



FACULTY OF LAW
University of Lund

Annika Oskarson

Intergenerational equity -
Protecting future generations
through domestic action

Master thesis
30 credits

Annika Nilsson

Environmental law

Spring 2009

Contents

SUMMARY	1
SAMMANFATTNING	2
ABBREVIATIONS	3
1.1 Objective and research questions	5
1.2 Theory and assumptions	5
1.3 Method and material	6
1.4 Delimitations	7
1.5 Outline	7
2.1 Introducing the problem	8
2.1.1 <i>The auditorium dilemma</i>	8
2.1.2 <i>Excessive consumption, environmental degradation and distributional problems</i>	9
2.1.3 <i>Failures of the economic system</i>	11
2.2 Moral grounds for obligations toward posterity	12
2.3 Intergenerational equity and international law	13
2.4 Intergenerational equity in different cultures and ethical systems	16
2.5 Critique and counter-arguments	17
2.6 Summary and concluding comments	19
3.1 Defining the subject	20
3.2 Future generations as a legal subject	21
3.3 Protecting the interests of posterity	22
3.3.1 <i>Approach and purpose of the legal doctrine of intergenerational equity</i>	22
3.3.2 <i>Principles of intergenerational equity</i>	23
3.3.3 <i>Planetary obligations</i>	24
3.3.4 <i>Planetary rights</i>	25
3.4 Critique	26
3.5 Concluding comments	27
4.1 Introduction	28
4.2 The state as a guarantor of Intergenerational equity	30
4.2.1 <i>Ombudsmen or commissioners</i>	30
4.2.2 <i>Constitutional Council or Council on Legislation</i>	35
4.2.3 <i>Concluding comments</i>	36
4.3 The role of courts and civil society	37
4.3.1 <i>Protection in the courts</i>	38

4.3.2	<i>Protection based on substantive rules</i>	43
4.3.3	<i>Protection based on procedural rules</i>	45
4.3.4	<i>Concluding comments</i>	49
	BIBLIOGRAPHY	54
	TABLE OF CASES	57

Summary

The objective of this thesis is to explore the concept of intergenerational equity and study a number of different options for protecting future generations through domestic action. Intergenerational equity focuses on the relationship between people living today and generations still unborn.

Problems of equity between generations are partially due to the distance between them. Future generations lack the ability of giving voice to their concerns and their interest are harmed when the economic and political system fails to take long-term environmental effects into account in decision-making procedures. When only short-term advantages are considered, there is a risk that decisions will result in excessive consumption, environmental degradation and distributional problems in the longer-term. Thereby the ability of succeeding generations to enjoy a natural world that is as rich and diverse as the one that earlier generations have had access to is damaged.

Whether or not a legal obligation to safeguard the environment for future generations exists is a highly debated subject. Considering the developments within international environmental law and human rights law in the past decades, there are signs of movement towards accepting such a principle. However, it seems too early to say that respect for intergenerational equity already has become an established obligation under international law. Nonetheless, there are compelling moral reasons to make sure that a healthy planet is passed on to our descendants.

In the fourth chapter of the thesis, a number of different options for implementing intergenerational equity are examined. These options focus on measures taken either by the state and state authorities, or by civil society and the courts. These options should not be seen as competing alternatives, but rather as measures working on different levels, with the potential to complement each other.

Intergenerational equity needs to be implemented through a comprehensive approach, which permeates all legislation where long-term environmental effects may follow. In order to achieve this, the establishment of strong provision aiming at environmental protection for the benefit of present and future generations seems to be of high importance. Correctly designed, such a provision could influence forthcoming legislation, guide the application of existing rules, facilitate public participation and contribute to raising the status of environmental values and future generations. In combination to a constitutional protection, the establishment of a watchdog institution in the form of an Ombudsman or Commissioner for future generations has the potential to contribute to ensuring that the provision is put into practice and act to give a voice to the interests of future generations.

Sammanfattning

Målet med denna uppsats är att undersöka begreppet intergenerationell rättvisa samt studera några olika alternativ för att skydda kommande generationer genom nationella åtgärder. Intergenerationell rättvisa tar sikte på relationen mellan människor som lever idag och de generationer som kommer att efterfölja oss.

Rättviseproblem mellan nuvarande och kommande generationer kan delvis hänföras till det avstånd som finns mellan dem. Kommande generationer har inte någon möjlighet att stå upp för sina intressen, vilka ofta blir lidande då långsiktiga konsekvenser inte tas i beaktande i politiska och ekonomiska beslutsfattningsprocesser. Då kortsiktiga fördelar ständigt ges prioritet finns en stor risk att beslut resulterar i överkonsumtion, utarmning av naturresurser samt ger upphov till fördelningsproblem. Därmed efterlämnas en värld med mindre mångfald och mindre motståndskraft till kommande generationer.

Huruvida en rättslig skyldighet att skydda miljön för kommande generationer redan existerar är en omdiskuterad fråga. Mot bakgrund av den utveckling som skett inom internationell miljö rätt och mänskliga rättigheter under de senaste årtiondena kan spår av en ökad acceptans för en sådan princip skönjas. Det ter sig dock som något för tidigt att hävda att en skyldighet att respektera intergenerationell rättvisa redan etablerats under internationell rätt. Inte desto mindre finns det starka moraliska skäl för att säkerställa att en sund planet bevaras till vår generations barn och barnbarn.

I uppsatsens fjärde kapitel studeras ett antal olika alternativ för att implementera intergenerationell rättvisa. Dessa alternativ fokuserar på åtgärder som initieras av antingen stat eller allmänhet och domstolar. Alternativen utesluter inte varandra, utan har potential att samverka och stärka varandra.

Det kan konstateras att intergenerationell rättvisa behöver implementeras genom ett vittomspännande tillvägagångssätt, som genomsyrar all lagstiftning och beslutsprocesser där långsiktiga miljökonsekvenser kan bli en följd. För att uppnå detta ter sig ett starkt konstitutionellt skydd av miljön, som tar sikte på såväl nuvarande som kommande generationer rätt till en sund naturmiljö, som särskilt viktig. Korrekt utformad kan införandet av ett sådant lagrum påverka kommande lagstiftning, styra tillämpningen av redan existerande regler samt höja miljöns och kommande generationers status. Ett konstitutionellt skydd kan lämpligen kombineras med en övervakande institution, t.ex. en ombudsman för kommande generationer, som har till uppgift att se till att tillämpningen sker på rätt sätt samt arbetar för att ge en röst för kommande generationers intressen.

Abbreviations

DDT	Dichlorodiphenyltrichloroethane (an insecticide).
DENR	Department of Environment and Natural Resources (Philippines).
EIA	Environmental Impact Assessment.
ICJ	International Court of Justice.
NGO	Non-governmental organization.
UN	United Nations.
UNESCO	United Nations Educational Scientific and Cultural Organization.
WCED	World Commission on Environment and Development.

1 Introduction

More than ever before, the generation living today has the ability to alter the destiny of humankind by changing the basic environmental conditions under which life takes place. By polluting air, water and soil, resources on which our species have been relying since the dawn of mankind, we slowly but surely eliminate the chance for future generations to access the same natural assets that we have had at our disposal. Intergenerational equity deals with precisely this problem – the relationship between different generations, and establishes a framework to ensure that justice is maintained between them. One example, which is currently of great concern, is the issue of greenhouse gas emissions and global warming. By increasing the levels of greenhouse gases in the atmosphere average global temperatures can be expected to increase with about 1,5-6° C by the end of the century,¹ passing down a planet with inhospitable conditions to our children and grandchildren. In itself, this poses a great problem with regard to intergenerational equity since present generations are reaping the benefits of having access to cheap coal-based energy, while many of the costs inferred by the CO₂-emissions are passed on to posterity. Moreover, some of the proposed solutions risk contributing to the creation of additional problems, as they are not based on sustainable grounds and fail to sufficiently take the needs and interests of posterity into account. If nuclear power becomes the alternative to “cheap” carbon based energy, threats of radiation and possibly substantial decontamination costs will be the long-term result. In sum, it is clear that dealing with the issue of intergenerational equity is not easy and that it demands an overall approach based on sustainability and precaution.

Given the gravity of the risks and possible consequences of current behavior for future generations, surprisingly little has so far been done to effectively deal with the problem in most countries. Incorporating a protection of the needs and interests of posterity in decision-making processes and legal systems is thus an issue of immediate concern.

The framework of sustainable development has so far played an important role in the debate, in both the international and national arena. Sustainable development has the ultimate goal of safeguarding a safe environment for present and future generations and constitutes the backbone of the United Nations Declaration on Environment and Development adopted in Rio de Janeiro, 1992. But the framework does not offer further information on how exactly the goal is to be reached, who these future generations are and how far into the future decision-makers should aim when adopting new laws and policies. Additional specifications are needed in order to make the implementation of a protection of future generations feasible in practice.

Ideas and theories that elaborate on the concept of intergenerational equity can be found in academic literature, as well as in practical examples at the

¹ Intergovernmental Panel on Climate Change, 2001, p. 13.

international and domestic level. This thesis will focus on some of those ideas and analyze options for ensuring that future interests are sufficiently taken into account in the long-term decision-making.

1.1 Objective and research questions

The ultimate objective of this thesis is to examine the concept of intergenerational equity and evaluate different options for implementing intergenerational equity into domestic law. In order to do this, I will give a theoretical background to the concept of intergenerational equity and place the concept in a larger historical, religious and philosophical context. I will examine which obligations or responsibilities current generations are subject to towards future generations, from both an ethical and a legal point of view, and describe different ways of justifying the implementation of such obligations into domestic law. When describing the models for implementing intergenerational equity, clarifying examples will be given from countries and legal statutes where a similar approach can be observed.

More specifically, my research questions are formulated as follows:

1. What support can be found for arguing that the present generation has a duty to safeguard the environment for future generations?
2. On which elements should such a protection focus?
3. What options are there to implement an increased protection of posterity into domestic legislation?

In the end, my goal is to give a general comment on what a protection of future generations entails, and what possibilities there are to efficiently protect intergenerational equity through legal measures.

1.2 Theory and assumptions

A few basic assumptions are made in this paper. On a theoretical level it sets out from the general principles related to sustainable development and human rights. This will directly affect the outcome of the paper; with another starting point, the same results would possibly not be reached.

The theory of sustainable development was first developed in the report *Our Common Future*, written in 1987 by the World Commission on Environment and Development under the direction of Gro Harlem Brundtland. It establishes a long-term perspective on development and demands a balancing of interests between economic, ecological and social concerns in all decision-making that will have long-term effects, aiming at creating sustainable development that meets the needs of present as well as future generations.

According to the human rights doctrine, all human beings are created equal and are accorded a number of rights and freedoms, such as the right to life

and the right to health. Currently a debate is going on regarding the so-called third generation human rights, which aims at establishing solidarity rights. One of the discussed rights concerns the right to a sound environment for present and future generations. Although this thesis does not specifically focus on the human right to a healthy environment, a similar line of reasoning and similar moral starting points can be used when discussing intergenerational equity. Both the framework of sustainable development and the role of human rights will be dealt with more in depth in the second chapter of the thesis.

The theories of Edith Brown Weiss, Professor of international law at Georgetown University, form the basis for the exposition in the third chapter of the paper. In her book *In fairness to future generations*, Weiss explores the concept of intergenerational equity and establishes a comprehensive framework for protecting future generations.

More generally, I make the assumptions that the survival of humanity is something desirable, that all human beings have the right to enjoy respect of their basic human rights and that this is something that has consequences also for our obligations towards future generations.

1.3 Method and material

The ultimate objective of this thesis is to explore the concept of intergenerational equity and to evaluate a number of different models for strengthening the protection of the environment for the benefit of future generations. In order to do so I have structured the thesis in three parts, where the first two chapters aim to clarify what intergenerational equity entails and to put the concept in a larger historical and philosophical context. In doing so, legal doctrine and scientific articles will be consulted.

In the fourth chapter of the thesis, I will describe different models for implementing intergenerational equity using legal doctrine and published articles. I will also support the exposition by offering practical examples from around the world. Doing so, case law from the International Court of Justice, the European Court of Human Rights and from national courts will be consulted. Moreover, I will study how different ideas have been incorporated into domestic law in order to illustrate how the ideas can be put in to practice. In examples from non-English or Swedish speaking countries, I have been forced to rely on secondary sources or unofficial translations.

Since this thesis has a transdisciplinary character, not only legal sources will be consulted. Where appropriate, models and theories from the field of practical philosophy and political science will be used to illustrate problems and give explanations.

1.4 Delimitations

The focus in this thesis is put on safeguarding the environment for the benefit of future generations. I will concentrate on approaches within environmental law, or areas that have consequences for the environment. Within the academic literature the boundary is not always placed here. Other interest, such as preserving cultural heritage for posterity is extensively dealt with in legal doctrine, but will not be discussed in this paper.

The moral background to our obligations towards future generations will only be briefly discussed in this thesis. There is an elaborate philosophical debate in this field within, for example, contract theory. Intergenerational equity constitutes an entire research field within practical philosophy. Since this is mainly a legal thesis my aim is not to give an in depth account for these philosophical issues, but merely a brief introduction into some of the ideas concerning our moral obligations towards posterity

1.5 Outline

As indicated previously, this thesis will be divided into three main parts. First a general background into the concept of intergenerational equity will be presented. In this section the problems at hand will first be described and explained. I will then move on to exploring the moral grounds for obligations toward posterity, draw links to international law and put the concept in a religious/cultural context. Finally some common critique and counter-arguments to intergenerational equity will be dealt with.

In the second part of the thesis, the legal framework of intergenerational equity will be introduced. The exposition will to some extent be based on the writings of Edith Brown Weiss, but will also deal with the theories of other scholars. It will clarify who is included when future generations are referred to, by defining the subject. Furthermore, the status of future generations as a legal subject will be discussed, before moving on to discussing the framework for protecting intergenerational equity as developed by Edith Brown Weiss.

In the third part, a number of different models for implementing a protection of future generation through legal measures will be studied. I will describe each of the models and give practical examples of how they have been used in other countries or institutions, as well as discuss their advantages and possible drawbacks.

The thesis will be concluded by a clarifying summary, with my own comments and remarks on how intergenerational equity can be implemented through domestic action.

2 Background and context

This chapter will introduce the concept of intergenerational equity, explain some of the basic thoughts behind our obligations toward future generations and put the concept in a larger context. Viewing intergenerational equity in a larger perspective is important in order to understand why there is a need for a protection of posterity and, ultimately, to be able to see how intergenerational equity fits into the legal system and evaluate different models for establishing such a protection.

