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## Introduction

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It is the age of the Anthropocene. With far-reaching changes to economy and technology, society and the environment, humanity has gained the capacity to either foster or foreclose the quality of life for future generations. Through degradation of the Earth's marine and terrestrial ecosystems and its climate, including the natural resources upon which all people depend, human civilization holds the potential to deprive billions of their rights to life, taking millions of other species as well. Particularly as social, economic and environmental transformations and impacts of the recent global COVID-19 pandemic become more apparent, a growing recognition of the risks and threats is slowly changing perceptions of humankind's responsibility for its descendants.<sup>1</sup> Since the 1972 UN Conference in Stockholm, numerous international policy declarations have reflected increasing concern for the need to promote a more sustainable development that can take into account the needs and interests of future generations, including the global adoption of the 17 Sustainable Development Goals (SDGs) and their 169 targets in 2015 by Heads of State in New York.

The contours of global commitments to respect intergenerational equity remain unclear in international law. Sustainable development entails the integration of economic, social and environmental objects to improve the quality of life for the present generation without compromising the needs of future generations. It is possible that a customary legal principle of intergenerational equity is gradually gaining recognition, as part of States' attempts to promote more sustainable development.<sup>2</sup> It is certain, however, that concern for intergenerational equity is found in international treaty law on sustainable development. A legal commitment to protection of the interests of future generations is reflected in international law

<sup>1</sup> J. Locke, *Essays on Human Understanding* (Penguin Classics 1998); C. Darwin, *Descent of Man* (CreateSpace 2014).

<sup>2</sup> T. Cottier, S. Lalani, and C. Siziba, *Intergenerational Equity: Environmental and Cultural Concerns* (Brill 2019).

through three fundamental (and near-universal) conventions: the venerable UNESCO 1972 World Heritage Convention,<sup>3</sup> the 1992 Convention on Biological Diversity (CBD),<sup>4</sup> and the 1992 United Nations Framework Convention on Climate Change (UNFCCC).<sup>5</sup> These widely ratified treaties are an essential part of the legal framework and models for achieving greater intergenerational justice by setting forth obligations and measures to protect natural heritage for the benefit of present and future generations, and by making international cooperation and assistance a duty of the States to enable the full and effective implementation of their treaty obligations. A commitment to intergenerational equity is also found in the 1994 United Nations Convention to Combat Desertification and Drought (UNCCD)<sup>6</sup> and the 1998 UNECE Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters,<sup>7</sup> among other accords. Indeed, perhaps one of the most comprehensive definitions of sustainable development is found in treaty law, in the 2003 Tanganyika Convention, where intergenerational justice is highlighted in Article 5 paragraph 2: “[t]he natural resources of Lake Tanganyika shall be protected, conserved, managed, and used for sustainable development to meet the needs of present and future generations in an equitable manner.”<sup>8</sup>

For the signatory States to such treaties, a legal duty arises to undertake domestic action for the protection and conservation of the elements of nature and the transmission of natural heritage to future generations. The motivation, means and metrics for implementing such treaty commitments, however, are worthy of a great deal more attention. With current gaps in effective global treaty enforcement mechanisms, national sustainability institutions and their efforts to implement international norms at domestic levels acquire crucial significance. As one small example, the Aichi Biodiversity Targets in the CBD’s Strategic Plan for Biodiversity 2011–2020 may have been the most ambitious treaty norms for the protection of biological diversity,<sup>9</sup> but they did not offer more than a mere hope that the loss of biological diversity could be reduced by 50 percent by 2020.<sup>10</sup> Since 1965, the territory of national parks and other natural reserves increased by 700 percent, while simultaneously a 40 percent loss of biological diversity worldwide was recorded in non-maritime areas, and in the

<sup>3</sup> UNESCO 1972 World Heritage Convention, 1975 UNTS 1037 art. 4.

<sup>4</sup> 1992 Convention on Biological Diversity preamble.

<sup>5</sup> 1992 United Nations Framework Convention on Climate Change preamble, art. 3.

<sup>6</sup> 1994 United Nations Convention to Combat Desertification and Drought preamble.

<sup>7</sup> 1998 UNECE Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters preamble, art. 1.

<sup>8</sup> Convention on the Sustainable Management of Lake Tanganyika concluded on 12 June 2003, arts. 2, 5.

<sup>9</sup> CBD, Strategic Plan for Biodiversity 2011–2020, Aichi Biodiversity Targets, UNEP/CBD/COP/DEC/X/2 (29 October 2010).

