

## 10. The Rights of and Obligations towards Future Generations

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**Abstract:** In this chapter, the rights of future generations and obligations towards future generations in particular in the context of environmental protection in relation to climate change issues will be discussed. As for the relationship between the present generation and future generations, future generations transfer their rights to the present generation, so that their rights are represented by the present generation. Furthermore, the present generation has responsibility or obligations towards future generations. First, the rights of future generations will be discussed and will be explained, from where one can derive these rights. Second, the obligations of states towards future generations will be analysed, in examining climate change litigation, the question why states are obliged to protect the environment for future generations will be treated. Third, by considering legal documents and climate change judgments, the duties of the present generation towards future generations will be discussed.

### 1. Introduction

Considerations about the rights or interests of future generations are not new. Early considerations were made in philosophical or ethical contexts. For example, John Rawls discussed intergenerational equity in his book ‘*Theory of justice*’ in 1971,<sup>1</sup> and in 1988, Saladin and Zenger published a book, entitled ‘*Rechte künftiger Generationen [Rights of Future Generations]*’.<sup>2</sup> In addition, Hans Jonas’s 1979 book ‘*Das Prinzip Verantwortung [the principle of responsibility]*’<sup>3</sup> indicated responsibility towards future generations. Later, Häberle pointed out that national debt and the disposal of radioactive waste are issues that simulate considerations about future generations.<sup>4</sup> In March 2021, the German Constitutional Court gave a landmark judgment in the *Klimaschutzgesetz* (Climate Change Act) case,

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1 John Rawls, *Theory of Justice* (Belknap Press of Harvard University Press 1971).

2 Peter Saladin and Christoph Andreas Zenger, *Recht künftiger Generationen* (Helbing & Lichtenbahn 1988).

3 Hans Jonas, *Das Prinzip Verantwortung* (Insel Verlag 1979).

4 Peter Häberle, ‘A Constitutional Law for Future Generations – The ‘Other’ Form of the Social Contract: The Generation Contract’ in Joerg Chet Tremmel, *Handbook of Intergenerational Justice* (Edward Elgar 2006) 215.

which is related to future generations.<sup>5</sup> In this case, the Court relied on its established case law related to nuclear power stations, in particular the 1978 *Kalkar* case<sup>6</sup> and the 1981 *Mühlheim-Kärlich* case.<sup>7</sup> Future generations have also been discussed regarding the pension system, national debt, chemicals, genetically modified organisms (GMOs) as well as nuclear energy related issues. In addition, regarding conservation of natural resources, Judge Cançado Trindade emphasised the importance of considering future generations in his separate opinion in the *Whaling in the Antarctic* case.<sup>8</sup> Currently, the concerns of future generations are receiving increasing attention in relation to climate change issues.

The amount of climate change litigation is increasing across the world. Children, young people and Non-Governmental Organisations (NGOs) are taking action before courts at national, regional and international level, playing an astonishing role as guardians not only of their own future interests but also of future generations and the earth. Climate change litigation is one of the most important mechanisms to induce states to protect the environment. Various courts have recently pronounced landmark judgments that oblige states to take measures to tackle climate change more efficiently and drastically. Such judgments enable us to recognise states' obligations towards future generations and may lead us to concretise the rights of future generations which have been considered as theoretical or ethical rights.

This book discusses 'representing the absent'. In this chapter, I will treat future generations as the absent. I will address the rights of future generations and obligations towards future generations in particular in the context of environmental protection in relation to climate change issues. I define future generations in the following way: future generations are composed of, young people who do not yet have the right to vote, and unborn people. Young people can also be considered to be part of the present generation. Thus, young people belong to both the present generation and

5 BVerfG, 1 BvR 2656/18, Beschluss des Ersten Senats vom 24. März 2021 [hereinafter '*Klimaschutzgesetz*'].

6 BVerfGE 49, 89, 2 BvL 8/77, Beschluß des Zweiten Senats vom 8. August 1978 [hereinafter '*Kalkar*'].

7 BVerfGE 53, 31, p. 57, 1 BvR 385/77, Beschluß des Ersten Senats vom 20. Dezember 1979 [hereinafter '*Mühlheim-Kärlich*'].

8 Separate Opinion of Judge Cançado Trindade, *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)*, Merits, Judgment of 31 March 2014, (1994) ICJ Rep 226, 348.

future generations. The present generation is composed of people who are alive now, including governments, companies, and organisations. As for the relationship between the present generation and future generations, as I will explain later, future generations transfer their rights to the present generation, so that their rights are represented by the present generation. In addition, the present generation have responsibility or obligations towards future generations.

I will first discuss the rights of future generations and identify from where we can derive these rights. Second, I will analyse the obligations of states towards future generations. In examining climate change litigation, I explain why states are obliged to protect the environment for future generations. Third, by considering legal documents and climate change judgments, I will discuss the duties of the present generation towards future generations so that those rights and obligations do not remain fictitious and we might be able to concretise them.

## 2. Rights of Future Generations

### 2.1. Why Should Rights Be Discussed?

As unborn future generations cannot presently exercise their potential subjective rights, some authors argue that they do not have any subjective rights.<sup>9</sup> Calliess is an example here. In the *Klimaschutzgesetz* case, although the German Federal Constitutional Court accepted the legal standing of young people who claimed that their fundamental rights were being violated,<sup>10</sup> it confirmed that those plaintiffs did not claim the rights of unborn or future generations and additionally held that subjective fundamental rights did not belong to the latter.<sup>11</sup> The Court followed Calliess's argument.<sup>12</sup> Jakab has also discussed possible objections to the conceptualisation of sustainability as the 'rights of future generations' and concluded that the general attempt to posit the 'rights of future generations' is conceptually irreconcilable with the current language of rights.<sup>13</sup>

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9 Christian Calliess, *Rechtsstaat und Umweltstaat* (Mohr Siebeck 2001) 119–120.

10 *Klimaschutzgesetz* (n 5) para. 90.

11 *ibid.*, para. 109.

12 *ibid.*

13 András Jakab, 'Sustainability in European Constitutional Law' (2016) 16 MPIL Research Paper Series 1, 16–17, 27.

Even so, the rights of future generations should be discussed and be acknowledged. Stones states that ‘right’ has a meaning in ordinary legal language, and a society that speaks of the legal rights of the environment, for example, would tend to formally enact more environment-protecting legal rules.<sup>14</sup> Obligations and duties do not have the same force: a state’s obligation towards future generations to protect the environment, and individuals’ duty to consider future generations in exercising rights, are not equivalent to legal recognition of the rights of future generations. The rights approach offers a more stringent framework than the duties approach because rights grant generalised legal competence and are open-ended, whereas duties are usually broken down into specific rules of limited scope, and because the rights approach encourages the development of a new body of law.<sup>15</sup>

I will discuss the rights of future generations from three different perspectives in the following sections. First, I will discuss the existence of the fundamental rights of future generations. Second, I will consider the rights of future generations in intergenerational relations. Third, I will explain that future generations transfer their rights to the present generation and that these rights are represented by the present generation.

