

# Defending the Future: Intergenerational Equity in Climate Litigation

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## ABSTRACT

*Several decades after Edith Brown Weiss elaborated the concept of intergenerational equity, it is now prevalent in international discourse, with references to future generations appearing in treaties, judicial decisions, and national constitutions. A recent spate of court cases brought by and on behalf of minor plaintiffs and future generations around the world are testing the legal strength and utility of rights and obligations grounded in intergenerational equity in the fight to address climate change. These cases demonstrate the ways the concept of intergenerational equity is changing and connecting with other legal concepts and principles including sustainable development, the public trust, non-discrimination, and fundamental rights. They highlight the challenges in realizing rights of future people in the face of urgent present need, but suggest solutions involving representation by living generations and transgenerational groups and better integration of future considerations in decision-making. Finally, they indicate the import rhetorical role of intergenerational equity in climate change litigation.*

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## INTRODUCTION

In 2018, a group of young people ranging from seven to twenty-five years old filed a claim against the government of Colombia arguing that the rapid deforestation of the Amazon violates their fundamental rights to life, health, water, and food, based on harms they will suffer from climate change as adults and in their old age. They asked the court to consider the principle of intergenerational equity both in relation to their own generation and generations to come. The case reached the Supreme Court of Colombia, which found that various government departments had failed to fulfill their duties pursuant to national and international commitments. The Court recognized the Colombian Amazon as a subject of rights, and ordered the formulation of an “intergenerational pact for the life of the Colombian Amazon” to adopt measures to reduce deforestation to zero, stating:

The scope of protection of fundamental rights is not only the individual, but also the other . . . the other people who inhabit the planet, other animals and plants . . . but, also, it includes those not yet born, who also deserve to enjoy the same environmental living conditions as we do.<sup>1</sup>

Plaintiffs representing the interests of future generations have brought cases in courts around the world raising questions related to intergenerational equity in the context of climate change. Some of these cases have resulted in successful judgments while others have failed to get past initial legal hurdles. Many more are pending final decision.

These cases can tell us something about the principle of intergenerational equity, its legal status, and its usefulness in addressing the threat of climate change. This Article reviews intergenerational equity in national and international law, as well as trends in national climate litigation. The Article then looks at how intergenerational equity fits into three components of climate litigation: 1) types of plaintiffs and questions of standing; 2) determination of rights and duties; and 3) fashioning of remedies. The concluding section discusses the existing and future potential of intergenerational equity as a tool for protecting rights.

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1. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Civ. abril 5, 2018, M.P: Luis Armando Tolosa Villabona, STC4360-2018, Radicación no. 11001-22-03-000-2018-00319-01, p. 18–19 (Colom.).

## I. CONTEXT

### A. INTERGENERATIONAL EQUITY IN NATIONAL AND INTERNATIONAL LAW

Intergenerational equity describes fairness in access to and use of planetary resources across time. It is founded on two types of relationships: 1) the relationship between each generation and all other generations—past, present, and future—as part of a community with equal rights to natural resources and 2) the relationship between the human community and the natural system, of which humans are a part.<sup>2</sup> One way to think about it is to imagine that all generations must agree on a method for allocating resources before they know when in time they will exist.<sup>3</sup> Each generation wants to enjoy at least as much benefit as the others and requires certain minimum standards to ensure the quality of life of its members. The resulting system therefore needs to satisfy two requirements: 1) equity among generations and 2) the ability of each generation to meet its own needs. These correspond to the linked principles of intergenerational equity and sustainable development.<sup>4</sup> A third requirement—the fair allocation of resources within each generation—corresponds to the principle of intra-generational equity, which is functionally inseparable from the other two.

Intergenerational equity does not imply absolute equality in allocation of resources but necessitates balancing present and future needs and providing flexibility for future generations to achieve their own goals. This is realized through three components:

- *Conservation of options* by maintaining the diversity of natural resources so future generations can make choices to meet their needs;
- *Conservation of quality* of ecological systems comparable to those enjoyed by previous generations, avoiding excessive degradation and pollution;
- *Conservation of access* to planetary resources so that members of present and future generations have opportunities to use and benefit from natural resources.<sup>5</sup>

Intergenerational equity can be realized through the device of a planetary trust. Each generation inherits the Earth and its resources from previous generations, so

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2. Edith Brown Weiss, *Implementing Intergenerational Equity*, in RESEARCH HANDBOOK ON INTERNATIONAL ENVIRONMENTAL LAW 102 (Malgosia Fitzmaurice, David M. Ong & Panos Merkouris, eds., 2010).

3. Edith Brown Weiss, *Intergenerational Equity: Toward an International Legal Framework*, in GLOBAL ACCORD (Nazli Choucri ed., 1993); JOHN RAWLS, A THEORY OF JUSTICE (1971).

4. Sustainable development is defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” WORLD COMM’N ON ENV’T & DEV., OUR COMMON FUTURE 54 (1987).

5. Brown Weiss, *supra* note 2, at 102.

it has an obligation to pass on the planetary resources in no worse condition than they were received.<sup>6</sup>

References to future generations are found throughout national and international law. The Convention on Biological Diversity, the World Heritage Convention, and the United Nations Economic Commission for Europe Water Convention, among others, include obligations to future generations.<sup>7</sup> The United Nations Framework Convention on Climate Change (UNFCCC) obliges Parties to “protect the climate system for the benefit of present and future generations of humankind, on the basis of equity . . . .”<sup>8</sup> Obligations to future generations are found in the constitutions of Brazil, Germany, Guyana, Norway, South Africa, and Vanuatu, among others, as well as the national and subnational legislation of many countries, including the United States, Japan, and Australia.<sup>9</sup>

The International Court of Justice has considered questions related to intergenerational equity on multiple occasions.<sup>10</sup> In a separate opinion in the case *Pulp Mills on the River Uruguay*, Judge Trindade argued: “Nowadays, in 2010, it can hardly be doubted that the acknowledgment of intergenerational equity forms part of conventional wisdom in International Environmental Law.”<sup>11</sup>

In 2016, Members of the International Union for Conservation of Nature World Conservation Congress adopted a resolution calling for an advisory opinion from the International Court of Justice (ICJ) on the principle of sustainable

6. Edith Brown Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 *ECOLOGY L.Q.* 495, 499 (1984); Edith Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 *AM. J. INT’L L.* 198, 199–200 (1990).

