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# Litigating for the Future: Rights-based Argumentation in Future Generations Climate Litigation

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***Abstract**:* **Litigating for Future Generations: Rights-based Argumentation for Future Generations in Climate Litigation**
In an attempt to counteract democratic myopia and the impending consequences of climate change, future generations have increasingly featured in global climate litigation. This paper examines how such litigation engages with this future-oriented discourse, with a focus on rights-based argumentation, notably the public trust doctrine and environmental rights. The study finds that judicial receptivity of such claims varies, while obscurity around the definition of future generations persists.

***Keywords***: Climate Change, Climate Litigation, Future Generations, Intergenerational Equity, Human Rights.



## 1. Introduction

"[T]he lack of a historical and legal tradition protecting the environment for future generations almost certainly led us to the position we are in now"[1]. So stated the Washington State Court of Appeal in delivering judgment in *Aji P v Washington*, a case brought by children and youth challenging the operation and maintenance of fossil fuel-based energy and transportation systems by the State of Washington.

[1] *Aji P v Washington* [2021] 16 Wash.App.2d 177, Washington State Court of Appeals, pp. 23-24. Note: This Court of Appeals judgment was subsequently affirmed by the Washington State Supreme Court in *Aji P v Washington* [2021] 198 Wash.2d 1025). (*Aji P v Washington*).

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Despite this candid remark, the case was dismissed, on separation of powers grounds[2]. This case, and this remark in particular, is nonetheless illustrative of the growing recognition that effective environmental protection and climate action require decision-making cognisant of the impacts of our decisions on generations to come.

Future generations, characterised as the "great silent majority"[3], are given little if any prominence in the ordinary functioning of democracies. Though some notable exceptions exist, with a handful of states having institutionalised the representation of future generations[4], long-termism is not regarded as a strong suit of contemporary democratic systems of governance[5]. At the same time, it is becoming increasingly clear that climate change stands to have severe, cumulative, long-lasting, and potentially irreversible impacts on the lives and living conditions of (even not-so-distant) future generations[6]. This is not to diminish the impacts already being felt by present persons – though whether this is in fact the result of future-oriented narratives is open to debate[7]. Rather, a future-oriented narrative aims to serve the broader objective of expanding the temporal scales deemed

[2] *Ivi*, pp. 9-12, 36.

[3] *D.G. Khan Cement Company v Government of Punjab* [2021] C.P.1290-L/2019, Supreme Court of Pakistan. (*D.G. Khan Cement Co*), § 19.

[4] Bodies for the representation of future generations have been established in Finland, Hungary, Israel, and Wales, amongst other jurisdictions, see https://futureinstitutions.com/en/web/network-of-institutions-for-future-generations, [Accessed: 23/05/2025]. See further, E. Krajnyák, "The Role and Activity of the Deputy Commissioner for Fundamental Rights Ombudsman for Future Generations in Shaping Environmental Protection in Hungary", in *Journal of Agricultural and Environmental Law*, XVIII (2023), n. 34, pp. 7-30; C.N. Radavoi, L. Rayman-Bacchus, "The Need for Durable Institutions for Future Generations: Mobilising the Citizenry", in *Futures*, 132 (2021), 102820; M. von Knebel, "Cross-country Comparative Analysis and Case Study of Institutions for Future Generations", in *Futures*, 151 (2023), 103181; B. Lewis, "Human Rights Duties Towards Future Generations and the Potential for Achieving Climate Justice", in *Netherlands Quarterly of Human Rights*, 34 (2016), n. 3, pp. 206-226, spec. pp. 222-225.

[5] See D.F. Thompson, "Representing Future Generations: Political Presentism and Democratic Trusteeship", in *Critical Review of International Social and Political Philosophy*, 13 (2010), n. 1, pp. 17-37.

[6] See H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.), IPCC, "Climate Change 2022: Impacts, Adaptation and Vulnerability", Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, Cambridge, 2022.

[7] The topic has triggered emphatic scholarly debate, see: S. Humphreys, "Against Future Generations", in *European Journal of International Law*, 33 (2022), n. 4, pp. 1061-1092; P. Lawrence, "International Law Must Respond to the Reality of Future Generations: A Reply to Stephen Humphreys", in *European Journal of Environmental Law*, 34 (2023), n. 3, pp. 669-681; M. Wewerinke-Singh, A. Garg, S. Agarwalla, "In Defence of Future Generations: A Reply to Stephen Humphreys", in *European Journal of International Law*, 34 (2023), n. 3, pp. 651-668; S. Humphreys, "Taking Future Generations Seriously: A Rejoinder to Margaretha Wewerinke-Singh, Ayan Garg and Shubhangi Agarwalla, and Peter Lawrence", in *European Journal of Environmental Law*, 34 (2023), n. 3, pp. 683-696.

consequential in decision-making[8]. Whether conceived of as present-day children or persons yet to be born, future generations clearly wield little-to-no economic and political power in the present. Given this political impotence, legal avenues for making the interests of future generations heard have been sought[9].

The global rise in climate litigation, and notably rights-based climate litigation, has been commented upon extensively[10]. The particularities of climate change as a diffuse and cumulative global phenomenon pose specific litigatory challenges and have prompted the development of novel legal arguments[11]. At the same time, discourse surrounding future generations has also grown in prominence in the context of climate change. The publication of the Maastricht Principles on the Rights of Future Generations[12] in 2023 and the Declaration on Future Generations annexed to the United Nations Pact for the Future[13] speak to a growing interest in future generations and their purported rights. So too does the requests for advisory opinions of the International Court of Justice and the Inter-American Court of Human Rights on state obligations in respect of climate change, both of which expressly refer to future generations[14]. Future generations and their rights have thus

[8] On the temporal framing of climate litigation, see C. Hilson, "Framing Time in Climate Litigation", in *Oñati Socio-legal Series*, 9 (2019), n. 3, pp. 361-379.

[9] A. Drigo, "Future Generations in Climate Litigation: Early Whispers of an Intergenerational Law?", in *German Law Journal*, 25 (2024), pp. 1120-1148, spec. p. 1121.

[10] J. Setzer, C. Higham, "Global Trends in Climate Change Litigation: 2024 Snapshot", Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science, London, 2024, available at https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/06/Global-trends-in-climate-change-litigation-2024-snapshot.pdf,[Accessed: 23/05/2025]; A. Savaresi, J. Setzer, "Rights-based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers", in *Journal of Human Rights and the Environment*, 13 (2022), n. 1, pp. 7-34.

[11] E. Lees, E. Gjaldbæk-Svedrup, "Fuzzy Universality in Climate Change Litigation", in *Transnational Environmental Law*, 13 (2024), n. 3, pp. 502-521, spec. p. 502; see also E. Fisher, E. Scotford, E. Barritt, "The Legally Disruptive Nature of Climate Change", in *Modern Law Review,* 80 (2017), n. 2, pp. 173-201.

[12] "Maastricht Principles on the Human Rights of Future Generations", 2023 (Maastricht Principles). Retrieved from https://www.rightsoffuturegenerations.org/the-principles, [Accessed: 23/05/2025].

[13] United Nations, "Summit of the Future Outcome Documents: September 2024", 2024. Retrieved from https://www.un.org/sites/un2.un.org/files/sotf-pact_for_the_future_adopted.pdf, [Accessed: 23/05/2025].

[14] The request submitted to the ICJ expressly calls upon the Court to clarify the obligations of states as regards anthropogenic greenhouse gas emissions, and the legal consequences of the breach of such obligations, in respect of "present and future generations". Similarly, the request for an advisory opinion on the climate emergency and human rights submitted to the Inter-American Court of Human Rights refers questions regarding "the rights of children and the new generations in light of the climate emergency". See International Court of Justice, "Request for an Advisory Opinion: Obligations of States in respect of Climate Change", (2023). Retrieved from https://www.icj-cij.org/sites/default/files/case-related/187/187-20230412-app-01-00-en.pdf,[Accessed: 23/05/2025] and Inter-American Court of Human Rights, "Request for an Advisory Opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the

increasingly featured in both domestic and international climate litigation, in an attempt to counteract democracy's myopic tendencies[15].

This paper offers an empirical analysis of global climate litigation invoking the interests of future generations, with a focus on the legal arguments used to assert their rights and corresponding duties owed to future generations, and the definitions of future generations featuring in such litigation. Section 2 first contextualises the study by reference to domestic and international legal instruments incorporating intergenerational equity and the interests of future generations. The section then introduces the concept of future generations climate litigation, defining the scope of the study conducted and situating these lawsuits within legal discourse on intergenerational equity and the rights of future generations. The substantive legal issues raised in future generations climate litigation are analysed in Section 3. The section examines theoretical and practical obstacles hindering the recognition of future generations as rights-holders, before outlining the rights and duties-based claims brought on their behalf in climate litigation. Particular attention is given here to the public trust doctrine and environmental rights, respectively. Section 4 turns to conceptualisations of future generations depicted in climate litigation , including the pervasiveness of language evoking children and related parental duties. Section 5 concludes.

## 2. Future Generations Climate Litigation: Context, Scope, and Methodology

This paper examines how climate litigation engages with the rights and interests of future generations from a legal perspective[16]. We are thus concerned with the legal norms through which parties and courts (seek to) ground a recognition of the rights of, or obligations to, future generations in the context of climate change and how future generations, as the rights holders in question, are defined, if at all. Our study suggests that references to the rights of and duties to future generations is becoming increasingly prevalent, reflecting the proliferation of rights-based discourse in climate litigation more broadly[17]. Although the prevalence of future-oriented

Republic of Colombia and the Republic of Chile", (2023). Retrieved from https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf, [Accessed 20.05.25], p. 10.

[15] See K. Sulyok, "Transforming the Rule of Law in Environmental and Climate Litigation: Prohibiting the Arbitrary Treatment of Future Generations", in *Translational Environmental Law*, 13 (2024), n. 3, pp. 475-501; A. Daly, "Intergenerational Rights are Children's Rights: Upholding the Right to a Healthy Environment through the UNCRC", in *Netherlands Quarterly of Human Rights*, 41 (2023), n. 3, pp. 132-154.

[16] This paper builds upon an empirical study of similar scope conducted by the author for the purposes of a master's thesis, submitted in October 2023. N. Koistinen, "Looking Forward: An Analysis of Global Climate Litigation Invoking Intergenerational Equity and the Interests of Future Generations", University of Eastern Finland, 2023. https://erepo.uef.fi/items/ce4bf494-bbdb-4177-b40d-feda48d23f50, [Accessed: 23/05/2025].

[17] A. Savaresi, J. Setzer, "Rights-based Litigation in the Climate Emergency", cit.

argumentation in climate litigation is relatively novel, it is nonetheless underpinned by a long history of legal references to future generations.

## 2.1. Future Generations in the Law

The representation of future generations' interests is founded on the concept of intergenerational equity, which pursues the equitable distribution of benefits and burdens across time. This concept thus embodies a form of intertemporal distributive justice[18]. Intergenerational equity plays out across various dimensions, concerning benefit- and burden-sharing not only between the numerous living generations at any given time (e.g., between present children and adults), but also between current generations and unborn generations, extending decades or even centuries into the future[19]. The equitable treatment of future generations thus constitutes an important facet of intergenerational equity, although the concept as a whole is broader in nature.

References to future generations and intergenerational equity have long been embedded in normative instruments ranging from international environmental law to national constitutional law[20]. In the latter, such references range from symbolic rhetorical statements concerning 'posterity'[21] to more substantive provisions conferring rights on, or imposing duties in respect of, future generations[22]. The "eternal and inviolate" rights enumerated in Article 10 of the Japanese Constitution, for example, are explicitly conferred on both present and future generations. Other constitutions weave intergenerational concerns into environmental provisions, such as the South African Constitution, which enshrines the right of all "to have the environment protected, for the benefit of present and future generations" (Article 24(b)). The use of rights-based language in constitutions in respect of future generations has grown in prominence in recent decades[23].