## 2.2. Existence of Fundamental Rights of Future Generations

### 2.2.1. Explicit Fundamental Rights of Future Generations

The 1776 Constitution of Virginia establishes ‘a declaration of rights made by the good people of Virginia, assembled in full and free convention; which rights do pertain to them and their posterity, as the basis and foundation of government’.<sup>16</sup> However, most current national constitutions, including the EU treaties, have not yet explicitly established the rights of future generations. As a result, it is difficult to determine whether future

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14 Christopher D Stone, ‘Should Trees Have Standing-Toward Legal Rights for Natural Objects’ (1972) 45(2) Southern California Law Review 450, 488–489.

15 Susan Emmenegger and Axel Tschentscher, ‘Taking Nature’s Rights Seriously: The Long Way to Biocentrism in Environmental Law’ (1994) 6(3) Georgetown International Environmental Law Review 545, 573; Cf Christopher D Stone (n 14) 488–489; Cf Anthony D’Amato and Sudhir K Chopra, ‘Whales: Their Emerging Rights to Life’ (1991) 85(1) American Journal of International Law 21, 51.

16 The Constitution of Virginia, June 29, 1776, Bill of Rights: June 12, 1776, <<https://perma.cc/HSS5-ZGSE>>; underlined by author.

generations have the same subjective rights as the present generation. In this context, it is remarkable that the Japanese Constitution guarantees the fundamental rights of future generations. The Japanese Constitution was promulgated in 1946 and entered in force on 3 May 1947. The Constitution was drafted under the supervision of an American, Douglas MacArthur, after World War II and was based on the high ideals of the Japanese people and their strong determination to achieve lasting peace. This Constitution has never been amended, and it guarantees the rights of future generations.

Article 11 sentence 2 of the Constitution states that, '[the] fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights.' This means that future generations as well as the present generation have fundamental rights according to this Article. Article 11 is located under chapter III 'Rights and Duties of the People'. Hatajiri comments that according to this Article, obligations towards future generations must be fulfilled in so far as not only current citizens, but also future generations, are able to enjoy the fundamental rights.<sup>17</sup> Furthermore, the preamble lays down, 'We, the Japanese people, [...] determined that we shall secure for ourselves and our posterity the fruits of peaceful cooperation'.<sup>18</sup> Article 13 provides for the right to pursue happiness. As the Japanese constitution has never been amended, this article has been used to adapt to social needs, and new fundamental rights such as the right of privacy have been established through interpretation. Thus, it can be also interpreted as, and is used as, a tool to make the government guarantee the right to environmental protection. Article 25 establishes the right to life, which is often used of to protect the environment. Kurokawa<sup>19</sup> indicates that these rights of future generations to environmental protection can be derived from individual provisions in combination with the preamble.

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17 Tsuyoshi Hatajiri, *Peta Heberure no Kenpouren* [Constitutional theory of Peter Häberle] (in Japanese) (Chuodaigaku Shuppanbu 2021) 107–108.

18 Underlined by author.

19 Tetsushi Kurokawa, 'Kankyohō kara mita kokka no yakuwari to shoraisedai heno sekinin [the role of the state and obligations towards future generations from the aspect of environmental law]' (in Japanese) (2012) 74 *Kohokenkyū* [Journal of Public Law] 165.

Few constitutions explicitly establish the rights of future generations. However, this situation may change in the future.<sup>20</sup>

### 2.2.2. Implicit Fundamental Rights of Future Generations

Even if constitutions do not explicitly establish the fundamental rights of future generations, we can assume that they implicitly lay down such rights, using the ‘social contract’ idea.

In his book ‘Du contrat social (the Social Contract)’,<sup>21</sup> Rousseau establishes the concept of a social contract, a fictitious contract between the state and its citizens. Rousseau’s idea contributed to the French revolution in 1789. During the revolution, the Declaration of the Rights of Man and of the Citizens was issued on 26 August 1789. The Declaration established that men are born and remain free and equal in rights, sovereignty lies in the citizens, and citizens have certain human rights. In this paper, I assume a fictitious social contract between states and future generations that is analogous to that described by Rousseau. National constitutions can be considered social contracts not only between past generations and the state and between the present generation and the state, but also between future generations and the state. Young people are both part of the present generation and future generations and have subjective rights. Obviously, unborn future generations will have subjective rights when they are born. Accordingly, the relationship between the state and future generations has not only been developing in the theoretical and ethical spheres, but also in the legal world. The development in the latter depends on national, regional, and international law.

### 2.3. The Rights of Future Generations in Intergenerational Relations

I take the stance that future generations have potential subjective rights, as some forward-looking authors have done. Using the concept ‘planetary’, Weiss indicates that ‘*planetary*’ rights and obligations coexist in each gener-

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20 For example, see Renan Araújo and Leonie Koessler, ‘The Rise of the Constitutional Protection of Future Generations’ (*Verfassungsblog*, 12 August 2022) <<https://perma.cc/WDG3-TFBP>>.

21 Jean-Jacques Rousseau, *Du Contrat Social* (first published 1762, Constant Bourquin 1947).

ation, and ‘in the intergenerational dimension, the generations to which the obligations are owed are future generations, while the generations with which the rights are linked are past generations.’<sup>22</sup> Here, ‘planetary’ rights and obligations imply that each generation is entitled to planetary quality comparable to that enjoyed by past generations and that they are required to maintain the quality of the planet. As a result, the rights of future generations are linked to the obligations of the present generation. Past generations, the present generation, and future generations are linked through planetary rights and obligations. In these intergenerational relations, intergenerational equity must be respected. These planetary rights have been translated to the right to a healthy environment or the right to life, in the legal language, while these planetary obligations have been translated to the duty on individuals to pay attention to future generations in exercising their rights.

The idea of intergenerational relations is concretised to some extent in the *Urgenda I* case.<sup>23</sup> In this case, the Dutch District Court referred to the principle of fairness between the present generation and future generations, although it did not recognise the rights of future generations. The Court pointed out that the principle of fairness means that ‘the policy should not only start from what is most beneficial to the present generation at this moment, but also what this means for future generations, so that future generations are not exclusively and disproportionally burdened with the consequences of climate change’.<sup>24</sup>

## 2.4. Representation of Future Generations

I will explain how the rights of future generations can be represented and then will show concrete cases in climate change litigation in which future generations were represented.

22 Edith Brown Weiss, ‘Our Rights and Obligations to Future Generations for the Environment’ (1990) 84 *The American Journal of International Law* 198, 202.

23 The Hague District Court, *Urgenda Foundation v the State of the Netherlands*, Judgment of 24 June 2015, C/09/456689/HA ZA 13–1396 (English translation), ECLI:NL:RBDHA:2015:7196 [hereinafter ‘*Urgenda I*’].

24 *ibid.*, para. 4.57.

