

FUTURE GENERATIONS IN CONSTITUTIONAL LAW

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ABSTRACT

The notion of future generations is a particularly interesting area of constitutional law. It is characterized by numerous difficult questions. *Who* are future generations? Do current generations have any reason to consider their interests, if these are ascertained to exist? How do we identify, and protect, those interests? The research question this project sets itself to answer is what are the characteristics of the legal concept and what are the ways in which they manifest themselves in the constitutional life of a state. The project uses a comparative constitutional law methodology to look at those examples where future generations appear, with the objective of making a comprehensive analysis of the characteristics of the notion in constitutional law. Due to the numerous instances of future generations provisions at the international level, the scope is limited to Member States of the Council of Europe. The analytical part of the project will show that future generations have a lot of constitutional *potential*, since there is an important number of mentions of responsibility towards them in foundational texts, but the practice remains almost non-existent. The reason for the abyss existing between text and practice will be identified as stemming from the citizen-subject divide and the enforcer-beneficiary divide. These could be considered difficulties, but the paper defends that they should not be seen as barriers for the development of protection—they just force us to look in new places for answers. It is defended in this paper that the state has a ‘duty of care’ for future generations, a commitment that has been clearly established in constitutional texts across Europe. It is further argued that there is no need to frame this protection on human rights terms, since the characteristics of future generations as a subject of law do not fit in appropriately. The ‘duty of care’ is sufficiently well-grounded to serve as a source and mechanism of protection on its own.

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1. INTRODUCTION

The research question this project sets itself to answer is what are the characteristics of future generations as a legal concept and what are the ways (if any) in which they manifest themselves in the constitutional life of a state. The project will use a comparative constitutional law methodology to look at those examples where future generations appear, with the objective of making a comprehensive analysis of the characteristics of the notion in constitutional law. Due to the numerous instances of some sort of future generations provision at the broad international level, this Project will reduce its scope to focus only on Member States of the Council of Europe (CoE). The first part of the paper will conduct a textual analysis of international instruments and those European constitutions that include a future generations clause. The paper will then move to constitutional practice, where the two forms of protection existing, namely institutional mechanisms and litigation, will be looked at. The analytical part of the project will show that future generations have a lot of constitutional *potential*. The caveat of the current way of using future generations is that it has not been properly conceptualized, given the difficult dimensions that the nature of future generations presents. This becomes clear when looking at the case law in Europe where future generations have appeared before court. One telling aspect is that it is very scarce, and another is that even when future generations are present in the claim, courts prefer to evade talking about them. Future generations are included in constitutional texts as a relevant part of the constitutional system established, they are identified as subjects of protection, they are recognized as a *member* of the state. As such, a more profound commitment towards their protection should be introduced in our constitutional sphere. Finally, the paper will then argue that a human rights approach should not be taken to realize the responsibility of current generations, since individual human rights do not fit correctly with the particular characteristics of the notion of future generations.

2. COMPARATIVE CONSTITUTIONAL ANALYSIS

2.1 *International Instruments*

While international instruments may not be constitutional law proper, their influence in constitutional law is undisputable. Moreover, international law is important because it is

a forum where states speak *as themselves*. What we hear from states at the international law level can be defined as a constitutional voice, since in this case states are speaking as subjects. The relevance of looking at them as part of a comparative constitutional analysis is thus warranted. The mentions of future generations in international instruments will be subdivided in two, on one hand sectorial documents and on the other hand the UNESCO Declaration on the Responsibilities of the Present Generations Towards Future Generations. The latter warrants a subsection of its own for being the only international document to deal with future generations as its substantive subject-matter. Sectorial documents are those that mention future generations as part of their text, but which are having a subject-matter other than future generations protection per se. These are almost entirely found in the area of environmental protection.

2.1.1 Sectorial Protection Documents

The Declaration of the United Nations Conference on the Human Environment in 1972, which eventually led to the creation of the UN Environment Programme states in its first Principle that ‘Man [...] bears a solemn responsibility to protect and improve the environment for present and future generations.’ The Earth Summit celebrated in Rio in 1992 saw the signing of three documents that stressed the importance of protecting future generations, the Rio Declaration mentioning in its Article 3 that ‘the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations’, the Convention on Biological Diversity, in its preamble stating that the Contracting States are ‘determined to conserve and sustainably use biological diversity for the benefit of present and future generations’, and the UN Framework Convention on Climate Change (UNFCCC) declaring in its Article 3 that ‘the Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities’. While these are just a few of the many instances of such type of statement in international instruments, these remain ‘vague, with no guidance as to how the balance between the needs of present and future generations is to be struck’.¹

¹ P. M. Lawrence, *Justice for Future Generations: Climate Change and International Law*, (Tilburg University, 2013): p. 120.

2.1.2 UNESCO Declaration on the Responsibilities of the Present Generations Towards Future Generations, 1997

The main aim of the Declaration is to build upon a series of documents at the UN level dealing with protection of future generations. These instruments were all focused in specific areas, such as environment or cultural heritage, thus prompting the ‘need to adopt an instrument which provides for safeguarding needs, interests and benefits of future generations in a comprehensive way.’² In terms of the legal characteristics of the instrument itself, declarations are considered to ‘set forth universal principles to which the community of States wished to attribute the greatest possible authority and to afford the broadest possible support’, where ‘stress is laid on moral authority’.³

A text named ‘The Universal Declaration of Human Rights for Future Generations’ was adopted in 1994 in an international conference celebrated in La Laguna (Spain), laying out in broad strokes what was understood to be the rights held by future generations.⁴ The UNESCO Executive Board welcomed the document, but stated that there were a list of points that needed to be addressed more closely in order to lay out a comprehensive text dealing with future generations. Among the questions raised were whether rights for future generations are legal or moral, whether they should ‘be understood only as human rights or as rights in the broader context of international law’ and whether they should be framed ‘as individual or collective rights’.⁵ The answer to these are equally relevant for the purposes of this inquiry, since many of the characteristics of the notion of future generations remain undetermined. On this line, during the drafting process and following comments from Members of the Executive Board and participating experts, the ‘legal possibility of a declaration of rights of those yet unborn, in other words—non-existing

² UNESCO Executive Board, 151st Session, (Paris, 1997), ‘Draft Declaration on the Safeguarding of Future Generations’.

³ ‘General Introduction to the Standard-Setting Instruments of UNESCO’. Available at: http://portal.unesco.org/en/ev.php-URL_ID=23772&URL_DO=DO_TOPIC&URL_SECTION=201.html

⁴ ‘Although the La Laguna Declaration adopted by a group of non-governmental experts cannot be qualified as a normative instrument as only declarations adopted by governmental organs may have such a character, nevertheless it can be seen as the beginning of the process leading to the elaboration and adoption of a normative instrument on the rights of future generations.’ UNESCO Executive Board, 145th Session, (Paris, 1994), ‘Question of the Preparation of a Declaration on the Rights of Future Generations’: para. 8.

⁵ UNESCO Executive Board, 151st Session, (Paris, 1997), ‘Draft Declaration on the Safeguarding of Future Generations’: para. 11.

subjects' was questioned. With that in consideration the approach was shifted towards focusing on 'the responsibilities of present generations'.⁶

Some very interesting issues regarding the nature of the notion of future generations were raised by states in the drafting process as part of their official responses to the Director General. Among these are who are exactly future generations⁷, how could we know what future generations need or what will impact them negatively⁸, and whether the legal structure of their protection is framed as individual or collective rights⁹. The government of China addressed an interesting and important aspect of the notion of future generations. They were concerned because the language of the draft was ambiguous in regards to who exactly *is* future generations, asking '[d]oes it refer both to the younger generation of people already born and to generations to come or to the younger generation living within a population at any given time?'. In fact, China at this point stated that they would prefer adopting the first interpretation, i.e. that future generations are understood as children, unfortunately without providing substantial reasoning for this preference.

