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SYMPOSIUM ARTICLE

Transforming the Rule of Law in Environmental and Climate Litigation: Prohibiting the Arbitrary Treatment of Future Generations[Ψ]

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Abstract
This article maps the shared legal anatomy of climate and environmental lawsuits, in which plaintiffs claim protection for future generations before domestic or international courts. By closely analyzing the litigation strategies of plaintiffs and the inquiry of courts, the article argues that these proceedings revolve around structurally similar legal standards across domestic and international jurisdictions, which correspond to five normative requirements flowing from the rule of law: namely, respect for human rights, certain quality of law requirements, prohibition of arbitrary exercise of governmental powers, non-discrimination, and access to justice. The cross-jurisdictional analysis shows that courts appear to be increasingly willing to protect future generations against arbitrary treatment by present-day decision makers. The article appraises whether such an intergenerationally sensitive reinterpretation of the rule of law could help to change the short-termist paradigm of environmental and climate law.

Keywords: Future generations; Intergenerational equity; Climate litigation; Environmental litigation; Rule of law; Arbitrariness

1. Introduction

Lawsuits that are challenging states' environmental or climate policies in the name of, or with reference to, future generations and their long-term interests are becoming a transnational trend. This pattern of litigation, referred to here as 'future generations lawsuits', includes climate litigation,[1] as well as environmental and biodiversity litigation,[2] and transcends continents, legal systems, and legal cultures. At the same

[Ψ] This contribution is part of a collection of articles growing out of the ELTE-Aarhus Joint Workshop on 'Future Generations Litigation', held at the ELTE University in Budapest (Hungary) on 8–9 June 2023.

1 J. Setzer & C. Higham, *Global Trends in Climate Change Litigation: 2023 Snapshot* (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2023), available at: https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2023-snapshot.

2 G. Futhazar, S. Maljean-Dubois & J. Razzaque (eds), *Biodiversity Litigation* (Oxford University Press, 2022).

time, these proceedings are highly diverse: they are launched under various substantive legal bases, by different kinds of plaintiff, against different respondents, and they seek different types of legal remedy before various national and, increasingly, international fora. Notwithstanding these differences, the lawsuits appear to share some structural similarities, which will be the focus of this article.

The analysis zeroes in on domestic and international lawsuits, in which the interests of future generations are invoked in order to claim and establish new or enhanced obligations for states in relation to posterity in the context of setting their environmental or climate policies. The aim of this cross-jurisdictional comparative analysis is to map the common legal architecture of future generations litigation by sketching the doctrinal 'frontlines' of such lawsuits. In other words, the article will focus on the legal doctrines based on which plaintiffs claim, and courts increasingly appear to afford, protection for long-term interests and needs across domestic and certain international jurisdictions. These demands, as I will argue, correspond to a handful of structurally similar legal safeguards that are derived from the imperative of the rule of law.

I use the term 'rule of law' in a broad and normative sense, as a guarantee against the state's arbitrary exercise of power over the individual.[3] This article will show that the shared legal anatomy of future generations litigation lies in five more concretely defined requirements of the rule of law: (i) respect for human rights, (ii) certain quality of law requirements, (iii) prohibition of arbitrary exercise of governmental power, (iv) non-discrimination, and (v) access to justice.[4] The cross-jurisdictional analysis will examine the ways in which these safeguards play out in the context of future generations litigation, where courts appear to be increasingly willing to reinterpret rule of law obligations in order to protect future generations against arbitrary treatment by present-day decision makers. In such an extremely rapidly proliferating field as future generations litigation it is not feasible to include every relevant decision in this article. The cases under review, therefore, have been selected to provide examples of the argumentative solutions of a wide range of jurisdictions, thereby shedding light on some cross-jurisdictional trends in the adjudicative practice.

The central claim of the article is that states are increasingly held accountable by courts – thus far primarily by domestic fora – when decisions by governments or the legislature undermine the vital environmental interests of posterity in an arbitrary manner. I understand arbitrariness here as the capacity of present-day decision makers to benefit from the inherent intergenerational asymmetry between those whose conduct generate long-term risks for the stability of the climate and the ecosystems and those who bear the devastating consequences of such actions. State policies that inflict harm on future generations in full awareness of the potentially catastrophic long-term

[3] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (McMillan and Co., 1982, first published 1885), p. 114.

[4] The article builds on the taxonomy of rule of law requirements as adopted by the Council of Europe (CoE); see Section 3 for more detail.

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impacts revealed by robust scientific insights can be viewed as unreasonable[5] and irrational[6] – and, even more fundamentally, as 'arbitrary'.

As a caveat, the scope of this analysis is confined to examining legal claims that seek to protect the 'environmental' interests of future generations – namely, a safe and liveable planet and climate for our descendants. Needless to say, posterity has a host of other interests, and their liveable future is not only jeopardized by the climate and ecological crises but also by a range of other threats, including nuclear wars, pandemics, and artificial intelligence. The doctrine of intergenerational equity has also been invoked in contexts outside the 'environmental' or 'climate' protection discourse – concerning, for instance, the accumulation of sovereign debts[7] or the sustainability of pension schemes.[8] This article, however, will only examine the ways in which states can be held liable for undermining intergenerational needs when designing their environmental and climate measures.

The rule of law framework adopted in this article serves both analytical and explanatory functions. On the one hand, it provides an anchor for the comparative analysis; this analysis seeks to make sense of the trends in a booming field that may, at first glance, appear to feature divergent legal arguments and even ad hoc judicial developments tied to the specificities of respective jurisdictions. On the other hand, the framework also helps to explain some of the drivers of these lawsuits and explores some wider, more systemic implications that such lawsuits may bring to the current paradigm of environmental and climate governance. The analysis will ultimately appraise whether an intergenerationally sensitive 'revolutionary' reinterpretation of normative rule of law guarantees can help to change the short-termist paradigm of the domestic decision-making process that has led to and is dominating the Anthropocene.

The analysis is structured in five main parts. Section 2 identifies three layers of connections between the rule of law and the current planetary crises. The interrelations identified here not only demonstrate how the rule of law could be thrown into disarray if critical thresholds that mark 'the safe operating space of humanity'[9] were to be exceeded, but also how the concept has played a critical role in producing such planetary risks and how it could be transformed into a means of abating them. Section 3 identifies the main normative obligations flowing from the rule of law, and explains why these safeguards offer an influential point of intervention for courts in various jurisdictions to impose long-term obligations on states. Section 4 turns to specific rule of law guarantees, and maps cross-jurisdictional patterns of mobilising these intergenerational rights and obligations before different national and

[5] P. Paiement, 'Urgent Agenda: How Climate Litigation Builds Transnational Narratives' (2020) 11(1–2) *Transnational Legal Theory*, pp. 121–43, at 141.

[6] R. Carnwath, 'Environmental Law in a Global Society', 28th Sultan Azlan Shah Law Lecture, Kuala Lumpur (Malaysia), 9 Oct. 2014, p. 262, available at: https://www.sultanazlanshah.com/pdf/2021/SAS_Lecture_28.pdf.

[7] J. Pinheiro, 'Generational Accounting in Portugal: An Assessment of Long-Term Fiscal Sustainability and Intergenerational Inequality' (2021) 20 *Portuguese Economic Journal*, pp. 181–221.

[8] S. Kunieda, 'Japanese Pension Reform: Can We Get Out of Intergenerational Exploitation?' (2002) 43(2) *Hitotsubashi Journal of Economics*, pp. 57–71.

[9] J. Rockström et al., 'A Safe Operating Space for Humanity' (2009) 461 *Nature*, pp. 472–5.

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international fora. Section 5 concludes by appraising the potentially transformative impact that future generations litigation may have for the short-termist paradigm of environmental and climate governance by developing an intergenerationally conscious reading of states' obligations under national and international law.

2. The Rule of Law and the Ecological and Climate Crises: Three Layers of Interconnections

The epoch of the Anthropocene[10] is marked by humanity's role as the dominant force of change on Earth.[11] Our activities and technologies are now capable of fundamentally altering ecosystems and the geochemical cycles of the planet. The last decades have seen an unprecedented environmental and climate crisis that will fundamentally impair the living conditions of future generations – if it remains unabated within a rapidly closing time window.[12] It is now widely accepted that the climate crisis is, essentially, a human rights crisis.[13] This article will take a step further and argue that the planetary crises challenge the very concept of the rule of law. The multifaceted connections between the rule of law and the planetary risks of the Anthropocene can be depicted through three distinct layers. The first is the most overt linkage, concerning the interdependence of sustaining the rule of law and a stable climate and thriving ecosystems. The second layer, perhaps less obviously, relates to the pivotal role that the rule of law has played in charting humanity's course into the Anthropocene. The third layer, however, highlights that rule of law guarantees, via an intergenerationally sensitive reinterpretation, can also be key in steering humanity towards a sustainable future.

Turning to the first layer, several phenomena attest to a mutual interdependence between securing the rule of law and maintaining a liveable planet. Multiple experts have voiced 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.[14] Philip Alston, United Nations (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',[15]

[10] P.J. Crutzen, 'Geology of Mankind' (2002) 415 *Nature*, p. 23.

[11] C. Folke, 'Our Future in the Anthropocene Biosphere' (2021) 50 *Ambio*, pp. 834–69.

[12] 'Summary for Policymakers', in Intergovernmental Panel on Climate Change (IPCC) (H. Lee & J. Romero (eds)), *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the 6th Assessment Report of the IPCC* (IPCC, 2023), pp. 1–34, at 20–1, para. B.6.1.

[13] D.R. Boyd, 'Safe Climate: A Report of the Special Rapporteur on Human Rights and the Environment', 1 Oct. 2019, UN Doc. A/74/161, available at: https://wedocs.unep.org/20.500.11822/30158; Speech of United Nations (UN) Secretary-General Antonio Guterres at the 66th Session of the Commission on the Status of Women (CSW66), 14 Mar. 2022, available at: https://www.un.org/sg/en/content/sg/speeches/2022-03-14/opening-remarks-the-commission-the-status-of-women.

[14] C. Voigt, 'Climate Change, the Critical Decade and the Rule of Law' (2020) 37 *The Australian Yearbook of International Law Online*, pp. 50–62.

