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*Working Papers, Forum Transregionale Studien* 14/2023
DOI: https://doi.org/10.25360/01-2023-00005

Design: Plural | Severin Wucher

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The Forum Transregionale Studien is an institutional platform for the international cooperation between scholars of different expertise and perspectives on global issues. It is funded by the Berlin Senate Department for Higher Education and Research, Health, Long-term Care and Gender Equality.

Working Papers are available in open access via *perspectivia.net*, the publication platform of the Max Weber Stiftung.

re:constitution - Exchange and Analysis on Democracy and the Rule of Law in Europe is a joint programme of the Forum Transregionale Studien and Democracy Reporting International, funded by Stiftung Mercator.
Abstract

This paper analyses the growing body of future generations litigation, i.e. lawsuits in which plaintiffs seek protection to long-term needs of future generations typically in domestic climate change and environmental litigation. It argues that national courts in several jurisdictions have started to deem domestic legal safeguards of inter-generational equity as justiciable and binding on the State in order to protect the long-term needs and interests of future generations against the myopic climate and environmental policies of present-day decision-makers. This paper looks at the unfolding climate and environmental crisis of the Anthropocene from a rule of law perspective. First, it addresses how the concept of the rule of law has played an instrumental role in steering humanity’s course towards the Anthropocene, and how it could have a role in finding a way out it. Second, the paper argues that despite the wide variety of the substantive legal contexts under which future generations litigation claims are brought, plaintiffs in such cases tend to claim the same types of violations across the jurisdictions, which correspond to five basic rule of law requirements. These are (i) respect for human rights, (ii) the quality of law requirement, (iii) guarantees of non-arbitrariness, (iv) access to courts and (v) non-discrimination. The paper uses an analytic framework tied to the above rule of law guarantees to examine more in-depth the litigation strategies of the plaintiffs and the doctrinal solutions of courts in cases revolving around inter-generational rights and obligations. The paper shows that several courts are willing to expand the temporal scope of the above rule of law guarantees to include concerns for otherwise disenfranchised future individuals, and thereby offer protection against generating excessive climate and environmental risks for posterity. In the narrative of this study, future generations case-law therefore showcases a revolutionary re-interpretation of traditional rule of law guarantees.

Keywords: climate change litigation, rule of law guarantees, intergenerational equity, future generations, human rights, quality of the law, non-arbitrariness, age-based discrimination

Suggested Citation:
A rule of law revolution in future generations litigation – intergenerational equity and the rule of law in the Anthropocene

Katalin Sulyok¹

Introduction

The rule of law traditionally refers to an ideal as to how governments should treat and regulate the people living under their rule and power at any given moment. Due to this tacit requirement of contemporaneity, the rule of law discourse has paid little attention to the implications of rule of law obligations in an intergenerational context; that is, how these requirements can be invoked to hold governments accountable for arbitrarily impairing the rights and interests of the governed in the foreseeable future. This paper will dissect the interaction between the rule of law and intergenerational equity, with a focus on the practice of domestic environmental and climate litigation. It will propose a rule of law-based framework to explore justiciable obligations of States owed to future generations, as they have been emerging in a recent wave of domestic case-law. Lastly, it and will utilise this framework to reveal the shared dynamics and anatomy of such future generations litigation.

There is a growing body of cases before national courts, where plaintiffs demand protection for the interests of future generations against the government’s action (or omission) concerning environmental and climate measures and policies. As such, their claims essentially correspond to the intergenerational dimensions of traditional rule of law guarantees. By analysing the doctrinal bases and argumentative solutions of the judicial inquiry in these cases, this study aims to show how courts can reinterpret such safeguards in an intertemporal way, using them as a vehicle to remedy the short-termist bias of the democratic governance and policy-making. This survey seeks to promote the allocation of responsibility for causing harm to future generations and long-term environmental assets by showing actionable legal bases on which intergenerational equity can be enforced through the judicial system under various legal settings. The judicial recognition of these is understood here as an essential corrective mechanism for charting a sustainable path in the Anthropocene for present and future generations.

Intergenerational equity embodies the ideal that long-term interests of future generations are taken into due account in the decisions made by the present generation and, thus, the latter does not compromise the former’s ability to meet their own needs.² Even though the

¹ Dr Katalin Sulyok LL.M. (Harvard), Ph.D., Assistant Professor in International and Environmental Law, Eötvös ELTE University (Budapest). Re:constitution fellow 2021/2022. E-mail: sulyok.katalin@ajk.elte.hu.
legal framework of intergenerational equity, as developed by Edith Brown Weiss, originally suggested “planetary obligations” of a normative character for present-day decision-makers, the concept has been deemed as a non-binding principle in international judicial practice; and was exiled to preambular references in international treaties and symbolic formulations in national constitutions. As a result, the idea of intergenerational equity has long appeared to have a strong moral appeal but with limited recognition in law. However, the tide seems to have turned. A recent wave of environmental and climate change litigation decisions of national courts suggests that intergenerational equity has started to develop normative ‘teeth’. Infringing upon the foundations of human life and stable societies in the future appears no longer to be at the full discretion of present-day decision-makers. Courts in a growing number of jurisdictions have started to afford protection to the basic needs of future generations creatively, through placing binding constraints on states’ ability to pursue myopic policies that arbitrarily impose risks and likely harm posterity. This research is primarily concerned with this body of case-law and investigates how courts can legitimately inject long-termism into environmental laws and policy-making through enforcing actionable rule of law guarantees.

The case-law analysis departs from exploring the broader context in which the rule of law interacts with the environmental and climate crises in the Anthropocene epoch, when humanity has become the dominant force impacting the Earth system. It first considers the role that democracy and the rule of law played in elevating our socio-economic structure to be a planetary-shaping force, which is now able to determine the future of the entire biosphere, including the future of mankind. The paper then proposes a reinterpretation of rule of law guarantees to remedy intergenerational grievances and thereby rectifies democracy’s short-termist bias.

As to its methodology, this analysis examines proceedings in which plaintiffs seek judicial protection for long-term interests against States’ short-termist policies. A dynamically developing subset of these cases is taken up by climate change litigation, where claimants seek to compel the legislature to adopt more ambitious greenhouse gas (GHG) reduction targets before the court. The other subset belongs to the category of environmental litigation,

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4 The International Court of Justice has thus far remained reluctant to rely on this principle in its judgments, and only certain international judges, most notably Judge Weeramantry and Judge Cançado Trindade elaborated on its meaning in their separate or dissenting opinions. In the Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) case, for instance, Judge Weeramantry dedicated a section to ‘the concept of intergenerational rights’ and argued that ‘the Court must regard itself as a trustee of those rights’ (at 342). In the 1997 Gabčíkovo-Nagymaros dispute (Hungary/Slovakia), Judge Weeramantry’s Separate Opinion discusses ‘the principle of intergenerational rights’ and ‘the imperative of balancing the needs of the present generation with those of posterity’ (at 107).
5 UN Secretary General Ban Ki-moon’s report lists more than 20 conventions mentioning future generations, most of them in their preamble, see: Intergenerational solidarity and the needs of future generations - Report of the Secretary-General, A/68/322 [2013].
6 For a list of relevant provisions see: James R. May and Erin Daly, Global Environmental Constitutionalism (Cambridge University Press 2015) 329–342.
where claimants typically aim to halt deforestation and large-scale pollution of natural resources. For this study, these proceedings will be referred to collectively as future generations litigation. Even though these two subtypes are often examined separately in the literature, almost creating a specialised field for climate change litigation, this study will purposefully adopt a wider scope and include both types for analytic reasons.