In international law, references to future generations tend to be couched in less concrete language. The 1972 Stockholm Declaration, one of the first international environmental legal instruments to refer to future generations, uses comparatively emphatic language, describing environmental protection for present

[18] E. Brown Weiss, "The Planetary Trust: Conservation and Intergenerational Equity", in *Ecology Law Quarterly*, 11 (1984), n. 4, pp. 495-582, spec. p. 525; B.H. Weston, "Climate Change and Intergenerational Justice: Foundational Reflections", in *Vermont Journal of Environmental Law*, 9 (2008), n. 3, pp. 375-430, spec. p. 386.
[19] S. Humphreys, "Against Future Generations", cit., p. 1066.
[20] L. Slobodian, "Defending the Future: Intergenerational Equity in Climate Litigation", in *Georgetown Environmental Law Review*, 32 (2020), pp. 569-589, spec. p. 572.
[21] E.g., as in the preamble of the 1789 United States Constitution.
[22] R. Araújo, L. Koessler, "The Rise of the Constitutional Protection of Future Generations", in *Legal Priorities Project Working Paper*, 7 (2021).
[23] *Ibidem.*

and future generations as an "imperative goal" and "solemn responsibility"[24]. Later, such intergenerational references are often subsumed into sustainable development, owing to the influential definition provided by the 1987 Brundtland Report of "development that meets the needs of the present without compromising the ability of future generations to meet their own needs"[25]. Numerous allusions to intergenerational equity and future generations are also found in the provisions of the international climate change regime. Article 3 of the United Nations Framework Convention on Climate Change encourages states parties to "protect the climate system for the benefit of present and future generations of humankind, on the basis of equity"[26]. The first express mention of intergenerational equity came in the preamble of 2015 Paris Agreement, which expressly lists intergenerational equity amongst the rights and concepts to be taken into account by states parties when acting to address climate change[27]. Over time, intergenerational equity and other principles and concepts that share a concern with the equitable treatment of present and future – such as the common heritage of humankind, sustainable development, and the precautionary principle – have been intermingled to such an extent that authors have commented upon a "creeping intergenerationalization" in international law[28]. This speaks both to the growing prominence of future-oriented narratives in environmental protection, as well as to the lack of clarity surrounding intergenerational equity in terms of both legal form and implications[29].

Thus, a legal preoccupation with future generations and their interests can be traced through both domestic and international law, including in specifically environmental and climate-related contexts. This preoccupation has, in turn, found its way into climate litigation.

## 2.2. Defining Future Generations Climate Litigation

The global rise in climate litigation has been commented upon extensively in the literature, ranging from the role of children and youth as actors in climate

[24] Declaration of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/Rev.1, 3-5 (16 June 1972) (Stockholm Declaration).
[25] UNGA, Report of the World Commission on Environment and Development: Our Common Future, UN Doc A/42/427 (4 August 1987) (Brundtland Report).
[26] United Nations Framework Convention on Climate Change (adopted 9 May 1992, in force 21 March 1994) 1771 UNTS (1994) 107 (UNFCCC).
[27] Paris Agreement (adopted 12 December 2015, in force 4 November 2016) 3156 UNTS 79 (Paris Agreement).
[28] C. Redgwell, *Intergenerational Trusts and Environmental Protection* (Manchester University Press, Manchester, 1999), pp. 126-127; D. Betram, "For You Will (Still) Be Here Tomorrow: The Many Lives of Intergenerational Equity", in *Transnational Environmental Law*, 12 (2023), n. 1, pp. 121-149, spec. p. 3.
[29] Z. Hadjiargyrou, "A Conceptual and Practical Evaluation of Intergenerational Equity in International Environmental Law", in *International Community Law Review*, 18 (2016), n. 3-4, pp. 248-277, spec. p. 249.

litigation[30], to the growth in rights-based argumentation therein[31]. In parallel, a large body of scholarship has engaged with the question of the rights of future generations, including in the context of climate change. The theoretical, ethical, and legal challenges and implications associated with recognising future generations as rights-holders have been the subject of considerable scrutiny– indeed, debate on the topic has been lively[32]. However, little empirical research appears to have been conducted thus far into how these matters arise within climate litigation and what legal norms are relied upon in representing future generations in light of (or despite) these challenges. In considering how such matters are reflected in jurisprudence, existing literature has primarily focused on what are considered key cases. For instance, comparative case studies have traced the development of intergenerational equity and evolutions in the receptiveness of courts to legal arguments centred on future generations on the basis of select cases[33]. This paper adopts an empirical approach, contributing a broad study of global climate litigation invoking the interests of future generations with a view to identifying whether the growing prominence of rights-based discourse around future generations has led towards shared understandings of climate change-related intertemporal rights and duties in the various jurisdictions included. In this respect, the study complements existing research, such as that conducted by Sulyok, while diverging somewhat in terms of scope and focus[34].

Despite the existence of an extensive body of scholarship on future generations and their rights in the context of climate change and of databases dedicated to climate litigation, no cross-jurisdictional dataset specifically encompassing climate litigation that invokes the rights of future generations exists. A dataset was thus compiled based on semantic searches of the databases of the

[30] A. Daly, "Intergenerational Rights are Children's Rights", cit.; E. Donger, "Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization", in *Transnational Environmental Law*, 11 (2022), n. 2, pp. 263-289; E. D. Gibbons, "Climate Change, Children's Rights, and the Pursuit of Intergenerational Climate Justice", in *Health and Human Rights Journal*, 16 (2014), n. 1, pp. 19-31; L. Parker, J. Mestre, S. Jodoin, M. Wewerinke-Singh, "When the Kids Put Climate Change on Trial: Youth-focused Rights-based Climate Litigation Around the World", in *Journal of Human Rights and the Environment*, 13 (2022), n. 1, pp. 64-89.

[31] A. Savaresi, J. Setzer, "Rights-based Litigation in the Climate Emergency", cit.; P. de Vilchez, A. Savaresi, "The Right to a Healthy Environment and Climate Litigation: A Game Changer?", in *Yearbook of International Environmental Law*, (2023), pp. 1-18.

[32] B. Lewis, "Human Rights Duties Towards Future Generations and the Potential for Achieving Climate Justice", cit.; S. Humphreys, "Against Future Generations", cit.; P. Lawrence, "International Law Must Respond to the Reality of Future Generations", cit.; M. Wewerinke-Singh *et al*., "In Defence of Future Generations", cit.; S. Humphreys, "Taking Future Generations Seriously", cit.

[33] See K. Sulyok, "Transforming the Rule of Law in Environmental and Climate Litigation", cit.; D. Bertram, "For You Will (Still) Be Here Tomorrow: The Many Lives of Intergenerational Equity", in *Transnational Environmental Law*, 12 (2023), n. 1, pp. 121-149.

[34] K. Sulyok, "Transforming the Rule of Law in Environmental and Climate Litigation", cit.

Columbia Law School Sabin Center for Climate Change Law[35], and complemented by cases identified through literature review. Climate litigation is defined here as lawsuits brought before international or domestic judicial or quasi-judicial bodies and which raise questions of law or fact concerning climate change science, mitigation, or adaptation[36]. For inclusion in the dataset, cases must have been the subject of a judicial determination as of 31 March 2025 (including, e.g., decisions on admissibility), but might remain pending as to the merits or any appeals. The study is not jurisdictionally limited, providing an empirical overview of global climate litigation invoking the interests/rights of future generations. The dataset therefore includes only lawsuits in which future generations are referred to by either the applicants in their claims (where these were available) and/or by the court in its judgment. A preliminary semantic search was conducted using search terms including 'intergenerational', 'future generations', and 'children's rights'[37]. The latter term was included due to frequent allusions to children as (representatives of) future generations in litigation, as noted in the literature[38]. Search results were then refined based on whether 'future generations' or synonymous terms were used in listed case documents[39]. The case law comprising the dataset is therefore referred to in this paper, for the sake of conciseness, as 'future generations climate litigation'. Both judgments and claimants' submissions were consulted, where the latter were available on the Sabin Centre databases[40]. Notably, claimants' submissions were included within the scope of the material studied in order to capture cases in which claimants made reference to the rights of/duties to future generations without this future-oriented perspective necessarily being carried forward by the court, as such cases offer insights on judicial receptiveness to such argumentation, or lack thereof.

[35] https://climatecasechart.com/ [Accessed: 07/04/2025].
[36] This definition is adapted from A. Savaresi, J. Setzer, "Rights-based Litigation in the Climate Emergency", cit., p. 8.
[37] As aforementioned, this paper is premised on a previous study conducted by the author for the purposes of a master's thesis submitted at the University of Eastern Finland in October 2023. The dataset upon which the present research was conducted was therefore compiled from the dataset previously gathered for the purposes of a master's thesis submitted in October 2023. The latter dataset was updated and refined to amend the scope so as to include cases brought against private actors such as corporations, and to exclude cases that did not expressly refer to future generations (or synonymous terms).
[38] A. Daly, "Intergenerational Rights are Children's Rights", cit.; E.D. Gibbons, "Climate Change, Children's Rights, and the Pursuit of Intergenerational Climate Justice", in *Health and Human Rights Journal*, 16 (2014), n. 1, pp. 19-31; L. Parker *et al.*, "When the Kids Put Climate Change on Trial", cit.
[39] The semantic search was conducted in two stages because the Sabin Centre database search function does not extend to the contents of documents within the database, but only of the text within the webpage of each case. The synonymous terms to 'future generations' used were 'succeeding generations', 'generations to come', 'posterity', and 'descendants'.
[40] Documents submitted by respondents are not readily available on these databases and were not, therefore, included.

The dataset studied comprises a total of eighty-three cases[41] from across twenty-four states[42], in addition to one regional and two international bodies[43]. Importantly, the study is not restricted to youth-led climate cases and is therefore distinct from studies of child- and youth-led climate litigation[44]. Instead, it investigates a broader collection of climate lawsuits as they pertain to future generations – including lawsuits which engage with the interests/rights of future generations though brought by other actors and for other purposes than youth-led climate cases may be. Thus, cases such as *D.G. Khan Cement Co v Government of Punjab*[45] – in which a corporate entity sought judicial review of a prohibition on the establishment or expansion of cement plants within a specified zone, with the court engaging in extensive discussion of the impact of decision-making on future generations – and *PSB et al v Brazil*[46] – a case brought by political parties against state acts and omissions relating to the implementation of national climate and deforestation policies – are included alongside quintessential youth-led cases such as *Juliana v United States*[47] and *Neubauer v Germany*[48].

Importantly, our study does not claim to be exhaustive, not least because the Sabin Centre databases, although extensive in jurisdictional scope, are not themselves exhaustive either jurisdictionally or in terms of the litigation included therein. With these constraints in mind, this paper analyses the means through which future generations are represented in climate litigation and how these are received by courts, with a view to drawing general inferences on emerging trends and rights-based understandings of future generations in the context of future generations climate litigation.

[41] Note: cases joined for judgment are counted here as a single case. This applies to the eleven cases brought before the German Federal Constitutional Court with a single judgment handed down (*Cosima Rade et al v Baden-Württemberg* 1 BvR 1565/21 and joined cases) and a number of cases adjudicated on jointly by the Constitutional Court of South Korea (Case no. 2020HunMa389 *Do-Hyun Kim et al v South Korea* and joined cases).

[42] Cases brought before state-level courts in federal republics are counted here under the national jurisdiction e.g., US cases brought before state courts are counted as all being brought in the United States.

[43] The regional and international bodies being the European Court of Human Rights, the United Nations Committee on Human Rights, and the United Nations Committee on the Rights of the Child.

[44] For examples of youth- and child-led litigation literature, see A. Daly, "Intergenerational Rights are Children's Rights", cit.; E. Donger, "Children and Youth in Strategic Climate Litigation", cit., pp. 263-289; E.D. Gibbons, "Climate Change, Children's Rights, and the Pursuit of Intergenerational Climate Justice", in *Health and Human Rights Journal*, 16 (2014), n. 1, pp. 19-31; L. Parker *et al*., "When the Kids Put Climate Change on Trial", cit.