<sup>10</sup> Aichi Biodiversity Targets, *ibid.* at Target 5.

seas, the loss of biological diversity has been estimated at 20 percent.<sup>11</sup> While global protection is failing to deliver the desired results, the development of national institutions entrusted with the protection of the interests of future generations may offer a suitable complementary means of implementing commitments. As such, the law and governance characteristics, competences and procedures of such implementing institutions merit careful consideration.

As noted in UN Secretary-General Ban Ki-moon's 2013 Report ('Intergenerational Solidarity and the Needs of Future Generations'),<sup>12</sup> it is possible to identify several key national institutions worldwide that play a pioneering role in the national implementation of sustainable development and intergenerational solidarity. Further, as the Secretary-General explains, there is a need to learn from the experiences of these institutions in order to create more effective instruments to assure our common future.<sup>13</sup> Given the commitments found in several key treaties that may require increased effort for effective implementation, a deeper cooperation between national human rights institutions committed to protecting the interests of future generations, and with economic and environmental institutions, could potentially contribute to the development of international legal principles and shape relevant state practice.

Starting from this concern – its premise and its promise – this volume provides a discussion of the theoretical, institutional and legal considerations inherent in the implementation of international treaties promoting intergenerational equity and justice. Implementing international conventions on sustainable development for future generations raises both conceptual and practical challenges. Conundrums are posed, for instance, by the status of beneficiaries (future generations) and their representation, the institutional implications of a duty of cooperation between States in promoting intergenerational justice, and the interpretation and enforcement of common but differentiated responsibilities.

Such questions are challenging and require an interdisciplinary response. The implementation of intergenerational equity and justice commitments is complex, not least owing to the abstract nature of the State obligations laid down in treaty law, but also because of the multiplicity of areas which intergenerational justice touches upon, ranging from environmental, social and economic sustainability to questions of demographical trends, public participation, fiduciary duties and the contours of a common heritage for humanity. To address these questions and more, this volume represents a multidisciplinary overview of the legal framework, the diverse mechanisms and possible challenges relating to the national implementation of intergenerational justice for the achievement of sustainable development. Against a background

<sup>11</sup> Protected Plant Report 2016: How Protected Areas Contribute to Achieving Global Targets for Biodiversity (UNEP 2016) 30–31.

<sup>12</sup> UN Secretary-General, 'Intergenerational Solidarity and the Needs of Future Generations: Report of the Secretary-General', UN Doc. A/68/322 (15 August 2013), items 39–48.

<sup>13</sup> Ibid. at 27–32.

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of scant general consensus on the appropriate enforcement of intergenerational justice, the volume examines several national institutions that have been established worldwide with different focuses and spheres of competence for the protection of the interests of future generations. Within its pages, expert authors also comment on the rights of future generations in constitutions and courts, as this pertains to implementation of the treaties that commit to respect for intergenerational equity. The comprehensive study of such institutions, their competences and their specific areas of expertise yields valuable insights for a more grounded theory and more effective implementation of intergenerational justice commitments, with due attention to current regional and global trends and developments in the ambit of promoting sustainable development.

#### OUTLINE OF THE VOLUME

The volume is structured in six parts, each discussing different aspects of implementing intergenerational law and policy departing from the relevant international treaties, through the challenges of sustainability and policy integration and the variety of national solutions to implement intergenerational justice commitments in the national framework.

Following this introductory note, in Chapter 2 the eminent Edith Brown Weiss asserts that the concept of intergenerational equity provides a valuable framework to address the most challenging issues featuring the new Anthropocene epoch, i.e. human activities that are shaping the planet's environment on an unprecedented scale. Since the temporal aspect of human activities has been understood, she argues, humankind's responsibility for its descendants became a major concern for many. The notion of intergenerational equity represents a tool for the reconciliation of solidarity between past, present and future generations. Basic principles of intergenerational equity are threefold, she explains: humanity must conserve the comparable quality, options and access to all basic resources of the Earth's environment for future generations to enjoy and to decide for themselves. Her chapter explores the substantial and institutional criteria of individual national institutions to take up their role in realizing these universal principles guaranteed by international law on a national level.

Part I then lays the foundations for the rest of the volume by exploring several relevant international conventions enshrining the basic exigencies of intergenerational justice and sustainable development, notably the 1992 CBD, the 1992 UNFCCC, the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, and the 1998 UNECE Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. This part defines and provides the theoretical background underpinning the principle of intergenerational equity in international law on sustainable development, and its implications.