#### 2.4.1. Transfer of Rights of Future Generations to the Present Generation

Even if future generations have potential subjective rights, they cannot exercise them directly. They might thus transfer their rights to the present generation through an implicit intergenerational contract between the present generation and future generations. Häberle<sup>25</sup> considers an intergenerational contract to be ‘another form’ of the social contract. In reality, an increasing number of NGOs are representing future generations voluntarily, despite the lack of an explicit intergenerational contract. Thus, future generations not only have subjective rights, they can also exercise their rights in so far as they have representatives. In fact, whether future generations can get their interests represented depends only on the procedural law of each country. As I will mention below, NGOs represent interests of future generations before courts and (even if not always) are granted *locus standi*. Alternatively, some central authority or ombudsman can be established to take action on behalf of future generations. Acknowledgments of *locus standi* by courts depend on the procedural law of each country.

#### 2.4.2. Climate Change Litigation

Recently, NGOs have been able to represent future generations in certain jurisdictions. In the Netherlands, the legal standing of environmental organisations can be easily accepted pursuant to Article 3:305a (Collective Actions) of the Dutch Civil Code (DCC), which establishes, ‘a foundation or association with full legal capacity that, according to its articles of association, has the objection to protect specific interests, may bring to court a legal claim that intends to protect similar interests of other persons’.<sup>26</sup> This provision was introduced in 1994 to ensure a more effective and efficient legal protection of collective interests.<sup>27</sup> In *Urgenda I* in 2015,<sup>28</sup> the Hague District Court accepted the legal standing of the plaintiff, the Urgenda Foundation, which represented 886 individuals, to act on behalf of future as well as current generations. Urgenda filed a collective action claim

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25 Häberle (n 4) 224.

26 As English version of the text, see <<https://perma.cc/H43S-3ZLD>>.

27 Berthy van den Broek and Liesbeth Enneking, ‘Public Interest Litigation in the Netherlands: A Multidimensional Take on the Promotion of Environmental Interests by Private Parties through the Courts’ (2014) 10(3) Utrecht Law Review 77, 84.

28 *Urgenda I* (n 23).



against the State before the Hague District Court. Urgenda represented the interests not only of current generations but also future generations of Dutch nationals. In the Netherlands, environmental organisations can take action before national courts without the existence of an identifiable group needing protection pursuant to the DCC. The Court positively recognised the meaning of representing the interests of future generations. First, the Court pointed out that Urgenda aims to achieve a more sustainable society according to Article 2 of its by-laws.<sup>29</sup> The Court then found that the phrase ‘sustainable society’ has an intergenerational dimension, referring to the definition of ‘sustainability’ in the Brundtland Report.<sup>30</sup> Furthermore, the Court ascertained that Urgenda strives to satisfy the interests of a sustainable society in defending the right of present and future generations’ access to natural resources and a safe and healthy living environment.<sup>31</sup>

In *Milieudefensie et al. v Royal Dutch Shell* in 2021, the Hague District Court gave another landmark judgment regarding climate change.<sup>32</sup> The Court established that a private company should take responsibility for tackling climate change. The defendant was one of the world’s biggest oil companies, Royal Dutch Shell. This case is notable because the Court again clearly acknowledged the legal standing of the plaintiffs representing future generations.

These two cases were won by the NGOs concerned. Article 3.305a of the DCC, which enables class action, allows public interest actions to be pursued before the Dutch Civil courts against public bodies as well as private companies. Thus, these cases demonstrate that the legal standing of NGOs is accepted in Dutch law and the interests which they represent are also acknowledged.

Intergenerational litigation, which represents future generations, is increasing not only in Europe, but also across the world. In *Juliana v U.S.*,<sup>33</sup> the plaintiffs were the non-profit organisation ‘Our Children’s Trust’, to which young individuals belong, and climatologist James Hansen as a ‘guardian for future generations’. The plaintiffs filed a lawsuit against the

29 *ibid.*, para. 4.7.

30 World Commission on Environment and Development, *Our Common Future* (OUP 1987).

31 *ibid.*, para. 4.8.

32 The Hague District Court, *Milieudefensie v Royal Dutch Shell*, Judgment of 26 May 2021, ECLI:NL:RBDHA:2021:5339 [hereinafter ‘*Milieudefensie*’].

33 United States District Court for the District of Oregon, *Juliana v United States*, April 8, 2016, 217 F. Supp. 3d 1224 [hereinafter ‘*Juliana*’].

United States government before the District Court of Oregon, insisting that the government had failed to take the necessary action to prevent CO<sub>2</sub> emissions. The plaintiffs asked the Court to order the government to take action to stabilise the climate system and protect vital resources for current and future generations. The plaintiffs alleged that emissions would lead to severe impacts on children and future generations and the government had thus violated their individual rights. The District Court acknowledged a substantive due process claim in the plaintiffs' assertions, stating that the government had a duty to protect public health and the 'government's public trust duties deeply ingrained in this country's [the US's] history'.

### 3. *States' Obligations towards Future Generations*

I have already approached the question of future generations from the perspective of their rights. In this section, I will instead approach the question of future generations from the perspective of state obligations.

Independently of whether constitutions establish the rights of future generations, states should take responsibility for future generations. In fact, some national constitutions do lay down states' obligations towards future generations and national courts have acknowledged these obligations more and more frequently. I will discuss why states should be obliged to take future generations into consideration and from where courts have derived states' obligations in climate litigation.

#### 3.1. Why Should States take Future Generations into Consideration?

Young people who already have the right to vote can at least be involved in parliament's decision making by exercising voting rights. However, young people who do not yet have the right to vote and unborn people cannot participate in decision making because they could not exercise their subjective rights by themselves, even if they do have subjective rights. Kleiber points out that there is a structural political deficit here because future generations are disadvantaged compared to the present generation due to defective representation in the democratic process.<sup>34</sup> He also indicates that

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34 Michael Kleiber, *Der grundrechtliche Schutz künftiger Generationen* (Mohr Siebeck 2014) 5.

the short-term legitimisation of current democracy brought about by short periods of office leads to a strong preference towards the present in politics at the expense of future generations. The state's long-term responsibility towards future generations, which does not depend on near-term benefits, is all the more important here because future generations cannot exercise their potential subjective rights.

Although future generations have subjective rights, they cannot exercise their rights by themselves. However, the need to protect future generations can be derived from the concept of intergenerational justice or equity, which is contained in the concept of sustainable development. Furthermore, a state's obligations to protect future generations are derived from the national constitution, which is considered to be a social contract between a state and its citizens. Appel suggests that an obligation to protect future generations might be derived from a combination of human dignity and trusteeship, and the constitution might be seen as the protection of the natural basis of life as a comprehensive social contract in which future generations participate as a fictional contract partner.<sup>35</sup> As I will explain in detail later, in the *Klimaschutzgesetz* case, the German Constitutional Court acknowledged that the State is responsible not only for the present generation but also for future generations under objective law when the state faces great dangers, such as climate change.<sup>36</sup>

The EU should also have obligations to protect future generations, in so far as the Member States transfer their competence to the EU. The obligations to protect future generations derive from the principle of sustainable development, which is a key principle of the EU. Acknowledging that Member States transfer their competence to the EU, Kube points out that the principle of sustainable development demands that the EU and Member states protect future generations.<sup>37</sup> In addition, the EU treaties themselves can also be considered as implicit social contracts between the EU and EU citizens because individuals are accepted as legal persons in the EU legal order, and they accordingly have rights and obligations. The EU treaties and the EU Charter of fundamental rights lay down the principle of sustainable development.