[45] *D.G. Khan Cement Co*.

[46] *PSB et al v Brazil* [2020] Supreme Court ADPF 760 (*PSB*).

[47] *Juliana v United States* [2020] 947 F.3d 1159 (*Juliana*).

[48] *Neubauer et al v Germany*, Bundesverfassungsgericht [BVerFG] [Federal Constitutional Court], 1 BvR 2656/18 (2021) (*Neubauer*).

## 3. Substantive Legal Norms for the Protection of Future Generations

The analysis of future generations climate litigation conducted demonstrates that the substantive legal norms relied upon by claimants and courts in asserting the interests of future generations are diverse, ranging from the common law public trust doctrine to constitutionally enshrined rights. These claims have received varying responses. Before delving into the findings of this analysis, however, it is worth making explicit the theoretical and practical challenges associated with the recognition of the rights of future generations and how these are reflected in the litigation in question.

### 3.1. Theoretical and Practical Obstacles

Perhaps the most infamous theoretical obstacle to the recognition future generations' rights is the non-identity problem (NIP), described as a "thorny conceptual [obstacle]"[49]. Originating in the field of ethics, the NIP questions whether duties can conceivably be owed to – and, by extension, rights held by – future persons. The theory here starts from the premise that the existence of specific future persons is impacted by every act and omission of current persons – altering whether, by whom, and when future persons might be conceived. Under this view, future persons enjoy an "unavoidably flawed" existence[50]. In other words, actions degrading the quality of life of these future individuals cannot be deemed morally wrong, as any pre-emptive remedial actions would make different people exist by altering the conditions of conception[51]. To concretise the issue in terms of climate change, the question posed is whether a duty to reduce greenhouse gas emissions can be said to be owed to future generations at all, given that those specific future persons would not exist but for policies permitting emissions of that magnitude. Following the NIP – or the "paradox of future individuals"[52] – to its logical conclusion suggests no such duty exists[53].

[49] D. Bertram, "For You Will (Still) Be Here Tomorrow", cit., p. 145.
[50] D. Parfit, *Reasons and Persons*, Clarendon Press, Oxford, 1987, p. 358.
[51] A. D'Amato, E. Brown Weiss, L. Gündling, "Agora: What Obligation Does Our Generation Owe to the Next? An Approach to Global Environmental Responsibility", in *American Journal of International Law*, 84 (1990), n. 1, pp. 190-212, spec. p. 191; D. Parfit, *Reasons and Persons*, Clarendon Press, Oxford, 1987, pp. 358, 363.
[52] G.S. Kavka, "The Paradox of Future Individuals", in *Philosophy and Public Affairs*, 11 (1982), n. 2, pp. 93-112.
[53] P. Sanklecha, "Should There Be Future People? A Fundamental Question for Climate Change and Intergenerational Justice", in *WIREs Climate Change*, 8 (2017), n. 3, pp. 1-11; J. Nedevska, "The Non-Identity Problem in Climate Ethics: A Restatement", in *Intergenerational Justice Review*, 2 (2019), pp. 63-68; B. Lewis, "Human Rights Duties Towards Future Generations and the Potential for Achieving Climate Justice", cit., p. 208.

The NIP has been subject to criticism, not least because of its over-emphasis of specific factors (in this context, climate policy) as determinant of the conditions of conception and, by extension, its unjustified ignorance of a myriad of other relevant factors[54]. It is nonetheless pervasive in discussions of the ethical and legal duties owed to future generations and may therefore have practical implications for the recognition of rights and duties in this context[55]. This is seen, in particular, in the obstacles encountered when attempting to apply individualised rights to the indistinguishable and non-specific collective of future persons. The NIP reflects narrow person-affecting views of moral duties, the most common iterations of which are rights- and harm-based approaches. These, in turn, find legal expression in the human rights framework, which is largely premised on the identification of specific rights-holders and particularised harms[56]. The foundational objective of human rights law is, after all, the protection of the individual against the power of the State and majority[57]. From the perspective of the long-term protection of the atmosphere for the benefit of future generations, 'traditional' human rights betray a rather narrow individualistic focus, in tension with the collective interests sought to be protected[58].

This tension manifests itself in (future generations) climate litigation through the preliminary hurdle of locus standi, often requiring applicants to demonstrate particularised harm or some variant thereof. Concerns have long been raised over the appropriateness of litigation as a tool for representing future interests precisely because of the obstacle presented by standing rules[59]. Such requirements proved fatal to a number of the cases in our dataset, rendering the claims inadmissible for lack of standing[60]. Other authors have identified a "worrisome trend" in the

[54] J. Tremmel, M. Mikulewicz, K. Helwig, "Fact-insensitive Thought Experiments in Climate Ethics exemplified by Parfit's Non-identity Problem", in J. Tahseen Jafry (ed.), *The Routledge Handbook of Climate Justice*, Routledge, London, 2019, pp. 42-56, spec. p. 42.

[55] J. Tremmel, M. Mikulewicz, K. Helwig, "Fact-insensitive Thought Experiments in Climate Ethics exemplified by Parfit's Non-identity Problem", in J. Tahseen Jafry (ed.), *The Routledge Handbook of Climate Justice*, Routledge, London, 2019, pp. 42-56, spec. pp. 54-55.

[56] B. Lewis, "Human Rights Duties Towards Future Generations and the Potential for Achieving Climate Justice", cit., p. 215.

[57] J.H. Albers, "Human Rights and Climate Change", in *Security and Human Rights*, 28 (2017), n. 1, pp. 113-144, spec. p. 120.

[58] On the limitations of human rights for the protection of collective interests in a healthy environment and stable climate system see J.H. Albers, "Human Rights and Climate Change", cit.; R. Pavoni, "Public Interest Environmental Litigation and the European Court of Human Rights: No Love at First Sight" in F. Lenzerini, A.F. Vrdoljak (eds.), *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature*, Hart Publishing, Oxford, 2014, pp. 331-359; F. Francioni, "International Human Rights in an Environmental Horizon", in *European Journal of International Law*, 21 (2010), n. 1, pp. 41-56.

[59] J.C. Wood, "Intergenerational Equity and Climate Change", in *Georgetown International Environmental Law Review*, 8 (1996), n. 2, pp. 293-332, spec. p. 304.

[60] Namely, in *Animal Legal Defense Fund v United States*, United States District Court for the District of Oregon, Case No. 6:18-cv-01860-MC (*Animal Legal Defense Fund*), Case C- 565/19 P *Armando Ferrão Carvalho v Parliament and Council* (*Carvalho*), *Clean Air Council v United*

preliminary dismissal of youth-led climate cases based on a lack of locus standi or justiciability[61]. An approach to legal protection based on personal injury thus arguably leaves limited scope for integrating the rights of future generations[62]. As noted by Cheong, "meaningful protection of future generations may require reconceptualizing how we understand positive rights themselves"[63].

Certainly, an evolution in the interpretation of human rights has already begun in response to global environmental crises[64], but difficulties remain in bending such claims to fit the existing mould of human rights adjudication. These challenges have been faced head on by courts in climate litigation. Courts have expressly recognised the need for legal evolution in response to the climate crisis, while simultaneously acknowledging the restrained role of the judiciary in this regard. In *KlimaSeniorinnen*, the European Court of Human Rights conceded that a "special approach to victim status, and its delimitation" is required to respond to the specificities of climate change, "the consequences of which are not limited to certain identifiable individuals or groups but affect the population more widely"[65]. The Court nonetheless highlighted the importance of ensuring that the effective protection of fundamental rights under the European Convention on Human Rights (ECHR) is balanced against the need to uphold the Convention's prohibition of *actio popularis*[66], and expressly excluded future generations from the Convention's scope of application[67]. These same tensions have been explicitly recognised by numerous other courts. The Supreme Court of Alaska has perhaps been most emphatic in its statement on the matter, averring that "denying injured persons standing on grounds that others are also injured – effectively preventing judicial redress for the most widespread injury solely because it is widespread – is perverse

*States*, United States District Court for the Eastern District of Pennsylvania, Civ. No. 17-4977 (*Clean Air Co*), *Harvard Climate Justice Coalition and Others v President and Fellows of Harvard College and Another* [2016] No. 15-P-905, Massachusetts Appeals Court, (*Harvard Climate Justice Coalition*)*, Layla H v Commonwealth of Virginia* [2024] Court of Appeals of Virginia, No. 1639-22-2 (*Layla H*), *Plan B Earth and Others v Prime Minister and Others* [2021] EWHC 3469 (Admin)*,* and *PUSH Sverige, Fältbiologerna and Others v Sweden* [2018] No. T 7261-17, Stockholm Court of Appeal.

[61] L. Parker *et al*., "When the Kids Put Climate Change on Trial", cit., p. 64.

[62] P. Dupuy, J.E. Viñualez, *International Environmental Law*, 2nd ed., Cambridge University Press, New York, 2018, pp. 386, 390-391.

[63] B.C. Cheong, "Bending the Arc of Law: Positivism Meets Climate Change's Intergenerational Challenge", in *Transnational Environmental Law*, (2025), pp. 1-27, spec. p. 11.

[64] P. de Vilchez, A. Savaresi, "The Right to a Healthy Environment and Climate Litigation", cit., p. 3; A. Daly, "Climate Competence: Youth Climate Activism and Its Impact on International Human Rights Law", in *Human Rights Law Review*, 22 (2022), pp. 1-24, p. 21; E. Cima, "The Right to a Healthy Environment: Reconceptualising Human Rights in the Face of Climate Change", in *Review of European, Comparative and International Environmental Law*, 31 (2022), pp. 38-49, spec. p. 46.

[65] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* [2024] Application n. 53600/20, European Court of Human Rights, 9 April 2024 (*KlimaSeniorinnen*), § 478.

[66] *KlimaSeniorinnen*, § 485.

[67] The Court stated that ECHR rights are enjoyed only by "those individuals currently alive who, at a given time, fall within the jurisdiction of a given Contracting Party." *KlimaSeniorinnen*, § 420.

public policy"[68]. Nonetheless, the Court held reservations around the appropriateness of judicial intervention in the absence of advance policy determinations by the legislature and executive[69]. The case was therefore dismissed as non-justiciable on separation of powers grounds.

Although these and other future generations climate lawsuits clearly indicate judicial awareness of the need for evolving legal standards and interpretations, courts in many instances find themselves constrained by procedural and substantive norms which evolved in a context far removed from the factual and legal complexities of climate change. The analysis of future generations climate litigation conducted confirms Cheong's finding that courts largely "remain anchored to core legal principles and are wary of interpretations that could lead to unforeseeable or overly expansive applications of human rights law"[70]. With this in mind, our inquiry now turns to a consideration of the claims forwarded in future generations climate litigation.

### 3.2. Claims for Future Generations: Typologies

Based on the future generations climate litigation examined, five main typologies of claims were identified, which can be further subdivided into duties- and rights-based framings, respectively. The former includes claims rooted in the public trust doctrine (PTD), involving fiduciary-type duties owed by public authorities to their citizens, as well as claims invoking a duty of care owed by respondents (primarily states), for instance, through the state-created danger doctrine. The PTD was the most prevalent duty-based framing of the interests of future generations due to its invocation in a series of atmospheric trust cases brought in the United States, supported by the non-governmental organisation Our Children's Trust.