[15] P. Alston, 'Climate Change and Poverty: Report of the UN Special Rapporteur on Extreme Poverty and Human Rights', 17 July 2019, UN Doc. A/HRC/41/39, para. 51, available at: https://documents.un.org/doc/undoc/gen/g19/218/66/pdf/g1921866.pdf?token=S73DGznSZV04V7AuP7&fe=true.

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and that further deprivation stimulates nationalist, xenophobic, and racist responses within societies.[16] Fundamental freedoms will be at risk, even in established democracies.[17] Delayed and ineffective climate action in the present will inevitably force future generations to enact immediate and drastic mitigation measures to halt the catastrophic consequences of climate change. Doing so would equate putting a 'full brake' on their lifestyle, which inevitably leads to restrictions on individual freedoms.[18] These include restrictions on personal modes of travel and on consumption of food, water, and energy.[19] Governments may also be forced to declare states of emergency. The German Federal Constitutional Court has also warned that courts may not be able to protect individuals against restrictions of their freedom rights as they would be deemed necessary and proportionate to tackle the climate crises, and therefore lawful under domestic laws.[20] This all suggests that, despite their deeply ingrained short-termist horizon, democracies must nevertheless become able to safeguard long-term environmental interests to sustain the rule of law and 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 against democracy and the rule of law also virtually always leads to a decline in the normative safeguards that protect ecosystems and the climate. Populist social movements often undermine taking ambitious climate mitigation action and environmental protective measures.[21] Populist leaders threaten the international rule of law by challenging multilateralism,[22] while, at the national level, they often pursue anti- or deregulatory agendas,[23] undermine environmental democracy, including rights related to environmental information and public participation,[24] and altogether hinder expertise-based environmental lawmaking.[25] Empirical surveys also suggest that greater degrees of

[16] Ibid., para. 67.

[17] See the inquiry of the German Federal Constitutional Court in *Neubauer et al.* v. *Germany*, Order of the First Senate of 24 Mar. 2021, 1 BvR 2656/18, para. 117 (*Neubauer*).

[18] Ibid., para. 192.

[19] Third-Party Intervention submitted by the Climate Action Network in case pending before the European Court of Human Rights (ECtHR), *Duarte Agostinho and Others* v. *Portugal and Others*, Appl. No. 39371/20, 13 Nov 2020, available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210506_3937120_na-3.pdf.

[20] *Neubauer*, n. 17 above, para. 192.

[21] See, e.g., the Gilets Jaune organizing a nationwide protest against fuel taxes in France (J. Lichfield, 'Just Who Are the Gilets Jaunes?', *The Guardian*, 9 Feb. 2019, available at: https://www.theguardian.com/world/2019/feb/09/who-really-are-the-gilets-jaunes), or Poland's intense logging activity in the Białowieża Forest, which was ruled to be illegal under European Union (EU) law in Court of Justice of the EU (CJEU), Case C-441/17, *European Commission* v. *Poland*, 17 Apr. 2018, ECLI:EU:C:2018:80.

[22] T.F.M. Etty & Veerle Heyvaert, et al., 'The End of a Decade and the Dawn of a Climate Resistance' (2020) 9(1) *Transnational Environmental Law*, pp. 1–9, at 2.

[23] B.J. Preston, 'The End of Enlightened Environmental Law?' (2019) 31(3) *Journal of Environmental Law*, pp. 399–411, at 399.

[24] S. Bogojević, 'The Erosion of the Rule of Law: How Populism Threatens Environmental Protection' (2019) 31(3) *Journal of Environmental Law*, pp. 389–94, at 389.

[25] E. Fisher, 'Unearthing the Relationship Between Environmental Law and Populism' (2019) 31(3) *Journal of Environmental Law*, pp. 383–7, at 385–6.

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commitment to the rule of law raises the stringency of environmental measures,[26] provided that this is not met with high degrees of corruptibility, which could offset such effects.[27]

The second layer of connections between the rule of law and the planetary crisis concerns the genesis of the Anthropocene. As argued in depth by Viñuales, as a social technology the law had a fundamental role in engendering the Anthropocene by regulating and legitimizing the growth-centred economic and industrial system that made it possible for our species to dominate the Earth system.[28] The global north has played a pioneering role in mastering both the necessary technological innovations and growth-based capitalism and consumerism that are jointly responsible for the Anthropocene. The right to property, for instance, in its liberal conception as conferring unlimited and exclusionary power on the owner, was a key driver behind developing a growth-based economy, originating from western Europe in the 17th century.[29] Property rights have enjoyed strong protection in democratic legal orders committed to the rule of law.

Sustaining the traditional normative content and contours of requirements flowing from the rule of law perpetuates socio-economic processes that undermine the opportunities for future generations. In particular, the rule of law provides for legal certainty, favouring stable and predictable laws. This requirement can also be utilized to hinder regulatory answers to emerging risks and uncertainties surrounding ecological and climate threats.[30] In the same vein, the rigidity of the law often works in favour of the holders of economic power by protecting their 'right to pollute' and enabling them to impose externalities on communities within the bounds of often relaxed environmental protection standards.[31]

Moreover, democratic governance is inherently, and systemically, biased against future generations.[32] Elected leaders favour immediate economic gains to satisfy their constituencies, whereas minors, and future generations, are disenfranchised. Presentism is thus deeply ingrained in democracy and in our conceptions of the rule of law, which, as argued in this article, has played a vital role in driving humanity into the Anthropocene. Rule of law guarantees, if interpreted as being applicable

[26] J. Scott, 'From Environmental Rights to Environmental Rule of Law: A Proposal for Better Environmental Outcomes' (2016) 6(1) *Michigan Journal of Environmental & Administrative Law*, pp. 203–38.

[27] P.G. Fredrikkson & M. Mani, 'The Rule of Law and the Pattern of Environmental Protection', International Monetary Fund (IMF) Working Paper WP/02/49, Mar. 2002, available at: https://www.imf.org/external/pubs/ft/wp/2002/wp0249.pdf.

[28] J.E. Viñuales, 'The Organisation of the Anthropocene: In Our Hands?' (2018) 1(1) *International Legal Theory and Practice*, pp. 1–81, at 10.

[29] N. Douglass & R.P. Thomas, *The Rise of the Western World: A New Economic History* (Cambridge University Press, 1973), pp. 132–45.

[30] J. Ebbesson, 'The Rule of Law in Governance of Complex Socio-Ecological Changes' (2010) 20(3) *Global Environmental Change*, pp. 414–22.

[31] On the deficiencies of direct environmental regulation see S. Kingston, V. Heyvaert & A. Cavoski, *European Environmental Law* (Cambridge University Press, 2017), p. 134.

[32] P. Lawrence, 'Justifying Institutions for Future Generations Based on the Mitigation of Bias and Intergenerational Justice', in J. Linehan & P. Lawrence (eds), *Giving Future Generations a Voice: Normative Frameworks, Institutions and Practice* (Edward Elgar, 2021), pp. 22–41.

only between contemporaries, create a system of laws that is *inherently inclined* to overlook long-term interests and non-human environmental assets. The rule of law is not only anthropocentric,[33] but its traditional understanding is also presentist and, thus, tolerates (if not enables) the necessities of life to be looted from our descendants.

Despite all these shortcomings, the third layer of relevant connections, which is the focus of the remainder of this article, suggests that a potential remedy for the 'regulatory deficits' of the Anthropocene[34] may also lie in the rule of law. Several fora have become responsive to the grave intergenerational asymmetry between the conditions and possibilities of decision makers living in the present and those who will have to bear the resulting impacts in the future. The last decade has seen a boom in successful future generations lawsuits, where courts were willing to limit governmental freedom of action in adopting policies with harmful future effects through developing intergenerational dimensions for certain rule of law guarantees. This will be explored in the coming section.

3. An Intergenerational Reinterpretation of the Rule of Law

Pleading with the interests of future generations appears to be a useful litigation strategy, which creates a material impact on judicial inquiries in climate and environmental lawsuits.[35] The plaintiffs in such cases claim normative guarantees under various domestic and international legal doctrines to protect future generations against arbitrary treatment. In other words, they demand the extending of core rule of law guarantees to posterity, too.

The political ideal of the rule of law[36] knows several expressions across jurisdictions, such as *Rechtsstaat* or *État de droit*, and has been translated into various more precise political and legal requirements in different legal systems.[37] The term is sometimes used to stipulate a set of principles for positive laws,[38] to designate the separation of powers,[39] or it is invoked in a broad sense to denote the legally regulated nature of certain aspects of state conduct,[40] the binding nature of relevant international rules,[41] or as a sweeping reference to the system of rules governing a

[33] K. Bosselmann, *Im Namen der Natur: Der Weg zum ökologischen Rechtsstaat* (Scherz, 1992).
[34] L.J. Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (Hart, 2016), p. 204.
[35] M. Wewerinke-Singh, A. Garg & S. Agarwalla, 'In Defence of Future Generations: A Reply to Stephen Humphreys' (2023) 34(3) *European Journal of International Law*, pp. 651–67, at 651; P. Lawrence, 'International Law Must Respond to the Reality of Future Generations: A Reply to Stephen Humphreys' (2023) 34(3) *European Journal of International Law*, pp. 669–81, at 669.
[36] J. Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979), pp. 211–29.
[37] CoE, European Commission for Democracy through Law (Venice Commission), 'Report on the Rule of Law', adopted by the Venice Commission at Its 86th Plenary Session, Venice (Italy), 25–26 Mar. 2011, pp. 3–5, available at: https://rm.coe.int/1680700a61.
[38] L.L. Fuller, *The Morality of Law* (Yale University Press, 1964).
[39] S. Shetreet, *The Culture of Judicial Independence: Rule of Law and World Peace* (Brill, 2014).
[40] F.M. Platjouw & A. Pozdnakova (eds), *The Environmental Rule of Law for Oceans: Designing Legal Solutions* (Cambridge University Press, 2023), p. 8.
[41] A. Buser, 'National Climate Litigation and the International Rule of Law' (2023) 36(3) *Leiden Journal of International Law*, pp. 593–615.

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given field.[42] In this article, by contrast, I rely on the definition used by rule of law scholars proper, which locates the essence of the term in an overarching guarantee against the arbitrary exercise of sovereign powers.[43] I will therefore look for judicially enforceable guarantees of the rule of law – that is, safeguards against arbitrariness – in the case law.