35 Ivo Appel, *Staatliche Zukunfts- und Entwicklungsvorsorge* (Mohr Siebeck 2005) 116.

36 *Klimaschutzgesetz* (n 5) para. 148.

37 Hanno Kube, 'Nachhaltigkeit und parlamentarische Demokratie' in Wolfgang Kahl (ed), *Nachhaltigkeit durch Organisation und Verfahren* (Mohr Siebeck 2016) 136, 157.

### 3.2. From Where do Courts Derive States' Obligations to Protect the Environment?

Tackling climate change is considered as a laboratory where new legal litigation is developed and tested.<sup>38</sup> Such litigation encompasses a model of society where we hope to live in future. Courts across the world have dealt with climate change litigation. Increased discussion and knowledge sharing around climate change litigation across the world leads to useful dialogues between applicants. NGOs exchange information across the world to strengthen their legal strategies.<sup>39</sup> Similarly, thanks to the availability of global discussions, judges around the world are increasingly influenced and informed by previous judgments and can also influence and inform future judgments.<sup>40</sup> For example, in the *Juliana v U.S.* case<sup>41</sup>, the District Court of Oregon accepted the government's responsibility for CO2 emissions, referring to the judgment of the *Urgenda I* case by the Hague District Court. The US Appeals Court acknowledged this.<sup>42</sup> It is noteworthy that in the Climate Change Act case, the German Constitutional Court referred to the judgment of the US Appeals Court as well as the judgments of the *Urgenda I and II* cases in this context.<sup>43</sup> In the following I will show different climate litigations in the world. Courts have relied on a variety of legal instruments at national and international level in order to oblige states to tackle climate change.

#### 3.2.1. The Duty of Care from National Law

In *Urgenda I*,<sup>44</sup> the Hague District Court in the Netherlands relied on the duty of care laid down in Article 21 of the Dutch Constitution, which states, 'It shall be the concern of the authorities to keep the country habitable and

38 Bruno Lasserre, 'L'environnement : les citoyens, le droit, les juges' (21 May 2021) <<https://www.conseil-etat.fr/actualites/discours-et-interventions/l-environnement-le-s-citoyens-le-droit-les-juges-introduction-de-bruno-lasserre-vice-president-du-conseil-l-d-etat>> accessed 28 November 2022.

39 Yann Aguila, 'Petite typologie des actions climatiques contre l'Etat' (2019) AJDA 1853.  
40 *ibid.*

41 *Juliana* (n 33).

42 United States Court of Appeals for the Ninth Circuit, Judgment of 17 January 2020, No 18–36082, 19–20.

43 *Klimaschutzgesetz* (n 5), para. 203.

44 *Urgenda I* (n 23).

to protect and improve the environment', to find a state obligation towards *Urgenda*. It held that the Netherlands had failed to meet this duty of care by failing to take sufficient measures to prevent climate change. The Court acknowledged that the State had discretionary power under Article 21 of the Constitution to organise national climate policy, but that power is not unlimited.<sup>45</sup> Article 21 of the Constitution itself does not give rights to the present generation nor to future generations.<sup>46</sup> However, the State has a duty to care for the environment under this article. The State is obliged to take into account environment relevant principles in determining the scope of the duty of care.<sup>47</sup>

In another case that relied on the duty of care in Australia, eight high school students took class action before the Australian Federal Court, demanding that the Federal Environmental Minister should not approve coal mining projects. The Federal Court gave a landmark judgment on 27 May 2021.<sup>48</sup> Pursuant to the law of negligence, the Court recognised the duty of care of the Minister of the Environment not to harm young people and to protect them from foreseeable future climate damage in deciding on projects. Although this case is not directly linked with future generations, it is an example in which the Court acknowledged a state's duty of care towards young people.

### 3.2.2. Public Trust Doctrine

In the *Juliana v U.S.* case,<sup>49</sup> the District Court held that the government had a duty to protect public health and the 'government's public trust duties were deeply ingrained in this country's [the US's] history'. This decision was based on the public trust doctrine<sup>50</sup>, which assigns the state responsibility for the integrity of a nation's public trust resources for future

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45 *ibid.*, paras 4.53 – 4.55.

46 *ibid.*, para. 4.56.

47 *ibid.*, para. 4.76.

48 Federal Court of Australia, *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment*, Judgment of 27 May 2021, (2021) FCA 560, VID 607/2020.

49 *Juliana* (n 33).

50 According to the Legal information Institute of Cornell Law School, 'public trust doctrine is a legal principle establishing that certain natural and cultural resources are preserved for public use'.

generations.<sup>51</sup> Lavorel commented regarding the opinion of Judge Aiken in the Julianna case that the judge relied on the concept of intergenerational vocation and found that federal authorities have an obligation to protect resources against damage and destruction and preserve capacities to provide ecological services for future generations.<sup>52</sup> Additionally, the Harvard Law Review case note<sup>53</sup> pointed out that the *Juliana v U.S.* case differed from ordinary environmental cases. The latter relied on common law tort theories or federal statutory law, in particular the 1970 Clean Air Act, while the former relied on unenumerated fundamental rights: constitutional rights to life, liberty and property.<sup>54</sup>

### 3.2.3. Human Rights

In *Urgenda II*, the Court of Appeal<sup>55</sup> relied on Articles 2 and 8 of the European Convention on Human Rights (ECHR) for the first time to find a positive state obligation to take action against climate change. It acknowledged that Article 2 ECHR is the right to life, which includes environment-related situations that affect or threaten to affect the right to life, and Article 8 ECHR protects the right to private life and family life and may also apply in environment-related situations.<sup>56</sup> The Court of Appeal held that the State has both positive and negative obligations relating to the interests protected by these articles including the positive obligation to take concrete measures to prevent a future violation of these interests.<sup>57</sup> It also held that it is appropriate to discuss the real threat of dangerous climate change, resulting in the serious risk that the present generation of Dutch nationals will be confronted with a loss of life and/or a disruption of family life and it follows from Articles 2 and 8 ECHR that the State has a duty to

51 Christiana Voigt, 'Introduction Climate Change as a Challenge for Global Governance, Courts and Human Rights' in Wolfgang Kahl and Marc-Philippe Weller (eds), *Climate Change Litigation* (Beck 2021) 9.

52 Sabine Lavorel, 'L'émergence d'une responsabilité climatique des États?' in Marta Torre-Schaub and others, *Quel(s) Droit(s) pour les changements climatiques?* (Mare & Martin 2018) 174–175.