Chapter 3 provides a further introduction to emerging trends in international law on sustainable development, with a focus on the principle of intergenerational equity as reflected in the New Delhi Declaration of the International Law Association (ILA), examining how its meaning and importance has become clearer over time, through global policy debates, through agreement of various international economic, human rights and environmental instruments which complement recent developments in the CBD and its protocols, the UNFCCC and its Paris Agreement, the Convention Concerning the Protection of the World Cultural and Natural Heritage (WHC) and the Aarhus Convention, and through the decisions of international courts and tribunals as interpreted by leading scholarly literature. It considers, from a perspective of international law on sustainable development, the meaning of current commitments to intergenerational equity, and the principal architecture for implementing these treaties in global, regional and local contexts.

Chapter 4 then provides a framework for the implementation of the norms of intergenerational justice envisioned by international treaty law. Introducing the most important references to intergenerational justice laid down in the CBD, the UNFCCC and the WHC, among others, the author concludes that there are three fundamental obligations of the state to comply with intergenerational provisions: (1) the obligation to protect natural heritage for future generations, (2) the legal duty to undertake domestic action aiming at the protection of the natural heritage and (3) a duty to cooperate internationally regarding the state's domestic actions. It also comments on the use of national constitutions, courts and institutions to defend the rights of future generations, including public trust doctrine.

Finally in Part I, Chapter 5 briefly surveys the jurisprudence that has developed in international human rights tribunals and how it has and may continue to improve environmental decisions and remediate environmental degradation, safeguarding our planet for future generations. It then turns to identify challenges for the future such as the capacity to use human rights law to prevent threats to the environment, especially long-term threats and harm to nature; the limits in tackling big questions like climate change and transboundary harm; and the limited jurisdiction of human rights tribunals that makes it impossible to address directly harm caused by non-state actors.

Shifting focus slightly, Part II of the volume focuses on the contours of intergenerational justice, equity and the rights of future generations, providing perspectives on the concept and its implications in law and policy. It scopes the international acceptance and dissemination of these norms, and focuses on the key issues of intergenerational justice awaiting national implementation with contributions concentrating on the main problems, relevant models, similarities and discrepancies.

With this in mind, in Chapter 6, the author argues that the principal challenge to be addressed by any institution for future generations is that of “embedded decision-making short-termism that is at odds with sustainable development.” From this starting point, it is posited, responses to the conundrum of identifying ‘how many

generations,' 'where' and 'in relation to what issues' can be flexibly addressed and must, inherently, address social as well as environmental considerations. Institutions for future generations can provide a stimulus to, and decision-making tools and information for, deliberation over choices and trade-offs about the future in policy processes, and a judicial and administrative review function to guarantee ongoing accountability of decision-makers. However, the author recommends, their functions and ways of working need to be linked clearly to the notion of demos in the present.

Chapter 7 argues that national institutions for future generations are responsible for representing coming generations at the negotiating table. There are several international conventions that outline the duty of the state to 'take future generations into consideration' when implementing their principles. National institutions can channel the interests of future generations into the process of decision-making. Institutional design and relationship with the powers of decision can be varied; however, certain common features make these bodies capable of executing this international duty. In general, institutions (1) convey citizens' concerns on long-term issues, (2) serve as an interface for creating policy coherence among different strategies, (3) recommend solutions of sustainability and (4) trace blocks of implementation of the conventions. The article focuses on the example of the Hungarian Ombudsman to further explore the executive powers of national bodies in the implementation of international intergenerational commitments.

Part III then highlights the key challenges for national implementation of intergenerational equity and justice in principle, exploring recent trends and innovations in the development of constitutional legal norms and arrangements, economic instruments, mechanisms for transparent public participation and access to justice, and measures to address science, precaution and uncertainty.

Throughout Chapter 8, it is asserted that the concept of sustainability reflects long-term social challenges which cannot be efficiently dealt with in the framework of the traditional democratic mechanism, as democracy is based on elections held every four or five years, and is therefore necessarily short-sighted. Constitutions have the task of providing the rules of the political game, listing the taboos that politicians otherwise might break. Structurally, democratically elected politicians are focused on short-term consequences that impact on immediate election cycles, and are likely to go for the easy solution. In order to prevent them from being seduced, the author argues, constitutions must bind them, as Ulysses was bound to the mast so that he could resist the sirens, in order to protect current and future generations and provide for intergenerational equity and justice.

Chapter 9 observes that intergenerational solidarity appears in different constitutions of the world and can provide an important marker for cases in domestic courts, among other forums. Using the example of Portugal's constitutional experiences as a prism, the author outlines the potential impact of the implementation of the generally recognized international concepts of intergenerational solidarity and equity in the transformation of the constitutional system of human rights.

