

24. Future Generations

The term “generation” usually describes the set of people in a society that is born and lives around the same period of time. For 30 years, the legal status of future generations has been the subject of an intense doctrinal debate.²⁷ The following sections will analyse it, as well as its recognition in positive law.

The necessity to protect future generations

The risks faced by future generations

Human lifestyle has always had an impact on the environment. The use of fire for hunting by Australian Aboriginals or of agriculture’s slash-and-burn techniques by local communities around the world has shaped local environments. Nevertheless, impacts have been greater as technology has improved, and mankind is nowadays causing long-term and global changes such as climate change, loss of biodiversity, ozone depletion, and pollution from plastic, from the use of persistent organic pollutants or from nuclear wastes. While this jeopardizes interests of future generations, short-term thinking in politics has prevented States from adopting effective measures (Collins, 2007).

The reasons to protect the interests of future generations

Moral considerations

Moral concerns about future generations are widely shared historically and globally (Collins, 2007). Recognition of their rights can morally be enriched on modern human rights, utilitarianist or contractualist doctrines, socio-evolutionist arguments or simply on the no-harm principle. Nevertheless, such recognition faces deep theoretical difficulties and objections. A first set of counter-arguments is ontological and contests the possibility of future generations’ rights entitlement, based on the non-existence argument (Ruth Macklin (1981). “Can Future Generations Correctly Be Said to Have Rights?” in Ernest Partridge (ed.), *Responsibilities to Future Generations*. Prometheus Books, pp. 151–156; Richard De George (1981). “The Environment, Rights,

and Future Generations” in Ernest Partridge (ed.), *Responsibilities to Future Generations*. Prometheus Books, pp. 157–166), or on the non-identity problem (Derek Parfit (1987). *Reasons and Persons*, Clarendon Press). The second set of arguments is epistemological. Firstly, it can be argued that recognition shall be limited in its extent because of our inability to identify preferences of distant generations (Martin Golding (1981). “Obligations to Future Generations” in Ernest Partridge (ed.), *Responsibilities to Future Generations*. Prometheus Books, pp. 61–72; Alexander Gillespie (2014). *International Environmental Law, Policy and Ethics*, Oxford University Press). But several authors argue that this should not prevent us from trying (e.g. Catherine Redgwell (1999). *Intergenerational Trusts and Environmental Protection*, Juris Publishing) and that we may be able to identify at least some of their needs linked to critical natural resources (Kristian Skagen Ekeli (2007). “Green Constitutionalism: The Constitutional Protection of Future Generations”, *Ratio Juris* 3(20), 378–401). Secondly, our ability to weigh needs and thus rights of succeeding generations remains questionable. In this respect, several and contradictory solutions have been suggested based on approaches such as egalitarianism, prioritarianism, Rawlsian’s “just saving” part, or a discounting rate.

Intergenerational equity theory

In 1989, E.B. Weiss made a pioneer contribution in the definition of a consistent intergenerational equity theory. The Earth is conceived as a “trust passed to us by our ancestors for our benefits, but also to be passed on to our descendant for their use” (Weiss, 1992). Each generation holds rights (to use the environment), but also bears obligations (to protect the environment). Allocation of rights and duties is governed by a set of three principles of conservation (of diversity, quality, and access to Earth’s natural and cultural resources), and four criteria (Weiss, 1989): equitable repartition (of rights and burdens), value neutrality (on future generations’ preferences), clearness (foreseeability in their application), and wide acceptance (in different social systems). While this theoretical framework overcomes above-mentioned difficulties such as the non-existence and the non-identity problems (in defining collective generational rights: Weiss, 1992) and the preference’s indeterminacy (using the value neutrality criterion), several aspects remain criticized in doctrine (for

an overview: Beckerman, Wilfred (2006). "The impossibility of a Theory of Intergenerational Justice", in Joerg Chet Tremmel, *Handbook of Intergenerational Justice*, Edward Elgar Publishing, 53–71; Collins, 2007; Anstee-Wedderburn, 2014), and no consensus exists on any theory for future generations.

