the manuscript assumed authority of the dead», while Burke was fighting «for the authority of the dead over the rights and freedom of the living» (Paine 1999 [1791-92]: 9-10).

Moreover, in a short pamphlet titled *Agrarian Justice* and published in 1797, Paine argued that God had gifted men with land in its uncultivated state as «the common property of the human race»; but because of «the improvement made by cultivation», landed property became sanctioned by inheritance customs and positive prescriptions. Since this state of things did not cherish the principle according to which «it is the value of the improvement only, and not the earth itself, that is individual property», thus violating natural equity and harming a great number of individuals of each successive generation from the introduction of farming, every «proprietor, therefore, of cultivated land, owes to the community a *ground-rent*» in order to re-establish justice and give the dispossessed «an indemnification» through a sophisticated system of intergenerational solidarity:

I shall now proceed to the plan I have to propose, which is, to create a National Fund, out of which there shall be paid to every person, when arrived at the age of twenty-one years, the sum of fifteen pounds sterling, as a compensation in part, for the loss of his or her natural inheritance, by the introduction of the system of landed property. And also, the sum of ten pounds per annum, during life, to every person now living, of the age of fifty years, and to all others as they shall arrive at that age (Paine 1894 [1797]: 289, 290, 291).

This measure was meant to be financed through an inheritance tax to be demanded upon the passage of property from one generation to the next, that is «at the moment that property is passing by the death of one person to the possession of another». Civic solidarity, then, became the condition for economic redistribution on a generational basis, as well as the tool for reforming «the present state of civilization», where «the contrast of affluence and wretchedness [was] continually meeting and offending the eye» (Paine 1894 [1797]: 292, 295) - something that Burke would see as a challenge to social and political tranquillity.

Epilogue

What could this story teach us? That the intergenerational perspective is really helpful to clarify the nature of solidarity, whether we conceive it as a political emotion or a rational, discursive principle; and, in reverse, that solidarity between generations should be one among the guiding lights for anyone interested in assessing some of the most contested policies within our globalized society - to begin with, anti-climate change remedies (Hiskes 2009; Skillington 2019).

Contemporary debates on intergenerational justice have increased enormously since John Rawls laid down his «just savings principle», according to which «each generation must not only preserve the gains of culture and civilization, and maintain intact those just institutions that have been established, but it must also put aside in each period of time a suitable amount of real capital accumulation». This principle, thus, should be regarded as «an understanding between generations to carry their fair share of the burden of realizing and preserving a just society» (Rawls 1999: 251, 257).

Solidarity, then, has to play an essential role within an intergenerational framework even

tough, as David Heyd has argued, in some ways «future-oriented solidarity» could be «of a fairly limited scope», since, for him, it «does not extend beyond two or at most three generations, and secondly, we feel solidarity with previous generations of our society only in the sense that it has to do with our identity rather than with a commitment to carry out their plans and respect their long-term intentions» (Heyd 2009: 184-185).

Looking back to the Jefferson/Madison debate, as well as its Burke/Paine appendix, could help us to approach these dilemmas on a more global scale and revive our sense of responsible solidarity (and not only our rational understanding of it) towards future generations. After all, if «each generation has the usufruct of the earth during the period of its continuance» (Jefferson 1984 [1813]: 1280), we are a sort of planet-keepers, of its environment as well as its democratic institutions, and our solidarity should extend well beyond two or three generations.

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