I will first explore some characteristics of the relationship between current and future generations by using a philosophical allegory. Second, I will introduce the problem that we are facing by examining the type of threats to which future interests are subject. Third, the moral grounds for intergenerational obligations will be dealt with, describing the argumentation for such a responsibility as well as accounting for some of the critique against it. Intergenerational equity in international law, as a part of the sustainable development framework and linked to other emerging principles under international law will subsequently be examined as well as links to human rights. Fourth, examples of intergenerational equity in systems of thought other than the western legal system will be given to illustrate how intergenerational concerns can actually be seen as an integrated part of different indigenous peoples beliefs, as well as the teachings of Judaism, Islam and Christianity. Finally, the chapter will be concluded with a short account for some of the most common concerns and counter-arguments brought up against the notion of intergenerational equity.

2.1 Introducing the problem

2.1.1 The auditorium dilemma

Within practical philosophy different models are often used to describe problematic issues and for intergenerational equity the auditorium dilemma serves as a suitable parable. The auditorium dilemma was used by the philosopher Derek Parfit in his influential book *Reasons and Persons* as a way of illustrating the problem concerning asymmetry in the relationship between current and future generations.² Parfit compares the situation of future generations of people to that of spectators in the back rows of an auditorium, who have been forced to stand up in order to see, only because the people in front of them have chosen to do so. He imagines an auditorium where the people in the first row can get a slightly better view of the stage if they stand up, but where that benefit is non-existent for those in the rows behind. Instead, those behind will be put in a worse situation than they were originally. They will no longer have the choice of sitting down (since they will not see anything at all if they do), and are consequently forced to

² Parfit, 1987, p. 383 note 19b.

endure the discomfort of standing up but *without* getting the relative improvement of view that the people in the first row got. As a result, they are also left without a choice but to pass the problem along to the people sitting even further back in the auditorium.

In this example, there is nothing that the people in the back rows can do to change their situation. They have neither control over, nor any way of influencing the people in front. In the end, everyone in the auditorium will be forced to stand up, accepting the situation and discomfort, only because a few people in the first row decided that they wanted a slightly better view³.

The relationship between current and future generations is characterized by similar problems. The current generation is in the first row of seats in the auditorium. Degrading environmental quality and consuming goods above our allotted share creates a worse situation for those behind us in the auditorium (that is to say future generations) and forces them to, in their turn, pass the problem along to the people coming after them. In the case of intergenerational equity the problem is, however, even worse than the auditorium dilemma suggest since the rate of consumption tends to exceed the regeneration rate and since some resources are becoming completely exhausted.⁴ Furthermore, future generations will not get a share of the profits that our behavior generates. Instead, they will have to bear the costs that it inflicts in the long-term and will be forced to suffer the discomfort of a more limited selection of options.

This example illustrates how the relationship between current and future generations is skewed. People who are living today are of course to some extent also impacted by the actions of those that came before. But it is after the enormous industrial progress that has followed since the end of the Second World War, that our capacity to impinge on the rights of future generations has truly emerged.

2.1.2 Excessive consumption, environmental degradation and distributional problems

The world we live in today is more than ever before a globalized world. Through scientific innovations a world where people, products and ideas are easily transported across oceans and continents has been created. In many ways this evolution has been of great benefit to human development. However, it has not been without drawbacks. Modern development can be viewed as based in an economic paradigm where little or no room has been given to long-term environmental concerns. Instead, short-term economic gains have been prioritized, often at the expense of environmental and social considerations. In a fast paced, globalized world environmental effects are no longer contained to local sites. Consequences are often far reaching, in both space and time, causing irreversible harm to the natural environment.

³ Parfit, 1987, p. 383 note 19b.

⁴ Persson, 2008, p. 97.

Concrete examples include such diverse occurrences as hazardous storage of nuclear waste, global warming, biodiversity loss *etc.*

So what exactly is it that we do that has the potential of harming posterity? Edith Brown Weiss has identified three categories of problems that are harmful for future generations and to which our actions can contribute; the main problems of equity between generations concern depletion of resources, degradation of environmental quality and discriminatory access to/use of resources.⁵

Regarding depletion of resources, three main aspects of the problem can be identified. First, consumption of higher quality resources may lead to substantially increased costs in the future. Even if the resource is not completely exhausted, increased scarcity and depletion of higher-grade resources may lead to escalating prices for future generations.⁶ For example, crude oil has so far been fairly cheap and easy to harvest. The resource has been abundant and easily accessible. However, as more and more of the resource is consumed, the price of extracting oil will rise, due to the fact that all the sources which have been easy to access and where it's cheap to extract will have already been emptied. So even though large quantities of the resource still remain, it may be of a different composition or located in tar sands or similar deposits where the price of extraction is significantly higher, thus leading to increased prices for the final product. Second, indiscriminate use of resources without full knowledge of their potential importance may lead to depletion of resources whose true value has yet not been discovered, or for which there may exist a better area of use. Until fairly recently, oil companies simply burned the natural gas that resulted as a by-product when extracting oil, without realizing its value. Nowadays the gas is taken care of and used for, *inter alia*, producing helium. Finally, excessive consumption of resources may of course also lead to complete exhaustion, leaving future generations with fewer options and a more vulnerable world in which to live. By using up a resource, the natural resource base is lessened, which may lead to a disturbance of the ecological balance, making ecosystems less resistant to outside stress.⁷

Degradation of environmental quality includes pollution of the natural environment, of air, water and soils, as well as the depletion of resources and disturbance of ecosystems. Degradation of environmental quality can to some extent be viewed as a waste disposal problem. How we choose to deal with our waste directly affects future generations. We can either leave behind a natural environment that is clean and robust, or one that is polluted, irreversibly damaged and in need of expensive sanitization measures. In the short-term the second alternative is probably more economically favorable; but in the long-term, the cost for dealing with the problem will almost certainly be higher.⁸

⁵ Weiss, 1988, chapter 1.

⁶ Weiss, 1988, p. 6.

⁷ Weiss, 1988, pp. 7-8.

⁸ Weiss, 1988, pp. 9-12.

In order to ensure an equitable relationship between current and future generations, the relationship within a generation, between different groups inhabiting the world today, must also be based on an equitable foundation. If we can be said to have moral obligations toward future generations, these obligations also ought to extend to less privileged peoples with whom we presently share the planet. *Intragenerational equity* is thus a precondition for *intergenerational equity*. Additionally, it is vital that the same distributional inequalities that are present today, between for example the global north and the global south, are not passed on to future generations.⁹ Ultimately, it is important to acknowledge that all consumption of resources will lead to distributional problems. The current generation cannot be expected to refrain from all consumption of resources, but must be mindful of the difficulties such consumption can entail.

2.1.3 Failures of the economic system

At the launch of the comprehensive and tremendously influential Stern Review Report on the Economics of Climate Change, Lord Nicolas Stern talked about the role of the market in the climate change crisis. According to Stern:

"The science tells us that GHG [greenhouse gas] emissions are an externality; in other words, our emissions affect the lives of others. When people do not pay for the consequences of their actions we have market failure. This is the greatest market failure the world has seen. It is an externality that goes beyond those of ordinary congestion or pollution, although many of the same economic principles apply for its analysis."

"This externality is different in 4 key ways that shape the whole policy story of a rational response. It is: global; long term; involves risks and uncertainties; and potentially involves major and irreversible change."¹⁰

This is a line of argument that is not only valid for climate change but that can be applied to many types of environmental damage (although the scope is exceptionally large in the case of global warming). As touched upon in the previous sections, the environmental challenges that we face today are largely a result of how our current economic system has been designed. The time horizon in economic decision-making is generally short and the full environmental cost of actions is rarely included on the pricetag. Additionally, cost benefit analysis', which is a commonly used tool for decision-making, uses a type of discount rate for effects that will not occur right away. The rate is generally equivalent to the rate of inflation and as result, costs and benefits that will occur more than thirty years into the future are given only little significance. Moreover, effects that will not be

⁹ Weiss, 1988, pp. 13-15.

¹⁰ See Lord Nicolas Sterns speaking notes from the launch of the Stern Review Report on the Economics of Climate Change, 2006. Available at: http://www.hm-treasury.gov.uk/sternreview_index.htm.

visible for more than a hundred years are regarded as being completely irrelevant for decisions that are made today.¹¹

Ultimately, the current economic system may lack means for appreciating the value of a sound environment. Measuring the value of preserving a species in monetary terms may simply be impossible to do.¹²

2.2 Moral grounds for obligations toward posterity

Before discussing measures to safeguard the interest of future generations, it is necessary to consider the question of *why* we owe them something in the first place. What moral arguments can be used to justify limitations of current consumption and activities for the sake of posterity? In the literature on intergenerational equity there are two theories that are commonly referred to: contractualism and communitarianism.

Contractualism is based on the ideas from John Rawls book *A Theory of Justice*. Rawls uses a type of thought experiment to argue for a distributional social system that benefits those that are least fortunate in society. The experiment involves an ideal observer, a person who is rational and self-interested, who is given the task of developing distributional principles for the society in which he or she lives. While doing so the person is situated behind a ‘veil of ignorance’, unaware of his or her role in the future society. The ideal observer has no knowledge of which gender, religious beliefs, social status *etc.* he or she will have once the veil is lifted. In Rawls example the ideal observer would adopt legislation and policies that are beneficial to the least advantaged in society, since there is a possibility that the ideal observer will find him- or herself in that position. The ideal observer would also ensure that a number of minimum rights were accredited too all members of society.¹³

In order to adapt the experiment to the situation of future generations, the aspect of time is added to the list of preconditions that the ideal observer is ignorant of. The observer is, thus, to develop principles for society without knowing which age he or she will be living in. It could be one of the first generations of mankind, or one of the last. In this extension of Rawls theory, a rational person would adopt principles that guarantee that the world is preserved for posterity in the same condition as it was once received. A generation is thus seen as a kind of trustee of the planet, with the right to use it but also a responsibility to care for it.¹⁴

A critique against this argumentation is that it does not actually deal with the asymmetry problem discussed in section 2.1.1. The relationship between

¹¹ Collins, 2007, p. 106.

¹² Hubacek, Mauerhofer, 2008, p. 415.

¹³ Rawls, 1972, pp. 136-142.

¹⁴ Weiss, 1988, pp. 24-25.

different generations is not reciprocal. Motivational problems are due to arise in practice since, regardless of where a person ends up in the spectrum of time, he or she will not be able to influence the policies that were adopted by previous generations and can not be held personally responsible by future generations.¹⁵ The theory is also subject to Nozicks general critique against Rawls ideas, i.e. that the individual right to ownership is not sufficiently taken into account.¹⁶

The second theory that is often used to justify responsibility to future generations, communitarianism, regards human society as a whole where every generation is a part of a larger collective. Communitarianism takes a cross-temporal approach to human existence. It claims that people identify with the community they live in, wishes for the well-being of that community and are prepared to make sacrifices in their own life to make it better even though the outcome of those sacrifices is not visible until well beyond their passing. The theory places cultural and social identity at a higher level than individual interests.¹⁷ This view is also shared by Weiss. Weiss describes our role on the planet as being both beneficiary and trustee, and advocates an elaborate system of planetary rights.¹⁸

The theory of communitarianism can be critiqued on similar grounds as contract theory. Viewing humanity as a continuum does not really solve the problem of asymmetry. Future generations still do not have a way of influencing our behavior and will be forced to live in a world that has been created by those that came before. Additionally, the status of individual rights, such as the right to ownership, comes under even harder stress here, since focus is so clearly put on the community and not the individual.

The asymmetry problem seems virtually impossible to escape. However, if we can accept that the relationship between present and future generations is not, and cannot be reciprocal, both theories do provide compelling arguments for the existence of a moral obligation to safeguard the interest of future generations.

2.3 Intergenerational equity and international law

The emergence of intergenerational environmental concerns can easily be linked to the broader evolution of international environmental law and the development of human rights law. Since the middle of the last century social and environmental concerns have won increasing importance in the international arena and are more and more seen not as separate goals to economic gains, but rather as a whole. Intergenerational equity, sustainable development, the precautionary principle, ideas of a common heritage of

¹⁵ Persson, 2008, pp. 99-104.

¹⁶ Nozick, 1974, pp. 171-174.

¹⁷ Gillespie, 1997, pp. 115-116.

¹⁸ Weiss, 1988, p. 45.

mankind and the debate surrounding the existence of a human right to a healthy environment all bear similarities and have emerged practically simultaneously. The development of international environmental law has moved towards the inclusion of softer values and the adoption of a preventive rather than reparative approach in environmental matters.

The World Commission on Environment and Development first introduced the concept of sustainable development in 1987 through the report *Our Common Future*. Sustainable development is development that “*meets the needs of the present without compromising the ability of future generations to meet their own needs*”.¹⁹ The approach couples three different aspects of development: economic, social and environmental, and suggests that development is not sustainable unless an acceptable compromise is made between these factors. Intergenerational equity can be described as a part of the sustainable development regime, as a form of clarification regarding what is actually needed in order to safeguard the ability of future generations to meet their needs. In itself the definition of sustainable development does not provide a sufficiently clear basis for implementation of legal responsibility towards posterity. The framework of intergenerational equity, however, attempts to deal with that problem by specifying which types of interests need to be sustained, and for whom. It can be seen as a mechanism to reach the overarching goal of sustainable development.²⁰

The concept of intergenerational equity is also closely linked to a number of the emerging principles under international law. It bears similarities to the precautionary principle, which requires that a preventive approach be taken when actions or policies pose a serious risk of causing irreversible environmental harm.²¹ Moreover, the ideas behind intergenerational equity can be compared to the doctrine of common heritage of mankind. Having the status of common heritage signifies that the identified resources be conserved and shared, and that all states are required to take measures for their environmental protection. Currently it is only some areas beyond national jurisdiction, such as the seabed and the moon, which have been given the status of common heritage of mankind. The global climate and biodiversity have been granted a slightly weaker status, namely that of a common *concern* of mankind.²² The legal status of the concept of common heritage is debated but Birnie and Boyle are of the opinion that the concept is important since it provides “*one of the most developed applications of trusteeship or fiduciary relationship in an environmental context, and in that sense it represents a significant precedent.*”²³

The prevalence of a human right to a healthy environment under international law has been much debated in the past decades. None of the major human rights instruments currently include such a right, but that

¹⁹ WCED, 1987, p. 43.

²⁰ Collins, 2007, p. 140.

²¹ Birnie and Boyle, 2002, pp. 115 ff.

²² Redgewell, 1999, p. 129.