Legal recognition of the rights of future generations

International recognition

Declarative instruments

Every major environmental declaration refers to future generations' interests or intergenerational principle (Stockholm Declaration, 1972, preamble, principles 1 and 2), generally anchoring them within the sustainable development principle, according to which needs of present generations shall be fulfilled without jeopardizing those of future generations (Rio Declaration on Environment and Development, 1992, principle 3; Rio Principles for Forests, 1992, principle 2 (b); Johannesburg Declaration on Sustainable Development, 2002, §37; Rio +20 Declaration: The Future We Want, 2012, §86). Two instruments directly deal with future generations' interests, and affirm the correlative responsibility of present generations to preserve them (UNGA, Resolution 35/8 on Historical Responsibility of States for the Preservation of Nature for Present and Future Generations, adopted on 30 October 1980, §1; UNESCO, Declaration on the Responsibilities of Present Generations towards Future Generations (1997), Article 1). Such interests and responsibility are also mentioned in the Millennium Development Goals and succeeding Sustainable Development Goals (UNGA, Resolution 55/2, §2 and 6; UNGA, Resolution 70/1, preamble and §18). Despite the fact that we observe a growing concern for needs and interests of future generations in international declarations, none of these texts recognizes rights for future generations. The only text following an approach similar to E.B. Weiss's theory (but on a limited scope) is the UNESCO Universal Declaration on Cultural Diversity that calls for recognition of cultural diversity as the common heritage of humanity (Article 1).

Conventions

Concerns about interests of future generations were initially mentioned in preamble provisions (first in the 1946 Convention for the

Regulation of Whaling and then in some environmental agreements: Convention on the Conservation of Migratory Species and Wild Animals; Convention on International Trade in Endangered Species of Wild Fauna and Flora). Greater legal recognition came along with the link made between the States' duties to protect and the benefits for future generations. This was first stated in the UNESCO World Heritage Convention (Article 4) and then more systematically within the three Rio conventions. Two of these last conventions go beyond by taking into account needs and interests of future generations in the definition of "sustainable use" (Convention on Biological Diversity, Article 2), and in a principle governing parties' implementation of the Convention (UN Framework Convention on Climate Change, Article 3§1, Paris Agreement, preamble).

Jurisprudence

The International Court of Justice (ICJ) shows some reticence in referring to future generations. It firstly did in its advisory opinion on the legality of threat or use of nuclear weapons in order to define the "environment" (para. 29) and risks of nuclear weapons (paras 35–36). In the *Gabcikovo-Nagymaros* case, the Court noted that new norms and standards have been developed in international environmental law because of growing awareness of the risks for present and future generations (para. 140) but did not explicitly base its decision on any intergenerational equity considerations. Some judges have supported more progressive positions. In 1993, Judge Weeramantry, in his dissenting opinion on the *Nuclear Weapon* case, affirmed that the rights of future generations "have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognized by civilized nations" (p. 233). In several separate opinions, Judge Cançado Trindade has given special attention to the intergenerational equity principle, considering it as a general principle of international environmental law (*Pulp Mills* case, Sep. op., para. 220) and affirming that the Court should have used it for interpretation (*Whaling* case, Sep. op.) and in order to define monitoring obligations (*Pulp Mills*, Sep. op., para. 124).

Regional instruments

At the regional level, rights of future generations benefit from a better recognition.

The European Union's duty towards future generations is explicitly recognized (Charter of Fundamental Rights, §6) and their rights are taken into account through the sustainable development principle (Collins, 2007). Conversely, whereas the European Court of Human Rights sometimes mentions international provisions about future generations (Tatar c. Romania case), it does not directly use them in its *ratio decidendi* or recognize any right to them. The Inter-American Court of Human Rights has been more progressive. In the Mayana (Sumo) Awas Tingni Community v. Nicaragua case, the Court affirmed the collective right of a community on its land because of their special relationship with this land, considering that it represents a material and cultural element that they ought to enjoy "to preserve their cultural legacy and transmit it to future generations" (para. 149).

National recognition

Since 1990, intergenerational equity and needs of future generations explicitly became included in various legislative and executive acts (Brazilian Laws No.12.305; No. 9.985/2000; No. 12.187) where they are often linked to the purpose of these acts (through the concept of sustainability: New Zealand Resource Management Act 1991, s. 5; Australian Environment Protection and Biodiversity Conservation Act, s. 3A; French Environment Code, Article L.110-1 II; Canadian National Marine Conservation Areas Act, s. 4§3). Interests of future generations have also been enriched in constitutional provisions. Some of them only recall that choices made to fulfil present needs shall not jeopardize those of future generations (Charter for the Environment, which is part of the French Constitution), or the government's duty to preserve the environment for present and future generations (Brazilian Constitution, Article 225). But various constitutions go further and recognize the right for present and future generations to a healthy environment (Bolivian Constitution, Article 7; Norwegian Constitution, Article 110 b; Japanese Constitution, Articles 11 and 97; South African Constitution, Article 24). While national courts have faced some difficulties to effectively protect such rights (Hollis, 2010; Ekele, 2007), they managed in some cases to deduce from them practical consequences such as the government's responsibility in ensur-