7. Convention on Biological Diversity, June 5, 1992, 1760 *U.N.T.S.* 79, arts. 1-2 (future generations as part of the definition of sustainable use, included as one of the objectives of the convention); Convention for the Protection of the World Cultural and Natural Heritage adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization art. 4, Nov. 16, 1972, 1037 *U.N.T.S.* 151, <https://perma.cc/KKG3-XAPZ> (duty of each State Party to conserve and transmit to future generations cultural and natural heritage on its territory); UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes art. 2 5(c), March 17, 1992, 31 *I.L.M.* 1312, <https://perma.cc/H79B-RAL2> (“Water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs.”).

8. United Nations Framework Convention on Climate Change, Art. 3 1, 1771 *U.N.T.S.* 107, <https://perma.cc/37ZZ-2YHB>.

9. See Jane Anstee-Wedderburn, *Giving a Voice to Future Generations: Intergenerational Equity, Representatives of Generations to Come, and the Challenge of Planetary Rights*, 1 *AUSTRALIAN J. ENVTL. L.* 37, 42–43 (2014), <https://perma.cc/P6R8-6GFJ>; Brown Weiss, *supra* note 2, at 105; U.N. Secretary-General, *Intergenerational Solidarity and the Needs of Future Generations*, ¶ 37, U.N. Doc. UNGA/68/322 (Aug. 5, 2013), <https://perma.cc/NA6D-FL9D>.

10. *E.g.*, Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of Dec. 20, 1974 in the Nuclear Tests (*New Zealand v. France*) Case, Order, 1995 *ICJ Rep* 288, ¶ 6 (Sept. 22), <https://perma.cc/2FCT-YGKD>; Gabčíkovo-Nagyymaros (Hung./Slovk.), Judgment, 1997 *I.C.J. Rep* 88, 106 (Sept. 25) (separate opinion by Weeramantry, Vice-President), <https://perma.cc/4R9Q-AQZG>.

11. *Pulp Mills on the River Uruguay* (Arg. v. Uru.), 2010 *I.C.J. Rep* 135, ¶ 122 (Apr. 20) (separate opinion by Trindade, J.), <https://perma.cc/F3GH-H6AQ>.

development and the needs of future generations.<sup>12</sup> To date, the ICJ has not issued an opinion.

It is not clear whether this body of law and practice adds up to an internationally accepted, legally binding obligation of intergenerational equity. References in international law are arguably not sufficiently specific or prescriptive to be enforceable.<sup>13</sup> Though there is international agreement on a general need to consider the interests of future generations in environmental decision making, there is no certainty on what this entails or what rights, if any, it implies.

#### B. EMERGING TRENDS IN NATIONAL CLIMATE LITIGATION

Climate-related litigation is booming. Over one thousand cases have been brought in the United States, and several hundred have been brought in the rest of the world.<sup>14</sup> In addition to routine cases challenging specific activities or decisions, strategic litigation campaigns attempt to influence public policy and behavior on a larger scale, borrowing tactics from tobacco and asbestos litigation.<sup>15</sup>

Most climate cases have been brought in developed countries, with the United Kingdom, European Union, New Zealand, and Australia following the United States, but more and more cases are coming before courts in the Global South.<sup>16</sup> Cases in developing countries demonstrate significant and often successful use of human rights principles, based on strong rights provisions in national constitutions, precedent in regional human rights tribunals, a history of innovation in recognizing environmental rights, and the urgency and immediacy of the climate change threat to human rights in many countries.<sup>17</sup> In *Leghari v. Pakistan*, a farmer brought public interest litigation against the federal government for delays in implementing the National Climate Change Policy, violating constitutional rights to life and dignity. The Lahore High Court found that the farmer's rights had been violated by the government's failure to take action to adapt to climate change and ordered the creation of a Climate Change Commission to oversee implementation of the policy.<sup>18</sup>

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12. World Conservation Cong., *Request For An Advisory Opinion Of The International Court Of Justice On The Principle Of Sustainable Development In View Of The Needs Of Future Generations*, WCC-2016-Res-079 (Sept. 2016), <https://perma.cc/ZKN6-J78X>.

13. Anstee-Wedderburn, *supra* note 9, at 39.

14. JOANA SETZER & REBECCA BYRNES, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2019 SNAPSHOT 3 (July 2019), <https://perma.cc/2F2G-7RYQ>; Maria L. Banda & Scott Fulton, *Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law*, 47 ENVTL. L. REPS. 10121, 10121 (2017), <https://perma.cc/DUU3-XJYU>; MICHAEL BURGER & JUSTIN GUNDLACH, STATUS OF CLIMATE CHANGE LITIGATION: A GLOBAL REVIEW 10 (2017).

15. Theodore Okonkwo, *Protecting the Environment and People from Climate Change through Climate Change Litigation*, 10 J. POLS. & L. 66, 68, 73 (2017).

16. SETZER & BYRNES, *supra* note 14, at 7.

17. Joana Setzer & Lisa Benjamin, *Climate Litigation in the Global South: Constraints and Innovations*, 9 TRANSNAT'L. ENVTL. L. 1, 1–25 (2019).

18. *Leghari v. Pakistan*, (2015) 25501/201 WP (Punjab) (2018) (Pak.), <https://perma.cc/K2KA-67WR>.

Almost all climate cases involve government defendants, including cases aimed at holding governments responsible for climate commitments as well as challenges to specific policies or projects.<sup>19</sup> In the *Urgenda* case, a Dutch nongovernmental organization (“NGO”) sued the government of the Netherlands on behalf of almost 900 Dutch citizens, as well as future generations and other citizens of the world. The NGO argued that the government had failed to take adequate action to reduce greenhouse gas emissions, violating its duty of care to current and future generations. The Dutch Supreme Court found that the government has a duty under the European Convention on Human Rights to protect the rights to life and home from the threat of climate change.<sup>20</sup> It ordered the Netherlands to increase its greenhouse gas reduction target to at least 25% by the end of 2020.<sup>21</sup> In this and other cases, courts have used international agreements as evidence for interpreting national rights and obligations.<sup>22</sup>

Strategic litigation against private emitters has been largely unsuccessful, owing to problems related to standing and separation of powers.<sup>23</sup> Improvements in attribution science, the increasing immediacy of climate harm, and the emergence of new categories of plaintiffs have raised hopes that a new wave of strategic private litigation may overcome previous hurdles.<sup>24</sup> The identification of the “Carbon Majors,” a group of fewer than one hundred companies responsible for two-thirds of global human-caused emissions, has helped focus litigation and provide evidence to support causation.<sup>25</sup> In 2019, after a four-year investigation, the Philippines Commission on Human Rights announced its conclusion that ExxonMobil, Chevron, Shell, and other Carbon Majors could legally be held liable for the impacts of climate change on human rights.<sup>26</sup> These factors may lead to increased recognition of private liability for climate change, which could shift corporate behavior in the future.<sup>27</sup>

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19. Burger & Gundlach, *supra* note 14, at 14.