²³ Birinei and Boyle, 2002, p. 144.

should be seen in light of the fact that most of the instruments were created before our awareness of environmental problems had awoken. Among some human rights advocates, there is a resistance towards accepting environmental human rights. There is a fear that the articulation of an environmental human right would be too vague and too difficult to apply, thus diluting the human rights system and undermining the status of present rights.²⁴ In spite of this, a strong movement towards dealing with environmental degradation through human rights law can be noticed. Some of the already existing rights, such as the right to life and the right to health or right to private and family life, can and are being used to protect the environment.²⁵ For example, the European Court of Human Rights has ruled in a number of cases of environmental character. In the case of *López Ostra v. Spain*, the court ruled that pollution in the form of hazardous fumes from a waste treatment facility constituted a breach of the right to private and family life of the applicant who was living next to the facility, under Article 8 of the Convention.²⁶ However, it should be noted that the cases in which the court has ruled in favor of the applicant have mainly concerned the individuals right to enjoy his or her immediate environment, and not protection of the environment in general.²⁷

Within national legislation there has also been a shift towards using a system of rights to protect the environment. Examples can be found of countries introducing substantive rights, such as a constitutional right to a sound environment, as well as procedural rights, such as access to information and justice, participation in decision-making, with the ultimate goal of improving environmental protection.²⁸ Lynda Collins, assistant professor of law at the University of Ottawa, states that it is clear that human rights have become integrated in the doctrine of international environmental law²⁹. Furthermore, there is an ongoing discussion within the field of human rights regarding the so-called third generation human rights, solidarity rights, such as environmental rights of future generations. Exploring the possibilities of expanding human rights law to also offer protection of the interest of future generations signals a shift in human rights law towards sustainability and intergenerational environmental justice.³⁰ Proponents of ecological justice and deep ecology go even further, wishing to broaden the scope to focus on protection of nature for the sake of itself, and not solely as a means to satisfy human needs.³¹

What has been shown in this section is that intergenerational equity, based on ideas of long-term protection of the environment for the benefit of posterity, is not an isolated notion, but rather forms part of the larger development in international environmental law and human rights law.

²⁴ Turner, 2004, pp. 281-282.

²⁵ *Ibid.*

²⁶ ECHR judgement of 12/9/1994, Case of *López Ostra v. Spain*.

²⁷ Turner, 2004, p. 284.

²⁸ Collins, 2007, pp. 91-93.

²⁹ Collins, 2007, p. 93.

³⁰ Morgan-Foster, 2005, se ex-jobbs mappen. Kolla sida.

³¹ See for example Bosselmann, 2008, pp. 319-320.

2.4 Intergenerational equity in different cultures and ethical systems

The notion that people of the generation living today have a responsibility to protect the well being of posterity has been recognized in numerous cultural traditions across the world. It should therefore not be seen solely against the background of developments within international environmental law and human rights law in the last decades, but in a larger historical and cultural perspective.

In Islamic tradition, ideas concerning the relationship between man, nature and posterity are well developed. Muslims living today are considered to be stewards of the natural world, with a duty to care for it, with respect to both present and future generations.³² This trusteeship is expressed in the Qur'an through the notion the individual's role of *khalifah*, steward, with an individual responsibility to work for the prosperity of the current society as well as for future generations.³³ Some scholars argue that a similar notion can be found in Judo-Christian tradition. God is said to have given the earth to his people and their offspring as an everlasting possession, implying that the natural world is owned by all of mankind and is to be cared for, for the sake of following generations.³⁴

Certain streams of African customary law also stipulate a type of collective stewardship over the natural world. One Ghanaian chief explained that: *"I conceive that land belongs to a vast family of whom many are dead, a few are living and countless host are still unborn."*³⁵

Among different indigenous groups, a concern for the wellbeing of future generations is a common notion. Many indigenous groups have traditionally lived in a closer relationship with nature than people of the majority population, which, unsurprisingly, has influenced their perception in environmental matters. In the constitution of the Six Nations of the Iroquois, a Native American people, leaders are obliged to keep in mind the consequences that a decision could result in for a period of seven generations to come.³⁶ Through this seven-generation rule, the generation living today is explicitly required to take the long-term consequences of their actions in to account in all environmental decision-making. Among the Sámi people, the indigenous people in northern Scandinavia, nature has always been viewed as a living being. This perception of nature has influenced the Sámi values, customs, social structures and relations. If the environment is damaged, Sámi culture will suffer as well as their ability to survive on the traditional livelihood, such as reindeer herding and fishing. Adopting a long-term approach to environmental decision-making therefore

³² Collins, 2007, p. 94.

³³ Morgan-Foster, 2005, p.106.

³⁴ Genesis 17:7-8 in Weiss, 1988, p. 19.

³⁵ Weiss, 1988, p. 20.

³⁶ Collins, 2007, p. 95.

becomes essential in order to preserve their cultural identity and safeguard their sources of income.³⁷

2.5 Critique and counter-arguments

Implementing a system for intergenerational equity is of course not completely problem-free. Difficulties arise in many different levels, and can be of both motivational and theoretical nature. I will not go in to depth in this section, but I will try to give a brief introduction to a few of the most commonly debated problems connected to intergenerational equity, starting with practical/motivational problems and moving on to theoretical problems of the future generations argument.

Many people would probably agree with the statement that some actions should be taken to safeguard the interests of future generations. However, when the time comes to realize that statement into actual policies, and sacrifices from individuals or actors are required, the answer may sound different. Self-interest tends to take precedence over moral sympathy for other groups, as long as people do not feel a closer connection to subject in need of protection. The distance between future and present generations is too big for members of the present generation to feel a connection, especially since the result of their sacrifice will not be visible within their lifetime. Another practical problem that arises when members of the present generation do not feel closely connected to posterity is that more immediate problems tend to be privileged. The problem has been described as “the tyranny of the immediate”.³⁸ The desire of politicians to get re-elected often results in prioritization of short-term interests at the expense of long-term environmental stability.³⁹ These types of motivational problems connected to intergenerational justice are closely linked to the discussion regarding asymmetry previously described in the thesis.

On a more theoretical level, problems of intergenerational equity are generally connected to the uncertainty regarding our knowledge of the existence and preferences of future generations.

Derek Parfit presents an interesting argument against moral obligations toward future generations. Say that the current generation is given a choice to either implement a policy for environmental protection or to hold back from doing so. Depending on which choice is made, *different* populations of human beings will appear in the future, due to factors such as the Chaos effect.⁴⁰ Members of a future generation can thus never wish that previous generations had acted differently, because if they had that exact future generation would never have come into existence. So, when we are comparing the expected outcome of two choices, we can never say that one

³⁷ <http://www.sametinget.se/7364>

³⁸ Gillespie, 1997, pp. 117-118.

³⁹ Collins, 2007, p. 96.

⁴⁰ The chaos effect is the phenomenon by which a small change in one place of a complex system can result in large effects elsewhere.

is better for future generations than the other; the effect of us making the choice in the first place is the creation of *different* future populations, whose respective situations cannot be compared.⁴¹

Another problem of intergenerational equity relates to our lack of knowledge about the preferences of posterity. The basic idea is that since we cannot know what generations far into the future are going to want, or whether or not they will share our perception of what constitutes a good life, it is not rational to implement strategies aiming at their protection. How can we safeguard the interest of posterity when we have no way of knowing what those interests are?⁴² Weiss, however, holds that even though we do not have complete information about the details surrounding the preferences of posterity, we can be fairly certain that they will have the same basic biological needs that we have today. Against this background, the implementation of strategies to ensure a healthy and robust environment remains a reasonable measure.

The Norwegian philosopher Kristian Skagen Ekeli has discussed the case of diverging interests between *different* future generations. It is not unlikely that some actions will benefit generations that are relatively close to us in time but be disadvantageous to generations further away (or *vice versa*). One concrete example is genetically modified crops. In the short-term, the use of genetically modified crops could provide bigger harvests, alleviating hunger and contributing to increasing the overall wealth of humanity, thus improving the preconditions for dealing with other environmental issues. In the long-term, however, the introduction of genetically modified species risks causing devastating consequences for biological diversity. Ekeli presents two solutions to the problem, either appointing different representatives for different future generations, or developing a framework of principles for how such situations should be dealt with.⁴³

Finally, the last problem covered in this section is related to uncertainty regarding the outcome of actions taken today. There are no guarantees that actions and policies implemented today will actually succeed in creating a sound environment for posterity. Moreover, it is possible that the same result would be reached even if nothing were done at all. The environment is complex, ecological interrelationships are non-linear and many feedback effects are unknown. Science simply has no way of predicting what is going to happen in the future with one hundred percent accuracy. The precautionary principle strives to deal with this issue, by requiring a preventive approach to be taken when there is a serious risk that actions or policies will cause irreversible environmental harm. Ultimately, some uncertainty will have to be accepted if the argument for intergenerational equity is to be endorsed.⁴⁴

⁴¹ Persson, 2008, pp. 99-104.

⁴² Gillespie, 1997, pp. 119-120.

⁴³ Skagen Ekeli, 2006, pp. 390 *ff.*

⁴⁴ Cameron, Wade-Gery and Abouchar, 1998, pp. 93 *ff.*

2.6 Summary and concluding comments

The problem at hand is a result of asymmetry in the relationship between current and future generations. The current generation can consume resources, degrade environmental quality and limit access to environmental goods and services without being touched by the consequences that such a behavior brings. Intergenerational equity tries to deal with this problem, and is not a new or isolated concept. It can be seen as a mechanism for reaching the goal of sustainable development and is closely linked to the developments under international environmental law during the last few decades. It is also closely tied to the debate regarding environmental human rights. In contrast to environmental human rights, intergenerational equity is not based on a "new" idea that has appeared during the latter half of the 20th century. Similar ideas figure in the Islamic Qur'an, through the notion of stewardship, as well as in Judo-Christian faith. Moreover, many indigenous peoples, such as the Sámi in northern Scandinavia view nature as a living being and have in some cases, like in the case of the North American Iroquois, developed mechanisms to integrate the interests of coming generations into decisions made today.

In conclusion, intergenerational equity is not new concept. Against the historical background and in light of the recent developments in international environmental law and human rights law, the idea of an obligation to safeguard the needs and interests of future generations should, thus, not be seen as something particularly controversial.

3 Legal framework of intergenerational equity

When attempting to concretize our obligations toward posterity, in order to translate them into legally binding rules, numerous questions of definition arise. To whom exactly are we referring when we talk about future generations; it is single individuals or a whole collective? What precisely do we need to safeguard in order to sufficiently take their interests into consideration? Which principles should direct the measures that we take today? These are some of the questions that the legal framework of intergenerational equity sets out to answer.

Weiss developed the foundation of the legal framework of intergenerational equity in the book *In fairness to future generations*. Her works will form the basis for this chapter, but thoughts and ideas of other scholars will also be raised. The questions above will be answered by first defining who future generations are, what status they have as a legal subject and which type of rights are intended. The principles raised in Weiss' works, regarding conservation of options, quality and access will subsequently be discussed. Lastly, some common criticism against the framework will be brought up and the chapter will be concluded by a brief summary.

3.1 Defining the subject

A clear definition of the term future generations, which is accepted as the standard meaning, has not yet been embraced. Some claim that the term includes only the living children of the present generation, whereas others prefer a slightly more extensive interpretation including the immediate descendants of the generation living today. Future generations can also be viewed as a continuum, comprising all generations to come without making any distinction based on where on the time spectrum they exist.⁴⁵ This latter interpretation is advocated by Weiss, who regards future generations as a wider group, including all future descendants of mankind, until the end of our existence.⁴⁶ Adopting a more generous definition of the term, which is not limited to the narrow time span immediately following the present generation, does seem advantageous when dealing with intergenerational justice. If the objective is to reach the long-term goal of sustainable development, a short-range definition of the term future generations is not suited for the purpose.

Going even further, proponents of ecological justice challenge the idea that only future generations of *mankind* should be encompassed by the definition of the term. Their argument is that such an anthropocentric view fails to take

⁴⁵ Malhorta, 1998, p. 41.

⁴⁶ Weiss, 1988, pp. 28-30.

in the need of environmental preservation for the sake of other species and thereby fails to recognize the inherent value of nature.⁴⁷ This idea has so far played a rather marginal role in the debate and will therefore not be dealt with further in this paper.

3.2 Future generations as a legal subject

In order to be identified as a legal subject, with the ability to bear rights and duties, an actor or group must possess legal capacity. Arguing that future generations of people, who do not yet exist, possess such a capacity is quite controversial. Within international law only states have traditionally been recognized as legal actors. Over time, the scope has been broadened, encompassing individuals and to a limited extent also groups of people. One example of this can be found within international human rights law, which is focused on the relationship between the state and individuals. Human rights law recognizes individuals as legal subjects, with certain rights that the state is required to respect. Yet another step to broaden the scope has been taken by accepting the possibility of groups of people to be identified as bearers of rights. For example, both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights include a right of self-determination for all peoples, offering a certain level of autonomy to indigenous people and minorities.⁴⁸

In fact, intergenerational rights bear similarity to the field of international human rights since both fields are targeted towards protecting the well-being of human beings. But rather than being aimed at single individuals intergenerational rights focuses on a larger collective, which is necessary for the framework to remain possible to operationalize.⁴⁹ If the intergenerational rights were to take aim on future individuals, rather than the larger group, it would be necessary to identify the particular interests of a specific being that does not yet exist. Doing so would be impossible, since there is no way to determine which preferences that individual will have. It is, however, less difficult to recognize a general interest among many to being able to enjoy a sound environment. Accordingly, Weiss chooses to define the rights of future generations as planetary rights, which is a type of group rights that exist regardless of the identity and numbers that form each future generation.⁵⁰

Support for the argument that future generations can be seen as bearers of rights can also be found in domestic law. In many domestic legal systems around the world, unborn descendants of present members of society are given the right to inherit. Their situation bears resemblance to that of future generations, in so far that both cases deal with rights of a subject that does yet not exist.⁵¹

⁴⁷ Taylor, 1998, pp. 281-282.

⁴⁸ Malhotra, 1998, p. 40.

⁴⁹ Borg, 1998, p. 133.

⁵⁰ Weiss, 1988, p. 96.

⁵¹ Malhorta, 2006, pp. 41-42.

Finally, it can be noted that although future generations are not presently recognized as a legal subject, such a development is not entirely unlikely to happen. The realm of international law has experienced a considerable evolution during the last century, encompassing a growing number of areas, and recognizing an increasing number of legal subjects. Against that background, and specifically considering the rapid developments within international environmental law and human rights law, the recognition of legal capacity for future generations may well form a natural progression.⁵²

3.3 Protecting the interests of posterity

The protection of the interests of posterity has been discussed from many angles and by many scholars in the scientific community. As mentioned above, one of the most important works has been developed by Weiss. She has developed a coherent legal doctrine of intergenerational equity, the contents of which will be further described in this section.

3.3.1 Approach and purpose of the legal doctrine of intergenerational equity

When developing strategies for managing the environment and administering the use of natural resources, two main approaches can be identified: a preservatist approach and an opulent approach. With the preservatist approach, the environment is to be conserved in the exact same condition as it was received, which makes it virtually impossible to consume any non-renewable resources at all. The opulent approach takes the complete opposite position and allows unrestricted consumption. It presumes that the best way to maximize the wealth and wellbeing of future generations is to maximize our wealth today and thereby pass on a rich economy to our descendants. This approach, however, fails to recognize the need for economic wealth to be rooted in a strong natural environment in order to represent true wealth that does not create costs further down the line.⁵³ Ultimately a middle way needs to be found. An approach that, without being too extreme, preserves a robust environment for future generations and at the same time allows for some consumption of resources. This would allow a robust economic system, resting on a firm ecological basis, to be passed on to posterity.