The final text of the Declaration establishes in its Article 1 that '[t]he present generations have the responsibility of ensuring that the needs and interests of present and future generations are fully safeguarded'. This is a later introduction into the text, made after the agreement was reached regarding the discussion of rights or needs and interests of future generations. Notably once the agreement was present it took an important position at the top of the structure of the text, clearly establishing the nature of the obligations towards future generations.¹⁰ Article 2 introduces an interesting dimension of the debate

⁶ UNESCO General Conference, 28th Session, (Paris, 1995), 'The Responsibilities of the Present Generations towards Future Generations: Preliminary Draft Declaration'.

⁷ Response by China, Working Group of Governmental Experts on the Draft Declaration on the Safeguarding of Future Generations: replies from the Member States received up to 24 June 1997, (Paris, 1997): p. 4-5.

⁸ Response by Venezuela, *ibid*, p. 28-29.

⁹ Response by Switzerland, *ibid*, p. 25-26.

¹⁰ Even though the differentiation was clearly established even in the academic literature we see examples of the lack of common understanding around the notion, as we can see in a statement by Lucas Lixinski where he mentions that '[i]n this Declaration, UNESCO reaffirms the importance of international human rights instruments to understanding *the rights* of future generations'. Lucas Lixinski, *International Heritage Law for Communities: Exclusion and Re-Imagination*, (Oxford: Oxford University Press, 2019): p. 110. Another example of this phenomenon can be seen in Randal Abate's book *Climate Change and the Voiceless*, where he states '[e]fforts are underway to enhance how human rights law can address future generations' needs. For example, the UN Educational, Scientific and Cultural Organization's Declaration on the Responsibilities of the Present Generations Towards Future Generations [...].

around future generations, it states ‘that future as well as present generations enjoy full freedom of choice as to their political, economic and social systems and are able to preserve their cultural and religious diversity’. The provision may seem confusing since it is not entirely clear what it is aiming for. In what way can the freedom of choice of both present and future generations be impacted, either negatively or positively? The Director General stated during the drafting process that ‘[in order to incorporate] the idea of solidarity between generations, the draft Declaration, in its [second] article, provides for freedom of choice of future generations.’¹¹ The meaning of the provision thus appears to reside on the notion of intergenerational solidarity, but its relationship to freedom of choice does not appear entirely clear. Something worth noting here is that the academic literature on future generations has an important strand dealing with questions of legitimacy in regards to constitutional texts binding generations that have not yet been born, and thus have had no role on the drafting of the provisions they are to live by. The prevalence of that discussion could answer why Article 2 was included, since it is indeed a notion that is often linked to the discussion on future generations. The following articles define the scope of different areas that have to be taken into consideration when protecting future generations, given the connection between both. These areas are the environment, which takes the higher relevance position in the text, by being mentioned both as ‘the Earth’ generally in Article 4 and the environment more specifically in Article 5; the human genome and biodiversity¹²; cultural diversity and heritage¹³; peace¹⁴ and lastly development and education¹⁵. This wide range of fields stands in contrast with the more conventional inclusion of future generations, which is normally limited to environmental considerations. The approach taken by UNESCO is thus more ambitious than anything that came before it, and to date, than anything that came after too. The drawbacks are the limited bite that a UNESCO Declaration has, and the lack of power that it has in some of

¹¹ UNESCO Executive Board, 151st Session, (Paris, 1997), ‘Draft Declaration on the Safeguarding of Future Generations’: para. 81.

¹² UNESCO Declaration on the Responsibilities of the Present Generations Towards Future Generations, Article 6.

¹³ UNESCO Declaration on the Responsibilities of the Present Generations Towards Future Generations, Article 7.

¹⁴ UNESCO Declaration on the Responsibilities of the Present Generations Towards Future Generations, Article 9.

¹⁵ UNESCO Declaration on the Responsibilities of the Present Generations Towards Future Generations, Article 10.

the areas of protection mentioned in the text, which is a criticism that Switzerland raised in their opinion.

Overall, two main takeaways can be drawn from the UNESCO Declaration. The first one is that there is consensus at the international level on the existence of the notion of future generations, i.e. that it is not only the present generations that are part of the human community, but also future generations belonging to ‘the whole of humanity, linked as a chain of generations’¹⁶, and that considering this point present generations have a responsibility towards future ones, in order to ensure that they will be able to enjoy at least certain minimum of conditions needed for life to continue. The second one is that beyond that common ground there is a wide array of differences in terms of defining what exactly is referred to by future generations (whether it is children or people yet to be born, or both), and how their protection is to be identified (we do not know with certainty what activities may have a detrimental or a positive impact), and ensured (what kind of mechanism can be put in place to ensure that those needs are secured). These issues are central to the discussion around future generations, and will be seen in the analysis of the domestic systems.

2.2 Constitutional Law

The presence of future generations is not unique to international law. The notion is also found across a wide number of constitutional texts across the world, around 60 of them. Interestingly, most of these instances appear as part of the preamble of the constitution, normally setting the responsibility of the people to preserve good living conditions to future generations. In this section a number of constitutional preambles will be looked at, in order to identify what are the origins and characteristics of future generations in constitutional law. Given the numerous instances in which future generations appear in foundational texts, the geographical scope here will be narrowed to include only Member States of the Council of Europe. More specifically, the states having such provisions are

¹⁶ UNESCO Executive Board, 152nd, (Paris, 1997), ‘Report of the Chairperson of the open-ended Working Group established to examine the draft Declaration on the Safeguarding of Future Generations Conference’: Annex I, p. 2.

Andorra, Azerbaijan, Estonia, France, Hungary, Latvia, Poland, Russia, Ukraine, Switzerland, Macedonia and Moldova.¹⁷

2.2.1 Preambles

These mentions have a series of common characteristics, the main one of them being that they are always linked to ‘responsibility’ in some way or another. The Azeri people ‘aware of their responsibility’, the Hungarian people ‘bear responsibility’, the Latvian people ‘acting responsibly’, the Russian people ‘proceeding from [...] responsibility’, the Swiss people ‘conscious of [...] their responsibility’, the Ukrainian people ‘aware of [their] responsibility’, the Macedonian people ‘taking responsibility’, and lastly the Moldovan people ‘aware of [their] responsibility’. Interestingly, this responsibility does not exist only towards future generations, since the mention often includes present *and* future generations—sometimes including also past generations. In the Azerbaijani constitution it is ‘past, present, and future generations’, in Estonia ‘present and future generations’, in Russia ‘present and future generations’, in Ukraine ‘past, present and future generations’, in Moldova ‘previous, present and future generations’. Even in the other texts, where responsibility to future generations is stated only towards them—not together with past or present ones—there are other additional expressions within the preamble indicating the linkage of generations. In Hungary the constitutional pact being ‘an alliance among Hungarians of the past, present and future’, Latvia ‘guarantees the existence and development of the Latvian nation [...] throughout the centuries’, Poland ‘guarantees the rights of the citizens for all time’, while Macedonia takes ‘responsibility for the present and future of their fatherland’. Another interesting aspect is that this responsibility is normally not limited to a specific *UNESCO dimension*—environment, biodiversity, cultural heritage, peace, development nor education are not mentioned as being the subject of the statements. These statements are made in a broader, over-encompassing manner not limited to just the environment or cultural heritage. The responsibility being expressed in these preambles includes all aspects of life.

Regarding what the notion of future generation means, in the sense of who is to be understood to *belong* within the term, interestingly the Hungarian preamble includes the

¹⁷ All constitutional texts used here have been taken from the Constitute Project, a part of the Comparative Constitutions Project at the University of Texas at Austin. Available at: <https://www.constituteproject.org>.

statement '[w]e trust in a jointly-shaped future and the commitment of younger generations'. Here we see the separation between the concepts of future generations and younger generations, clearly showing the latter as representing living generations and the former as those yet to come. While the other preambles do not explicitly make this distinction, the fact of mentioning future generations along *present* ones would lead to the conclusion that these states understand something similar in this respect, namely that future generations represent people that are not yet born.