The second set of typologies comprise rights-based framings. The "rights turn" in climate litigation[71] is therefore clearly echoed in future generations climate litigation: in thirty of the cases studied, claimants invoke the rights of future generations, while the courts use the language of rights in respect of future generations in twenty-one cases. For instance, the Colombian Supreme Court applied a progressive rights-based interpretation of intergenerational equity in *Demanda Generaciones Futuras v Minambiente*, expressly recognising the rights

[68] *Kanuk and Others v State of Alaska* [2014] No. 6953, Supreme Court of the State of Alaska (*Kanuk*) p. 10; See further *Funk v Wolf* [2015] No. 467 M.D. 2015, Pennsylvania Commonwealth Court (confirmed by *Funk v Wolf* [2016] No. 88 MAP, Supreme Court of Pennsylvania) (*Funk v Wolf*), p. 23; *Held and Others v State of Montana and Others* [2024] DA 23-0575 2024 MT 312, Supreme Court of the State of Montana (*Held*), § 38.
[69] *Kanuk*, pp. 16-20.
[70] B.C. Cheong, "Bending the Arc of Law", cit., p. 11.
[71] J. Peel, H.M. Osofsky, "A Rights Turn in Climate Change Litigation?", in *Transnational Environmental Law*, 7 (2018), n. 1, pp. 37-67; A. Savaresi, J. Setzer, "Rights-based Litigation in the Climate Emergency", cit.

of unborn future generations[72]. Similarly, in *Callejas v Law No. 406*, the Panamanian Supreme Court emphatically concluded that in weighing the conflicting constitutional rights at play in the case, the rights to life, health, and environment of future generations outweighed any other right of an economic nature, including investment rights[73]. In the pivotal case of *Neubauer*, a slightly more nuanced approach was adopted. Here, the German Federal Constitutional Court found that the backloading of emissions reductions produced an "advance interference-like effect" on fundamental rights, thereby disproportionately impinging on rights into the future in violation of the State's constitutional obligations[74]. In this connection, the Court affirmed that although unborn future generations do not enjoy subjective rights in the same way as present persons, the State nonetheless bears an objective duty in their respect[75]. These cases, though by no means the only ones to do so, stand out for their rather emphatic receptiveness to the recognition of the rights of future generations, by contrast to many other cases in the dataset.

The rights to life, health, bodily integrity, and private and family life are particularly prevalent in the litigation examined, reflecting broader trends in rights-based climate litigation. Due process rights are also frequently invoked by claimants, particularly the principle of non-discrimination and the right to equal treatment. In the context of future generations climate litigation, these claims are framed in terms of discrimination on the basis of age or birth cohort and are notably brought by youth and children as (in some cases, representatives of) future generations[76]. In jurisdictions in which the codification of environmental rights is yet to occur, claimants also frequently rely on due process rights or other enumerated rights, such as the rights to life, health, or bodily integrity, as a basis

[72] *Demanda Generaciones Futuras v Minambiente* [2018] STC4360-2018, Supreme Court of Colombia, (*Demanda Generaciones Futuras*) pp. 18, 21.
[73] *Callejas v Law No. 406* [2023] Supreme Court of Panama, (*Callejas*), p. 233.
[74] *Neubauer*, § 183-195.
[75] *Neubauer*, § 146.
[76] See *Aji P v Washington*, *Do-Hyun Kim et al v South Korea* [2024] Case No. 2020HunMa389 and joined cases, Constitutional Court of Korea (*Do-Hyun Kim*), *Ecodefense and Others v Russia* [2023], Supreme Court of the Russian Federation, *Environnement Jeunesse v Procureur General du Canada* [2021] QCCA 1871, Quebec Court of Appeal, *Genesis B et al v United States Environmental Protection Agency et al* [2025] Case No. CV 23-10345-MWF (AGRx) , United States District Court for the Central District of California (*Genesis B*), *Greenpeace Mexico v Ministry of Energy and Others (on the National Electric System policies)* [2020] 104/2020, District Court (*Greenpeace Mexico*), *Herrera Carrion et al v Ministry of the Environment et al* [2021] Case No. 21201202000170, Provincial Court of Sucumbíos, *Lho'imggin et al v Her Majesty the Queen* [2020] FC 1059, Federal Court of Ontario (*Lho'imggin*), *Mathur et al v Her Majesty the Queen in Right of Ontario* [2023] ONSC 2316, Superior Court of Justice of Ontario, *Sagoonick v Alaska II* [2025] Case No. 3AN-24-06508CI, Superior Court for the State of Alaska, *Jaci-Paraná Extractive Reserve and Guajará-Mirim State Park* [2021] State ADI 0804739-62.2021.8.22.0000, Rondônia State Court (*Jaci-Paraná Extractive Reserve*).

for the recognition of an unenumerated right to a healthy environment and/or stable climate system.

Secondly, claimants in future generations climate litigation appeal to social and economic rights ranging from subsistence rights, such as the rights to water and housing, to cultural rights. The latter are commonly invoked by Indigenous persons and comprise an inherent intertemporal dimension, concerning as they do the conveying of tangible and intangible cultural practices, traditions, and heritage to one's descendants[77]. The interest of future generations in receiving this cultural heritage is thus embedded within the cultural rights invoked by present persons.

Children's rights also feature in future generations climate litigation, although to a much lesser extent than the other categories of rights alluded to here[78]. Indeed, the United Nations Convention on the Rights of the Child (UNCRC) features in only five of the cases analysed[79], with a further five cases referring to national constitutional provisions on children's rights[80] and one case invoking such a provision in the EU Charter of Fundamental Rights[81]. In *Sacchi v Argentina et al*, for example, the claimants closely intertwine arguments based on the UNCRC and the rights of future generations, arguing that delayed decarbonisation disproportionately burdens children and future generations in violation of the principles of intergenerational equity and the best interests of the child[82]. The best interests principle is likewise invoked in *Africa Climate Alliance v Minister of Mineral Resources and Energy* on behalf of "present and future generations of children"[83].

[77] See, for instance, *Daniel Billy and Others v Australia*, and *Smith v Attorney General*.
[78] See also E. Donger, "Children and Youth in Strategic Climate Litigation", cit., pp. 263-289, spec. p. 272.
[79] Namely, *Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 104/2019* (2021) UN Committee on the Rights of the Child, CRC/C/88/D/104/2019 to CRC/C/88/D/108/2019 (*Sacchi*), *VZW Klimaatzaak v Belgium* [2021] Tribunal de première instance francophone de Bruxelles, Section Civile 2015/4585/A, *Waratah Coal Pty Ltd v Youth Verdict Ltd and Others (No 6)* [2022] QLC 21, Land Court of Queensland, *Greenpeace Nordic and Nature & Youth v. Energy Ministry (The North Sea Fields Case)* [2024] LB-2024-36810-2, Bogarting Court of Appeal, and *La Rose v Her Majesty the Queen* [2023] FCA 241, Federal Court of Appeal of Canada (*La Rose*).
[80] Namely, *Children of Austria v Austria* [2023] 123/2023-12, Constitutional Court of Austria, *PSB, Africa Climate Alliance et al v Minister of Mineral Resources and Energy et al* [2024] Case No. 56907/21, High Court of South Africa (*Africa Climate Alliance*), *Callejas v Law No. 406* [2023] Supreme Court of Panama, *Clara Leonel Ramos and Bruno de Almeida de Lima v State of São Paulo (Families for the Climate and IncentivAuto Program)* [2023] PAP No. 1047315-47.2020.8.26.0053, São Paulo State Court.
[81] *Carvalho*.
[82] *Sacchi*, complaint, § 28.
[83] *Africa Climate Alliance*, complaint, §§ 340-346, 416.

Finally, the growing prominence of environmental rights in climate litigation[84] is reflected in future generations climate litigation through the invocation of the right to a healthy environment. Numerous cases appeal to the right or seek its recognition and application to the atmosphere, for the benefit of present and future generations. In *Funk v Wolf*, for instance, the applicants successfully invoked constitutional environmental rights provisions in asserting standing. Notwithstanding the dismissal of the case on other grounds[85], the Court in that case notably recognised that the "zone of interest protected by the ERA [Environmental Rights Amendment] is the rights of all the people of the Commonwealth [of Pennsylvania], *including future generations*"[86].

The typologies identified are not mutually exclusive, in that they are not brought as standalone claims but rather interact with each other within the lawsuits. Certainly, duty and rights-based formulations are inherently complementary, with duties of care often arising as corollaries of rights in cases relying on fundamental rights and vice versa. Unsurprisingly, various typologies of rights and duties are relied upon within individual cases as separate and supporting grounds. In *Children of Austria*, for instance, the claimants invoked the obligation to take the best interests of children into account coupled with the right of equal treatment, arguing that "younger generations will bear the brunt of the [greenhouse gas] reduction burden associated with addressing the climate crisis" and that this constitutes unjustified unequal treatment[87]. The complementarity of children's rights arguments and claims of age-based discrimination seems intuitive, particularly where claims are framed in terms of equitable sharing of emissions reductions burdens. Likewise, environmental rights are regularly drawn in to bolster arguments based on the public trust doctrine in atmospheric trust litigation. In *Barhaugh v Montana*, for instance, state constitutional provisions enshrining the right to a healthy environment were relied upon by the claimants as the basis for seeking the recognition of an atmospheric public trust[88]. The potential interconnectedness of these various typologies is perhaps best summed up in the following quote from the claimants' petition in *Genesis B*, seeking the recognition of the right to a stable climate system: "[c]hildren cannot exercise their equal rights to life without a stable climate system"[89]. Here, the claimants simultaneously invoke the right to life and the dependence of this right on effective protection of the atmosphere, while alluding to the specific (vulnerable) position of children and the right to equal treatment.

[84] A. Savaresi, J. Setzer, "Rights-based Litigation in the Climate Emergency", cit.; P. de Vilchez, A. Savaresi, "The Right to a Healthy Environment and Climate Litigation", cit.
[85] The case was deemed inadmissible due to a lack of redressability.
[86] *Funk v Wolf*, p. 29 (emphasis in original)
[87] *Children of Austria*, application, pp. 33, 38.
[88] *Barhaugh v Montana* [2011] No. OP 11-0258, Supreme Court of the State of Montana (*Barhaugh v Montana*), petition, pp. 1, 3, 11-12.
[89] *Genesis B*, amended application, § 392.

In the body of case law analysed, intergenerational equity and the rights of future generations most often featured within the legal arguments and/or narrative framing put forward by claimants. By contrast, the courts have frequently preferred to bypass closer engagement with this discourse; in eighteen of the cases studied, allusions to future generations are entirely absent from judgments despite featuring in claimants' submissions. In a further fourteen cases, courts make only cursory references to future generations, using the terminology solely in summarising claimants' arguments without further engaging in this future-oriented discourse or drawing out its legal implications. Whether this is due to judicial reticence to embrace broader temporal conceptualisations of existing rights and duties, or due to a prevailing perception amongst judges that references to the rights of future generations are not serious legal contentions, remains open to question. This passive, somewhat evasive, and even implicitly dismissive approach to future generations discourse suggests that claims rooted in intergenerational equity have not been widely regarded as robust legal arguments meriting express discussion. Albeit greater engagement with this discourse is evident in certain cases, some have suggested that this judicial reticence may stem from the morally loaded nature of such arguments, which comes into tension with the separation of law and morality under positivist legal tradition[90]. In any case, our analysis confirms that clarity on whether future generations are indeed rights-holders, how future generations should be defined, and the legal impact of these matters, remains pending in many jurisdictions. In this connection, no universal understanding of future generations and their rights emerges from future generations climate litigation.

Although it is not feasible, in a global study of this nature, to engage in depth with the particularities of the various legal systems in which future generations climate litigation has been brought, the analysis conducted indicates that receptiveness to the rights of future generations varies across jurisdictions. Courts in the Global South appear to exhibit greater openness towards future-oriented legal reasoning, with judgments issued in Brazil, Colombia, India, Nepal, and South Africa, inter alia, recognising rights and/or duties owed to future generations and proactively engaging with such arguments. In *ABRAGET v Rio de Janeiro*, for instance, the Court ostensibly raises the question of intergenerational equity independently of any such invocation by the claimants, referring to federal and state constitutional provisions mandating the protection of the environment for the benefit of present and future generations[91].

Conversely, courts in the Global North appear somewhat more reticent towards future-oriented argumentation, tending to engage less emphatically with this discourse. Some cases and jurisdictions are of course exceptions, with the likes

[90] B.C. Cheong, "Bending the Arc of Law", cit.