20. *Urgenda Foundation v. Kingdom of the Netherlands*, Hoge Raad, ECLI:NL:HR:2019:2007 (Dec. 20, 2019).

21. *Id.*

22. Burger & Gundlach, *supra* note 14, at 15.

23. See Mark Belleville & Katherine Kennedy, *Cool Lawsuits- Is Climate Change Litigation Dead After Kivalina v. ExxonMobil?*, 7 APPALACHIAN NAT. RESOURCES L.J. 51, 59 (2013).

24. See generally Geetanjali Ganguly, Joana Setzer & Veerle Heyvaert, *If at First You Don't Succeed: Suing Corporations for Climate Change*, 38 OXFORD J. LEGAL STUD. 841, 841–868 (2018).

25. See *id.*; *Carbon Majors*, CLIMATE ACCOUNTABILITY INST. (Oct. 8, 2019), <https://climateaccountability.org/carbonmajors.html>.

26. *Groundbreaking Inquiry in Philippines Links Carbon Majors to Human Rights Impacts of Climate Change, Calls for Greater Accountability*, CTR. FOR INT'L ENVTL. L. (Dec. 9, 2019), <https://perma.cc/6ABD-H5GQ>.

27. Ganguly, Setzer, & Heyvaert, *supra* note 24, at 841, 848–49; Kim Bouwer, *The Unsexy Future of Climate Change Litigation*, 30 J. ENVTL. L. 483, 501 (2018); Negin Heidari & Joshua M. Pearce, *A Review of Greenhouse Gas Emission Liabilities as the Value of Renewable Energy for Mitigating Lawsuits for Climate Change Related Damages*, 55 RENEWABLE & SUSTAINABLE ENERGY REVS. 899, 899 (2016).

A wave of cases are being brought by young people, on their own behalf and on behalf of future generations. In *Juliana v. United States*, children and young adults ranging from eight to nineteen years old together with an NGO and a named guardian for future generations sought a court order directing the United States government to develop a plan to reduce greenhouse gas emissions, claiming violations of constitutional rights and the public trust doctrine. The district court denied motions to dismiss, finding that “the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.”<sup>28</sup> The Ninth Circuit overturned this decision because, although the young people had sufficiently alleged injury and causation, they had failed to show redressability.<sup>29</sup>

The impact of the ongoing surge of climate change cases is still uncertain. To date, there have been few examples of successful cases resulting in actual private or public action. However, there are promising trends, particularly in cases brought in developing countries and cases targeting the Carbon Majors. The role of intergenerational equity in these cases, including but not limited to those brought by youth plaintiffs, will be explored throughout this Article.

## II. GENERATION REPRESENTATION

In bringing a case in the modern judicial system, future generations face a fundamental challenge: they do not exist. As well as a number of logistical obstacles, nonexistence raises an issue described by Derek Parfit as the “non-identity problem.” Because decisions made in the present determine the identity of future people, fulfilling obligations to future people can cause those particular people not to exist. For example, taking action to effectively address climate change could prevent massive climate migration and climate-related deaths and influence individual reproductive choices, leading to different demographic conditions and different people being born. By trying to improve the lives of future people, we ensure that those particular future people never exist, and therefore cannot have rights.<sup>30</sup> The non-identity problem becomes more severe the further into the future obligations are considered.

One response to this problem is that rights of future people are held by future generations as a class, into which individuals are born and become holders of rights.<sup>31</sup> This is an attractive theory, but it does not entirely get around the non-identity problem. It is not clear that abstract potential future generations can legally hold rights, and by the time individual rights-holders are born, they are not in a position to object to policy decisions that led to their circumstances of conception. Generations themselves are hard to divide into distinct rights holding

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28. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016).

29. *Juliana v. United States*, 947 F.3d 1159, 1159 (9th Cir. 2019).

30. DEREK PARFIT, REASONS AND PERSONS 351–380 (1984).

31. Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, *supra* note 6, at 203.

groups; they overlap in interests and lifespans to the extent that the designation of a discrete generation is arbitrary.<sup>32</sup> It is not sufficient to consider all future humans as part of a single community, as the interests of people at different points in the temporal continuum will not necessarily align; distant humans may have different needs and interests than those that will be born in the next ten years. Moreover, this approach does not take into consideration inequality within future generations, which may be entrenched over time, as the descendants of vulnerable communities are likely to remain vulnerable and even become more so as a result of climate change.<sup>33</sup>

There may be no need to identify future rightsholders at all—an obligation can exist without a specific right.<sup>34</sup> It may be more useful to determine how and by whom the interests of future people can be protected in the present. The climate cases have used at least three different approaches to representing future generations. In the first approach, the interests of future generations are represented by a guardian *ad litem* or other appointed representative. This can be a specific individual or civil society organization who represents the interests of future people, whether or not they coincide with their own interest, or members of a present generation, such as children, who share interests with future people and consider themselves to be part of the same class. In the second approach, members of a living generation bring suits on their own behalf for harm they will suffer in the future, claiming that intergenerational equity applies to them as well as to people not yet born. In the third approach, rights are claimed by transgenerational groups, such as countries, tribes, communities and organizations which exist now and will continue to exist beyond the lifetimes of their current members.<sup>35</sup> These groups assert obligations to represent the interests of their own future members, and rights to exist and not suffer certain types of harm in the future.

#### A. SHOULD FUTURE PEOPLE HAVE STANDING?

In the early 1990s, Antonio Oposa brought a case to challenge unsustainable logging on behalf of a group of children (including his own), claiming to represent future generations. The Supreme Court of the Philippines recognized the children and future generations as a class with standing to challenge government action that threatened their right to a balanced and healthful ecology. It found that

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32. Dinah Shelton, *Intergenerational Equity*, in *SOLIDARITY: A STRUCTURAL PRINCIPLE OF INTERNATIONAL LAW* 123 (Rudiger Wolfrum & Chie Kojima eds., 2010), <https://perma.cc/UX5M-VU4B>.

33. Snorre Kverndokk, Eric Nævdal & Linda Nøstbakken, *The Trade-off Between Intra- and Intergenerational Equity in Climate Policy*, 69 *Eur. Econ. Rev.* 40, 41 (2014); Brown Weiss, *supra* note 2, at 113.

34. Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, *supra* note 6, at 205.