Future generations lawsuits deeply resonate with the core idea of (non-)arbitrariness. In an increasing number of judgments, courts attempt to curtail the almost unrestricted ability of governments to favour immediate economic gains by disregarding, arbitrarily, the basic needs and interests of future generations. Arbitrariness is defined here as the 'uncontrolled, unpredictable and unrespectful' exercise of governmental power,[44] which denotes a 'distinctive form of unreasonable[ness]'.[45] Domestic laws in which present-day lawmakers use their discretionary leeway to pursue short-term gains while freely ignoring the harmful future ramifications, of which they are clearly aware based on ample scientific warning, are fundamentally unjust, unreasonable, and, in this sense, 'arbitrary'[46] in respect of future generations.

Intergenerationally arbitrary decisions may come in many forms, by way of both an action or an omission of the state. The former is illustrated in cases where courts strike down short-termist climate and environmental policies that sacrifice long-term interests for immediate gains.[47] With regard to the latter, when faced with state inaction to protect environmental assets for the sake of posterity, courts often compel governments to enact protective measures.[48] In these cases the exact formulation of judicial guarantees of non-arbitrariness is closely tied to national laws and domestic legal cultures and, hence, are varied in nature.

The analytic framework adopted here relies on the rule of law pillars identified by the Council of Europe (CoE) European Commission for Democracy through Law (also known as the Venice Commission), an international independent advisory body dedicated specifically to promoting the rule of law and democracy.[49] The Venice

[42] K.C. Sokol, 'Forging Global Rule of Law through Climate Litigation against the United States and the Fossil Fuel Industry' (2023) 4(1) *Yearbook of International Disaster Law Online*, pp. 237–62.

[43] See, e.g., M. Krygier, 'The Rule of Law: Pasts, Presents, and Two Possible Futures' (2016) 12(1) *Annual Review of Law and Social Science*, pp. 199–229, at 203–5; Dicey, n. 3 above, p. 114; J. Waldron, 'The Rule of Law', in E.N. Zalta & U. Nodelman (eds), *The Stanford Encyclopedia of Philosophy* (Fall 2023 edn), available at: https://plato.stanford.edu/archives/fall2023/entries/rule-of-law.

[44] M. Krygier 'The Rule of Law and State Legitimacy', in W. Sadurski, M. Sevel & K. Walton (eds), *Legitimacy: The State and Beyond* (Oxford University Press, 2019), pp. 106–36.

[45] T.A.O. Endicott, 'The Coxford Lecture: Arbitrariness' (2014) 27(1) *Canadian Journal of Law & Jurisprudence*, pp. 49–71, at 49.

[46] See 'arbitrary' in the *Oxford English Dictionary*: '(i) to be decided by one's liking; dependent upon will or pleasure; at the discretion or option of anyone. (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'.

[47] See cases discussed in Section 4 below.

[48] See, e.g., the *Amazon* decision, n. 83 below, in which the government of Colombia was ordered to enact a plan of action to prevent deforestation.

[49] CoE, Venice Commission Resolution RES(2002)3 Adopting the Revised Statute of the European Commission for Democracy through Law, 27 Feb. 2022, CDL (2002) 27, available at: https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL(2002)027-e. Its Art. 1(1) lists among the mandates of the Commission the task of 'promoting rule of law and democracy'.

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Commission has developed extensive doctrinal work regarding the normative content and components of the rule of law. Its relevance is not confined to Europe, as the Commission's definition squares with that endorsed by the UN at the global level,[50] and also resonates with scholarly views coming from a non-Eurocentric perspective.[51] The Commission lists five overarching 'thick'[52] (meaning substantive) requirements under the rule of law, which are: (i) respect for human rights, (ii) quality of law criteria, (iii) guarantees of non-arbitrariness, (iv) non-discrimination, and (v) access to justice.[53]

Notwithstanding certain future-looking policies,[54] these pillars have largely been enforced under a tacit assumption of contemporaneity, in as much as they pertain to how reigning governments should treat and regulate people living under their rule and power *at the given moment*. Plaintiffs' litigation strategies in future generations cases, however, seem to challenge such a presentist conception of the rule of law head-on, and increasingly successfully so. A growing number of courts have been willing to expand the temporal scope of rule of law guarantees into the future, either by enforcing them with regard to the grievances of future rights holders or applying such guarantees to protect current subjects against future risk or harm.

The following section will show how such an intergenerational reinterpretation of rule of law pillars emerges in judicial practice and serves to limit the ability of states to disregard the interests and needs of future generations in an arbitrary manner. In these judicial decisions, rule of law obligations are interpreted in a future-oriented way and thereby impose the following binding obligations on states:

- respect for the human rights of future individuals (currently living or yet to be born),
- the quality of law requirement, demanding that national laws capable of interfering with human rights safeguards must meet certain requirements, such as clarity, foreseeability, and specificity;
- the prohibition of arbitrary use of governmental powers in respect of the long-term interests of posterity;
- non-discrimination vis-à-vis future generations, prohibiting direct and indirect discrimination against children based on age or birth cohorts; and

[50] UN General Assembly (UNGA) Resolution 68/116, 'The Rule of Law at the National and International Levels', 16 Dec. 2013, UN Doc. A/RES/68/116, available at: https://www.refworld.org/legal/resolution/unga/2013/en/97012 (its Preamble and para. 17 mention 'access to justice' and the protection of 'human rights'). See also UNGA Resolution 60/1, '2005 World Summit Outcome', 16 Sept. 2005, UN Doc. A/RES/60/1, available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf (its para 134 mentions 'non-discrimination').

[51] For a 'core definition' of the rule of law emerging across national laws see S. Chesterman, 'An International Rule of Law?' (2008) 56(2) *American Journal of Comparative Law*, pp. 331–61, at 340–2.

[52] Ibid.

[53] CoE, Venice Commission, 'Rule of Law Checklist', 18 Mar. 2016, available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e.

[54] J. Boston, *Governing for the Future: Designing Democratic Institutions for a Better Tomorrow* (Emerald, 2017).

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- access to justice: justiciability of legal challenges against environmental and climate policies of governments and granting standing to plaintiffs acting on behalf of long-term interests.

The above pillars denote, in my view, the common legal architecture of many future generations lawsuits. It may be no coincidence that litigation strategies in diverse jurisdictions and under different legal contexts can all be traced back to specific aspects of the rule of law. Indeed, climate governance studies have observed that 'overarching rules' can act as vehicles for change and alter the prevailing system of governing climate change.[55] The rule of law concept appears to be one of those 'overarching rules'.

Developing forward-looking, intergenerational dimensions for actionable rule of law obligations is a significant legal innovation, which can assist in reimagining the legal order to become more responsive to future threats and to the risk of committing posterity to harmful path-dependencies in the present. A recent study warns, however, that successful legal innovations need to be incremental rather than radical, because of law's preference and need to adhere to past commitments.[56] This means, in our context, that the creative, 'imaginative',[57] one might even say 'revolutionary' interpretation of the scope and content of intergenerational state obligations should also be grounded in well-established norms in order to succeed.

The concept of the rule of law could satisfy such a need for groundedness and continuity. The fundamental role that the ideal of the rule of law plays in every democratic legal system renders its normative components effective and legitimate anchors for courts to develop incremental changes in the understanding of states' obligations. The combined effects of this reinterpretation may nevertheless be transformative for the enforceability of claims of intergenerational justice. Further, invoking claims based on the rule of law before courts has practical value in protecting the interests of future generations. Many successful landmark judgments attest to the potential of targeting these basic pillars of the rule of law.

Rule of law safeguards thus serve as influential points of intervention. Through novel interpretations, courts can inject a long-term perspective into states' traditionally short-termist decision making. Applying actionable rule of law guarantees to protect the interests of later generations offers a workable backdoor mechanism to challenge states' myopic policies, which are otherwise often insulated from judicial review.[58] If domestic and international courts were to continue to acknowledge the intertemporal

[55] A. Jordan et al. (eds), *Governing Climate Change: Polycentricity in Action?* (Cambridge University Press, 2018), p. 19.

[56] N. Craik & S.L. Seck, 'The Value of an Innovation Framework for International Law', in N. Craik et al. (eds), *Global Environmental Change and Innovation in International Law* (Cambridge University Press, 2018), pp. 317–28, at 319.

[57] Wewerinke-Singh, Garg & Agarwalla, n. 35 above, p. 667.

[58] E.g., by procedural rules of domestic administrative laws (see M. Eliantonio, E. Lees & T. Paloniitty, 'Conclusions', in M. Eliantonio, E. Lees & T Paloniitty (eds), *EU Environmental Principles and Scientific Uncertainty before National Courts* (Hart, 2023), pp. 349–62, at 355–7), and the margin of appreciation doctrine (see A. Legg, *The Margin of Appreciation in International Human Rights Law* (Oxford University Press, 2012) p. 145.

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dimensions of basic rule of law guarantees, legislatures would be discouraged from passing myopic environmental and climate measures. As a result, invoking the interests of future generations can also help to close the liability gap for inflicting future harm, which is thought to be a potentially significant legal response to the Anthropocene challenge.[59]

Finally, to appraise the practical significance of demanding safeguards against arbitrariness towards future people, we should examine the temporal limits of such litigation strategies. While the basic theory of intergenerational equity is not limited in its temporal scope,[60] it is important to acknowledge the practical barriers to effective advocacy with regard to interests to be protected in the 22nd or 23rd centuries. The temporal reach of such claims appears to be capped by constraints inherent in the methods with which posterity's relevant interests can be defined by courts in a robust (and non-arbitrary) way. As I argue in Section 5, these standards lie in scientific knowledge and soft law instruments. The horizon of our scientific and political attention currently revolves around harm that is likely to arise from human-induced warming by 2050 (that is, within the lifetime of the next generation),[61] or at the end of the 21st century (affecting the generation that comes after).[62] Viewed from this perspective, it may be no coincidence that plaintiffs appear to be most successful in claiming rule of law-based protection for future generations when they frame their complaints around the near future.

Having stated that, with the advent of technologies capable of exerting large-scale systemic influence over the climate system, such as geoengineering, it is not inconceivable to imagine a scenario where actions taken today produce harmful effects over centuries from now. Theoretically speaking, nothing precludes claiming guarantees of non-arbitrariness towards posterity even on such a timescale.

4. Limiting Arbitrariness: Litigation Strategies in Future Generations Lawsuits

The overwhelming majority of claims thus far put forward by plaintiffs in future generations litigation seem to fall into one or more of the above-listed five main categories corresponding to the main rule of law guarantees.