Returning to the purpose of intergenerational equity can offer further guidance on how to go about protecting the interests of posterity. The purpose for safeguarding intergenerational equity is, as Weiss defines it: "*to sustain the welfare and well-being of all generations.*"⁵⁴ In order to reach this purpose, three different aspects need to be considered: "*to sustain the*

⁵² Nagy, 1998, pp. 55-56.

⁵³ Weiss, 1988, pp. 22-23.

⁵⁴ Weiss, 1988, p. 37.

life-support systems of the planet, to sustain the ecological processes, environmental conditions and cultural resources necessary for the survival of the human species, and to sustain a healthy and decent human environment."⁵⁵ Moreover, principles that are established to protect the interests of posterity must be equitable between generations, value-neutral, reasonably clear and foreseeable and acceptable within most cultural, economic and political systems.⁵⁶

3.3.2 Principles of intergenerational equity

The principles that Weiss proceeds to articulate are closely connected to the problems identified and described in section 2.1.2., namely depletion of resources, degradation of environmental quality and issues related to access to the use and benefits of natural resources. In order to efficiently deal with these problems, principles for conserving options, conserving quality and conserving access are established.

The first principle, conservation of options, aims to ensure that a robust natural world is preserved. The objective is for future generations to inherit a flexible environment and to have the same freedom of choice as the present generation regarding how to reach their goals and live a healthy life. Diversity in the resource base, with regards to the number of resources as well as the diversity within *i.e.* a population of species, is presumed to be essential if a stable environment is to be retained. Conserving options does not, however, require that a *status quo* be maintained. Needs of the present generation, such as combating poverty, do not have to be ignored, as long as an overall diversity in the resource base is preserved. Furthermore, it is recognized that ecosystems are dynamic by nature and cannot be expected to remain exactly the same over long periods of time. What needs to be protected is a diverse and flexible resource base overall and not every individual resource exactly the way that it is composed today.⁵⁷

The second principle, conservation of quality, requires that an equal quality of the natural environment that the present generation enjoys is passed on to posterity. Air, water and soil should not be so polluted that the health and well being of future generations is compromised. Nor should the quality of the resources be lessened to the extent that future generations cannot use them for the activities that they deem important. Moreover, the principle requires that high costs of sanitation are not passed on to posterity. Rather, the polluter pays principle should be respected, so that all costs with which a present activity is combined, are carried by its current practitioner. Similarly to the first principle, conserving of quality does not mean that changes in the environment need to be avoided altogether. Once again it is the overall quality of the environment that needs to be protected. Some specific conditions can, and most likely will, change.⁵⁸ Critique has been raised at

⁵⁵ *Ibid.* Based on a report from the International Union for Conservation of Nature.

⁵⁶ Weiss, 1988, p. 38.

⁵⁷ Weiss, 1988, pp. 40-42.

⁵⁸ Weiss, 1988, pp. 42-43.

this point, suggesting that an obligation to conserve an overall high quality of the environment is so vague that it would not have any effect in practice.⁵⁹

The third principle, conservation of access, differs from the previous two since it is primarily aimed at the relationship between members of the same generation. The idea behind this principle goes back to the equitable foundation on which the theory of intergenerational equity is based. If one accepts the argument that the relationship between present and future generations needs to be directed by principles of equity, the same should consequently be valid for the relationship within a generation. Wealthier members of the present generation are thus required to assist poorer members, both with meeting their conservation obligations and with realizing their right to use and benefit from the planetary legacy.⁶⁰ Lynda Collins, assistant professor of law at the University of Ottawa, raises the concern of conflicts between the interests of posterity and the interests of poorer members of the present generation. She illustrates the problem through the example of using DDT to combat malaria in Africa. In the long-term perspective, such a practice will harm biodiversity and compromise the health of future generations, but in the present, it has the potential to save lives and prevent much suffering.⁶¹ Collins, however, also notes that even in the event of such conflicts, the framework developed by Weiss can be useful in order to analyze the interests at hand, and to develop an approach for how to deal with the problem.⁶²

3.3.3 Planetary obligations

Directly following from the three principles, Weiss identifies three planetary obligations that must be respected in order to protect the interests of posterity. The present generation is required to conserve diversity, quality and access. The obligations are planetary in the sense that they are intended to apply collectively and are derived from the position we have as members of humanity.⁶³ Responsibility to ensure that the obligations are fulfilled is ultimately placed on the nation-state.⁶⁴

Further developing the obligations, Weiss articulates five specific duties with which it is necessary to comply: a duty to conserve resources, to ensure equitable use, to avoid adverse impacts, to prevent disasters, minimize damage and to provide emergency assistance and compensate for environmental harm. First, the duty to conserve resources obligates the current generation to conserve both renewable and non-renewable natural resources. It is not intended to bring about a complete cessation of all resource exploitation, but rather to shift the starting-point for managing

⁵⁹ Collins, 2007, p. 103.

⁶⁰ Weiss, 1988, pp. 43-45.

⁶¹ Collins, 2007, p. 103, note 129.

⁶² Collins, 2007, p. 104.

⁶³ Weiss, 1988, p. 45.

⁶⁴ Weiss, 1988, p. 86.

resources. Instead of allowing unrestricted exploitation of resources, so long as there are no compelling reasons not to, resources should be conserved and sustainably managed unless there are compelling reasons for exploiting them. For some endangered species and unique natural resources, strict preservation may be required, but use of resources is generally to be accepted, as long as it takes place in an efficient and sustainable manner.⁶⁵ Second, the duty to ensure equitable use is defined as a reasonable, nondiscriminatory access to the planetary legacy.⁶⁶ It includes a requirement to refrain from impinging on the rights of others, as well as a duty to aid poorer groups in realizing their right to access and use resources.⁶⁷ The third duty, the duty to avoid adverse impacts, bears similarity to the precautionary principle and is focused on prevention and mitigation of environmental damage; it emphasizes the need for procedural environmental regulations. Giving notice to affected parties, providing information, allowing for consultation and conducting a proper environmental impact assessment should be required before any potentially harmful activity takes place.⁶⁸ The fourth duty is to prevent disasters, minimize damage and provide emergency assistance. It applies to disasters that have significant transboundary effects on the environment, disasters that affect shared natural resources and accidents or natural disasters affecting the common heritage within a state. The duty to prevent disaster includes an obligation to take measures such as adopting adequate safety standards and procedures to reduce the risk and potential magnitude of an accident. Should a disaster or accident still occur, the affected state is required to do what it can to minimize the damage, for example, by notifying other countries that could be affected. Moreover, other states are obligated to assist the country in question by, *inter alia*, providing rescue personnel or sharing costs.⁶⁹ Finally, the fifth duty, to compensate for environmental harm, requires states to offer reparations if their actions, or lack thereof, has contributed the creation of the problem that causes harm to posterity or other members of the present generation.⁷⁰

3.3.4 Planetary rights

A duty to protect the interest of one person or group is always combined with a matching right for someone else. Corresponding to the planetary obligations, the doctrine of intergenerational equity, thus establishes planetary rights to diversity, quality and access. In an intergenerational perspective the rights apply collectively, to the group as a whole, regardless of number and identity of the individual members of the group. On the *intragenerational* level, the rights should however be considered as

⁶⁵ Weiss, 1988, p. 50-51.

⁶⁶ Weiss, 1988, p. 55.

⁶⁷ *Ibid.*

⁶⁸ Weiss, 1988, p. 60.

⁶⁹ Weiss, 1988, p. 70-79.

⁷⁰ Weiss, 1988, p. 80-81.

individual rights.⁷¹ Responsibility to ensure that the rights are fulfilled rests on the state.⁷²

3.4 Critique

Much of the critique raised against the theory developed by Weiss refers to uncertainty regarding the identity and preferences of future generations and has already been covered in section 2.5. However, concerns regarding the temporal aspects of the theory are also commonly put forth. Weiss states that the planetary rights extend to all generations, without any temporal limits whatsoever. Critics, on the other hand, argue that our obligations towards future generations should be limited in time. Farber and Hemmersbaug, for example, raise the concern that too much consideration to consequences happening more than one generation into the future would not be supported by the general public today. Therefore, taking action to protect future generations, against the will of the people, would be in conflict with democratic principles.⁷³ Avner de-Shalit goes even further when discussing how far in time the obligations should stretch. De-Shalit argues that the present generation has positive obligations towards future generations, but only so far as they are members of the same transgenerational-community. The transgenerational-community consists of generations that share the same basic moral values and can be expected to have similar preferences and priorities. The transgenerational-community is suggested to last about eight to ten generations.⁷⁴ Negative obligations, however, obligations to refrain from causing irreversible harm, are extended to generations even further down the line.⁷⁵ Collins agrees that a similar, limited time scale may be preferable, if a shift to accepting the notion of responsibility towards posterity is to take place. She also points out that a time-scale between six to twelve generations would be in line with traditional legal rules such as the seven generation rule of the native American Iroquois.⁷⁶

Critique against Weiss' theory has also been raised for not sufficiently taking into account problems of equity between the global north and the global south. Concerns have been raised regarding the *intragenerational* aspects of Weiss' theory, implying that these aspects of the framework are not adequately developed. As a result, safeguarding the needs of future generations risks being prioritized over dealing with immediate problems in the developing world. Moreover, the theory has been criticized for failing to sufficiently consider such moral responsibilities that originate from the colonization of developing world by the developed.⁷⁷

⁷¹ Weiss, 1988, p. 95-97.

⁷² Weiss, 1988, p. 109.

⁷³ Farber & Hemmersbaug, 1993, p. 293

⁷⁴ De-Shalit, 1995, p. 54.

⁷⁵ De-Shalit, 1995, pp. 13-14.

⁷⁶ Collins, 2007, p. 113.

⁷⁷ Collins, 2007, p. 115 and Mayeda, pp.55-56.

One of the most serious practical critiques against the theory relates to the issue of legal standing for future generations and was discussed in section 3.2. Identifying future generations as a legal subject does imply a stretch of logic regarding the type of subjects that have traditionally been granted legal standing. As was noted above, such a development is not unimaginable, given the overall evolution of international environmental law and human rights law.⁷⁸

3.5 Concluding comments

The doctrine of intergenerational equity, defines the rights of posterity as a form of group right, which is held by the entire generation regardless of the identity or numbers of its members. Each generation has the responsibility to conserve options, quality and access to safeguard the interests of future generations.

The theory of Weiss is not without problems and critique. There is uncertainty regarding the preferences and situation of future generations, the temporal extension of our obligations is being questioned and it is criticized for not sufficiently taking the needs of developing countries and historical factors such as colonization into account. Yet the theory manages to establish a coherent theoretical basis for the protection of future generations. It may not provide all the answers or be completely developed in all aspects, but can serve as a foundation for measures to safeguard the interests of posterity. The understanding of what matters are possible to control through legislation, or which interests that can be given legal significance, is under constant evolution. If agreement can be reached regarding the existence of moral responsibilities towards posterity, the translation of those into legal obligations may very well be the next rational step to take.

⁷⁸ Nagy, 1998, pp. 55-56.

4 Implementing intergenerational equity

4.1 Introduction

The concept of intergenerational equity has been mentioned in a considerable number of sources of international law. As early as 1946, the International Convention for the Regulation of Whaling recognized the interest of the world to safeguard "*for future generations the great natural resources represented by the whale stocks*".⁷⁹ More than 40 years later, the World Commission on Environment and Development expanded on the topic, stating the ability of future generations to reach their own goals as the ultimate objective of sustainable development.⁸⁰ The findings of the WCED are directly reflected upon in the subsequently adopted Rio Declaration on Environment and Development, as well as in the United Nations General Assembly Millennium Declaration.⁸¹

Following the report from the WCED and the Rio-declaration, the need to safeguard the interest of posterity has been mentioned in a number of international treaties. In the United Nations Framework Convention on Climate Change Art. 3.1 states that: "*[p]arties should protect the climate system for the benefit of present and future generations of humankind, in the basis of equity and in accordance with their common but differentiated responsibilities*". The concept has also been incorporated into i.e. the preamble of the Convention on Biological Diversity and in the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

The notion of intergenerational responsibilities is also present in a number of soft-law instruments such as the UNESCO declaration in the responsibilities of the present generation towards future generations,⁸² and the Goa Guidelines on Intergenerational Equity.⁸³ Considering the widespread support shown for the concept of intergenerational equity in various international declarations and agreements, it is clear that the idea of a responsibility towards future generations has been fairly well received in the international community. However, it is important to note that the concept often appears in preambles, guidelines, or soft-law instruments that are of a non-binding character.

⁷⁹ Preamble of the International Convention for the Regulation of Whaling, 1946

⁸⁰ WCED, 1987, p. 43.

⁸¹ United Nations Millennium Declaration, 2000, para. 6, 21.

⁸² UNESCO Declaration on the Responsibilities of the Present Generations Toward Future Generation, Article 5.

⁸³ Goa Guidelines on Intergenerational Equity, adopted by the Advisory Committee to the United Nations University Project on "International Law, Common Patrimony and Intergenerational Equity", 1988. Reproduced in Weiss, 1988, pp. 293-294.

The goal of this chapter is not to give a full account of the support that the theory has been shown by the international community, although that does found an important background for further action. Rather, the chapter will link the support that has been shown for the concept with options for going forward, and explore how this general support can be translated into measures in domestic law.

The chapter will discuss and analyze different options for implementing a stronger protection for posterity in practice, and study their potential for ensuring that a binding obligation to protect the environment for future generations is established. The structure of the chapter divides the measures depending on which level the initiative is taken and who it is that acts to ensure that the interests of posterity are sufficiently taken into account. The chapter will be divided into two main parts. The first part deals with mechanisms initiated by the state, where state authorities or institutions appointed/established by the state have the primary obligation to act in the interest of intergenerational equity. An example is the establishment of a commissioner or ombudsman for future generations. The second part focuses on mechanisms where other actors, such as courts or members of the civil society, initiate action for intergenerational equity in legal processes. Here solutions such as protection based on procedural rules or a constitutional right to a sound environment are in focus. When analyzing the different models, strengths and weaknesses of the approach will be discussed.

Regardless of which structure is chosen, some overlapping is unavoidable when reviewing the models. The methods for protecting the interests of posterity will inescapably bear similarities, making it possible to argue for a placement in either of the identified subdivisions. For example, legislation initiated by the parliament is a precondition for representatives of civil society to be granted legal standing and the ability to act in the interest of posterity in legal processes. The division between options that call for action from either state actors or others has been chosen because it illustrates on which level intergenerational equity is claimed and which actor bears the main responsibility for making sure that the interests of posterity are considered.

In common for all the studied options is that neither by itself can establish an adequate protection of intergenerational equity. Ultimately, intergenerational equity needs to permeate the entire legal system in order to assure that the interests of posterity are not compromised. Examining which options are available today for the implementation of intergenerational equity is, however, interesting in order to find a way forward and initiate the larger process of streamlining the legal system with the doctrine of intergenerational equity.

