

# **THE UTILITY OF THE PRINCIPLE OF INTERGENERATIONAL EQUITY IN STRATEGIC CLIMATE CHANGE LITIGATION IN SOUTH AFRICA: LESSONS FROM COLOMBIA AND GERMANY**

EMMA REINECKE

Supervisor: Ms Amanda Mkhonza

Word Count: 24 999

Research dissertation/research paper presented for the approval of Senate in fulfilment of part of the requirements for the LLM Environmental Law in approved courses and minor dissertation/ research paper. The other part of the requirements for the LLM Environmental Law in approved courses and a minor dissertation/ research paper. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of the LLM Environmental Law dissertations/research papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/ research paper conforms to those regulations.

**Signed: Emma Reinecke**

**Date: 13/02/2023**

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

## DECLARATION

1. I know that plagiarism is wrong. Plagiarism is to use another's work and pretend that it is one's own.
2. I have used the footnoting convention for citation and referencing. Each contribution to, and quotation in, this opinion from the work(s) of other people has been attributed, and has been cited and referenced.
3. This opinion is my own work.
4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

Signature

Signed by candidate

## **Abstract**

Climate change is a threat not only to present generations, but to all present and future inhabitants of the planet as well as the planet itself. Recent climate change litigation has shown a growing trend in utilising the principle of intergenerational equity – the idea that there should be equality between generations, and that present generations owe future generations duties that involve safeguarding and protecting the environment. This minor dissertation analyses the role and utility of the principle of intergenerational equity in strategic climate change litigation with a view to highlighting its potential usefulness in the South African context. It begins by unpacking the theory of intergenerational equity and its differing interpretations. It goes on to consider what strategic climate change litigation is, what the key issues for litigants are, and what successful strategies have been employed in this exciting and rapidly growing area of law. Next, two cases – one from Colombia and one from Germany – in which litigants successfully utilised the principle of intergenerational equity in climate change litigation are analysed. Key lessons are then drawn with particular reference to the different interpretations of intergenerational equity and the main issues in climate change litigation highlighted earlier. Thereafter, the position of the principle of intergenerational equity is considered in the South African context, with a particular focus on the trickier elements of climate change litigation, namely: standing, rights and obligations, and remedies. Finally, the conclusion provides an overarching review and analysis of the principle of intergenerational equity as a strategic climate change litigation tool in South Africa.

# Table of Contents

EMMA REINECKE.....	i
Supervisor: Ms Amanda Mkhonza.....	i
Abstract .....	i
Table of Contents.....	ii
Chapter 1: Introduction.....	1
1.1. Background.....	1
1.2. Scope and purpose.....	5
1.3. Methodology and structure .....	6
Chapter 2: Literature Review.....	8
2.1. What is intergenerational equity? .....	8
2.1.1. Contestation and criticism .....	11
a. Delineating between ‘generations’ .....	11
b. Can future generations have standing? .....	14
c. Can future generations be said to have rights and do present generations owe them duties? ...	16
d. Anthropocentrism, ecocentrism, and intergenerational equity .....	20
2.2. Climate change litigation .....	20
2.2.1. Introduction.....	20
2.2.2. The Paris Agreement: A basis for climate change litigation? .....	21
2.2.3. Key issues in climate change cases .....	23
2.2.4. Overview of litigation trends in climate change cases .....	24
3. The Colombian Amazon and <i>Neubauer</i> cases .....	25
3.1. The Colombian Amazon case .....	25
3.1.1. Background and facts .....	25
3.1.2. Issues and Appellants’ arguments.....	26
3.1.3. The Supreme Court’s findings and reasoning .....	27
3.1.4. Remedy .....	31
3.1.5. Outcome.....	31
3.1.6. Key lessons .....	32
3.2. The <i>Neubauer</i> case.....	34
3.2.1. Background and facts .....	34
3.2.2. Applicant’s arguments.....	36
3.2.3. The Federal Constitutional Court’s findings and reasoning .....	38
a. Procedural issues: Justiciability and standing .....	38
b. Merits.....	40
3.2.4. Remedy .....	44
3.2.5. Outcome.....	45
3.2.6. Key lessons .....	45
3.3. General Remarks on the Jurisprudence .....	49
4. Chapter 4: Intergenerational equity in South African law .....	50
4.1. Introduction .....	50
4.2. Recognition.....	51
4.2.1. Recognition in legislation .....	51
4.2.2. Recognition of intergenerational obligations and intergenerational equity in case law .....	53
4.3. Standing .....	57
4.4. Intergenerational rights and obligations.....	59
4.5. Remedies .....	63
4.6. General remarks on South Africa’s position .....	64
5. Chapter 5: Conclusion .....	65
Bibliography .....	68
Domestic cases .....	68
Domestic legislation.....	68
Draft legislation.....	68

Domestic policy.....	68
International cases .....	68
Hard international law .....	68
<i>The Stockholm Declaration on the Human Environment (1972)</i> .....	69
Soft international law .....	69
Official international publications .....	69
Foreign law cases .....	69
Constitutions .....	69
Foreign legislation .....	69
Books.....	69
Chapters in books .....	70
Journal articles .....	70
Web sources.....	71

# Chapter 1: Introduction

## 1.1. Background

As the many consequences of climate change resulting from human-driven global warming become ever-clearer, so too has the fact that the world the present generation has inherited will be left behind far warmer and more ecologically fragile for successive generations.<sup>1</sup> The past decade has seen significant growth in the global response to climate change, with countries around the world increasing their commitments to tackling climate change at both the national and international levels.<sup>2</sup> The widespread adoption of the Paris Agreement is both an indication of this and a catalyst for further change, as it requires all parties to set out national targets for greenhouse gas ('GHG') emission reductions in fulfilment of their international commitments,<sup>3</sup> and many countries – including South Africa – have additionally begun to embed these commitments in national legislation.<sup>4</sup> These national commitments have, in effect, opened up more opportunities for domestic climate litigation.<sup>5</sup> Recognising this, activists have brought an increasing number of both state and non-state actors to courts with a strong focus on 'strategic' climate litigation – essentially cases which are strategically formulated for and targeted at maximising their impact on law, policy, or action related to climate change.<sup>6</sup> To evaluate and compare all the different arguments, principles, and strategies put forth in strategic climate litigation around the world is far beyond the scope of this research. However, one particularly interesting principle which captures the ethical dilemmas innate to many decisions around climate change and which has seen recent success in several climate change cases is the

---

<sup>1</sup> IPCC *Climate Change 2021: The Physical Science Basis* (2021) 15-30.

<sup>2</sup> UN Environment Programme *The Status of Climate Change Litigation* (2017) 6.

<sup>3</sup> Article 4 of the Paris Agreement to the United Nations Framework Convention on Climate Change (2015).

<sup>4</sup> South Africa has recently produced the Climate Change Bill *Draft* 2021, which makes provision for a national GHG emission reduction trajectory in s 21 and includes interim national GHG emission reduction targets in Schedule 3. Examples of other countries which have included GHG emission reduction targets in climate change legislation on are New Zealand, Germany, and Chile – see respectively: New Zealand: Climate Change Response (Zero Carbon) Amendment Act 2019; Bundes-Klimaschutzgesetz of 2019 ('the Federal Climate Protection Act'); and Ley 21.455 'Ley Marco de Cambio Climático'. For an overview of which countries have included intermediate and long-term GHG emission reduction targets in framework climate change legislation, see: World Bank *Reference Guide to Climate Change Framework Legislation* (2020).

<sup>5</sup> Statutes and policy make up the majority of sources for domestic climate litigation. See: UN Environment Programme *Global Climate Litigation Review* (2020) 17-20; and 40-41.

<sup>6</sup> For an in-depth discussion on the rise of strategic climate litigation, see: Setzer & Higham *Global Trends in Climate Change Litigation: 2022 Snapshot* 15-25. See also: Peel & Markey-Towler 2021 (22) *GLJ* 1484-1487.

principle of intergenerational equity. It is the utility of this principle as a tool for advancing successful climate change arguments in courts which forms the focus of this minor dissertation.

So, what is the principle of intergenerational equity? At its core, intergenerational equity is concerned with fairness between and within successive generations, and what duties we, in the present, owe to the people of the future, who will inevitably inherit the planet and its resources from us in whatever state we leave it.<sup>7</sup> It advances the idea that each generation is both the beneficiary and the custodian of the ‘planetary trust’, with the rights to use the planet’s resources and corresponding obligations to care for the planet for future generations.<sup>8</sup> The idea of protecting the environment for the benefit of both present *and* future generations has been present in environmental law for quite some time, going at least as far back as the Stockholm Declaration of 1972.<sup>9</sup> Though it is far from ubiquitous, it has since been included in various iterations in several hard and soft law instruments at the international level,<sup>10</sup> as well as over 40 domestic Constitutions.<sup>11</sup> In South African law, it forms a part of the environmental right in the Constitution, which states, *inter alia*, that, “everyone has the right... to have the environment protected, for the benefit of present and future generations.”<sup>12</sup> In spite of this recognition, it is argued that at least until recently, intergenerational equity has been relatively under-utilised and under-developed in courts. Perhaps part of the reason for this is ambiguity and contestation around some of its core components, such as who exactly comprises present and future generations, the content and extent of intergenerational rights and duties, and skepticism around whether it is even possible for future generations to have either rights or standing in the legal sense.<sup>13</sup> Climate change cases are already fraught with issues around

---

<sup>7</sup> Brown Weiss *In Fairness to Future Generations* 5-15.

<sup>8</sup> Brown Weiss 1984 *Ecology law quarterly* 11(4) 581.

<sup>9</sup> See *The Stockholm Declaration on the Human Environment* (1972) para 6.

<sup>10</sup> For examples of hard law see arts 3(1) and 3(2) of the United Nations Framework Convention on Climate Change (1992); and art 1 of The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998). For examples of soft law, see: annexe 1 of World Commission for Environment and Development *Our Common Future*, which proposes the inclusion of the principle of intergenerational equity for environmental protection and sustainable development; principle 4 of the Earth Charter (2002); and art 25 of the United Nations Declaration on the Rights of Indigenous Peoples (2007).

<sup>11</sup> See Appendix E of May & Daly’s *Global Environmental Constitutionalism* 332-342.

<sup>12</sup> S 24 of the Constitution of the Republic of South Africa, 1996.

<sup>13</sup> See ‘Contestation and Criticism’ below for a detailed discussion of this.

justiciability, rights, duties, and remedies,<sup>14</sup> and the principle of intergenerational equity introduces additional questions and uncertainties about these crucial aspects of litigation.

Nevertheless, there are good reasons – and urgent reasons – to develop the principle of intergenerational equity, as it is of central relevance to questions around reducing global warming. Over the past several decades, the international community has acknowledged and responded to scientific knowledge that human activity has and is warming the planet – activity which, unless sufficiently mitigated, will have dire and irreversible consequences for both present and future generations.<sup>15</sup> Some of these consequences are already being felt;<sup>16</sup> however, the nature of global warming is that as temperatures increase year upon year, its effects tend to compound and cascade, crossing tipping points and thresholds that result in a downward spiral of rapidly worsening outcomes.<sup>17</sup> The most severe consequences of global warming are set to emerge in the long-term,<sup>18</sup> and will therefore disproportionately affect future generations. Conversely, the extent of global warming and emergence of climate risks are ultimately dependent on the global GHG emissions trajectory,<sup>19</sup> which will in large part be determined by actions taken in the present day. Under the Paris Agreement, many sovereign states,<sup>20</sup> including South Africa,<sup>21</sup> have agreed to reduce GHG emissions in order keep the global increase in temperature to well-below 2°C above pre-industrial levels, and to take action in alignment with with the more ambitious target of 1.5°C above pre-industrial levels,<sup>22</sup> thereby minimising future-related climate risks.<sup>23</sup> The Intergovernmental Panel on Climate Change (‘IPCC’) has

---

<sup>14</sup> For an overview of some of the common legal issues which pervade climate change cases, see: UN Environment Programme *Global Climate Litigation Review* (2020) 37-45.

<sup>15</sup> For examples of major international agreements responding to the problem of human-driven global warming, see: The United Nations Framework Convention on Climate Change (1992); The Kyoto Protocol (1997); and the Paris Agreement (2015).

<sup>16</sup> IPCC *Climate Change 2021: The Physical Science Basis* (2021) 5-15.

<sup>17</sup> For a broad scientific overview of the risks associated with different temperature projections and a discussion of how incremental temperature increases are expected to interact, compound, and cascade, see: IPCC *Summary for Policymakers: Impacts, Adaptation and Vulnerability* (2022) 16-20. (2022) 16-20.

<sup>18</sup> For the IPCC’s latest research on the long-term risks of climate change, see: IPCC *Summary for Policymakers: Impacts, Adaptation and Vulnerability* (2022) 14-16.

<sup>19</sup> IPCC *Summary for Policymakers: Global Warming of 1.5°C* (2018) 5.

<sup>20</sup> 194 parties have ratified the Paris Agreement. For a full list, see: UNFCCC “Paris Agreement - Status of Ratification”.

<sup>21</sup> Department of Forestries, Fisheries and the Environment “South Africa joins Nations of the World in ratifying the Paris Agreement on Climate Change”.

<sup>22</sup> Article 2 of the Paris Agreement (2015).

<sup>23</sup> Projections show that future climate-related risks are significantly lower and more adaptable at 1.5°C than at 2°C or above, see: IPCC *Summary for Policymakers: Global Warming of 1.5°C* (2018) 7-11.

warned that in order to meet the 1.5°C target, anthropogenic GHG emissions need to start declining well before the year 2030.<sup>24</sup> Nevertheless, parties' commitments to reducing their GHG emissions under the Paris Agreement, which take the form of Nationally Determined Contributions ('NDCs') are on the whole not sufficiently ambitious nor sufficiently well-implemented to meet these objectives,<sup>25</sup> including in South Africa.<sup>26</sup> The latest research from the IPCC indicates that current policies to reduce global GHG emissions are likely to result in a 2.8°C increase above pre-industrial levels by the end of the century,<sup>27</sup> with the full implementation of NDCs only reducing that number down to between 2.4-2.6°C.<sup>28</sup> Consequently, and in spite of a groundbreaking global agreement to limit global warming, future generations are set to bear the brunt of the consequences and the risks of severe climate change. Yet, the extent of these consequences will depend to a substantial degree on actions taken by the present generation to mitigate and adapt to climate change. This raises ethical and legal questions around intergenerational equity in the context of global warming. Future generations are especially vulnerable to harm arising from climate change, but they do not have a voice in today's political decisions, nor are they capable of playing a meaningful role in present day mitigation and adaptation efforts. Instead, it falls to present generations to make critical decisions about climate change that will shape the future, such as the degree to which global warming ought to be limited, and the kinds of trade-offs that should be made in the transition to net-zero emissions. What's more, it falls to the present generation to ensure the full and effective implementation of these decisions. Troublingly, present generations also stand to benefit from activities which generate high levels of GHG emissions, while passing the greatest risks of these activities along to younger generations. It is no wonder then that difficult transitions to less carbon-intensive lifestyles and cleaner energy sources are not happening fast enough in spite of parties' international and national commitments.

Several recent climate change cases brought primarily by young people have sought to capture the injustice of this trade-off, using intergenerational equity to argue that there is not just an

---

<sup>24</sup> IPCC *Summary for Policymakers: Global Warming of 1.5°C* (2018) 18.

<sup>25</sup> UN Environment Programme *Emissions Gap Report* (2022).

<sup>26</sup> To view South Africa's first NDC, see: South Africa's First Nationally Determined Contribution Under the Paris Agreement (2021). For an assessment of South Africa's NDC, see: Climate Action Tracker "South Africa".

<sup>27</sup> UN *NDC Synthesis Report 2022* 35-36.

<sup>28</sup> *Ibid* 35-36.

ethical but also a legal duty to protect the environment for the sake of future generations. Some of the jurisdictions where recent cases have been brought include Colombia,<sup>29</sup> Germany,<sup>30</sup> Canada,<sup>31</sup> Australia,<sup>32</sup> the USA,<sup>33</sup> Brazil,<sup>34</sup> and the European Court of Human Rights.<sup>35</sup> In these cases, courts have begun to grapple with some of the thornier questions around intergenerational equity, such as who exactly comprises future generations, whether future generations can have standing, whether future generations have rights, and the content and extent of intergenerational obligations. In the South African context, though intergenerational equity is recognised, these questions have yet to be considered in detail. Thus, cases emerging in foreign jurisdictions have the potential to provide valuable insights into how intergenerational equity could be further developed and utilised in climate change litigation in South Africa.

## 1.2. Scope and purpose

Given the growing number of cases around the world involving future generations and the principle of intergenerational equity in climate change litigation, this minor dissertation seeks to evaluate the principle of intergenerational equity as a climate change litigation tool in South Africa. Litigating for future generations raises many questions about how best to approach issues of standing, rights and duties, and remedies. The focus of this minor dissertation is on examining and interpreting South African law in relation to intergenerational equity and these different elements of litigation. In seeking to evaluate different approaches to the different elements of litigation, lessons will be drawn from cases in two foreign jurisdictions: Germany and Colombia. The reason for drawing from foreign jurisdictions is that although South African cases have referenced intergenerational equity,<sup>36</sup> there has not yet been a South African case brought on behalf of future generations concerning the rights of future generations and the duties owed to them in the present, with remedies focused on addressing these. In considering

---

<sup>29</sup> Corte Suprema de Justicia, *sentencia 4360 de 2018*, read alongside *Dejusticia* 2018.

<sup>30</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 24, 2021, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1723 (2021); For the official English translation, see *Climate Case Chart* “Neubauer et al v. Germany”. This reference is henceforth ‘Neubauer’.

<sup>31</sup> *Environnement Jeunesse c. Procureur général du Canada* 2021 QCCA 1871.

<sup>32</sup> *Sharma v. Minister for the Environment* [2021] FCA 560 (May 27, 2021).

<sup>33</sup> *Juliana v. United States*, No. 18-36082 (9th Cir. 2020).

<sup>34</sup> London School of Economics and Political Science “PSB et al. v. Brazil (on deforestation and human rights)”.

<sup>35</sup> *Reuters* “Portuguese youth sue European states over ‘life-threatening’ climate change”.

<sup>36</sup> For an overview of South African case law recognising intergenerational equity, see Chapter 4 “recognition in case law” below.

the rights and obligations arising from the principle of intergenerational equity, this minor dissertation will consider constitutional rights relating to intergenerational equity, and rights and duties arising from the inter-related principles of public trusteeship and sustainable development. However, the principle of intergenerational equity as a climate litigation tool is the overarching focus of the research.

Excluded from the scope of this minor dissertation is the principle of intergenerational equity in the international and regional context, because these hold fewer lessons for domestic litigation than considerations of the principle in foreign domestic contexts. Due to the word limit and the need for deep analysis of the cases, only two foreign law cases are considered. They have been chosen because of their relative success, and because the courts in both the Colombian Amazon and *Neubauer* cases gave in-depth analyses of the principle of intergenerational equity within their respective legal systems.<sup>37</sup>

The purpose of this research is to explore the use of intergenerational equity as a tool to enhance environmental and intergenerational justice in climate change litigation. This minor dissertation seeks to evaluate the principle of intergenerational equity within the South African legal context, while drawing lessons from the successes of the principle in foreign jurisdictions on how and when this principle could and should be invoked in strategic climate litigation.

### **1.3. Methodology and structure**

Chapter I is an introductory chapter. Its purpose is to give a broad overview of climate change and the global response to it, emphasise the role of climate litigation as a strategy for enhancing climate justice, as well as introduce the principle of intergenerational equity and highlight its ethical and legal relevance to the problem of climate change. This chapter also outlines the scope and purpose of this minor dissertation, as well as providing an overview of each chapter in ‘Methodology and structure’.

Chapter II seeks to provide a detailed, in-depth analysis of the principle of intergenerational equity as well as contextualise the post-Paris proliferation of climate change litigation, and provide an overview of its key issues and trends. The theoretical basis, definitions, and differing academic views on intergenerational equity are considered, and particular

---

<sup>37</sup> For a detailed discussion of the role intergenerational equity played in these cases, see Chapter III below.

consideration is given to different formulations of standing as well as intergenerational rights and obligations. The basis for climate change litigation is considered alongside important trends and key issues.

Chapter III sets out the background, facts, reasoning and outcomes of *Neubauer* and *Sentencia 4360 de 2018* ('the Colombian Amazon case')<sup>38</sup>, two successful key climate change cases brought on behalf of future generations in which the courts elaborated on the principle of intergenerational equity. Both cases were chosen because of the court's substantive analysis of the principle of intergenerational equity and the strategic role this principle played in the successful outcome of the case. Particular attention is paid to the justiciability of the cases and standing of the applicants, questions of rights and obligations, key legal arguments, remedies, and the role of attribution science to support climate change litigation. After the details of each case are explained, they are analysed for strategic lessons.