This research contends that future generations lawsuits, despite their diverse legal nature, do have essentially the same anatomy. First, these cases manifest structurally similar attempts at challenging the prevailing short-termist paradigm of environmental law and policy-making; and second, courts face the same doctrinal dilemmas in articulating intergenerational obligations for States. Indeed, future generations lawsuits have diverse legal bases, ranging from international human rights law to constitutions and statutory law, and entertain diverse legal doctrines, such as environmental human rights, rights of Nature, children’s rights, and trusteeship or guardianship obligations over natural resources. Nevertheless, these proceedings all create actionable intergenerational obligations for States and, as will be argued below, the legal demands of plaintiffs in such cases all appeal to the same rule of law guarantees. These structural similarities warrant including both types of litigation in the object of this study.

It needs to be stated clearly at the outset that this paper uses the term rule of law in a normative sense, as opposed to more broad understandings of the concept, and relies on the normative framework developed by the Venice Commission, which distinguishes five main pillars, namely (i) respect for human rights, (ii) the quality of law requirements, (iii) prohibition of arbitrary use of governmental powers, (iv) non-discrimination of future generations, and (v) access to justice. This research will map the extent to and interpretative ways in which domestic courts enforce these rule of law obligations to protect the needs of future generations on various substantive legal bases. It will argue that future generations litigation attests a ‘revolution’ in the interpretation and intertemporal application of normative rule of law guarantees.

This paper concludes by appraising the more systemic implications of these revolutionary judicial decisions for the paradigm of environmental governance. In the current system, States enjoy almost unfettered discretion in setting their environmental and climate policies, and their freedom of action is only constrained by obligations they willingly undertake under international or national laws. However, the effectiveness of self-imposed constraints is considerably capped by the short-termist bias of democratic decision-making. It will be argued that successful future generations litigation, where courts extend the temporal scope of rule of law guarantees in order to protect the long-term interest, may help achieve a transformative change in the paradigm of environmental governance.

The analysis proceeds as follows. Section 2 explores the interrelations between the ideal of the rule of law and the Anthropocene, when humanity’s proximate future is overshadowed

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by a looming ecological and climate catastrophe. It will show how the rule of law accommodated human conduct, which created massive, even existential climate and ecological risks for future generations, and will propose a way in which the rule of law can be reconfigured normatively to remedy these failures and govern humanity into a safer, and intergenerationally more equitable, path. Section 3 describes the doctrinal framework of this analysis, by setting out a rule of law-based model of intergenerational state obligations. It also defines the normative content for the intergenerational dimension of traditional rule of law guarantees. Section 4 then turns to the case-law and examines how these intertemporal guarantees play out in the national judicial practice in climate and environmental cases. Finally, Section 5 concludes by assessing the implications of the successful future generations litigation for the paradigm of environmental and climate governance.

1. The rule of law in the Anthropocene: from a cause to a potential remedy to short-termism

The sciences are clear that humans became the dominant force of change on Earth, as our activity and technology are now capable of fundamentally altering ecosystems and even the geochemical cycles of the planet. This prompted scientists to suggest marking a new geological epoch, the Anthropocene. The last decades of the Anthropocene have seen an unprecedented environmental and climate crisis, where a massive wave of human-induced extinction of species is coupled with GHG emissions on track to a “hothouse Earth” scenario. Intensifying climate impacts, such as droughts, wildfires, heatwaves, floods and rising sea levels devastate communities around the world.

Against this background, it is now widely acknowledged that the climate crisis is, essentially, a human rights crisis. This piece will argue that the problem runs even deeper than that – climate change and the massive environmental problems of today should be better framed as a rule of law crisis. This perspective reveals a multifaceted connection between the rule of law and the planetary risks of the Anthropocene, which are depicted here through three distinct layers. The first one is the most overt linkage, concerning the interdependence between sustaining the rule of law and a stable climate and biodiverse ecosystems. The second layer, which is perhaps less obvious, represents the pivotal role that the concept of the rule of law played in charting humanity’s course towards the Anthropocene. The third

9 Carl Folke, ‘Our Future in the Anthropocene Biosphere’ 36.
12 Safe Climate: A Report of the Special Rapporteur on Human Rights and the Environment (David R. Boyd), 01 October 2019, A/74/16; speech of UN Secretary-General Antonio Guterres at the 66th session of the Commission on the Status of Women (CSW66).
aspect highlights that rule of law guarantees can also be key in steering humanity away from exceeding the boundaries of its “safe operating space” on the planet.

Turning to the first layer, several phenomena bespeak of a mutual interdependence between securing rule of law and a liveable planet. Experts voice concerns that democracies and the rule of law will not survive this century if our generation fails to take sufficiently stringent and immediate measures to protect the ecosystems and the climate. Philip Alston, UN Special Rapporteur on Extreme Poverty and Human Rights, warns that poverty fundamentally threatens the rule of law, as massive inequalities between nations may result in “climate apartheid”, and that further deprivation stimulates nationalist, xenophobic, and racist responses within societies. Fundamental freedoms will be at risk even in established democracies. Delayed and ineffective climate action in the present will inevitably force future generations to enact immediate and drastic mitigation measures to halt catastrophic consequences of climate change. Doing so would equal putting a “full brake” on their lifestyle, which inevitably leads to restrictions on individual freedoms. Potential limitations on human rights include restrictions on individual means of travel, on consumption of food, water, and energy. Governments may also want to declare a state of emergency, or introduce obligatory military service for citizens to protect borders under increased pressures on international peace and security. The German Federal Constitutional Court also warned that human rights adjudication may not be able to protect against such restrictions on individual freedom, as they will even be deemed necessary and proportionate, and therefore, lawful under domestic laws. These all suggest that despite their deeply engrained short-term horizon and preference, democracies must nevertheless become able to safeguard long-term environmental interests to sustain democracy itself in the long-run.

Their interdependence is, emphatically, mutual. Not only do environmental problems frustrate the principles of the rule of law, but a backlash in democracy and the rule of law also virtually always leads to a decline in the normative safeguards protecting ecosystems and the climate. Populist social movements and political forces that seek to weaken rule of law guarantees ‘in the name of the people’, threatens not only the rule of law, but also taking ambitious climate mitigation action and enacting protective measures to preserve the natural capital. Populist leaders threaten the rule of law on the global level by challenging

13 Johan Rockström et al. Safe operating space for humanity, Nature 461 (2209) 472–475.
14 Christina Voigt, ‘Climate Change, the Critical Decade and the Rule of Law’ (2020) 37 The Australian Year Book of International Law Online 50.
16 Ibid. para. 67.
17 German Federal Constitutional Court: Neubauer et al., the Order of the First Senate of 24 March 2021, 1 BvR 2656/18, para. 192.
18 Third-party intervention submitted by the Climate Action Network in the Duarte Agostinho and Others v Portugal and Others case pending before the European Court of Human Rights, App. no. 39371/20.
19 German Federal Constitutional Court: Neubauer et al., the Order of the First Senate of 24 March 2021, 1 BvR 2656/18, para. 192.
20 See e.g. deforestation occurring in countries with a populist leader, such as in Brazil in the Amazon region under President Bolsonaro (see Gabriela Sá Pessoa and Kasha Patel: Amazon deforestation hits new record in Brazil, Washington Post, July 8 2022, citing data from Brazil’s National Institute for Space Research, which shows
multilateralism, while, on the national level, they often pursue anti- or deregulatory agendas, undermine environmental democracy and relating rights to environmental information and public participation, and altogether hinder expertise-based environmental law-making.