Unlike the substantive provisions that will be looked at next, preambles are not normally considered to have the same outright binding legal nature. But as Ginsburg et al. defend, 'constitutions are about more than creating enforceable law: they are also supposed to express the fundamental values and aspirations of the people, and bind them together as a nation.'¹⁸ The reality is that preambles have a very relevant role in shaping both a constitution itself and a constitutional order. Future generations are mentioned as an intrinsic part of the people, and the responsibility of the state and its members towards them is stated explicitly.

2.2.2 Substantive Provisions

When future generations are included as part of the substantive part of the constitutional text, this is done in almost all cases in environmental protection provisions. The reasons for this can be located at the influence of international instruments on environmental protection, which as we have seen in the first part of this chapter almost always establish intergenerational responsibilities, as well as the reason being the very same that made future generations enter into those environmental protection instruments, namely the fact that environmental damage is the area that can have the most detrimental impact on those that are yet to be born. Member states of the CoE to include substantive provisions regarding future generations are Albania, Andorra, Armenia, Georgia, Germany, Hungary, Luxembourg, Norway, Poland, Slovakia and Sweden.

The way we see these provisions phrased is highly similar to those present in the preambles. Here a noticeable wider variety of terms are used, they are not just phrased in

¹⁸ Tom Ginsburg, Daniel Rockmore and Nick Foti, 'We the Peoples: The Global Origins of Constitutional Preambles', *George Washington International Law Review*, Vol. 46, 305 (2014): p. 105.

terms of ‘responsibility’, but the words used instead are highly similar in nature. Georgia ‘[takes] into account the interests’, Luxembourg ‘guarantees [...] satisfaction of the needs’, Norway has a very strong statement—considering what we have observed up until now—since it will ‘safeguard [the] right [to an environment that is conducive to health]’, while Sweden with a more restrained approach ‘shall promote’. In the same way that the mentions of the preamble were phrased, in substantive provisions the responsibility towards future generations is mentioned along that towards present generations. In Albania ‘present and future generations’, in Georgia ‘current and future generations’, in Luxembourg ‘present and future generations’, with the same exact formulation being used in Sweden as well.

Apart from these similarities, these provisions also have broad differences in their legal nature within the different constitutional orders. As we can see in Norway the provision is phrased in terms of rights, which obviously carries a much different weight than for example the German provision, which is phrased as a non-justiciable state objective.¹⁹ The differences in the nature of the provision unfortunately cannot be seen in regards to their impact in practice, since the reality is that practice in the use of future generations as a legal notion remains very seldom. Nonetheless there are a few examples that are able to shine some light into the different effects of these provisions, which will be looked at in the next section.

2.2.3 Constitutional Practice

Constitutional practice here is used in a very broad sense, meaning activity that happens within the state, and thus under the umbrella of the constitution. Therefore, the case law included here is not limited to top courts but extends to appellate and first instance courts. In the same vein, ombudspersons and parliamentary commissions are also considered to be part of the constitutional life of the state. These three—case law, ombudspersons and commissions—are the main instances in which future generations appear in practice. They are all very scarce in number, numbering one ombudsperson, two parliamentary committees and three cases, counting all the states members of the CoE. The striking divide between textual presence and practical appearances will be analyzed in detailed

¹⁹ Claudia E. Haupt, ‘The Nature and Effects of Constitutional State Objectives: Assessing the German Basic Law’s Animal Protection Clause’, *Journal of Animal Law*, Vol. 16:213, (2010): p. 221-225.

further down. Nonetheless, while few and wide apart, these examples are indeed the first ones to give a voice or pay attention to future generations and thus inform us of the characteristics that the notion has in practice.

Edith Brown Weiss wrote a seminal book in 1989, where she laid out the groundwork for the notion of ‘current generations acting as stewards of the Earth’²⁰. In it, she called for the need of states to bear their responsibility towards future generations through their political representation, in the shape for example of commissioners or ombudspeople.²¹ In Europe, three states have implemented some form of these, specifically an ombudsperson in Hungary, a Parliamentary advisory council in Germany and a Parliament Committee in Finland, which will be looked at in more detail next.

The constitutional provisions including future generations in Hungary are among the more detailed ones in terms of prescribing institutional arrangements to be established in order to protect them. More specifically, Article 30 calls for the creation of a Commissioner for Fundamental Rights by the National Assembly and then charges the body with the duty of protecting ‘the interests of future generations’. An ombudsperson for future generations had been set up in 1993, before the introduction of the new constitution. After the new text the ombudsperson was transferred to the office of the Commissioner, and now acts as her deputy. The ombudsperson ‘monitors, evaluates and controls the enforcement of legal provisions ensuring the sustainability and improvement of the state of the environment and nature’.²² Among its activities and powers the ombudsperson can ‘recommend the Commissioner to initiate ex-officio investigations into environmental matters’, ‘propose that the Commissioner turn to the Constitutional Court’, ‘monitor the implementation of the Sustainable Development Strategy accepted by Parliament’, and ‘propose the adoption and the amendment of legislations promoting

²⁰ Randall S. Abate, *Climate Change and the Voiceless: Protecting Future Generations, Wildlife, and Natural Resources*, (Cambridge: Cambridge University Press, 2019): p. 44.

²¹ Michael Rose, ‘All-affected, Non-identity and the Political Representation of Future Generations: Linking Intergenerational Justice with Democracy’, in *Intergenerational Equity: Environmental and Cultural Concerns*, Thomas Cottier, Shaheez Lalani and Clarence Siziba (eds.), (Leiden, Boston: Brill Nijhoff, 2019): p. 32.

²² Ludvig Beckman and Fredrik Uggla, ‘An Ombudsman for Future Generations: Legitimate and Effective?’, in *Institutions For Future Generations*, Iñigo González-Ricoy and Axel Gosseries (eds.), (Oxford: Oxford University Press, 2016): pp. 120-121.

the interests of future generations’.²³ The German advisory council stands for a ‘strong commitment to maintaining the life-conditions of future generations’, and ‘serves as the advocate of long-term responsibility’, by among others presenting recommendations on medium and long-term planning, entering ‘into dialogue with other parliaments, particularly in the European Union, and underpins the discussion within society on the subject of sustainable development.’²⁴ In a very similar vein the parliamentary committee in Finland ‘makes statements to other Parliamentary Committees on request’, and ‘processes issues relating to future development factors and development models’.²⁵

An important aspect to look at here is that these three bodies are members of the Network of Institutions for Future Generations, which ‘is an independent, non-formal network of institutions worldwide for the protection of the interests of future generations’²⁶, established in 2014. Other members of the Network are the Commissioner of the Environment and Sustainable Development of Canada, the Commissioner for Future Generations of Wales, the Parliamentary Commissioner for the Environment of New Zealand, the Former Commissioner for Future Generations of Israel, the Commissioner for Sustainability and the Environment of the Australia Capital Territory and lastly, the Ombudsman for Children of Norway. Interestingly, this last member is another example of the closeness that exists between notions of protection of future generations together with younger generations, which will be seen even further in the practice before courts. The members of the Network, together with the supporting members and other representatives—such as members of academia and NGOs—sat together in Budapest in 2014 in the Conference of Model Institutions for a Sustainable Future and elaborated the Budapest Memorandum. The Memorandum states as its main goal to ‘strongly support the spread of institutional solutions for safeguarding and promoting the needs of future generations as well as the fostering of sustainable development on the national, subnational and the UN level’, stemming from a ‘historical responsibility of present generations towards those yet to come’ and it focuses in environmental aspects—with no

²³ Information provided by the Network of Institutions for Future Generations. Available at: <https://www.ajbh.hu/documents/2238847/2953603/Institutions+description/898cc06c-cc1f-b832-a810-ff86e85790f>.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Network of Institutions for Future Generations, ‘About Us’. Available at: <http://futureinstitutions.com/en/web/network-of-institutions-for-future-generations/about>.

mention to other thematic areas of interest such as those mentioned in the UNESCO Declaration.²⁷ This initiative shows that while there are still not a lot of institutional examples across the continent, there is indeed still some activity in the area, and clear impetus for the creation of more entities of the kind. The main thrive for their existence, what they identify as the ‘historical responsibility’ is phrased in exactly the same terms that the preambles looked at are. This points towards a great potential for activism in these countries in order to push for the *activation* of these constitutional commitments in the shape of ‘institutional solutions’.