35. Lydia Slobodian, *Obligations to Transgenerational Groups: A Justification for Sustainable Environmental Policy*, 24 *GEO. INT'L ENVTL. L. REV.* 387, 387 (2012).



every generation has a responsibility to preserve the rhythm and harmony of nature, and that the minors' assertion of these rights fulfilled their own obligation to ensure protection of the environment for future generations.<sup>36</sup>

Decades later, climate change cases are trying to replicate this success in suits on behalf of future generations, often represented by young people.<sup>37</sup> Few of these have resulted in explicit recognition of rights and standing of future generations. In *Robinson Township v. Commonwealth*, the Supreme Court of Pennsylvania in a plurality opinion stated that Pennsylvania's "obligations as trustee to conserve and maintain the public natural resources for the benefit of the people, including generations yet to come, create a right in the people to enforce the obligations."<sup>38</sup> The Pennsylvania Commonwealth Court relied in part on this decision in finding that "the rights of all people of the Commonwealth, including future generations" encompassing "the right to enjoy public natural resources and to not be harmed by the effects of environmental degradation now and in the future" are within the zone of interests protected by the Pennsylvania Constitution, and therefore meet one of the tests for standing.<sup>39</sup> In this case, brought by a young person alleging representation of future generations, the Court found that the fact that harms will occur in the future is not a reason to reject standing.<sup>40</sup> Nonetheless, the Court dismissed the petition, finding the requested relief was inappropriate.<sup>41</sup>

Where a court has the option to avoid addressing the issue of standing of future generations, it tends to do so. In the *Urgenda* case, the Hague Court of Appeal declined to decide whether plaintiffs could represent future generations, because the claim on behalf of present generations was admissible in itself:

After all, it is without a doubt plausible that the current generation of Dutch nationals, in particular but not limited to the younger individuals in this group, will have to deal with the adverse effects of climate change in their lifetime.<sup>42</sup>

The same conclusion was reached in *Juliana*, the case brought by youth plaintiffs as well as a guardian for future generations. The district court judge found it unnecessary to address standing of future generations plaintiffs because the youth plaintiffs had adequately alleged current harm.<sup>43</sup>

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36. *Minors Oposa v. DENR*, Supreme Court of the Philippines, 33 I.L.M. 173 (1994).

37. See Adrian Treves et al., *Intergenerational Equity Can Help to Prevent Climate Change and Extinction*, 2 NATURE ECOLOGY & EVOLUTION 204, 205 (2018); Julie H. Albers, *Human Rights and Climate Change*, 28 SECURITY & HUM. RIGHTS 113, 133 (2017).

38. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 974 (Pa. 2013).

39. *Funk v. Wolf*, 144 A.3d 228, 248 (Pa. Commw. Ct. 2016).

40. *Id.*

41. *Id.* at 252. See also Samvel Varvaštian, *Current Legal Developments: Climate Change and the Constitutional Obligation to Protect Natural Resources: The Pennsylvania Atmospheric Trust Litigation*, 7 CLIMATE L. 209, 218–219 (2017).

42. *Netherlands v. Urgenda*, Case No.200.178.245/01, Hague Court of Appeal, ¶ 37 (2018).

43. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1260 (D. Or. 2016).

In these cases, the immediacy of the climate change threat obscures the question of whether there could be standing for future generations and seems to render such standing unnecessary. They implicitly assume that the interests of future generations and current children are identical, or at least that it is sufficient for the purposes of standing to consider the interests of the living plaintiffs alone. This decision to focus on living plaintiffs has repercussions for the determination of obligations and crafting of remedies, as discussed below.

#### B. EQUITY AMONG LIVING GENERATIONS

Climate change plaintiffs are making intergenerational equity arguments not only on behalf of future people, but also for themselves. In the Colombian case, youth plaintiffs claimed that:

intergenerational equity isn't only between the present generation and a future generation of people who do not yet exist, but also between those who make decisions today and the generation of younger people who face the effects of those decisions made in the present.<sup>44</sup>

In its decision, the Supreme Court of Colombia applied the principle of intergenerational equity to “future generations, including the children who brought this action,” and it ordered the government to formulate an intergenerational pact for the life of the Colombian Amazon with active participation of the youth plaintiffs.<sup>45</sup>

This represents an expansion of the definition of intergenerational equity and a shift in focus to a more immediate timeframe. It is in line with the trend of cases brought by young people in which standing is based on past or current harm to the children, rather than to future generations, and is linked to the increasing urgency of the climate change threat.<sup>46</sup> In *Juliana*, youth plaintiffs met one element of the standing test by showing current harm ranging from evacuation due to flooding to loss of recreational opportunities.<sup>47</sup> In an order from the bench in the case *Foster v. Washington Department of Ecology*, Judge Hill remarked, “This is not a situation these children can wait on.”<sup>48</sup>

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44. Peña v. Presidencia de la República de Colombia, Tutela Action, ¶ 3, (Tribunal Superior del Distrito Judicial de Bogotá – Sala Civil, 2018).

45. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Civ. abril 5, 2018, M.P: Luis Armando Tolosa Villabona, STC4360-2018, Radicación no. 11001-22-03-000-2018-00319-01, p. 14 (Colom.).

46. *E.g.*, Kanuk v. Alaska, 335 P.3d 1088, 1094 (Alaska 2014); *Thomson v. Minister for Climate Change Issues* [2017] NZHC 733 at [157] (N.Z.); see Mary Christina Wood & Charles W. Woodward IV, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last*, 6 WASH. J. ENVTL. L. & POL’Y 633, 634 (2016).

47. *Juliana v. United States*, 947 F.3d 1159, 1168 (9th Cir. 2020).

48. Transcript of Hearing at 20, *Foster v. Wash. Dep’t of Ecology*, No. 14-2-25295-1 (Wash. Super. Ct. Apr. 29, 2016). The Court ordered the Department of Ecology to complete a rulemaking on managing greenhouse gas emissions by the end of 2016, later reversed by the Washington Court of Appeals as an abuse of discretion. *Foster v. Wash. Dep’t of Ecology*, 200 Wash. App. 1035, 1 (Wash. Ct. App. 2017).

If intergenerational equity applies to living people as well as the unborn, it is worth asking whether children are the only generation who can make a claim. In Switzerland, a group of senior women filed an administrative appeal arguing that the Department of Environment failed to act sufficiently to address climate change. The seniors claimed that they are particularly vulnerable to climate change, as older persons have a higher risk of heat-related death. The Swiss Federal Administrative Court dismissed the appeal, saying that the impacts of climate change are general, even if not equal across the population, and do not amount to a violation of personal legal rights.<sup>49</sup> This case illustrates an important point: as climate change effects are becoming more severe in the present, there is decreasing need to focus on future harm, either to unborn generations or to children.