The second layer of the interrelation between these concepts concerns the genesis of the Anthropocene. As argued in detail by Viñuales, law as social technology had a fundamental role in engendering the Anthropocene by regulating, and legitimising, the growth-centred economic and industrial system that made it possible for our species to dominate the Earth system. The Global North has played a pioneering role in mastering the necessary technological innovations and growth-based capitalism and consumerism, which pushed the Earth into the Anthropocene. The legal order in these societies have relied on democracy and the rule of law as its backbone. Viewed from this perspective, it becomes obvious that democracy and the rule of law were also among the technologies that actively paved the way to the Anthropocene. What is more, sustaining their traditional normative contours and functions perpetuate socio-economic processes that generate intergenerational harm.

In particular, on the one hand, the rule of law provides for legal certainty, favouring stable and predictable laws. This can be utilized as a means of hindering regulatory answers to emerging risks and uncertainties surrounding ecological and climate threats. In the same vein, the rigidity of the law can often be invoked by holders of economic power to protect their ‘right to pollute’ and to continue imposing externalities on communities within the bounds of often relaxed regulatory standards.

On the other hand, democratic governance is inherently biased against future generations. Elected leaders systematically favour immediate economic gains to satisfy their constituencies. At the current pace and magnitude of resource exhaustion, pollution, and anthropogenic land use, this inescapably leads to depriving future generations of a safe

that more than 3,980 square kilometers were cleared in the first six months of 2022), or populist social movements, such as the Gilets Jaune movement in France, which organized a nationwide protest against enacting fuel taxes (see: John Lichfield, Observer Special Report: Just who are the gilets jaunes?, Guardian, 9 Feb 2019, available at https://www.theguardian.com/world/2019/feb/09/who-really-are-the-gilets-jaunes (last accessed 26 January 2023)).

or Poland’s intense logging activity in the protected Białowieża Forest, which was ruled to be illegal under EU law by the EU Court of Justice in Case C-441/17.

climate and biodiverse ecosystems. Against this background, this study argues that presentism is deeply engrained in the paradigm of democratic governance and in our conceptions of the rule of law that played a vital role in driving humanity into the Anthropocene. Rule of law guarantees, including human rights, apply only between contemporaries, creating a system of laws that are designed to overlook long-term interests and non-human environmental assets. The rule of law has already been criticised for being anthropocentric,\textsuperscript{28} leading to the destruction of the natural environment. This study adds a further criticism, pointing out that the traditional, presentist conception of the rule of law tolerates (if not enables) looting the necessities of life from our descendants.

Despite all these shortcomings, the third layer of relevant connections suggests that a potential remedy to the “regulatory deficits” of the Anthropocene\textsuperscript{29} may also lie in the rule of law. To turn the rule of law into a corrective mechanism of this structural bias, we must first recognise that short-termist governmental policies are arbitrary towards future generations, and therefore, run against the core ideal of the rule of law. If one looks at myopic policies from an intertemporal perspective, it becomes salient that present generations are now able to substantially undermine, or even eliminate, the livelihood of future generations at their will and pleasure, without assuming responsibility for the harm their choices knowingly entail for posterity. Such an exercise of governmental power is deeply arbitrary towards all humans (and non-humans), who will suffer from the effects of these decisions in a few decades from now. This points out a grave asymmetry between the powers of the decision-makers and the impact-bearers, as the latter cannot prevent or oppose the harmful policies of the former. Minors and unborn generations, together with nature, are disenfranchised in current constitutional schemes, and even when children seek to challenge climate and environmental action or inaction of governments, several national laws pose obstacles for them in accessing the courts.

Recently, national fora have become responsive to these intergenerational asymmetries. The last decade has seen a boom in successful future generation lawsuits, where courts were willing to limit governments’ freedom of action in adopting policies with harmful future effects. As will be argued in the following section, the legal demands of plaintiffs in these proceedings essentially demand intertemporal rule of law guarantees. These claims appear to follow a substantive conception of the rule of law, which provides good laws, the purpose of which is “to diffuse happiness and powers universally and equally”\textsuperscript{30} - in this context, even across generations.

\textsuperscript{28} K. Bosselmann, Im Namen der Natur: Der Weg zum ökologischen Rechtsstaat (Bern: Scherz, 1992).
\textsuperscript{29} Louis J Kotzé, \textit{Global Environmental Constitutionalism in the Anthropocene} (Hart Publishing 2016) 204.
\textsuperscript{30} For such a definition of good laws see the letter of Lord Dickinson to the Inhabitants of the Province of Quebec, written in 1774: "In every human society, ... there is an effort, continually tending to confer on one part the height of power and happiness, and to reduce the other to the extreme of weakness and misery. The intent of good laws is to oppose this effort, and to diffuse their influence universally and equally." Cited by Judge Xenia Turkovic in her speech at the First re:constitution Fellows Meeting held in Berlin on 27 Oct 2021. (emphasis added).
The remainder of this study is dedicated to exploring more closely the potentials of using rule of law requirements to remedy the short-termist nature of the Anthropocene’s legal order through enforcing intergenerational equity.

2. The analytic framework: the intergenerational dimension of rule of law obligations

Even though the rule of law is a foundational principle in virtually every legal system, it is notoriously difficult to pin down its normative content. The concept is sometimes broadly defined, referring to the importance of proper implementation of and compliance with the law (see discussions on the ‘environmental rule of law’). In other contexts, the rule of law is equated with the ideal of justice, demanding fair laws and the prevention of arbitrary exercise of power. In such a reading, the rule of law can be defined as “an opposite to arbitrariness,” where arbitrariness stands for “uncontrolled, unpredictable and unrespectful” exercise of power.

This research refers to the concept of the rule of law in a sense rooted in the latter understanding. It investigates the normative constraints that domestic courts impose on governments to limit their ability to incur costs and thereby to inflict harm on future generations at their full discretion and will, without having any regard to the long-term consequences of present choices and actions – in other words, in a way that is ‘arbitrary’ towards posterity.

The definitional point of departure lies in the work of the Venice Commission of the Council of Europe, which enumerates five normative requirements flowing from the rule of law in its Rule of Law Checklist, which are:

1. respect for human rights;
2. the quality of law requirement, which demands that laws potentially restricting basic human rights of individuals must be of a certain quality, namely clear, transparent and foreseeable;
3. the prevention of arbitrary use of governmental powers;
4. non-discrimination, prohibiting direct and indirect discrimination against minorities based on defined grounds; and

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34 The colloquial use of the term also supports such an interpretation. According to the Oxford English Dictionary, ‘arbitrary’ means (i) to be decided by one’s liking; dependent upon will or pleasure; at the discretion or option of any one. (ii) derived from mere opinion or preference; not based on the nature of things; hence, capricious, uncertain, varying. (iii) unrestrained in the exercise of will; of uncontrolled power or authority, absolute; hence, despotic, tyrannical.”
35 Venice Commission of the Council of Europe: Rule of Law Checklist.
(5) access to justice, requiring that individuals can challenge governmental decisions before independent and impartial courts.

This study argues that these requirements can be reinterpreted in a way that extends their temporal scope to be applicable to the grievances of future rightsholders. When interpreted with a view to their intergenerational dimensions, the traditional pillars of the rule of law can be understood as imposing the following obligations on governments:

1. respect for human rights of future individuals (present or future adults/children),
2. the quality of law requirement, demanding that national laws, which are capable of interfering with human rights safeguards meet a certain quality, such as transparency, foreseeability and specificity;
3. the prohibition of arbitrary use of governmental powers vis-à-vis long-term interests of posterity;
4. non-discrimination of future generations, prohibiting direct and indirect discrimination against children based on age or birth cohorts;
5. access to justice, allowing various plaintiffs, often in the express name of future generations, to challenge the environmental and climate policies of governments before courts.

This research will now turn to examining how the above intertemporal pillars of the rule of law appear in the practice of future generations litigation, and will appraise the exact ways in which domestic courts accommodate and operationalise such guarantees.