Apart from different institutional set-ups, another way in which future generations have appeared in the constitutional life of European states is litigation. These are always claims related to the environment. The selection of cases for the below analysis was not a difficult process, since these three are currently the only ones to have been substantially linked to future generations protection.

The first case is *Urgenda Foundation v. State of the Netherlands*²⁸, decided in 2015, in 2018 and finally in the Supreme Court in 2019. It is rather interesting that one of the few court case where future generations can be argued to have been *present* comes from one of the few states of the CoE to include no mention to the notion within its constitution. Instead the source of protection is directly taken from international law, more specifically the UNFCCC.²⁹ On its first instance the court declared that Urgenda was able to represent the interests of future generations ‘since its internal by-laws stipulate that the NGO strives for a sustainable society, [...] and since sustainability has an inherent intergenerational element’³⁰. Interestingly, the District Court stated as well that ‘[t]he principle of fairness means that the policy should not only start from what is most beneficial to the current

²⁷ ‘Budapest Memorandum, adopted at the Conference of Model Institutions for a Sustainable Future held in Budapest, 24-26 April 2014’. Available at: http://futureroundtable.org/documents/2238847/0/Budapest_Memorandum.pdf/0b6c83e2-5217-4ef7-8a62-01156974fdbd. Last accessed: 3 June 2020.

²⁸ District Court of the Hague, 24 June 2015; *Urgenda Foundation v. The Netherlands*; The Hague Court of Appeal, 9 October 2018 and Supreme Court of the Netherlands, 20 December 2019, *State of the Netherlands v. Urgenda Foundation*.

²⁹ Article 3(1) UNFCCC: ‘Parties should protect the climate system for the benefit of present and *future generations* of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities’.

³⁰ Laura Burgers and Tim Staal, ‘Climate Action as Positive Human Rights Obligation: The Appeals Judgment in *Urgenda v the Netherlands*’, *Netherlands Yearbook of International Law* 49, (2018): p. 228.

generation at this moment, but also what this means for future generations, so that future generations are not exclusively and disproportionately burdened with the consequences of climate change³¹, showing the kind of language that could be used in these type of cases, and how the responsibility towards future generations that is included over and over in international and domestic instruments is taken seriously. The Court also stated that ‘the possibility of damages for those whose interests *Urgenda* represents, including current and future generations of Dutch nationals, is so great and concrete that, given its duty of care, the state must make an adequate contribution—greater than its current contribution—to prevent hazardous climate change’³², thus raising the notion of duty to protect in the context of future generations. This will be taken up later by the paper in order to develop a duty to protect future generations stemming from constitutional law.

Sadly, in the appeal to the case the court did not address the question of future generations, nor did the Supreme Court³³—showing the reluctance, or simply following the historic trend of not taking the interests of future generations into account in practice. Beckman and Ugglä in their commentary of the case mention that the unborn ‘are not legal subjects’ in Dutch law and as such, their interests are not important enough to bring claims on their behalf³⁴. Furthermore, they put forward that in the case of the Appellate Court did not need address the future generations issue since the claim had already been brought by present generations of Dutch people, thus making it unnecessary.³⁵ Here again we see one of the common trends surrounding future generations, their interests are superfluous because they are protected by current generations already. This seems to fly on the face of the very essence of the notion of responsibility towards future generations, namely that our actions do not have an impact only on the present, but also on the future. Future generations should be a part of any claim of the kinds seen here, because it is important to keep in mind at all times that environmental damage will not only impact the current generation—thus it should not only be *them* standing before a court. All in all, *Urgenda*, while being a very positive milestone for climate change litigation it does not improve the status of future generations significantly—further than the first instance court no other

³¹ Abate, *supra* at n. 18: p. 47.

³² Abate, *supra* at n. 18: p. 47.

³³ Supreme Court of the Netherlands, 20 December 2019, *State of the Netherlands v. Stichting Urgenda*. Unofficial translation prepared by Urgenda, available at: <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf>

³⁴ Beckman and Ugglä, *supra* at n. 28: p. 228.

³⁵ *Ibid.*.

raised any considerations in this regard. If anything, it lessens it because it has pushed it aside within an environmental protection case, the dimension where it had the strongest credentials to be a part of.

*The People vs. Arctic Oil*³⁶ is a Norwegian case dealing with new oil extraction licenses in the North Sea, which were claimed to be by the applicants contrary to Article 112 of the Constitution. The first decision was handed on 2018, with the appeal ruled on January 2020. While the Article invoked includes the mention of future generations, an interesting characteristic of it is that it is a rights provision. This interestingly shifts the focus towards current generations and its composing individuals, and makes it more difficult to tackle the issue of rights linked to future generations. Not the District Court nor the Appellate Court dealt with these questions directly. The Appellate Court in the decision stated that ‘natural resources are to be managed on the basis of comprehensive long-term considerations which will safeguard the right for future generations as well’. While that mention would point towards the Court seeing the right also belonging to future generations, later on the Court states that what is included in Article 112 is a ‘principle on solidarity with future generations’. As such it appears that the Court does not ever consider that future generations *have* that right in the present, but that they will have it, and until then there is a principle of solidarity to make sure they will be able to enjoy that right. This line makes future generations simply a tool that can buttress some arguments throughout a case, but with no real weight. For example, the Court interprets that CO2 emissions produced overseas but due to Norwegian exports are to be taken into account into the environmental assessment partly because of the ‘need for comprehensive consideration out of concern for future generations’, but at no point in the case for example the issue of standing for future generations is discussed—it appears the Court does not even consider for a second that there should be a discussion on that regard. Luckily this is not the last we have heard from this case, since an appeal has been accepted by the Supreme Court. In the appeal the applicants have stressed the need to consider

³⁶ Oslo District Court, 4 January 2018, *Föreningen Greenpeace Norden and Natur og Ungdom v. Government of Norway*, and Borgarting Court of Appeal, 23 January 2020, *Föreningen Greenpeace Norden and Natur og Ungdom v. Government of Norway*.

future generations more substantially when interpreting Article 112³⁷, so hopefully we will see the Court tackling these questions.

The *Magnolia* cases in Sweden, filed on 2016 and decided on 2017 and 2018 (appeal), dealt with the sell by a state energy company of lignite to a Czech company³⁸. Two youth organizations brought the case claiming that the sell would directly provoke an increase in greenhouse gas emissions.³⁹ The claim was struck down by the court on first instance, as was the subsequent appeal. While unsuccessful, the Network of Institutions for Future Generations has stated that ‘the petition highlights some of the most interesting aspects on how the interests of future generations can be put in practice through climate change litigation claims’.⁴⁰ The structure of the claim was very similar to the one in *Urgenda*, being based around international environmental instruments, Article 2 and 8 of the ECHR and a constitutional duty of care. On the aspect of the duty of care the submission claimed that ‘by allowing [the state-owned company] to complete the sale, the State has acted in a way that does not meet the requirements that can reasonably be attributed to its duty of care to Sweden’s inhabitants and to the rights of future generations regarding environment, health and property.’⁴¹ Unlike in *Urgenda*, where the notion of duty of care stemmed from Dutch private law⁴² in this case the applicants allude to it as coming from the ‘Constitution, the European Convention on Human Rights and general principles of law’ as well as from the signing of the UNFCCC and the Kyoto Protocol. Unfortunately, the claim does not seem very detailed in the legal sense, as it would have been positive to develop more the duty of care dimension.

³⁷ *Föreningen Greenpeace Norden and Natur og Ungdom v. Government of Norway*, Notice of Appeal to the Supreme Court of Norway, p. 6. Unofficial translation by the applicant’s platform, available at: <https://drive.google.com/file/d/1Mkjoemyd3XSxpN49YVXz83h9zy87z5Uf/view?usp=sharing>

³⁸ Stockholm District Court, 30 June 2017, *Push Sverige, Fältbiologerna et al v Staten*, and Stockholm Court of Appeal, 23 January 2018, *Push Sverige, Fältbiologerna et al v Staten*.