53 '*Juliana v. United States*' (2021) 134(5) Harvard Law Review 1929.

54 *ibid.*, 1929–1930.

55 The Hague Court of Appeal, Judgment of 9 October 2018, *the State of the Netherlands v Urgenda Foundation*, 200.178.245/01 (English translation), ECLI:EU:GHD-HA:2018:2610.

56 *ibid.*, para. 40.

57 *ibid.*, para. 41.

protect against this real threat.<sup>58</sup> The Court of Appeal concluded that the State failed to fulfil its duty of care pursuant to Articles 2 and 8 ECHR by not demanding reduction of emissions by at least 25 % by the end of 2020.<sup>59</sup>

In *Urgenda III*, the Supreme Court ascertained that the State has a positive obligation to take measures to prevent climate change pursuant to Articles 2 and 8 ECHR.<sup>60</sup> In *Urgenda II* and *Urgenda III*, climate change issues can be linked to human rights – the right to life and the right to private and family life – and environmental organisations can rely on those rights before national courts. A landmark judgment such this one might have been possible because it was made in the Netherlands where the Constitution is open to international law and in particular to the ECHR.<sup>61</sup>

### 3.2.4. Protective Obligation from Fundamental Rights in the Constitution

Notably, the German Constitutional Court derived the state's objective obligation towards future generations from fundamental rights laid down in the German Constitution. First, the Court held that the State is obliged to protect against climate change based on the fundamental right in Article 2 para. 2 sentence 1 of the Grundgesetz (GG) (Basic Law).<sup>62</sup> Article 2 para. 2 sentence 1 lays down, 'Everyone shall have the right to life and physical integrity'.<sup>63</sup> The Court confirmed that Article 2 para. 2 sentence 1 contains a state's general obligation to protect life and physical integrity.<sup>64</sup> The Court held that this fundamental right not only protects against state intervention, it also includes the state's obligation to protectively and supportively guarantee the legal interests of life and physical integrity and to protect them against unlawful interferences. The Court explained that the protective obligations that derive from the objective function of the fundamental right belong to the subjective entitlement of the fundamental right (*subjektive*

58 *ibid.*, para. 45.

59 *ibid.*, para. 73.

60 The Supreme Court of the Netherlands, *the State of the Netherlands v Urgenda foundation*, Judgment of 20 December 2019, Number 19/00135, ECLI:NL:HR:2019:2006.

61 Cf. André Nollkaemper and Laura Burgers, 'A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case' (*EJILTalk!*, 6 January 2020) <<https://perma.cc/RHH5-MJBV>>.

62 *Klimaschutzgesetz* (n 5) para. 144.

63 Official translation by the Federal Ministry of Justice and Consumer Protection and the Federal Office of Justice <[https://www.gesetze-im-internet.de/englisch\\_gg/](https://www.gesetze-im-internet.de/englisch_gg/)>.

64 *Klimaschutzgesetz* (n 5) para. 145.

*Grundrechtsberechtigung*).<sup>65</sup> The Court then held that the state's obligation derived from Article 2 para. 2 sentence 1 GG does not only intervene when violations have already happened, but also when the obligation is directed towards the future.<sup>66</sup> Finally, the Court clarified that the obligation to protect life and physical integrity may constitute a protection obligation in relation to future generations as well.<sup>67</sup> The Court established a condition that this obligation applies only if irreversible development is at issue.<sup>68</sup> The Court added that such an intergenerational protection obligation can only be an objective law (not a subjective right) because future generations, neither as a whole nor as a sum of individuals, have legal capacity to enjoy fundamental rights.<sup>69</sup>

To this end, the Court referred to four previous judgments. The first is the judgement in the *Kalkar* case in 1978,<sup>70</sup> which concerned nuclear power stations. In this case, taking the risk of future damage into consideration, the Court held that pursuant to Article 1 para. 1 sentence 2 GG all state powers are obliged to not only respect human dignity but also to protect it.<sup>71</sup> The Court therefore held that the State is obliged to shape law so that the risk of violations of fundamental rights is reduced. In the *Mühlheim-Kärlich* case in 1981, which was also related to nuclear power stations, the Court held that Article 2 para. 2 not only protects the subjective right of defence against state intervention but that the state's obligation stands in a protective and supportive way for the legal interests of life and physical integrity derived from the objective substance of Article 2 para. 2.<sup>72</sup> In the third case, the Court referred to the first and second cases and confirmed that the state's obligation includes analysing future risks to fundamental rights.<sup>73</sup> Furthermore, the Court held that the state obligation derived from Article 2 para. 2 GG contains the obligation to tackle health risks from aircraft noise. The fourth case, which is related to the protection of non-smokers, also confirmed the existence of the State's obligation derived

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65 *ibid.*

66 *ibid.*, para. 146.

67 *ibid.*

68 *ibid.*

69 *ibid.*

70 *Kalkar* (n 6).

71 *ibid.*, 141–142.

72 *Mühlheim-Kärlich* (n 7).

73 BVerfGE 56, 78, 1 BvR 612/72, Beschluß des Ersten Senats vom 14. Januar 1981.



from Article 2 para. 2 GG.<sup>74</sup> Those four judgments did not directly mention future generations, but took future risks regarding nuclear power stations, aircraft noise, and secondary smoking into account. All cases acknowledged the State's obligations from Article 1 or Article 2 GG. The ground-breaking climate protection judgment was based on established case law that dealt with future risks and acknowledged the State's protection obligation, which derives from the GG.

The Court concluded that the state's obligation to protect life and physical integrity against climate change may apply to future generations by referring to a 1986 article by Hasso Hofmann.<sup>75</sup> The article dealt with the state's protection obligation towards future generations in considering nuclear power stations.<sup>76</sup> In this article, Hofmann confirmed that future generations cannot have any entitlements. However, he argued that the state authority might not be allowed to force future generations to bear excessive burdens. He asserted that pursuant to Article 1 para. 1 sentence 1 GG the State is obliged not only to respect fundamental rights for the sake of human dignity, but also to protect them. He argued that the state must take appropriate defence measures when constitutional subjective fundamental rights are threatened by a third party. He contended that this objective or institutional effect of fundamental rights may apply for future generations who do not have a substantive entitlement to fundamental rights. Although he recognised that future generations cannot enjoy substantive rights, he argued that (objective) law may provide for the provisions for the protection of future generations. He concluded that the state's protection obligations derived from fundamental rights must exist independently from subjective entitlements. Furthermore, he argued that when the state faces an imminent public health risk that requires governmental measures to be taken, the state's protection obligation must extend into the future. He held that Article 2 para. 2 sentence 1 GG obliges the State to take measures against such dangers.

In addition, Appel, on whose literature the Court relied, also described that the state's obligation to respect constitutional objects of protection is an objective obligation and does not depend on whether certain people are

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74 BVerfGE 121, 356, 1 BvR 3262/07, Urteil des Ersten Senats vom 30. Juli 2008.