3. A look at domestic case-law: a rule of law revolution in future generations litigation

In recent years, domestic courts have started to acknowledge the intertemporal dimensions of rule of law guarantees through various legal bases and doctrines. This gives rise to, in the narrative of this study, a revolutionary application of these safeguards the exact contours of which are discussed in the following sections with respect to each rule of law pillar.

3.1 Respect for human rights in the future

Traditionally, human rights have only been applicable (and enforceable) between contemporaries, where rights-holders and duty bearers belong to the same generation.\(^{36}\) International human rights guarantees also apply only if the rights-holder falls under the jurisdiction of the duty-bearer.\(^{37}\) One of the chief structural obstacles to assigning rights to

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\(^{37}\) See e.g. Art. 2 of International Covenant on Civil and Political Rights.
future generations therefore lies in the impasse of intertemporality; that is, the inability of future rights-holders to hold present-day duty-bearers accountable.

Nevertheless, rights-based climate litigation across various jurisdictions suggests that domestic courts are increasingly willing to break this impasse and to offer protection to human rights against future harm and/or to those of future individuals in certain cases. The courts’ doctrinal solutions differ in (i) how they define the material scope of human rights that can be successfully claimed in the face of the climate and ecological crises, and (ii) how they conceptualise the temporal scope of relevant human rights violations. As will be seen below, these two aspects of the judicial inquiry are closely interlinked.

Turning to the question of material scope, namely which human rights guarantees offer protection even against future interference, the case-law demonstrates two types of judicial answer: courts may either specify certain rights according to their subject matter, or they select rights with such an intertemporal scope according to their special rights-holders.

In the first group, some jurisdictions invoke constitutionally granted rights to a healthy environment when advocating for the environmental needs of posterity. In the groundbreaking Minors Oposa decision, which was the first successful environmental class action brought in the name of present and future generations, the Supreme Court of the Philippines discerned protective duties for the government towards generations yet unborn from the constitutional right to a balanced and healthful ecology. The court interpreted the content of this obligation “to ensure the protection of that right for the generations to come”; and proceeded to invalidate the timber licence agreements issued by the government to halt large-scale deforestation, which had already reduced the country’s rainforest coverage from 53% to less than 3%.

Others turn to general human rights safeguards, such as in the Urgenda litigation, where Dutch courts found that the government’s too lenient climate commitments violated Articles 2 and 8 of the European Convention on Human Rights (ECHR). The Supreme Court reasoned that the government’s GHG reduction commitments failed to protect these specific rights of future Dutch citizens against climate threats. Such a configuration of relevant rights appears a legitimate solution for managing the uncertainties inherent in specifying the catalogue of rights that future persons may claim. Even though future societies may change priorities and preferences, any future individual is reasonably expected to claim core human rights, such as

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39 Supreme Court of the Philippines, Minors Oposa v. Factoran (Secretary of the Department of Environment and Natural Resources), G.R. No. 101083 July 30, 1993.
40 Supreme Court of the Philippines, Minors Oposa v. Factoran (Secretary of the Department of Environment and Natural Resources), G.R. No. 101083 July 30, 1993.
41 Ibid.
a right to life, or a right to home. Accordingly, plaintiffs frequently plead a violation of such rights in climate change cases.

In the second group, courts define particular rights to be protected against future infringement according to the holders of such rights. Some proceedings focus on the rights of children, who, on account of their age, have a special vulnerability to and interest in long-term protection against future threats. A prime example are the *Sacchi and Others v Argentina and Others* proceedings heard by the UN Commission of the Rights of the Child. Even though the complaint was found inadmissible for not exhausting local remedies, a detailed assessment was conducted, showing how states’ over-lenient climate commitments infringe specific rights of children under the UN Convention of the Rights of the Child. Interestingly, however, so far the majority of child plaintiffs did not plead violations of specific children’s rights, but instead sought protection for their long-term interests, such as abating climate risks and harm and by articulating future human rights grievances to be endured in their adulthood.

From a doctrinal point of view, children’s rights have to be distinguished from rights claimed by (or more precisely, claimed for) future generations. Some courts even acknowledge such rights. The Colombian Supreme Court, in its *Amazon* decision for instance, expressly referred to the environmental rights of unborn generations.

Other jurisdictions conceptualise harmful climate impacts as a violation of an even wider catalogue of rights, which are held by every future individual. The German Federal Constitutional Court in *Neubauer* found that inadequate GHG reduction measures made the German federal climate law unconstitutional due to it leading to a future, where “practically all forms of freedom” will be put in jeopardy. This approach can arguably be seen as securing planetary rights for future generations.

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44 Larissa Parker and others, ‘When the Kids Put Climate Change on Trial: Youth-Focused Rights-Based Climate Litigation around the World’ (2022) 13 Journal of Human Rights and the Environment 64.
45 UN Committee on the Rights of the Child: *Sacchi and Others v Argentina and Others*, Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 104/2019.
46 Donger (n 118) 275–276.
48 Supreme Court of Colombia: Demanda Generaciones Futuras v. Minambiente, Number 11001-22-03-000-2018-00319-01, 4 April 2018, (Amazon decision) para. 5.2.
49 *Neubauer* decision, para. 117.
The above conceptualizations of protected rights are closely interlinked in the judicial analysis with different configurations of the temporal dimension of relevant human rights violations. One may distinguish four judicial approaches in this respect.

First, courts may address breaches that take place in the present, for instance when special rights enjoyed by children are breached in the present by insufficient climate actions of States. A second, somewhat similar approach adopts a back-casting method by focusing on competing rights in the present to tackle a conflict between the interests of different generations. The analysis of the Hungarian Constitutional Court in the Forest decision gives an apt example for such a back-casting approach to defining the violation’s temporal dimension. The procedure was launched by the Ombudsman for Future Generations on the basis of constitutional public trust provisions and the right to a healthy environment. It targeted an amendment to the Forestry Act, which increased opportunities for commercial logging in protected forests. The court focused its reasoning on the necessity and proportionality test to review the restrictions entailed by property rights of private forest owners on everyone’s right to a healthy environment. It found that the restrictions were disproportionate, therefore unconstitutional, and quashed the amendment. By readjusting the balance between the competing rights of present-day rights-holders, the Court in fact afforded protection to long-term environmental interests against the resource extraction of present-day stakeholders.

As a third alternative option for inquiry, some fora choose to protect individual’s rights against imminent violations, which are bound to happen in the short-term. This occurs, for instance, in the protection granted by the European Court of Human Rights (ECtHR) to right to life and private life in cases involving imminent future environmental risks. A fourth possible reasoning method scrutinises violations that will take place in the more distant future. This approach is clearly featured in Neubauer, where the reason for quashing the federal climate law was rooted in restrictions of general freedom rights that will occur in the second half of the century. The German Constitutional Court deems fundamental rights to be intertemporal guarantees of freedom, distributed evenly across the generations. Such a conceptualisation of the temporal scope of constitutional rights compels the legislator to act in a “forward-looking manner” and to manage the reduction of burdens in ways that respects fundamental rights, even after 2030. The Dutch Supreme Court took a similar path in Urgenda, where it declared a violation of rights under the ECHR, when the government’s

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52 See cases Brincat and others v. Malta, no. 60908/11, para. 82; Budayeva and others v. Russia, no. 15339/02, para. 146, Taşkin and others v Turkey, App. no. 46117/99, para.113, Cordella and Others v Italy, App. no. 54414/13, paras. 163 and 172.