³⁹ Submission by the applicants, Unofficial translation by the Sabin Center for Climate Change Law. Available at: http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2016/20160915_3649_summons.pdf

⁴⁰ Brief prepared by the Network of Institutions for Future Generations. Available at: <http://futureroundtable.org/documents/2238847/0/Magnolia+case+updated+2018.pdf/09f602a1-47ad-a9dd-e935-9690f0d614b6>.

⁴¹ Submission by the applicants, *supra* at n. 35.

⁴² Eleanor Stein and Alex Geert Castermans, ‘Case Comment—Urgenda v. The State of the Netherlands: The “Reflex Effect”—Climate Change, Human Rights, and the Expanding Definitions of the Duty of Care’, *McGill Journal of Sustainable Development Law*, Vol. 13, Issue 2, (2017): p. 308.

An interesting aspect of this case is actually common in the new wave of climate change litigation, namely that they are brought by youth organizations establishing themselves as representatives of both young and future generations. Such a phenomenon was first seen in the 1993 milestone case *Oposa v Factoran* of the Supreme Court of the Philippines, where the applicants claimed to represent themselves as well as ‘generations yet unborn’⁴³. The Supreme Court accepted the ability of the applicants to represent future generations, but limited it stating that they could sue on their behalf ‘based on the concept of intergenerational responsibility in so far as the right to a balanced and healthful ecology is concerned’.⁴⁴ This concept was then embraced by the new wave of climate change litigation, with examples in *Magnolia* in Europe, *Juliana et al. v United States* in the United States and *Mathur, et al. v. Her Majesty the Queen in Right of Ontario* in Canada. The tendency to put together both notions together is a particular commonality in the discussion around future generations. China’s comments on the drafting of the UNESCO Declaration showed that future generations may be confused as meaning younger generations, but it is certainly interesting that this is the case. Here it is argued that both notions should be understood as clearly separate, and that it should not be the case that we understand young generations as the logical representatives of future generations. This seems rather reductionist, since it equates future generations with a small sector of the current generations (children). Future generations should be understood as a notion that includes all types of future individuals, be it young or old. While it is to be appreciated that these youth organizations are embodying a movement that fights a paternalistic and short-terminist system that overlooks the interests of young people and infantilizes what they might have to say⁴⁵, while also claiming to fight the same fight also for future generations—as they suffer from a similar view of the community—we need not establish this trend firmly. Future generations should not be understood to be best represented by current young generations, but by current generations at large.

The case law reviewed above shows both a scarce landscape but a promising potential. Litigation of future generations is in a very early stage of infancy, but that is how anything starts. If NGOs around Europe continue bringing to court this type of claims, and force

⁴³ Supreme Court of the Philippines, 30 July 1993, *Oposa v Factoran*.

⁴⁴ Abate, *supra* at n. 18: p. 62.

⁴⁵ Jane Fortin, *Children's Rights and the Developing Law*, (Cambridge: Cambridge University Press: 2009): p. 4-5.

courts to answer important questions put before them the notion of future generations will continue to grow in relevance. After all environmental protection and the responsibility of current generations towards future ones are very pressing issues. Even more than ever at this precise point in time, where we see that the emphasis on economic recovery post-COVID is promoting a growth dismissive of environmental concerns. Land use⁴⁶, fossil fuel consumption and reliance on single-use plastics⁴⁷ are some of the many areas that governments are prioritizing regardless of their potential harmful consequences. That being said, the reality is that there is still a very wide separation between the textual presence of future generations—and the responsibility that current generations have towards them—and its practical reality. That divide has a series of sources that could be addressed, in order to make it possible for litigation of this type to continue to appear in courts around Europe.

3. FUTURE GENERATIONS IN CONSTITUTIONAL LAW

After having conducted the analysis of the textual and practical presence of future generations as a notion of constitutional law the answer of the research question set out in this project can be answered. Future generations as a concept of law can be considered ambiguous and very open textured but it also carries a considerable normative and substantive force. The notion appears in a large number of constitutional texts, almost always framed in terms of responsibility of the state towards their protection. This is a product of constitutional texts identifying future generations as part of ‘the people’—the responsibility towards them is expressed at the same time and in the same terms as that which owed to current generations. This is a characteristic of the mentions of them both in preambles and substantive provisions. It is important to stress this fact, since what we see is in a sense a subjectification of future generations, not as individuals—due to the nature of the notion—but as a collective representing those that will be. The state cannot simply dismiss its duties towards future generations, there needs to be further action in state practice. The reality though shows that when it comes to translate that responsibility

⁴⁶ ‘El Sector del ‘Ladrillo’ Generará Dos Millones de Empleos tras la Crisis’, *El Economista*, (11 May 2020). Available at: <https://www.eleconomista.es/empresas-finanzas/noticias/10533983/05/20/El-sector-del-ladrillo-generara-dos-millones-de-empleos-tras-la-crisis.html>.

⁴⁷ ‘The Amount Of Plastic Waste Is Surging Because Of The Coronavirus Pandemic’, *Forbes*, (25 April 2020). Available at: <https://www.forbes.com/sites/lauratenenbaum/2020/04/25/plastic-waste-during-the-time-of-covid-19/#6e4d995e7e48>.

into actual commitments states remain passive for the most part. Constitutional practice shows two nascent varieties of action, one along the lines of institutional mechanisms and another in the form of litigation. The examples reviewed show that there is in fact possibilities for the duties that the states have declared towards future generations to be realized. Nonetheless, there is still a very wide divide between textual presence and practical initiative. In order to fulfill the potential of the notion of future generations this divide has to be assessed and addressed. This is not due to some whimsical, progressive agenda but because states have declared a very unambiguous responsibility towards their protection.

Jessica Eisen, in the context of constitutional animal protection has identified two aspects that explain the reasons for the divide that can be observed here between text and practice. While there are some important differences in terms of animal and future generations protection, the essence remains useful. These two aspects are the citizen-subject divide and the enforcer-beneficiary divide.⁴⁸ The first one illustrates the problems that arise from a democracy point of view, since future generations are voiceless in democratic processes—they ‘cannot protest or vote today’⁴⁹. That voicelessness stems simply from the nature of future generations, but the conclusion should not be that simply because they cannot assert themselves they should be excluded from these processes. The practice in the area of political institutional representation shows that this divide can be overcome—that the fact that future generations are not *here* should not mean they should not be taken into consideration. The second explanatory aspect is the enforcer-beneficiary divide. Future generations ‘are not individuals as they have no personal identity; they do not yet exist and who they will turn out to be is in most cases indeterminate’.⁵⁰ Therefore they will never become the holders of individual rights since technically, they will never *become*. Future generations begin to hold rights the moment they become an individual in the current generation, which means they stop being part of future generations. This was put very clearly by the UN in a report by the Secretary General on ‘Intergenerational solidarity and the needs of future generations’, where while making the separation

⁴⁸ Jessica Eisen, ‘Animals in the Constitutional State’, *International Journal of Constitutional Law*, 15, (2017): p. 926-940.

⁴⁹ Kate Stone, ‘Creating a Constitutional People’, in *Reconstituting the Constitution*, Caroline Morris, Jonathan Boston and Petra Butler (eds.), (Berlin, Heidelberg: Springer-Verlag, 2011): p. 488.