[59] Viñuales, n. 28 above, p. 71.

[60] See, e.g., the definition of future generations encompassing all yet unborn generations, as defined in s. I.1. of the Maastricht Principles on the Human Rights of Future Generations (Maastricht Principles), July 2023, available at: https://www.rightsoffuturegenerations.org/the-principles. See also the 7th generation principle adopted by the Confederation of the Six Nations of the Iroquois cited in UN, Report of the Secretary-General 'Intergenerational Solidarity and the Needs of Future Generations', 15 Aug. 2013, UN Doc. A/68/322, para. 12, available at: https://digitallibrary.un.org/record/756820/files/A_68_322-EN.pdf.

[61] This study defines a generation as lasting for around 20 years, as people gain voting rights typically somewhere between ages of 16 and 21. This also squares with the definition used in generational theories in sociology; see W. Strauss & H. Neil, *Generations: The History of America's Future, 1584 to 2069* (Morrow, 1991).

[62] See, e.g., IPCC, n. 12 above, p. 18, para. B.3 'Likelihood and Risks of Unavoidable, Irreversible or Abrupt Changes' (considering scenarios for 2050 and 2100, respectively).

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4.1. Respect for Human Rights in the Future

The traditional conception of human rights is somewhat presentist, in that safeguards are thought to be applicable only between contemporaries.[63] Major international human rights covenants are silent about future individuals and declare jurisdiction over complaints if the rights holder falls within the jurisdiction of the duty bearer,[64] which arguably requires proximity in both space and time. However, expert proposals have long advocated adopting a more future-oriented stance.[65] Most recently, the Maastricht Principles on the Human Rights of Future Generations, released in February 2023, set the tone for a new reading of international human rights law, which emphasizes the absence of any 'temporal limitations' of the guarantees set forth in major covenants.[66] This implies that human rights safeguards should be guaranteed for future individuals in the same manner as for those currently living.

The proliferating field of rights-based climate litigation also attests that courts do offer protection for human rights *against future harm* and/or for those of *future individuals* in the context of the climate and ecological crises. There are various conceptualizations of relevant violations of human rights across different temporal scales and with regard to different specific rights, leading to divergent lines of judicial inquiry in such cases.

Initially, courts deduced the obligations that states owe to future generations from select human rights, such as the constitutional right to a balanced and healthful ecology,[67] or to a healthy environment.[68] The latter has been invoked to advocate the protection of long-term needs and environmental assets in a range of jurisdictions, which include Pakistan,[69] Brazil,[70] Hungary,[71] and a state court in the United States (US).[72] The Supreme Court of Hawaii has even declared a 'right to a life-sustaining

[63] A. Gosseries, 'On Future Generations' Future Rights' (2008) 16(4) *Journal of Political Philosophy*, pp. 446–74, at 455; B. Lewis, 'The Rights of Future Generations within the Post-Paris Climate Regime' (2018) 7(1) *Transnational Environmental Law*, pp. 69–87, at 78–80; É. Gaillard, 'Avoiding the Tragedy of Human Rights', in G. Bos & M. Düwell (eds), *Human Rights and Sustainability* (Routledge, 2016), pp. 40–52, at 42.

[64] See, e.g., Art. 2 of International Covenant on Civil and Political Rights (ICCPR), New York, NY (US), 16 Dec. 1966, in force 23 Mar. 1976, available at: https://www.ohchr.org/sites/default/files/ccpr.pdf.

[65] See, e.g., the Universal Declaration of Human Rights for Future Generations (also known as the La Laguna Declaration), adopted at an expert meeting sponsored by the United Nations Educational, Scientific and Cultural Organization (UNESCO) at the University of La Laguna, Tenerife (Spain), 25–26 Feb. 1994, available at: https://unesdoc.unesco.org/ark:/48223/pf0000106455; and the Charter of Future Generations' Rights (1985) referenced by Gaillard, n. 63 above, p. 47.

[66] Maastricht Principles, n. 60 above, Preamble, para. II.

[67] *Minors Oposa* v. *Factoran (Secretary of the Department of Environment and Natural Resources)*, Supreme Court of the Philippines, G.R. No. 101083, 30 July 1993 (*Minors Oposa*).

[68] P.D. Vilchez & A. Savaresi, 'The Right to a Healthy Environment and Climate Litigation: A Game Changer?' (2023) 32 *Yearbook of International Environmental Law*, pp. 3–19.

[69] *Ashgar Leghari* v. *Federation of Pakistan et al.*, Lahore High Court (Pakistan), WP No. 25501/2015, 4 Sept. 2015.

[70] *PSB et al.* v. *Brazil (on Climate Fund)*, Federal Supreme Court of Brazil, Decision 1 July 2022, paras 6, 8, 15, 16.

[71] Constitutional Court of Hungary, Decision No. 14/2020 (VII.6), Judgment 9 June 2020 (*Forest*).

[72] *Rikki Held* v. *State of Montana*, Montana First Judicial District Court, Case No. CDV-2020-307, Findings of Fact, Conclusions of Law, and Order, 14 Aug. 2023, Section VI.A. 40 (*Held* v. *Montana*).

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climate system'.[73] Other courts are focusing on more general human rights safeguards. Dutch[74] and Belgian[75] courts, for instance, have found that the over-lenient climate commitments of their governments violated Articles 2 (right to life) and 8 (right to private life) of the CoE European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[76]

Other jurisdictions define potential claimants more narrowly, and protect only the rights of certain most vulnerable special rights holders, such as children[77] and Indigenous communities.[78] Building on its own earlier findings in *Sacchi* v. *Argentina and Others*,[79] the UN Committee on the Rights of the Child, in 2023, defined several specific obligations for states in the context of climate change in its General Comment No. 26.[80] It remains to be seen whether this document will alter the litigation strategy of child plaintiffs, as an empirical study found that the majority of them did not plead violations of their rights as children but focused on their grievances to be endured later, in their adult lives.[81]

Moreover, as a doctrinally distinct category from children's rights,[82] explicit recognition for the rights of future generations is also gaining ground in human rights discourse. Besides the Maastricht Principles cited above, a central role was afforded to the environmental rights of 'unborn generations' in the inquiry of apex courts in Colombia[83] and Pakistan.[84] Even in jurisdictions that remain wary of speaking explicitly about the rights of future generations, future interests do shape the obligations

[73] *In re Hawaii Electric Light Co*., Supreme Court of the State of Hawaii, SCOT-22-0000418, 13 Mar. 2023.

[74] *The State of the Netherlands* v. *Stichting Urgenda*, Hoge Raad, Civil Division (Dutch Supreme Court), Judgment, 20 Dec. 2019, No. 19/00135, ECLI:NL:HR:2019:2007 (*Urgenda*).

[75] *VZW Klimaatzaak* v. *Kingdom of Belgium & Others*, Court of First Instance of Brussels, Civil Section, JUG-JGC No. 167, Judgment, 17 June 2021 (*Klimaatzaak*).

[76] Rome (Italy), 4 Nov. 1950, in force 3 Sept. 1953, available at: https://www.echr.coe.int/documents/d/echr/Convention_ENG.

[77] L. Parker et al., 'When the Kids Put Climate Change on Trial: Youth-Focused Rights-Based Climate Litigation around the World' (2022) 13(1) *Journal of Human Rights and the Environment*, pp. 64–89.

[78] UN Human Rights Committee, 'Views adopted by the Committee under Article 5 (4) of the Optional Protocol [of the ICCPR], concerning Communication No. 3624/2019', 21 July 2022, UN Doc. CCPR/C/135/D/3624/ 2019 (*Daniel Billy et al.* v. *Australia*).

[79] UN Committee on the Rights of the Child, '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', 22 Sept. 2021, UN Doc. CRC/C/88/D/104/2019 (*Sacchi*).

[80] UN Committee on the Rights of the Child, 'General Comment No. 26 on Children's Rights and the Environment, with a Special Focus on Climate Change', 22 Aug. 2023, UN Doc. CRC/C/GC/26., paras 95–106 (UN CRC General Comment No. 26).

[81] E. Donger, 'Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization' (2022) 11(2) *Transnational Environmental Law*, pp. 263–89, at 275–6.

[82] UN CRC General Comment No. 26, n. 80 above, para. 11.

[83] *Demanda Generaciones Futuras* v. *Minambiente*, Supreme Court of Colombia, No. 11001-22-03-000-2018-00319-01, 4 Apr. 2018, para. 5.2 (*Amazon*).

[84] *D.G. Khan Cement Company Ltd* v. *Government of Punjab*, Supreme Court of Pakistan, C.P.1290-L/2019, Judgment, 15 Apr. 2021, para. 19 (*D.G. Khan Cement Company*).

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that courts impose on states.[85] Courts may also conceptualize harmful climate impacts as a violation of the full range of the possible spectrum of rights held by every individual. As famously found by the German Federal Constitutional Court, unambitious greenhouse gas (GHG) reduction measures were unconstitutional because they were leading to a future where 'practically all forms of freedom' would be put in jeopardy.[86]

The above conceptualizations of protected rights are closely interlinked in judicial analysis with different configurations of the temporal dimension of relevant human rights violations. One may distinguish four judicial approaches in this respect. Firstly, courts can address violations of human rights that are already taking place. This approach was chosen in the Torres Strait Islanders' case, in which the lack of climate adaptation measures was deemed an ongoing breach of human rights.[87]

The second, somewhat similar approach adopts a back-casting method focused on competing rights in the present to tackle the conflicting interests of different generations. The analysis of the Hungarian Constitutional Court in its *Forest* decision is a stark example.[88] The Court reviewed the constitutionality of an amendment to the Forest Act that would expand the property rights of private forest owners against the general public's right to a healthy environment. Noting the constitutional importance of intergenerational equity, the Court annulled the amendment and afforded protection for the interests of future generations against the resource extraction of the current generation by balancing the right to environment against the right to property.