4.2 The state as a guarantor of Intergenerational equity

In this first section, measures and mechanisms that are taken by or aimed at state authorities will be covered. This also encompasses entities that have been assigned with a task that involves the exercise of state authority. By establishing institutions, guiding principles and frameworks, the state can facilitate the implementation of a protection of future interests. This section will deal with two options for implementing intergenerational equity. First, establishing ombudsmen or parliamentary commissioners for future generations. Second, potential for intergenerational equity to be a part of the review of forthcoming legislation by a constitutional council or council on legislation.

Contrary to what will be discussed in section 4.2.2., state authorities would be obligated to act in accordance with intergenerational equity in order to properly fulfill their assignment. Non-governmental organizations and civil society can never be forced to act on the behalf of the interest of future generations, but can, given that the legal conditions permit them to, do so on a voluntary basis.

4.2.1 Ombudsmen or commissioners

An ombudsman or commissioner is a person or institution that has the capacity to protect and raise concerns related to a certain interest or group. Ombudsmen can exist on many different levels: international, domestic or regional. They are also common figures within labor law as union representatives, advocating the interests of the workers to the employer. In addition, numerous examples of national ombudsmen for human rights can be found around the world.⁸⁴

In this part, focus will mainly be put on the potential of instituting an ombudsman or commissioner on the domestic level. The ombudsman or parliamentary commissioner would be established by the parliament with a mandate to protect the interests of future generations. The ombudsman would serve a quasi-judicial role: he/she would monitor administrative and legal procedures, but also have the capacity to intervene if the interest of posterity were in risk of being harmed. The ombudsman could also intervene in procedures after requests from the public, and be able to issue statements following citizen complaints about governmental action. On a more general level, the ombudsman would serve as a watchdog, alerting the legislator and general public of environmental threats to posterity.⁸⁵

⁸⁴ For example, Ombudsmen or Commissioners function in Denmark, Slovenia, Canada, Australia, India and South Africa. See list at: <http://www.nhri.net/NationaldataList.asp>.

⁸⁵ Allen, 1993-1994, p. 739.

An advantage of instituting an ombudsman or parliamentary commissioner for the protection of future generations is that the establishment does not require participation of the protected group.⁸⁶ The task to act in the *interest* of future generations is given by the parliament and not by the future generations themselves. The potential legitimacy problem, related to the fact that there is no direct link between the individuals with something at stake and the advocate acting to safeguard their interests, is thus avoided.

Examples of institutions safeguarding the interest of posterity can be found in several countries. In Poland there is a proposal for a Commission on Future Generations, in France a Council of Future Generations that is nominated by the president, in Finland a Committee for the Future, in England a Green Party speaker for Future Generations, *etc.*⁸⁷ Two of the most commonly studied examples are found in Hungary and Israel.

In Hungary, the legal scholar Mr. Sándor Fülöp was elected as the first Ombudsman for Future Generations by the parliament in 2008. The proposal to institute the position was first raised by the Hungarian NGO "Protect the Future" in 2000, and won interest and acceptance from politicians and the public over time.⁸⁸ The Ombudsman answers solely to the parliament, and is independent from the government as well as governmental institutions and economic interests. The main objective of the Ombudsman is to promote the individual right to a healthy environment, which is recognized in the Hungarian constitution.⁸⁹ The constitutional right also incorporates a right for future generations to enjoy a healthy environment, thus expanding the mandate of the Ombudsman to encompass such activities that, even if they are not causing harm today, will do so in the long-term.

In order to complete his assignment, the Ombudsman is required to follow the emergence of legislation relevant to environmental protection and scrutinize the environmental integrity of the forthcoming provisions. If any improprieties are found, he must initiate measures to redress the problem.⁹⁰ The Ombudsman shall also contribute to the international cooperation of Hungary, by expressing opinions on motions relating to the recognition of international agreements concerning environmental protection, nature conservation or the common heritage/concerns of mankind. The Ombudsman may demand that persons or organizations illegally harming or endangering the environment terminate such activities and he may call on the competent authority to take measures related to environmental protection. Moreover, the Ombudsman can initiate supervisory proceedings against, or the suspension of, administrative resolutions relating to

⁸⁶ Jávör, 2006, p 287.

⁸⁷ Jávör, 2006, p 287.

⁸⁸ Jávör, 2006, p. 296.

⁸⁹ Art. 18, Act XX of 1949, the Constitution of the republic of Hungary.

⁹⁰ Art. 27/B, Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights.

environmental issues. In such cases the Ombudsman retains the right to intervene in the judicial review.⁹¹

The Ombudsman also handle complaints from individuals and organizations regarding alleged violations of the right to a healthy environment. It is possible for the Ombudsman to refuse complaints, but according to the guidelines for the position, that possibility is not expected to be used except for in extreme cases. Most applications are expected to be accepted, since the interests of future generations encompass a broad spectrum of concerns and are often at stake in environmental matters.⁹²

Benedek Jávör and Axel Gosseries have carried through a short evaluation concerning potential of the Hungarian institution in an article from the Action and Communication Network for International Development. The authors note that the Ombudsman has been granted fairly extensive powers, with the right call upon private actors to cease with harmful activities, issue recommendations to public and private entities *etc.* However, they also identify two main challenges facing the Hungarian Ombudsman. First, the Ombudsman will not be accountable to the people whose voice he is given the task to represent. This problem has been discussed in depth previously in this thesis,⁹³ and represents an issue here as well. The ombudsman is only guided by a general vision on what intergenerational justice would require, and what future generations would be entitled to expect from us.⁹⁴

The second challenge the Hungarian Ombudsman faces relates to the substantive scope of his powers. The legal text establishing the institution and its powers stresses environmental protection as a focus for the Ombudsman. This could be interpreted as meaning that the mandate of the Ombudsman is restricted only to such matters that directly fall within the scope of what traditionally has been seen as environmental protection. Such an interpretation would exclude matters that only indirectly have consequences for the environment, such as the economic and social aspects of sustainable development. By only allowing the ombudsman to act in a limited field, his ability to successfully safeguard the interests of future generations is considerably obstructed.⁹⁵

Jávör and Gosseries conclude by noting: *"As we can see, the ombudsman may end up finding himself both too lonely and with too narrow a mandate. If success is far from being guaranteed, the challenge still remains exciting."*⁹⁶

In Israel, a Commission for Future Generations operated between 2001 and 2007. The commission was established as an organ of the parliament, with

⁹¹ Art. 27, Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights.

⁹² <http://www.jno.hu/en/?&menu=guideline>

⁹³ See section 2.5.

⁹⁴ <http://www.alternatives.ca/article3932.html>

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

the objective to "*create a dimension of the future that would be included in the primary and secondary legislation of the State of Israel*".⁹⁷ The objective was to create an entity that had a comprehensive overview of the legislative picture in Israel, which could prevent the adoption of legislation that had the potential to harm the interests of future generations. Contrary to the institution in Hungary, the establishment of the Commission was not preceded by any public campaign. Rather, it was the result of a top-down process, aiming to amend a repetitive flaw in parliamentary decision-making; the constant lack of long-term considerations in the work of Knesset.⁹⁸

The functions of the Commission included:

- giving opinions on bills and regulations brought before the parliament, which were of concern to future generations,
- providing the parliament with recommendations on matters that the commissioner considered being of importance to future generations,
- providing members of parliament with advice in matters that are of special interest to future generations.⁹⁹

The scope of the Commissioner's powers was fairly far reaching, encompassing not only matters related to the environment, natural resources and development, but also broader social issues which could have consequences for future generations, such as health, education, state economy and technology. In sum, the scope included twelve predefined areas.¹⁰⁰ However, authority over defense and foreign affairs was excluded. In the initial bill the Commission was granted even broader power, where all subjects that are of interest to future generations was included, but the scope was restricted through an amendment before the law was passed in 2001.¹⁰¹

In its work, the Commission chose to interpret future generations as including only members the immediate future.¹⁰² Through this solution they avoided needing to deal with the truly long-term dimension and the problem of opposing interests of different future generations. Although that surely facilitated the work of the Commission, it of course risked creating problems of equity for generations further away.

In performing its functions, the role of the Commission was of a mainly advisory character. The commissioner could demand to be given enough time to prepare an opinion, which could delay the legislative process, but had no way to veto or otherwise hinder the parliament from adopting legislation that would cause harm to future generations.¹⁰³ The

⁹⁷ Knesset, The Commission for Future Generations, 2004, p. 3. Available at http://www.knesset.gov.il.sponsorship/future/eng/future_index.htm.

⁹⁸ Sholam and Lamay, 2006, pp. 244-245.

⁹⁹ Art. 32, Knesset Law 5761-2001

¹⁰⁰ Knesset, The Commission for Future Generations, 2004, p. 4. Available at http://www.knesset.gov.il.sponsorship/future/eng/future_index.htm.

¹⁰¹ Sholam and Lamay, 2006, p. 247.

¹⁰² Sholam and Lamay, 2006, p. 252.

¹⁰³ Sholam and Lamay, 2006, pp. 248-249.

commissioner also had the power to demand information from any governmental entity. This entailed an advantage in contrast to other members of parliament and government ministries, and enabled the commissioner to give better-informed opinions.¹⁰⁴ The institution ceased to operate at the end of the term of its first commissioner in 2007. It has been claimed that it was a result of suggestions from several influential voices in Knesset that the Commission was an unnecessary institution and a waste of public funds.¹⁰⁵

When comparing the two examples, many similarities but also some significant differences are noticeable. The institution of the Hungarian Ombudsman is more independent, but has a more limited mandate concerning the type of matters it handles. This risks making it harder for the Ombudsman to efficiently carry out his task, since many matters of importance to future generations fall outside the realm of his authority. The Commission for Future Generations under Knesset had a broader mandate, but served a more advisory role and was less independent than its Hungarian counterpart. It also lacked the ability to act in the interest of future generations in legal procedures and to carry out inquiries following citizens' complaints of breaches of the right to a healthy environment. The role of the Commission was limited to the legislative process and bears resemblance to the role of a constitutional council or council on legislation, which is given the task of scrutinizing pending legislation from a set of predefined criteria. An elaboration on the potential of Constitutional councils to protect intergenerational equity will follow in section 4.2.2.

Reviewing legislation, which is something that both examples have in common, offers a possibility to positively influence pending legislation towards increased consideration for intergenerational equity. In order to work efficiently, a broad mandate, which is not only limited environmental protection, is required. To increase its efficiency, the institution should also serve more than just an advisory role and have the authority to initiate legislation and other measures. Furthermore, granting the ombudsman or commissioner the ability to enter into legal proceedings, provides a means for giving a voice to the concerns of posterity.

Similarly to practically all measures aimed at protecting posterity, the work of an ombudsman or commissioner is combined with challenges as to knowing what future generations will need and to identifying the consequences that may result from a specific law.

In the framework developed by Weiss, the ultimate responsibility to ensure that intergenerational equity be respected rests with the state. Instituting an ombudsman or commissioner for future generations could provide one important tool for realizing that obligation, both through promoting consideration for posterity in the legislative process and through promoting civil engagement, giving future generations a voice in legal procedures.

¹⁰⁴ Sholam and Lamay, 2006, pp. 246-247.

¹⁰⁵ <http://www.haaretz.com/hasen/spages/936023.html>

4.2.2 Constitutional Council or Council on Legislation

A possible alternative to creating a new institution for increasing the consideration of future interests in pending legislation is to expand the mandate of entities that already exist and serve a somewhat similar function. This would require a strong and well-defined protection of intergenerational equity in the constitution of the country, for example, through a human right to a healthy environment, extended to future generations. Another alternative is to implement a provision requiring the consideration of sustainable development and the interests of future generations in all exercise of public authority.

In France the *Conseil Constitutionnel*, Constitutional Council, must be consulted before the promulgation of such laws that are of constitutional importance (*lois organiques*). This includes legislation such as institutional acts and the rules of procedure of the parliamentary assemblies. The council will also review ordinary laws, if the President of the Republic, the Prime Minister, the President of the National Assembly or of the Senate demand it, or if 60 members of the Assembly or Senate demand it. The council examines the proposed law and judges whether or not it is in accordance with the constitution. The decisions of the council are binding and have the effect of censuring those parts of the pending legislation that is in conflict with the constitution.¹⁰⁶

In Sweden, *lagrådet*, the Council on Legislation gives expert opinions on the accordance of pending legislation with the constitution and legal order as a whole. The Council should be consulted before the parliament passes bills on matters that relate to freedom of expression and freedom of the press, the Official Secrets Act, intrusions into statutes establishing individual rights, municipal taxation, onerous public law and matters related to the legal procedures or administrative law under certain circumstances. The opinions given by the council are however not binding; in cases where the council has not been consulted even though it should have been, the adoption or validity of the law is not hindered.¹⁰⁷

A benefit of using this option is that intergenerational equity could be promoted through an already existing and functioning institution, which, under some circumstances could produce binding decisions. This could provide an effective means for incorporating concerns for posterity into the legal order. A prerequisite is, however, that the legislator gives instructions and that a strong and clear protection is established in the constitution to ensure that the matter is sufficiently taken into account by the council. Compared to establishing an inner-parliamentary commission, such as in the

¹⁰⁶ Official website of the Constitutional Council: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/le-conseil-constitutionnel/le-conseil-aujourd-hui/presentation-generale/presentation-generale.206.html>

¹⁰⁷ Strömberg and Lundell, 2004, pp. 104-105.

Israeli example, another benefit is that the experts are working in a non-political environment, and potentially are less sensitive to political pressure, thus having better chances of delivering objective opinions.

A possible drawback of working within existing institutions such as the Constitutional Council or the Council of Legislation is that special expertise of the kinds of problems that future generations face and how intergenerational equity should be taken into consideration today may be missing. The implementation of increased consideration for posterity is likely to require innovative thinking and fresh ideas, for which some existing institutions are possibly not the ideal forum. Additionally, the fact that the opinions of the Council in the Swedish example can be quite easily circumvented also poses a risk for the effectiveness of the option.

Another challenge is that not all legislation is automatically reviewed. In both France and Sweden, the Councils automatically review only legislation of a certain status, or in certain fields. For practical reasons that makes sense, but it does pose a risk for the implementation of intergenerational equity, since some legislation that would be harmful for future generations could slip through the net and escape review.

4.2.3 Concluding comments

As discussed earlier in this paper, Weiss argues that the state bears the ultimate responsibility for ensuring that intergenerational equity is sufficiently respected within its borders.¹⁰⁸ In order to fulfill that responsibility, the state must take a comprehensive approach towards implementing intergenerational equity. Both alternatives discussed in this section would contribute to serving this purpose. An ombudsman or council on legislation can contribute to increasing the considerations of the interest of posterity in forthcoming legislation; either as a type consultative body, which is the case for the Hungarian Ombudsman and Israeli Commission, or as a body tasked with reviewing legislation such as the Swedish Council on Legislation or French Constitutional Council.