Chapter IV then turns to the South African legal context. Intergenerational equity, intergenerational ethics and the opportunities and limitations of their legal recognition are evaluated in light of the key issues and lessons learned in chapters II and III. Specific principles, constitutional rights, obligations, and remedies are identified as theoretically operating well in conjunction with the principle of intergenerational equity. Finally, consideration is given to potential key lessons for the South African context.

Chapter V concludes that the principle of intergenerational equity, although under-utilised, has much potential for strategic impacts in climate change litigation provided the key lessons distilled from previous chapters are adequately accounted for. In the South African context particularly, it is argued that standing may not present a difficult barrier to surmount, that the formulation of rights and obligations may hold the potential for litigation against both state and non-state actors, that South African law provides a wide scope for developing appropriate remedies, and that South African courts are willing to take intergenerational ethics into account in their decisions.

---

<sup>38</sup> Corte Suprema de Justicia, *sentencia 4360 de 2018*.

## Chapter 2: Literature Review

### 2.1. What is intergenerational equity?

Philosophies, beliefs, and rules around what role present generations should play in the safeguarding of the environment for future generations and the duties present generations owe to those in the future have deep and diverse roots in many cultures, religions, and legal systems.<sup>39</sup> In modern environmental law, ethical concerns over how environmental degradation might impact future generations led parties to include the interests of both present *and* future generations in the principles of the Stockholm Declaration of 1972.<sup>40</sup> This inclusion reflected the growing awareness of how human activities are capable of altering the environment in ways that can affect generations to come.<sup>41</sup> It is this concern – the idea that the environment and resources should be protected and conserved for posterity – which constitutes the central ethical premise of intergenerational equity. Intergenerational equity recognises that although different generations exist at different times on the temporal spectrum, they share a common heritage in the natural and cultural resources of the planet.<sup>42</sup> It therefore requires that present generations act in a way that does not compromise the resource base such that future generations cannot meet their own needs and strive towards their own goals. However, since future generations do not yet exist, their precise needs and preferences vis-à-vis resources is unknown, and unknowable. Moreover, what is beneficial for present generations may not necessarily be beneficial for future generations, and vice versa. So, how should the law protect the indeterminate needs and interests of future generations? And how should the law balance these needs against the needs of present generations? These are some of the central tensions and questions at the heart of intergenerational equity not just as an ethical concern, but as a legal principle.

---

<sup>39</sup> See Brown Weiss *In Fairness to Future Generations* 18-20 where Brown Weiss discusses the various inculcations of these ideas in African customary laws, the civil and common law traditions, nontheistic traditions of Asia and South Asia, Islamic law, Judaism, and Christianity.

<sup>40</sup> See principles 1 and 2 of The Stockholm Declaration on the Human Environment (1972).

<sup>41</sup> Sands & Peel *Principles of International Environmental Law* 29.

<sup>42</sup> Brown Weiss *In Fairness To Future Generations* 5-6.

In the field of environmental law, one of the foremost thinkers on intergenerational equity is Edith Brown-Weiss.<sup>43</sup> Drawing inspiration from an existing legal mechanism known as a trust, Brown-Weiss proposes that the natural and cultural resources of the planet can be seen as comprising ‘the planetary trust’.<sup>44</sup> Each successive generation inherits this planetary trust and adopts the position of trustor.<sup>45</sup> As such, each generation is both a beneficiary and custodian of planetary resources, able to use and enjoy them, and simultaneously obliged to safeguard them for future generations.<sup>46</sup> Brown-Weiss terms these two elements of rights and obligations as ‘planetary rights’ and ‘intergenerational planetary obligations’.<sup>47</sup> In expanding and defining what this means, she suggests viewing humanity as a partnership amongst all generations across time.<sup>48</sup> This would require each generation to pass on the planet in no worse condition than it was received.<sup>49</sup> Moreover, it would require that where previous generations have improved the planet’s natural and cultural resources, these improvements be conserved by and for successive generations.<sup>50</sup> On the other hand, where previous generations have degraded the planet’s natural and cultural resources, the burdens of repairing this ought to be passed down and shared across succeeding generations until the harm is repaired.<sup>51</sup> Brown-Weiss’ use of the trust mechanism has several benefits: it acknowledges the cross-temporal relationships between different generations; it establishes rights and corresponding obligations; it emphasises the shared nature of planetary resources; it views resources from a global, rather than domestic, perspective; and because of its use of the trust mechanism, it translates easily into the language of law.

In addition to the trusteeship relationship between generations, Brown-Weiss proposes that the principle of intergenerational equity includes *intragenerational* relationships that operate

---

<sup>43</sup> Falk “Preface” in Brown Weiss *In Fairness To Future Generations* xxii-xxiii; Fitzmaurice 2004 *Non-State Actors and International Law* 190-191; Slobodian 2020 *The Georgetown Environmental Law Review* 569. For more on intergenerational equity in the philosophical context, see Rawls *A Theory of Justice* 250-257; and Parfit *Reasons and Persons* 351-441.

<sup>44</sup> Brown Weiss 1984 *Ecology law quarterly* 495-581.

<sup>45</sup> Brown Weiss *In Fairness To Future Generations* 21.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*; For a critical discussion on intergenerational rights and duties, see below: ‘Can future generations be said to have rights and do present generations owe them duties?’.

<sup>48</sup> *Ibid* 23.

<sup>49</sup> *Ibid* 24; In the philosophical context, Rawls similarly argued that each generation should pass on real capital, or resources, to succeeding generations which are equivalent in value to what they inherited from their predecessors. See: Rawls *A Theory of Justice* 255-256.

<sup>50</sup> *Ibid* 24.

<sup>51</sup> *Ibid.*

between those *within* a generation.<sup>52</sup> She terms this ‘intragenerational equity’. It consists of a parallel set of planetary rights and duties operating between those within an existing generation.<sup>53</sup> These rights and duties aim to ensure fairness amongst those within a generation by requiring that the benefits of planetary resources be shared equitably, as well as the burdens of safeguarding them. Brown-Weiss explains that these rights and duties are necessary to guard against situations where one segment of a generation could benefit either wholly or disproportionately from planetary resources, whilst another might be wholly or disproportionately burdened by caring for them.<sup>54</sup> In contemplating extant economic inequalities between countries, Brown-Weiss recognises the difficulties of countries and communities struggling with poverty to meet the needs of present generations, let alone future generations.<sup>55</sup> She argues that wealthier countries and communities are obliged to support impoverished ones by helping them to gain equitable access to planetary resources, by contributing to the costs of preserving and protecting their planetary resources, and by contributing to the costs of protecting their people from the harms of ecological degradation.<sup>56</sup> In other words, there can be no equality between generations unless the inequalities *within* existing generations are also addressed.

In recognition of the potential difficulties in applying intergenerational equity, Brown-Weiss proposes using a subset of guiding principles.<sup>57</sup> The first of these is the principle of conservation of options, which posits that in order for future generations to prosper and achieve their goals, multiple paths and opportunities need to be open to them.<sup>58</sup> Present generations cannot accurately predict what future generations will value, nor what problems they will face.<sup>59</sup> Nevertheless, by avoiding locking future generations onto a particular path, or creating an over-reliance on any single resource, and instead diversifying the pathways and resources available to them, present generations can ensure that future generations have the freedom and flexibility to self-determine.<sup>60</sup> The second guiding principle is conservation of environmental

---

<sup>52</sup> Ibid 21.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid 27-28.

<sup>56</sup> Ibid 27-28.

<sup>57</sup> Ibid 38.

<sup>58</sup> Ibid 40-42.

<sup>59</sup> Ibid 38.

<sup>60</sup> Ibid 38.

quality. This principle does not require that the environment be kept in pristine condition, but it does require the maintenance of a baseline quality.<sup>61</sup> Further, it requires that the long-term benefits of development be balanced against the long-term environmental costs, to ensure that future generations benefit from any trade-offs.<sup>62</sup> The third guiding principle is conservation of access, which aims to ensure that all members of a present generation have a minimum level of access to planetary resources.<sup>63</sup> The obligation to ensure equitable access falls on all members of those within a present generation.<sup>64</sup>

### **2.1.1. Contestation and criticism**

Perhaps unsurprisingly, the idea that the law should protect a class of people such as ‘future generations’ who do not yet exist, has been subject to much contestation by legal scholars. Some have disagreed over the meaning of the principle, and others have critiqued its practical legal utility. As the principle of intergenerational equity has received increased recognition at the international and national levels, and as more litigants successfully rely on it in courts, I would argue that these critiques have become less relevant. Nevertheless, they are still useful insofar as they clarify the meaning of the principle, give context to court’s differing interpretations of the principle, and highlight some of the practical challenges of using this principle in litigation.

#### **a. Delineating between ‘generations’**

One aspect of intergenerational equity which has received a lot of attention is the ambiguous nature of the word ‘generations’. Commentators have identified several possible interpretations. The first of these is that ‘generations’ refers to societal generations, such as ‘millennials’ and ‘generation Z’.<sup>65</sup> However, this usage is ill-suited in the context of intergenerational equity because the delineations between generations are often based on characteristics rather than clear points in time, and different generations can vary across

---

<sup>61</sup> Ibid 42-43; Brown-Weiss suggests that this baseline measurement be informed by scientific breaking points in the earth’s systems.

<sup>62</sup> Ibid 42-43.

<sup>63</sup> Ibid 43-45.

<sup>64</sup> Ibid 43-45.

<sup>65</sup> Shelton “Intergenerational Equity” in *Solidarity: A Structural Principle of International Law* 126-127; Solum 2001 *Loyola Los Angeles Review* 169-170; and Tremmel *Intergenerational Justice* 20-21.

cultures and nationalities (the ‘Born-Free’ generation, for example, refers only to South Africans born after South Africa’s transition to democracy, and not members of any other nation).<sup>66</sup> The result is unclear boundaries and overlaps between different societal generations.

A second meaning of ‘generations’ is that it refers to lineal descent generations within families – for example, parents, their children, their children’s children, and so on.<sup>67</sup> However, this definition works best within one lineal line of descent and is difficult to apply even to extended families, where for example the ages of children, grandchildren and great grandchildren may overlap.<sup>68</sup> When applied to the broader human population, where there is a wide variety of ages amongst grandparents, parents, and children, this definition of generation becomes unworkably vague.<sup>69</sup>

Solum suggests a third definition of ‘generation’, which simply delineates between the deceased generation, the living generation, and ‘future generations’ who will exist but are not yet born.<sup>70</sup> Another commentator, Shelton, questions whether intergenerational equity even requires a precise definition of ‘generation’, and if perhaps it is enough simply to acknowledge the possibility of future human existence.<sup>71</sup> Brown-Weiss does not define ‘generation’ but she does delineate between generations in much the same way as Solum: she refers to those who have previously existed as ‘past’ or ‘previous’ generations, those who currently exist as the ‘present’ generation, and those who will exist in the future, even very far into the future, as ‘future’ or ‘successive’ generations’.<sup>72</sup> For the purposes of this dissertation, these divisions will be used as they offer a practical and fairly clear delineation, and, in general, the phrase, “present and future generations”, which implies this delineation, has frequently been used to incorporate the principle of intergenerational equity in law both internationally and domestically.<sup>73</sup>

---

<sup>66</sup> Ibid; For a discussion of the ‘born-free’ generation, see: *BBC News*.

<sup>67</sup> Shelton “Intergenerational Equity” in *Solidarity: A Structural Principle of International Law* 127; Solum 2001 *Loyola Los Angeles Review* 170; and Tremmel *Intergenerational Justice* 19.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Solum 2001 *Loyola Los Angeles Review* 170-171.

<sup>71</sup> Shelton “Intergenerational Equity” in *Solidarity: A Structural Principle of International Law* 130-131.

<sup>72</sup> Brown Weiss *In Fairness To Future Generations* 21-25.

<sup>73</sup> For examples of this wording in international law see: the preamble and article 3 of the UNFCCC; principle 2 of the Stockholm Declaration; and principle 3 of the Rio Declaration on Environment and Development 1992. For examples in domestic law see: s 24 of the Constitution of the Republic of South Africa, 1996; Article 42 of the Constitution of Kenya, 2010; and Article 225 of the Constitution of the Federative Republic of Brazil, 1998.

So, if present generations are those that exist, and future generations will only exist in the future, then what is the status of children who are yet to be adults in the future? Brown-Weiss' delineation would suggest that unborn children belong to future generations, and already-born children to the present generation. Brown-Weiss has also spoken of leaving a planetary legacy to, "our children and their descendants", possibly suggesting that these two groups are distinct, but related.<sup>74</sup> Weston has argued that children, defined as persons under the age of 18, have little agency and need others to safeguard their interests.<sup>75</sup> In this sense, they are effectively in the same situation as those who are yet to be born, and he therefore includes them as part of his definition of 'future generations'.<sup>76</sup> However he appears to be in a minority. Other academics share the view that children are part of the present generation, but have emphasised that they have overlapping interests with future generations and can serve as a 'bridge' between current and future generations.<sup>77</sup> The connection between children and future generations also has relevance for standing, discussed further below.

Somewhat in line with this argument that children may have overlapping interests with future generations is Tremmel's slightly more nuanced understanding of 'generations'. Tremmel argues that there are two important understandings of 'generations'. The first is the intertemporal understanding – where 'present' generations refers to those who are alive today, and 'future' generations to those who have not yet been born.<sup>78</sup> This understanding is essential for intergenerational justice. The second understanding of 'generations' is a temporal one, which divides those who are alive today into different age groups, such as the youth, the middle-aged, and the old.<sup>79</sup> Tremmel emphasises that this second understanding is important for generational justice, because it acknowledges that there may be inequities between those of different ages that are already alive today.<sup>80</sup>

---

For a complete overview of this phrases' inclusion in domestic constitutions, see: Appendix E of May & Daly's *Global Environmental Constitutionalism* 332-342.

<sup>74</sup> Brown Weiss *American University International Law Review* 19.

<sup>75</sup> Weston 2008 (9) *Vermont Journal of Environmental Law* 388-389.

<sup>76</sup> *Ibid.*

<sup>77</sup> Rose "All-affected, Non-identity and the Political Representation of Future Generations" in *Intergenerational Equity: Environmental and Cultural Concerns* 34-35; Slobodian 2020 *The Georgetown Environmental Law Review* 578-579; and United Nations *SDGS* 4.

<sup>78</sup> Tremmel *Intergenerational Justice* 20.

<sup>79</sup> *Ibid* 20.

<sup>80</sup> *Ibid* 22-33.

In summary, there is no singular definition of ‘generation’. However, in the intergenerational context, the tendency is to delineate between ‘present’ and ‘future’ generations, where the present generation is understood to be constituted of those who exist today, and ‘future’ or ‘successive’ generations are those who will exist tomorrow. Children enjoy a special position that connects the present generation with future generations. In addition to this, a more holistic understanding of justice and equity acknowledges that alongside inequalities between the present generation and future generations, there may also be inequalities between different age cohorts within the present generation.

### **b. Can future generations have standing?**

One of the fundamental problems with intergenerational equity as a principle in law is that future generations cannot legally represent themselves, because as established above, the broad consensus is that they do not yet exist. The question of how to represent future generations in courts has generated many different answers.

One obvious solution, which has received widespread support, is that future generations have proxy representatives solely dedicated to protecting their interests, with standing to represent them in courts – at the international, regional, and national levels.<sup>81</sup> Numerous suggestions have been put forward as to what the best form for such representatives might be, including that they take the form of institutions, non-governmental organisations, commissioners, or ombudsman.<sup>82</sup> One of the advantages of proxy representation is that it ensures that there is an ever-present representative dedicated to advocating for future generations.<sup>83</sup> Moreover, proxy representatives can advocate for future generations outside of court rooms – for example, depending on the type of representative they may be able to conduct investigations, do research, give recommendations, speak in political forums, impose sanctions and incentives, or vote on

---

<sup>81</sup> Brown Weiss *In Fairness To Future Generations* 120-126; Agius & Kim “Introduction” in Agius & Busuttil (eds) *Future Generations and International Law* xv-xvi; and Rose “All-affected, Non-identity and the Political Representation of Future Generations” in *Intergenerational Equity: Environmental and Cultural Concerns* 32-51; Padilla 2002 *Ecological Economics* 21.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

issues.<sup>84</sup> Some countries have already appointed proxy representatives for future generations.<sup>85</sup> However, many have not, and in the absence of these, other options for legal standing may need to be explored.

Another inventive solution is to allow adolescents to represent the interests of both themselves and future generations. As already discussed, children share many of the vulnerabilities of future generations, and can be seen as providing a connecting link between present and future generations.<sup>86</sup> However unlike future generations, children already exist, and so may approach courts about issues that will affect their futures. While children may not be appropriate representatives for future generations in every situation, at least in the context of immediate threats such as climate change their interests overlap with those of future generations.<sup>87</sup> Therefore, they may go to court on their own behalf, and additionally act as representatives of future generations.<sup>88</sup>

Slobodian has noted that future generations' interests can equally be represented through the use of transgenerational groups. Communities, organisations, and countries by their nature, persist through time and membership within these groups cycles across generations. Therefore, transgenerational groups have the capacity to represent both present and future members of their group in courts.<sup>89</sup> This is applicable not just in domestic contexts, but also international ones. Brown-Weiss, for instance, has argued that since States may represent their own nationals, they should equally be able to represent the interests of their future nationals in international courts and tribunals.<sup>90</sup>

Ultimately, which people, organisations, proxies, or groups may successfully establish standing in cases concerning the interests of future generations will depend largely on the complexities within the legal system in which the case is brought. Some jurisdictions may be

---

<sup>84</sup> Ibid.

<sup>85</sup> For a list of proxy representatives, which includes Commissioners for Future Generations in Hungary and Wales, see: Rose "All-affected, Non-identity and the Political Representation of Future Generations" in *Intergenerational Equity: Environmental and Cultural Concerns* 50-51.

<sup>86</sup> See "Delineating between generations" above.

<sup>87</sup> Slobodian 2020 *The Georgetown Environmental Law Review* 576-577.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid 579-580.

<sup>90</sup> Brown Weiss *In Fairness To Future Generations* 121.

open to ‘anyone’ bringing a case on behalf or in the interests of future generations,<sup>91</sup> whereas others may require applicants to have a special interest in the matter,<sup>92</sup> or have other requirements which make standing difficult to establish.<sup>93</sup> Those seeking to litigate on behalf of future generations should be careful to ensure that all the requirements for standing are met. In jurisdictions where requirements for standing are particularly narrow, the establishment and appointment of a proxy representative with legal standing may prove especially important.

### **c. Can future generations be said to have rights and do present generations owe them duties?**

Whether future generations can have legally enforceable rights and whether they are owed duties has been a subject of some disagreement. Legal scholars Beckerman and Pasek argue that because future generations do not exist, they cannot be said to have legal rights, and as such there can be no legal enforcement of their interests.<sup>94</sup> Tremmel has responded to this by pointing out that it is irrelevant whether future generations have rights in the present, because human rights are universal in nature, and we can therefore be sure that any future humans will have rights.<sup>95</sup> This stance is supported by the phrasing of the United Nations Declaration on Human Rights, which states that: “All human beings are born free and equal in dignity and rights.”<sup>96</sup> For Tremmel, the fact that future people *will* have rights makes all the difference. He further argues that future peoples’ rights could conceivably be violated by actions in the present, and uses this, along with the widespread acknowledgment of the need to pass on an intact planet for future generations, to argue that present generations have actionable obligations to future generations.<sup>97</sup>

---

<sup>91</sup> Ibid 123.

<sup>92</sup> The Australian legal system, for example, requires litigants to have a special interest in the matter at hand in order to bring a case, see: *Australian Conservation Foundation v Commonwealth* [1980] HCA 53, (1980) 146 CLR 493 (13 February 1980).

<sup>93</sup> In the USA, young people seeking to bring a case on behalf of future generations failed to meet the third requirement of standing, which is that the remedy asked for is in the court’s power to grant. See: *Juliana v. United States*, No. 18-36082 (9th Cir. 2020) 21-32.

<sup>94</sup> Beckerman & Pasek *Justice, Posterity and the Environment* 2001 14; see also: Lowe “Sustainable Development and Unsustainable Arguments” in A. Boyle and D. Freestone (eds.) *International Law and Sustainable Development: Past Achievements and Future Challenges* 27.

<sup>95</sup> Tremmel *Intergenerational Justice* 48-52.

<sup>96</sup> Article 1 of the Universal Declaration of Human Rights (1948).

<sup>97</sup> Tremmel *Intergenerational Justice* 52-53.