53 Neubauer decision, para. 122.

54 Ibid., para. 194.
mitigation commitments were leading to risks that “will only be able to materialise a few decades from now”.55

3.2 The quality of law requirement set vis-à-vis climate mitigation laws

According to the quality of law requirement, domestic laws that may interfere with the human rights of individuals must meet a certain quality in order to be compatible with the rule of law. This requirement was developed in the most nuanced way by the ECtHR under Article 8 of ECHR, typically in secret surveillance cases.56 In the ECtHR jurisprudence, national laws must be “sufficiently clear and detailed”,57 “accessible” by the persons concerned and “foreseeable”58 as to their effects on them. Laws must also be “precise” to prevent undue interference with protected rights.59 Such quality of law requirements have not been invoked in the currently pending climate cases before the ECtHR,60 although, as I argued elsewhere,61 these criteria can potentially be used as a climate litigation tool, demanding domestic climate laws that provide for immediate and deep emission cuts in cases brought under the ECHR.

Outside the scope of the ECHR, national courts have already announced similar quality of law requirements under domestic constitutions and statutory laws. The German Federal Constitutional Court in Neubauer discerned normative requirements for the quality of national mitigation measures by developing a novel constitutional doctrine called the advance effect of freedom rights (“eingriffsähnliche Vorwirkung”).62 The court ruled that the federal emission pathway was unconstitutional for not specifying long-term reduction targets. Such a design offloaded the mitigation burden onto future generations. The Bundesverfassungsgericht opined that “it is imperative under constitutional law that further reduction targets beyond 2030 are specified in good time, extending sufficiently far into the future”.63

A similar line of reasoning can be found in the Friends of the Irish Environment judgment. The Supreme Court of Ireland examined whether the statutory National Mitigation Plan was in

56 For a detailed overview of the ECtHR case-law on the quality of law requirement see: Küris (n 32); Paul Lemmens, ‘The Contribution of the European Court of Human Rights to the Rule of Law’ in Geert De Baere and Jan Wouters, The Contribution of International and Supranational Courts to the Rule of Law (Edward Elgar Publishing 2015).
57 Amann v Switzerland, no. 27798/95 (16 February 2000) §58.
59 Di Tommaso v. Italy, no. 43395/09, (23 February 2017), §108.
60 Duarte Agostinho and Others v. Portugal and Others, App.no. 39371/20; Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, Application no. S3600/20; Careme v. France, App.no. o. 7189/21.
63 Neubauer decision, para. 253.
conformity with the mandate enshrined in the higher-ranking Climate Change and Low Carbon Development Act. In the Act’s wording, the National Mitigation Plan must specify the policy measures that the Government considers necessary to reach the national transition objective set for 2050. The Court reasoned that the government therefore had to “give real and sufficient details” in the Plan as to how the transitional objective would be met. The Supreme Court quashed the Plan for failing to meet this requirement, that is, for not detailing the exact types of technology envisaged to be utilised during the transition.

These two, essentially similar, avenues for the judicial inquiry show how domestic courts set specific quality of law requirements in their judgments to distinguish between lawful and unlawful GHG mitigation commitments in the national laws.

3.3 The prevention of arbitrary exercise of governmental powers to the detriment of future generations

Another common thread in future generations litigation shows that courts increasingly attempt to curtail governments’ unfettered discretion to favour immediate economic gains with reference to the imperative of preserving essential long-term interests. At a time when the government cannot pretend to be unaware of the harmful consequences of their actions on future generations, freely ignoring such negative implications, which will materialise in a couple of decades from now, would be fundamentally unjust – and, in this sense, ‘arbitrary’ towards future members of society. Viewed from this perspective, it is not surprising that future generations litigation case-law features various doctrinal solutions with which domestic courts extend a core rule of law guarantee; that is, they afford protection against arbitrary exercise of governmental power to future generations.

Arbitrary decisions may come in many forms, both as an action or an omission of the State. The former is illustrated in cases where courts strike down short-termist climate and environmental policies, which sacrifice long-term interests for immediate gains. With regard to the latter, when faced with state actions destroying environmental assets without due respect for the needs of posterity, courts often compel governments to enact protective measures. In these cases, the exact formulation of judicial guarantees of non-arbitrariness is closely tied to national laws and domestic legal cultures and, thence, displays a wide variety. This subpart will first summarise the doctrinal bases on which courts assess the arbitrary nature of governmental policy choices (4.3.1.). The second subsection will take a deeper look at the shared anatomy of the judicial inquiry into non-arbitrariness. It will identify common legal standards with which courts measure the normative content of arbitrary decisions across jurisdictions (4.3.2.).

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64 Supreme Court of Ireland, Friends of the Irish Environment, Judgment of 31 July 2020.
65 Ibid. para.6.21, 6.36.
66 Ibid, para. 6.47.
3.3.1 Doctrinal bases of scrutinizing arbitrariness

Future generations case-law shows that several doctrines, rooted in international human rights law and domestic laws, serve to exclude myopic policy choices from the discretion of present-day governments. The judicial scrutiny into the arbitrariness of sovereign policy choices are tied to various normative bases in the case-law, such as:

- the due diligence obligation under international human rights law;
- the duty of care under domestic laws, such as civil law, constitutional law or common law;
- stewardship and guardianship obligations;
- and the constitutional or the statutory/common-law public trust doctrine.

Under the ECHR’s system, States have a positive duty to take “reasonable and necessary” measures to prevent interference with protected rights. This doctrine of positive obligations gives rise to a duty of care, which is a frequent legal ground in climate change lawsuits. Although the ECtHR has not yet rendered judgments in the pending climate cases to reveal its stance on how the doctrine of due diligence applies to states’ mitigation measures, national courts have already reviewed the legality of national climate laws under the doctrine. They concluded that the respective governments overstepped the bounds of their discretion under Articles 2 and 8 of ECHR, failing to demonstrate the required level of care in designing their GHG reduction pathways.

Due diligence obligations may also stem from constitutions. In Neubauer, for instance, the Federal Constitutional Court discerned a similar obligation from constitutional provisions when found that Art. 20a of the Grundgesetz imposes a special duty of care on the legislature, including a responsibility for future generations.

An Australian judge established a slightly different formulation of the due diligence obligation under common-law, requiring the executive to pay due care towards the interests of minors in making discretionary decisions. In Sharma v the Minister for the Environment, the court opined that the minister had a duty of care towards minors when she exercised her discretion under statutory law to approve an extension of a coal mine so as to avoid harmful climate impacts. The judge concluded that the duty of care existed under the common-law law of negligence, as the requisite elements were fulfilled because (i) a known risk of serious harm

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68 Maxwell, Mead and van Berkel (n 8).
70 See judgments in the Urgenda case and the Klimatzaak case (VZW Klimaatzaak v. Kingdom of Belgium & Others, French-speaking Court of First Instance of Brussels, Civil Section, JUG-JGC No. 167, Klimatzaak case, judgment, 17 June 2021).
71 Neubauer decision, para. 229.
72 Sharma v Minister for the Environment, 2021 FCA 560 and FCA 774.
to Australian children was reasonably foreseeable; (ii) the Minister had direct control over that risk; and (iii) the plaintiffs were vulnerable due to their age and innocence to a risk of harm arising from climate hazards. While the judge recognised the duty of care in the relevant case, he found that plaintiffs did not prove that a breach of that duty was reasonably to be expected. The judgment was overturned on appeal, as the Full Federal Court of Australia found that such a duty of care was absent in the case.\(^{73}\)

Civil codes may also establish duty of care obligations, as do the Dutch and Belgian civil codes. These due diligence obligations, imposed on governments and business entities, were invoked by plaintiffs in the *Milieudefensie v. Royal Dutch Shell*\(^{74}\) and *Klimatzaak*\(^{75}\) cases, to which we shall return later.