⁵⁰ Ori J. Herstein, ‘The Identity and (Legal) Rights of Future Generations’, *The George Washington Law Review*, Vol. 77, No. 5/6, (2009): p. 1181.

between younger generations and future generations he states ‘[f]or one thing, living generations are unambiguously rights holders’.⁵¹ When the moment comes to assert the interests of future generations, it is not them the ones with the capacity to do so, there is a necessity for someone within the present generation to bring a claim forward. As such, there is an element of the usefulness of human rights litigation that is lost—there is no conversation with the subject of protection. The enforcer-beneficiary divide calls for a path other than rights protection. Rights are best suited for a dialectic engagement of right holders and duty bearers, or as Eisen puts it, ‘the utility of rights in bridging the gap between demand and power, and in building community, [is] crucially linked to the actual words of disempowered people, and their own articulations of what rights could and should mean’.⁵² Although there are voices that defend that there should be a rights approach to future generations protection,⁵³ here it is argued that such an avenue need not be taken. As András Jakab has stated,

With the conceptualisation as ‘right’ comes not a heavier weight, but also certain conceptual constraints. One of the virtues of law as a method of social control is exactly its conceptual coherence and thus its systematic nature which is necessary for legal certainty. Law can be changed in many ways, and even its conceptual system can be rewritten, but it always has a price: the legal machinery (courts, authorities, solicitors, enforcement agencies, legal academics) have to accommodate and to learn the novelties. If the novelties do not fit to the old system, i.e., if the old conceptual system is questioned, then the solution of new and not explicitly regulated cases will be difficult when applying the law. The concept of ‘rights’ is a fundamental one in modern constitutional democracies, and they are perceived as individual rights or existing people. It is possible to change this but it is a highly risky move which should only be done if no other options are available.⁵⁴

The concept of rights *is* a fundamental one in modern constitutional democracies, and changing it *is* a highly risky move, only to be done if no other options exists. The contention here is that we can let go of the risks, because a different approach can be thought of. Eisen, using ideas raised by Vicki Jackson has put forward that the legitimacy of the constitutional state does not stem solely from democracy and respect for human dignity but also from ‘good and fair principles’, among which the duty of the state to

⁵¹ ‘Intergenerational Solidarity and the Needs of Future Generations’, Report of the UN Secretary-General.

⁵² Eisen, *supra* at n. 44: p. 936.

⁵³ Rachel Johnston, ‘Lacking Rights and Justice in a Burning World: The Case for Granting Standing to Future Generations in Climate Change Litigation’, *Tilburg Law Review*, Vol. 21, Issue 1, (2016): pp. 32-33.

⁵⁴ András Jakab, ‘Sustainability in European Constitutional Law’, *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper*, No. 16, (2016): p. 12.

protect its most vulnerable subjects must be considered as one. Interestingly, in the litigation of future generations we have seen a very related notion come up, namely the ‘duty of care’ of the state. Traditionally this duty of care has been understood to be an element that stems from human rights instruments, an example of which can be seen in German constitutional law.⁵⁵ At this point though we see that there are instances where the duty of care seems to appear, but in no connection to individual human rights protection—which ties nicely with the defense here made that rights are not the avenue of protection that should not be taken. Thus, it may be time to reinterpret the duty of care as predating human rights, and as such giving rise to more notions of protection—for example in the case of future generations and animals. In the case of future generations this duty of care does not need to undergo a theoretical exercise akin to the one needed in animal protection, since there are numerous unambiguous declarations of responsibility towards future generations, both at the constitutional and at the international level. Therefore, the way forward must be to pressure governments to respond to their duty of care, both through institutional mechanisms and litigation. The first steps have already been taken, we just need to continue walking.

4. CONCLUSION

As current generation, we have a responsibility towards future generations. International instruments and constitutional texts alike express this commitment. Constitutions for their part tend to be unambiguous in regards to this responsibility, including it along the responsibility towards current generations. Thus the same level of consideration that is afforded to the present should be afforded to the future. The constitutional practice of Europe shows that there is still a long way ahead, but that some examples of a nascent doctrine exist already. Institutional mechanisms are an appropriate approach, giving future generations a voice in legislative procedures and the design and monitoring of state policy. Along institutionalization should follow litigation, although in reality a tendency of courts to avoid answering directly issues raised by responsibilities towards future generations remains prevalent.

The separation between text and practice can be located in the difficulties posed by the citizen-subject and the enforcer-beneficiary divide, which are particularly impactful when future generations are before court. This is mainly due to the fact that since future

⁵⁵ Dieter Grimm, *Constitutionalism: Past, Present, and Future*, (Oxford: Oxford University Press, 2016): p. 176-179.

generations are not technically individuals, the doors of the traditional arena of protection close before them. A notion that applicants in new climate change cases are bringing to courts is that of the ‘duty of care’, which ties with what Jessica Eisen defends as one of the legitimacy sources of the constitutional state—its duty to protect vulnerable subjects. A non-rights path, focused on the duty of care of the state could serve to push forward the protection of future generations in litigation. The ultimate textual normative source for such an approach is already there, in the constitutional texts of a large number of European states. The task now is for activism to push for states to implement institutional mechanisms and to grant standing and representation to future generations. Our responsibility towards them has been established, and now it is up to us to ensure our commitment to it.

ANNEX I: CONSTITUTIONAL PROVISIONS

Preambles

Andorra, 1993

Willing to bring their collaboration and effort to all the common causes of mankind, and especially to those of preserving the integrity of the Earth and guaranteeing an environment fit for life for the *coming generations*,

Azerbaijan, 1995 (rev. 2016)

The Azerbaijan people, continuing the traditions of many centuries of their Statehood, guided by the principles which are reflected in the Constitutional Act on the State Independence of the Republic of Azerbaijan, wishing to provide welfare for all and everyone, and to establish justice, freedom, security, and being aware of their responsibility before past, present, and *future generations*, exercise their sovereign right by solemnly declaring the following goals:

Estonia, 1992 (rev. 2015)

With unwavering faith and a steadfast will to strengthen and develop the state, [...] which forms a pledge to present and *future generations* for their social progress and welfare, which must guarantee the preservation of the Estonian people, the Estonian language and the Estonian culture through the ages,

France, 2004

Charter of the Environment⁵⁶

The French People,

The future and very existence of mankind are inextricably linked with its natural environment;

[...]

In order to ensure sustainable development, choices designed to meet the needs of the present generation should not jeopardise the ability of *future generations* and other peoples to meet their own needs,

Hungary, 2011 (rev. 2016)

⁵⁶ The Charter of the Environment is considered to be part of the *bloc constitutionnelle*, and thus belongs in this section. The excerpt here is from its preamble.

WE, THE MEMBERS OF THE HUNGARIAN NATION, at the beginning of the new millennium, with a sense of responsibility for every Hungarian, hereby proclaim the following:

[...]

We commit ourselves to promoting and safeguarding our heritage, our unique language, Hungarian culture and the languages and cultures of national minorities living in Hungary, along with all man-made and natural assets of the Carpathian Basin. We bear responsibility for our descendants and therefore we shall protect the living conditions of *future generations* by making prudent use of our material, intellectual and natural resources.

[...]

Our Fundamental Law shall be the basis of our legal order; it shall be an alliance among Hungarians of the past, present and *future*. It is a living framework which expresses the nation's will and the form in which we want to live.

Latvia, 1922 (reinst. 1991, rev. 2016)

The people of Latvia, in freely elected Constitutional Assembly, have adopted the following State Constitution:

The State of Latvia, proclaimed on 18 November 1918, has been established by uniting historical Latvian lands and on the basis of the unwavering will of the Latvian nation to have its own State and its inalienable right of self-determination in order to guarantee the existence and development of the Latvian nation, its language and culture *throughout the centuries*, to ensure freedom and promote welfare of the people of Latvia and each individual.

[...]

Each individual takes care of oneself, one's relatives and the common good of society by acting responsibly toward other people, *future generations*, the environment and nature.

Poland, 1997 (rev. 2009)

Having regard for the existence and *future* of our Homeland,
Which recovered, in 1989, the possibility of a sovereign and democratic determination of its fate,

We, the Polish Nation - all citizens of the Republic,

[...]

Obliged to bequeath to *future generations* all that is valuable from our over one thousand years' heritage,

[...]

Desiring to guarantee the rights of the citizens *for all time*, and to ensure diligence and efficiency in the work of public bodies,

[...]