In addition to promoting intergenerational concerns in pending legislation, an institution following the model of the Hungarian Ombudsman could also contribute to ensuring a more effective implementation and enforcement of the laws. It takes a proactive approach and demand that public or private entities cease with activities that are causing harm to the environment as well as receive and review complaints submitted by individual citizens or non-governmental organizations. A commission following the Israeli example would, however, not share this capacity, since it was designed as an inner-parliamentary organ with a more limited assignment as to which tasks it was given.

¹⁰⁸ Weiss, 1988, p. 109.

It is important to note that the different options do not need to be alternative to each other. Rather, they could serve complementary roles. An Ombudsman similar to the Hungarian model could easily be combined with some form of legislative council to further the interests of posterity. In addition, both options are based on the need for some type of constitutional provision or guiding principle establishing a responsibility to respect the interests of future generations or right to enjoy a healthy environment. Such a provision could also result in other positive effects for the protection of posterity, if it was to be considered as guiding for all exercise of public authority. This would also be in line with the idea of taking a comprehensive approach towards the implementation of intergenerational equity. Ultimately, an effective implementation requires the establishment of guiding principles and enabling frameworks to ensure that the interests of future generations are taken into account in the day-to-day work of public as well as private entities.

4.3 The role of courts and civil society

By establishing mechanisms and institutions through which individuals can become involved and contribute to environmental protection, a stronger protection of posterity can be achieved. Historically, solutions such as fiduciary trusteeships, which infer certain restrictions on the ownership of a resource have been one way to encourage respect for future concerns in land management. Fiduciary trusteeships were common in Sweden from circa 1650 until the early 20th century and were established in order to hinder the exploitation and division of land, which would harm the resource as time progresses.¹⁰⁹ This type of long-term thinking with regards to the ownership of a resource is quite far from the reasoning in modern society. The decision to repeal fiduciary trusteeships can in some aspects be considered a result of the increased importance that the individual right to ownership has gained in most western societies.

Modern solutions that contribute to strengthening the protection of future generations often relate to increasing the possibilities for civil society to make their voice heard in the development of environmental policies and in legal procedures. Moreover, the establishment of substantial rules, such as the right to a healthy environment, can form the basis for individual complaints as well as demands for a strengthened environmental protection that will benefit not only people living today, but also future generations.

This section will specifically focus on these two possibilities for civil society to become involved through the strengthening of substantial and procedural rules relating to environmental protection. It will also discuss the role of courts for the implementation of intergenerational justice.

¹⁰⁹ Nationalencyklopedin, 1991, search term: "fideikommiss".

4.3.1 Protection in the courts

Courts play a crucial role when it comes to executing protection of the environment and future generations. When disagreements and conflicts arise, it is the courts' responsibility to interpret the rules and obligations at hand and establish which rules apply and which interests that should be given priority. The courts have the possibility to work in imaginative ways: they can be generous when granting legal standing in procedures, allow for class actions and representative standing, make use of pioneering doctrine *etc.* How far they will go will of course to some extent be up to the individual judges, but within their work, there is plenty of opportunity to put an increased protection of future interests into practice.¹¹⁰

What action a court can take depends in part on the norms upon which it has to base its decision. If the legal order within which the court is operating has a clear recognition of sustainable development and intergenerational equity, establishing environmental protection will be easier. However, even where such a concept is not directly supported, intergenerational equity can still have a normative potential. Sustainable development and intergenerational equity can be used as interstitial principles, establishing the relationship between primary norms that overlap or are in conflict with each other.¹¹¹ The following exposition will first give an example of a case where protection of future generations has been granted, on the basis of a constitutional protection of a healthy environment. Subsequently, examples of cases where the protection of future generations has been discussed or ascertained in spite of a lack of explicit provisions establishing the concept will follow. Last in this section the potential that courts have for the implementation of intergenerational equity will be analyzed, and advantages and disadvantages of the option will be discussed.

That a proactive judiciary can be facilitated through positive norms protecting the environment for the sake of present and future generations is clear in the case of *Minors Oposa v. Secretary of the Department of Environment and Natural Resources (DENR)* from the Philippine Supreme Court.¹¹² In this case, the Philippine Supreme Court granted legal standing to 44 minors to sue on the behalf of themselves and future generations in a legal action concerning unsustainable logging. Twenty-five years prior to the lawsuit, rainforests covered about 53 percent of the Philippines. It was the home of indigenous peoples, countless species and fulfilled important ecological services. However, in the early nineties, rainforests covering only 2.8 percent of the country remained.¹¹³ Concerned by this development and fearing that the nation would soon lose all its forests, the plaintiffs brought an action calling on the defendant, DENR, to cancel all logging permits in the remaining national forests. The children argued that continued

¹¹⁰ Turner, 2004, p. 287.

¹¹¹ Lowe, 2000, p. 216.

¹¹² *Minors Oposa v. Secretary of the Department of Environment and Natural Resource*, 1993.

¹¹³ Allen, 1993-1994, p. 174.

deforestation would cause irreparable harm to their generation and succeeding ones by violating their right to a healthy environment under the Constitution. The defendant asserted that the complaint should be dismissed, arguing that the plaintiffs had no course of action and that the issue at hand was a political question that should be dealt with by the legislative or executive, rather than judicial, branch of government.¹¹⁴

In its ruling the court upheld the arguments submitted by the plaintiffs, and recognized that the children did have personality to sue for succeeding generations insofar as the right to a sound environment was concerned. It stated that: "*Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and helpful ecology. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come*".¹¹⁵

In the end, the case did not actually result in any logging permits being cancelled, but it is, nonetheless, interesting for the development of jurisprudence; it is an important example of a ruling from a nation's supreme court where intergenerational equity was openly addressed and was held to form the basis for legal standing on behalf of future generations when environmental degradation was concerned.¹¹⁶

In the *Minors Oposa* case there was a direct link to a constitutional provision, which was interpreted to include an intergenerational aspect. The lack of such a provision does, however, not necessarily mean that intergenerational concerns do not have to be taken into account. The International Court of Justice (ICJ) has ruled in a number of cases where the interests of future generations were at stake, and the ICJ Judge Christopher Weeramantry has been a leading proponent for intergenerational equity.

In the case *Denmark v. Norway*, concerning the maritime delimitation in the area between Greenland and Jan Mayen, Justice Weeramantry made an extensive analysis of the role of equity in international law in his separate opinion to the ruling. Weeramantry explicitly covered intergenerational equity, and noted the support for intergenerational equity can be found in diverse historical, cultural and legal traditions around the world. Furthermore, Weeramantry referred to the concept of wise stewardship and conservation of natural resources for the benefit of future generations.¹¹⁷ Later in the opinion, he also cited Weiss' book *In Fairness to Future Generations*.¹¹⁸

¹¹⁴ Sands, 1998, p. 87.

¹¹⁵ *Minors Oposa v. Secretary of the Department of Environment and Natural Resource*, 1993, in Sands, 1998, p. 87.

¹¹⁶ Cordonier Segger and Khalfan, 2004, pp. 128-129.

¹¹⁷ *Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway)*, 1993, Separate Opinion of Judge Weeramantry, p. 274.

¹¹⁸ *Ibid.*, p. 277.

Weeramantry insisted that intergenerational should be recognized as a principle of international law in the subsequent *Nuclear Tests* case, in 1995, and argued for an increased involvement of the ICJ in the protection of future generations.¹¹⁹ Weeramantry held that the ICJ "*must regard itself as a trustee of [the] rights [of future generations] in the sense that a domestic court is a trustee of the interests of an infant unable to speak for itself*" and continued, "*New Zealand's complaint that its rights are affected does not relate only to the people presently in existence. The rights of the people of New Zealand include the rights of unborn posterity. Those are rights which a nation is entitled, and indeed obliged, to protect*".¹²⁰

In 1996 the majority of the court recognized that the use of nuclear weapons would cause serious danger for future generations, in the *Nuclear Weapons Advisory Opinion*.¹²¹ Although the use of nuclear weapons was not found to be specifically prohibited, the court noted that international law relating to the protection and safeguarding of the environment does indicate important environmental factors that must be taken into account in the implementation of principles and rules of law applicable in armed conflict. Continuing, the court recognized that "*the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn*".¹²² The court did, however, not discuss the status of intergenerational equity under international law.

In a separate opinion to the *Gabčíkovo-Nagymaros* case from 1997, Justice Weeramantry once again acknowledged the importance of respect for intergenerational equity. Weeramantry stated that modern international environmental law includes "*the principle of trusteeship of earth resources, the principle of intergenerational rights, and the principle that development and environmental conservation must go hand in hand*".¹²³

The legal status of intergenerational equity under international law is something that's heavily disputed among legal scholars. In spite of a lack of incorporation of the concept into legal statutes, Lynda Collins argues that the duty to preserve the environment for future generations is an emerging principle under international law, referring to repeated recognition in preambles, soft law instruments and legal jurisprudence.¹²⁴ Catherine Redgewell takes a slightly more precautionous approach, noting that the case law from the ICJ indicates that intergenerational equity "*at best can be seen*

¹¹⁹ Cordonier Segger and Khalfan, 2004, p. 127.

¹²⁰ Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgement of 20 December 1974 in the Nuclear Tests (New Zealand v. France), Dissenting Opinion of Judge Weeramantry, p. 341.

¹²¹ Legality of the Threat or Use of Nuclear Weapons Case, Advisory Opinion, 1996, p. 244.

¹²² *Ibid.*, p. 241.

¹²³ Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), 1997, Separate Opinion of Judge Weeramantry, p. 110.

¹²⁴ Collins, 2007, p. 138.

*as a 'guiding principle' in the application of substantive norms, including existing treaty obligations, under international law".*¹²⁵

Even if intergenerational equity is not recognized as a binding legal principle, the concept could still have normative potential. Vaughan Lowe, professor of international law at Oxford University, argues that concepts such as sustainable development can influence the application of international law as type of meta-principle or interstitial norm when primary norms overlap or are in conflict. Interstitial norms do not have any normative force themselves, but rather operate by modifying the effect of primary norms and determining the relationship between the legal norms that are potentially applicable. Lowe uses the environmental impact from industrial projects as an example. When reviewing the facts relevant to such a project, it is clear that they could be viewed from the perspective of either the right to development or the duty to avoid environmental harm. Here, the concept of sustainable development could work as an interstitial norm, reconciling the two perspectives.¹²⁶

Principles for the resolution of conflicts between norms are, according to Lowe, drawn from other sources than the primary norms themselves. Generally, the principles would be decided by what is thought to be desirable on broader moral and political grounds. Furthermore, general cohesion of the outcome with the legal system as a whole would be sought. The use of interstitial norms for reconciling primary norms could in one way be seen as incorporating an aspect of reasonableness in the practical application of primary norms and could be used by courts without any embodiment in state practice or other legal support. They are used not because they are obligatory, but because they are necessary for the legal reasoning to proceed.¹²⁷

In his example, Lowe uses the concept of sustainable development to show how a concept can function as an interstitial norm, reconciling primary norms under international law. However, in the development of international law, he expects that many other examples will arise;¹²⁸ intergenerational equity could potentially be one such example. The line of argument used for the application of interstitial norms in international law could also be used in a domestic context.

The possibility to put the concept of intergenerational equity in to practice right away, without having to wait for a parliament to pass legislation, may be one of the greatest advantages that courts have in the implementation of intergenerational equity. Although courts are not free to do exactly what they want, they do have a certain amount of freedom and room for interpretation in the practical realization of environmental protection. They have the ability to grant legal status for representatives to act in the interest

¹²⁵ Redgewell, 1999, p. 123.

¹²⁶ Lowe, 2000, pp. 213-215.

¹²⁷ Lowe, 2000, pp. 216-217.

¹²⁸ Lowe, 2000, p. 218.

of future generations, as was the case in *Minors Oposa*, or they can choose to be guided by equity and sustainable development when evaluating facts or reconciling conflicting primary norms. Creative judges have a chance to use existing norms, guiding principles and concepts to integrate an increased protection of the interests of future generations.

Furthermore, judges are often appointed for life and therefore have a better chance to remain objective than other elected officials who need to worry about short-term industry interests and re-elections every four or five years. For this reason, judges may have a better starting point for promoting long-term interests such as those of future generations.¹²⁹

At the same time, it is important that creativity in the courtrooms does not go so far that the rule of law is jeopardized. In a democratic society, rules are created by parliaments, forming a predictable basis for public and private entities to act. Interpretations and ingenuity that is not based on established principles and provisions risks creating conflicts between the need for predictability for people living today, and the need for environmental protection for posterity. An appropriate balance between the two interests needs to be found.¹³⁰

The implementation of intergenerational equity in courts can be stimulated and encouraged by the government and legislator. By adopting guiding principles and acknowledging the need for protection of posterity, the legislative and executive branch can support innovative action in the courts. However, innovative action will to some extent always depend on the existence of creative and courageous judges, with a firm understanding of the importance of environmental protection. This may pose a problem for the immediate potential of a strengthened protection of posterity through court involvement, since not all judges can be expected to share the progressive views of Justice Weeramantry or the Supreme Court of the Philippines. One example in support of that concern can be found in the implementation of the Environmental Code of 1998 in Sweden. The first provision of the Code states that reaching a sustainable development (which includes preserving a healthy environment for future generations) is the ultimate objective of the law, and that its application should be guided by this objective.¹³¹ However, despite the fact that the law offers much room for interpretations in line with sustainable development, Swedish courts have quite consistently chosen to not make use of that possibility.¹³² Instead, interpretations that advance the interests of the single individual or entrepreneur are preferred, letting his or her right to predictability and rule of law take precedence over the interests of the global common, sustainable development and future generations. If it is so difficult for Swedish courts to advance "softer" values such as sustainable development even when there is

¹²⁹ Tremmel, 2006, p. 207.

¹³⁰ Skagen Ekeli, 2007, p. 384.

¹³¹ 1 Chapter, 1 § Miljöbalken, 1998:808.

¹³² Nilsson, 2008, p. 258.

outspoken support for it in the legislation, more innovative approaches in the courts seem less likely to be taken.

Given that the individual judges have a deep understanding for environmental concerns and the potential threats to future generations, courts can play an important role in the implementation of obligation towards posterity. However, the courts may be reluctant to act in the interest of future generations without clear instructions and support to do so. Relying on courts for the protection of future generations will not in itself provide a sufficient solution, but does have the potential to complement actions taken by the state.