Another more philosophical challenge to future individual's rights is advanced by D'Amato, who drew on Parfit's 'non-identity problem' to argue that all actions in the present influence the eventual existence or non-existence of specific individuals in the future.<sup>98</sup> It follows that any action taken today on behalf of specific future people may inevitably change the course of the future in such a way that they are never born. Paradoxically then, instead of helping or protecting them, any actions taken on behalf of future people may inadvertently wipe them out of existence. In response to this argument, Brown-Weiss has clarified that planetary rights and obligations are collective, generational rights and obligations.<sup>99</sup> They do not attach to specific individuals, but rather to each generation, regardless of the size or specific composition of individuals in that generation.<sup>100</sup> She has also stressed that planetary rights and obligations are independent from one another.<sup>101</sup> The duty to conserve the quality of the resource base, for example, is not dependent on the rights of future generations to inherit that resource base. Other academics have been similarly skeptical of the non-identity problem. Arianson, for instance, argues that general obligations to those in future generations should be viewed as obligations towards place-holders, rather than specific individuals.<sup>102</sup> Tremmel has questioned the very foundation of the non-identity problem, arguing that multiple factors contribute to the circumstances of any individuals' birth, and it would be a mistake to say that any person's birth is the result of *one* particular action or policy, let alone an entire generation of people.<sup>103</sup>

Philosophical challenges aside, May and Daly have recorded the inclusion of legal duties towards or rights of future generations in 39 national Constitutions.<sup>104</sup> Of these, 5 domestic constitutions explicitly refer to the 'rights' of future generations.<sup>105</sup> The remainder, while not explicitly recognising that future generations have rights, either recognise some form of duty

---

<sup>98</sup> D'Amato 1990 (84) *The American Journal of International Law* 190-192; See also: Parfit *Reasons and Persons* 351-441.

<sup>99</sup> Brown Weiss 1990 (84) *Georgetown University Law* 203-204.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> Ariansen "Beyond Parfit's Paradox" in *Future Generations and International Law* (1998) 1-6

<sup>103</sup> Tremmel *Intergenerational Justice* 40-42

<sup>104</sup> See Appendix E of May & Daly's *Global Environmental Constitutionalism* 332-342.

<sup>105</sup> Article 33 of Bolivia (Plurinational State of)'s Constitution of 2009; Article 50 of Iran (Islamic Republic of)'s Constitution of 1979 with Amendments through 1989; Article 39(2) of the Constitution of the Republic of Angola, 2010; Article 13(d)(iii) of the Constitution of the Republic of Malawi, 2006; and Article 117(2)(d) of the Constitution of Mozambique, 2004.

on the state or citizens towards future generations,<sup>106</sup> or incorporate the need to protect the environment for present and future generations in the environmental right.<sup>107</sup> This suggests that the idea that present generations have obligations towards future generations is more widely-endorsed than the idea that future generations have actionable legal rights.

At the international level, numerous hard law instruments recognise the importance of protecting resources for future generations,<sup>108</sup> but far fewer recognise concrete and actionable rights of future generations or duties towards them. One hard law instrument which explicitly recognises duties to future generations is the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, which recognises the duties on all its state parties to ensure the identification, protection, conservation, presentation and transmission of natural and cultural heritage to future generations.<sup>109</sup> A rare example of a hard law instrument acknowledging the 'rights' of future generations is the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.<sup>110</sup> Similarly, the International Court of Justice has recognised the importance of taking the interests of present and future generations into account, without fully endorsing rights or

---

<sup>106</sup> For examples of constitutions which impose duties towards future generations on states, see: The Namibian Constitution; and the Constitution of the Maldives, 2008. For examples of constitutions which also place obligations on their citizens or 'everyone' to preserve the environment for future generations, see: The Constitution of the Kingdom of Bhutan, 2008; and the Constitution of the Democratic Republic of Timor-Leste, 2002.

<sup>107</sup> See for example, article 24 of the Constitution of the Republic of South Africa, 1994; and article 42 of the Constitution of Kenya, 2010.

<sup>108</sup> See for example: The preamble of the 1946 International Convention for the Regulation of Whaling, which recognises nations' interests in safeguarding whale stocks for future generations; the preamble of the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals 1980, which recognises that man holds the earth's resources for future generations; Article 33 of the Fourth Lome Convention, 1995, which strives to safeguard environment and natural resources for future generations; The preamble of Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 1972, which recognises the importance of marine resources for present and future generations; The preamble of the the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, which recognises the importance of wild fauna and flora 'for generations to come'; and the preamble of the 1992 Convention on Biodiversity, which states the determination of the parties to conserve and sustainably use biological diversity for the benefit of present and future generations.

<sup>109</sup> Article 4 of the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage recognises the importance of natural and cultural heritage for future generations.

<sup>110</sup> See article 1 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998), which states that it aims: '...to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her well-being.'

obligations towards them.<sup>111</sup> The only recognition that future generations have rights appears in a dissenting opinion by Judge Weeramantry, who wrote:

“It is to be noted in this context that the rights of future generations have passed the stage when they were merely an embryonic right struggling for recognition... When incontrovertible scientific evidence speaks of pollution of the environment on a scale that spans hundreds of generations, this Court would fail in its trust if it did not take serious note of the ways in which the distant future is protected by present law. The ideals of the United Nations Charter do not limit themselves to the present, for they look forward to the promotion of social progress and better standards of life, and they fix their vision, not only on the present, but on ‘succeeding generations’.”<sup>112</sup>

From this explanation, it is not entirely clear whether Judge Weeramantry is asserting that future generations have rights in the present or can be assumed to have rights in the future. However, what is clear is that Judge Weeramantry recognises that those in the present have both moral and legal obligations to protect the rights of future generations. His use of the words “succeeding generations” and reference to the ideals of the United Nations Charter echoes its preamble, which begins: “We the peoples of the United Nations determined to save succeeding generations from the scourge of war...”<sup>113</sup> Thus, Judge Weeramantry’s determination that present generations have obligations towards future generations stems from his interpretation of the United Nations Charter as a forward-looking instrument, and the universal nature of human rights.

In conclusion, whether future generations can actually be said to have rights in the present is still a far from settled matter. However, the commentary suggests that present generations can and do have duties to protect future generations’ rights, regardless of whether those rights exist now or will only exist in the future. Nevertheless, the establishment of binding rights and obligations is not a philosophical question, but a legal one. Acknowledgment of the importance of future generations’ interests at the international level has mostly fallen short of recognising concrete rights and duties. On the other hand, at the national level, numerous domestic constitutions have recognised obligations towards future generations, particularly in connection with the environment. The nature and content of those obligations will naturally vary from state to state, depending on the wording of the obligation and its interpretation by

---

<sup>111</sup> *Case Concerning the Construction of the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* 1998 37 (ILM) 78 para 140.

<sup>112</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (1996) 35 ILM 809 at 88.

<sup>113</sup> The preamble of the Charter of the United Nations (1945).

jurisdictional courts. In the end, as Tremmel points out, human rights are ever-evolving, and legal recognition is ultimately determined by the *boni mores* of societies.<sup>114</sup>

#### **d. Anthropocentrism, ecocentrism, and intergenerational equity**

Another critique of intergenerational equity is that it is anthropocentric, rather than eco-centric.<sup>115</sup> Specifically, critics such as D'Amato have argued that nature should be protected for its inherent value, and not its usefulness to humans or future generations of humans.<sup>116</sup> Brown-Weiss has also acknowledged that her conceptualisation of intergenerational rights and duties is anthropocentric.<sup>117</sup> In *Of Course For Humans*, Tladi considers criticisms of intergenerational equity made by eco-centrists and concludes that although it is anthropocentrically-phrased, there is nothing to suggest that intergenerational equity is actually in conflict with the eco-centric approach.<sup>118</sup> Moreover, in recognising the interests of future generations and the importance of intergenerational equity, a court in Colombia has granted rights of nature to the Colombian Amazon by way of remedy.<sup>119</sup> In doing so, the court ensured that the river's rights will be protected in perpetuity, and by extension, the rights of future generations to use the river. This judgment demonstrates that the principle of intergenerational equity and rights of nature are not necessarily in conflict. One can therefore argue that present generations of humans have duties to preserve the environment, and rights to benefit from the planet's natural resources, and still recognise the inherent value of nature.

## **2.2. Climate change litigation**

### **2.2.1. Introduction**

Climate change litigation is essential to any rational climate change strategy.<sup>120</sup> Litigation operates as a compliance and enforcement mechanism that can hold governments and

---

<sup>114</sup> Tremmel *Intergenerational Justice* 51.

<sup>115</sup> See: D'Amato 1990 *American Journal of International Law* 190-198; and Gillespie *International Environmental Law, Policy and Ethics* 124-126.

<sup>116</sup> D'Amato 1990 *American Journal of International Law* 198.

<sup>117</sup> Brown Weiss 1984 *Ecology law quarterly* 498 at footnote 13.

<sup>118</sup> Tladi 2002 *SAJELP* 183, 186.

<sup>119</sup> This is discussed in detail in Chapter III.

<sup>120</sup> UN Environment Programme *The Status of Climate Change Litigation* (2017) 8.

corporations accountable for their legal commitments (which many have adopted under international instruments) and for actions that cause harm and thus necessitate redress.<sup>121</sup> It is therefore an important tool for achieving climate justice. In recent years, thanks in part to the Paris Agreement and an increase in national commitments to addressing climate change, there has been a dramatic uptick in the amount of domestic climate change cases brought globally.<sup>122</sup> This section attempts to give an overview of climate change litigation – how the Paris Agreement has facilitated domestic climate change litigation, and the key issues and trends that have emerged from this exciting and relatively new area of law.

### **2.2.2. The Paris Agreement: A basis for climate change litigation?**

The Paris Agreement has been heralded as a breakthrough in international efforts to combat climate change because it is the first global agreement that commits all parties to reaching net-zero emissions.<sup>123</sup> By contrast, prior international agreements aimed at tackling the problem of climate change only committed industrialised nations to reducing their emissions which, while laudable, left out some of the world’s highest emitters and thus failed to provide a viable solution for stabilising GHG emissions and ending global warming.<sup>124</sup> As previously mentioned, the Paris Agreement relies heavily on Nationally Determined Contributions (‘NDCs’) to achieve its aims.<sup>125</sup> These are nationally determined plans wherein states commit to the global effort of undertaking ambitious efforts to mitigate climate change.<sup>126</sup> All parties are bound to develop and submit NDCs and are required to pursue efforts to mitigate climate change under their NDCs.<sup>127</sup> Furthermore, parties are required to develop and submit new NDCs every five years that reflect their highest ambitions.<sup>128</sup> Each successive NDC must be

---

<sup>121</sup> Ibid.

<sup>122</sup> Ibid 11-13; UN Environment Programme *Global Climate Litigation Review* (2020) 13.

<sup>123</sup> Obergassel et al 2016 *ELM* 3 3.

<sup>124</sup> Both the United Nations Framework Convention on Climate Change (1992) (‘UNFCCC’) and the Kyoto Protocol (1997) only place obligations to enact policies to reduce GHG emissions on industrialised countries, see article 4(2)(a) of the UNFCCC and article 3 of the Kyoto Protocol, read with Annex I and Annex II of the UNFCCC. See also *Statista* for a list of the world’s highest GHG emitters, which includes non-annexure countries such as China, India, and Japan in its top 5 global emitters. For further analysis of the strengths and weaknesses of different international climate agreements, see broadly: Bodansky 2016 110(2) *American Journal of International Law*.

<sup>125</sup> Article 3 of the Paris Agreement (2015); Sands & Peel *Principles of International Environmental Law* 321.

<sup>126</sup> Article 3 of the Paris Agreement (2015).

<sup>127</sup> Article 4(2) of the Paris Agreement (2015).

<sup>128</sup> Article 4(9) of the Paris Agreement (2015).

more ambitious and progressive than the last, taking into account differing national circumstances.<sup>129</sup> In this way it is envisaged that all parties will gradually ‘ratchet-up’ their progress and objectives until the ultimate goal of net-zero emissions is achieved by 2050.<sup>130</sup> Although parties are bound to formulate and submit their NDCs, they are not bound to achieve the goals in their NDCs,<sup>131</sup> but rather to report transparently on their progress.<sup>132</sup> It is envisaged that such transparency will induce compliance through public pressure.<sup>133</sup> Although the ambitions and achievement of the NDCs are discretionary, Obergassel et al argue that this was necessary for high political buy-in.<sup>134</sup>

One potential method for holding parties accountable for achieving their NDCs or pressuring them to aim for more ambitious targets is through domestic litigation. Although the Paris Agreement does not provide a cause of action for litigation, it does provide a starting point on which to base future actions.<sup>135</sup> Through ratification of the Paris Agreement and through their NDCs, parties have endorsed climate change policies and actions. Clearly then, policies that will result in an increase in net emissions would be going against stated political commitments.<sup>136</sup> Analyses of policies and legislation on climate change mitigation could further find that ambitions, progress, or both, are insufficient to meet stated commitments, creating space for litigation where none may have existed before.<sup>137</sup>

The UN Environmental Programme Report on the Status of Climate Change Litigation notes that domestic climate change litigation is a rapidly growing area of law both in and outside the United States of America (‘USA’).<sup>138</sup> They also note that it has never been a more important tool than it is now, in part because the Paris Agreement and other environmental laws now form a legal foundation on which to base actions.<sup>139</sup> Therefore, even though parties are not bound to set minimum commitments in emission reductions in their NDCs, nor bound by

---

<sup>129</sup> Article 4(3) of the Paris Agreement (2015).

<sup>130</sup> Obergassel et al 2016 *ELM* 3 44-46.

<sup>131</sup> Ibid 13-14.

<sup>132</sup> Article 13(7)(b) of the Paris Agreement 2015.

<sup>133</sup> Obergassel et al 2016 *ELM* 3 3.

<sup>134</sup> Ibid 8-12.

<sup>135</sup> Obergassel et al 2016 *ELM* 3 53.

<sup>136</sup> UN Environment Programme *The Status of Climate Change Litigation* (2017) 8-9.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid 11-13; UN Environment Programme *Global Climate Litigation Review* (2020) 13.

<sup>139</sup> UN Environment Programme *The Status of Climate Change Litigation* (2017) 8.

international law to achieve their NDCs, they could still be held accountable by their own people and courts through the use of domestic litigation.

### **2.2.3. Key issues in climate change cases**

The 2020 UNEP Report identifies 4 key issues that tend to arise at the different stages in climate change litigation.<sup>140</sup> These issues are highlighted here because they inform the reading and analysis of the cases discussed in Chapter III below.

The first key issue is justiciability.<sup>141</sup> At the start of any case, before considering substantive issues, the court needs to consider whether the applicants have standing and whether the court itself has jurisdiction to hear the case. If the case is not justiciable, it will be dismissed before it can be heard on the merits. In climate change litigation this is frequently not a straightforward issue. In this new area of litigation, cases are being brought by a wide-range of litigants, including individuals, non-profits, environmental bodies, and on behalf of mother nature, natural entities such as rivers, vulnerable communities, and future generations.<sup>142</sup> Courts may also be asked to consider if they have jurisdiction – and complexities can arise in relation to the separation of powers, and the transboundary impacts of climate change.<sup>143</sup>

A second key issue courts frequently have to consider is whether the source of climate obligations amount to a legally enforceable basis for the claim.<sup>144</sup> The sources that arise in these cases generally fall into one of the following three groups: statutes and policy; constitutional and human rights; and the common law.<sup>145</sup>

Thirdly, courts consider remedies and targets. These usually take the form of damages or injunctive remedies – authors of the Report note that there is wide variation in amounts claimed for damages and in injunctive relief asked for (which could constitute an authorisation to erect

---

<sup>140</sup> UN Environment Programme *Global Climate Litigation Review* (2020) 1.

<sup>141</sup> *Ibid* 37-40.

<sup>142</sup> *Ibid*.

<sup>143</sup> *Ibid*.

<sup>144</sup> *Ibid* 40-42.

<sup>145</sup> *Ibid*.

shoreline barriers, or orders to reform a company's corporate governance system, or even orders for a national government to implement policy changes).<sup>146</sup>

Fourthly, courts frequently have to consider whether climate change can be sufficiently attributed to the cause in question.<sup>147</sup> A strong scientific link needs to be established otherwise the case may fail.<sup>148</sup>

#### **2.2.4. Overview of litigation trends in climate change cases**

Recent years have seen civil society and activists scrambling to figure out the best ways to strategically enhance climate justice through domestic litigation, and the United Nations Environment Programme has noted the emergence of 6 litigation trends. First, there have been an increasing number of climate change cases relying on universal human rights as enshrined in international law (eg life, health, liberty, privacy, and more).<sup>149</sup> Secondly, as countries have codified commitments to tackling climate change, there has been increased domestic enforcement of these obligations.<sup>150</sup> Thirdly, there has been a trend in litigation which aims to keep fossil fuels in the ground and preserve carbon sinks – for example, challenging offshore exploitation of oil and gas, and preserving forests and wetlands.<sup>151</sup> Fourthly, there has been a trend in cases which seek to hold corporations accountable for their contributions to GHG emissions and roles in the climate crisis.<sup>152</sup> Fifthly, litigants frequently attempt to hold governments accountable for their adaptation actions – either failures to adapt or for the impacts of adaptation.<sup>153</sup> Sixthly, there has been a trend in litigants challenging misleading statements from corporations, including suing for their investments where companies had mislead them about the risk of their investments.<sup>154</sup> These trends are noteworthy because they reflect the different strategies that litigants have taken in efforts to litigate impactfully on climate change. They reflect a trend of litigants bringing cases not just against the state, but

---

<sup>146</sup> Ibid 43.

<sup>147</sup> Ibid 44.

<sup>148</sup> Ibid.

<sup>149</sup> Ibid 13-17.

<sup>150</sup> Ibid 17-20.

<sup>151</sup> Ibid 20-22.

<sup>152</sup> Ibid 22-23.

<sup>153</sup> Ibid 23-26.

<sup>154</sup> Ibid 26-27.

also corporations. They also indicate that litigants tend to base their claims on either human rights or the enforcement of national commitments.

### 3. The Colombian Amazon and *Neubauer* cases

#### 3.1. The Colombian Amazon case

##### 3.1.1. Background and facts

The Amazon Basin comprises an area of 6.7 million km<sup>2</sup> that spans across multiple countries, including Colombia. It holds the largest rainforest in the world – the Amazon Rainforest – which is home to over 30 million people, and contains 10% of the planet’s biodiversity.<sup>155</sup> Moreover, it absorbs considerable amounts of CO<sub>2</sub>, and contains a further 90-140 billion metric tons of CO<sub>2</sub>, which, if released, would have a profound accelerating effect on global warming and climate change.<sup>156</sup> Despite its importance and the crucial role it plays, the Amazon Basin is currently disappearing due primarily to land conversion and deforestation.<sup>157</sup> The significance of the Amazon Basin, and the rainforest specifically, has been recognised globally in various international agreements and treaties. Colombia has committed itself under the Paris Agreement and in national law to reduce deforestation and GHG emissions, as well as reduce the net rate of deforestation of the Colombian Amazon to zero by 2020.<sup>158</sup> In spite of these commitments, 178 697 hectares of the Colombian Amazon were lost in 2016, an increase of 44% above what had been lost in 2015.<sup>159</sup>

In contrast to the state’s inefficacy in combatting deforestation, Colombian courts have a history of progressive, ecocentric environmental decisions. This is evidenced by the courts’ repeated recognitions of nature as a legal subject with rights,<sup>160</sup> including one groundbreaking judgment in which the Constitutional Court of Colombia recognised the Atrato river

---

<sup>155</sup> WWF.

<sup>156</sup> Ibid.

<sup>157</sup> Ibid.

<sup>158</sup> Article 5(2) of the Paris Agreement (2015); Article 171 of the Ley 1753 de 2015; and Corte Suprema de Justicia, *sentencia 4360 de 2018 2*, read alongside *Dejusticia* 2018.

<sup>159</sup> Corte Suprema de Justicia, *sentencia 4360 de 2018 2*, read alongside *Dejusticia* 2018.

<sup>160</sup> See for instance Corte Constitucional, *sentencia C-595 de 2010*; and Corte Constitucional *T-080 de 2015*.

For an overview of the ecocentric paradigm shift in Colombian courts, see: Villavicencio Calzadilla 2019 (15/1) *LEAD* 49-59.

specifically as a subject with legal rights.<sup>161</sup> Against this background, it is easy to understand why a group of Colombian youth, frustrated by the government's inaction and led by research and advocacy group Dejusticia, decided to approach the courts.<sup>162</sup> The applicants, aged between 7 and 25, identified themselves as part of the future generation in the sense that they expected to experience adulthood between the years 2017-2041, and so brought their case on behalf of themselves and future generations collectively.<sup>163</sup> This is in contrast with the thinking of many commentators, at least in the Anglophone literature, who as discussed above, have largely leaned towards classifying children and young people as members of the present generation. The applicants brought their case against the President of Colombia and other government ministers and bodies, as well as selected municipalities, arguing that their failure to prevent rampant deforestation in the Amazon constituted an infringement of their basic human and constitutional rights.<sup>164</sup> Their case took the form of a *tutela* action, which is a special legal mechanism in Colombian law reserved for the protection of basic, or 'fundamental' human rights.<sup>165</sup> However, the District Court found that the applicants did not have standing to bring the case, because *tutela* actions are in general restricted to violations of individual's human rights, rather than collective rights.<sup>166</sup> The applicants then appealed to the Colombian Supreme Court of Justice ('the Supreme Court'), which is the second-highest court in Colombia, after the Constitutional Court of Colombia.<sup>167</sup>

### 3.1.2. Issues and Appellants' arguments

At the Supreme Court, the appellants argued that the government's failure to fulfil both their national and international obligations to stop deforestation in the Amazon was contributing to climate change and the erosion of their basic, constitutional rights to life, to health, and to a healthy environment in the present day and across their expected life spans.<sup>168</sup> They further argued that not only had the government failed in its obligations to reduce deforestation, but that the rate of deforestation was in fact increasing.<sup>169</sup> They argued that the protection of the

---

<sup>161</sup> Corte Constitucional, *sentencia T-622 de 2016*.