We call upon all those who will apply this Constitution for the good of the Third Republic to do so paying respect to the inherent dignity of the person, his or her right

to freedom, the obligation of solidarity with others, and respect for these principles as the unshakeable foundation of the Republic of Poland.

Russian Federation, 1993 (rev. 2014)

We, the multinational people of the Russian Federation,
[...]
proceeding from the responsibility for our Fatherland before present and *future generations*,

Switzerland, 1999 (rev. 2014)

In the name of Almighty God!
The Swiss People and the Cantons,
[...]
determined to live together with mutual consideration and respect for their diversity, conscious of their common achievements and their responsibility towards *future generations*,
and in the knowledge that only those who use their freedom remain free, and that the strength of a people is measured by the well-being of its weakest members;

Ukraine, 1996 (rev. 2016)

The Verkhovna Rada of Ukraine, on behalf of the Ukrainian people - citizens of Ukraine of all nationalities,
[...]
based on the centuries-old history of Ukrainian state-building and on the right to self-determination realised by the Ukrainian nation, *all the Ukrainian people*,
[...]
aware of our responsibility before God, our own conscience, past, present and *future generations*,

Macedonia, (Republic of) 1991 (rev. 2011)⁵⁷

The citizens of the Republic of Macedonia, the Macedonian people, as well as citizens living within its borders who are part of the Albanian people, the Turkish people, the Vlach people, the Serbian people, the Romany people, the Bosniak people and others taking *responsibility for the present and future of their fatherland*, aware of and grateful to their predecessors for their sacrifice and dedication in their endeavours and struggle to create an independent and sovereign state of Macedonia, and responsible to *future generations* to preserve and develop everything that is valuable from the rich cultural inheritance and coexistence within Macedonia [...].

⁵⁷ While technically this is paragraph one of Amendment IV of the Republic of Macedonia, paragraph two states ‘[i]tem 1 of this amendment replaces the Preamble of the Constitution of the Republic of Macedonia.’

Moldova (Republic of) 1994 (rev. 2016)

WE, the plenipotentiary representatives of the people of the Republic of Moldova,
members of the Parliament,

[...]

BEING AWARE of our responsibility and obligations towards the previous, present
and *future generations*,

Substantive Provisions

Albania 1998, (rev. 2016)

Chapter V, Article 59¹

1. The state, within its constitutional powers and the means at its disposal, aims to
supplement private initiative and responsibility with:

[...]

d. a healthy and ecologically adequate environment for the present and *future
generations*;

Andorra, 1993

The State has the task of ensuring the rational use of the soil and of all the natural
resources, so as to guarantee a befitting quality of life for all and, for the sake of the
coming generations, to restore and maintain a reasonable ecological balance in the
atmosphere, water and land, as well as to protect the autochthonous flora and fauna.

Armenia, 1995 (rev. 2015)

Chapter 1, Article 12

1. The state shall promote the preservation, improvement, and regeneration of the
environment, and the reasonable utilization of natural resources, governed by the
principle of sustainable development and taking into account the responsibility
towards *future generations*.

Georgia, 1995 (rev. 2018)

Chapter II, Article 29²

Environmental protection and the rational use of natural resources shall be ensured
by law, taking into account the interests of current and *future generations*.

Germany, 1949 (rev. 2014)

Article 20A

Mindful also of its responsibility toward *future generations*, the state shall protect the
natural foundations of life and animals by legislation and, in accordance with law and

justice, by executive and judicial action, all within the framework of the constitutional order.

Hungary, 2011 (rev. 2016)

Article P.1

Natural resources, in particular arable land, forests and the reserves of water, biodiversity, in particular native plant and animal species, as well as cultural assets shall form the common heritage of the nation; it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for *future generations*.

Article 30

The Commissioner for Fundamental Rights and his or her deputies shall be elected for six years with the votes of two-thirds of the Members of the National Assembly. The deputies shall protect the interests of *future generations* and the rights of nationalities living in Hungary. The Commissioner for Fundamental Rights and his or her deputies may not be members of political parties or engage in political activities.

Luxembourg, 1868 (rev. 2009)

Chapter II, Article 11Bis

The State guarantees the protection of the human and cultural environment, and works for the establishment of a durable equilibrium between the conservation of nature, in particular its capacity for renewal, and the satisfaction of the needs of present and *future generations*.

Norway, 1814 (rev. 2020)

Article 112

Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for *future generations* as well.

Poland, 1997 (rev. 2009)

Chapter II, Article 74

Public authorities shall pursue policies ensuring the ecological security of current and *future generations*.

Slovakia, 1992 (rev. 2017)

Chapter I, Article 4

Raw materials, caves, underground water, natural and thermal springs and streams are the property of the Slovak Republic. The Slovak Republic protects and develops these resources, and makes careful and effective use of mineral resources and natural heritage to the benefit of its citizens and *subsequent generations*.

Sweden, 1974 (rev. 2012).

The Instrument of Government, Chapter 1, Article 2

The public institutions shall promote sustainable development leading to a good environment for present and *future generations*.

ANNEX II: BLOG POST

Practical element of the Capstone Project

Future Generations in Constitutional Law

Juan Fuente Bravo

If something has become clear with the passing of time is that humans have had, are having, and—most probably—will continue to have a negative impact in the environment. So much so, that Earth has entered new geological era, the Anthropocene, due to this impact. An issue that has arisen in this context is what should then be the responsibilities that living generations of humans have towards future ones, or if there should be such a notion at all. The consensus that has emerged is that current generations indeed have a responsibility towards future generations:

The Parties to this Convention,

Determined to protect the climate system for present and future generations,

Article 3

Principles

In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following:

1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.

The text of the UNFCCC serves as a clear example of what is the global consensus on the notion of future generations, and in what terms it is expressed. Current generations have the responsibility to ensure the protection of those that will be, but are not yet. Within this

commitment there is an intrinsic interesting dimension—future generations, by definition, are not *here*. They cannot speak, they cannot protest and cannot vote.

It is up to those of us *here* to protect them. We will have to speak for them.

But what is fundamentally understood, or should be, is that the fact that they cannot speak should not mean we do not have to think about them. It is a responsibility that we have, and as such, we have to behave responsibly.

Decades of silence followed the Philippines Supreme Court case *Oposa*, where the Court stated ‘the assertion of the minors of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come’. The silence has now been broken; in recent years we have seen the resurgence of cases with applicants claiming to represent the interests of future generations, and to hold accountable those infringing on *our* responsibilities. The cases of *Urgenda* in the Netherlands, *Juliana* in the US, *The People vs. Arctic Oil* in Norway, *Magnolia* in Sweden and *Mathur* in Canada have all brought environmental harm claims in the name of future generations.

The truth is, courts are having problems dealing with the notion. And that is completely understandable, because the notion has not yet been conceptualized properly so as to be a workable instrument of law. The tendency of courts is to simply side-step the question. In the *Urgenda* case it was the first instance district court to tackle the issue in a laudable exercise of legal bravery. The court said:

‘[t]he principle of fairness means that the policy should not only start from what is most beneficial to the current generation at this moment, but also what this means for future generations, so that future generations are not exclusively and disproportionately burdened with the consequences of climate change’

‘the possibility of damages for those whose interests *Urgenda* represents, including current and future generations of Dutch nationals, is so great and concrete that, given its duty of care, the state must make an adequate contribution—greater than its current contribution—to prevent hazardous climate change’

Sadly, the Appellate and the Supreme Court did not attempt neither to ask, nor answer. The Appellate Court stated that it did not need address the future generations issue since the claim had already been brought by present generations of Dutch people, thus making

it unnecessary.⁵⁸ Here we see one of the common trends surrounding future generations: their interests are superfluous because they are protected by current generations already—or more technically, because current generations are the ones *able* to bring the claim. This seems to fly on the face of the very essence of the notion of responsibility towards future generations, namely that our actions do not have an impact only on the present, but also on the future. In the Norwegian case *The People vs. Arctic Oil* the Appellate Court states only that what is included in Article 112 of the Norwegian Constitution is a ‘principle on solidarity with future generations’. The NGOs and groups of activists that are bringing forward these cases normally raise the notion of the ‘duty to care’ of the state. This is an approach that makes sense, it makes sense to think that as part of a constitutional system the state would have clear responsibilities towards its subjects. Now it is clear that among those subjects are included future generations.