75 Klimaschutzgesetz (n 5) para. 146.

76 Hasso Hofmann, 'Nachweltschutz als Verfassungsfrage' (1986) 19(4) Zeitschrift für Rechtspolitik 87, 88.

endangered. Thus, the state is obliged to protect constitutional objects of protection for future generations.<sup>77</sup>

### 3.2.5. Intertemporal Guarantees of Freedom

It is also noteworthy that for the first time, the German Constitutional Court introduced ‘intertemporal guarantees of freedom’. In doing this, the Court transformed the theoretical concept of ‘intergenerational equity’ into a justiciable concept. In the Climate Protection Act case, most of the complainants were minors. The Court considered the guarantee of their freedom in the future, or their intertemporal guarantees of freedom. In doing so, the Court combined this concept with Article 20a GG.

First, the Court held that the fundamental rights of the complainants will continue to be protected against unreasonable impairments of freedom.<sup>78</sup> Then, it held that ‘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>79</sup> Article 20a GG lays down, ‘[m]indful 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’. Article 20a GG does not establish a fundamental right, but Article 20a GG contains a constitutional provision that includes the elemental precepts.<sup>80</sup> Interference with fundamental rights can only be justified under constitutional law if relevant provisions comply with the elemental precepts and general constitutional principles of the GG.<sup>81</sup> Therefore, compatibility with Article 20a GG is a precondition to justify any interference with fundamental rights.<sup>82</sup> Furthermore, the Court held that fundamental rights in combination with Article 20a GG oblige the German legislator to ensure that ‘the reduction burdens are not unevenly distributed over time and between generations to the detriment of the future’.<sup>83</sup> Based on the princi-

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77 Appel (n 35) 117–118.

78 *Klimaschutzgesetz* (n 5) para. 117.

79 *ibid.*, para. 183.

80 *ibid.*, para. 190.

81 *ibid.*, para. 189.

82 *ibid.*, para. 190.

83 *ibid.*, para. 192.

ple of proportionality, the Court also held that one generation must not be allowed to consume large portions of the CO<sub>2</sub> budget while bearing a relatively minor share of the reduction effort.<sup>84</sup> The Court relied on the concept of intergenerational equity here. In addition, the Court clarified that the objective protection mandate derived from Article 20a GG includes the necessity to leave the natural foundations of life ‘in such condition that future generations who wish to carry on preserving these foundations are not forced to engage in radical abstinence’.<sup>85</sup> As stated above, Article 20a GG does not create a fundamental right, but the Court held that Article 20a GG is a justiciable legal provision and is binding on the legislator, which is designed to commit to a political process favouring the ecological interests of future generations who will be particularly affected.<sup>86</sup> The Court went one step further regarding future generations, stating that based on Article 20a GG, environmental protection is now a matter of constitutional significance because future generations, who will be most affected, naturally have no voice of their own in shaping the current political agenda and that in light of these inherent limitations, Article 20a GG imposes substantive constraints on democratic decision making.<sup>87</sup> The Court relied on German literature to make this judgment, including Ivo Appel’s 2005 book ‘*Staatliche Zukunfts- und Entwicklungsvorsorge*’. Appel stated that the interests of future generations should be taken into consideration by the present generation because the future generations cannot enunciate their interests in current political processes nor participate in current market development.<sup>88</sup> Kube also pointed out that although the principle of sustainable development requires the legislature to consider the interests of future generations, the will of future generations cannot be represented in parliament.<sup>89</sup> The Court acknowledged that Article 20a GG imposes a special duty of care on the legislator, including a responsibility for future generations.<sup>90</sup> In this case, the Court expanded the horizons of Article 20a GG for future generations by giving unprecedented importance to it.

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84 *ibid.*

85 *ibid.*, para. 193.

86 *ibid.*, paras 197 and 205.

87 *ibid.*, para. 206.

88 Appel (n 35) 75.

89 Kube (n 37) 143, 147, 157.

90 *Klimaschutzgesetz* (n 5) para. 229.

### 3.2.6. Obligations from the Paris Agreement

The Conseil d'État, the French Supreme Administrative Court, also pronounced a landmark judgment in 2020. In the *Grande Synthe* case, the Conseil d'État held that France is obliged to meet climate objectives and to transform obligations derived from the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement into national law.<sup>91</sup> For the first time, it acknowledged that those obligations have a binding nature. The Conseil d'État held that the French government is obliged not only to meet these objectives, but also to account for how it meets them. Notably, the Court directly cited phrases including 'future generations', 'sustainable development' and 'equity' in referring to these documents.<sup>92</sup> The Court drew the state's obligation to take appropriate measures to combat climate change from the fact that the EU and France are bound by the UNFCCC and the Paris Agreement.<sup>93</sup> Furthermore, the Court held that the obligations derived from those international documents must be considered in interpreting the provisions of national law. Those documents must be fully effective in French law, even if they do not have any direct effect.<sup>94</sup> Finally, the Court held that the effective implementation of the principles set out in the UNFCCC and the Paris Agreement must be set by French national law.<sup>95</sup> Lasserre commented that the Conseil d'État had acknowledged an interpretive force for the first time and had taken a significant step in judging that the objectives of those documents are not simply programmatic, but binding.<sup>96</sup>

### 3.2.7. Etat de droit

According to the concept of 'Etat de droit' (the rule of law) in France, citizens play an important role as guardians of states' commitments.<sup>97</sup> In France there are two methods of taking action against the government; one is the 'action en responsabilité' (state responsibility action) and the other is the 'le recours pour excès de pouvoir' (appeal for misuse of power).

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91 Conseil d'État, 19 novembre 2020, *Grande Synthe*, No 427301.

92 *ibid.*, para. 9.

93 *ibid.*, para. 12.

94 *ibid.*

95 *ibid.*, para. 13.

96 Lasserre (n 38).

97 Aguila (n 39).

An example of the first method is *Affaire du Siècle* (the Case of the Century). Several NGOs – Oxfam France, Notre Affaire à Tous, Greenpeace and La Fondation pour la Nature et l’Homme – took action against the French Government before the administrative Tribunal of Paris. The Tribunal found that the Government had failed to exercise power (‘la carence fautive’).<sup>98</sup> According to Article 1246 of the French civil code, which is the legal foundation for reparation as any person responsible for ecological damage is required to repair it. Article 1248 lays down that the action for compensation for ecological damage is open to any person with standing and interest of action, and this can therefore include NGOs. The Tribunal held that the state had caused ecological damage caused by failing to comply with the obligations to combat climate change, and this failure had damaged the collective interests which the claimants defended. The Tribunal ordered the French state to pay the organisations the sum of one euro as compensation for their moral prejudice. In the case of *Affaire du Siècle*, episode 2 (the Case of the Century II), confirming that the reduction of CO<sub>2</sub> emission by the Government was not sufficient, the Court ordered the French government to repair the ecological damage until 31 December 2022 and to prevent further deterioration and to take measures as soon as possible.<sup>99</sup>

The aforementioned *Grande-Synthe* case is an example of the second method.