<sup>162</sup> Corte Suprema de Justicia, *sentencia 4360 de 2018*, read alongside *Dejusticia 2018*.

<sup>163</sup> *Ibid* 1-2.

<sup>164</sup> *Ibid*.

<sup>165</sup> *Protection International*; and Hagan *Legal Design and Innovation*.

<sup>166</sup> *Ibid*.

<sup>167</sup> Nagle 1995 *Indiana International & Comparative Law Review* 71-72.

<sup>168</sup> Corte Suprema de Justicia, *sentencia 4360 de 2018* 1, read alongside *Dejusticia 2018*.

<sup>169</sup> *Ibid* 2-3.

Amazon Basin was crucial not just for the ecosystems in that region, but for the ecosystems of the whole of Colombia.<sup>170</sup> They specifically identified adverse effects to the natural water cycle, the resultant lack of reliability of available water supplies, changes in the soil that exacerbate flooding, and accelerated global warming, as severe consequences of deforestation that were already affecting them and would affect them to an even greater degree in the future.<sup>171</sup> They asked the Supreme Court for the following: to order a moratorium on the activities causing deforestation in the Amazon; to order various governmental members, bodies, and municipalities to prepare and implement plans to enable them to meet their commitments to decrease and eventually end deforestation in the Amazon; and to order the creation of an Intergenerational Pact for the Life of the Colombian Amazon.<sup>172</sup> The purpose of this pact would be to ensure the protection of the Colombian Amazon for future generations.<sup>173</sup>

### 3.1.3. The Supreme Court's findings and reasoning

In considering the appellants' standing, the Supreme Court noted that in the past, courts had held that *tutela* actions can be brought for violations of collective rights, provided that the persons bringing the case: (a) established a link between the collective rights and basic human rights; (b) proved that they were directly affected by the rights violation; (c) proved that there was an actual, not merely theoretical, violation of their basic human rights; and (d) requested a remedy aimed at the restoration of basic human rights, not collective rights.<sup>174</sup> On the facts, the Court found that basic human rights, such as the rights to life, health, freedom, minimum subsistence, and human dignity, are directly connected to and affected by the environment and ecosystem.<sup>175</sup> It further found that degradation of the environment constituted *prima facie* wrongful conduct directly affecting the appellants' basic constitutional rights to life, health, and access to water.<sup>176</sup> Moreover, it found that ecological degradation generally affected the current and future life and basic rights of all Colombians, including future generations.<sup>177</sup> It

---

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid 4-5.

<sup>173</sup> Ibid.

<sup>174</sup> Ibid 11.

<sup>175</sup> Ibid 11-12.

<sup>176</sup> Ibid 13.

<sup>177</sup> Ibid.

thus concluded that the appellants had satisfied the requirements of standing for a *tutela* action.<sup>178</sup>

The second key issue the Supreme Court considered was the gravity of the climate crisis and its cause.<sup>179</sup> First, the Supreme Court noted that climate change is a global issue which jeopardises the planet and poses a threat to human beings around the world.<sup>180</sup> They found on the facts that an anthropocentric world view, evidenced in global population growth, consumerist culture, contemporary political and economic systems, and over-exploitation of natural resources, was at the centre of the climate crisis problem.<sup>181</sup> For this reason, the Supreme Court found that humanity and anthropocentrism are at the root of climate change.<sup>182</sup>

The next key issue the Supreme Court had to grapple with was the legal recognition of future generations and the principle of intergenerational equity. The Supreme Court began by reasoning that the protection of basic human rights in the context of climate change requires a shift away from self-interest and a move towards the new ideology of ‘*ecocéntrica-antrópica*’ (ecocentric-anthropic), which recognises the inherent value of nature.<sup>183</sup> This perspective necessitates taking into account not just the individual, but ‘the other’, or ‘the neighbour’.<sup>184</sup> The Supreme Court defines ‘the other’ as the other inhabitants of the planet – including people in other countries, animals, plants, and even those who are yet to be born.<sup>185</sup> To strengthen their point further, the Supreme Court referenced academic literature which argues that the principle of solidarity requires the consideration of ‘the other’ in both space *and* time – meaning that ‘the other’ includes both present and future inhabitants of the planet.<sup>186</sup>

Having utilised the principle of solidarity and the ecocentric-anthropic perspective to recognise future generations, the Supreme Court again drew on both these principles to elaborate on the content and nature of the rights of future generations and the obligations owed to them.<sup>187</sup> First,

---

<sup>178</sup> Ibid 14.

<sup>179</sup> Ibid 15.

<sup>180</sup> Ibid.

<sup>181</sup> Ibid 16.

<sup>182</sup> Ibid.

<sup>183</sup> Ibid 16-17.

<sup>184</sup> Ibid 18.

<sup>185</sup> Ibid 18-19.

<sup>186</sup> Ibid 19.

<sup>187</sup> Ibid 19.

they stated that natural resources are the shared inheritance of all of Earth's inhabitants, including their descendants and future generations.<sup>188</sup> In the absence of a judicious and equitable approach to the use of natural resources, these resources could be squandered, jeopardising humanity's future.<sup>189</sup> Secondly, the Supreme Court noted that the ecocentric-anthropocentric ideology views human beings and the environment as equal.<sup>190</sup> It recognises the inherent value of nature, and aims to encourage conservationism and discourage over-exploitation.<sup>191</sup> Human beings, including future generations, are a part of the natural system and therefore a part of nature.<sup>192</sup> By connecting the protection of future generations with these two recognised legal principles, the Court reasoned that a binding legal relationship exists between present and future generations.<sup>193</sup> In considering the nature of this relationship, it stated that it presents primarily as an omission, the effect of which is to constrain the actions of the present generation.<sup>194</sup> Simultaneously, it requires implicit duties of care and custodianship of the planet's natural resources and the future human world.<sup>195</sup>

Having established that the present generation has binding obligations towards future generations, the Supreme Court then considered Colombia's international and national obligations under various treaties, including the Paris Agreement and the Amazonian Cooperation Treaty, as well as Colombian laws, the Colombian Constitution, and the principle of solidarity.<sup>196</sup> The Supreme Court highlighted the importance of the Amazon, and stated that protecting it is both a national and international obligation.<sup>197</sup> Nevertheless, it noted that in spite of Colombia's many national and international commitments, the problem of deforestation and climate change was worsening, and that governmental measures had so far failed to protect peoples basic rights to water, air, a dignified life, health, and other rights connected to the environment.<sup>198</sup> The Supreme Court found that the rapid pace of deforestation in the Colombian Amazon was the result of a score of harmful activities, including illegal

---

<sup>188</sup> Ibid 20.

<sup>189</sup> Ibid.

<sup>190</sup> Ibid.

<sup>191</sup> Ibid 20-21.

<sup>192</sup> Ibid 21.

<sup>193</sup> Ibid.

<sup>194</sup> Ibid.

<sup>195</sup> Ibid.

<sup>196</sup> Ibid 22-32.

<sup>197</sup> Ibid 30.

<sup>198</sup> Ibid 33.

logging, illegal mineral extraction, land grabbing, illicit crops, the building of infrastructure, and the agricultural industry.<sup>199</sup> It further noted that the long and short-term consequences of this deforestation in the Amazon would affect not just all the complainants, but also all the inhabitants of Colombia, including future generations, and a multitude of fauna and flora.<sup>200</sup> The Supreme Court stated that all of the above was in stark contrast to environmental principles, namely: the precautionary principle; the principle of intergenerational equity; and the principle of solidarity.<sup>201</sup>

In light of the precautionary principle, the irreversible nature of environmental degradation on this scale, and scientific certainty about the consequences of climate change due to deforestation, the Supreme Court held that it is necessary to take a cautious approach to the protection of the Amazon.<sup>202</sup> Furthermore, it stated that there had been a clear violation of the principle of intergenerational equity, because rampant deforestation in the Amazon contributes to global warming and threatens the lives and livelihoods of future generations, including the appellants who were minors.<sup>203</sup> The Supreme Court further found that environmental authorities had failed both to ensure the sustainable use of natural resources, and to enforce sanctions against offenders of environmental protection laws and standards.<sup>204</sup> It stated that rampant deforestation in the Amazon was evidence of this failure by the Natural National Parks of Colombia and Amazonian municipalities to fulfil their obligations.<sup>205</sup> Finally, the Supreme Court concluded that the government had failed to fulfil its national and international obligations to protect the Amazon and reduce deforestation. Likewise, they found that Amazonian municipalities had been negligent in their duties to protect the Amazon and reduce deforestation.<sup>206</sup>

---

<sup>199</sup> Ibid 34.

<sup>200</sup> Ibid 35.

<sup>201</sup> Ibid.

<sup>202</sup> Ibid 35-36.

<sup>203</sup> Ibid 37.

<sup>204</sup> Ibid 42.

<sup>205</sup> Ibid 42-43.

<sup>206</sup> Ibid 43-44.

### 3.1.4. Remedy

Although the litigants did not request that the Colombian Amazon be granted rights of nature, by way of remedy the Supreme Court did recognise the Colombian Amazon as a legal subject with rights, ordering that the state and regional agencies must uphold those rights by protecting and restoring the Colombian Amazon.<sup>207</sup> In addition, the Supreme Court further granted the requested relief – namely, a number of orders for different plans to protect the Amazon.<sup>208</sup> First, it ordered the creation of short, medium, and long-term action plan to address the rapid pace of deforestation in the Colombian Amazon.<sup>209</sup> It ordered that these plans be developed by a number of governmental and non-governmental actors, in conjunction with the appellants and other interested and affected parties, and that they be created within four months of the date of judgment.<sup>210</sup> Secondly, it ordered the creation of the Intergenerational Pact for the Life of the Colombian Amazon, again with the participation of multiple governmental and non-governmental actors, within five months of the date of the judgment.<sup>211</sup> Thirdly, it ordered municipalities in the Colombian Amazon to update and implement their Land Management Plans, also within five months of the date of the judgment.<sup>212</sup> Fourthly, it ordered various regional Amazonian environmental authorities to create action plans to counter-act deforestation in areas within their jurisdictions, utilising criminal, judicial or administrative measures.<sup>213</sup> Finally, it ordered all of the defendants to increase their actions to mitigate deforestation generally.<sup>214</sup>

### 3.1.5. Outcome

Despite the appellants' victory in court, and despite the timelines attached to the formulation and implementation of all the remedial plans, Dejusticia reported that after the judgment, the rate of deforestation in the Colombian Amazon continued to increase.<sup>215</sup> The authorities never created the Intergenerational Pact for the Life of the Colombian Amazon, nor did any of the 14

---

<sup>207</sup> Ibid 45.

<sup>208</sup> Ibid 45-46.

<sup>209</sup> Ibid.

<sup>210</sup> Ibid 46.

<sup>211</sup> Ibid.

<sup>212</sup> Ibid 46-47.

<sup>213</sup> Ibid 47.

<sup>214</sup> Ibid.

<sup>215</sup> *Dejusticia* 2019.

identified municipalities update their land management plans.<sup>216</sup> None of the regional environmental authorities produced the court-ordered action plans. Only the Presidency and the identified Ministers produced the short, medium and long-term action plan for tackling deforestation which was required of them.<sup>217</sup> However, the action plan they produced was only a draft, and public participation was restricted to 5 cities, effectively leaving out the rural Amazonian communities most affected by deforestation.<sup>218</sup> Moreover, the action plan fell disappointingly short of its required aim, as it only committed the government to reducing the *increase* in the rate of deforestation, rather than committing it to decreasing and ultimately ending deforestation, which is what the Supreme Court had ordered the plan to achieve.<sup>219</sup>

### 3.1.6. Key lessons

The first observation is with regards to standing. In this case, the interests of future generations were represented by youth litigants who were directly affected by climate change, overcoming the problems of standing that some academics have stated render the principle of intergenerational equity inactionable.<sup>220</sup> Notably, the litigants failed to establish standing at the court of first instance due to the limitations of the *tutela* mechanism. This is a reminder that standing is not necessarily a given in climate change cases, and that litigants should take care to construct their justifications for standing from the outset.

The philosophical tension between who comprises ‘present’ and ‘future’ generations seemed to have little impact on the outcome of the case, as the litigants simply identified themselves as members of the future generation and explained that for them, this meant that they had their whole adult lives ahead of them. A key lesson from this is that as the literature suggests, youth litigants, are well-placed to invoke the principle of intergenerational equity in courts. However, whether they identify as members of the ‘present’ or ‘future’ generation is to an extent arbitrary and may differ between jurisdictions. Intriguingly, when referring to ‘future’ generations, the Court seemed to refer to all of the inhabitants of the Earth, their descendants, and generations

---

<sup>216</sup> Ibid.

<sup>217</sup> Ibid.

<sup>218</sup> Ibid.

<sup>219</sup> Ibid.

<sup>220</sup> See above ‘Can future generations have standing?’.

to come, possibly suggesting that non-humans may also be included as part of future generations.<sup>221</sup>

The Court's formulation of the rights and duties arising from the principle of intergenerational equity are also worth noting. In this regard, the Court did not concern itself with the question of whether all members of future generations have rights in the present or only in the future. Instead, it simply considered the question of whether the present generation has a binding legal obligation to protect the environmental rights of future generations. Having concluded that they do, it formulated the obligation as one which presents mainly as an omission or limitation on present-day actions. The judgment echoed some of the language used by Brown-Weiss, stating that the present generation also has simultaneous duties to safeguard and steward natural resources. As with Brown-Weiss' formulation of intergenerational obligations, the duties belong to the present generation as a whole, not the state. A key lesson to be distilled from this is that unlike what some commentators have suggested, the question of whether or not unborn generations can have rights in the present is irrelevant for establishing binding legal obligations towards future generations.

Another interesting observation is how the Court used academic literature on the ecocentric-anthropocentric ideology, already established in Colombian jurisprudence, to draw out the principle of intergenerational equity. Although many constitutions recognise the interests of future generations, Colombia's Constitution contains no references to future generations or any indication that it endorses the principle of intergenerational equity.<sup>222</sup> A key lesson from this is that the principle of intergenerational equity is not necessarily at odds with ecocentric perspectives. Moreover, the broad phrasing of intergenerational equity and its differing academic interpretations could actually be seen as a merit of the principle, because it allows for adaptation to different legal contexts and ideologies, and works well with other legal principles. In this case, the principle of intergenerational equity was interpreted to be consistent with other important principles in the Colombian legal dispensation – namely, the principle of solidarity and the precautionary principle.

---

<sup>221</sup> Corte Suprema de Justicia, *sentencia 4360 de 2018* 37, read alongside *Dejusticia* 2018 20.

<sup>222</sup> The Political Constitution of Colombia of 1991.

A final observation is the role of politics and the state in the outcome of the case. Despite a progressive judgment, which recognised the principle of intergenerational equity and granted the Colombian Amazon rights of nature, after the case deforestation of the Colombian Amazon continued (and still continues) at an alarming rate.<sup>223</sup> Thus, successful outcomes in strategic litigation have the potential to be undermined by a lack of accompanying political follow-through. This is one of the key differences between the final outcome of the Colombian Amazon case, and the outcome of the *Neubauer* case.

## 3.2. The *Neubauer* case

### 3.2.1. Background and facts

Germany is the largest emitter of greenhouse gases in the European Union, which is itself the third highest emitter of greenhouse gases globally.<sup>224</sup> In spite of the country's high emissions, high levels of climate activism exist amongst German people, particularly the youth. This is evidenced by widespread youth activism, such as the Fridays for Future movement, which has seen tens of thousands of German children skipping school on Fridays to protest for better climate action.<sup>225</sup> The United Nations Development Program's *G20 Peoples' Climate Vote* found that 77% of all Germans agree that the world is facing a climate emergency, with that statistic rising to 83% for those under the age of 18.<sup>226</sup>

In line with their European and international law obligations to reduce emissions, the German government had previously and repeatedly taken cabinet decisions reflecting their commitment to reduce emissions by 40% compared to 1990 levels by the year 2020.<sup>227</sup> This commitment was further reflected in the Action Programme on Climate Change 2020.<sup>228</sup> However, by 2018 it had become clear that the target was not going to be met on time.<sup>229</sup> So, in 2018, after a particularly hot summer, German farmers, along with Greenpeace, took the government to the Administrative Court of Berlin ('the Administrative Court').<sup>230</sup> The litigants argued that the

---

<sup>223</sup> *Dejusticia* 2019.

<sup>224</sup> *Armstrong Statista*.

<sup>225</sup> *Wahlström & Others Keele University*.

<sup>226</sup> *The G20 Peoples' Climate Vote 2021*

<sup>227</sup> *Climate Case Chart* "Family Farmers and Greenpeace Germany v. Germany" (unofficial English translation) 2.

<sup>228</sup> *Ibid.*

<sup>229</sup> *Ibid* 4.

<sup>230</sup> *Ibid* 1-2.

2020 target was binding, and that in failing to meet it, the government would be allowing dangerous climate change that would undermine their fundamental rights to property, freedom, health and well-being.<sup>231</sup> In addition, the litigants argued that a failure to meet the 2020 target would constitute an infringement of article 20a of the German Constitution, which describes the state as being responsible for future generations.<sup>232</sup> They asked that the Administrative Court remedy this by ordering the government to update the Action Programme on Climate Change 2020 to take measures to ensure that the 2020 target would be met.<sup>233</sup> However, the Administrative Court found that action plans and programs are not legally binding in nature, and with regards to the cabinet decisions, it stated that the context and wording, particularly the use of the first person and brochure format, made it clear that the targets contained within were merely political declarations and not intended to be legally binding.<sup>234</sup> Therefore, it reasoned that the 2020 reduction target set out in the Action Programme and cabinet decisions was not legally binding.<sup>235</sup> The Court further found that article 20a of the German Constitution was not a right, but did place obligations on the German state to protect the environment for future generations.<sup>236</sup> Nevertheless, they found that the state has wide discretion to decide how it fulfils its protective duties, and that as long as the state's measures are not 'entirely unsuitable or completely inadequate', then it will not be in breach of its protective duties.<sup>237</sup> On the facts, they found that the state's protective measures were adequate, and therefore the protective duty had not been breached.<sup>238</sup>

In the meantime, Germany had signed and ratified the Paris Agreement in 2016.<sup>239</sup> Pursuant to their commitments under the Paris Agreement to limit global warming, the German legislature had begun developing legislation to address climate change.<sup>240</sup> In December 2019, the German legislature enacted the Federal Climate Protection Act (henceforth the 'FCPA').<sup>241</sup> The FCPA outlined a plan to address climate change which included clearly stated emission reduction

---

<sup>231</sup> Ibid.

<sup>232</sup> Ibid 4.

<sup>233</sup> Ibid 7.

<sup>234</sup> Ibid 12-13.

<sup>235</sup> Ibid 13.

<sup>236</sup> Ibid 17.

<sup>237</sup> Ibid.

<sup>238</sup> Ibid 18.

<sup>239</sup> *United Nations Treaty Collection*.

<sup>240</sup> *Neubauer* para 3.

<sup>241</sup> Ibid para 2

targets to reduce emissions by 55% compared to 1990 levels by the year 2030.<sup>242</sup> However, it contained no plans, time frames, or targets for emission reductions in the period beyond 2030. Moreover, these emission reduction targets did not appear to align with the core commitment of the Paris Agreement to limit global warming to well-below 2°C, preferably 1.5°C, above pre-industrial levels. In fact, the FCPA allowed for such large quantities of GHG emissions, particularly CO<sub>2</sub>, as to make it virtually impossible for Germany to stay within these limits. Thus, it was widely criticised by opposition parties in Germany for lacking the ambition needed to comply with Germany’s national and international commitments.<sup>243</sup> Following the enactment of the FCPA, three separate constitutional complaints were lodged at Germany’s Federal Constitutional Court, the only German court with jurisdiction to declare legislation unconstitutional.<sup>244</sup> The applicants included Luisa Neubauer and many of the other young adults and minors who had taken to the streets of Germany in protest of a lack of action on climate change, as well as several citizens from Nepal and Bangladesh. Another diverse group of applicants, which included two environmental organisations, had also previously lodged a constitutional complaint in 2018, and they now amended this to challenge the reduction path and mitigation targets set out in the new legislation.<sup>245</sup> The four separate constitutional complaints were then heard jointly before the Federal Constitutional Court.<sup>246</sup>

### **3.2.2. Applicant’s arguments**

The four sets of applicants levied a plethora of arguments against the FCPA, most of which primarily challenged the inadequacy of its emission reduction measures to limit global warming to well-below 2°C, preferably 1.5°C, above pre-industrial levels.<sup>247</sup> Broadly, their arguments can be grouped into three different strategies.