[91] Based on the absence of any such references in the application filed by the claimant before the court. It is, of course, possible that these provisions were referred to by parties in oral proceedings. *ABRAGET v Rio de Janeiro* [2015] Case No. 0282326- 74.2013.8.19.0001, Rio de Janeiro State Court, pp. 483, 491.

of *Neubauer* providing a conspicuous example of this. In Australia, too, the judiciary has proactively raised intergenerational equity – and, by extension, the interests of future generations – as a relevant legal consideration in planning decisions and the conduct of environmental impact assessments (EIA). In *Cadzow Enterprises Pty Ltd v Port Phillip County Council*, for example, the issue of climate-induced sea level rise and intergenerational equity was raised by the Court proprio motu, directing amendment of the construction permit at issue to incorporate flood-risk mitigation measures[92]. The consistent recognition of the legal relevance of future interests by the Australian courts in the lawsuits examined may be attributable to the legal norms in place in that jurisdiction. The principle of ecologically sustainable development (ESD) is integrated as a key objective in planning and/or environmental legislation in many of the Australian states featuring future generations climate litigation, as well as being codified at the national level[93]. Intergenerational equity is, in turn, explicitly recognised under federal Australian legislation as a constitutive principle of ecologically sustainable development[94]. A consideration of intertemporal benefit- and burden-sharing is therefore mandated by law when evaluating planning decisions and conducting EIA. In this way, taking the interests of future generations into account is an integral part of the planning and EIA processes in Australia. This is illustrated in *KEPCO Bylong Australia v Independent Planning Commission and Bylong Valley Protection Alliance*[95]. Here, the respondent public authorities had refused the claimant's development consent application, inter alia, on the ground that "the distribution of costs and benefits over and beyond the life of the mine is temporally inequitable in that the economic benefits accrue to the current generation and the environmental, agricultural and heritage costs are borne by future generations" and that the project is "not in the public interest because it is contrary to the principles of ESD [environmentally sustainable development] – namely intergenerational equity"[96].

This kind of proactive future-oriented reasoning is not, however, commonplace in other Global North jurisdictions. In this respect, it is worth noting that when categorised by jurisdiction, future generations climate litigation hailing from the Global North is dominated by cases brought in the United States, in line

[92] *Cadzow Enterprises Pty Ltd v Port Phillip County Council* [2010] VCAT 634, Victorian Civil and Administrative Tribunal (*Cadzow Enterprises*), § 35.
[93] Section 1.3(b), Environmental Planning and Assessment Act 1979 No 203 (New South Wales). Retrieved from https://legislation.nsw.gov.au/view/html/inforce/current/act-1979-203, [Accessed 04/05/2025]; sections 3-4, Environmental Protection Act 1994 (Queensland). Retrieved from https://www.legislation.qld.gov.au/view/html/inforce/current/act-1994-062 [Accessed 04/05/2025].
[94] Section 3A, Environment Protection and Biodiversity Conservation Act 1999. Retrieved from https://www.legislation.gov.au/C2004A00485/latest/text [Accessed 04/05/2025]
[95] *KEPCO Bylong Australia v Independent Planning Commission and Bylong Valley Protection Alliance Inc* [2021] NSWCA 216, New South Wales Supreme Court (*KEPCO Bylong*).
[96] *KEPCO Bylong*, § 18-20; see also *Haughton v Minister for Planning and Others* [2011] NSWLEC 217, New South Wales Land and Environment Court.

with broader trends in climate litigation[97] : the United States accounts for more than one third of the cases in the dataset. Despite the high level of activity in that jurisdiction relative to others represented in the dataset, US courts have largely declined to engage with arguments seeking to represent the interests of future generations[98]. This lack of engagement, whether intentional or inadvertent, means that, for the most part, the term 'future generations' lacks (legal) definition and the legal implications of intergenerational equity in respect of future generations remain unclear and inconsistent across jurisdictions. Further jurisdiction-specific research into future generations climate litigation is necessary to account for the varying levels of openness and engagement with such argumentation, bearing in mind the diverging legal cultures, systems, and norms influencing judicial reasoning, as well as the broader social and cultural norms and values underpinning these.

In any case, our focus for now remains upon the broad trends in future generations climate litigation globally. We therefore turn to consider two of the aforementioned typologies of claims in greater detail: the public trust doctrine and environmental rights. These claim types are some of the most prevalent in the dataset and offer specific advantages in protecting future generations – which may indeed explain their prevalence. The following sections explore the presentation of each of these claim-types by claimants and their potential as vehicles for the protection of the interests of future generations, in addition to their receipt by courts.

### 3.2.1. The Atmospheric Public Trust

The language of trusts has long been associated with intergenerational equity. This is likely due to the potentially long-term implications of a trust relationship[99], rendering it a useful mechanism for ensuring the enduring management of natural resources in an equitable manner. As set out above, the classic conceptualisation of intergenerational equity centres on the equitable distribution of burdens and benefits between generations. Edith Brown Weiss' quintessential definition of

[97] J. Setzer, C. Higham, "Global Trends in Climate Change Litigation", cit.

[98] Although the large number of cases in the United States may be attributable, at least in part, to the litigious culture prevailing there, as well as the influence of actors like Our Children's Trust, it should also be noted here that questions have been raised regarding the possible overrepresentation of US and other Global North cases in climate litigation datasets, due to the definitions of climate litigation applied excluding the varieties of climate litigation seen in Global South jurisdictions and thereby underrepresenting the latter. See M.A. Tigre, N. Urzola, A. Goodman, "Climate Litigation in Latin America: Is the Region Quietly Leading a Revolution?", in *Journal of Human Rights and the Environment*, 14 (2023), n. 1, pp. 67-93; K. Bouwer, U. Etemire, T. Field, A.O. Jegede (eds.), *Climate Litigation and Justice in Africa*, Bristol University Press, Bristol, 2024.

[99] Indeed, the common law system of trusts permits charitable trusts to extend into perpetuity, see: P.H. Pettit, *Equity and the Law of Trusts*, 12th ed., Oxford University Press, Oxford, 2012, pp. 255-256.

intergenerational equity is premised on the existence of a 'planetary trust' which "assumes that each generation receives a natural and cultural legacy in trust from previous generations and holds it in trust for future generations"[100]. Accordingly, each generation and its individual members are regarded as both rights-holders and duty-bearers – i.e., beneficiaries and trustees – within the planetary trust. Each is deemed to be entitled, as beneficiaries of the trust, to inherit natural and cultural goods from their predecessors in equal or better condition than the latter received them in, while simultaneously owing these very same duties, as trustees, to succeeding generations.

The same notion of stewardship underpins the public trust doctrine, which comprises an associated through narrower trust. Unlike the planetary trust, the PTD designates public authorities as trustees rather than the public at large and thus acts to limit the exercise of power by the former in the management of (certain) natural resources[101]. The connection between public and planetary trusts is illustrated in *Barhaugh v Montana*. Here, the plaintiffs referred to generational trusteeship duties alongside those of the State under the PTD. These arguments were grounded in the Montana Environmental Policy Act, which charges the State with a "continuing responsibility" to use all means practicable to fulfil "the *responsibilities of each generation* as trustee of the environment for succeeding generations"[102]. The plaintiffs further invoked constitutional provisions imposing a duty not only on the state, but also on individuals, to "maintain and improve a clean and healthful environment in Montana for present and future generations"[103] and, in addition, guaranteeing the right to a clean and healthful environment amongst other professed inalienable rights[104]. These arguments, though unsuccessful due to separation of powers and procedural issues[105], nonetheless point to a broader understanding of trusteeship duties extending from the public doctrine, approximating the dual individual and generational duties and rights encapsulated by the planetary trust.

[100] L.B. Sohn, E. Brown Weiss, "Intergenerational Equity in International Law", in *American Society of International Law Proceedings*, 81 (1987), pp. 126-133, spec. p. 127; See also E. Brown Weiss, "The Planetary Trust: Conservation and Intergenerational Equity", in *Ecology Law Quarterly*, 11 (1984), n. 4, pp. 495-582, spec. p. 504.

[101] M.C. Blumm, M.C. Wood, "No Ordinary Lawsuit: Climate Change, Due Process, and the Public Trust Doctrine", in *American University Law Review*, 67 (2017), n. 1, pp. 1-88, spec. p. 43; L. Slobodian, "Defending the Future", cit., p. 582.

[102] Montana Environmental Policy Act, Mont. Code Ann. §75-1-103(2) (emphasis added).

[103] *Barhaugh v Montana*, petition, p. 11; Article IX, Section 1(1), Montana Constitution.

[104] Article II, Section 3, Montana Constitution: "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities."

[105] The Supreme Court of Montana determined that the plaintiffs had failed to demonstrate fulfilment of the prerequisites for the commencement of original proceedings before that court, including the establishment of urgency and emergency factors rendering the normal appeal process inadequate. *Barhaugh v Montana*, pp. 1-2.

Given the longstanding framing of intergenerational equity as a trust relationship, it is no surprise that trust-based arguments have been invoked numerously in future generations climate litigation, featuring in almost one-third of the cases examined: twenty-six cases appeal to the public trust doctrine, while a further two cases use the language of trusts and stewardship[106]. The conceptualisation and concretisation of future-oriented duties in the form of a trust relationship is exemplified in the early example of *Oposa v Factoran*, regarded as a pioneering case on the rights of future generations. In that case, the claimants framed the defendants' duties in terms of a trust relationship, arguing that by allowing the deforestation of Philippine rainforests, the defendant unlawfully impaired the natural resources held on trust for the benefit of the plaintiff minors and future generations[107]. The Court in turn echoed this framing, referring to legislation predicated on the "responsibilities of each generation as trustee and guardian of the environment for succeeding generations"[108].

Invocation of the public trust doctrine has been most prevalent in the United States[109], though it has also featured in other jurisdictions – notably those influenced by common law – such as Canada and India[110]. The prevalence of the doctrine and its invocation have not, however, translated to litigatory success, with Wilson J's concurring opinion in *In re Hawai'i Light Co* offering a rare example of the recognition of an atmospheric public trust[111].

Having originated in Roman civil law and the English common law, the public trust doctrine has since been codified, and even constitutionalised, in some jurisdictions[112]. Be that as it may, codification has not necessarily bolstered the doctrine's success as a tool in (future generations) climate litigation. In fact, in *Sanders-Reed v Martinez*, codification was deemed fatal to claims grounded on the common law public trust. Here, the existence of constitutional provisions codifying the doctrine combined with legislation regulating air quality were deemed to limit

[106] Namely, *D. G. Khan Cement Co* and *Oposa v Factoran* [1993] G.R. No. 101083, Supreme Court of the Philippines (*Oposa*).
[107] *Oposa*, p. 4.
[108] *Oposa*, p. 11.
[109] A series of cases have been (and continue to be) brought in the United States before both state and federal courts supported by Our Children's Trust, which rely on the public trust doctrine and seek to expand its application to the atmosphere. See J. Lewis, "In Atmosphere We Trust: Atmospheric Trust Litigation and the Environmental Advocate's Toolkit", in *Colorado Natural Resources, Energy & Environmental Law Review*, 30 (2019) n. 2, pp. 361-386; and A. Rodgers, J. Olson, E. Laschever, "Climate Justice and the Public Trust", in *Natural Resources & Environment*, 36 (2022), n. 3, pp. 13-17.
[110] See *La Rose, Layla H, Lho'imggin*, and *Pandey v India* [2019] No. 187/2017, National Green Tribunal of India (*Pandey*). In total, twenty-six cases included in the dataset rely on the public trust doctrine.
[111] Concurring opinion of Wilson J., *In re Hawai'i Light Co* [2023] No. 2017-0122, Supreme Court of the State of Hawai'i (*Hawai'i Light Co*), p. 33; see also K. Sulyok, "Transforming the Rule of Law in Environmental and Climate Litigation", cit., p. 492.
[112] See for instance, the state constitutions of New Mexico and Pennsylvania.

the possibility of bringing a common law claim for the recognition of an atmospheric public trust[113]. An array of similar cases have faced comparable difficulties before US federal and state courts, rarely proceeding to a consideration on the merits.