A similar back-casting logic features in *Neubauer*, where the partial annulment of Germany's federal climate law was rooted in the anticipated restrictions on constitutional rights (so-called 'advance interference-like effect') that the act would have imposed after 2030.[89] This approach is responsive towards violations that will take place in the more distant future. The Dutch Supreme Court, for instance, declared a violation of rights even though the government's lax mitigation commitments were leading to risks that 'will only be able to materialize a few decades from now'.[90]

A final option lies in protecting the individual's rights against violations that are inevitable in the short term. The European Court of Human Rights (ECtHR), for instance, protects the right to life and private life against imminent future environmental risks.[91]

4.2. The Quality of Law Requirement vis-à-vis Domestic Climate Laws

Domestic laws that may interfere with human rights must meet a certain quality to be compatible with the rule of law. Such a requirement was developed in the most nuanced

[85] *Neubauer*, n. 17 above, para. 115.
[86] Ibid., para. 117.
[87] *Daniel Billy* v. *Australia*, n. 78 above, para. 8.12.
[88] N. 71 above. For a detailed analysis see K. Sulyok, 'The Public Trust Doctrine, the Non-Derogation Principle and the Protection of Future Generations: The Hungarian Constitutional Court's Review of the Forest Act' (2021) 9 *Hungarian Yearbook of International Law and European Law*, pp. 359–75.
[89] *Neubauer*, n. 17 above, paras 115, 183. In more detail see P. Minnerop, 'The "Advance Interference-Like Effect" of Climate Targets: Fundamental Rights, Intergenerational Equity and the German Federal Constitutional Court' (2022) 34(1) *Journal of Environmental Law*, pp. 135–62.
[90] *Urgenda*, n. 74 above, para. 5.6.2.
[91] See, e.g., ECtHR, *Cordella and Others* v. *Italy*, Appl. No. 54414/13, 24 Jan. 2019, paras 163, 172.

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way by the ECtHR[92] in requiring that national laws that may interfere with basic rights be 'sufficiently clear and detailed'[93] and 'foreseeable'[94] as to their effects on the persons concerned. In the context of climate litigation, these requirements could be invoked analogously to demand that national climate laws include detailed and clear mitigation targets that are sufficiently ambitious to avert drastic climate impacts.[95] Although such quality of law requirements have not been argued by applicants – though by one intervener[96] – in the pending climate cases before the ECtHR, national courts have set similar conditions for the quality of climate mitigation laws under domestic law.

In *Neubauer*, the German Constitutional Court found that the statutory emissions pathway was unconstitutional because it did not specify long-term reduction targets, and therefore offloaded the mitigation burden onto future generations.[97] The same justification was adopted later by the South Korean National Human Rights Institution in its Opinion on the climate crisis.[98] Similar specificity requirements were invoked by the Supreme Court of Ireland, which ruled that the government had to 'give real and sufficient details' in its National Mitigation Plan,[99] and also by the United Kingdom (UK) High Court in litigation surrounding the UK Net Zero Strategy. The Court in the latter case required the Secretary of State to give 'explanations' for the bases of the Net Zero Strategy under the statutory obligation to 'set out' policies for meeting the carbon budget.[100]

4.3. Preventing Arbitrary Exercise of Governmental Powers to the Detriment of Future Generations

A distinct pillar of the rule of law embodies safeguards that curtail the state's ability to exercise its governmental powers arbitrarily over the individual. Such guarantees against arbitrariness in the strict sense find legal expression in various formulations of due diligence obligations. These ensure that the interests of future generations are not neglected or overridden even outside the scope of human rights safeguards and

[92] For an overview of the ECtHR case law on the quality of law requirement see E. Küris, 'On the Rule of Law and the Quality of the Law: Reflections of the Constitutional-Turned-International Judge' (2019) 42 *Teoría y Realidad Constitucional*, pp. 131–59.

[93] ECtHR, *Amann* v. *Switzerland*, Appl. No. 27798/95, 16 Feb 2000, para. 58.

[94] ECtHR, *Huvig* v. *France*, Appl. No. 11105/84, 24 Apr. 1990, para. 26.

[95] K. Sulyok, 'The Quality of Law Requirement as a Climate Litigation Tool', *ELTE Law Working Papers* 2022/02, available at: https://www.ajk.elte.hu/dstore/document/3168/ELTE%20LAW%20WORKING%20PAPERS_2022_02_SulyokKatalin.pdf.

[96] ECtHR, *Carême* v. *France*, Appl. No. 7189/21, 7 June 2022, Written Observations of the European Network of National Human Rights Institutions, available at: https://ennhri.org/wp-content/uploads/2022/12/ENNHRI-3rd-party-intervention-Careme-v.-France.pdf.

[97] *Neubauer*, n. 17 above, para. 253.

[98] Opinion of the National Human Rights Commission on the Climate Crisis and Human Rights, 1 Jan. 2023, Section C, available at: https://climatecasechart.com/non-us-case/opinion-of-the-national-human-rights-commission-on-the-climate-crisis-and-human-rights.

[99] *Friends of the Irish Environment*, Supreme Court of Ireland, 2017 No. 793 JR, Judgment, 31 July 2020, paras 6.21, 6.36.

[100] *R (on the application of Friends of the Earth and Others)* v. *Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin), Judgment, 18 July 2022, para. 248.

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requirements for the quality of climate legislation. Duties of care towards the future are rooted in a range of doctrines that are closely tied to the substantive laws of respective jurisdictions and, hence, span a wide variety. Yet, they all aim at curtailing the freedom of the sovereign decision maker to disregard future needs and interests in exercising its executive powers.

Firstly, under the ECHR system, states have a well-established positive duty to take 'all reasonable and necessary' measures to prevent interference with protected rights. This duty of care is frequently invoked in climate change lawsuits.[101] National courts have already reviewed the legality of domestic climate measures under the doctrine,[102] and concluded that respective governments overstepped the bounds of their discretion under Articles 2 and 8 ECHR in that they failed to demonstrate the required level of care in designing their GHG reduction pathways.[103] The District Court of the Hague (The Netherlands), in its *Urgenda* decision, allowed conducting a cost-benefit analysis in discharging such a duty of care. It stressed, however, that costs should be allocated reasonably between present and future generations and that the state has a 'serious obligation to combat climate change if taking action in the present is predicted to be cheaper'.[104] The Court of Appeal found that the economic and social costs of delayed action strongly warranted taking action in the present.[105]

The possible intergenerational aspects of states' due diligence obligations under international human rights law at the global level and under customary international law so far have been less articulated in either positive law or in international judicial practice.[106] An early exception lies in General Comment No. 26, emphasizing that states

[101] L. Maxwell, S. Mead & D. van Berkel, 'Standards for Adjudicating the Next Generation of Urgenda-Style Climate Cases' (2022) 13(1) *Journal of Human Rights and the Environment*, pp. 35–63.

[102] For more details of the due diligence obligations under the ECHR in *Urgenda* and the ECtHR environmental case law see P. Minnerop, 'Integrating the "Duty of Care" under the European Convention on Human Rights and the Science and Law of Climate Change: The Decision of The Hague Court of Appeal in the Urgenda Case' (2019) 37(2) *Journal of Energy & Natural Resources Law*, pp. 149–79, 160–7.

[103] See judgments in *Urgenda*, n. 74 above, and *Klimaatzaak*, n. 75 above.

[104] *Stichting Urgenda* v. *The State of the Netherlands*, District Court of the Hague, Case No. 200.178.245/01, Judgment, 9 Oct. 2018, ECLI:NL:RBDHA:2015:7145, para. 4.76. See also J. van Zeben, 'Establishing a Governmental Duty of Care for Climate Change Mitigation: Will *Urgenda* Turn the Tide?' (2015) 4(2) *Transnational Environmental Law*, pp. 339–57.

[105] *Stichting Urgenda* v. *Government of the Netherlands (Ministry of Infrastructure and the Environment)*, The Hague Court of Appeal, C/09/456689/HA ZA 13-1396, 9 Oct. 2018, ECLI:NL:GHDHA:2018:2591. para. 71. See also B. Mayer, '*The State of the Netherlands* v. *Urgenda Foundation:* Ruling of the Court of Appeal of The Hague (9 October 2018)' (2019) 8(1) *Transnational Environmental Law*, pp. 167–92.

[106] Intergenerational equity has been addressed by individual judges, but not in majority opinions. See, e.g., International Court of Justice (ICJ), Separate Opinion of Judge Weeramantry in *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway)*, *ICJ Reports* (1993), pp. 211–79, para. 240; Dissenting Opinion of Judge Weeramantry attached to the Provisional Measures Order of 22 Sept. 1995 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*, *ICJ Reports* (1995), pp. 317–62, at 341; Separate Opinion of Judge Weeramantry in *Gabčíkovo-Nagymaros Project (Hungary* v. *Slovakia)*, *ICJ Reports* (1997), pp. 88–119, at 107; Separate Opinion of Judge Cançado Trindade in *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, *ICJ Reports* (2010), pp. 135–215, paras 114–31; and Separate Opinion of Judge

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do have a 'heightened duty of care' towards children and thus have an obligation 'to set and enforce environmental standards that protect children from such disproportionate and long-term effects'.[107] A major international legal avenue for protecting intergenerational interests lies in the due diligence obligation under customary international law.[108] This is also well reflected in the questions put before the International Court of Justice (ICJ) in the pending advisory opinion proceedings, which ask the Court to clarify the legal relevance of future generations for the content of due diligence obligations under customary and treaty obligations, and with respect to the legal consequences of any violation thereof.[109] Putting future generations more squarely into the due diligence calculus would be an important step with potentially far-reaching implications. Doing so would, for instance, provide further support for states in refusing to grant new fossil fuel projects on account of their expected future emissions.[110]

Due diligence obligations may also stem from domestic law. In *Neubauer*, the Court deducted that the German Basic Law imposes on the legislature a special duty of care towards future generations.[111] Such a duty may also be rooted in civil codes[112] or in common law doctrines requiring consideration of the interests of minors.[113] In some jurisdictions there are currently proposals to enshrine a duty of care towards future generations in statutory law.[114] States may also be required to exercise care to protect essential ecosystems and natural resources (such as forests or rivers) for the future, under various stewardship[115] or guardianship[116] obligations.

Cançado Trindade in *Whaling in the Antarctic* (*Australia* v. *Japan: New Zealand intervening*), *ICJ Reports* (2014), pp. 348–82, paras 41–7.

[107] UN CRC General Comment No. 26, n. 80 above, para. 73.

[108] S. Maljean-Dubois, 'The No-Harm Principle as the Foundation of International Climate Law', in B. Mayer & A. Zahar (eds), *Debating Climate Law* (Cambridge University Press, 2021), pp. 15–28.