ing access to healthy water by constructing a sewage system (High Court of Kenya, Mr Peter Waweru v. Republic of Kenya, 2006, para. 48); some environmental impact assessments' requirements (Land and Environment Court of New South Wales, Gray v. The Minister of Planning and Others, 2006, para. 126); or a limit of annual mineral excavation (Supreme Court of India, Goa Foundation v. Union of India & Others, 2013, para. 71).

Ways to protect the rights of future generations

Commissioner, ombudsman, guardian for future generations

Calls for the appointment of a person representing the interest of the environment (Christopher Stone (1972). *Should Trees Have Standing?: Toward Legal Rights for Natural Objects*, Southern California Law Review (45), 450–501) or future generations (Weiss, 1989) have been heard for a long time (Brundtland Report, 1987, §84, Agenda 21, paras 38–45). Several States created a commission, a council or a commissioner, who shall, in fulfilling its mandate, promote the interests of future generations and intergenerational equity (New Zealand, Finland, Canada, Germany, Hungary, Malta. Some existed only for few years: in France, Israel, and Australia). Nevertheless, these institutions lack power to effectively protect future generations' rights because they only have advisory and consultative functions, and cannot stand for future generations in judicial processes. On the road to Rio+20, a non-governmental organization (NGO) proposed to create a High Commissioner for Future Generations (within the UN system) in charge of formulating advice, investigating, advocating for future generations, and defining their legal rights. Even if this was discussed, the final declaration adopted only asked the Secretary General to present a report on future generations (§86). In the near future, this proposition is unlikely to succeed because even if the Secretary General recommended the appointment of a High Commissioner he limited its mandate to advisory functions (UNSG (2013). Intergenerational solidarity and the Needs of Future Generations, UN Doc. A/68/322, §§ 53–58) and this point is absent from the agenda of the High-level Political Forum.

Standing for future generations

Even if no existing institutions can stand for future generations, young living generations could work as a proxy. The 1993 decision of the Supreme Court of the Philippines gave some hope in this context. Based on Article II of the Philippines Constitution, the Court recognized standing to a group of children to represent themselves but also generations to come. In a recent case, the Colombian Supreme Court ruled in a similar way on this aspect and concluded to the State's responsibility for insufficient action to reduce deforestation (Colombian Supreme Court of Justice, sentencia 4360-2018, 5 April 2018). Nevertheless, national courts around the world remain reluctant to recognize such standing to children. The question has been raised in the 2013 Urgenda case in the Netherlands, where a NGO sued the government for insufficient action to prevent climate change. Whereas The Hague Court of Appeals made a reference to the interest of future generations (2018, para. 8), it decided not to consider the question of Urgenda's ability to act on behalf of future generations (para. 37). In December 2018, four French NGOs initiated a similar action where they notably referred to interests of future generations (Administrative Tribunal of Paris, "L'affaire du siècle", Complementary memoir, 2019), but there is little indication that the French tribunal will decide differently from The Hague Court in this respect. Finally in January 2020, the US ninth Circuit Court of Appeal ruled that the plaintiffs (21 children) lacked standing in the so-called Juliana v. United States case (United States Court of Appeals for the ninth circuit, January 17, 2020, Case n° 18-36082).

Concluding remarks

Even if intergenerational equity has long been discussed in doctrine, the concept did not reach a binding status under international law. Future generations' interests are mainly enshrined in preambles or declarative instruments. While it could be argued (and some judges do) that this principle and rights of future generations are part of general international law, the ICJ has never drawn conclusions to support this interpretation. Similarly, arguing that intergenerational equity is a part of the sustainable development principle would not be useful

because the legal status and implications of the latter also remain unclear. It seems unlikely to see future generations become right holders under international law in the near future. Nevertheless, the principle of intergenerational equity will probably gain legal recognition and produces its effects as a meta-principle (like sustainable development) that allows in a flexible way the articulation of other rights, norms and principles. Effective protection of the rights of future generations will mainly depend on the extent of their recognition in national legal systems, the ability of people or organizations to stand for them and the will of courts to give to these rights some content.

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