Even where the justiciability of a claim is successfully asserted, other obstacles to admissibility have arisen. For instance, in *Kanuk v Alaska*, the claimants contended that the State had breached its public trust obligations in respect of the atmosphere, contrary to article VIII of the Alaskan Constitution. The constitutional basis of this claim satisfied the Court as to its justiciability, but it was nevertheless dismissed on prudential grounds relating to redressability. The Court observed that public trust principles have historically been interpreted as a restraint upon public authorities rather than imposing affirmative obligations of the kind proposed by the plaintiffs[114]; they preclude the restriction of public access to trust resources, as opposed to compelling public authorities to regulate (the use of) these resources. In other words, recognition of an atmospheric public trust would impose affirmative obligations on the state to reduce harm to the atmosphere by addressing anthropogenic GHG emissions. A declaratory judgment recognising the atmospheric public trust would not therefore, in the Court's view, remedy the harms complained of. Thus, despite acknowledging that the Alaskan legislature had indicated the applicability of public trust principles to the atmosphere, the claim was dismissed for failing to meet the requirement of redressabilit[115].

The historical subject matter of the PTD has also inhibited the success of atmospheric trust litigation. The doctrine was originally developed in relation to navigable waterways, requiring their management by public authorities for the benefit of the public. In the centuries since the doctrine's emergence, it has evolved somewhat but remains largely tied to its fluvial origins[116]. Notwithstanding the broadening of the doctrine's scope in some instances, its boundaries and the duties flowing therefrom remain rather nebulous when it comes to its application to other ecosystem components[117]. Future generations climate litigation relying on the doctrine has provided little further clarification due to the reluctance of courts to engage with such claims on their merits.

Even where claims have been elaborated in a manner more proximate to the doctrine's origins, courts have exhibited a marked reluctance to broaden the doctrine. In *Chernaik v Brown*, for example, the claimants relied on the State's

[113] *Sanders-Reed v Martinez* [2015] 350 P.3d 1221, Court of Appeals of the State of New Mexico (*Sanders-Reed*), § 13-18.
[114] *Kanuk*, p. 27.
[115] *Kanuk*, pp. 16-17, 19-21, 24-28.
[116] See, for instance, *Aronow v Minnesota* [2012] A12-0585, Court of Appeals of the State of Minnesota (*Aronow*), and *Aji P*.
[117] E. Washburn, A. Nuñez, "Is the Public Trust a Viable Mechanism to Regulate Climate Change?", in *Natural Resources and Environment*, 27 (2012), n. 2, pp. 23-27, spec. p. 24; A. Christiansen, "Up in the Air: A Fifty-State Survey of Atmospheric Trust Litigation Brought by Our Children's Trust", in *Utah Law Review*, 3 (2020), pp. 867-915, spec. p. 875.

public trust duties in respect of the atmosphere and wildlife, in addition to the more traditional objects of the public trust: navigable waterways and submerged and submersible lands[118]. Although the Court acknowledged that the PTD, as a common law doctrine, is flexible in nature and not bound to its current scope – having, indeed, evolved over time to encompass resources beyond navigable waterways – the Court refrained from extending its application, reasoning that the scope proposed by the plaintiffs was excessively broad[119].

Some courts have indicated greater receptiveness to the broadening of the doctrine, but with little difference in material outcome. In *Butler v Brewer*, the applicability of the PTD to the atmosphere was assumed by the Court, though decision on the matter was reserved[120]. The Court thus essentially proffered a negative statement on the matter – affirming that one cannot assume that the atmosphere is *not* covered by public trust principles – by rejecting the defendants' submission that the PTD was limited to navigable waterways to the exclusion of the atmosphere. The Court stressed that no such determination had been issued by an Arizona court but equally declined itself to do so, thereby maintaining this state of affairs. The claim ultimately failed on the ground that the doctrine is not a standalone norm on the sole basis of which state inaction can be deemed unlawful, without reference to constitutional or other legal provisions[121].

Although the focus of the PTD is on the duties owed by public authorities, express rights-based framing of the doctrine is adopted in numerous cases, amplifying the growth in rights-based climate litigation. In *Juliana*, for instance, the claimants speak of the "right [of future generations] to inherit well-stewarded public trust resources"[122]. Meanwhile, in *Layla H*, the PTD is alluded to as a *jus publicum* right of present and future generations of Virginians to benefit from the unimpaired and unpolluted lands, waters, and atmosphere of the state[123]. The Court itself painted the doctrine in rights terms in *Funk v Wolf*, quoting precedent to the effect that the PTD confers a "common right to a protected value under the trusteeship of the State", but dismissed the claim on the ground, inter alia, that this does not automatically entail a right to relief given the diverse duties shouldered by the State and the policy considerations implicated in balancing them[124]. Markedly

[118] *Chernaik v Brown*, [2020] 367 Or. 143, Supreme Court of the State of Oregon (*Chernaik*), p. 149.
[119] *Chernaik*, pp. 148, 156, 158-163, 165-168.
[120] *Butler v Brewer* [2013] Docket No. 1 CA-CV 12-0347, Court of Appeals of the State of Arizona (*Butler*), § 27.
[121] *Butler*, § 13
[122] *Juliana*, amended application, § 92. This framing is echoed in *Foster and Others v Washington Department of Ecology* [2017] 200 Wash. App. 1035, Court of Appeals of the State of Washington, in which the claimants argue that in conducting their activities, the defendants "implicate Youth Petitioners' and future generations' rights to essential public trust resources, protected by the Public Trust Doctrine and the Washington Constitution", application, p. 8.
[123] *Layla H*, application, § 181
[124] *Funk v Wolf*, p. 5-6, citing *Payne II* 361 A.2d.

emphatic wording was used by the Court in *Filippone v Iowa Department of Natural Resources*, identifying an inviolable right of access to natural resources as the foundation of the PTD[125]. The extension of the doctrine to the atmosphere was, however, denied here due to the absence of supporting precedent[126]. Furthermore, in *Clean Air Council v United States*, the claimants relied (unsuccessfully) on substantive due process rights under the US Constitution in seeking the imposition of public trust obligations on the federal government[127]. The invocation of the PTD thus evidently emulates the rights-based framings prevalent in climate litigation and the growing tendency to frame temporal concerns in the language of rights.

The prevalence of the PTD in future generations climate litigation confirms that the doctrine is perceived (at least by litigators) as a natural vehicle for asserting the rights of future generations, whether explicitly or implicitly, because of its inherently long-term nature. Despite this, the cases analysed indicate that the proliferation of trust-based arguments in future generations climate litigation has prompted little, if any, evolution in judicial interpretation of the doctrine in the context of climate change. Cases invoking the doctrine appear to fall at many of the same hurdles that typically affect broader climate litigation: redressability, justiciability, the separation of powers doctrine, and standing requirements. Analysis of the dataset in question shows that attempts to extend application of the PTD to the atmosphere so far have largely been perceived by the judiciary as an unjustifiably ambitious leap in legal interpretation. Nonetheless, invocation of the doctrine reflects the increasingly prevalent rights-based framings of future generations interests. In this connection, we now turn to consider the invocation of environmental rights, and notably the right to a healthy environment, in future generations climate litigation.

### 3.2.2. Towards Collective Capitalisation: The Right to a Healthy Environment

Future generations climate litigation displays strong engagement with environmental rights. The right to a healthy environment features in forty-nine of the eighty-three cases included in the dataset, demonstrating the growing prominence of the right in environmental and climate-related legal discourse[128].

[125] *Filippone v Iowa Department of Natural Resources* [2013] 829 N.W.2d 589, Court of Appeals of Iowa (*Filippone v Iowa*), p. 5.
[126] *Filippone v Iowa*, pp. 5-6.
[127] *Clean Air Co*, pp. 20-21; see also, *Chernaik v Brown*, in which the applicants refer to the "paramount right [of Oregon citizens] over private interests to use the atmosphere consistent with public trust purposes." (amended application, § 40) and *Kain and Others v Department of Environmental Protection* [2016] 49 N.E.3d 1124, High Court of the State of Massachusetts (*Kain*), application, § 14, in which reference is made to Article 97 of the Massachusetts Constitution linking the right to clean air and the public trust doctrine.
[128] See further P. de Vilchez, A. Savaresi, "The Right to a Healthy Environment and Climate Litigation", cit.

There are two main features of environmental rights that render them potentially useful vehicles for the protection of the interests of future generations; namely, their preventive and collective aspects.

Firstly, the nature of environmental rights means that they are inherently future-oriented, offering a mechanism for the protection of the rights of future generations without necessarily requiring their express invocation *as* the rights of future generations[129]. In other words, their invocation by present persons can act as a vehicle for the protection of the environment into the long term, and thereby also for the benefit of future persons. This is because environmental rights necessitate pre-emptive action, in line with the principles of precaution and prevention. In this sense, environmental rights depart from the primarily reactive character of human rights. As noted in *Held v Montana*, the right to a "clean and healthful" environment is intended to be "anticipatory and preventative" as well as "forward-looking"[130]. Environmental degradation to such an extent that the environment is no longer clean and healthful is not a prerequisite to invocation of the right. As one lawmaker quoted by the Court stated, "[i]f all we have is a survivable environment, then we've lost the battle. We have nothing left of importance"[131].

Secondly, environmental rights unify the individual and the collective, increasing the coherence between rights-based discourse and intergenerational equity and circumventing some of the challenges posed by the prevailing western "individualist paradigm"[132]. Notwithstanding individualistic conceptualisations of environmental rights as derivatives of the individual rights to life, health, or private and family life, inter alia[133], environmental rights embody a fundamentally collective dimension in that the factors underpinning the right (that is, the quality of natural resources and ecosystem components making up the environment) are inherently collective in nature[134]. This is particularly evident with regard to global goods that cannot be individually possessed nor thereby subject to property rights, such as the atmosphere. By the same token, environmental harm tends to produce much broader circles of impact when compared to violations of 'traditional' rights. In this regard, environmental rights offer a potentially effective mechanism for protecting the rights of future generations, who by their very nature form an indistinguishable collective[135].

[129] H.S. Cho, O.W. Pedersen, "Environmental Rights and Future Generations", in M. Tushnet, T. Fleiner, C. Saunders (eds.), *Routledge Handbook of Constitutional Law*, Routledge, London, 2013, pp. 435-447, spec. p. 441.
[130] *Held*, § 20-28.
[131] *Held*, § 24.
[132] A. Daly, "Intergenerational Rights are Children's Rights", cit., p. 137; R. Pavoni, "Public Interest Environmental Litigation and the European Court of Human Rights", cit., p. 345.
[133] F. Francioni, "International Human Rights in an Environmental Horizon", cit., pp. 43-44.
[134] On the individual and collective conceptualisations of the right to a healthy environment, see E. Cima, "The Right to a Healthy Environment", cit., pp. 44-45.
[135] E. Cima, "The Right to a Healthy Environment", cit., pp. 39, 46.

These intergenerational and forward-looking dimensions of the right to a healthy environment were highlighted by the High Court of South Africa in *Earthlife Africa Johannesburg v Minister for Environmental Affairs and Others*, by reference to the linking of this right and the principle of sustainable development in the South African Constitution[136]. A collectivist interpretation of the right is likewise seen in *Greenpeace Mexico*. According to the Court in that case, the constitutional right to a healthy environment comprises the right of all persons, as part of a collective, to claim effective environmental protection[137]. The right to a healthy environment is thereby conceptualised as a universal interest of present and future generations, with solidarity at its core[138].