[109] Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, adopted by UNGA Resolution A/77/L.58, 29 Mar. 2023, available at: https://www.icj-cij.org/sites/default/files/case-related/187/187-20230412-app-01-00-en.pdf.

[110] J.E. Viñuales, 'Legal Opinion: International Obligations Governing Canada's Development of New Liquefied Natural Gas Production Capacity in Light of the Climate Change Emergency', David Suzuki Foundation, 26 July 2023, paras 32, 50–9, available at: https://davidsuzuki.org/science-learning-centre-article/legal-opinion-international-obligations-governing-canadas-development-of-new-liquefied-natural-gas-production-capacity-in-light-of-the-climate-change-emergency.

[111] *Neubauer*, n. 17 above, para. 229.

[112] *Milieudefensie et al.* v. *Royal Dutch Shell Plc*, District Court of the Hague (The Netherlands), Judgment, 26 May 2021, ECLI:NL:RBDHA:2021:5337, English translation ECLI:NL:RBDHA:2021:5339, para. 3.2, available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339, (*Milieudefensie* v. *Shell*); see also *Klimaatzaak*, n. 75 above, p. 42.

[113] *Sharma* v. *Minister for the Environment*, Federal Court of Australia, FCA 560 and FCA 774 (overturned on appeal), 27 May 2021.

[114] E.g., the initiative of Senator Pocock in Australia: L. Cox, 'Pocock Seeks to Impose Duty of Care on Australian Government over Climate Harm', *The Guardian*, 30 July 2023, available at: https://www.theguardian.com/australia-news/2023/jul/31/pocock-seeks-to-impose-duty-of-care-on-australian-government-over-climate-harm.

[115] *Amazon*, n. 83 above, p. 21.

[116] *Center for Social Justice Studies et al.* v. *Presidency of the Republic et al.*, Constitutional Court of Colombia, Judgment T-622/16, 10 Nov. 2016, para. 10.2.

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In some jurisdictions (Ecuador, for example), courts use the Rights of Nature paradigm to safeguard the interests of posterity. Even though the future generations discourse and the Rights of Nature movement may appear, at first, to be distinct and divergent, they share the goal of carving out certain long-term assets from the unfettered discretion and resource exhaustion of states.[117] Ecuadorian courts, for instance, prohibited all mining operations in the Los Cedros forest on such a legal basis,[118] and opined that any harm that impairs nature is harm inflicted upon several generations.[119]

Another prominent legal avenue for restricting states' ability to favour immediate economic gains lies in the public trust doctrine, which appears in the laws of various jurisdictions.[120] The doctrine imposes fiduciary duties on states under common law, statutory law or constitutional law, and it deems governments to be sovereign trustees, which ought to preserve the trust's assets – natural resources – for its beneficiaries, present and future. The scope of relevant assets varies across jurisdictions,[121] as do the exact requirements for the trustee.

The public trust doctrine has already been applied successfully in environmental litigation to exclude policy choices that arbitrarily impair the needs and rights of future generations.[122] Scholars have also long advocated pursuing the doctrine in climate litigation through arguing for an atmospheric public trust,[123] but it is only recently that courts have picked up such a line of reasoning. In March 2023, Judge Wilson argued in his concurrent opinion, in the *Hawai'i Electric Light Co*. case, for a public trust obligation to reduce the level of atmospheric carbon dioxide (CO_2) below 350 parts per million.[124] A few months later, a state court in Montana decided in favour of youth plaintiffs based partly on the doctrine in *Held* v. *Montana*.[125] A number of further climate public trust cases are still pending, including the *Juliana*

[117] For examples of how Rights of Nature legislation explicitly references the interests of future generations see, e.g., P. Lawrence, 'Justifying Representation of Future Generations and Nature: Contradictory or Mutually Supporting Values?' (2022) 11(3) *Transnational Environmental Law*, pp. 553–79.

[118] *Revisión de Sentencia de Acción de Protección Bosque Protector Los Cedros*, Ecuadorian Constitutional Court, Case No. 1149-19-JP/21, Nov. 2021.

[119] Provincial Court of Justice of Loja (Ecuador), Judgment 03-30 of 2011; see, in more detail, A. Álvez-Marín et al., 'Legal Personhood of Latin American Rivers: Time to Shift Constitutional Paradigms?' (2021) 12(2) *Journal of Human Rights and the Environment*, pp. 147–76, at 166–7.

[120] J. Orangias, 'Towards Global Public Trust Doctrines: An Analysis of the Transnationalisation of State Stewardship Duties' (2021) 12(4) *Transnational Legal Theory*, pp. 550–86.

[121] M.C. Blumm & R.D. Guthrie, 'Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision' (2011) 45 *UC Davis Law Review*, pp. 741–808, at 748.

[122] E.g., *Forest*, n. 71 above, Reasoning, para. 22.

[123] M.C. Blumm & M.Ch. Wood, '"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine' (2017) 67(1) *American University Law Review*, pp. 70–82; see also the lawsuits and campaigns launched by Our Children's Trust, available at: https://www.ourchildrenstrust.org.

[124] *In re Hawaii Electric Light Co*., n. 73 above, concurring opinion of Judge Wilson, p. 32.

[125] N. 72 above.

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case before a US district court,[126] and those before courts in India, Pakistan, and Hungary.[127]

4.4. Age-Based Discrimination of Minors and Future Generations

In political decision making, future generations are a permanently disenfranchised interest group[128] whose diverse interests are harmed by myopic laws and policies. There is ample scientific evidence that children born today will experience much harsher climate conditions in their adulthood than experienced by members of previous generations.[129] The staggering results of a scientific study show that children aged below 10 in 2020 will experience a fourfold increase in certain weather extremes.[130] In the light of these scientific insights, it becomes obvious that children are already 'particularly affected' by climate change.[131] What is more, such studies make it possible to frame disparate climate impacts as discriminatory treatment. One may conceptualize the problem as either indirect discrimination against children on account of their age, or as birth-cohort discrimination, whereby certain children alive today (together with later generations) are more adversely affected than previous cohorts.[132]

[126] *Kelsey Cascadia Rose Juliana et al.* v. *United States*, District Court of Oregon, Case No. 6:15-cv-01517-TC, Opinion and Order, 10 Nov. 2016, p. 39 (*Juliana*). For more on the case's history see R.S. Abate, *Climate Change and the Voiceless: Protecting Future Generations, Wildlife, and Natural Resources* (Cambridge University Press, 2019), pp. 95–106.

[127] According to the climate change litigation database of the Columbia University Sabin Center for Climate Change Law (available at: https://climatecasechart.com/case-category/public-trust-claims), 29 claims have been submitted based on the public trust doctrine in climate cases in the US. In other jurisdictions see *La Rose* v. *Her Majesty the Queen*, pending before the Federal Court of Appeal Canada; T-1750-19; *Maria Khan et al.* v. *Federation of Pakistan et al.*, Lahore High Court, Writ Petition No. 8960/2019, 15 Feb. 2019; *Mbabazi and Others* v. *The Attorney General and National Environmental Management Authority*, pending before the High Court of Uganda at Kampala; Civil Suit No. 283/2012; *Pandey* v. *India*, National Green Tribunal (India), No. 187/2017, Order of 15 Jan. 2019; *Ali* v. *Federation of Pakistan*, Lahore High Court (Pakistan), Constitutional Petition No. _/I of 2016; *Ex post Constitutional Challenge against the Hungarian Climate Law*, pending before the Hungarian Constitutional Court, Case No. II/3536/2021, available at: https://alkotmanybirosag.hu/ugyadatlap/?id=6E82DC 86EA198AF3C12587640033C9F2.

[128] Future generations are also labelled as a 'permanent minority'; see M. Kates, 'Justice, Democracy, and Future Generations' (2015) 18(5) *Critical Review of International Social and Political Philosophy*, pp. 508–28, at 517.

[129] Note that the elderly are also disproportionately adversely affected by heatwaves compared with younger age groups, which can also be framed as age-based discrimination. This argument is pursued in the pending ECtHR case, *Verein KlimaSeniorinnen Schweiz and Others* v. *Switzerland*, Appl. No. 53600/20, 17 Mar. 2021, Observations on the Facts, Admissibility and the Merits by the Applicants, 2 Dec. 2022, para. 61 (*KlimaSeniorinnen*), available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20221202_Application-no.-5360020_petition-1.pdf.

[130] W. Thiery, S. Lange & J. Rogelj, 'Intergenerational Inequities in Exposure to Climate Extremes' (2021) 374(6564) *Science*, pp. 158–60.

[131] *Sacchi*, n. 79 above, para. 10.13.

[132] A. Gosseries, 'Environmental Degradation as Age Discrimination' (2015) 2 *Revista Eletrónica de Direito Público*, pp. 25–39; R. Kaya, 'Environmental Vulnerability, Age and the Promises of Anti-Age Discrimination Law' (2019) 28(2) *Review of European, Comparative & International Environmental Law*, pp. 162–74.

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Climate impacts are framed as a violation of non-discrimination towards children and future generations in several cases pending before the ECtHR.[133] The problem of birth-cohort discrimination features most acutely in the *Duarte Agostinho* case, initiated by Portuguese children before the ECtHR against 32 states, on the basis of violating the right to life and to private life in conjunction with the prohibition of discrimination.[134] They argue that, as a result of the respondents' failure to adopt stringent mitigation measures, the complainants will experience extreme weather events, which affect their living conditions and health. An essentially similar pleading was put before the Court of Justice of the European Union (CJEU) in the *Armando Carvalho* case to challenge the European Union (EU) GHG reduction commitments as far too lenient, but failed on procedural grounds because of the claimants' lack of standing.[135] Anti-age discrimination claims are also on file with domestic courts in various states, from Italy and Austria to South Korea and Canada.[136] Hearing a complaint based partly on the non-discrimination clause of the Canadian Charter of Rights and Freedoms, the Superior Court of Justice of Ontario has deemed the 'adverse effects of climate change on younger generations' as 'self-evident'.[137]

4.5. Access to Justice in Future Generations Litigation

Another central issue in future generations litigation concerns the rights of minors to access justice – that is, whether disputes involving scientifically (and politically) loaded environmental and climate policy choices are deemed justiciable by the courts, and whether certain plaintiffs can claim intergenerational standing. Even though climate change disrupts longstanding judicial doctrines in respect of both questions,[138] there are signs that courts are increasingly open to tackling intergenerational cases on the merits.