### C. THE ROLE OF TRANSGENERATIONAL GROUPS

Transgenerational groups play a key role in climate cases. Legal entities that exist now and will continue to exist beyond the lifetimes of their individual constituents can hold rights and bring claims in a way that future people cannot. Rights held by transgenerational groups do not implicate the non-identity problem; as long as there is an expectation that the group will continue to exist, the group can and should represent the interests of its members, even those not yet born.<sup>50</sup> Compared to living individuals, transgenerational entities can assert rights over a longer time-frame, including rights not to suffer future harm from climate change.

Transgenerational groups, such as communities, can better represent the relative circumstances and needs of their constituents within each generation. An Arctic village facing melting sea ice and accelerating erosion, a Nigerian community suffering health problems and loss of crops, and a U.S. state threatened by future loss of coastline may all have an interest in addressing climate change but all have very different mitigation and adaptation needs.<sup>51</sup> These entities are better positioned to bring cases representing these needs than plaintiffs seeking to represent generic future generations.

Among transgenerational plaintiffs, sovereign entities such as nations, tribes, and U.S. states may receive special treatment in consideration of standing. The U.S. Supreme Court found in *Massachusetts v. EPA* that a state government can bring suit to contest harm that would occur over the next one hundred years as a result of climate change, based on the special interest of a sovereign state in all earth and air within its domain.<sup>52</sup>

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49. Bundesgericht [BGer] [Federal Supreme Court] Jan. 21, 2019, No. A-2992/2017 [BGE] XXX (Switz.).

50. Slobodian, *supra* note 35, at 388–89.

51. *Kivalina v. ExxonMobil Corp.*, 663 F. Supp 2d 863, 863 (N.D. Cal. 2009); *Gbemre v. Shell Petroleum* [2005] FHC/B/CS/53/05 (Nigeria); *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007).

52. 549 U.S. at 520–26.

Governments and other transgenerational groups are increasingly bringing cases against private plaintiffs, with the hope that government plaintiffs can get around some of the hurdles faced by individual litigants.<sup>53</sup> Legal cases have been brought by U.S. states such as Massachusetts and Connecticut, municipalities such as San Francisco and Oakland, and even private industry associations such as the Pacific Coast Federation of Fishermen's Associations.<sup>54</sup> The success of this wave of cases is yet to be seen.

### III. DUTIES TO THE FUTURE

In multiple jurisdictions, climate litigation has established the existence of obligations to future generations, aligning more or less with the components of the principle of intergenerational equity. These obligations are founded on three key concepts: the public trust doctrine; the principle of nondiscrimination; and the obligation to protect, respect, and fulfill fundamental rights. Each of these concepts relates to a particular aspect of intergenerational equity. The public trust doctrine recalls the planetary trust model of intergenerational equity. The principle of nondiscrimination has been extended to apply to discrimination among generations, giving rise to arguments for considering future generations a suspect class. Fundamental rights to life, property, health, and a healthy environment can be recognized in an intergenerational context, echoing and informing the sustainable development concept that each generation should be able to meet its own needs. Often these obligations are based in constitutional provisions or statutory laws that reference obligations to future generations to a greater or lesser degree. Courts interpret these provisions and transform them into legally enforceable rights.

#### A. PUBLIC TRUST, PLANETARY TRUST

A global atmospheric trust litigation campaign has sought to make courts recognize the judicial role in addressing climate change, declare the obligation to protect the atmosphere as part of the public trust, and compel governments to undertake comprehensive measures to meet these obligations.<sup>55</sup> The public trust doctrine states that the government owes a fiduciary duty to conserve and maintain public natural resources for the benefit of present and future generations. Climate change endangers established trust resources, such as coastlines, rivers, and oil and gas reserves. Many plaintiffs argue that the atmosphere itself should be considered a trust resource.<sup>56</sup> Atmospheric trust cases have been brought in

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53. Ganguly, Setzer & Heyvaert, *supra* note 24, at 848.

54. SETZER & BYRNES, *supra* note 14, at 9.

55. Wood & Woodward IV, *supra* note 46, at 655.

56. *Id.* at 647–654.

Oregon, Texas, New Mexico, Arizona, North Carolina, Colorado, Kenya, Uganda, the Netherlands, Pakistan, Ukraine, and India, among others.<sup>57</sup>

In *Robinson Township*, the Pennsylvania Supreme Court found parts of oil and gas legislation unconstitutional based on provisions of the Environmental Rights Amendment, which establishes a public trust over natural resources for the benefit of all citizens, “including generations yet to come.”<sup>58</sup> The court found that exploitation of trust resources in a way that infringes on the people’s right to a quality environment constitutes a violation of the trust. A later case affirms the decision and extends the trust to include revenue from the sale of trust resources (for example, oil and gas licenses), which must be used to serve the purpose of the trust: conserving and maintaining natural resources.<sup>59</sup>

Public trust cases have struggled with the requested relief. In *Foster v. Washington*, after the Washington Superior Court recognized the state’s obligation to address climate change and ordered the Department of Ecology to complete a rulemaking, the Washington Court of Appeals overturned the order, finding that the Superior Court had abused its discretion and should not have issued affirmative relief at that point in the proceedings.<sup>60</sup>

In *Juliana*, the district court found that public trust assets including the ocean and coasts would be affected by climate change, and that the public trust doctrine would therefore create a requirement for the government to take action to address this threat.<sup>61</sup> The court found that the public trust doctrine creates an obligation to both present and future beneficiaries of the trust.<sup>62</sup> In 2020, the Ninth Circuit reversed the district court’s decision, as previously noted. While the plaintiffs met the injury and causation requirements for standing, they had failed to show redressability. The plaintiffs had requested multiple forms of relief—a declaration that the federal government is violating the Constitution by not taking sufficient action on climate change, an injunction on activities supporting exploitation of fossil fuels such as permits and subsidies, and a comprehensive plan to draw down emissions through transformation of the energy system and massive reforestation. The Ninth Circuit found that a mere declaration was not substantially likely to redress the plaintiffs injuries by itself; a halt to subsidies and leases would also not halt growth of CO<sub>2</sub> in the atmosphere sufficiently to prevent further injury to the plaintiffs; and the comprehensive transformation that would be required to provide actual redress was beyond the power of the Court to order and oversee.<sup>63</sup>

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57. *Id.* at 645; Michael C. Blumm & Mary Christina Wood, “No Ordinary Lawsuit”: *Climate Change, Due Process, and the Public Trust Doctrine.*, 67 AM. UNIV. L. REV. 1, 70–82 (2017).

58. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 948 (Pa. 2013).

59. *Pa. Env’tl. Def. Found. v. Commonwealth*, 161 A.3d 911, 939 (2017).

60. *Foster v. Wash. Dep’t of Ecology*, 200 Wash. App. 1035 (Wash. Ct. App. 2017).

61. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1276 (D. Or. 2016).

62. *Id.*

63. *Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020).

The public trust doctrine reflects, but is not equivalent to, the planetary trust concept of intergenerational equity. Under the planetary trust model, each generation as a whole and all of its members act as both custodian and beneficiary of the trust. Under the public trust doctrine, a specific government has an obligation to manage trust resources for the benefit of its citizens.<sup>64</sup> Whereas the planetary trust applies to all natural resources, the public trust doctrine applies only to public resources within the relevant government's jurisdiction. However, the idea of a fiduciary duty to protect the resources of the earth for its future inhabitants is shared by both models and is a strong mechanism for championing the rights of future generations.

#### B. NONDISCRIMINATION AMONG GENERATIONS

Intergenerational equity is based on the principle of nondiscrimination. Just as there is no moral justification for discriminating among members of the current generation on the basis of gender, race, or religion, there is no justification for giving preferential treatment to one generation over others.<sup>65</sup> The nondiscrimination principle does not require equal allocation of resources, but equity in considering the needs and interests of present and future people.

Future generations, who literally do not yet have a voice, can be particularly subject to discrimination. Participatory and democratic decision-making processes often have no way to take their interests into account, as future generations are not able to participate in consultations or submit comments on proposed rules.<sup>66</sup> Young people below the voting age also have fewer opportunities to participate in decisions that will affect their interests in the future. Official and unofficial representatives of future generations can try to ensure that future needs are considered, as discussed in Section IV(C), but there is often no legal guarantee. Where the democratic process fails, it falls on the courts to step in to protect the rights of the marginalized group.

In the *Juliana* case, plaintiffs argued that children and unborn generations are a suspect class: because they have no voting rights and little or no political power, they are denied equal protection of the law.<sup>67</sup> The district judge declined to address the issue, as she had already found an infringement of fundamental rights. This kind of explicit nondiscrimination argument has gotten little attention in climate cases. However, some courts are finding an obligation to fairly consider the interests of the future in decision-making processes. In *Robinson Township*, the

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64. Blumm & Wood, *supra* note 57, at 44.

65. Dieter Birnbacher, *What Motivates Us to Care for the (Distant) Future?*, in INTERGENERATIONAL JUSTICE 273, 276 (2009).

66. Treves et al., *supra* note 37, at 205.

67. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1248 (D. Or. 2016).

court found that within the paradigm of the public trust doctrine, the trustee has an obligation to deal impartially with all beneficiaries and to balance the interests of present and future generations.<sup>68</sup>

The nondiscrimination principle is rarely explicitly dealt with in climate cases, but underlies the concept of intergenerational equity and is implicit where the needs of future generations are invoked. The recognition of future people as holders of rights, discussed below, and as beneficiaries of the public trust, discussed above, is rooted in and informed by the principle of nondiscrimination.

### C. INTERGENERATIONAL ASPECTS OF FUNDAMENTAL RIGHTS

Rights-based arguments have emerged in climate litigation around the world.<sup>69</sup> Failure to adequately address climate change can constitute a violation of human rights, and rights can influence the interpretation of statutory obligations, such as the requirement to conduct environmental impact assessments.<sup>70</sup> A significant number of cases from different countries have found an intergenerational aspect of constitutional rights, including rights to life, property, and a healthy environment. Various courts have found that future generations are protected by rights, that the principle of intergenerational equity should inform interpretation of rights, or that sustainable development to meet the needs of future generations is a fundamental right in itself. In a separate opinion on a case before the Inter-American Court of Human Rights, Judge Trindade remarked, “Human solidarity manifests itself not only in a *spacial* [sic] dimension . . . but also in a *temporal* dimension—that is, among the generations who succeed each other *in the time*, taking the past, present, and future altogether.”<sup>71</sup>

In many countries, obligations to future generations are embedded in national constitutions. The Norwegian Constitution provides that natural resources should be managed in a way that safeguards the right to a healthy environment for future as well as present generations.<sup>72</sup> In 2018, a district court determined that this provision creates a legally enforceable right granted to each individual citizen. However, the court did not go so far as to specify whether or how future generations could enforce the right. Moreover, it found that in granting licenses for oil and gas production in the Berents Sea, the government did not violate this right

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68. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 959 (Pa. 2013).

69. Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 *TRANSNAT'L ENVTL. L.* 37, 39–40 (2018), <https://perma.cc/PUJ2-HFZ8>.

70. *Id.* at 58.

71. *Bamaca-Velasquez v. Guatemala*, Judgement, Inter-Am. Ct. H.R. (ser. A) No. 11.129, ¶ 23 (2002), (Separate Opinion of Trindade, J.), <https://perma.cc/H2XM-5HP8> (emphasis in original).

72. KONGERIGET NORGES GRUNDLØV [CONSTITUTION] art. 112 (Nor.), *translated in* CONSTITUTE, NORWAY'S CONSTITUTION OF 1814 WITH AMENDMENTS THROUGH 2014 (2020), <https://perma.cc/82FT-5R4T>.

because the environmental risk from the licenses is small, regardless of their contribution to global emissions.<sup>73</sup>

In other cases, the court itself determines that a right encompasses future as well as present generations. In *Leghari v. Pakistan*, the Lahore High Court found that the constitutional rights to life and human dignity “include within their ambit” the international principles of sustainable development and intergenerational equity.<sup>74</sup> The Court considered that such rights provide a toolbox for developing a jurisprudence of climate change justice.<sup>75</sup> In the Colombian future generations case, the Colombian Supreme Court found that future generations are included within the scope of fundamental rights to life and health.<sup>76</sup>

On more than one occasion, the National Green Tribunal of India has held that intergenerational equity is an essential part of the right to the environment, and that this requires balancing environmental protection with development. In one case, the Tribunal ordered the State of Himachal Pradesh to undertake a set of specific activities, including regulating vehicle traffic and undertaking reforestation, to address disappearing glaciers.<sup>77</sup> In another, the Tribunal set aside orders approving clearing of forestland and ordered the ministry to seek advice from the forest advisory committee.<sup>78</sup> Both decisions relied on the idea that considering needs of future generations is a component of environmental rights under the constitution.