The broad potential of the right to a healthy environment as a legal tool for the protection of future generations is exemplified in the Brazilian jurisprudence within the dataset. Delivering a separate opinion in *PSB et al v Brazil*, judge Cármen Lúcia characterised the right as a corollary of the State's constitutional duty of environmental protection and highlighted its collective and broad temporal character[139]. According to the judge, constitutional environmental rights are not merely individual rights but rather inhere in humans such that the identification of a specific rights-holder is rendered superfluous[140]. The right therefore extends to the protection of the environment for the benefit of future generations. Environmental dignity and solidarity are presented here as core pillars of Brazilian constitutional law, reflecting a conceptualisation of nature as a common good essential to the preservation of adequate living conditions into the future[141]. A similar collectivist interpretation of environmental rights is reiterated in *State of Rondônia and Public Prosecutor's Office of the State of Rondônia v Invaders of the Guajará-Mirim State Park and its Amortization Zone*[142] and in *Rede Sustentabilidade v National Environment Council*[143], amongst other cases[144]. In the latter, the Federal Supreme Court of Brazil emphasised not only that effective environmental protection is indissociable from the protection of a host of individual rights, but also that the right to a healthy environment constitutes a universal interest that must be guaranteed on behalf of both present and future generations. The Court stated that violation of the principle of solidarity by failing to defend and preserve

[136] *EarthLife Africa Johannesburg v Minister of Environmental Affairs and Others* [2016] 65662/16, High Court of South Africa (*Earthlife Africa*), §§ 81-82.
[137] *Greenpeace Mexico*, p. 34-35.
[138] *Greenpeace Mexico*, p. 68.
[139] *PSB*, pp. 5, 8, 23; Art 225 Federal Constitution of Brazil.
[140] *PSB*, p. 34.
[141] *PSB*, p. 37.
[142] *State of Rondônia and Public Prosecutor's Office of the State of Rondônia v Invaders of the Guajará-Mirim State Park and its Amortization Zone* [2023] ACP 7002381-27.2020.8.22.0015, Rondônia State Court (*Invaders of the Guajará-Mirim State Park*), p. 24.
[143] *Rede Sustentabilidade v National Environmental Council* [2021] ADPF 747-749, Supreme Federal Court of Brazil (*Rede Sustentabilidade*)
[144] See, for instance, *Jaci-Paraná Extractive Reserve*, p. 43.

the right to a healthy environment would constitute a "grave intergenerational [conflict]"[145]. Moreover, in the Court's view, infringement of the right to an ecologically balanced environment unequivocally imperils the very essence of the national constitutional regime[146]. The critical importance of the right is further emphasised in *Demanda Generaciones Futuras*. Here, the Court affirmed that the right to a healthy environment not only undergirds a plethora of other fundamental rights but equally ensures the survival of present and future generations and the continuance of basic societal structures including the family and the State itself[147]. These emphatic proclamations of the foundational role of a stable environment bring to mind Staton J.'s appeal to the perpetuity principle in her dissenting opinion in *Juliana*. In so doing, the dissenting judge expressly connected the existential threat of irreversible climate change with the unconstitutional wilful dissolution of the state[148]. Environmental quality and rights are thus explicitly tied to the perpetuity of the state and the continuing transmission of public heritage, cultural, institutional, and natural, to posterity.

In some jurisdictions, courts have gone one step further, adopting an eco-centric approach to environmental rights with a view to protecting the interests of future generations through the rights of nature. Notably, in *Demanda Generaciones Futuras*, the Court recognised the Colombian Amazon as a subject of rights and ordered the establishment of an "intergenerational pact for the life of the Colombian Amazon". The Court here drew a connection between nature and future generations as legal subjects and beneficiaries of intertemporal environmental protection, indicating the complementarity of the rights of nature and the environmental rights of future generations. As Sulyok observes, "the future generations discourse and the Rights of Nature movement […] share the goal of carving out certain long-term assets from the unfettered discretion and resource exhaustion of states"[149]. Incidentally, a parallel can also be drawn here to the public trust doctrine, though the latter is notably anthropocentric in focus by contrast with the eco-centric character of the rights of nature.

The interplay between individual and collective dimensions of environmental rights is thus clearly underscored in numerous climate lawsuits representing the interests of future generations. This jurisprudence demonstrates that the right to a healthy environment is increasingly interpreted as a pre-requisite to the fulfilment of other (individual) rights, rather than deriving from or merely being additional to the latter. The progressive accentuation of the collective nature of the right illustrates and reinforces its suitability as a vehicle for incorporating future-oriented considerations into legal reasoning. At the same time, the burgeoning recognition

[145] *Rede Sustentabilidade*, § 15-16.
[146] *Rede Sustentabilidade*, § 6.
[147] *Demanda Generaciones Futuras*, p. 13.
[148] *Juliana*, pp. 35, 37-43.
[149] K. Sulyok, "Transforming the Rule of Law in Environmental and Climate Litigation", cit., p. 492.

of the rights of nature offers additional mechanisms for implicitly collectivist and future-oriented legal protection. As both the right to a healthy environment and the rights of nature increasingly receive legislative and judicial recognition and protection, reliance on these norms with a view to protecting the interests of future generations is likely to increase.

## 4. Who are Future Generations? Definitional Questions in Future Generations Climate Litigation

Narratives evoking future generations are part of the temporal framing of climate litigation[150]. The term 'future generations' is clearly broad and imprecise necessitating definition to clarify the time scales encompassed. This is not to say that a blanket definition is imperative. Rather, the contention here is that mere use of the term 'future generations' without further elaboration leaves open a multitude of potential understandings of the timescales and rights-holders in question[151]. The imprecision inherent in the term thus craves definition. Yet, future generations climate litigation displays little engagement with definitional questions.

### 4.1. Matters of Temporal Scale: How Far into the Future?

Future generations framing plays a strong role in what Hilson terms "generational" as well as "continuity time frames", both of which emphasise the continuing enjoyment of stable climatic conditions by humans, and all this entails, over time, as well the potentially irreversible present and future consequences of anthropogenic climate change[152]. Generation-based framings to some extent evade definition due to the inherently fluid nature of generational cohorts and the continuous "transit [of future persons] into the present"[153]. Nonetheless, if one is to attempt to capture 'future generations' semantically, the key determining factor is clearly the time scale in question.

There are essentially two core ways in which future generations can be defined. The first – the narrower of the two – includes only persons who are yet to be born. The second extends the scope of the first into the present by including currently living children and infants. Although the latter is broader in that the timescales concerned range from present persons to potentially the distant future, definitions encompassing currently living minors can also be used, conversely, to contract the timescales in question by drawing attention to the present and thereby

[150] See C. Hilson, "Framing Time in Climate Litigation", cit.
[151] See A. Nolan, "Children and Future Generations Rights before the Courts: The Vexed Question of Definitions", in *Transnational Environmental Law*, 13 (2024), n. 3, pp. 522-546.
[152] C. Hilson, "Framing Time in Climate Litigation", cit., pp. 366-367.
[153] S. Humphreys, "Against Future Generations", cit., p. 1066.

obscuring the further future. Definitions of future generations can also be further specified and contracted by reference to quantified timeframes, as proposed by Knox, although this appears rare in practice[154].

The case of *Harvard Climate Justice Coalition* – in which plaintiffs expressly claimed to represent the interests of future generations as a class and in which the latter are listed amongst the plaintiffs – offers a rare example of a lawsuit in which an express definition of future generations is provided. This definition, included in the plaintiffs' application, is of the broader variety, with future generations said to comprise "individuals not yet born or too young to assert their rights but whose future health, safety, and welfare depends on current efforts to slow the pace of climate change"[155].Thus, future generations are taken here to include both currently living minors (those too young to assert their rights) and not yet living future persons (those who are yet to be born).

In the vast majority of lawsuits, however, the definition of 'future generations' tends to be implicit, if at all discernible. In this connection, recourse to the public trust doctrine evades many of the complications typically associated with advocating for the rights of future generations, particularly the matter of delineating the rights-holders in question. By placing the focus on the duty-bearer – which is a clearly identifiable entity: public authorities – the PTD circumvents the need to delineate the rights-holders in question. This subsection of lawsuits thus does little to lift the obscurity surrounding future generations. Plaintiffs and courts engaging with the PTD employ the broadbrush terminology of 'present and future generations' or analogous wording[156], maintaining the prevailing opacity in references to future generations[157].

Definitions are not forthcoming even in lawsuits grounded in rights-based claims, notwithstanding the usual preoccupation of human rights law with the identification of specific rights-holders. In *Neubauer*, for instance, the Court's affirmation that the claimants were "not asserting the rights of unborn persons or even of entire future generations, neither of whom enjoy subjective fundamental rights", implies that the young persons and minors bringing the case were not viewed by the court as 'future generations'[158]. A similar definition is implicit in *KlimaSeniorinnen*, with the European Court of Human Rights stressing that rights under the ECHR extend only to "those individuals currently alive who, at a given

[154] A. Nolan, "Children and Future Generations Rights", cit., pp. 532-533.
[155] *Harvard Climate Justice Coalition*, cit.
[156] For example, in *Barhaugh v Montana*, the claimants employ the terms "generations of Montanans to come" and "succeeding generations", while in both *Blades and Others v State of California and Another* [2011] CGC-11-510725, Superior Court of California (*Blades v California*), and *Svitak and Others v State of Washington and Others* [2013] 178 Wash. App 1020, Court of Appeals of the State of Washington (*Svitak v Washington*), the claimants speak of "citizens, born and yet to be born", and in *Sagoonick v Alaska* [2022] 503 P.3d 777, Supreme Court of the State of Alaska (*Sagoonick I*), the term "posterity" is used.
[157] A. Nolan, "Children and Future Generations Rights", cit.
[158] *Neubauer*, § 109.

time, fall within the jurisdiction" of a state party and are not, therefore, enjoyed by future generations[159]. Both of these cases thus imply that 'future generations' encompass only unborn persons.

By contrast to this, in *Demanda Generaciones Futuras*, the applicant minors *are* regarded as members of future generations[160]. It is noteworthy, as highlighted by Nolan, that although the applicants in that case justified their recognition as future generations rather extensively, the Court merely referred to them as such without further elaboration[161]. Thus, even in cases where courts engage with and even recognise the rights of future generations, preoccupation with definitional questions is lacking.

Obscurity surrounding definition of the term may very well contribute to the judicial reticence we observed in this dataset in engaging with claims referring to future generations[162]. Courts may, however, be somewhat more open to future generations claims framed by reference to children. The following section examines such framing in greater detail.

### 4.2. 'The Children are the Future': Kinship, Children, and Future Generations

Child-focused language pervades future generations climate litigation, despite the fact that the invocation of children's rights is prevalent in neither climate litigation generally[163] nor in future generations climate litigation specifically. Notwithstanding the relative scarcity of cases relying on children's rights, references to children abound in future generations climate litigation. This is perhaps due to a large portion of future generations climate litigation including minors and young people amongst the claimants.

In addition, child-centred language arguably provides more convincing grounds for the legal recognition of the rights enjoyed by, and duties owed to, future generations, by making use of the intuitive moral duties one bears towards one's kin[164]. The strengths of storytelling usually lie in capturing lived experiences, "deriv[ing] persuasive power from lived realities"[165]. Narratives on future

[159] *KlimaSeniorinnen*, § 420.
[160] *Demanda Generaciones Futuras*, § 11.2.
[161] *Demanda Generaciones Futuras*, application pp. 63-67; A. Nolan, "Children and Future Generations Rights", cit., p. 530.
[162] As intimated by A. Nolan, "Children and Future Generations Rights", cit., p. 543.
[163] E. Donger, "Children and Youth in Strategic Climate Litigation", cit., p. 272.
[164] Radavoi and Raymon-Bacchus speak of "latent communitarian benevolence" towards future generations, "The Need for Durable Institutions for Future Generations", cit., p. 3; see, also F. Woollard, "Have We Solved the Non-Identity Problem?", in *Ethic Theory Moral Practice*, 15 (2012), pp. 677-690, spec. p. 678.
[165] M. Wewerinke-Singh, A.S.F. Ramsay, "Echoes Through Time: Transforming Climate Litigation Narratives on Future Generations", in *Transnational Environmental Law*, 13 (2024), n. 3, pp. 547-568, spec. p. 549.

generations are hampered by the a lack of connection to such lived realities. Framing future-oriented claims in child-centred language may remedy these challenges. For instance, stating that "[i]t is our children and children's children who will suffer the harms and losses caused by our lack of action" on climate change[166] paints a much more evocative picture than references to nameless, faceless future persons. Present children thus stand as a "neat temporal bridge" connecting present and future[167]. For instance, in *Kanuk v Alaska*, the claimants express their fears that, due to climate change, their (future) children and grandchildren will not enjoy the quality of life and features of the natural world they have benefited from[168]. This kind of narrative strategy is also employed in *Svitak v Washington*, with the plaintiffs expounding that "[t]here is no greater duty of parents than the protection and safety of their children. Likewise, there is no greater duty of our State government than the protection and safety of its citizens, born and yet to be born"[169]. This presentation of the public trust doctrine uses figurative language centred around children to draw an analogy between state duties to future generations and parental duties to one's children. In this manner, the claimants seek to concretise and humanise the beneficiaries in question, bringing future generations to life in a manner that one may struggle to do when conceiving of distant future persons.