And as it turns out, these commitments of protection, these declarations of duty, are very common in constitutional Europe. A close look to the constitutional texts of the continent show that there are many instances where the state declares its responsibility towards future generations. And it is interesting that all these commitments remain almost always unfulfilled, brushed off with the excuse that future generations are not here, they cannot complain. But such unfulfilling situation cannot continue, because the declarations of responsibility are *already* part of our constitutional texts.

The Azeri people are ‘aware of their responsibility’, the Hungarian people ‘bear responsibility’, the Latvian people ‘acting responsibly’, the Russian people ‘proceeding from [...] responsibility’, the Swiss people ‘conscious of [...] their responsibility’, the Ukrainian people ‘aware of [their] responsibility’, the Macedonian people ‘taking responsibility’, and lastly the Moldovan people ‘aware of [their] responsibility’. Interestingly, this responsibility does not exist only towards future generations, since the mention often includes present *and* future generations. In the Azeri constitution it is ‘past, present, and future generations’, in Estonia ‘present and future generations’, in Russia ‘present and future generations’, in Ukraine ‘past, present and future generations’, in Moldova ‘previous, present and future generations’. Even in other texts, where responsibility to future generations is stated only towards them—not together with past

⁵⁸ Laura Burgers and Tim Staal ‘Climate Action as Positive Human Rights Obligation: The Appeals Judgment in *Urgenda v the Netherlands*’, *Netherlands Yearbook of International Law* 49, (2018): p. 228.

or present ones—there are other additional expressions within the preamble indicating the linkage of generations. In Hungary the constitutional pact being ‘an alliance among Hungarians of the past, present and future’, Latvia ‘guarantees the existence and development of the Latvian nation [...] throughout the centuries’, Poland ‘guarantees the rights of the citizens for all time’, while Macedonia takes ‘responsibility for the present and future of the fatherland’. Albania, Andorra, Armenia, Estonia, France, Georgia, Germany, Luxembourg, Norway, Slovakia and Sweden also have this type of intergenerational responsibility clause.

It is time to start developing these provisions. Together with the new wave of case law mentioned above, an institutional approach has been taken by some other states in order to protect future generations. This shows that there are two already-established ways forward. There needs to be a campaign to move European states to start developing their mechanisms of protection of future generations. And this approach does not have to involve individual human rights protection. The system for example laid out by the ECHR simply does not fit well the characteristics of the notion of future generations, and as András Jakab has stated,

With the conceptualisation as ‘right’ comes not a heavier weight, but also certain conceptual constraints. One of the virtues of law as a method of social control is exactly its conceptual coherence and thus its systematic nature which is necessary for legal certainty. Law can be changed in many ways, and even its conceptual system can be rewritten, but it always has a price: the legal machinery (courts, authorities, solicitors, enforcement agencies, legal academics) have to accommodate and to learn the novelties. If the novelties do not fit to the old system, i.e., if the old conceptual system is questioned, then the solution of new and not explicitly regulated cases will be difficult when applying the law. The concept of ‘rights’ is a fundamental one in modern constitutional democracies, and they are perceived as individual rights or existing people. It is possible to change this but it is a highly risky move which should only be done if no other options are available.⁵⁹

The argument I make is that he is right, it is a highly risky move and we do not have to make it. Because there are indeed other options available, we just have to develop them properly. The examples we are seeing in the practice show that gradually and progressively future generations protection can be workable. And we should do our best

⁵⁹ András Jakab, ‘Sustainability in European Constitutional Law’, *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper*, No. 16, (2016): p. 12.

to continue this trend, because as we have seen our relationship with future generations is a commitment prevalent in our constitutional texts. We have to honor that commitment and live up to our responsibility.

BIBLIOGRAPHY

International Instruments

Declaration of the United Nations Conference on the Human Environment. 16 June 1972.

United Nations Framework Convention on Climate Change. 4 June 1992.

Rio Declaration on Environment and Development. 14 June 1992.

UNESCO Declaration on the Responsibilities of the Present Generations Towards Future Generations. 12 November 1997.

Cases

District Court of the Hague, 24 June 2015; *Urgenda Foundation v. State of the Netherlands*.

The Hague Court of Appeal, 9 October 2018, *State of the Netherlands v. Urgenda Foundation*.

Supreme Court of the Netherlands, 20 December 2019, *State of the Netherlands v. Urgenda Foundation*.

Oslo District Court, 4 January 2018, *Föreningen Greenpeace Norden and Natur og Ungdom v. Government of Norway*

Borgarting Court of Appeal, 23 January 2020, *Föreningen Greenpeace Norden and Natur og Ungdom v. Government of Norway*.

Stockholm District Court, 30 June 2017, *Push Sverige, Fältbiologerna et al v Staten*.

Stockholm Court of Appeal, 23 January 2018, *Push Sverige, Fältbiologerna et al v Staten*.

Supreme Court of the Philippines, 30 July 1993, *Oposa v Factoran*.

Books

Abate, Randall S. *Climate Change and the Voiceless: Protecting Future Generations, Wildlife, and Natural Resources*. (Cambridge: Cambridge University Press, 2019).

Cottier, Thomas, Lalani, Shaheezah and Siziba, Clarence (eds.). *Intergenerational Equity: Environmental and Cultural Concerns*. (Leiden, Boston: Brill Nijhoff, 2019).

González-Ricoy, Iñigo and Gosseries, Axel (eds.). *Institutions For Future Generations*. (Oxford: Oxford University Press, 2016).

Grimm, Dieter. *Constitutionalism: Past, Present, and Future*. (Oxford: Oxford University Press, 2016).

Jane Fortin, *Children's Rights and the Developing Law*, (Cambridge: Cambridge University Press: 2009): p. 4-5.

Lawrence. M. *Justice for Future Generations: Climate Change and International Law*. (Tilburg University, 2013): p. 120.

Lixinski, Lucas. *International Heritage Law for Communities: Exclusion and Re-Imagination*, (Oxford: Oxford University Press, 2019).

Morris, Caroline; Boston, Jonathan and Butler, Petra (eds.). *Reconstituting the Constitution*. (Berlin, Heidelberg: Springer-Verlag, 2011).

Articles

Burgers, Laura and Staal, Tim. 'Climate Action as Positive Human Rights Obligation: The Appeals Judgment in *Urgenda v the Netherlands*'. *Netherlands Yearbook of International Law* 49, (2018).

Eisen, Jessica. 'Animals in the Constitutional State'. *International Journal of Constitutional Law*, 15, (2017).

Ginsburg, Tom; Rockmore, Daniel and Foti, Nick. 'We the Peoples: The Global Origins of Constitutional Preambles'. *George Washington International Law Review*, Vol. 46, 305 (2014).

Haupt, Claudia E. 'The Nature and Effects of Constitutional State Objectives: Assessing the German Basic Law's Animal Protection Clause'. *Journal of Animal Law*, Vol. 16:213, (2010).

Herstein, Ori J. 'The Identity and (Legal) Rights of Future Generations'. *The George Washington Law Review*, Vol. 77, No. 5/6, (2009).

Jakab, András. 'Sustainability in European Constitutional Law'. *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper*, No. 16, (2016).

Johnston, Rachel. 'Lacking Rights and Justice in a Burning World: The Case for Granting Standing to Future Generations in Climate Change Litigation'. *Tilburg Law Review*, Vol. 21, Issue 1, (2016).

Stein, Eleanor and Geert Castermans, Alex. 'Case Comment—Urgenda v. The State of the Netherlands: The "Reflex Effect"—Climate Change, Human Rights, and the Expanding Definitions of the Duty of Care'. *McGill Journal of Sustainable Development Law*, Vol. 13, Issue 2, (2017): p. 308.