According to the Venice Commission, 'the judicial branch appears to be best placed to protect future generations against the decisions of present-day politicians'.[139]

[133] *Duarte Agostinho*, n. 19 above; ECtHR, *Uricchio* v. *Italy and 32 Other States*, Appl. No. 14615/21; ECtHR, *De Conto* v. *Italy and 32 Other States*, Appl. No. 14620/21; ECtHR, *Greenpeace Nordic and Others* v. *Norway*, Appl. No. 34068/21; ECtHR, *Soubeste and Others v. Austria and 11 Other States*, Appl. No. 31925/22.

[134] *Duarte Agostinho*, n. 19 above.

[135] CJEU, Case C-565/19P, *Armando Carvalho and Others* v. *European Parliament and Council of the European Union*, ECLI:EU:C:2021:252. See also G. Winter, '*Armando Carvalho and Others* v. *EU:* Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation' (2020) 9(1) *Transnational Environmental Law*, pp. 137–64.

[136] *ENVironnement JEUnesse* v. *Procureur General du Canada*, Superior Court of Québec (Canada), No. 500-06-000955-183, 11 July 2019; *A SUD and Others* v. *Italy*, pending before the Civil Court of Rome (Italy); *Do-Hyun Kim et al.* v. *South Korea*, Third Supplementary Brief by Petitioners, 15 Apr. 2021, available at: https://climatecasechart.com/non-us-case/kim-yujin-et-al-v-south-korea/#:~:text=On%20April%2015%2C%202021%2C%20the,are%20violating%20their%20equal%20rights; *Children of Austria* v. *Austria*, Constitutional Court of Austria, Decision to Dismiss the Claim inadmissible, 27 June 2023.

[137] *Mathur* v. *Ontario*, Superior Court of Justice of Ontario (Canada), 2020 ONSC 6918, para. 187.

[138] E. Fisher, E. Scotford & E. Barritt, 'The Legally Disruptive Nature of Climate Change: Climate Change and Legal Disruption' (2017) 80(2) *The Modern Law Review*, pp. 173–201, at 183–8.

[139] CoE, Venice Commission, Opinion No. 997/2020 on Iceland, 9 Oct. 2020, CDL-AD(2020)020, para. 114.

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Indeed, courts often deem such safeguards justiciable, despite pledges mostly being couched in symbolic language. This trend is backed by an emerging scholarly consensus[140] and practitioners' support[141] for judicial intervention aimed at protecting long-term interests when fundamental rights are at stake. The justiciability of conflicting rights and obligations in an intergenerational setting was expressly linked to the rule of law in *Urgenda*, in which the Dutch Supreme Court 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'.[142]

In European jurisdictions, the separation of powers doctrine does not usually constitute an insurmountable obstacle to adjudicate cases challenging domestic climate targets.[143] The approach of courts is far from uniform, though. The first instance court in *Klimaatzaak*, for instance, found that it was not entitled to set a specific reduction target for the legislature under the separation of powers principle.[144] The appellate court disagreed and compelled the respondents to ensure that Belgium meets its target of reducing GHG emissions by 55% by 2030 compared with emissions levels in 1990.[145] The reach of the political question argument is strongest in some common law countries, having blocked climate lawsuits on the merits in the US and Canada.[146] EU courts have also been hesitant in relaxing strict standing requirements to allow climate claims to proceed.[147]

Plaintiffs seeking to establish standing on behalf of generations unborn face challenges rooted in the conceptual difficulty of claiming representation for future individuals.[148] Transgenerational entities[149] such as communities – which include states, tribes and cities, as well as specialized spokesperson institutions[150] – have already succeeded in bringing intergenerational claims to courts.[151] Children and youth plaintiffs are the other types of actor who typically have standing; they comprise around a quarter of the claimants in rights-based climate change lawsuits.[152] Some

[140] L. Burgers, 'Should Judges Make Climate Change Law?' (2020) 9(1) *Transnational Environmental Law*, pp. 55–75.

[141] 'Declaration on Climate Change, Rule of Law and the Courts', 2021 (signed by more than 140 judges, policymakers, academics and practitioners), available at: https://www.biicl.org/climate-change-declaration?cookieset=1&ts=1661720448.

[142] *Urgenda*, n. 74 above, paras 8.1–8.3.5.

[143] Ibid., para. 8.2.7.

[144] *Klimaatzaak*, Court of First Instance of Brussels, n. 75 above, pp. 82–3.

[145] *Klimaatzaak*, Court of Appeal of Brussels, Case No. 2021/AR/1589, Judgment, 30 Nov. 2023, para. 294.

[146] See, e.g., opinion of the Ninth Circuit Court of Appeal in *Juliana*, No. 18-36082 DC No. 6:15-cv-01517- AA, 17 Jan. 2020. Notably, Judge Aiken of the District Court of Oregon opined that the doctrine is not fatal to the plaintiffs' case: *Juliana*, n. 126 above. In Canada, see the judgment of the Federal Court in *La Rose* v. *Canada*, n. 127 above.

[147] See Winter, n. 135 above.

[148] D. Bertram, '"For You Will (Still) Be Here Tomorrow": The Many Lives of Intergenerational Equity' (2023) 12(1) *Transnational Environmental Law*, pp. 121–49, at 137–9.

[149] L. Slobodian, 'Defending the Future: Inter-generational Equity in Climate Litigation' (2020) 32 *Georgetown Environmental Law Review*, pp. 569–89, at 579.

[150] See, e.g., (ombudsmen) institutions for future generations: Network of Institutions for Future Generations, available at: https://futureroundtable.org/en/web/network-of-institutions-for-future-generations.

[151] *Carême*, n. 96 above; *Forest*, n. 71 above; *Daniel Billy et al* v. *Australia*, n. 78 above.

[152] Donger, n. 81 above, p. 264.

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courts have acknowledged the right of youth plaintiffs to claim intergenerational standing,[153] but many jurisdictions have not.[154] At the international level, children have been deemed to be victims of adverse climate impacts in the future, and thus were granted standing before the UN Committee of the Rights of the Child in a complaint regarding states' inaction on climate change.[155] The same issue is currently being litigated before the ECtHR with regard to Portuguese children, coupled with the question of whether the children have standing to bring a claim that demands climate action extraterritorially, from 32 foreign states.[156]

Domestic courts have mostly addressed the exterritoriality question at the standing stage. Some acknowledge a close link between *inter*generational and *intra*generational equity, as suggested by various scholars.[157] In *Neubauer*, the German Constitutional Court recognized the standing rights of complainants coming from Bangladesh and Nepal, although it stressed that the extent of Germany's obligations to prevent future adverse climate impacts abroad are fundamentally different from those owed to its own citizens. It thus found the narrower extraterritorial obligations to have been met.[158] To this extent, this decision may even be placed among the more restrictive jurisdictions.

Intergenerational claims are also raised in class action lawsuits, which are filed by children in their own name and on behalf of future generations. A Canadian court notably deemed the composition of a class to be arbitrary because it involved only residents under the age of 35 in a particular province and excluded inhabitants of other regions.[159] The majority of decisions seems to follow a more restrictive path and bundle the interests of present-day children and future generations only at the local scale – if they all live in the same region or in the same state.[160] Such an attitude expands the temporal horizon of state obligations at the price of confining their geographical scope. This approach fails to consider intragenerational (extraterritorial) grievances – past, present, and future – in concretizing intergenerational obligations.

Such decisions could be criticized for being 'parochial'[161] and even 'hypocritical'.[162] Indeed, courts of the global north appear to be weary of holding historically high-emitting states accountable for their historical emissions, and they do not compel governments to adopt stricter emissions reduction obligations on account of the widespread damage that such emissions have been (and will be) causing for the

[153] I. Gonzalez-Ricoy & F. Rey, 'Enfranchising the Future: Climate Justice and the Representation of Future Generations' (2019) 10(5) *WIREs Climate Change*, article e598, p. 4.
[154] Parker et al., n. 77 above.
[155] *Sacchi*, n. 79 above (although the complaint was found inadmissible on the ground of non-exhaustion of local remedies).
[156] *Duarte Agostinho*, n. 19 above.
[157] E.B. Weiss, 'Intergenerational Equity', in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2013), para. 11; S. Caney, 'Justice and Future Generations' (2018) 21 *Annual Review of Political Science*, pp. 475–93.
[158] *Neubauer*, n. 17 above, paras 101, 173–81.
[159] *ENVironnement JEUnesse* v. *Attorney General of Canada*, Court of Appeal, No. 500-09-028523-199, Judgment, 13 Dec. 2021.
[160] *Milieudefensie* v. *Shell*, n. 112 above, para. 4.2.4; *Minors Oposa*, n. 67 above.
[161] Bertram, n. 148 above, pp. 146–7.
[162] Wewerinke-Singh, Garg & Agarwalla, n. 35 above, p. 652.

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historically low-emitting countries from the global south. In a warming world, future generations of different parts of the world will face very diverse climate and environmental futures. We are yet to see whether domestic and international courts will be willing to reflect on these differences and integrate *intra*generational equity into their reasoning in future generations lawsuits.

5. Judicial Standards for Detecting Arbitrariness: Science and Soft Law

In operationalizing the legal doctrines surveyed above, courts need some criteria to anchor their analysis concerning the future interests they deem worthy of protection through judicial intervention. Most importantly, they must ensure that their reasoning is not seen as capricious or biased. The legal doctrines I identified above are vaguely defined, open-textured norms, the application of which to particular facts leaves considerable room for judicial discretion. For instance, the concept of due diligence under international human rights law does not entail specific obligations for states,[163] nor do the public trust doctrine or the right to a healthy environment. Courts therefore need to find substantive benchmarks to appraise the compatibility of sovereign conduct with normative requirements. In 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 emerge. Courts either refer to scientific knowledge or to goals enshrined in soft law documents to review the merits of short-termist legislation.

Science is often seen as a supplier of objective knowledge in the courtroom,[164] enabling adjudicators to make robust assessments of the magnitude and imminence of future risks. Taking into account robust scientific knowledge is a core requisite for making 'reasonable'[165] decisions. In this vein, to limit the sovereign's regulatory freedom, domestic courts often rely primarily on scientific reports. In *Neubauer*, the German Federal Constitutional Court pointed to the results of climate science in finding that the lawmaker exceeded the bounds of its discretion. It stressed that 'if reliable data suggest that the constitutionally relevant temperature limit might be exceeded, such data must be taken into account'.[166]

References to climate science seem to be an almost obligatory accessory of climate litigation judgments. The recommendations contained in the reports of the Intergovernmental Panel on Climate Change have sometimes directly laid the foundation for the reduction targets mandated by courts.[167] The findings of expert organizations are also instrumental in defining the breach of stewardship obligations.