Chapter 10 explores the role of the individual person in the discussion of intergenerational justice, national institutions and sustainable development. It considers the legal concept of sustainable development and examines whether it does indeed allow valuable assessments of present actions and future developments. A perspective of future generations is necessarily a perspective that goes beyond the European continent and beyond the legal traditions of Western industrialized countries. The modern organization of societies and economies clearly favours institutions, collective rights, transboundary governance and general interference with the sphere of individuals, in the name of efficiency. The author draws conclusions for the present political and economic situation throughout the globe, focusing in particular on the individual as a consumer and as a user of the natural environment.

Chapter 11 then conveys the Brazilian legal experience with concepts of intergenerational equity and justice using the example of class actions and *actio popularis*, especially the solutions adopted to protect the collective interests in case of petitioner's neglect of the case. Furthermore, the importance of independent and specialized public institutions to defend the rights of future generations will also be highlighted and discussed in the context of developing robust systems which allow for the promotion and elevation of the voices of the public in matters that affect the present and the future.

Chapter 12 explains that several constitutional principles, rights and values support the idea of public participation, such as democracy, rule of law, human dignity, the collective or 'community' dimension, common concern of humanity, common heritage, common good, subsidiarity and environmental justice. It further notes that there are numerous practical reasons underlying public participation, such as building trust in connection with administration, enhancing legitimacy of decisions, promoting mutual learning through incorporation of public values into decisions, and facilitating conflict resolution. Public participation may be implemented in various forms, such as local and national elections, public hearings, referendums, ombudspersons, public prosecutors and NGOs. The author focuses on the constitutional and empirical underpinnings of environmental public participation as well as the very different forms it may take in the pursuit and advancement of intergenerational equity and justice.

Chapter 13 considers public participation for the interests of future generations and the role of young people in policy development and decision-making for the long term. It examines practical steps taken by the office of the Commissioner for Sustainability and the Environment in the Australian Capital Territory to involve young people in its work, and finishes by identifying the current trend of youth-initiated climate change litigation, for and on behalf of future generations.

In Chapter 14, the author argues that, despite a great number of international political agreements, the sustainability performance of societies is often very weak. Significant negative correlation between words and facts are fundamental economic challenges that have the potential to undermine sustainability and the rights of



future generations, including concepts of intergenerational equity. First, he highlights certain economic problems regarding sustainability transitions such as discounting and selecting the appropriate social discount rates in decision-making processes, or the problem of transition costs. Then, he outlines possible institutional solutions to the problem of the long-term effects of decisions.

In Chapter 15, the author argues that Sustainability Impact Assessments (SIAs) can be valuable tools applied to foreign investment: they allow negotiators to identify aspects of agreements that require mitigation or enhancement measures in order to achieve the fullest benefits of investment. It is noted, however, that there are important differences between trade and investment liberalization commitments in their impacts on social and environmental concerns. The most notable difference is that investment liberalization can have both an impact on regulation and a localized effect.<sup>14</sup> While trade liberalization might impact an entire sector or sectors, investment liberalization can have very little impact overall but drive significant detrimental changes for one part of the country where sensitive sectors such as mining or forestry are considerably expanded because of investment liberalization. Drawing on this, the author analyses how impact assessment can, as an instrument of sustainable development, play a role in strengthening and improving world investment law.

Chapter 16 recognizes that both environmental law and policy-making face significant challenges due to scientific uncertainty. Scientific uncertainty, by inherently burdening and rendering less reliable scientific evidence, causes considerable problems in environmental cases. This is especially true for fact finding and establishing causality. The International Court of Justice, regional human rights courts and other international and domestic tribunals, as well as scholars, are still striving to develop effective legal tools for addressing uncertainty in the face of law. Such attempts range from the well-known precautionary principle to a selection of innovative methods applied in a variety of decisions. The author discusses leading public trust cases that deal with these problems directly, setting forth the precautionary principle as a fiduciary duty associated with a sovereign trustee. The effort is to look beyond the discussion of existing legal tools by providing insights into the ecological subject matter of environmental cases, then briefly present the main sources and types of scientific uncertainty manifest in ecological decision-making. In so doing, the author argues that the deeper understanding of the characteristics of natural sciences is pivotal for enhancing the efficiency of environmental law.

Chapter 17 advances from this to assert that sustainability policies focus on new transformation and trajectories, responsibility and governance. Providing scientific evidence and transformative knowledge is one of the main sources and tools for achieving sustainability through policy reform. The author argues, by way of an

<sup>14</sup> See K. von Moltke, *An International Investment Regime? Issues of Sustainability* (IISD 2000) 21.



example from the German Council for Sustainable Development, that such policies can trigger choice editing and raise awareness. Through this lens, the author provides experiences and new approaches that demonstrate the place of intergenerational equity in these transformations and trajectories, and how that place may become further refined in the future.