### 3.2.8. The Environmental Charter in France

The Environmental Charter can be a useful instrument to protect the environment for future generations. The Conseil Constitutionnel made an important judgment for environmental protection on 31 January 2020 in decision no 2019–823 QPC (la question prioritaire de constitutionnalité),<sup>100</sup> in which it held that the protection of the environment is ‘the common heritage of all mankind’ and ‘therefore constitutes an objective of constitutional values’.

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98 Tribunal administratif de Paris, 3 février 2021, No 1904967, 1904968, 1904972, 1904976/4–1.

99 Tribunal administratif de Paris, 14 octobre 2021, No 1904967, 1904968, 1904972, 1904976/4–1.

100 Conseil Constitutionnel, 31 janvier 2020, Union des industries de la protection des plantes, No 2019–823 QPC, para. 4.

#### 4. *Obligations of the Present Generation towards Future Generations*

##### 4.1. The Present Generation and Future Generations

Climate change has been caused by anthropogenic emissions as the Intergovernmental Panel on Climate Change has made clear.<sup>101</sup> This means that not only the present generation, but also past generations have caused climate change through their activities. The present generation is thus the victimiser as well as the victim. The European Commission recognises that ‘we are at a pivotal moment in the world’s response to the climate and biodiversity emergencies and we are the last generation that can still act in time’.<sup>102</sup> Regarding the relationship between the present generation and future generations, Weiss states that ‘intergenerational equity requires a new planetary ethos in which each generation views itself both in relation to past and future generations of the human species and as an integral part of the natural system’ and furthermore that, ‘each generation has a right to use the natural system for its own benefit but also an obligation to care for it so that future generations will inherit a robust planet in no worse condition than previous generations received it’.<sup>103</sup> Based on intergenerational equity, future generations should have the right to live in a healthy environment as the present generation has. The present generation has three types of obligations towards future generations. The first is to represent future generations, for example before courts. The second is to consider the interests of future generations in exercising fundamental rights. The third is to take positive actions for future generations.

In the first case, future generations confer competence on the present generation because they cannot exercise their subjective rights by themselves. The present generation is now taking action to address the irreparable man-made damage to nature. The present generation is obliged to make use of their competence for future generations. This has led to climate change litigation in which young people and NGOs represent future generations to request states to take more drastic and rapid measures to tackle climate change. Furthermore, citizens and courts act in tandem in order to

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101 IPCC, the Sixth Assessment Report, ‘Climate Change 2021: The Physical Science Basis’, 6 August 2021.

102 The European Commission, COM(2021)550; underlined by author.

103 Edith Brown Weiss, ‘In Fairness to Future Generations’ (1990) 32(3) *Environment* 6, 31.

oblige states to protect environment and future generations. Citizens, and in particular NGOs, observe as guardians whether states respect their international commitments, and they take action before courts if necessary.<sup>104</sup> In the second case, the present generation has an obligation to maintain a healthy environment for future generations, that is to say, a duty to take care of the environment. That means that the present generation should take into account future generations in exercising their rights. Sometimes, the exercise of the rights by the present generation might deteriorate the interests of future generations. In this case, the present generation is under an obligation not to exercise their rights where this would lead to such a deterioration. In the third case, the present generation, which is composed of individuals and companies, should take positive action to protect the interests of future generations because the present generation as well as past generations has caused environmental damage.

These ideas based on intergenerational equity are concretised in some legal documents and climate change litigation. In the following sections, I will examine them in my discussion of the second and third type of obligations of the present generation.

## 4.2. Obligations of the Present Generation Towards Future Generations

### 4.2.1. Explicit Obligations of the Present Generations Towards Future Generations

Some legal documents from various countries explicitly specify the obligations of the present generations.

Japanese law is an example here. Article 97 of the Japanese Constitution, which is located under Chapter X 'Supreme Law', lays down, '(t)he fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of humankind to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate.' According to this provision, the trustees of the fundamental rights are the current and future generations. Interestingly, the beneficiary is all of humankind. The present generation enjoys the fundamental rights entrusted by past generations. The present generation may enjoy those fundamental rights

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104 Aguila (n 39).

on the condition that it exercises them for the next generation and future generations.<sup>105</sup> As trustee, the present generation must preserve and hand over the fundamental rights as results to the next generation and future generations. Here, we can see intergenerational relations between past generations, the present generation and future generations regarding rights and obligations.

Furthermore, the concept of intergenerational equity is concretised in Japanese law.<sup>106</sup> The Japanese Basic Environmental Act, as the ‘Constitution’ of Japanese environmental law, was enacted in November 1993.<sup>107</sup> This Act establishes the obligations of companies and citizens and reflects the principles agreed at the Rio Summit of June 1992. The purpose of the Act is:

to comprehensively and systematically promote policies for environmental conservation to ensure healthy and cultured living for both the present and future generations of the nation as well as to contribute to the welfare of mankind, through articulating the basic principles, clarifying the responsibilities of the State, local governments, corporations and citizens, and prescribing the basic policy considerations for environmental conservation (Art. 1).

The Act fully accepted the concept of sustainable development inserted into the Rio Declaration. Article 3 of the Basic Act provides that environmental conservation shall be conducted to ensure that present and future generations of human beings can enjoy the benefits of a healthy and productive environment. It is also noteworthy that the Act not only establishes state obligations (Article 6), and those of local governments (Article 7) but also those of companies (Article 8) and citizens (Article 9). According to Article 9 citizens are obliged to reduce the environmental impact associated with their daily lives to promote environmental conservation. Article 4 states that environmental conservation shall be conducted to ensure a sustainable society by obliging all people to share the burden of reducing their environmental impact fairly. In addition, Article 1 of the 1972 Japanese Conservation Act states that the purpose of the Act is ‘to widely provide the citizens with the enjoyment of benefits of natural environments, as well

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105 Hatajiri (n 17) 108.