The Colombian Constitutional Court has held that sustainable development, defined in terms of allowing future generations to meet their needs, is itself a fundamental right. Recognizing the importance of *páramos* (high altitude ecosystems) as a source of drinking water and a carbon sink, the Court found a constitutional obligation to protect *páramos* and declared parts of the national development law unconstitutional.<sup>79</sup>

The Ninth Circuit dissenting opinion in *Juliana* provides a unique perspective on the intergenerational nature of constitutional rights. In her dissent, Judge Staton argued that the U.S. Constitution itself has a temporal component, as it was intended for all future generations. She reasoned that the “perpetuity” principle inherent in the Constitution does not create a right to healthy environment,

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73. Greenpeace Nordic Ass’n and Nature and Youth v. Ministry of Petroleum and Energy, No. 16-166674TVI-OTIR/06 at\* 25 (Oslo District Court, 2018) (Nor.) *aff’d*, Greenpeace Nordic Ass’n v. Norway, Borgarting, No. 18-060499ASD-BORG/03, (Court of Appeals, 2020), <https://perma.cc/5SZV-RKXA>.

74. *Leghari v. Pakistan*, (2015) 25501/201 WP (2018).

75. *Id.*

76. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Civ. abril 5, 2018, M.P: Luis Armando Tolosa Villabona, STC4360-2018, Radicación no. 11001-22-03-000-2018-00319-01 (Colom.).

77. 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>.

78. Sudiep Shrivastava v. Union of India, (2014) Appeal no. 73/2012, National Green Tribunal of India, <https://perma.cc/49YW-L6YC>.

79. Alberto Castilla et al v. Colombia, Sentencia C-035 Colombia Corte Constitucional, (2016), <https://perma.cc/42EQ-829R>.



but does prohibit the “willful dissolution of the Republic.”<sup>80</sup> Because climate change represents an existential threat to the nation, ignoring it violates the most basic constitutional mandate to keep the country intact.

Intergenerational equity has been interpreted by several courts as connected to existing rights, particularly the rights to life and health, and the right to a healthy environment. Some have suggested that future people are protected by and may be considered holders of rights, though it is not clear how they could assert them. The mere recognition of the inclusion of future generations within the scope of fundamental rights is enough to create a duty on the part of governments and other actors to respect, protect, and fulfill these rights for future generations.

#### IV. REMEDIES ACROSS TIME

Crafting legal remedies that can protect the rights of future generations is not straightforward. Many cases have been dismissed because plaintiffs failed to request a form of relief within the court’s power to award that would redress their injuries.<sup>81</sup> Accepted remedies seem to fall into two categories: 1) establishment or recognition of transgenerational entities or institutions that can represent the rights of future people and 2) integration of future needs in planning and decision making. Both forms of remedy invoke the balance between rights and needs of the future and those of the present.

##### A. INSTITUTIONAL REPRESENTATION

The establishment of an institution to promote implementation of intergenerational equity is a tried idea. In 2015, Wales adopted the Well-Being of Future Generations Act, which creates a duty for each public body to set objectives for sustainable development and take all reasonable steps to meet them. The Act created the position of Future Generations Commissioner to act as a guardian of interests of future generations. However, the Act has been criticized for failing to provide for sanctions or citizen suits to ensure compliance.<sup>82</sup> Several other countries, including Israel, Hungary, Canada, Finland, and New Zealand, have appointed commissioners or ombudsmen to represent the needs of future generations with varying degrees of success.<sup>83</sup>

The creation of an institutional mechanism has been used as a remedy in several cases. In *Leghari*, in order to ensure implementation of the National Climate Change Policy and protection of the fundamental right to life, the Lahore High Court ordered the establishment of a Climate Change Commission comprising representatives of key departments, NGOs, technical experts, and others. Each

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80. *Juliana v. United States*, 947 F.3d 1159, 1179 (9th Cir. 2020) (Staton, J., dissenting).

81. *See id.*; *Kanuk v. Alaska* 335 P.3d 1088, 1100 (Alaska 2014).

82. Haydn Davies, *The Legal Protection of the Well-Being of Future Generations (Wales) Act 2015: Duties or Aspirations?*, 29 J. OF ENVTL. L. 5, 6 (2017), <https://perma.cc/YK79-M8QU>.

83. U.N. Secretary-General, *supra* note 9, at ¶ 39–44.

relevant ministry and department was asked to nominate a climate change focal person to work with the Ministry of Climate Change to ensure implementation.<sup>84</sup>

In 2019, as a result of a discussion of intergenerational equity in a mining case before the Indian Supreme Court, India adopted a National Minerals Policy, which establishes an interministerial body charged with ensuring sustainable mining, considering the principles of intergenerational equity and sustainable development.<sup>85</sup>

Colombia may be unique in using rights of nature as a remedy in a case involving intergenerational equity.<sup>86</sup> In the future generations case, the Supreme Court recognized the Colombian Amazon as a subject of rights. In doing so, the Court imbued a transgenerational entity with the legal rights to ensure its ability to continue to benefit future generations. This reflects a philosophical theory that it can be easier to motivate people to care for elements of nature that will last into the future, such as World Heritage sites or familiar landscapes, than to care about distant humans who do not yet exist.<sup>87</sup>

#### B. PLANNING FOR THE FUTURE

Integrating future concerns in decision-making is an important form of remedy and the focus of many climate cases. In *Earthlife Africa Johannesburg v. Minister*, the Gauteng High Court found a requirement to adequately consider climate change impacts—both national and international—in approving a new coal plant. The Court drew on South Africa’s international obligations under the UNFCCC as well as constitutional provisions on sustainable development, stating that intergenerational justice requires the state to take reasonable measures to protect the environment for the benefit of present and future generations, including by weighing short-term needs against long-term consequences.<sup>88</sup> This implies a duty, arising from the principle of sustainable development, to include impacts on future generations in assessing activities that could affect the climate.

In 2008, the Victoria Civil and Administrative Tribunal considered how future sea-level rise should be taken into account in granting development permission. The Tribunal stated that, in making decisions on development, the precautionary principle requires estimation of potential “intergenerational liability” arising from the proposal. Finding that foreseeable inundation of proposed development areas created “a longer term risk of intergenerational liability that can and should

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84. Leghari v. Pakistan, (2015) 25501/201 WP (2018).

85. Common Cause v. Union of India, (2017) No. 1501, (India), <https://perma.cc/8RKE-26XR>; Gov’t of India Press Info. Bureau, *National Mineral Policy, 2019 Approved by Cabinet*, INDIA BRAND EQUITY FOUND., <https://perma.cc/NS83-NS3R>.

86. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Civ. abril 5, 2018, M.P: Luis Armando Tolosa Villabona, STC4360-2018, Radicación no. 11001-22-03-000-2018-00319-01, p. 14 (Colom.).

87. Birnbacher, *supra* note 65, at 289.

88. *Earthlife Africa Johannesburg v. Minister of Environmental Affairs*, 2 All SA 519, High Court of South Africa, Gauteng Division, Pretoria, ¶ 82 (2017), <https://perma.cc/3RK3-RWBF>.

be avoided,” the tribunal set aside the decision of the administrative authority and held that the land in question was unsuited to the proposed development.<sup>89</sup> Two years later, the same tribunal found that the planning law contained requirements for implementing intergenerational equity, including taking account of climate risks in development planning and not deferring responsibility for mitigating climate change to future generations. Granting a permit for development in areas at high risk of severe climate impacts would fail to satisfy this requirement.<sup>90</sup>

In these and other cases involving environmental impact assessment, permitting, and planning, the remedy typically comprises overturning the authorization in question and remitting the case to the appropriate authority with explicit instructions to consider the interests of future generations. This type of decision can turn permitting and planning processes into vehicles for implementing intergenerational equity in the context of climate change. In environmental impact assessment and development planning, governments already engage in the exercise of weighing risks, costs, and benefits across time. The explicit requirement to consider future generations in this analysis is a relatively small step, but one that can create a useful hook for ensuring that the rights of future people continue to be taken into account.

### C. BALANCING NEEDS

A central tension in realizing intergenerational equity is how to weigh the needs of the present against the needs of the future. Historically, generations have not enjoyed equitable opportunities to access and benefit from natural resources. Past generations have often lacked the technology and economic conditions to extract or use many of the mineral resources we rely on today or to enjoy modern standards of nutrition and sanitation. While future generations are likely to face significant climate-related challenges, they are also likely to continue to develop both economically and technologically. This reasoning has been used to justify the practice of discounting both the benefits and costs of future natural resource management in relation to current costs and benefits.

In *Thomson v. Minister for Climate Change*, a law student brought a suit challenging New Zealand’s Nationally Determined Commitment for delaying action and relying on future technology that may never exist. The student argued that deferring costs of mitigation to future generations violates intergenerational equity. The Court denied the application for judicial review, stating that balancing costs is an appropriate matter for the Executive to decide and delays that might increase future challenges are not necessarily unjustified.<sup>91</sup>

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89. *Gippsland Coastal Bd. v South Gippsland*, [2008] SC VCAT 1545 (29 July 2008) 43 (Austl.) <https://perma.cc/6EW6-C72W>.

90. *Taip v E Gippsland Shire Council*, [2010] VCAT 1222 (28 July 2010) 14 (Austl.).

91. *Thomson v. Minister for Climate Change Issues* [2017] NZHC 733 at [160] (N.Z.).

Future discounting fails to consider inequality within generations. Climate change is likely to exacerbate wealth inequality both within and between generations. Future discounting can further increase this inequality, as poor populations who are most vulnerable to climate damage are least likely to have the wealth and technology that would help mitigate this harm.<sup>92</sup> Moreover, at least in the near term, mitigation is likely to cost more the longer it is delayed, as more greenhouse gases enter the atmosphere and warming starts to trigger snowballing effects. In the *Urgenda* case, the court recognized that postponing emissions reduction would increase the cost of reductions in the future.<sup>93</sup>

The changing understanding of “future generations” to include living people as well as the unborn represents a shortening timeframe that could affect the balance between present and future needs. When people are facing climate-related disasters within their lifetimes, is it necessary or even justifiable to consider the interests of people in the future? Considering future people, particularly in the more distant future, affects decisions on how to address climate change; for example, when considering options with potential long-term consequences such as geoengineering or increasing use of nuclear power. The interests of future people do not need to override the interests of the present, particularly in cases where there is an emergency, but thinking along a longer timeframe can result in more robust and resilient decisions that can continue to meet the needs of the present.

#### CONCLUSION: WHERE IS THE HOPE?

Since the Colombia Supreme Court’s decision recognizing the environmental rights of children and those yet to be born, deforestation of the Colombian Amazon has continued. The Intergenerational Pact for the Life of the Colombian Amazon has not been created, and the plaintiffs returned to court to file for a declaration that the government failed to comply with the court order.<sup>94</sup> Overall, there has been little evidence of the actual impacts of climate cases on political or corporate decision-making.<sup>95</sup>

Is litigation the right tool for responding to the climate crises? Litigation can be long and costly and can create backlash. Rights of any kind are inherently a blunt instrument for addressing a highly technical, complex, and uncertain problem, as many courts have recognized in refusing to legislate from the bench. However, while the political process fails to take necessary action, the courts have become a last resort, and their refusal to take on the problem can feel like a betrayal. In her dissent to the dismissal of the *Juliana* case, Judge Staton writes:

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92. Kverndokk, Nævdal, & Nøstbakken, *supra* note 33, at 41.

93. *Netherlands v. Urgenda*, Case No.200.178.245/01, Hague Court of Appeal, ¶ 71 (2018).

94. SETZER & BYRNES, *supra* note 14, at 7.

95. *Id.*; David Markell & J. B. Ruhl, *An Empirical Assessment of Climate Change In The Courts: A New Jurisprudence Or Business As Usual?*, 64 FLA. L. REV. 15, 47 (2012).

Where is the hope in today's decision? . . . When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything in between, those remaining will ask: Why did so many do so little?<sup>96</sup>

There is growing momentum in climate cases that may result in meaningful change. References to intergenerational equity can contribute to this change not necessarily because of their legal power, but because of their rhetorical strength. Both young people and rights language have significant symbolic weight. Asserting a violation of the rights of children and future generations can be more powerful and motivating than technical scientific arguments. Some cases, like *Urgenda* and *Juliana* have inspired cases in other countries.<sup>97</sup> Whether or not it is a legal obligation, intergenerational equity is widely recognized as a moral obligation, which can catalyze individual action.<sup>98</sup> By telling a story of children and young people fighting in the courts to preserve their future, raising the profile of climate cases, and increasing public awareness of future generations' rights, intergenerational equity in climate litigation is itself a source of hope.

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96. *Juliana v. United States*, 947 F.3d 1159, 1191 (9th Cir. 2020) (Staton, J., dissenting).

97. SETZER & BYRNES, *supra* note 14, at 6–7.

98. Steve Vanderheiden, *Individual Moral Duties Amidst Climate Injustice: Imagining a Sustainable Future*, 37 U. TASMAN. L. REV. 116, 122 (2018).