Part IV provides original case studies of prominent national sustainable development institutions of model character, analysing different solutions to the complex problems of policy integration and the representation of the interests of future generations in policy-making, implementation and reform. This part of the volume offers comparative insights from different domestic experiences and traditions, identifying areas of commonality and difference in efforts to activate domestic institutions in the interest of intergenerational equity.

Chapter 18 provides a case study of institutional reform in Israel, although the Israel Commission for Future Generations no longer exists as such. As the author explains, the competences of the Israeli Commission included advising the Parliament on issues of particular relevance for the interests of future generations and submitting opinions on the implication of laws for the needs of future generations. The Commission gave itself a broad scope of responsibilities and considered all policies and laws that may have significant long-term effects on the living conditions of future generations, including environmental issues, education of children, health care, medical research, national economy and pension funds. Although lacking decision-making power, the author suggests, the Commission had the ability to exert pressure on the government by raising awareness of the long-term consequences of harmful policies, laws and actions.

Chapter 19 examines the Norwegian Ombudsman for Children as an independent human rights institution with strong powers to investigate petitions and complaints, ensuring that the voices and opinions of children and young people are heard, and that their rights are adequately protected. As the author explains, the Ombudsman can monitor legislation and policies affecting the incorporation of the Convention on the Rights of the Child into all areas of society, including health, human rights education and cultural rights. Embedding responsibility towards children both in the legal and social systems forms the underlying premise of the work of this institution, which the author asserts is at the heart of intergenerational equity and justice.

Chapter 20 discusses the German Parliamentary Council on Sustainable Development as a case study of national implementation mechanisms for intergenerational equity. The Parliamentary Advisory Council on Sustainable Development works within the parliamentary system as a multi-stakeholder body. Its competences include supporting the Federal Government with recommendations on medium- and long-term planning, and developing goals, measures and instruments for longer-term strategies. It carries out SIAs that are mandated for all pieces of legislation. In general, the Council seeks to integrate and streamline the principles of sustainable development and long-term thinking in politics and policy-making, and engages

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in dialogue with other parliaments, the European Union and society as a whole to promote greater fairness between generations and the maintenance of the Earth's ecosystem.

Chapter 21 considers the functions of the Finnish Committee for the Future. The Committee for the Future is one of the sixteen parliamentary committees providing a basis for decisions taken by the Finnish Parliament. It prepares reports and statements to the Parliament upon request and undertakes analyses concerning future-related research and technological development. Its studies and statements are based on long-term issues, such as climate change, energy policy and population demographics, as well as the perspectives of the welfare state. By identifying future development trends and possible scenarios, the author posits, the Committee seeks to influence the government's decisions on actions that have long-term consequences for the living conditions of future generations.

Chapter 22 discusses the Welsh Commissioner for Sustainable Futures. The powers of the Commissioner include advisory functions and setting out principles to the Welsh Government on leadership for sustainable development aligned with the SDGs, as well as ensuring that the views and opinions of the wider public are channelled into its suggestions to the government. The Commission seeks to embed sustainable practices in the policies governing various sectors and communities, and convenes stakeholders to address difficult issues by creating a platform for cooperation. In this way, the author explains, the Commissioner plays an important bridging role between civil society and the government.

Chapter 23 provides an analysis of the experiences of the New Zealand Parliamentary Commissioner for Environment, including the functions and powers that have bearing on intergenerational equity. The functions of the Parliamentary Commissioner for the Environment include reviewing the system of agencies established to manage the country's natural resources and examining the effectiveness of management and planning. It also investigates situations in which the environment has been adversely affected on the basis of petitions or requests submitted by the House of Representatives. While conducting in-depth investigations, the Commissioner can obtain and disseminate information, summon individuals and question them under oath, report on findings to the wider community and make recommendations on remedial actions, as the author explains.

Chapter 24 considers the Canadian Commissioner of Environment and Sustainable Development. Situated in the Office of the Auditor General of Canada, the Commissioner of the Environment and Sustainable Development provides additional environmental aspects to the work of the Auditor General when reporting to the House of Commons, while assisting in its environmental auditing responsibilities. The Commissioner regularly monitors the federal departments' progress on the implementation of their respective sustainable development strategies, reporting on these to the Auditor General. It also receives and handles petitions on environmental and sustainable development matters and seeks responses to these