The first strategy involved challenging various sections of the FCPA, particularly the sections permitting large annual emission quantities, on the basis that they were inadequate to address climate change and thus violated the applicants’ constitutional rights.<sup>248</sup> The applicants differed in which rights they drew on, with some even deriving rights from different articles in the

---

<sup>242</sup> Ibid para 4

<sup>243</sup> von Burchard *CMS Germany*

<sup>244</sup> Buser 2021 (22) *German Law Journal* 1410.

<sup>245</sup> *Neubauer* para 39.

<sup>246</sup> Ibid para 1.

<sup>247</sup> Ibid para 38.

<sup>248</sup> Ibid para 1.

German Constitution, such as the right to an ecological minimum standard, and the right to a future consistent with human dignity.<sup>249</sup>

The second strategy employed by some of the applicants was to argue that rather than outright violating their rights, the state had violated its protective duties towards their constitutional rights. Similarly to the arguments alleging rights violations, these arguments challenged various sections in the FCPA, critiquing their high allowances for GHG emissions.<sup>250</sup> On the one hand, the applicants argued that due to these high emission allowances, the FCPA failed to adequately protect them from climate change, resulting in the state being in violation of its obligations to protect the right to life, physical integrity and personal freedom, the right to property and inheritance, and the right to occupational freedom.<sup>251</sup> On the other hand, the applicants also argued that the high emissions the FCPA provided for would inevitably lead to Germany's overall CO<sub>2</sub> budget being almost depleted by the year 2030.<sup>252</sup> In order to stay within the small post-2030 CO<sub>2</sub> budget, the applicants, and all those residing in Germany, would have to be subject to drastic measures in the years after 2030 that would have profound consequences for their ability to enjoy their fundamental rights and freedoms.<sup>253</sup> Thus, they argued that by disproportionately allocating the CO<sub>2</sub> budget over time, and deliberately jeopardising their rights and freedoms in the future, the state was in violation of its protective duties towards their fundamental rights and freedoms generally.<sup>254</sup> Crucially, the applicants justified their forward-looking perspective of the state's protective duties in part by relying on article 20a of the German Constitution, which obliges the state to protect the environment and be cognisant of its responsibilities to future generations.<sup>255</sup>

The applicants' third strategy was to challenge the legislation as a whole. Some alleged that the FCPA failed to satisfy the 'essential matters' rule, which requires that matters of critical importance be provided for in legislation, due to its failure to comprehensively and effectively address the essential matter of the climate change crisis.<sup>256</sup> Others challenged the legislation

---

<sup>249</sup> Ibid paras 40 and 60.

<sup>250</sup> Ibid paras 40, 60 and 78.

<sup>251</sup> Ibid.

<sup>252</sup> Ibid para 1.

<sup>253</sup> Climate Case Chart "*Neubauer et al v. Germany* – Complaint (unofficial English translation)" 104 and 109; and *Neubauer* 127.

<sup>254</sup> *Neubauer* paras 1 and 127.

<sup>255</sup> Ibid 40.

<sup>256</sup> Ibid.

on the basis that it was incompatible with novel rationality obligations stemming from article 20a, because the legislature did not adequately take into account the IPCC's findings that abandoning the 1.5°C degree target would increase the chances of vital tipping points being reached and jeopardise the lives of millions of people.<sup>257</sup>

### **3.2.3. The Federal Constitutional Court's findings and reasoning**

#### **a. Procedural issues: Justiciability and standing**

The Court dealt with a range of procedural issues. It is beyond the scope of this research to discuss them all in detail. Instead, this section focuses on just two of these: the standing of the applicants, and the justiciability of article 20a of the German Constitution. These issues are discussed because justiciability and standing are key issues in climate change cases generally, standing is a point of contestation in literature around intergenerational equity, and article 20a is the key section in the German Constitution that recognises responsibilities towards future generations.

In German law, standing is restricted to those whose rights can be shown to be presently, individually, and directly affected.<sup>258</sup> On the facts, the Court could not find any conclusive indications that the state had outright violated any of the applicants' rights with respect to any of the challenged provisions in the FCPA.<sup>259</sup> Thus, none of the applicants could show they had standing for any of the arguments relying on direct rights violations and these challenges were all dismissed at the procedural stage.<sup>260</sup> This was unfortunate, as challenges to rights violations made up a large proportion of the applicants' arguments. Nevertheless, the applicants were more successful with regards to the complaints alleging violations of protective duties. With respect to the complaint that the state was in violation of its protective obligations towards the right to life, physical integrity, and personal freedom, and the right to property and inheritance, the Court indicated that all the applicants who qualified as natural persons, including those from Nepal and Bangladesh, were presently, individually, and directly affected and so had

---

<sup>257</sup> Ibid para 71; and Climate Case Chart "*Neubauer et al v. Germany – Complaint* (unofficial English translation)" 9.

<sup>258</sup> Buser 2021 (22) *German Law Journal* 1412.

<sup>259</sup> Ibid para 113-115.

<sup>260</sup> Ibid.

standing.<sup>261</sup> However, the Court found that protective duties did not extend to the right to occupational freedom, so none of the applicants had standing for this part of the complaint.<sup>262</sup> In terms of the complaint that the state was in violation of its protective duties towards rights generally because of its reckless and disproportionate allocation of the CO<sub>2</sub> budget, the Court found that only the German applicants had standing.<sup>263</sup> They reasoned that if there were harsh measures enacted to curb emissions in Germany in the future, these would not affect the applicants living abroad.<sup>264</sup> Therefore the applicants from Nepal and Bangladesh did not have standing for this complaint.<sup>265</sup> In addition, the Court upheld the position in German law that non-governmental organisations cannot have standing on behalf of others, so the environmental organisations, which brought complaints on behalf of the environment, failed to establish standing entirely.<sup>266</sup> As a result, a number of complaints were dismissed at the preliminary stage due to lack of standing. This is another stark reminder of how crucial it is to carefully consider standing in climate change cases.

The Court then turned to the question of whether article 20a is a justiciable provision, and in interrogating this, came to several critical conclusions regarding intergenerational standing, rights, and obligations in the German context. In full, article 20a states:

“Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.”<sup>267</sup>

First, the Court found that this article falls outside of the ‘rights’ section of the German Constitution and therefore upheld its previous position that this article reflects a national goal, rather than a right.<sup>268</sup> Though none of the applicants had claimed to represent future generations nor sought to protect the rights of future generations, the Court clarified that the position in German law is that article 20a cannot be used to invoke standing, and that neither unborn people nor future generations can be said to have rights in the present.<sup>269</sup> In spite of this, the Court still

---

<sup>261</sup> Ibid 96-101.

<sup>262</sup> Ibid 97.

<sup>263</sup> Ibid 116-132.

<sup>264</sup> Ibid 132.

<sup>265</sup> Ibid.

<sup>266</sup> Ibid para 136.

<sup>267</sup> The Basic Law for the Federal Republic of Germany.

<sup>268</sup> *Neubauer* para 112.

<sup>269</sup> Ibid.

found that article 20a is justiciable and that it imposes obligations, including the obligation to take action on climate change.<sup>270</sup>

## **b. Merits**

Having dismissed several of the applicants' arguments already in the procedural stage, the Court turned to consider the merits of the remaining challenges. First, the Court considered the nature of the state's protective duties. The position in German law is not merely that the state has an obligation not to violate peoples' rights, but also a duty to safeguard certain constitutional rights from being infringed on by others.<sup>271</sup> The Court found that in the context of the right to life and physical integrity, 'others' can include environmental pollution and climate change.<sup>272</sup> Moreover, the Court found that the state's duty of protection is a future-oriented duty, that does not only take effect *after* rights violations, but also extends to protection against *future* rights violations.<sup>273</sup> Crucially, the Court also confirmed that the legislature has a wide scope of discretion in how it designs legislation, even in cases where it has protective obligations to fulfil.<sup>274</sup> Typically, a duty of protection will only be said to have been violated either where the legislature has failed to take any precautionary measures whatsoever, or where the measures that have been taken are 'manifestly unsuitable or completely inadequate'.<sup>275</sup>

In terms of the complaint that the state had violated its protective duties towards certain rights by failing to sufficiently protect the applicants living in Germany from climate change, the Court stated that merely enacting the FCPA constituted taking a precautionary measure.<sup>276</sup> The method by which the FCPA sought to address climate change – decreasing emissions year on year until Germany reached net zero – was a suitable one.<sup>277</sup> In addition, the FCPA contained measures to mitigate climate change, not only adapt to it, therefore it could not be said to be completely inadequate.<sup>278</sup> Thus, the Court found that the measures in the FCPA for addressing climate change were not so egregious as to meet the high standard of being 'manifestly

---

<sup>270</sup> Ibid.

<sup>271</sup> Ibid para 145.

<sup>272</sup> Ibid para 147-148.

<sup>273</sup> Ibid para 146.

<sup>274</sup> Ibid para 152.

<sup>275</sup> Ibid.

<sup>276</sup> Ibid para 154.

<sup>277</sup> Ibid para 156.

<sup>278</sup> Ibid para 157.

unsuitable or completely inadequate’.<sup>279</sup> With respect to the applicants living in Bangladesh and Nepal, the Court found that though in principle it was possible that Germany might have protective obligations towards them, there was no need to decide the matter because Germany would in any case have fulfilled these obligations through their national and international commitments to addressing climate change.<sup>280</sup>

The Court then considered whether the state had violated its protective duties towards fundamental rights and freedoms generally by distributing Germany’s CO<sub>2</sub> budget disproportionately across time.<sup>281</sup> The consequences of the provisions of the FCPA that provided for high emissions in the short-term, would inevitably be harsh restrictions that would interfere with rights in the future.<sup>282</sup> Such interference, the Court reasoned, would have to be constitutionally justifiable if it was effectively built-into legislation.<sup>283</sup> Thus, the Court shifted the burden, and rather than just considering whether the measures taken were ‘manifestly unsuitable or completely inadequate’,<sup>284</sup> they also considered whether the provisions were in alignment with the German Constitution, particularly the state’s article 20a obligations towards the environment and future generations.<sup>285</sup> This required the Court to clarify the nature of fundamental rights and particularly, the obligations imposed by article 20a on the legislature. The Court stated:

“Under certain conditions, the Basic Law imposes an obligation to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations. As intertemporal guarantees of freedom, fundamental rights afford the complainants protection against the greenhouse gas reduction burdens imposed by Article 20a GG being unilaterally offloaded onto the future.”<sup>286</sup>

Thus, the Court reasoned that the legislature had an obligation to manage CO<sub>2</sub> reductions in a forward-looking and proportionate way in order to achieve climate neutrality without unreasonably compromising the freedoms of those in the future or disproportionately distributing emission reduction burdens over time and generations.<sup>287</sup> They stated that the

---

<sup>279</sup> Ibid paras 152 and 172.

<sup>280</sup> Ibid paras 173-181.

<sup>281</sup> Ibid para 182.

<sup>282</sup> Ibid paras 183 and 187.

<sup>283</sup> Ibid.

<sup>284</sup> Ibid para 152.

<sup>285</sup> Ibid.

<sup>286</sup> Ibid.

<sup>287</sup> Ibid 188.

principle of proportionality requires that one generation cannot take disproportionate quantities of the CO<sub>2</sub> budget for themselves while shouldering a comparatively minor burden in efforts to reduce emissions – effectively leaving subsequent generations with binding obligations that would stifle their fundamental freedoms.<sup>288</sup> They emphasised that the legislature must not act in a way that is ‘short-sighted’ or ‘one-sided’.<sup>289</sup> They further added that the global nature of the climate change problem does not absolve the German state from meeting their international obligations arising from the Paris Agreement and reducing their GHG emissions in proportion with their global fair share.<sup>290</sup>

Having outlined what is required of the legislature, the Court set about factually evaluating the emissions allowed in the FCPA in comparison with Germany’s overall CO<sub>2</sub> budget. Reasoning that the IPCC, the Paris Agreement, and even the FCPA, aimed to prevent dangerous climate change by limiting global warming to well-below 2°C, preferably 1.5°C, above pre-industrial levels, the Court found that this temperature target was what was constitutionally required by article 20a.<sup>291</sup> Due to the inherent difficulties in calculating an overall CO<sub>2</sub> budget, the Court stated that they would allow the legislature discrepancy in their evaluation.<sup>292</sup> Drawing on the IPCC’s Advisory Council’s own calculations of Germany’s CO<sub>2</sub> budget, which the Court found to be based on verifiable and reliable data, the Court found that Germany had an overall budget of 6.7 gigatonnes of CO<sub>2</sub> remaining.<sup>293</sup> This figure was calculated to give a 67% probability of limiting the global temperature to 1.75°C, the median between the upper and lower temperature limit. The Court then compared this figure with the total emission quantities permitted under the FCPA leading up to the year 2030, which the Court found to be at least 6 gigatonnes.<sup>294</sup> This would effectively leave less than 1 gigatonne post-2030, not accounting for CO<sub>2</sub> emissions from several industries, including aviation and shipping, which would reduce the remaining budget even further.<sup>295</sup> The Court concluded that in order for the population of Germany to stay within the remaining post-2030 CO<sub>2</sub> budget, climate neutrality would need to be reached

---

<sup>288</sup> Ibid para 192.

<sup>289</sup> Ibid para 194.

<sup>290</sup> Ibid para 202-203.

<sup>291</sup> Ibid para 208-209.

<sup>292</sup> Ibid para 214.

<sup>293</sup> Ibid para 231.

<sup>294</sup> Ibid para 232.

<sup>295</sup> Ibid para 233.

soon after 2030, but on the facts it seemed highly unlikely, even impossible, that Germany would be able to transition this quickly.<sup>296</sup>

Considering the above, the Court found that the sections of the FCPA allowing high emissions were not constitutionally justifiable in light of article 20a and the principle of proportionality insofar as they distributed the CO<sub>2</sub> budget disproportionately and seriously endangered future fundamental freedoms.<sup>297</sup> However, in interpreting whether the legislature had breached article 20a, the Court allowed the legislature a wide scope for discretion.<sup>298</sup> Acknowledging the imperfections of the IPCC Advisory Council's calculations, the Court reasoned that their final figure of 6 gigatonnes was only an estimate, and could not be regarded as definitive.<sup>299</sup> Not only that, but this quantity did not appear to outright exceed Germany's overall CO<sub>2</sub> budget of approximately 6.7 gigatonnes.<sup>300</sup> Overall, the Court concluded that there were simply too many variables and not enough information to definitively find that the legislature had violated article 20a.<sup>301</sup> Thus, the applicants fell short of securing a declaration from the Court that the legislature had actually breached article 20a or any other article or right in the German Constitution. Nevertheless, the applicants still succeeded in that the Court had already held that under the present circumstances it would not suffice for the legislature merely not to have breached any rights or obligations.<sup>302</sup> The irreversible risks to future freedoms meant that the challenged sections of the FCPA needed to be constitutionally justifiable, and on the facts the Court held that they were not.<sup>303</sup>

The Court then considered the challenges to the FCPA as a whole. With respect to the complaint that the FCPA failed to fulfil a minimum requirement of rationality arising from article 20a, the Court held that article 20a does not impose any obligations on the legislature to justify or rationalise their chosen pathway.<sup>304</sup> Therefore, this challenge failed. In terms of the complaint that the FCPA failed to satisfy the essential matters rule, the Court was in agreement

---

<sup>296</sup> Ibid para 234.

<sup>297</sup> Ibid paras 142, 183, 230 and 236.

<sup>298</sup> Ibid paras 206, 210 and 230.

<sup>299</sup> Ibid para 236.

<sup>300</sup> Ibid.

<sup>301</sup> Ibid paras 230-236.

<sup>302</sup> Ibid.

<sup>303</sup> Ibid 236. See also: para 187.

<sup>304</sup> Ibid para 239.

with the applicants.<sup>305</sup> It stated that there was a constitutional imperative for the legislature to clarify Germany's emission reduction path beyond the year 2030.<sup>306</sup> It emphasised that actions to mitigate climate change and move to net zero would need to happen soon in order to prevent drastic and abrupt curtailments of freedoms in the future.<sup>307</sup> Thus, the Court found that to the extent that the FCPA lacked critical guidance about Germany's reduction path, specifically the future quantities of allowable annual emissions, it did not satisfy the essential matters rule.<sup>308</sup>

In conclusion, the Court found that 20a GG obliges the state to take climate actions that both stay within the allocated carbon budget and align with a reduction path that sees net greenhouse gas emissions reaching zero.<sup>309</sup> The emission quantities permitted by the legislature in the FCPA must therefore be steadily reduced in a way that ensures that Germany reaches net zero while staying within its CO<sub>2</sub> budget.<sup>310</sup> Consequently, the Court held that S 3(1) and 4(1) of the FCPA read with Annex 2 were unconstitutional to the extent that they failed to satisfy the protection of fundamental rights by not providing a plan which spread the remaining CO<sub>2</sub> budget proportionately across time and failed to specify emission reduction targets in the period from 2031 until the constitutional requirement of climate neutrality was eventually reached.<sup>311</sup> All of the applicants who had succeeded in establishing standing were ultimately successful to the extent that their complaints aligned with this reasoning.<sup>312</sup>

#### **3.2.4. Remedy**

By way of remedy, the Court ordered the legislature to update the FCPA to provide for an emissions reductions path in the post-2031 period up until the point at which climate neutrality is reached that would satisfy its protective obligations towards fundamental rights.<sup>313</sup> Due to the many variables and uncertainties in calculating an exact CO<sub>2</sub> budget, and the wide discretion the Court afforded to the legislature in its interpretation of the science, the Court's order did not include specific emission reduction quantities or an order to stay within a CO<sub>2</sub> budget calculated for limiting global warming to 1.5°C. However, their judgment made it clear

---

<sup>305</sup> Ibid para 260-261.

<sup>306</sup> Ibid para 253.

<sup>307</sup> Ibid.

<sup>308</sup> Ibid para 260.

<sup>309</sup> Ibid para 255.

<sup>310</sup> Ibid para 255.

<sup>311</sup> Ibid paras 243 and 266.

<sup>312</sup> Ibid para 266.

<sup>313</sup> Ibid.

that the 1.5°C target is constitutionally significant, and that an unequal distribution of the CO<sub>2</sub> budget across time would not be constitutionally justifiable in light of the state’s protective obligations towards fundamental rights, which must align with the principle of proportionality and article 20a.

### **3.2.5. Outcome**

Following the Court’s judgment, the legislature swiftly amended the unconstitutional provisions to include updated, constitutionally proportionate targets for the period following 2030 up until 2045, the year by which Germany aims to achieve climate neutrality.<sup>314</sup> The swift adoption of the amendments has been attributed to popularity of climate change amongst voters and the proximity of the judgment to an upcoming federal election.<sup>315</sup> However, the legislative amendment process, which took place over less than two weeks and afforded only minimal opportunity for comment from states, associations and municipal umbrella organisations, has also been critiqued for failing to achieve an adequate balancing of interests.<sup>316</sup> As of June 2022, Climate Action Tracker gave Germany an overall rating of ‘insufficient’.<sup>317</sup> Their domestic target and policies and action are labelled as ‘almost sufficient’, and in line with a below 2°C increase in global temperatures, but still not ambitious enough to be compatible with an increase of 1.5°C.<sup>318</sup> Even so, Climate Action Tracker calculates their fair share target and climate finances as being ‘insufficient’ – meaning they align with a global temperature increase of between 2-3°C, above what is required by the Paris Agreement.<sup>319</sup>

### **3.2.6. Key lessons**

As with many climate change cases, justiciability, in particular standing, was a key issue in *Neubauer*. Although the youth complainants in *Neubauer* avoided the difficult questions around the standing of future generations by only representing themselves, they still struggled to establish their standing due to the Court dismissing a number of their claims at the outset and the requirement of proving that they were personally, directly, and individually affected. The diversity of the applicants and the many different arguments they advanced ultimately

---

<sup>314</sup> von Burchard *CMS Germany*; and sections 3 and 4 of the Federal Climate Protection Act.

<sup>315</sup> von Burchard *CMS Germany*.

<sup>316</sup> *Dentons*.

<sup>317</sup> *Climate Action Tracker* “Germany”.

<sup>318</sup> *Ibid*.

<sup>319</sup> Article 2(1)(a) of the Paris Agreement (2015).

proved useful, as the Court was able to grant standing to the second and third sets of applicants even after dismissing their claims based on the strength of the first set of applicants' arguments. A potential lesson from this is that where advancing novel arguments, it may prove strategic to put forward more than one argument to increase the chances of success. Likewise, in jurisdictions with high barriers to standing, having a diverse group of litigants may increase the chances of the case progressing to the merits stage.