Other jurisdictions developed stewardship and guardianship obligations to States to compel protective measures for natural resources. The Supreme Court of Colombia imposed a stewardship obligation on the government over “natural resources and the future world” when it mandated protection of the rainforests in the Amazon region.\(^{76}\) A quite similar language was adopted by the Constitutional Court of Colombia, when it recognised the rights of the River Atrato and imposed guardianship obligations over it for the government and the communities inhabiting the region.\(^{77}\)

Courts may also put similar restraints on pleasing immediate economic development interests using the Rights of Nature paradigm. Ecuadorian courts deem Article 71 of the Ecuadorian Constitution, acknowledging the Rights of Nature as a justiciable provision, which was interpreted as banning all mining operations in the Los Cedros protected forests under a hard reading of the precautionary principle.\(^{78}\) In the 2011 *Vilcabamba River* case, the Provincial Court of Justice of Loja stressed that any harm impairing Nature entails a harm inflicted upon several generations.\(^{79}\)

Finally, the public trust doctrine also leads to putting restraints on policy choices that arbitrarily impair the needs and rights of future generations. The doctrine imposes fiduciary duties on States to preserve their natural resources as trust assets for the benefit of present

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\(^{73}\) Full Federal Court of Australia, *Sharma v Minister for the Environment*, 2022 FCAFC 35.


\(^{75}\) VZW *Klimatzaak* v. Kingdom of Belgium & Others, French-speaking Court of First Instance of Brussels, Civil Section, JUG-JGC No. 167, *Klimatzaak* case, judgment (17 June 2021), p. 42.

\(^{76}\) Amazon Decision, p. 21.


and future generations. Having its roots in ancient Roman law and English common-law, public trust provisions now appear in a number of constitutions around the world. At its core, the public trust doctrine sees the government as a sovereign trustee and obliges it to manage the trust’s assets for the beneficiaries, typically the public and future generations. The scope of relevant assets varies across jurisdictions, just as the exact requirements set for the trustee. The trustee’s obligations traditionally include a duty to protect the trust from damage, and to prevent wasting the trust’s assets.

The public trust doctrine has been successfully invoked in environmental litigation to justify judicial intervention to protect long-term ecological interests. In the Forest case, discussed above, the Hungarian Constitutional Court opined that Article P of the Fundamental Law embodied the public trust doctrine, compelling the State to manage the trust assets, including forests, for the benefit of future generations. In this vein, the Court stressed that the State can only allow the exploitation of natural resources by the present generations as long as such use does not threaten the long-term existence of the trust’s asset.

Interestingly, thus far the public trust doctrine has been invoked with lesser success in climate change litigation. Despite repeated scholarly accounts recommending an atmospheric public trust litigation strategy, as of today no such claim has been accepted by domestic courts. Still, a good number of climate change lawsuits have invoked the public trust doctrine, the most well-known being perhaps the Juliana case. In these proceedings, which are pending before US courts, young plaintiffs sued the federal government for breaching inter alia its public trust obligations by failing to protect the atmosphere, water, seas, seashores, and wildlife. Judge Aiken at the District Court of Oregon opined that “the government, as trustee, has a fiduciary duty to protect the trust assets from damage so that current and future trust beneficiaries will be able to enjoy the benefits of the trust.” Judge Aiken found that the public trust doctrine applied to the federal government under federal common law, and

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80 The Institutes of Justinian declared that “the following things are by natural law common to all – the air, running water, the sea, and consequently the seashore.” Institutes of Justinian, Book II On the Law of Things, Title I of the Different Kinds of Things, p. 1 (translated into English by J.B. Moyle, Oxford, 1913).
83 Blumm & Guthrie 2011, p. 748.
85 Id. pp. 94-95.
86 For a detailed assessment of the Forest decision see: Sulyok (n 48).
87 Decision No. 14/2020. (VII. 6.) AB, Reasoning [22].
89 In the US 26 claims submitted based on the public trust doctrine, see: http://climatecasechart.com/non-us-case-category/public-trust/ (last accessed on 26 January 2023).
90 For an overview of the case’s history see: Abate (n 7) 65–74.
covered, at a minimum, the territorial seas, and hence denied the defendants’ motion to dismiss. The judgment, however, did not have to touch upon whether and in what ways the government breached its obligations. The Ninth Circuit later found a lack of standing for the plaintiffs, leaving substantive questions of the doctrine’s reach under US law still unanswered. Public trust obligations were also invoked in climate cases outside the US. Some of these claims are still pending, giving the courts an opportunity to discuss how the doctrine applies to states’ mitigation obligations and responsibility for averting climate harm.

3.3.2 Standards for defining arbitrariness

In operationalising the above legal doctrines, courts need legal criteria to anchor their analysis of the needs and interests of posterity. Most importantly, they must ensure that their reasoning is not seen as capricious or biased. The legal doctrines listed above are all vaguely defined, open-textured norms, applying which to the particular facts leaves a considerable room for judicial discretion. For instance, due diligence under international human rights law does not entail specific obligations for States, nor does the public trust doctrine or the constitutional right to a healthy environment. Courts therefore need to find substantive benchmarks to appraise the compatibility of sovereign conduct with normative requirements. For doing so, they must devise legal (or technical) standards to measure against the ‘arbitrariness’ of laws and policies, or in other words, their capacity to encroach upon the interests of future generations. Two common argumentative solutions to this judicial dilemma emerge across the jurisdictions and legal contexts. Courts either refer to scientific knowledge or to the soft law goals of respective States to review the merits of short-termist legislation.

The sciences are often seen as a supplier of objective knowledge in the courtroom, which enables adjudicators to make robust assessments on the magnitude and imminence of future risks and harm. In this vein, to limit the legislature’s freedom of action in jeopardising the life opportunities of later generations, domestic courts often primarily rely on scientific reports to put constraints on sovereigns’ regulatory freedom. In Neubauer, the German Federal Constitutional Court pointed to the findings of climate science to hold that the lawmaker exceeded the bounds of its discretion. It stressed that “if reliable data suggest that the

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93 La Rose v. Her Majesty the Queen (pending before the Federal Court of Appeal, Canada); Lahore High Court: Maria Khan et al. v. Federation of Pakistan et al. (Writ Petition No.8960 of 2019, 15, February 2019); Mbabazi and Others v. The Attorney General and National Environmental Management Authority (pending before the High Court at Kampala); National Green Tribunal: Pandey v. India (Order of 15 January 2019); Ali v. Federation of Pakistan (pending before the Lahore High Court).
94 E.g. before the Hungarian Constitutional Court in an ex post constitutional review procedure of the Hungarian Climate Change Act, which was challenged by members of the opposition on the basis of inter alia the constitutional public trust doctrine.
constitutionally relevant temperature limit might be exceeded, such data must be taken into account”.  

The consensual findings of climate science emerging from the Intergovernmental Panel on Climate Change’s (IPCC) reports are particularly frequently invoked by courts in concretizing the level of climate ambition, required by human rights guarantees. The Dutch Supreme Court directly relied on the IPCC’s estimates when it calculated the emission cuts with which the government could ‘do its part’ in combatting climate change and to comply with its duty of care under the ECHR. The court marked the outer boundaries of the government’s lawful regulatory space with reference to the IPCC’s estimates on necessary GHG reductions and, hence, it came up with an exact number for the amount of GHG reduction expected from the State. In a somewhat similar fashion, a Belgian court in Klimatzaak referred to the opinion of the Federal Council for Sustainable Development to justify finding a lack of good climate governance, which was one of the grounds for establishing a breach of the government’s civil law duty of care.