106 Kurokawa (n 19) 163.

107 See, Yumiko Nakanishi, ‘Introduction: The Impact of the International and European Union Environmental Law on Japanese Basic Environmental Law’ in Yumiko Nakanishi (ed), *Contemporary Issues in Environmental Law* (Springer 2016) 4–6.



as to ensure inheriting this to future citizens, and with this, to contribute to secure the healthy and cultural life of the current and future citizens'. Article 2 of the 1989 Basic Act for Land indicates that the land is 'a finite, precious resources for citizens both at present and in the future. Article 3 para. 1 of the 2002 Japanese Law for the Promotion of Nature Restoration establishes that, 'Nature restoration shall be carried out appropriately for the purposes of maintaining and passing on a sound and bountiful national environment to future generations...'.<sup>108</sup>

National as well as international instruments increasingly concretise the intergenerational contract and establish the duties of the present generation to protect the environment for future generations. For example, the Bayern Constitution (a German State) of 1984 explicitly provides for the duty of the present generation towards future generations.<sup>109</sup> Article 141 establishes that, 'the protection of the natural basis of life shall be the duty of each individual and the state community, bearing in mind the responsibility for future generations'. In addition, the preamble of the French Charter for the environment states that 'the future and very existence of mankind are inextricably linked with its natural environment' and 'in order to ensure sustainable development, choices designed to meet the needs of the present generation should not jeopardise the ability of future generations'. The concept of intergenerational equity should be noted here. Article 2 of the French Environmental Charter provides that 'Every person has the duty to participate in the preservation and improvement'. Referring to this, the Conseil Constitutionnel held that compliance with the rights and duties set out in general terms under Articles 1 and 2 is a requirement not only for public bodies and administrative authorities but also for all persons: 'every person is under an obligation to exercise care that no damage to the environment results from his actions'.<sup>110</sup>

Additionally, members of the present generation have fundamental rights and can exercise them by themselves. However, individuals of the present generation cannot exercise their rights without limitations, and thus the exercise of their rights is connected to their responsibilities and duties to take future generations into consideration. Some documents state this explicitly. For example, Article 28 of the French Constitution of 24 June 1793 states that a generation cannot subject future generations to its laws. The pream-

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108 Underlined by author.

109 Häberle enumerates other examples (n 4) 216–217.

110 Conseil Constitutionnel, 8 avril 2011, *M. Michel Z et autre*, No 2011–116 QPC, para. 5.

ble of the EU Charter of fundamental rights provides that the enjoyment of the EU's fundamental rights entails responsibilities and duties towards future generations.<sup>111</sup> Kitamura comments that Japanese environmental law, as discussed above, is based on an idea that the present generation should not maximise the use of resources and should rather take future generations into consideration in their use of resources.<sup>112</sup>

#### 4.2.2. Obligations of Companies as the Present Generation

It can be argued that certain companies are responsible for climate change. Therefore, climate change litigation is pursued not only against states, but also against companies. In this context, in the *Milieudefensie v Royal Dutch Shell* case on 26 May 2021,<sup>113</sup> the Hague District Court gave another landmark judgment regarding climate change following its ground-breaking judgment regarding climate change in 2015. At that time, the Court had acknowledged that the State had violated its duty of care to take measures to prevent climate change. This time, in 2021, the Court established that a private company should take responsibility for tackling climate change. The defendant was one of the world's biggest oil companies, Royal Dutch Shell. Milieudefensie, six other environmental organisations and about 17 000 citizens participated in the proceedings as the plaintiff. Although Shell insisted that it had taken measures to reduce CO<sub>2</sub> emissions, the Court held that such measures were inadequate. This was a historic judgment because the Court determined that companies have certain responsibilities regarding climate protection. Companies that affect our society cannot longer ignore their social responsibilities. The Hague Court explicitly accepted the legal standing of Milieudefensie and other environmental organisations that represented current and future generations in the Netherlands based on Article 3:305a of the Dutch Civil Code, stating that 'the common interest of preventing dangerous climate change by reducing CO<sub>2</sub> emissions can be protected in a class action'.<sup>114</sup> We can see that the Court took future generations into consideration here. The Court relied on the unwritten standard of care established in Book 6 Section 162 Dutch Civil Code,

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111 Häberle elaborated development of draft texts (n 4) 219–220.

112 Kitamura, *Kankyohou* [Environmental Law] (in Japanese) (2<sup>nd</sup> edn, Koubundo 2013) 10.

113 *Milieudefensie* (n 32).

114 *ibid.*, paras 4.2.2. and 4.2.4.

‘which means that acting in conflict with what is generally accepted according to unwritten law is unlawful’.<sup>115</sup> In addition, the Court stated that in its interpretation of the unwritten standard of care, it followed the UN Guiding Principle as soft law instrument, which set out the responsibilities of states and businesses in relation to human rights.<sup>116</sup> Furthermore, the Court held that Articles 2 and 8 ECHR and Articles 6 and 17 of the International Covenant on Civil and Political Rights (ICCPR) could not be directly invoked against Shell but these rights could be considered.<sup>117</sup> In this context, the Court referred to a case concerning the right to life as enshrined in Article 6 ICCPR,<sup>118</sup> and cited the following phrases of the UN Human Rights Committee: ‘Furthermore, the Committee recalls that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right of life’.<sup>119</sup> Significantly, the Court held that *Shell* is responsible for both current and future generations and is required to take measures to prevent climate change.<sup>120</sup>

This judgment is only the first example of legal interpretation of corporate social responsibility regarding climate change. Climate litigation is increasing across the world. In France, 14 local authorities and several NGOs sued the oil company Total before the tribunal of Nanterre (le tribunal judiciaire de Nanterre) on 28 January 2021. The tribunal rejected the allegation regarding the inadmissibility on the side of Total on 11 February 2021.<sup>121</sup> According to French law,<sup>122</sup> companies must respect the duty of vigilance (devoir de vigilance).

## 5. Concluding Remarks

In the second section of this chapter, I aimed to demonstrate the existence of the rights of future generations. Discussing such rights is difficult from

115 *ibid.*, para. 4.4.1.

116 *ibid.*, para. 4.4.11.

117 *ibid.*, para. 4.4.9.

118 HRC 23 September 2020, CCPR/C/127/D/2728/2016 (Ioane Teitiota-New Zealand), section 9.4.

119 *Milieudefensie* (n 32) paras 4.4.9 and 4.4.10.

120 *ibid.*, para. 4.4.54.

121 Tribunal Judiciaire de Nanterre, Ordonnance de mise en état, 11 février 2021.

122 Loi No 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre.

both a legal and general perspective because few constitutions explicitly establish the rights of future generations. However, it is important to discuss the rights of future generations to protect their interests. I explained why and how future generations have rights and that some national constitutions explicitly or implicitly lay down these rights of future generations. National constitutions can be considered as a social contract between future generations and the state, and unborn future generations will gain subjective rights when they are born (II.2). I also considered rights of future generations in the context of intergenerational relations (II.3). Furthermore, I discussed that future generations might transfer their rights to the present generation through an implicit intergenerational contract between the present generation and future generations (II. 4 (1)).

In sections III and IV, I dealt with obligations of the present generation towards future generations. I aimed to show the obligations of states towards future generations. I showed that states have or should have responsibility towards future generations. These obligations have been acknowledged before national courts, which have developed a variety of methods to create states' obligations towards future generations. Then, I clarified that not only states, but also individuals and companies have obligations towards future generations. The states' obligations have developed through climate change litigation by citizens and NGOs.

In climate change litigation, the defendants are usually states. In some cases, applicants have succeeded in obliging states to protect the environment. As a further and potentially more complex step, the obligations of companies as the present generation towards future generations should be recognised. The *Shell* case<sup>123</sup> highlighted the possibility of making a private companies' responsibilities towards future generations a legal duty. As a final step, which might be the hardest, we should consider the obligations of the present generation, or *our* own obligations towards future generations.

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123 *Milieudefensie* (n 32).