Peel and Markey-Towler also highlight that a key lesson from *Neubauer* and other climate change cases with successful outcomes is the use of novel arguments, particularly those that rely on protective duties.<sup>320</sup> The judgment in *Neubauer* clearly demonstrates that the standard for determining whether the state had violated the applicants' rights – 'manifestly unsuitable or completely inadequate' – made it difficult for the litigants to definitively prove that the state had violated their rights.<sup>321</sup> However, when considering the arguments about protective duties, the Court applied a stricter standard to the state, which favoured the litigants. Intergenerational equity, which is recognised but possibly underdeveloped in many jurisdictions, also holds a lot of potential for legal innovation. This can be seen from how the Court in *Neubauer* developed the law by finding that the state's protective duties must be interpreted in light of article 20a as obligations which are forward-looking and do not favour one time period or generation over another.

Also notable in *Neubauer* is the Court's interpretation of key contested aspects of the principle of intergenerational equity – particularly who comprises future generations, and intergenerational rights and duties. In considering standing, the Court stated that:

“The complainants are not asserting the rights of unborn persons or even of entire future generations, neither of whom enjoy subjective fundamental rights... Rather, the complainants are invoking their own fundamental rights.”<sup>322</sup>

This clarifies that the Court did not consider the youth applicants as members of future generations, but rather as members of the present generation. The Court further emphasised that future generations do not have rights in the present, either as a group or as individuals.<sup>323</sup> Nevertheless, even without granting future generations rights or standing, the Court still found

---

<sup>320</sup> Peel & Markey-Towler 2021 (22) *GLJ* 1494-1495.

<sup>321</sup> *Neubauer* para 152.

<sup>322</sup> *Ibid* para 109.

<sup>323</sup> *Ibid* paras 109 and 146.

that the state has obligations in the present to protect people's rights and freedoms in the future. A key lesson here is that, as the literature suggests, litigants seeking to utilise the principle of intergenerational equity to protect future generations' rights do not have to prove that they are part of or represent future generations, nor do they have to prove that future generations have rights in the present, in order to prove that there are binding legal obligations to protect future rights and freedoms. Another key lesson is that the immediacy of climate change, which is already impacting people, somewhat nullifies the need to use a proxy to represent future generations.

Another key issue reflected in *Neubauer* is the source of climate obligations.<sup>324</sup> The applicants in *Neubauer* all based their challenges on the FCPA. A key lesson from this is that it is easier to litigate on climate change where a state has tangible, national commitments embedded in legislation.<sup>325</sup> This allows litigants the opportunity to either challenge the legislation itself, or where the legislation is satisfactory to address climate change, then to challenge the state's fulfilment of its own obligations.<sup>326</sup> This was one of the key weaknesses in the 2018 case which preceded *Neubauer*, as the earlier applicants' constitutional complaint failed because they based the source of the state's obligations on reduction targets in the state's Action Programme on Climate Change and decisions taken in cabinet meetings, which were found not to be legally binding in nature.<sup>327</sup>

Before considering the admissibility or merits of the case, the Court explained the science behind global warming and climate change, relying extensively on reports from the IPCC, reports from the UN, other scientific reports, and national plans and statistics.<sup>328</sup> Having accepted these scientific reports as part of the facts at the start of the judgment, the Court later relied heavily on scientific calculations of CO<sub>2</sub> budgets in their reasoning.<sup>329</sup> Kotze notes that the Court's willingness to recognise climate change science, much of which is relatively recent, is commendable.<sup>330</sup> It points to the broader trend of courts' increased willingness to build their

---

<sup>324</sup> UN Environment Programme *Global Climate Litigation Review* (2020) 40-42.

<sup>325</sup> *Ibid* 41.

<sup>326</sup> *Ibid* 40.

<sup>327</sup> See above 'The *Neubauer* case: Background and facts'.

<sup>328</sup> *Ibid* paras 11-30.

<sup>329</sup> See for instance *Neubauer* paras 215-231.

<sup>330</sup> Kotze 2021 (22) *German Law Journal* 1444.

findings on a reliable scientific basis.<sup>331</sup> Markey-Towler and Peele use the litigants' close reliance on climate change science to support their arguments in *Neubauer* is a prime example of how litigants can and should strengthen their arguments using climate change science.<sup>332</sup> This is perhaps especially important for litigants who seek to make future-oriented arguments, as scientific reports, especially those from the IPCC, can provide important guidance on how current behaviours and measures may impact the climate in the future.

Recognising the uncertainties inherent in the CO<sub>2</sub> budget calculations, the Court chose to adopt an approach that afforded leeway to the legislature. Buser notes that German law has a concept known as *Abstandsgebot*.<sup>333</sup> Similar to the precautionary principle, *Abstandsgebot* requires a precautionous approach, or a safety margin, in assessing risks to constitutional rights.<sup>334</sup> Buser critiques the Court for not utilising this concept in their assessment of the science and argues that had they done so, this would have resulted in the Court ordering the legislature to follow a stricter emissions reduction path.<sup>335</sup> A key lesson from that is that it is not enough just to utilise the science. Much of the science can only specify probabilities, not certainties. Therefore, strategic litigants will also need to argue that a precautionous approach ought to be taken in interpreting the science and protecting the rights of future generations.

Although the Court did not interpret the science and the principle of intergenerational equity in conjunction with *Abstandsgebot*, they did rely on the principle of proportionality. This principle was crucial to their interpretation of article 20a, as they found that the the state had obligations to ensure that emission reduction burdens would not be disproportionately offloaded onto future generations. Ultimately, it was the combination of article 20a with the principle of proportionality that led the Court to the conclusion that the CO<sub>2</sub> budget was distributed disproportionately across time, and was therefore not constitutionally justifiable. A key lesson from this is that litigants should take careful advantage of other legal principles which could aid the Court in interpreting both scientific findings and the principle of intergenerational equity.

---

<sup>331</sup> Peel & Markey-Towler 2021 (22) *GLJ* 1492-1493.

<sup>332</sup> Peel & Markey-Towler 2021 (22) *GLJ* 1492-1493.

<sup>333</sup> Buser 2021 (22) *German Law Journal* 1416 and 1420-1421

<sup>334</sup> *Ibid.*

<sup>335</sup> *Ibid.*

A final observation – and one which distinguishes *Neubauer* from the Colombian Amazon case – is the amount of public support for the case. As explained previously, in the years leading up to the case, youth climate activism had exploded in Germany, culminating in thousands of young people staging weekly Friday protests on the streets.<sup>336</sup> Many of the activists behind those protests, including Luisa Neubauer, ultimately became litigants in the *Neubauer* case. Thus, even before the Court ruled on the case, there was already considerable public pressure on the state to strengthen their emission reduction targets. After the judgment, the state was swift to amend the FCPA. In fact, Buser argues that the amendments made to the FCPA went above and beyond what was required by the *Neubauer* judgment.<sup>337</sup> The key lesson here is that successful outcomes in strategic litigation are most impactful where they are also backed by public support, which in turn encourages political action.

### **3.3. General Remarks on the Jurisprudence**

Apart from some of the key lessons already highlighted, one takeaway from these cases is that courts alone cannot solve the problem of climate change. The political climate, pressure from people and civil society, national conversations, national commitments, and international commitments, all play important roles.

A second takeaway is the adaptability of the concept of intergenerational equity. Both courts established the principle of intergenerational equity in different ways – Colombia, from the ecocentric-anthropocentric perspective, and Germany, from their Constitution. Not only that, but the courts also had differing views on who comprises the future generation, whether future generations have rights, and whether future generations can be represented via proxies. Nevertheless, both courts agreed that obligations are owed to future generations. However, even on this issue, they formulated those obligations differently. In Germany, it was found that the state had forward-looking, protective duties towards future generations, whereas the Colombian Supreme Court found that everyone in the present generation has intergenerational obligations, which they stated primarily take the form of an omission or limitation on rights. These differences in the courts reflect many of the different interpretations of intergenerational

---

<sup>336</sup> See above ‘*Neubauer*: Background and facts’.

<sup>337</sup> Buser 2021 (22) *German Law Journal* 1422.

equity in the literature, but ultimately they did not drastically effect the utility of intergenerational equity in the litigants' arguments.

Notably, both cases used the principle of intergenerational equity in conjunction with principles well-recognised in their respective legal contexts, and both also drew heavily on human rights to construct and support their arguments. In both courts, human rights, and in particular the fact that they persist across time and generations, were crucial to the arguments put forward. The principles utilised in both cases also advanced the arguments and proved to work well alongside the principle of intergenerational equity.

A final standout from these and other cases is the resonance of the idea of protecting the future today. In a world that does not afford children many opportunities to engage with politics or speak out on behalf of their own interests, it is inspiring to see the youth holding their governments and politicians accountable for decisions that will markedly impact on their lives. Although the Colombian Amazon case may not have reduced deforestation in the Colombian Amazon, it did have the effect of encouraging other young people across the globe to defend their own futures in climate change litigation.<sup>338</sup> While not all cases will be successful, as seen in *Neubauer*, litigants may need to advance multiple arguments, adjust their strategies, or return to courts after national commitments are codified before finding success. Slobodian notes that even when litigants fail in courts, their actions may inspire others to take individual action.<sup>339</sup> Intergenerational equity engages with the problems of climate change on an ethical level and provides a source of hope for the future, which many people may find more resonant and inspiring than purely scientific arguments or warnings of doomsday.<sup>340</sup>

## **4. Chapter 4: Intergenerational equity in South African law**

### **4.1. Introduction**

This section seeks to understand intergenerational equity in the South African context. First, it considers the extent of the recognition of intergenerational equity in South African law, including courts' recognitions of intergenerational ethics and of intergenerational equity in tandem with other principles. These recognitions are important for the insights they bring about

---

<sup>338</sup> Slobodian 2020 *The Georgetown Environmental Law Review* 589.

<sup>339</sup> *Ibid.*

<sup>340</sup> *Ibid.*

the status of intergenerational equity in South African law, and how courts may interpret rights and duties in the South African context, which have thus far been demonstrated to vary in both the philosophical and legal realms. Next, it considers the issue of standing in South Africa and how this may influence litigation. Thirdly, it attempts to identify relevant principles in South African law that intersect with intergenerational equity, as a key lesson from the case law examined above was the use of other legal principles to understand, interpret, and apply the principle of intergenerational equity. Fourthly, it attempts to identify constitutional rights that may assist in the application of intergenerational equity in climate change litigation. Fifthly, having previously observed that cases are often brought on the basis of existing national commitments, it attempts to identify national and other commitments that may form a basis for cases. Finally, it concludes with a brief note on the types of remedies available in the South African context.

## **4.2. Recognition**

### **4.2.1. Recognition in legislation**

In the South African legal context, the concept of intergenerational equity has been adopted but is in need of further engagement and clarity.<sup>341</sup> The Constitution of the Republic of South Africa, 1996, which is the supreme law of the Republic,<sup>342</sup> contains an environmental right, which states that: “[E]veryone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures...”<sup>343</sup>

The above wording is further incorporated in the preamble of the National Environmental Management Act 107 of 1998 (‘NEMA’).<sup>344</sup> However, NEMA does not list intergenerational equity as one of its guiding principles.<sup>345</sup> Nevertheless, it does recognise the closely interlinked principles of sustainable development and public trusteeship.<sup>346</sup> Furthermore it recognises the

---

<sup>341</sup> Du Plessis 2015 *SAJHR* 269.

<sup>342</sup> S 2 of the Constitution of the Republic of South Africa, 1996.

<sup>343</sup> S 24(b) of the Constitution.

<sup>344</sup> The preamble of the National Environmental Management Act 107 of 1998.

<sup>345</sup> S 2 of the National Environmental Management Act 107 of 1998.

<sup>346</sup> See the s 1 definition of sustainable development, read with s 2(3) and s (2)4(a) for recognition of sustainable development as a guiding principle of the National Environmental Management Act 107 of 1998; see s 2(4)(o) for recognition of the public trusteeship as a guiding principle of the National Environmental Management Act 107 of 1998; see further ‘The relationship between the intergenerational equity and the public trusteeship and recognition of this relationship in South African law’ and ‘The relationship between the intergenerational equity

importance of safeguarding the nation’s cultural heritage,<sup>347</sup> an important component of intergenerational equity. Apart from that, it also recognises the importance of evaluating policies, programs projects, products, processes, services or activities across their life cycles,<sup>348</sup> promoting a future-oriented perspective of assessments of environmental impacts.

The preambles of numerous other environmental acts recognise the importance of protecting resources for both present and future generations.<sup>349</sup> In addition, the National Water Act 36 of 1998 makes reference in its aims to meeting the needs of both present and future generations,<sup>350</sup> and the Marine Living Resources Act 18 of 1998 recognises the need to conserve marine resources for present and future generations.<sup>351</sup>

Though not yet enacted, the latest draft of the Climate Change Bill recognises intergenerational equity. Its preamble includes the same phrasing of the environmental right as the Constitution – referencing the need to protect the environment for both present and future generations.<sup>352</sup> Moreover, its objectives include the goal to, “protect and preserve the planet for the benefit of present and future generations of humankind.”<sup>353</sup> Its principles also include, “the principle that the climate system should be protected for the benefit of present and future generations of humankind,”<sup>354</sup> which suggests that there may be intergenerational obligations to protect the climate system for both present and future generations. Another of its principles calls for decision-making to take the needs and circumstances of the most vulnerable in society into account, which is in alignment with intragenerational equity and could be interpreted as an intragenerational obligation.<sup>355</sup>

---

and sustainable development and recognition of this relationship in South African law’ below where these principles are analysed and in particular it is argued that South African courts understand the principle of intergenerational equity as a necessary component of sustainable development.

<sup>347</sup> S 2(4)(a)(iii) of the National Environmental Management Act 107 of 1998.

<sup>348</sup> S 2(4)(e) of the National Environmental Management Act 107 of 1998.

<sup>349</sup> See for instance: the preamble of Mineral and Petroleum Resources Development Act 28 of 2002; the preamble of the National Heritage Resources Act 25 of 1999; and the preamble of the National Environmental Management: Integrated Coastal Management Act 24 of 2008.

<sup>350</sup> S 2(a) of the National Water Act 36 of 1998.

<sup>351</sup> S 2(b) of the Marine Living Resources Act 18 of 1998.

<sup>352</sup> The preamble of the Climate Change Bill *Draft* 2021.

<sup>353</sup> S 2(f) of the Climate Change Bill *Draft* 2021.

<sup>354</sup> S 3(b) of the Climate Change Bill *Draft* 2021.

<sup>355</sup> S 3(f) of the Climate Change Bill *Draft* 2021.

#### 4.2.2. Recognition of intergenerational obligations and intergenerational equity in case law

In recent years, South African courts have explicitly recognised the principle of intergenerational equity. However, even in cases that preceded this recognition, South African courts recognised that the present generation owes duties to future generations. For example, just a year before the Stockholm Declaration recognised the responsibility to protect the environment for the benefit of present and future generations, in 1971, the High Court in *King v Dykes*,<sup>356</sup> stated:

“[t]he idea which prevailed in the past that ownership of land conferred the right on the owner to use his land as he pleased is rapidly giving way in the modern world to the more responsible conception that an owner must not use his land in a way which may prejudice his neighbours or the community in which he lives, and that he holds the land in trust for future generations.”<sup>357</sup>

The use of the trust mechanism to describe the relationship between present-day land owners and future generations bears similarities to contemporary legal understandings of intergenerational equity. One notable difference between the obligations formulated in this judgment and later articulations of intergenerational equity in South African case law is that the court placed the duty to protect the environment for future generations on land-owners, rather than all members of the present generation.

There are several other instances of South African courts taking the interests of future generations into account in their judgments, although some of these fall short of acknowledging binding legal obligations towards them. For example, in *City of Cape Town and Others v Oudekraal Estate (Pty) Limited and Others*,<sup>358</sup> the court framed the irretrievable loss of biodiversity in an area as something that would be prejudicial to future generations.<sup>359</sup> Moreover, in *Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others* (‘*Baleni*’), when asked to consider the community’s standing, the court also took into account that the issues raised in the matter affected future generations.<sup>360</sup>

---

<sup>356</sup> 1971 (3) SA 540 (RA).

<sup>357</sup> Ibid 545.

<sup>358</sup> (Unreported judgment of Van Reenen J in the High Court (Cape Provincial Division) (Case No. 8112/2004) dated 9 October 2007) para 20.

<sup>359</sup> 2021 (1) SA 110 (GP).

<sup>360</sup> Ibid para 96.

Other cases have been more explicit in acknowledging obligations towards future generations. For instance, in *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others*,<sup>361</sup> ('*Save the Vaal*') when considering the granting of a mining licence the court recognised the principle of sustainable development, and in doing so, acknowledged that the needs of the present must not compromise the needs of future generations.<sup>362</sup> Moreover, in *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*,<sup>363</sup> the High Court held:

“The balancing of environmental interests with justifiable social and economic development is to be conceptualised well beyond the present living generation. This must be correct since s 24 requires the environment to be protected for the benefit of 'present and future generations'.”<sup>364</sup>

Both of these judgments indicate that the environmental right and the principle of sustainable development impose obligations on the present generation to balance their needs against those of future generations.

One of the first explicit acknowledgments of intergenerational equity in South African law was in *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* ('*HTF Developers*').<sup>365</sup> In this case, the High Court had to consider *inter alia* whether a s 31(A) directive under the Environment Conservation Act may be issued in respect of non-listed environmental activities which nevertheless meet the criteria for being detrimental, seriously damaging, or threatening to the environment.<sup>366</sup> In evaluating the role of environmental impact assessments, the court noted that environmental impact assessments are a method of ensuring long-term sustainability and intergenerational equity.<sup>367</sup> Later in the judgment, the court also connected the idea of well-being with ecological stewardship, stating: “The attainment of [well-being] confers upon authorities a stewardship, whereby the present generation is constituted as the custodian or trustee of the environment for future generations.”<sup>368</sup> It also re-affirmed the position in *King v Dykes* that land-owners have special obligations not to use their land in ways that are prejudicial to their communities or future generations.<sup>369</sup> These precedents

---

<sup>361</sup> 1999 (2) SA 709 (SCA).

<sup>362</sup> *Ibid* para 20.

<sup>363</sup> 2004 5 SA 124 (W).

<sup>364</sup> *Ibid* 24.

<sup>365</sup> 2006 (5) SA 512 (T).

<sup>366</sup> *Ibid* paras 1 and 12.

<sup>367</sup> *Ibid* para 16.

<sup>368</sup> *Ibid* para 19.

<sup>369</sup> *Ibid*.

are especially pertinent for protecting present and future generations' interests in the South African context, as the vast majority of land in the country is privately owned.<sup>370</sup>

The Constitutional Court later recognised both intergenerational equity and intragenerational equity as elements of the principle of sustainable development in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* ('Fuel Retailers').<sup>371</sup> In addition, Justice Ngcobo gave full expression and recognition to the concept of the planetary trust, which is core to Brown-Weiss' theory of intergenerational equity, by stating: "The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment."<sup>372</sup>

Since then, the high courts have also explicitly recognised intergenerational equity and the trustee relationship between present and future generations. One example of this is *Wakkerstrom Natural Heritage Association v Dr Pixley ka Isaka Local Municipality*,<sup>373</sup> wherein the court considered a challenge to a municipality's decision to construct a water pipeline over ecologically sensitive and protected areas without first obtaining an additional water use licence, or the requisite environmental authorisation.<sup>374</sup> The court emphasised the importance of giving effect to the principle of sustainable development, which includes intergenerational equity and necessitates balancing the interests of both present *and* future generations. Moreover, the court explicitly recognised that the present generation holds the earth in trust for future generations.<sup>375</sup> In the end, the court found that both economic and environmental interests, as well as the interests of future generations, weighed against the decision to construct the pipeline and ordered that construction be halted until an environmental authorisation could be obtained.<sup>376</sup>

Another example is *WWF South Africa v Minister of Agriculture, Forestry and Fisheries and Others*,<sup>377</sup> wherein WWF South Africa disputed the lawfulness of lobster regulations which

---

<sup>370</sup> *PLAAS*.

<sup>371</sup> 2007 10 BCLR 1059 (CC) para 56.

<sup>372</sup> *Ibid* para 102.

<sup>373</sup> 2019 JDR 2463 (MN).

<sup>374</sup> *Ibid* paras 1-3.

<sup>375</sup> *Ibid* para 55-56.

<sup>376</sup> *Ibid* para 19.

<sup>377</sup> 2019 2 SA 403 (WCC).

allowed for unsustainably high levels of lobster fishing.<sup>378</sup> In its judgment, the High Court stated that intergenerational equity is an integral component of the principle of sustainable development,<sup>379</sup> and gave further recognition to intragenerational equity, stating that:

“Many people in the past, the present and the future have depended, do depend or will depend for their economic wellbeing on exploiting renewable resources. To enable them to do so, and thus to preserve food security and avoid poverty, one cannot allow the resource of the many to be exhausted for the benefit of the few.”<sup>380</sup>

Considering this, and considering the future harmful impacts of setting the TAC too high, such as job losses and food insecurity, the High Court found that the determination of the TAC had not been made rationally and declared it invalid.<sup>381</sup>

There has also been recognition of the principle of intergenerational equity in the context of climate change. In *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* (*‘Earthlife’*),<sup>382</sup> a non-profit environmental organisation sought to challenge the decision to grant an environmental authorisation under NEMA for the construction of a coal-fired power station.<sup>383</sup> Earthlife argued that in granting the environmental authorisation, the decision-maker had failed to take all relevant information into account as they were required to by NEMA, particularly the project’s climate change impacts.<sup>384</sup> In considering the purpose and ethos of NEMA, the High Court interpreted one of its core principles – the principle of sustainable development – as a principle which requires intergenerational justice.<sup>385</sup> Specifically, it requires that the interests of both present and future generations are adequately accounted for, and that short-term needs are balanced against long-term impacts.<sup>386</sup> Considering this, as well as South Africa’s other commitments to mitigating climate change, the High Court concluded that the failure to take the power station’s climate change impacts into account was a fatal error and set aside the decision to grant an environmental authorisation.<sup>387</sup>

---

<sup>378</sup> Ibid para 1.