The findings of expert organisations are instrumental in defining the breach of stewardship obligations, too. In the Amazon decision, the Supreme Court of Colombia referred to scientific reports to support its conclusion that governmental measures were ineffective in combatting environmental problems in the region. On these bases, the court ordered the government to adopt measures to combat deforestation.

Another cross-jurisdictional pattern shows that courts often use soft law goals and previously undertaken commitments of the state as a benchmark for assessing whether governments arbitrarily harm the interests of future generations. Such an inquiry was most explicitly made in the Hungarian Forest decision, where the Constitutional Court found that the amendments to the Forest Act infringed upon the interests of future generations, because the impugned legislation contravened principles set out in the long-term national forestry strategy. The underlying National Forestry Strategy had been adopted by the Parliament a few years prior to the challenged amendment, as a non-binding sectoral policy instrument setting out a long-term vision, priorities, and principles for national forest management. The Strategy played a fundamental point of reference for the Constitutional Court to reason that the amendment runs against the interests of future generations. The amendment increased opportunities for commercial logging while it narrowed down the powers of authorities to mandate temporal and spatial restrictions on logging for nature conservation purposes. The Court opined that the amendment ran against sustainable forest management, which had been a

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97 Neubauer decision, para. 214.
98 Hoge Raad, Urgenda, judgment, para. 5.8.
99 Ibid. para. 7.3.6.
100 VZW Klimatzaak v. Kingdom of Belgium & Others, French-speaking Court of First Instance of Brussels, Civil Section, JUG-JGC No. 167, Klimatzaak case, judgment (17 June 2021), page 76, 79.
101 Supreme Court of Colombia, Future Generations v Ministry of the Environment and Others, STC4360-2018, April 4 2018 (Amazon decision), para 12 and the ordering part of the judgment.
102 Hungarian Constitutional Court: Decision No. 14/2020. (VII.6.) AB, paras. [31] – [32].
long-established priority under the Strategy, and therefore repealed the amendment for contravening the public trust obligations of the State.

A structurally similar argument was crafted by the Hague District Court in Milieudefensie v. Royal Dutch Shell. In the judgment, which is currently under appeal, the court ordered the oil company to adopt stricter GHG reduction commitments for all types of emissions that can be linked to its activity. While interpreting the normative content of the unwritten standard of care in civil law, the court turned to the UN Guiding Principles on Business and Human Rights (UNGP). This instrument, endorsed by the UN Human Rights Council, is a soft law compilation of principles addressed to States and companies, which, however, does not aspire to impose binding obligations on corporations. The court nevertheless argued that “the responsibility of business enterprises to respect human rights, as formulated in the UNGP, is a global standard of expected conduct for all business enterprises”. On these premises, the district court ordered Shell to increase its mitigation efforts in line with its obligations under the UNGP in order to take positive steps to prevent human rights violations from occurring.

The above examples of judicial reasoning techniques showcase how the dividing line between hard law and soft law obligations becomes blurred in future generations litigation. Future generations lawsuits often see the courts turning non-binding standards into judicially enforceable benchmarks to carve out certain policy choices from decision-makers’ lawful room of manoeuvre in a legitimate way. The soft law standards reflect a political consensus, reached irrespective of the particular lawsuit, on the measures deemed necessary to accommodate long-term interests. Similarly, the scientific opinion of competent institutions with recognised prestige and expertise lends persuasive force to judicial findings, as they represent objective knowledge negotiated, irrespective of the parties’ litigious conflict. In this way, these points of reference provide the courts with highly persuasive, non-arbitrary benchmarks to articulate what lies in the interests of future generations.

3.4 Age-based discrimination of future generations

In democracies, future generations are treated as a permanent minority, who are disenfranchised and discriminated against by myopic policies. Scientific projections clearly suggest that, due to their young age, currently living children will experience much harsher climate conditions in their adult lives than any other previous generation. Policies that leave climate change unabated have a disproportionate negative impact on children, and hence, they indirectly discriminate against minors based on their age. Such a view was expressly adopted by the UN Committee of the Rights of the Child. The Committee recognized that

104 Milieudefensie v Royal Dutch Shell, judgment of the Hague District Court, 2021, para. 4.4.13.
105 Ibid, 4.4.16.
children are already “particularly affected” by climate change at present and will also be in the future, as climate impacts will worsen by the end of the century.\textsuperscript{106}

In addition, certain disparate climate impacts can also be framed as cohortal problems, where individuals are more adversely affected than others, not as part of an age group, but as members of a birth cohort. For instance, scientific evidence now suggests that people younger than 10 years old in 2020 will experience a fourfold increase in extreme weather events, which older cohorts will never experience.\textsuperscript{107} Such marked disparate climate change impacts can be addressed through a litigation strategy rooted in anti-age discrimination laws.\textsuperscript{108}

The problem of birth cohort discrimination is raised in the currently pending \textit{Duarte Agostinho} case, initiated by Portuguese children and minors before the ECtHR.\textsuperscript{109} The applicants launched their complaint against Portugal and 32 other States for violating Article 2 (right to life) and 8 (right to family life) in conjunction with Article 14 (non-discrimination) of the ECHR. They argue, that due to the respondents’ failure to adopt stringent mitigation measures, the complainants will experience extreme weather events, including heatwaves, which affect their living conditions and health. An essentially similar pleading was put before the Court of Justice of the European Union in the \textit{Armando Carvalho} case against over-too lenient GHG reduction commitments set forth in EU law, but this claim was not evaluated on the merits due to the lack of standing.\textsuperscript{110}

Anti-age discrimination claims are also filed with domestic courts.\textsuperscript{111} In Canada, the Superior Court of Justice Ontario in \textit{Mathur} deemed the “adverse effects of climate change on younger generations” to be “self-evident”\textsuperscript{112} and allowed the claim to proceed to trial.

3.5 Access to justice in future generations litigation

A revolutionary interpretation of access to justice rights appears in future generations litigation in two respects: first, concerning the justiciability of scientifically (and politically) loaded questions of environmental and climate protection measures, which are usually at the heart of such cases; and second, when plaintiffs seek to establish their standing to bring intergenerational complaints to court.

\begin{footnotesize}
\begin{itemize}
\item[107] Wim Thiery, Stefan Lange and Joeri Rogelj, ‘Intergenerational Inequities in Exposure to Climate Extremes’ (2021) 10 Science.
\item[109] Duarte Agostinho and Others v. Portugal and Others, App.no. 39371/20.
\item[112] Mathur v Ontario, 2020 ONSC 6918, para. 187.
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There is an emerging consensus among scholars and practitioners that courts may legitimately intervene to protect long-term interests when fundamental rights of individuals are at stake, which is a core feature of environmental and climate change litigation. According to the Venice Commission, “the judicial branch appears to be best placed to protect the future generations against the decisions of present-day politicians.” The justiciability of conflicting rights and obligations in an intergenerational setting has been expressly linked to the rule of law by the Dutch Supreme Court in Urgenda, which stressed that the courts’ mandate to “offer legal protection, even against the government, is an essential component of a democratic state under the rule of law.”

Indeed, we see that courts are often willing to deem safeguards of future generations as justiciable, even though they are often couched in symbolic language. Similarly, despite the fact that climate laws and environmental protection measures heavily draw on the legislature’s policy choices, the overwhelming majority of jurisdictions deems such questions justiciable. However, the political question doctrine and concerns for the separation of powers still block climate lawsuits in the US and Canada. EU Courts are also hesitant to interpret standing requirements in a way as to allow climate claims to proceed.