4.3.2 Protection based on substantive rules

Establishing substantive rules, such as a constitutional right to a healthy environment, could comprise a very important element in the implementation of intergenerational equity. Correctly formulated, such constitutional provisions can provide a powerful tool for protecting the environment for the benefit of both present and succeeding generations. Furthermore, a codification of the interests of future generations into written law signifies a clear recognition of our moral responsibilities towards posterity and could steer the direction of future policies.¹³³

Constitutional rights can function defensively, to protect citizens against actions that would violate their rights, as well as affirmatively, to compel the government to ensure certain constitutional rights and guide the exercise of public authority. Moreover, constitutional provisions can be valuable for environmental protection in a number of different ways. First, it can serve as a safety net for environmental problems that are not resolved through existing laws and regulations. Even in countries that have a well-developed legal system for environmental protection, some cases may fall outside the scope of existing rules and regulations. In such situations, constitutional provisions recognizing the need to protect the environment would establish the general objective under the constitution and offer guidance on how the situation should be handled.¹³⁴ Secondly, constitutional rights can contribute to raising the status of environmental values. Traditionally, environmental values have often been seen as a 'softer' value of lower importance than, for example, economic concerns. Establishing a constitutional right aiming at environmental protection can contribute to changing that, making it more likely that environmental concerns are viewed as being equally significant as economic factors.¹³⁵ Finally, constitutional environmental rights can also serve as a source for procedural rights. Environmental rights can give individual citizens means to challenge decisions made by the state or public authorities and promote transparency and accountability.¹³⁶ The *Minors Oposa* case from the Philippine Supreme Court is one example of this,

¹³³ Tremmel, 2006, p. 189.

¹³⁴ Bruch, Coker and VanArsdale, 2001, p. 134.

¹³⁵ *Ibid.*

¹³⁶ Bruch, Coker and VanArsdale, 2001, pp. 134-135.

where the constitutional provisions also formed the basis for legal action on behalf of future generations.

The aim of a substantive environmental rule is normally to ensure a certain level of environmental quality that individuals in the country are entitled to enjoy. It can for example focus on clean water and air or an environment that is adequate for the health of human beings.¹³⁷ In order to be effective, the provision should be precise and represent a public right for each individual citizen and not only an objective for the state.¹³⁸

In practice two different types of substantive rights relevant to intergenerational equity can be identified: specific rights concerned with environmental protection and other rights that are not specifically designed for protecting the environment, but which can be used to that end.¹³⁹ In over 20 countries, the environmental constitutional right specifically recognizes the environmental interests of future generations. Two examples of this can be found in Norway and Bolivia. The Norwegian Constitution states that: *"Every person has a right to an environment that is conducive to health and to natural surroundings whose productivity and diversity are preserved. Natural resources should be made use of on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well"*.¹⁴⁰ Similarly, the Bolivian Constitution establishes that every person has a fundamental right to *"enjoy a healthy environment, ecologically balanced and adequate for his wellbeing, safeguarding the rights of future generations"*.¹⁴¹ Both these provisions call on the state to ensure a sound environment for present as well as future generations. An even more innovative approach has been taken by the Republic of Vanuatu, where the constitution establishes a duty for every person *"to himself and his descendants and to others [...] to safeguard the natural wealth, natural resources and environment in the interest of the present generation and of future generations"*.¹⁴²

Skagen Ekeli suggests a constitutional rule that takes aim at protecting certain critical resources for the benefit of posterity. Similarly to the reasoning of Weiss, Skagen Ekeli argues that even though we cannot know anything about the preferences of future generations, we do have scientific knowledge of their physiological needs. We know that adequate nutrition and an environment that does not transmit life-threatening diseases is necessary for the wellbeing of future generations. Based on these needs, we can identify a set of critical resources that need to be protected in order to fulfill our obligations towards posterity. Which resources that will be identified as critical would to some extent vary from state to state. The general idea, however, is to create a framework where courts are

¹³⁷ Skagen Ekeli, 2007, p 381.

¹³⁸ Tremmel, 2006, p. 204.

¹³⁹ Turner, 2004, p. 285.

¹⁴⁰ The Constitution of Norway, Article 110b, subsection 1.

¹⁴¹ The Constitution of the Republic of Bolivia, Article 7, subparagraph m.

¹⁴² In Collins, 2007, 137.

empowered to enforce the rights of posterity through the existence of clearer guidelines for the assessment of cases brought before the court. Moreover, the constitutional provision should impose duties on state authorities. Those duties should be of both negative and positive character: obliging state authorities to avoid making decisions that would damage the critical resources, as well as requiring the establishment of regulations of activities that could destroy the resources.¹⁴³

A challenge that constitutional environmental rules often meet is that their phrasing is too vague and unclear. Provisions that are poorly defined offer little guidance for the application of the rule, which risks making them ineffective for their intended purpose. A formulation that is too vague will either render the provision insignificant for all practical purposes, or lead to problems of democracy and rule of law in its application. Democratic problems arise when so much of the specific content of a rule is left to the courts to define in their application of the provision, that the democratic processes, whereby rules are created by elected officials, is circumvented. Problems related to the rule of law, on the other hand, appear when the provision is so vague its effect cannot be predicted by the citizens that are affected by it, thus, leaving room for arbitrary use of state power.¹⁴⁴

As discussed above, a correctly designed constitutional provision could have many positive effects. For example, by showing recognition of the importance of environmental protection for meeting obligation towards future generations, by functioning as a safety-net for actions that are not directly targeted by other legislation and to steer the direction for future policies.

4.3.3 Protection based on procedural rules

Procedural environmental regulations are important for the implementation and enforcement of substantive environmental rules and represent a field where much progress has been made in recent decades. Procedural rules are constructed to make it possible for civil society to access information, participate in decision-making processes and to challenge decisions that affect their environment. Increasing the public involvement in decision-making processes is generally perceived as leading to better decisions, since it contributes to ensuring that all relevant factors are taken into account before a decision is made.¹⁴⁵ It is also perceived as contributing to intergenerational equity, through strengthening environmental protection overall and by offering a way to bring concerns relevant to posterity into decision-making processes in environmental matters. Furthermore, allowing for increased public participation contributes to meeting one of the planetary obligations identified by Weiss, namely, the duty to avoid adverse impacts.

¹⁴³ Skagen Ekeli, 2007, pp. 387-391.

¹⁴⁴ Skagen Ekeli, 2007, 382-387.

¹⁴⁵ Turner, 2004, p. 280.

Procedural environmental rights have been included in a large number of international treaties and soft-law instruments, including the 1992 Rio Declaration on Environment and Development and the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention). In the Rio Declaration, Principle 10 states that individuals shall have appropriate access to information regarding the environment, the opportunity to participate in decision-making processes and have an effective access to judicial and administrative proceedings. The declaration has received wide recognition, but is not legally binding.

The Aarhus Convention is a legally binding treaty, specifically dealing with procedural rights in environmental matters, and can be seen as a development of the requirements laid out in the Rio Declaration. As its name indicates, the provisions of the convention focus on the right to access information, participation in decision-making and access to justice. The convention also includes an intergenerational aspect, recognizing the right of every person, living today or in the future, to live in an environment adequate to his or her health and the duty to protect and improve the environment for the benefit of present and future generations.¹⁴⁶ Correspondingly, the objective of the convention is *"to contribute to the protection of the right of every person of the present and future generations to live in an environment adequate to his or her health and well-being"*.¹⁴⁷

Being able to access relevant information is a significant need for civil society to be aware of threats and to be able to advocate environmental protection. Having access to information can be seen as a precondition for the enjoyment of the other two rights; if the public is unaware of the process that is going on, it can neither become involved in the decision-making process nor demand judicial review after the decision has been made. Access to information is the first right that is mentioned in the Aarhus Convention, and is dealt with in Articles 2, 4 and 5 of the Convention. Environmental information is defined in Article 2 as all information regarding the condition of different elements of the environment (such as air, water and soils), factors that affect or are likely to affect the environment (such as noise and radiation or policies and measures) or the condition of human health and safety or cultural sites and built structures inasmuch as they are affected by the environmental factors or the condition of the natural environment. Article 4 states that environmental information must be made available for the public upon request, as soon as possible, and without requiring that the person requesting the information states his or her reason for interest. Moreover, Article 5 imposes a duty on states to ensure that the state authorities keep updated records of relevant environmental information and that the information is dispersed in an appropriate manner.¹⁴⁸

¹⁴⁶ The Aarhus Convention, Preamble.

¹⁴⁷ The Aarhus Convention, Article 1.

¹⁴⁸ Ds 2004:29, pp. 41-47.

Not offering adequate access to environmental information can also constitute a breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁴⁹

The right to participate in environmental decision-making has support in Article 6 to 8 of the Aarhus Convention as well as Principle 10 of the Rio declaration. The provisions in the Aarhus Convention focus on public participation in three areas: decisions regarding specific activities, the development of plans, programmes and policies relating to the environment and during the preparation of legislation and regulations.

The Aarhus Convention also includes rules regarding access to justice, granting members of the public access to judicial review if his or her request to access information has been ignored, wrongfully refused or inadequately answered. Moreover, members of the public may challenge the substantive and procedural legality of decisions regarding specific activities.¹⁵⁰

As a way of implementing the requirements of the Rio declaration and Aarhus Convention, many states have introduced legislation demanding that environmental impact assessment (EIA) are carried out before activities are undertaken, or new plans developed, that would harm the environment or risk doing so. When an EIA is being performed, it is obligatory to create opportunities for public participation and deliberation. If an EIA has not been performed, or if the EIA is inadequate or has not allowed for sufficient public involvement, that can form grounds for challenging the decision. In *In fairness to future generations*, Weiss proposes that the scope of EIA's should be extended so that consequences that risk harming the interests of future generations should play a more prominent role than what is currently the case in most countries.¹⁵¹

Another way to increase the consideration of future interests through public involvement would be to appoint guardians for future generations in legal processes and introduce an extended legal standing for citizens and environmental NGOs to act on behalf of posterity. Legal standing is generally granted to actors that have an interest or some type of personal stake in a conflict. By extending the scope of who is given legal standing in a conflict, a guardianship approach can be established whereby independent third parties (that are not personally affected by the outcome) are ascribed procedural rights and given the ability to raise issues relevant to future interests, thus contributing to the protection of posterity.¹⁵²

The selection of who is best suited to act as a guardian for future generations is not unproblematic. Guardians could potentially be either self-appointed and granted standing by the court on an ad hoc basis, or be pre-authorized

¹⁴⁹ Judgement from The European Court of Human Rights, 19 February 1998, p. 15. *Guerra and Others v. Italy*, 116/1996/735/932.

¹⁵⁰ The Aarhus Convention, Article 9.

¹⁵¹ Weiss, 1988, pp. 62-63, 132-133.

¹⁵² Skagen Ekeli, 2006, pp. 388-389.

by an independent agency, acting on behalf of future generations in a precautionary manner. Furthermore, questions arise regarding which competence should be required of someone, in order to allow them to act as guardians for future generations and grant them standing in legal procedures. One alternative is to reserve the right to act on behalf of posterity for environmental organizations, which are presumed to care for the well being of posterity, have knowledge in the particular case and have access to sufficient resources to protect the interests of posterity in a legal conflict. A similar solution has been implemented in Swedish law. Non-profit organizations with more than 2000 members and the protection of nature or environmental interests as its main purpose are given standing in certain procedures within the field of environmental law.¹⁵³ Reserving the opportunity to act as a guardian for posterity for environmental organizations is based on the view that they are best suited to know what is in the interest of posterity. Whether or not this is the case can be discussed. Situations may occur where disagreements arise regarding what the interests of posterity actually are. Environmental organizations will most likely find measures contributing to environmental protection to be in the best interest of future generations, whereas more technologically optimistic actors could be of another opinion. Skagen Ekeli therefore thinks that the right to serve as guardian should not be restricted to environmental organizations. Rather, guardianship should be open to both environmental NGOs, individuals and others, and considered by courts on a case-by-case basis, taking factors such as those mentioned above, care, knowledge and expertise about the case at hand and financial resources into account.¹⁵⁴

It is also possible to picture situations where no direct procedural right to act as a guardian of future interests exists, but where standing can be based on substantive rules. An example of this is the *Minors Oposa* case, wherein the court held that the right to a healthy environment, extended to future generations, would be rendered meaningless if standing on behalf of posterity was not granted.¹⁵⁵

Where procedural rights exist, using them as a basis for protection of the interests of posterity is, however, not dependent on the existence of a clearly defined substantive right. A substantive right to a healthy environment would most likely facilitate increased public participation, but procedural rules can function also in the absence of such a right. Moreover, procedural rights making it possible for concerned citizens and NGOs to participate in legal procedures where the interests of posterity are at stake gives them the ability to act as watchdogs, and to protect those interests.¹⁵⁶

Some critique has been raised suggesting that allowing for standing for future generations would 'open the floodgates' for frivolous litigation. If anyone is allowed to represent future generations, actors that are not sincere

¹⁵³ The Swedish Environmental Code of 1998:808, 16 chapter, 13 §

¹⁵⁴ Skagen Ekeli, 2006, pp. 390-392.

¹⁵⁵ Cordonier Segger and Khalfan, 2004, pp. 128-129.

¹⁵⁶ Skagen Ekeli, 2006, p. 392.

in their wish to protect posterity can abuse that opportunity to promote objectives that are in their own interest. However, this problem can likely be avoided by adopting ethical guidelines for the selection of guardians and through a cautious and alert implementation by the courts.¹⁵⁷

Litigation by itself can surely not be the only solution for establishing protection for future generations, but can work as an important tool for giving a voice to the interests of posterity. Public participation depends on the vigilance of environmental organizations, citizens and other non-governmental actors, which can never be forced to act to protect posterity. Furthermore, there is a risk that increased possibilities to bring the interests of posterity into legal procedures could lead to abuse. But as one court expressed it, even if an increased number of insincere lawsuits would follow from expanding the scope of who can be granted legal standing: *"if that should be the price for the preservation and protection of our natural resources and environment against uncoordinated or irresponsible conduct, so be it"*.¹⁵⁸

4.3.4 Concluding comments

Actions taken by courts and civil society all have in common that they can not be forced; they depend upon the actors' understanding of the problem and their will to resolve it. Strong substantive rules aiming at establishing a protection of intergenerational equity and the individual's right to a healthy environment seem to be important for both protection in the courts and for public participation; they can guide the interpretation and application of other norms in the courts, form the basis for legal standing and facilitate public participation.

Weiss places the ultimate responsibility for safeguarding the interests of posterity on the state. The options discussed in this section create ways for the public to become involved through strengthened substantive and procedural rights and encourage creativity in the courts to take concerns of future generations into account. These options ultimately provide ways for the concerns of posterity to be voiced that are additional to the work of state authorities and institutions. Thus, the options have a potential to contribute to meeting that obligation and ensuring that the end result (sufficient protection of posterity) is achieved. Additionally, public participation contributes to an overall better decision-making, since more relevant factors will be brought forward and considered before the final decision is made.

¹⁵⁷ Allen, 1993-1994, p. 731.

¹⁵⁸ Allen, 1993-1994, p. 732.

5 Concluding remarks

This thesis sets out from a number of basic questions regarding the contents and practical implementation of the concept intergenerational equity: does the present generation have a responsibility to safeguard the environment for future generations? If so: on which element should a protection focus? What options are there to implement a protection of posterity into domestic legislation? The questions have been answered throughout the exposition in the thesis, but will be summarized and commented upon here. Moreover, I will also give my view on which steps ought to be taken in domestic law to safeguard the interests of future generations.