<sup>379</sup> Ibid

<sup>380</sup> Ibid para 91.

<sup>381</sup> Ibid 2 and para 94.

<sup>382</sup> 2017 (2) SA 519 (GNP).

<sup>383</sup> Ibid paras 1-2.

<sup>384</sup> Ibid para 57.

<sup>385</sup> Ibid para 82.

<sup>386</sup> Ibid.

<sup>387</sup> Ibid para 126.

In conclusion, South African courts have given substantial recognition to the principle of intergenerational equity, especially as it relates to the principle of sustainable development. Significantly, they have embraced the view that the present generation, not just the state or land-owners, holds the earth in trust for future generations. Unlike the courts in *Neubauer* and the Colombian Amazon case, South African courts have also recognised intragenerational equity, and emphasised its importance.

### 4.3. Standing

The right to stand before a court, included in s 38 of the Constitution is essential to the legal enforcement of any right in the Bill of Rights.<sup>388</sup> Without the necessary justification to bring a case to court, the merits of the arguments will not be considered. As has been noted repeatedly, standing can often present problems, both in the context of intergenerational equity and climate change litigation.<sup>389</sup> This section explores what barriers, if any, litigants may face in establishing standing in the South African context.

The constitutional grounds for establishing standing in matters that threaten or infringe upon rights in the Bill of Rights are listed in s 38 of the Constitution.<sup>390</sup> Fortunately, this section extends standing to a broad array of people, groups, and organisations and there is no additional requirement to show special harm or damage. Included in those who can demonstrate standing are “anyone acting in their own interest.”<sup>391</sup> Considering the immediacy of the impacts of climate change, it is feasible that many people could demonstrate standing using this section. Standing is also open to, “anyone acting as a member of, or in the interest of, a group or class of persons.”<sup>392</sup> Young people and members of transgenerational groups could potentially rely on this provision to represent their own interests and the interests of their group – including future members of their groups. But perhaps the most promising ground for standing in the Constitution is s 38(d), which grants standing to “anyone acting in the public interest.”<sup>393</sup> In

---

<sup>388</sup> S 38 of the Constitution.

<sup>389</sup> For further discussion on this, see Chapter II: “Can future generations have standing?” and “Key issues in climate change cases”.

<sup>390</sup> S 38 of the Constitution.

<sup>391</sup> S 38(a) of the Constitution.

<sup>392</sup> S 38(c) of the Constitution.

<sup>393</sup> S 38(d) of the Constitution.

considering the standing of applicants seeking to act in both their own and the ‘public interest’ in the *Baleni* case, Judge Makhubele had this to say:

“In the matter before me the applicants’ standing is not only derived from their individual rights as occupiers, but also as part of a community and in the public interest. The issues raised in this matter do not only affect them, but also future generations.”<sup>394</sup>

In other words, the applicants in the case were understood to be acting in the public interest because their case affected people beyond themselves – specifically future generations.

Further provisions for establishing standing in environmental cases can be found in s 32 of NEMA. Many of these provisions are fairly similar to those already in the Constitution.<sup>395</sup> However, s 32 does add a unique basis for standing in environmental cases in s 32(e), which states that standing can be founded by persons or groups acting in the interest of protecting the environment.<sup>396</sup> The court considered this unique basis for standing in *LionsWatch Action Group v MEC: Local Government, Environmental Affairs & Development Planning, and Others*.<sup>397</sup> LionsWatch Action Group (henceforth ‘LionsWatch’), was an umbrella organisation of residence associations which sought to challenge a development in their area.<sup>398</sup> In order to establish standing, LionsWatch relied on both s 38 of the Constitution and s 32 of NEMA.<sup>399</sup> However, for a variety of reasons LionsWatch failed to establish their standing on any of the constitutionally listed grounds. It failed to qualify for standing under s 38(a), because although its members were affected by the development, LionsWatch itself was not.<sup>400</sup> LionsWatch was not acting on behalf of another who could not represent themselves, so they were not granted standing under s 38(b) either.<sup>401</sup> LionsWatch additionally failed to fulfil the requirements of a class action under s 38(c), and could not base their standing on this section either.<sup>402</sup> Moreover, LionsWatch had clearly indicated that it was acting in the interests of its members, not in the

---

<sup>394</sup> *Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others* 2021 (1) SA 110 (GP) para 96.

<sup>395</sup> S 32 of the National Environmental Management Act 107 of 1998.

<sup>396</sup> S 32(e) of the National Environmental Management Act 107 of 1998.

<sup>397</sup> (Unreported decision of High Court (Western Cape Division under Case No. 5278/2013)).

<sup>398</sup> *Ibid* para 8.

<sup>399</sup> *Ibid* para 14.

<sup>400</sup> *Ibid* para 16.

<sup>401</sup> *Ibid* para 18.

<sup>402</sup> *Ibid* para 19.

public interest, so it failed to base its standing on s 38(d).<sup>403</sup> Nevertheless, LionsWatch was saved by s 32(1)(e) of NEMA. In interpreting this provision, the court stated that, "...it provides a very broad basis for standing in what might aptly be described as environmentally concerned watchdog litigation."<sup>404</sup> Though LionsWatch had not argued that they were acting to protect the environment, the court was able to infer this from its papers, and therefore found that it had satisfied the requirements for standing under s 32(1)(e) of NEMA.<sup>405</sup> Consequently then, this broad basis for standing in s 32(1)(e) could enable a wide range of litigants to bring climate change cases on behalf of themselves and future generations, or even solely on behalf of future generations, provided they can show that they are acting to protect the environment.

In conclusion, both s 38(d) of the Constitution and s 32(1)(e) of NEMA provide grounds for standing which litigants seeking to protect future generations' rights or interests could potentially utilise. As previously discussed, youth litigants and transgenerational groups, who can bring cases on behalf of themselves and future members of their groups, may be especially well-placed to bring such cases. Nevertheless, the provisions for standing are broad enough that any organisation, individual, or group could feasibly bring a case on behalf of future generations, provided they show they are acting in terms of a public interest or in order to protect the environment.<sup>406</sup> Thus, it is argued that many of the problems of standing that have plagued other legal jurisdictions may not prove so onerous in the South African context, which provides litigants with many broad grounds on which to establish standing.

#### **4.4. Intergenerational rights and obligations**

With regards to intergenerational rights and obligations holders, South African courts have yet to consider the question of whether future generations can be said to have rights in the present, or whether they will only have rights in the future. However, as previously discussed,<sup>407</sup> and affirmed in *Neubauer*, whether future generations hold rights in the present is not a pre-requisite for establishing whether there are legally binding duties towards them. Moreover, in spite of not engaging with the question of whether future generations have rights, South African

---

<sup>403</sup> Ibid paras 20-21.

<sup>404</sup> Ibid para 23.

<sup>405</sup> Ibid para 22.

<sup>406</sup> See Slobodian 2020 *The Georgetown Environmental Law Review* 576-577.

<sup>407</sup> See Chapter II: 'Can future generations be said to have rights and do present generations owe them duties?'.

courts have already affirmed that there are obligations towards them. In *King v Dykes*,<sup>408</sup> the court stated that land-owners hold their land in trust for future generations.<sup>409</sup> The Constitutional Court later expanded these intergenerational obligations in *Fuel Retailers* where it stated that the present generation holds the earth in trust for and has responsibilities towards future generations.<sup>410</sup> This position has since been echoed by the lower courts.<sup>411</sup> This suggests that South African law, like Colombian law, places duties not just on land-owners, but on all those in the present generation, both individually and collectively, to safeguard the environment for future generations. Therefore, it is argued that in South African law, litigants seeking intergenerational justice could theoretically bring claims for violations of intergenerational obligations not just against land-owners or the state, but against any person or group that has failed to fulfil their obligations towards future generations.

Brown-Weiss has acknowledged that holding the earth in trust for future generations is a somewhat vague obligation, which is why she elaborated on the content of intergenerational obligations by suggesting additional supporting principles – specifically the conservation of options, the conservation of quality, and the conservation of access.<sup>412</sup> However, neither the courts in *Neubauer* nor the Colombian Amazon case referenced these principles, instead opting to use well-established legal principles from their own jurisdictions, such as the principle of proportionality and the principle of solidarity, as tools for interpreting intergenerational obligations within their respective legal contexts. Likewise, there is reason to believe that South African context courts might similarly use other legal principles to clarify intergenerational obligations.

One principle which has already informed the interpretation of intergenerational obligations is the principle of sustainable development. The position in South African law is that

---

<sup>408</sup> 1971 (3) SA 540 (RA).

<sup>409</sup> Ibid para 545.

<sup>410</sup> *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (10) BCLR 1059 (CC) para 102.

<sup>411</sup> See *Wakkerstrom Natural Heritage Association v Dr Pixley ka Isaka Local Municipality* 2019 JDR 2463 (MN) para 55-56.

<sup>412</sup> For a discussion of this, see above Chapter II: ‘What is intergenerational equity?’.

intergenerational equity arises from the principle of sustainable development,<sup>413</sup> and that these two principles are closely linked.<sup>414</sup> For example, in *Earthlife*,<sup>415</sup> the court found that sustainable development and intergenerational justice require a balancing of short-term gains with their long-term impacts.<sup>416</sup> In *BP Southern Africa*,<sup>417</sup> the court found that sustainable development requires a forward-looking perspective which takes into account the needs of future generations,<sup>418</sup> and in *Save the Vaal* the court noted that the needs of the present must not compromise the needs of future generations.<sup>419</sup> Therefore, intergenerational obligations include weighing the needs of both present and future generations when applying the principle of sustainable development, such as in instances of environmental impact assessments, or interpreting the provisions of NEMA, which lists sustainable development as one of its guiding principles.

Another principle which may inform the interpretation of intergenerational obligations in the South African context is the principle of public trusteeship. Similar to the idea of the planetary trust, the principle of public trusteeship imposes obligations to safeguard resources. However, rather than describing the relationship between present and future generations, this trustee relationship typically operates between the state, as trustor, and the public, as the trustees or beneficiaries of resources.<sup>420</sup> Moreover, this trustee relationship is usually in respect of specific resources, rather than natural and cultural resources more generally.<sup>421</sup> In South African law, numerous acts incorporate the principle of public trusteeship by recognising the state or specific organs of state as the public trustee of various resources.<sup>422</sup> Du Plessis has explicitly

---

<sup>413</sup> *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 10 BCLR 1059 (CC) para 56.

<sup>414</sup> *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* 2017 (2) SA 519 (GNP) para 82.

<sup>415</sup> *Ibid.*

<sup>416</sup> *Ibid.*

<sup>417</sup> 2004 5 SA 124 (W).

<sup>418</sup> *Ibid* para 20.

<sup>419</sup> 1999 (2) SA 709 (SCA).

<sup>420</sup> Sand 2004 *Global Environmental Politics* 55; and Du Plessis 2015 *SAJHR* 129.

<sup>421</sup> *Ibid.*

<sup>422</sup> See for instance: s 3 of the National Water Act 36 of 1998, which makes the state the trustee of the nation's water resources; s 3 of the Mineral and Petroleum Resources Development Act 28 of 2002, which makes the state the custodian of the nation's mineral and petroleum resources; s 3 of the National Environmental Management: Biodiversity Act 10 of 2004, which makes the state the trustee of biological diversity; and s 12 of the National Environmental Management: Integrated Coastal Management Act 24 of 2008, which makes the state the trustee of the coastal zone.

connected the principle of public trusteeship in South African law with intergenerational equity, highlighting the similarities between them and arguing that the public trusteeship is a useful legal construct specifically for enforcing the states' duties to protect resources for future generations.<sup>423</sup> Other scholars have similarly argued that the principle of public trusteeship has an intergenerational component, obliging the state to safeguard resources for the benefit of both the present *and* future generations.<sup>424</sup>

In addition to using other legal principles to elaborate on intergenerational obligations, litigants in both the *Neubauer* and Colombian Amazon cases also drew on their constitutional rights.<sup>425</sup> The court in the Colombian Amazon case understood environmental degradation as an attack on current and future life which undermined all constitutional rights.<sup>426</sup> Though the court in *Neubauer* did not find that any rights were presently infringed upon, it did find that rights persist across time and that there is a need to protect rights from future violations today.<sup>427</sup> Intergenerational perspectives of human rights are also reflected in the literature.<sup>428</sup> In the South African context, applicants have the right to approach courts not just to challenge rights infringements but also to challenge threats to their constitutional rights.<sup>429</sup> This is consistent with a forward-looking perspective of constitutional rights. Moreover, the environmental right has an explicit intergenerational component, because it refers to both present *and* future generations.<sup>430</sup> This suggests that South African courts are open to understanding constitutional rights, especially the environmental right, through an intergenerational lens that takes into account long-term impacts of present-day actions on constitutional rights.

Intergenerational perspectives of constitutional rights and their corresponding duties are important in the context of climate change litigation because they widen the scope for novel climate change arguments. For example, litigants seeking to accomplish a similar result to the

---

<sup>423</sup> Du Plessis 2015 *SAJHR* 278-280.

<sup>424</sup> See: Blackmore 2018 (4) *SALJ* 641; and van der Schyff 2013 (130) *SALJ* 388.

<sup>425</sup> Litigants in the Colombian Amazon case drew on the rights to life, to health, and to a healthy environment; and litigants in *Neubauer* drew on, *inter alia*, the right to life, physical integrity and personal freedom. See above Chapter III: 'The Colombian Amazon case: Issues and applicants' + arguments' and 'Neubauer: Applicants' arguments' respectively for further details.

<sup>426</sup> See above Chapter III: 'The Colombian Amazon case: the Supreme Court's finding and reasoning'.

<sup>427</sup> See above Chapter III: 'Neubauer: The Federal Constitutional Court's finding and reasoning'.

<sup>428</sup> For a discussion on this, see above Chapter II: 'Can future generations be said to have rights and do present generations owe them duties?'.

<sup>429</sup> S 38 of the Constitution.

<sup>430</sup> S 24 of the Constitution.

applicants in the Colombian Amazon case could similarly allege that a state's failure to fulfil its climate change obligations has resulted in the violation of both current and future generations' rights to life, water, health. On the other hand, litigants seeking to advance similar arguments to those in *Neubauer* could potentially rely on the right to equality to argue that emission reduction burdens are distributed disproportionately across time, discriminating against people at a future point in time and threatening their right to equality.<sup>431</sup> Or alternatively, litigants could mirror the arguments in *Neubauer* more closely by arguing that future emission reduction measures are inconsistent with the spirit, purport and objects of the Bill of Rights because they jeopardise the enjoyment of rights and freedoms in the future. These are merely examples, meant to demonstrate how intergenerational equity and constitutional rights can potentially be combined to create a basis for litigation in the context of climate change.

#### 4.5. Remedies

Remedies play a crucial role in litigation.<sup>432</sup> In the context of strategic climate litigation in particular, Peele and Markey-Towler have emphasised the importance of requesting remedies that will result in widespread impacts.<sup>433</sup> Some common remedies in South African law available to litigants include: interim and final interdicts; damages, supervisory orders, and declaratory relief.<sup>434</sup> In general, courts also have a wide scope to determine appropriate remedies in constitutional matters. For instance, in matters which concern threats to or infringements of constitutional rights, courts are empowered in terms of s 38 of the Constitution to grant "appropriate relief, including a declaration of rights."<sup>435</sup> Another important provision in the Constitution relating to remedies is s 172(1), which states that: "when deciding a constitutional matter, courts (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable."<sup>436</sup> Upon finding that conduct or law is unconstitutional, it is mandatory

---

<sup>431</sup> Though the litigants in *Neubauer* did not rely on the right to equality, they did rely on the principle of proportionality, which has substantial overlap with the right to equality in German law. See: Lurie 2020 *German Law Journal* 195-196.

<sup>432</sup> Du Plessis et al *Constitutional Litigation* 107.

<sup>433</sup> Peel & Markey-Towler 2021 (22) *GLJ* 1495-1496.

<sup>434</sup> Du Plessis et al *Constitutional Litigation* 107.

<sup>435</sup> S 38 of the Constitution.

<sup>436</sup> S 172(1) of the Constitution.

for courts to make a declaration of invalidity, which could include severing words from legislation, reading words into legislation, or in more extreme cases finding legislation is invalid in its entirety.<sup>437</sup> With regards to s 171(2)(b), courts have broad discretionary powers both in deciding whether to grant remedies that are just and equitable, and in determining what those remedies might be.<sup>438</sup> Litigants can also bring cases requesting access to information under the Promotion of Access to Information Act ('PAIA'),<sup>439</sup> or, amongst other things, request that an administrative actions be reviewed and set aside under the Promotion of Administrative Justice Act ('PAJA').<sup>440</sup> One excellent example of an impactful climate change case which relied on the latter remedy is *Earthlife*, wherein litigants succeeded in setting aside the decision to grant an environmental approval for a new coal-fired power station.<sup>441</sup> Thus, litigants in South Africa have a wide range of remedial options available to them, especially in constitutional matters. In spite of this, it should be noted that it will in general tend to be more difficult to ask courts for vague or novel remedies, so this should be avoided insofar as is possible.

#### **4.6. General remarks on South Africa's position**

The principle of intergenerational equity has a strong basis in South African law and holds a lot of potential for development, especially in the context of climate change litigation. This chapter has sought to give an in-depth consideration to the utility of intergenerational equity in the South African context, by considering courts' interpretations of intergenerational equity, questions of standing, potential formulations of rights and obligations, and possibilities for remedies.

Some of the key findings in this chapter are, first, that South African courts have shown willingness to recognise and apply the principle of intergenerational equity, particularly in the interpretation and application of the principle of sustainable development. Secondly, due to the many grounds for standing and the court's past interpretation of these, South African litigants should not face difficulties in establishing standing but should nevertheless take care to clearly

---

<sup>437</sup> Du Plessis et al *Constitutional Litigation* 109-115.

<sup>438</sup> Ibid 108-109.

<sup>439</sup> The Promotion of Access to Information Act 2 of 2000.

<sup>440</sup> See s 8 of the Promotion of Administrative Justice Act 3 of 2000 for a full list of remedies available in proceedings for judicial review.

<sup>441</sup> 2017 (2) SA 519 (GNP).

show their standing on the papers. Thirdly, in elaborating on intergenerational rights and obligations, South African litigants may potentially draw on the principle of sustainable development, the principle of public trusteeship, and constitutional rights, particularly the environmental right. Fourthly, in the South African context it is theoretically possible for the principle of intergenerational equity to be utilised in litigation against both state and non-state actors, because the obligation to hold the earth in trust for future generations falls to the present generation. Finally, the broad array of remedial options in South African law may facilitate litigation with strategic impacts.

## **5. Chapter 5: Conclusion**

This research has sought to assess the utility of the principle of intergenerational equity in the context of climate change litigation in South Africa using lessons from foreign case law. An evaluation of the philosophical arguments revealed that there was disagreement as to how certain key components of intergenerational equity, such as standing, rights, and obligations, should translate into the legal context. At the same time, it was shown that domestic climate change litigation has proliferated since the Paris Agreement, with litigants frequently constructing novel and human-rights based arguments and relying on attribution science to determine probabilities for future environmental outcomes.

Despite some of the doubts expressed in the literature, courts in both Colombia and Germany ruled in favour of youth applicants who had come to courts to protect their own futures and those of future generations. In assessing the cases, particular attention was paid to some of the thornier issues of both intergenerational equity and climate change litigation, such as justiciability (including standing), the construction, source and nature of rights and obligations, the identities of rights and obligations holders, and the intertemporal dimension. Interestingly, it was found that the courts in both cases had differing interpretations of intergenerational equity and also extracted the principle of intergenerational equity from different sources. It is argued that these differing interpretations are a mark of how adaptable the principle of intergenerational equity is to different legal contexts and perspectives. What perhaps seemed in the literature like a principle attenuated by its ambiguities and bogged down in academic contestation has ultimately proven to be flexible to different legal systems and schools of thought. Several key lessons for litigants were distilled from the cases, including the

importance of attribution science in elaborating on future-related climate risks, the emphasis on human rights, the use of well-established legal principles to interpret and strengthen the principle of intergenerational equity in differing jurisdictions, the importance of challenging specific rather than vague commitments, and the need to carefully consider and set out legal standing at the outset of any action.