Child-centred discourse in future generations climate litigation is of two varieties, though these are sometimes used in interchangeable or overlapping manners: children may be defined as *members* of future generations themselves and/or as proximate *representatives* of the latter. In the first instance, the identification of children *as* future generations is premised on the fact that children are 'future adults' and stand to inherit the conditions and goods passed on by their parents and other predecessors, while wielding little power as minors. Thus, in *Six Youths v Minister of Environment and Others*, the claimants depict youth as the inheritors of the planet and successors of the present generation, thereby identifying them as 'future generations'[170]. A similar definition is adopted in *Demanda Generaciones Futuras*[171]. Furthermore, in *Youth Verdict v Waratah Coal*, the Court emphasised that "the children of today and of the future" would be encumbered by the most severe impacts of climate change as well as the costs of mitigation and adaptation, contrary to their best interests[172]. The permitting of a coal mine was thus deemed to undermine intergenerational equity by disproportionately burdening future generations. In this way, the Court applied the principle of the best interests

[166] *Svitak v Washington*, complaint, § 3.
[167] C. Hilson, "Framing Time in Climate Litigation", cit., p. 368.
[168] *Kanuk*
[169] *Svitak v Washington*, complaint, § 2.
[170] *Six Youths v Minister for Environment and Others* [2021] AP No. 5008035-37.2021.4.03.6100, Federal Court of São Paulo.
[171] *Demanda Generaciones Futuras*.
[172] *Youth Verdict*, § 1603

of the child with a long-term view, encompassing both present children and those that will be born in the future, and thereby concretised 'future generations' somewhat.

However, the labelling of children as future generations in this way risks undermining the rights of present children by reinforcing the perception and treatment of children as "human becomings"[173], in a manner incongruous with the objectives of children's rights, notably the best interests principle and children's participatory rights[174]. Concerns have also been raised that such a future-focused lens may dilute the immediacy of present child rights violations and obscure their "time sensitive nature", in that even brief rights violations can have severe and long-lasting impacts on child development and thus necessitate rapid intervention[175]. Understanding children as the future may result in delayed action on children's rights due to an overemphasis on the fulfilment of their future rights as adults, to the detriment of the present fulfilment of their rights in childhood.

The second manner in which children are implicated in future-oriented narratives involves the conferral of a separate but representative role to children in respect of future generations. In other words, children are not conceptualised as being members of future generations, but as appropriate representatives due to a perceived proximity between these generational cohorts. This conceptualisation is exemplified by the Maastricht Principles on the Human Rights of Future Generations, which defines future generations as "those generations that *do not yet exist* but will exist and who will inherit the Earth"[176]. Future generations are thus clearly distinguished here from present generations of children and youth. The Principles nonetheless reinforce what is perceived to be an intrinsic connection between children and future generations; the preamble refers to the "unique position" of children and youth as those most (temporally) proximate to future generations, thus justifying – and even requiring[177] – the accordance of a special role to them.[178] The Principles further require States to "recognise and respect that

[173] L. Parker *et al*., "When the Kids Put Climate Change on Trial", cit., p. 69; see also A. Daly, "Intergenerational Rights are Children's Rights", cit., p. 135.
[174] On child participation in climate-related matters, see J. Todres, S.M. King, *The Oxford Handbook of Children's Rights Law*, Oxford University Press, Oxford, 2020; A.V. Sanson, S.E.L. Burke, "Climate Change and Children: An Issue of Intergenerational Justice", in N. Balvin, D. Christie (eds.), *Children and Peace: From Research to Action*, Springer Nature, 2020, pp. 343-362.
[175] A. Nolan, "The Children are the Future – Or Not? Exploring the Complexities of the Relationship between the Rights of Children and Future Generations. Retrieved from https://www.ejiltalk.org/the-children-are-the-future-or-not-exploring-the-complexities-of-the-relationship-between-the-rights-of-children-and-future-generations/ [Accessed: 23/05/2025]; J. Todres, S.M. King, *The Oxford Handbook of Children's Rights Law*, cit.
[176] Maastricht Principles, Principle 1.
[177] The Principles state that children's "perspectives and participation in decision-making with respect to long-term and intergenerational risks *must* be accorded special weight." (emphasis added).
[178] See G. Basson, S. Liebenberg, M. Wewerinke-Singh, A. Khalfan, C. Muffett, M. Kothari, M. Sepúlveda Carmona, S. Venne-Manyfingers, "Commentary to the Maastricht Principles on the Human Rights of Future Generations", in *Human Rights Quarterly*, forthcoming (2025), p. 5.

present children, adolescents and youth occupy a proximate position to future generations"[179]. While the Commentary on the Principles emphasises that children should be *enabled* to represent future generations rather than being forced to shoulder this responsibility alone[180], the Principles' perpetuation of assumptions about the congruity of present children's and future (as yet unborn) persons' interests is open to question.

Such co-opting of children's voices in the name of 'future generations' is potentially objectionable in that it may distort the interpretation and application of present children's rights[181]. The assumption that present children and future generations have mutual – or at least similar – interests is based on alleged temporal proximity. This proximity, however, depends entirely on the temporal scale applied, which is rarely made explicit. In other words, if the term 'future generations' extends to persons belonging to generations a century or further removed from the present, the relative proximity of today's children – by contrast to today's adults, for instance – to those future generations is clearly less significant. The proposition that children can act as a proxy for future generations thus becomes increasingly tenuous the further into the future timeframes are extended. By the same token, the lack of clarity around what is meant by 'future generations' risks ever-broader interpretations of children's rights being applied in an attempt to encompass broader time scales, diluting and distorting their application to present children[182].

In fact, concerns have been raised in future generations climate litigation about the legitimacy of present persons representing future generations. In a concurring opinion in *Segovia et al v Climate Change Commission*, Leonen J. questions the wisdom and fairness of allowing present persons to enforce the environmental rights of future generations, stating rather emphatically that "the premise that the present generation is absolutely qualified to dictate what is best for those who will exist at [a] different time, and living under [a] different set of circumstances" is "objectionable". In the judge's view, the principle of intergenerational equity "should not be used to obtain judgments that would preclude and constrain future generations from crafting their own arguments and defending their own interests"[183]. These concerns demonstrate the complexities involved in incorporating the interests of future generations into legal argumentation and rulings.

The duty of conservation of options, one of the three constitutive duties of intergenerational equity as conceptualised by Edith Brown Weiss – the remaining two being conservation of quality and of access to natural resources – proscribes a

[179] Maastricht Principles, Principle 22(a).
[180] G. Basson *et al*., "Commentary to the Maastricht Principles on the Human Rights of Future Generations", cit., pp. 5-6.
[181] A. Nolan, "The Children are the Future – Or Not?", cit.
[182] *Ibidem.*
[183] *Segovia and Others v Climate Change Commission and Others* [2017] GR No. 211010, Supreme Court of the Philippines (*Segovia*), pp. 21-22.

situation in which natural heritage is passed onto future generations such that the choices available to the latter as to the use of natural resources are more limited than those enjoyed by their predecessors[184]. Such limitation can come about through policy choices but, as highlighted by Leonen J. in *Segovia*, so too can judicial determinations impose such limitations. According to the judge, "[i]t is enough that this present generation may bring suit on the basis of their own right. It is not entitled to rob future generations of both their agency and their autonomy"[185].

In *Do-Hyun Kim et al v South Korea*, the Korean Constitutional Court affirmed that a stricter standard of judicial review is applicable where the rights of minors and future generations are implicated. This was justified on the ground that a lack of representation of these groups in political processes necessitates greater judicial intervention to secure their rights. However, there is an inherent tension here, as highlighted by Leonen J.: in attempting to give a voice to the indeterminate individuals of coming generations, litigants may inadvertently circumscribe or misrepresent their interests. Courts may therefore need to tread carefully. The fact that future generations cannot be consulted in order to determine their preferences renders this exercise highly delicate.

In any case, it is clear that an understanding of future generations which relies too heavily on present children and their interests poses risks both to today's children and the future generations they may claim to represent. At the same time, future generations climate litigation demonstrates that narratives evoking children are pervasive in argumentation relating to future generations and are commonly used to bolster legal argumentation in this regard. Transparency around the definition of future generations applied in individual cases would aid in addressing some of the concerns expressed by scholars and judges alike and better clarify the extent of legal rights and obligations identified in respect of future generations.

## 5. Conclusion

The recognition of future generations as rights-holders remains a contested topic of discussion, within and beyond courtrooms[186]. The highly varied landscape of future generations climate litigation across jurisdictions indicates the contentiousness of the issue. Controversy surrounding the matter is not aided by the absence of a clear understanding of what - or rather who - is meant by 'future generations'. Future generations climate litigation has done little to resolve this obscurity, with claimants and courts alike avoiding express definition of the term in all but a handful of cases. Even where (explicit or implicit) definitions of the term can be extracted from legal reasoning and argumentation in these cases, the application of varying temporal scopes means no unified picture emerges.

[184] L.B. Sohn, E. Brown Weiss, "Intergenerational Equity in International Law", cit., p. 130.
[185] *Segovia*, p. 22.
[186] A. Nolan, "Children and Future Generations Rights", cit., p. 532.

Additionally, although the language of (the rights of) future generations has become increasingly mainstreamed in climate change discourse, this has not resulted in widespread, consistent judicial recognition of such rights. The legal norms of which claimants and courts avail to assert the rights of future generations are varied, demonstrating the breadth of intergenerational equity as a concept and the diversity of legal tools that may act as vehicles for the introduction of long-termism in decision-making. Clearly, however, some of these tools have proven more effective than others, with certain jurisdictions appearing more receptive to arguments rooted in the rights of future generations and to specific legal arguments than others. Thus, numerous claims relying on the atmospheric public trust doctrine have met their demise at an early stage, whereas claims rooted in environmental rights have been comparatively successful, though not exclusively so. Diverging legal cultures as well as substantive and procedural norms likely influence the disparate responses and receptivity of courts to future-oriented claims in the context of climate change, as well as broader societal and cultural norms. The specific conditions influencing legal recognition of the rights of future generations within diverse legal systems provide ripe material for further research.

It remains open to question whether the broad recognition of future generations as rights-holders is a desirable legal development, given the complexities and risks associated therewith. Besides, the fact remains that the adoption of a uniform definition of future generations coupled with universal recognition of the legal implications of intergenerational equity (whether in the form of the rights of future generations, or otherwise) cannot offer an "indeterminacy panacea"[187]. Such legal clarifications are not a crystal ball capable of revealing the needs and preferences of future generations. The uncertainties inhering in long term decision-making extending generations into the future will therefore inevitably persist. It is nevertheless clear that intergenerational equity and the rights of future generations can and do play a notable narrative role within climate litigation, seeking the "recalibration of temporal structures"[188].

[187] A. Nolan, "Children and Future Generations Rights", cit., p. 543.
[188] A. Drigo, "Future Generations in Climate Litigation", cit., p. 1140.