In order to answer the first question an overview of the problem and its underlying causes was made, the moral grounds for responsibility reviewed and links to other areas of law and philosophical/religious systems analyzed. Do we have a responsibility to safeguard the environment for future generations? The answer is both yes and no. There is a firm basis for claiming that we have moral responsibility to do so; both the extension of Rawls theory of justice and the argumentation based on communitarianism, viewing all of humanity as a whole, suggest that we do. Furthermore, there is support for the notion of intergenerational justice in moral and religious belief systems from around the world, such as the cited examples among indigenous groups and in Islamic faith.

Whether or not we have a legal responsibility to safeguard the interests of posterity is more unclear, however. Parallels can be drawn to the evolution of sustainable development as well as the development of international environmental law and human rights law. There are many similarities between the ideas behind intergenerational equity and, for example, the emerging principles of customary international law, requiring that a precautionary approach be taken when there is a risk of irreversible environmental harm. Links can also be made to human rights law, which is moving towards accepting the notion of a human right to a sound environment. Looking at the support that has been shown for the concept in various international declaration and agreements,¹⁵⁹ no legally binding obligation for states to respect intergenerational equity has so far been established. A legal responsibility towards posterity has, however, been accepted in the domestic legal system of a number of countries around the world.

In sum, it is possible to make a strong argument for a legal responsibility to protect posterity, but it is still too early to say that such a responsibility already exists under international law.

Moving on to the second question, regarding contents of a protection of future generations, Weiss works formed the basis for the exposition in the

¹⁵⁹ See section 4.1.

thesis. According to Weiss, a protection of posterity should focus on the conservation of options, quality and access. She sets up a rather elaborate framework, identifying principles for protection and planetary obligations and rights. The ultimate objective of her model is to sustain the welfare and well being of all generations, by adopting an approach that preserves a robust environment for future generations while at the same time allowing for controlled consumption of resources today. In order to fulfill our planetary obligations, the present generation should conserve resources, ensure an equitable use of resources, avoid adverse impacts on the environment, prevent disasters that have transboundary effects and compensate for environmental harm.

The principles, obligations and rights set out by Weiss can provide a guideline for implementing an increased protection of posterity. But apart from it having a similar objective, it is hard to see exactly how they have influenced the options that are discussed in this thesis. The options all aim at establishing a stronger protection of posterity but do not directly correspond to the framework of Weiss. Rather, I have tried to focus on options that are being experimented with in the international and domestic field and that are targeted towards protecting the interests of posterity. The objective has been to explore which steps can be taken for moving forward with domestic action, in order to put the moral responsibility towards future generations into practice through legal efforts.

The notion that the responsibility to protect posterity should be put on the state, which Weiss gives voice to, has been used to categorize the models studied in the paper. In order to fulfill that responsibility, the state can either act through state institutions and authorities or encourage public participation and action in the courts.

When preparing this study it became clear that none of the options would be sufficient by itself to provide an adequate protection of the interests of posterity. In order to meet the objective of sustaining the welfare and well being of all generations, a comprehensive approach is needed, where intergenerational equity permeates practically all legislation, not only that which deals with traditional environmental protection. One of the options did however stand out: the establishment of a strong constitutional protection of the environment for the benefit of future generations.

Strong constitutional provisions protecting future generations can support and function as a basis for practically all the other options. They give weight to Ombudsmen or Commissioners when carrying out their tasks, they are important (although not crucial) for public participation, and can facilitate innovative action in the courts. Moreover, constitutional protection is essential for influencing forthcoming legislation through the process of a Constitutional Council or Council on Legislation. It is also clear that a strong constitutional protection could have many additional benefits; it provides a safety net for cases that fall outside the scope of existing legislation and contributes to raising the status of environmental values and

future generations. Moreover, constitutional provisions are valuable for guiding the application of existing rules and can direct future policies and legislation. It has also been shown that it is of vital importance that constitutional provisions are clearly defined so that they may function in the desired way. They must not provide another fuzzy and vague general aim, but rather, represent an actual right that can be used to challenge decisions that risk harming the environment and violating the rights of people living today, as well as in the future. In addition, the constitutional provisions must be clear enough to offer predictability and uphold the rule of law.

If a protection of posterity is desired, a substantive right to a healthy environment should be combined with taking steps for creating institutions and encouraging action to put the protection into practice. For this purpose, establishing an Ombudsman for future generations can be a useful tool. As was discussed in the examples of Hungary and Israel, giving the Ombudsman a sufficiently broad mandate, enough independence and powers that are adequate for effectively carrying out the task can facilitate a successful result. If these requirements are met, the institution has a large potential to contribute to safeguarding the environment for future generations. Moreover, the Ombudsman can work as a watchdog for the interests of posterity and contribute to promoting the status of future generations in the public debate.

In addition to the parliament establishing institutions for protecting future generations, an increased opportunity for the public to participate in decision-making processes and legal matters can contribute to putting a protection of posterity into practice. As has been explained in this thesis, increased public participation will function both in a precautionary manner, by producing better decisions, and be of importance when errors and faults have already taken place, by allowing the public to bring action against measures and activities that are harming the environment and violating the right of present and future generations to enjoy a healthy environment. Thereby, the public can act as a guardian for future generations. The *Minors Oposa* case is a good example of how action by civil society can contribute to safeguarding the interests of posterity.

In this thesis I have acknowledged that an increased protection of posterity is not completely problem-free. Conflicts are bound to arise between the need to protect future generations and the need for poverty eradication in the global south today. Conflicts between the need for intergenerational equity and the need for predictability and preventing abuse of state power for members of the present generations are also likely to occur. There is also uncertainty regarding the actual needs of future generations, and how our actions will in fact contribute to meeting those needs.

In spite of these problems, implementing measures to protect posterity is imperative if future generations are to have equal opportunities to make as good of a life for themselves on this planet as members of the present generation have had, and members of the present generations have a moral

responsibility to ensure that they do. Given the gravity of the risks that our way of life poses for our children and grandchildren, this generation needs to redefine how we think about development, resource management and their long-term consequences.

Looking forward at the future of intergenerational equity, there is support suggesting that the legal development is moving towards a more long-term type of thinking and decision-making. The increased recognition of intergenerational equity in international instruments, case law and constitutions from around the world is pointing in that direction. The developments within international environmental law and human rights law also support such an interpretation.

However, there are also indications of the opposite. The decision to terminate the Commission for Future Generations in Israel, for example, was not a step in the right direction for an increased protection of posterity. Moreover, the individual right for predictability is still often given priority over concerns relating to the environment, future generations and the global commons. Similarly, the need for economic growth is high on the agenda in countries around the world. When comparing at the astronomical financial commitments that have been made to combat the current financial recession with the commitments that countries are willing to make in order to solve the climate crisis, it becomes clear that immediate consequences are prioritized in the political decision-making.¹⁶⁰

The former Secretary General of the UN, Boutros Boutros-Ghali said, "*without protection of the environment, the basis of human survival will be eroded*".¹⁶¹ Solving the problem of resource degradation and environmental damage is of fundamental importance for our future on this planet. No generation has the right to inflict such damage to the environment that the wellbeing of their children and grandchildren is jeopardized.

¹⁶⁰ See for example statement by Stefan Singer of WWF at: <http://features.csmonitor.com/environment/2008/11/13/financial-crisis-threatens-climate-change-momentum/>

¹⁶¹ In Turner, 2004, p. 301.

Bibliography

- Allen, T., "The Philippine Children's Case: Recognizing Legal Standing for Future Generations", pp. 713-741 in *The Georgetown International Environmental Law Review*, 1993-1994.
- Birnie, P. and Boyle, A., *International Law and the Environment (second edition)*. Oxford: Oxford University Press, 2002.
- Bosselmann, K., "The Way Forward: Governance for Ecological Integrity", pp. 319-332 in Westra, L., *et al* (ed.) , *Reconciling human existence with ecological integrity*. London: Earthscan, 2008.
- Bruch, C., Coker, W., VanArsdale, C., "Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa" pp. 131-211 in *Columbia Journal of Environmental Law*, 2001.
- Collins, L., "Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance", pp. 81-140 in *The Dalhousie Law Journal*, 2007.
- Cordonier Segger, M.C., Khalfan, A., *Sustainable Development Law. Principles, Practices and Prospects*. Oxford: Oxford University Press, 2004.
- De-Shalit, A., *Why Posterity Matters*. London: Routledge, 1995.
- Farber, D., Hemmersbaug, P., "The Shadows of the Future: Discount Rates, Later Generations and the Environment", pp. 267-304 in *Vanderbilt Law Review*, volume 48, 1993.
- Gillespie, A., *International environmental law, policy and ethics*. Oxford: Oxford University Press, 1997.
- Hubacek, K., Mauerhofer, V., "Future generations: Economic, legal and institutional aspects", pp. 413-423 in *Futures*, volume 40, 2008.
- Intergovernmental Panel on Climate Change, *Climate change 2001 : the scientific basis : contribution of Working Group I to the third assessment report of the Intergovernmental Panel on Climate Change*. New York : Cambridge University Press, 2001.
- Jávör, B., "Institutional protection of succeeding generations - Ombudsman for Future Generations in Hungary", pp. 282-298 in Tremmel, J.C. (ed.), *Handbook of Intergenerational Justice*. Cheltenham: Edward Elgar Publishing, 2006.
- Lowe, V., "The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?" pp. 207-226 in Byers, M. (ed.), *The role of Law in International Politics: essays in international relations and international law*. New York: Oxford University Press, 2000.
- Malhorta, A., "A Commentary on the Status of Future Generations as a Subject of International Law", pp. 39-50 in Aguis, E. *et al* (ed.), *Future generations and international law*. London: Earthscan Publications, 1998.
- Mayeda, G., "Where should Johannesburg take us? Ethical and Legal Approaches to Sustainable Development in the Context of

- Morgan-Foster, J., Third Generation Rights: "What Islamic Law Can Teach the International Human Rights Movement", pp. 67-116 in *Yale human rights and development L.J.* Volume 8, 2005.
- Nilsson, A., "Miljöorganisationer i miljödomstolarna: Gör de skillnad?" pp. 237-259 in Tegner Anker, H., Egelund Olsen, B. (ed.), *Miljøretlige emner: Festskrift til Ellen Margrethe Basse*. Copenhagen : Jurist- og Økonomforbundets forlag, 2008
- Nozick, R., *Anarchy, State and Utopia*. Oxford : Blackwell, 1974.
- Parfit, D., *Reasons and Persons*. Oxford: Oxford University Press, 1987.
- Persson, E., *What is wrong with extinction?* Lund: Lund University, 2008.
- Rawls, J., *A theory of justice*. New York: Oxford University Press, 1972.
- Redgewell, C., *Intergenerational trusts and environmental protection*. Manchester: Manchester University Press, 1999.
- Sands, P., "Protecting Future Generations: Precedents and Practicalities" pp. 83- 91 in Aguis, E. *et al* (ed.), *Future generations and international law*. London: Earthscan Publications, 1998.
- Shoham, S. and Lamay, N., "Commission for Future Generations in Knesset: lessons learnt", pp. 244-281 in Tremmel, J.C. (ed.), *Handbook of Intergenerational Justice*. Cheltenham: Edward Elgar Publishing, 2006.
- Skagen Ekeli, K., "Principle of liberty and legal representation of posterity" pp. 385-409 in *Res Publica*, 2006.
- Skagen Ekeli, K., "Green Constitutionalism: The Constitutional Protection of Future Generations", pp. 378-401 in *Ratio Juris*, Volume 20, 2007.
- Stern, N., Speaking notes from the launch presentation of the Stern Review Report on the Economics on Climate Change. Accessible at http://www.hm-treasury.gov.uk/sternreview_index.htm.
- Strömberg, H., Lundell, B., *Sveriges författning*. Lund: Studentlitteratur, 2004.
- Taylor, P., *An ecological approach to international law: responding to the challenges of climate change*. London: Routledge, 1998.
- Tremmel, J.C., "Establishing intergenerational justice in national constitutions" pp.187-214 in Tremmel, J.C., *Handbook of Intergenerational Justice*. Cheltenham: Edward Elgar Publishing, 2006.
- Turner, S., "The Human Right to a Good Environment - The sword in the stone" pp. 277-301 in *Non-State Actors and International Law*, Volume 4, Number 3, 2004.
- Weiss, E., *In Fairness to Future Generations*. Tokyo: The United Nations University, 1988.

- Weiss, E., "Our Rights and Obligations to Future Generations for the Environment", pp. 198-207 in *The American Journal of International Law*, Volume 84, 1990.
- World Commission on Environment and Development, *Our Common Future*. Oxford: Oxford University Press, 1987.

Swedish Public Records:

- Ds 2004:29, Århuskonventionen.

Electronic sources:

- *Action and Communication Network for International Development*:
<http://www.alternatives.ca/article3932.html>
Consulted 2009-06-22.
- *Haaretz Daily Newspaper*:
<http://www.haaretz.com/hasen/spages/936023.html>
Consulted 2009-06-15.
- *National Human Rights Institutions Forum*:
<http://www.nhri.net/NationaldataList.asp>
Consulted 2009-07-10.
- *Official website of the French Constitutional Council*:
<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/le-conseil-constitutionnel/le-conseil-aujourd-hui/presentation-generale/presentation-generale.206.html>
Consulted 2009-06-17.
- *Official website of the Parliamentary Commissioner for Future Generations, Hungary*:
<http://www.jno.hu/en/?&menu=guideline>
Consulted 2009-06-15.
- *Official website of the Sámi parliament*:
<http://www.sametinget.se/7364>
Consulted 2009-04-01.
- *Official website of The Knesset Commission for Future Generations*:
http://www.knesset.gov.il/sponsorship/future/eng/future_index.htm
Consulted 2009-06-15.
- *The Christian Science Monitor*:
<http://features.csmonitor.com/environment/2008/11/13/financial-crisis-threatens-climate-change-momentum/>
Consulted 2009-07-20.

Table of Cases

The European Court of Human Rights:

- Judgement from The European Court of Human Rights, 12/9/1994. *Case of López Ostra v. Spain*.
- Judgement from The European Court of Human Rights, 19/02/1998. *Guerra and Others v. Italy*.

The International Court of Justice:

- *Maritime Delimitation in the Area Between Greenland and Jan Mayen* (Denmark v. Norway), Separate Opinion of Judge Weeramantry, 1993.
- *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgement of 20 December 1974 in the Nuclear Tests* (New Zealand v. France), Dissenting Opinion of Judge Weeramantry, 1995.
- *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion, 1996.
- *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Separate Opinion of Judge Weeramantry, 1997.

The Supreme Court of the Philippines:

- *Minors Oposa v. Secretary of the Department of Environment and Natural Resource*, 1993.