Claimants who seek protection for intergenerational rights and interests often challenge traditional rules of standing. Children and minors take up around a quarter of the claimants in rights-based climate change lawsuits, even though they still face hurdles in many jurisdictions to establish their locus standi. Minors also file class action lawsuits in their own name and also on behalf of future generations. Courts generally have allowed such actions, yet mainly when they bundled the interests of present-day children and future generations on a local scale. This means that the members of the class shall live on the same territory.

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116 Hoge Raad’s judgment in Urgenda, paras. 8.1. – 8.3.5.
117 See judgments delivered on the basis of constitutional provisions couched in vague terms, such as the Minors Oposa case, the Forest decision, the Amazon decision, and the Neubauer case.
118 See discussion on how the political question doctrine was not fatal to the case e.g. in the Minors Oposa decision.
119 See e.g. the Ninth Circuit Court of Appeal’s opinion in Juliana (No. 18-36082 D.C. No. 6:15-cv-01517- AA Opinion, 17 January 2020). Notably, Judge Aiken at the District Court of Oregon opined that the doctrine is not fatal to the plaintiffs’ case (District Court of Oregon, Case No. 6:15-cv-01517-TC Opinion and Order, 10 November 2016). In Canada see the judgment of the Federal Court in La Rose v. Canada, 2020 FC 1008.
120 See the Court of Justice of the European Union’s judgment in the Armando Ferrão Carvalho and Others v. The European Parliament and the Council case (C 565/19 P), which was dismissed for the applicants’ lack of standing. For more details see: Gerd Winter, ‘Armando Carvalho and Others v. EU: Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation’ (2020) 9 Transnational Environmental Law 137.
122 Parker and others (n 42).
123 Milieudefensie v Shell, Minors Oposa. For judgments deeming the composition of a class arbitrary for involving only residents under the age of 35 of a particular province see: Court of Appeal’s judgment in Environnement Jeunesse v. Attorney General of Canada, N° 500-09-028523-199, 13 December 2021.
Besides youth plaintiffs, other actors may also represent long-term environmental assets and future generations’ corresponding rights in a litigious context. Transgenerational entities, which exceed the lifespan of any given generation (such as various communities including states, tribes, and cities) as well as specialised spokesperson institutions can also initiate proceedings. These entities often establish their locus standi successfully, which makes them a potent litigious proxy for enforcing intergenerational rights and obligations.


Grave intergenerational asymmetries are the hallmark of the Anthropocene. Scientific indicators clearly warn that the distributive justice problems between the present and future generations will soon turn to zero-sum games. The intergenerational conflicts of interests no longer pose a distant, theoretical dilemma, but an imminent and increasingly justiciable problem. The policy choices of today directly undermine the freedom of action of individuals in a few decades from now – in other words, within the lifespan of the next generation. This lends a heightened sense of urgency to claims of intergenerational equity.

This overview suggests that a growing number of domestic courts seem to be receptive to the pressing dimensions of intergenerational injustice. The judgments analysed in this study attest that intergenerational equity considerations cease to be mere symbolic gestures but serve as a vehicle for domestic courts to impose binding limitations on sovereigns’ decision-making powers. This survey also argues that the plaintiffs’ legal demands essentially correspond to the same rule of law guarantees, and their pleadings increasingly find resonance with domestic courts.

Even though future generations litigation is very much in the making, with new cases being launched and decided almost every week, some trends can nevertheless be deciphered as to the success of intergenerational rule of law claims. First, as to the respect for human rights, courts in many jurisdictions, afford protection to human rights safeguards against environmental risks that may materialise in the future. Some even recognise unborn generations as rights-holders. Second, national courts have also set various quality of law requirements for national climate laws to mark those mitigation commitments that aim for a relaxed mitigation trajectory as off-limits. Third, concerning the guarantees of non-arbitrariness, several jurisdictions have put constraints on the arbitrary exercise of governmental powers against long-term natural assets. Courts have nullified laws that grossly upset the equilibrium between short-term and long-term interests, and compelled protective measures when the inaction of present-day stakeholders threatened the viability of key resources. Fourth, as for the claims of age-based discrimination against minors, the majority

125 See e.g. ombudsman institutions advocating for future generations’ interests. An environmental lawsuit was launched by the Hungarian Ombudsman for Future Generations against laws favouring for-profit logging in protected forests see: Sulyok (n 48).
of lawsuits are still pending before national courts and the ECtHR. However, some courts have already been sympathetic to plaintiffs’ arguments rooted in disproportionate adverse climate impacts. Finally, access to justice is usually granted in intergenerational lawsuits, as a growing number of jurisdictions are willing to deem such legal controversies justiciable. Moreover, even though establishing locus standi remains challenging under the procedural rules of many States, youth plaintiffs are dominant participants in climate change litigation.

This study has shown that domestic courts increasingly intervene to protect long-term interests by enforcing rule of law guarantees in an intertemporal context to account for the vital needs of future generations. In such a ‘revolutionary’ interpretation of the rule of law, the temporal scope of these normative obligations are expanded to include concerns for future individuals. While doing so, domestic courts level the democratic playing field for currently disenfranchised future constituencies, by readjusting the balance previously struck by short-sighted law-makers.

Using a rule of law-based framework to analyse inter-generational obligations also highlights some shared challenges and common leverage points in the judicial protection of long-term interests. The legitimacy of judicially imposed long-term constraints on government is a key challenge in administering justice. This paper shows that scientific knowledge and soft law commitments are instrumental in identifying the scope of long-term interests that courts may legitimately preserve for posterity against the majoritarian decisions of today.

When the current system of environmental regulation is “failing at a geological scale”126 in managing the Anthropocene, we clearly need a change in the legal system and policy-making.127 Incremental changes in environmental laws are not enough to ensure that the socio-economic system changes course towards sustainable models sufficiently soon to avert cataclysmic harm to humanity. The “constitutional moment of the Anthropocene”128 calls for rethinking the most basic legal concepts to align their normative meaning with our new understanding of their fundamental role in shaping the future of humanity. We need a new conception of the rule of law too, which redefines the normative relationship between present and future generations. These guarantees need to be reinterpreted in a way that protects the currently disenfranchised human and non-human entities against the exercise of governmental power that has devastating repercussions on them in the foreseeable future.

Such an intertemporal reinterpretation of the rule of law can be an important instrument for change. This research showed how domestic courts have already begun to mobilise rule of law guarantees in various jurisdictions to halt short-termist governmental policies. This revolutionary case-law can have transformative implications outside the courtroom, too.

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128 Kotzé (n 29) 204.
Courts can be agents of long-termism and help change the prevailing paradigm of environmental governance, which has been predicated upon states’ sovereignty over their natural resources and their fundamental freedom to pursue immediate benefits, even if doing so entails existential risks for the future. Further judgments deciding in favour of intergenerational rule of law obligations can discourage legislators from passing short-termist environmental and climate policies, as defending them in court becomes a more difficult, and less successful, endeavour.

By giving intergenerational obligations a real ‘bite’, domestic courts award what international negotiations have failed to deliver. The Paris Agreement, for instance, which governs the most influential intergenerational conflict of our time, refers to intergenerational equity only peripherally in the preamble, while efforts to adopt a binding Global Pact for the Environment, which would have included a substantive provision on intergenerational equity, proved to be futile. At present, national courts are more active in affording protection to intergenerational claims than international fora. This suggests an essentially local character for future generations advocacy, which in turn highlights the vital role of national laws and domestic legal cultures in devising efficient legal avenues to articulate justiciable intergenerational obligations for States.

The rule of law framework of intergenerational state obligations, as discussed in this study can be seen as a conceptual compass, orienting the necessary transformative change in environmental laws and governance. It highlights those vantage points where judicial intervention can remedy the most acute intergenerational conflicts of interests by accommodating long-term needs in rule of law obligations.

129 Article 4 of Global Pact for the Environment.