[163] M. Malaihollo, 'Due Diligence in International Environmental Law and International Human Rights Law: A Comparative Legal Study of the Nationally Determined Contributions under the Paris Agreement and Positive Obligations under the European Convention on Human Rights' (2021) 68(1) *Netherlands International Law Review*, pp. 121–55, at 148.

[164] K. Sulyok, *Science and Judicial Reasoning: The Legitimacy of International Environmental Adjudication* (Cambridge University Press, 2021).

[165] *Duarte Agostinho*, n. 19 above, Observations of Applicants, 5 Dec. 2022, paras 94–7.

[166] *Neubauer*, n. 17 above, para. 214.

[167] *Urgenda*, n. 74 above, para. 5.8. On the role that IPCC science played in the decision see M. Wewerinke-Singh & A. McCoach, '*The State of the Netherlands* v. *Urgenda Foundation*: Distilling

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In the *Amazon* decision, the Supreme Court of Colombia referred to scientific reports to support its conclusion that governmental measures were ineffective in combating environmental problems in the region.[168] Similarly, the first instance court in *Klimaatzaak* 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.[169]

Another cross-jurisdictional pattern shows that courts often use soft law goals and prior policy commitments of the state as a benchmark for assessing whether governments arbitrarily harm the interests of future generations. Such an inquiry was most explicit in the Hungarian *Forest* decision, in which the Constitutional Court partially quashed an amendment to the Forest Act for contravening principles set out in the long-term National Forestry Strategy. The Strategy had been adopted by the legislature as a non-binding sectoral policy instrument setting out a long-term vision and principles for national forest management. A few years later, the amendment narrowed the powers of authorities to mandate temporal and spatial restrictions on logging for nature conservation purposes. The Court opined that this ran counter to sustainable forest management, as set out in the Strategy, and therefore repealed the amendment.[170]

A structurally similar argument was made in *Milieudefensie* v. *Royal Dutch Shell* by the first instance court.[171] While interpreting the normative content of the unwritten standard of care in civil law, the District Court turned to the UN Guiding Principles on Business and Human Rights (UNGP),[172] which is a soft law compilation of principles addressed to states and companies. Although the UNGP do not 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'.[173] On these premises, the District Court ordered Shell to increase its mitigation efforts in line with its obligations under the UNGP.

These examples also suggest that the dividing line between hard law and soft law obligations often becomes blurred in future generations litigation. Courts appear to

Best Practice and Lessons Learnt for Future Rights-Based Climate Litigation' (2021) 30(2) *Review of European, Comparative & International Environmental Law*, pp. 275–83.

168 *Amazon*, n. 83 above, para. 12.

169 *Klimaatzaak*, n. 75 above, p. 76.

170 *Forest*, n. 71 above, paras 31–2.

171 *Milieudefensie* v. *Shell*, n. 112 above. For analysis of the judgment see B. Mayer, 'The Duty of Care of Fossil-Fuel Producers for Climate Change Mitigation: *Milieudefensie* v. *Royal Dutch Shell*, District Court of The Hague (The Netherlands)' (2022) 11(2) *Transnational Environmental Law*, pp. 407–18; L. Burgers, 'Response: An Apology Leading to Dystopia: Or, Why Fuelling Climate Change Is Tortious' (2022) 11(2) *Transnational Environmental Law*, pp. 419–31; B. Mayer, 'Judicial Interpretation of Tort Law in *Milieudefensie* v. *Shell*: A Rejoinder' (2022) 11(2) *Transnational Environmental Law*, pp. 433–6.

172 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', adopted by the UN Human Rights Council in Resolution 17/4, 16 June 2011, UN Doc. HR/PUB/11/4, available at: https://digitallibrary.un.org/record/720245/files/GuidingPrinciplesBusinessHR_EN.pdf.

173 *Milieudefensie* v. *Shell*, n. 112 above, para. 4.4.13.

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turn non-binding standards into judicially enforceable benchmarks to carve out certain policy choices from decision makers' lawful room for manoeuvre. The soft law standards reflect a political consensus, negotiated irrespective of the particular lawsuit, on the measures that the courts deem necessary to protect posterity's long-term interests. Similarly, the scientific opinion of competent institutions with recognized prestige and expertise lends persuasive force to judicial findings that limit sovereign choices.

6. Conclusions on Transforming the Rule of Law: Trends and Implications

This snapshot of the frontlines of future generations litigation has shown how legal claims keep challenging the traditional content of states' rule of law obligations across national, and also some international, jurisdictions. Courts are increasingly willing to interpret and apply traditional rule of law guarantees in a 'revolutionary' way: by extending their temporal scope to include both the concerns of future individuals as well as the future needs and rights of present-day subjects. Firstly, many jurisdictions now afford human rights safeguards against future environmental and climate hazards; and some even recognize unborn generations as rights holders. Secondly, national courts have also set various quality of law requirements for national climate laws to establish ambitious mitigation commitments. Thirdly, several jurisdictions have put constraints on the arbitrary exercise of governmental powers that threaten the viability of long-term natural assets, either by declaring such laws invalid or by compelling present decision makers to establish protective measures. Fourthly, while most lawsuits involving claims of age-based discrimination against minors are still pending, some courts have already shown sympathy for the discriminatory impact of adverse climate change on future generations. Finally, access to justice is increasingly granted in intergenerational lawsuits through expanding rules on justiciability and standing.

Courts concretize the meaning of legal standards through heterogeneous strategies, which are closely tailored to the specificities of national laws. Different modalities of rights-based approaches (including creating new rights holders), duty-centred reasoning, and concepts borrowed from Indigenous legal cultures[174] all have their rightful place in the judicial 'toolbox', depending on the interpretative canons of the applicable legal culture. Such heterogeneity appears to be inevitable. The success of future generations lawsuits depends, at least in part, on whether plaintiffs manage to find the appropriate doctrine to expand the contours of state obligations that is most in line with domestic legal traditions.

In sum, courts appear to delineate the interests of future generations worthy of judicial protection through one of five legal avenues, all of which flow from the rule of law. Accordingly, these rule of law pillars mark the application of the intergenerational equity principle in judicial practice. In many scenarios it would be difficult for courts to select long-term interests that ought to be protected through substantive standards, given that such interests can be vague and subjective, and thus contestable. In similar delicate situations in the past, courts have turned to procedural requirements in their

[174] Wewerinke-Singh, Garg & Agarwalla, n. 35 above.

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environmental case law.[175] For the same reason, using the safeguards stemming from the rule of law are perhaps the most viable judicial tool to operationalize intergenerational equity.

On a higher level of abstraction, plaintiffs demand (with increasing success) that states respond to scientifically substantiated environmental risks and adopt 'good laws' with the purpose of diffusing 'happiness and powers *universally and equally*'[176] – in our context, *equally across generations*. To that extent, successful future generations lawsuits insist on an ambitious justice concept as expressed within various theories of intergenerational justice.[177] At the minimum, unfolding judicial practice pushes present decision makers 'to make wise choices for future generations'.[178]

In the 'laboratory' of future generations litigation, courts translate the morally rooted requirement of passing good laws and making wise policies into binding obligations on states not to treat future individuals in an arbitrary way. Decisions and policy choices made in the present that are 'capricious' and unjustifiable in the light of scientific knowledge and soft law goals are repeatedly struck down by courts. States are no longer free to prioritize 'at will' certain short-term gains over long-term risks by wielding 'uncontrolled power' (to use colloquial synonyms of 'arbitrary') over 'colonized'[179] future generations. Even though states do retain discretion in balancing competing interests, their actions are becoming increasingly scrutinized to 'arriv[e] at a reasonable balance'[180] between present-day interests and longer-term impacts.

Judicially prohibiting arbitrary disregard for the interests of future generations may not be as revolutionary an idea as it may sound at first. It is in line with the changing contours of sovereignty, where states need to take into account 'other-regarding considerations' in designing their policies not only towards '*foreign* stakeholders',[181] but arguably also towards *future* stakeholders. Positing binding guarantees against arbitrariness towards future generations also resonates well with the idea that state sovereignty has inherent limits under international law and prohibits unreasonable exercise of sovereignty to the detriment of future people.[182]

[175] J. Brunnée, 'International Environmental Law and Community Interests: Procedural Aspects', in E. Benvenisti & G. Nolte (eds), *Community Interests Across International Law* (Oxford University Press, 2018), pp. 151–75, at 155.

[176] 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' (emphasis added). Cited by Judge Xenia Turkovic in her speech at the Re:Constitution Fellows Meeting held in Berlin (Germany), 27 Oct. 2021.

[177] On intergenerational justice see Caney, n. 157 above.

[178] *Waratah Coal Pty Ltd* v. *Youth Verdict Ltd and Others (No 6)*, Land Court of Queensland (Australia) [2022] QLC 21, para. 1603.

[179] *D.G. Khan Cement Company*, n. 84 above.

[180] UN CRC General Comment No. 26, n. 80 above, para. 73.

[181] E. Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107(2) *American Journal of International Law*, pp. 295–333, at 300 (emphasis added).

[182] C. Foster, 'Due Regard for Future Generations? The No Harm Rule and Sovereignty in the Advisory Opinions on Climate Change' (2024) 13(3) *Transnational Environmental Law* (forthcoming)).

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The implications of future generations lawsuits are of constitutional proportions; they call for transforming our conceptions of the meaning of the rule of law[183] and, through that, they might recalibrate some of the basic tenets of the current system of environmental and climate governance. More specifically, a transformed understanding of basic rule of law obligations, if spread across jurisdictions and maintained to a sufficient degree to solidify,[184] could assist in holding states liable for inflicting harm over longer timescales. By fostering a new, future-focused understanding of the rule of law, courts could level the playing field for later generations and emancipate them from the 'systematic bias'[185] of current short-termist decision making.

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[183] *D.G. Khan Cement Company*, n. 84 above, para. 19.
[184] Craik & Seck, n. 56 above, p. 318.
[185] Lawrence, n. 32 above, p. 22.

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