Having considered the foreign cases, this research examined the position of intergenerational equity in South African law. It was found that although intergenerational equity has been recognised by the courts, no cases have yet been brought on behalf of future generations. Nevertheless, the jurisprudence that does exist indicates the existence of several intergenerational obligations, including the obligation on the present generation to balance their own needs against those of future generations, obligations on land-owners not to use their land in ways that are prejudicial to future generations, and the obligation to balance short-term gains with long-term impacts when applying the principle of sustainable development. In addition, it was shown that intergenerational ethics resonate with South African courts. Furthermore, it was found that the principles of public trusteeship and sustainable development enrich and in turn are enriched by the principle of intergenerational equity, at least in the South African context. This research went on to consider how questions of standing, rights and obligations, and remedies, may theoretically fit into the South Africa context, and South Africa is shown to have a legal system that is overall amenable to utilising the principle of intergenerational equity in climate change litigation, but for a relative scarcity of specific commitments aimed at addressing climate change, which may well prove a stumbling block in particular in the context of litigation against non-state actors.

In conclusion, what may have initially come across as an overly philosophical or impractical theoretical concept has in fact proven to be adaptable and have practical utility in different legal contexts. Furthermore, the principle of intergenerational equity is particularly useful in climate change litigation because it helps clarify one of the core moral dilemmas of climate change and gives voice to the voiceless. As it did in the German context, the principle of intergenerational equity may well lend itself to specific challenges to timeframes and emission reductions, which is precisely what may be required to domestically enforce the realisation of parties' commitments under the Paris Agreement to produce NDCs. In addition, intergenerational equity is useful and impactful insofar as it has proven to be resonant in South African court

rooms and across the globe, raising awareness and catalysing further action. Therefore, utilised alongside human rights, other principles, reliable attribution science, and concrete sources of climate commitments, the principle of intergenerational equity may complete a winning hand for climate change litigants.

## **Bibliography**

### **Domestic cases**

- Adams and Others v Minister of Mineral Resources and Energy and Others* (1306/22) [2022] ZAWCHC 24
- Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others* 2021 (1) SA 110 (GP)
- BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W)
- City of Cape Town and Others v Oudekraal Estate (Pty) Limited and Others* (Unreported judgment of Van Reenen J in the High Court (Cape Provincial Division) (Case No. 8112/2004) dated 9 October 2007)
- Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA)
- Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* 2017 (2) SA 519 (GNP).
- Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (10) BCLR 1059 (CC)
- Gongqose and Others v Minister of Agriculture, Forestry and Others* 2018 (2) SACR 367 (SCA)
- HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2006 (5) SA 512 (T)
- King v Dykes* 1971 (3) SA 540 (RA)
- Lionswatch Action Group v MEC: Local Government, Environmental Affairs & Development Planning, and Others* (Unreported decision of High Court (Western Cape Division under Case No. 5278/2013)
- Sustaining The Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* 2022 (2) SA 585 (ECG)
- Wakkerstrom Natural Heritage Association v Dr Pixley ka Isaka Local Municipality* 2019 JDR 2463 (MN)
- WWF South Africa v Minister of Agriculture, Forestry and Fisheries and Others* 2019 2 SA 403 (WCC)

### **Domestic legislation**

- The Constitution of the Republic of South Africa, 1996.
- The Mineral and Petroleum Resources Development Act 28 of 2002.
- The Marine Living Resources Act 18 of 1998
- The National Environmental Management Act 107 of 1998.
- The National Water Act 36 of 1998
- The National Environmental Management: Biodiversity Act 10 of 2004
- The National Environmental Management: Integrated Coastal Management Act 24 of 2008
- The Promotion of Access to Information Act 2 of 2000.
- The Promotion of Administrative Justice Act 3 of 2000.

### **Draft legislation**

- Climate Change Bill *Draft* 2021

### **Domestic policy**

- South Africa: First Nationally Determined Contribution under the Paris Agreement (2021).

### **International cases**

- Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (1996) 35 ILM 809 at 88

### **Hard international law**

- The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998)
- The Paris Agreement to the United Nations Framework Convention on Climate Change (2015)
- The 1946 International Convention for the Regulation of Whaling
- The 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals 1980
- The Fourth Lome Convention, 1995
- The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 1972
- The 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora
- The 1992 Convention on Biodiversity
- The 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage
- The Charter of the United Nations (1945)
- The Universal Declaration of Human Rights (1948)
- The United Nations Framework Convention on Climate Change (1992)

The Rio Declaration on Environment and Development 1992  
*The Stockholm Declaration on the Human Environment* (1972)

### **Soft international law**

The Earth Charter (2002)  
The United Nations Declaration on the Rights of Indigenous Peoples (2007)

### **Official international publications**

IPCC *Climate Change 2021: The Physical Science Basis* (2021).  
IPCC *Global Warming of 1.5°C: Impacts of 1.5°C of Global Warming on Natural and Human Systems* (2018)  
IPCC *Summary for Policymakers: Global Warming of 1.5°C* (2018)  
IPCC *Summary for Policymakers: Climate Change 2022: Impacts, Adaptation and Vulnerability* (2022) 16-20.  
UN Environment Programme *Emissions Gap Report* (2021)  
UN Environment Programme *Global Climate Litigation Review: 2020 Status Review* (2020)  
UN Environment Programme *The Status of Climate Change Litigation – A Global Review* (2017)  
UN *NDC Synthesis Report 2021*  
United Nations Development Program *The G20 Peoples' Climate Vote* (2021)  
World Commission for Environment and Development *Our Common Future* (1987)  
World Bank *World Bank Reference Guide to Climate Change Framework Legislation* (2020)

### **Foreign law cases**

*Australian Conservation Foundation v Commonwealth* [1980] HCA 53, (1980) 146 CLR 493 (13 February 1980)  
Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 24, 2021, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1723 (2021) (Ger.)  
Corte Constitucional, *sentencia T-622 de 2016*  
Corte Suprema de Justicia, *sentencia 4360 de 2018*  
Corte Constitucional, *sentencia C-595 de 2010*  
Corte Constitucional, *sentencia T-080 de 2015*  
National Green Tribunal, (Principal Bench, New Delhi), Court on its own Motion v. State of Himachal Pradesh, 8 (May 9, 2016), <https://perma.cc/C93Y-MMU>.  
*Environnement Jeunesse c. Procureur général du Canada* 2021 QCCA 1871.  
*Juliana v. United States*, No. 18-36082 (9th Cir. 2020)  
*Sharma v. Minister for the Environment* [2021] FCA 560 (May 27, 2021)

### **Constitutions**

The Namibian Constitution  
The Constitution of the Maldives, 2008  
The Constitution of the Kingdom of Bhutan, 2008  
The Constitution of the Democratic Republic of Timor-Leste, 2002  
The Constitution of the United States, 1787  
Bolivia (Plurinational State of)'s Constitution of 2009  
Iran (Islamic Republic of)'s Constitution of 1979 with Amendments through 1989  
Constitution of the Republic of Angola, 2010  
Constitution of the Republic of Malawi, 2006  
The Constitution of Mozambique, 2004  
the Constitution of Kenya, 2010

### **Foreign legislation**

Bundes-Klimaschutzgesetz of 2019 ('the Federal Climate Protection Act')  
Ley 1753 de 2015  
Ley 21.455 'Ley Marco de Cambio Climático'

### **Books**

Brown Weiss E *In Fairness To Future Generations* (1989) United Nations University

Du Plessis M, Brickhill J, and Penfold G *Constitutional Litigation* (2013) Cape Town South Africa Juta  
 Gillespie A *International Environmental Law, Policy and Ethics* (1997) Clarendon Press Oxford  
 Glazewski J & Du Toit L (eds) *Environmental Law in South Africa* issue 5 (2017) LexisNexis Durban.  
 May J & Daly E *Global Environmental Constitutionalism* (2014) Cambridge Cambridge University Press.  
 Parfit D *Reasons and Persons* (1986) Oxford University Press Oxford  
 Rawls J A *Theory of Justice* (1971) The Belknap Press of Harvard University Press Cambridge, Massachusetts  
 Sands P, Peel J, Fabra Aguilar A and MacKenzie R, *Principles of International Environmental Law* 4<sup>th</sup> ed (2018)  
 Cambridge Cambridge University Press.  
 World Commission for Environment and Development *Our Common Future* (1987) Oxford University Press Oxford  
 Setzer J & Higham C *Global Trends in Climate Change Litigation: 2022 Snapshot* (2022) Grantham Research Institute  
 on Climate Change and the Environment and Centre for Climate Change Economics and Policy London

### Chapters in books

Agius E & Kim T “Introduction” in Agius & Busuttil (eds) *Future Generations and International Law* (1998) Earthscan  
 London xiii-xvi  
 Ariansen P “Beyond Parfit’s Paradox” in Agius & Busuttil (eds) *Future Generations and International Law* (1998)  
 Earthscan London 1-6  
 Beckerman W & Pasek J *Justice, Posterity and the Environment* 2001 14.  
 Lowe V ‘Sustainable development and Unsustainable Arguments’ in A. Boyle and D. Freestone (eds.) *International  
 Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 27.  
 Falk R “Preface” in Brown Weiss E *In Fairness To Future Generations* (1989) United Nations University xix-xxiii  
 Shelton D “Intergenerational Equity” in Wolfrum R & Kojima C (eds) *Solidarity: A Structural Principle of  
 International Law* (2010) Springer 123-161  
 Stone C “Safeguarding Future Generations’ in E Agius & S Busuttil et al (eds) *Future Generations and International  
 Law* (1998) 76.

### Journal articles

Blackmore A “The application of and the prospects for the public trust doctrine in South Africa” 2018 (4) *SALJ* 631-  
 641  
 Bodansky D “The Paris Climate Change Agreement: a new hope?” 2016 110(2) *American Journal of International Law*  
 Brown Weiss E “Our Rights and Obligations to Future Generations for the Environment” 1990 (84) *Georgetown  
 University Law Centre* 198-207  
 Brown Weiss E “In fairness to future generations and sustainable development” 1991 8(1) *American University  
 International Law Review* 18-26  
 Brown Weiss E “The Planetary Trust: Conservation and Intergenerational Equity” 1984 11(4) *Ecology law quarterly*  
 495–581  
 Buser A “Of Carbon Budgets, Factual Uncertainties, and Intergenerational Equity – The German Constitutional Court’s  
 Climate Decision” 2021 (22) *German Law Journal* 1409–1422  
 D’Amato A “Do we owe a duty to future generations to preserve the global environment?” 1990 *American Journal of  
 International Law* 190-198  
 Du Plessis A “Climate change, public trusteeship and the tomorrows of the unborn” 2015 *SAJHR* 269-293  
 Fitzmaurice M “The International Court of Justice and the environment” 2004 4 *Non-State Actors and International  
 Law* 173-197  
 Nagle LE “Evolution of the Colombian Judiciary and the Constitutional Court” 1995 6 *Indiana International &  
 Comparative Law Review* 59-90  
 Hadjiargyrou Z “A Conceptual and Practical Evaluation of Intergenerational Equity in International Environmental  
 Law” 2016 *International Community Law Review* 18 248–277  
 Kotze L “*Neubauer et al. versus Germany: Planetary Climate Litigation for the Anthropocene?*” 2021 (22) *German  
 Law Journal* 1423–1444  
 Lurie G “Proportionality and the Right to Equality” 2020 (21) *German Law Journal* 174-196  
 Obergassel et al “Phoenix from the Ashes —An Analysis of the Paris Agreement to the United Nations Framework  
 Convention on Climate Change” 2016 28 *ELM* 3 1-54.  
 Padilla E “Intergenerational Equity and Sustainability” 2002 (41) *Ecological Economics* 69–83  
 Peel J & Markey-Towler R “Recipe for Success?: Lessons for Strategic Climate Litigation from the Sharma, Neubauer,  
 and Shell Cases” 2021 (22) *German Law Journal* 1484–1498

Reiman J “Being Fair to Future People: The Non-Identity Problem in the Original Position” 2007 (35) *Philosophy & Public Affairs* 69-92

Rose M “All-affected, Non-identity and the Political Representation of Future Generations: Linking Intergenerational Justice with Democracy” in Cottier T, Lalani S, Sibiza C (eds) *Intergenerational Equity: Environmental and Cultural Concerns* (2015) Brill 32-51

Slobodian L “Defending the Future: Intergenerational Equity in Climate Litigation” 2020 32 *The Georgetown Environmental Law Review* 569-589

Sand P “Sovereignty Bounded: Public Trusteeship for Common Pool resources?” 2004 *Global Environmental Politics* 4(1) 57

Solum L ‘To our Children’s Children’s Children: The problems of Intergenerational Ethics’ 2001 *Loyola Los Angeles Review* 35 172.

Tladi D “Of Course for Humans: A Contextual Defence of Intergenerational Equity” 2002 9 *SAJELP* 177-186

Tremmel JC *A Theory of Intergenerational Justice* (2009) Earthscan London

van der Schyff E “Unpacking the Public Trust Doctrine: A Journey into Foreign Territory” 2010 (13)5 *PELJ* 122-159.

van der Schyff E “Stewardship doctrines of public trust: has the eagle of public trust landed on south african soil?” 2013 (130) *SALJ* 369-389.

Villavicencio Calzadilla P “A paradigm shift in courts’ view on nature: the Atrato river and Amazon basin cases in Colombia” 2019 (15/1) *Law, Environment and Development Journal* 49-59

Weston “Climate Change and Intergenerational Justice: Foundational Reflections” 2008 (9) *Vermont Journal of Environmental Law* 375-430

### Web sources

Armstrong A “Europe's Biggest Greenhouse Gas Emitters” *Statista* <https://www.statista.com/chart/19937/europes-biggest-greenhouse-gas-emitters/> (accessed 30.04.2022)

*BBC News* “South Africa's 'born-free' generation” <https://www.bbc.com/news/world-africa-27146976> (accessed 30.07.2022)

*CBS – Statistics Netherlands* “Urgenda reduction target for GHG emissions achieved in 2020” <https://www.cbs.nl/en-gb/news/2022/06/urgenda-reduction-target-for-ghg-emissions-achieved-in-2020> (accessed 09.09.2022)

*Climate Action Tracker* “Germany” <https://climateactiontracker.org/countries/germany/> (accessed 30.07.2022)

*Climate Action Tracker* “Glasgow’s 2030 credibility gap” <https://climateactiontracker.org/publications/glasgows-2030-credibility-gap-net-zeros-lip-service-to-climate-action/> (accessed 10.02.2022)

*Climate Action Tracker* “South Africa” <https://climateactiontracker.org/countries/south-africa/> (accessed 03.01.2022)

*Climate Case Chart* “Family Farmers and Greenpeace Germany v. Germany” (unofficial English translation) <http://climatecasechart.com/non-us-case/family-farmers-and-greenpeace-germany-v-german-government/> (accessed 30.04.2022)

*Climate Case Chart* “Neubauer et al v. Germany” [http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210324\\_11817\\_order-1.pdf](http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210324_11817_order-1.pdf), (accessed 13.09.2022)

*Climate Case Chart* “Neubauer et al v Germany – Complaint (Unofficial English translation)” [http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200206\\_11817\\_complaint.pdf](http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200206_11817_complaint.pdf) (accessed 12.09.2022)

*Dejusticia* “Climate Change and Future Generations Lawsuit in Colombia: Key Excerpts from the Supreme Court’s Decision” 2018 <https://www.dejusticia.org/en/climate-change-and-future-generations-lawsuit-in-colombia-key-excerpts-from-the-supreme-courts-decision/> (accessed 08.07.2021)

*Dejusticia* “The Colombian government has failed to fulfill the Supreme Court’s landmark order to protect the Amazon” 2019 <https://www.dejusticia.org/en/the-colombian-government-has-failed-to-fulfill-the-supreme-courts-landmark-order-to-protect-the-amazon/> (accessed 07.02.2022)

*Dentons* “Parliament passes first law amending the German Federal Climate Protection Act” <https://www.dentons.com/en/insights/articles/2021/june/18/first-draft-law-amending-the-german-federal-climate-protection-act> (accessed 30.04.2022)

*Department of Forestry, Fisheries and the Environment* “South Africa joins Nations of the World in ratifying the Paris Agreement on Climate Change” [https://www.dffe.gov.za/mediarelease/southafrica\\_ratifies\\_parisagreement](https://www.dffe.gov.za/mediarelease/southafrica_ratifies_parisagreement) (accessed 01.06.2022)

*Environmental Law Australia* “Sharma v Minister for the Environment” <http://envlaw.com.au/sharma/> (accessed 25.01.2022).

Hagan M “A Journey through Colombia’s Constitutional Court’s tutela design challenge” *Legal Design and Innovation* <https://medium.com/legal-design-and-innovation/a-journey-through-colombias-constitutional-court-s-tutela-design-challenge-c3f4d20d73bd> (accessed 29.04.2022)

Library of Congress “Germany: Amendment of Climate Change Act Codifies Climate Neutrality Goal by 2045” <https://www.loc.gov/item/global-legal-monitor/2021-09-28/germany-amendment-of-climate-change-act-codifies-climate-neutrality-goal-by-2045/> (accessed 07.02.2022).

Fridays for Future “List of Countries” <https://fridaysforfuture.org/what-we-do/strike-statistics/list-of-countries/> (accessed 30.04.2022)

London School of Economics and Political Science “PSB et al. v. Brazil (on deforestation and human rights)” [https://climate-laws.org/geographies/brazil/litigation\\_cases/psb-et-al-v-brazil-on-deforestation-and-human-rights](https://climate-laws.org/geographies/brazil/litigation_cases/psb-et-al-v-brazil-on-deforestation-and-human-rights) (accessed 07.02.2022).

Online Academic Community “German Klimaklage (Neubauer, et al. v. Germany)” <https://onlineacademiccommunity.uvic.ca/climatechangelitigation/2021/08/03/german-klimaklage-neubauer-et-al-v-germany/> (accessed 07.02.2022)

PLAAS “The Distribution of Land in South Africa: An Overview” <https://mronline.org/wp-content/uploads/2018/06/No120Fact20check20web.pdf> (accessed 30.11.2022)

Protection International “The ruling of the tutela action on the right to defend human rights in Colombia” <https://www.focus-obs.org/documents/infographic-ruling-of-the-tutela-action-on-the-right-to-defend-human-rights-in-colombia/> (accessed 29.04.2022)

Reuters “Germany sets tougher CO2 emission reduction targets after top court ruling” <https://www.reuters.com/business/environment/germany-raise-2030-co2-emissions-reduction-target-65-spiegel-2021-05-05/> (accessed 07.02.2022)

Reuters “Portuguese youth sue European states over 'life-threatening' climate change” <https://www.reuters.com/article/us-europe-climatechange-lawsuit-idUSKBN25U1K8> (accessed 15.01.2023)

Statista “Distribution of carbon dioxide emissions worldwide in 2021, by select country” <https://www.statista.com/statistics/271748/the-largest-emitters-of-co2-in-the-world/> (accessed 15.10.2022)

von Burchard F “In a bombshell and boost for climate action Germany approves amendment to climate act” *CMS Germany* [https://www.cms-lawnow.com/ealerts/2021/05/in-a-bombshell-and-boost-for-climate-action-germany-approves-amendment-to-climate-act?cc\\_lang=en](https://www.cms-lawnow.com/ealerts/2021/05/in-a-bombshell-and-boost-for-climate-action-germany-approves-amendment-to-climate-act?cc_lang=en) (accessed 30.04.2022)

Wahlström M & Others “Protest for a future: Composition, mobilization and motives of the participants in Fridays For Future climate protests on 15 March, 2019 in 13 European cities” *Keele University* [https://eprints.keele.ac.uk/6571/7/20190709\\_Protest%20for%20a%20future\\_GCS%20Descriptive%20Report.pdf](https://eprints.keele.ac.uk/6571/7/20190709_Protest%20for%20a%20future_GCS%20Descriptive%20Report.pdf) (accessed 30.04.2022)

WWF “Inside the Amazon” [https://wwf.panda.org/discover/knowledge\\_hub/where\\_we\\_work/amazon/about\\_the\\_amazon/](https://wwf.panda.org/discover/knowledge_hub/where_we_work/amazon/about_the_amazon/) (accessed 29.04.2022)

WWF “The vital links between the Amazon rainforest, global warming and you” [https://wwf.panda.org/discover/knowledge\\_hub/where\\_we\\_work/amazon/about\\_the\\_amazon/why\\_amazon\\_important/](https://wwf.panda.org/discover/knowledge_hub/where_we_work/amazon/about_the_amazon/why_amazon_important/) (accessed 29.04.2022)

United Nations “Notes from the expert panel on intergenerational solidarity” *Sustainable Development Goals* <https://sustainabledevelopment.un.org/content/documents/1818summary.pdf> 1-4 (accessed 07.03.2022)

UC Davis “Top 10 Environmental Law Decisions of 2021” <https://www.ucdavis.edu/news/top-10-environmental-law-decisions-2021> (accessed 25.01.2022)

United Nations Treaty Collection “Paris Agreement” [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg\\_no=XXVII-7-d&chapter=27&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=XXVII-7-d&chapter=27&clang=en) (accessed 14.08.2022)