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The Struggle Is Now

Why We Should Be Cautious About Granting Present Rights to Future Generations

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The appeal to future generations as a means to legitimize climate litigation is growing. The idea of advocating for the rights of future generations is closely linked to the recognition of the human right to a healthy environment (HR2HE); this right is seen as a *conditio sine qua* for the existence of future generations. However, this appeal – and the conceptual connection it entails –raises various questions. Is it feasible to distinguish between present and future generations in the context of the climate crisis? Can all future people be meaningfully treated as a single, homogenous category? What rights, if any, do future generations have? And who can speak on their behalf? This blog post offers a preliminary analysis of the issue, reflecting the key arguments presented during the workshop on HR2HE and IP.

While protecting the planet for future generations is crucial, the legal invocation of future generations remains unclear and inconsistent. This blog post will briefly discuss this inconsistency by (i) arguing that "future generations" do not constitute a coherent group of (present) rightsholders; (ii) contending that the consequences of advancing a legally vague approach to future generations and future generations' rights need further analysis; (iii) questioning whether granting rights to future generations is an adequate means to tackle the climate crisis.

Future generations?

The appeal to future generations seems to be increasingly presented as an established and accepted concept. It may then appear counterintuitive and unpopular to look critically at this "almost-sacred-entity". However, we must define this category in order to use it consistently in the legal domain.

Future generations are often invoked without further specification. In other instances, there is plenty of discussion over what constitutes future generations: present children, the following generation(s), or those yet unborn?

This inconsistency and – at times inaccuracy – can also be exemplified by several quotations on the famous Urgenda case, portraying it as a decision in which future generations' rights were central. Contrary to what is often suggested in the literature, the Dutch Supreme Court did not rely on future generations' rights to decide Urgenda; it upheld the arguments put forward by the Court of Appeal, stating that greenhouse gas emissions are a current-generation issue (n. 4.7 of the decision).

A more detailed analysis of the usage of future generations and future generations' rights, possible (in)accurate references to legal documents and case law falls beyond the scope of this blogpost. To further illustrate the allegedly inconsistent use of future generations, a reference can be made to a recent article by Aoife Nolan, where, investigating the relation between children's rights and future generations before courts, Nolan observes that future generations do not constitute a defined category within constitutional law. Moreover, she notes that *"[t]he specific scope of future generations and the extent to which they benefit from protection under IHRL [international human rights law] has always been unclear"*.

If future generations are to be conceived as rightsholder, it would require identifying distinct generational cohorts — those born in 10 years, 100 years, and so forth – whose rights may differ or even conflict. Yet such generational boundaries are impossible to draw.

Given these definitional challenges, "future generations" is often being considered as referring to indi-

viduals yet to be born. This approach indicates a group and makes it possible to make some broad predictions about future generations — they will exist, the planet will be warmer, and coastal areas might disappear. Within such a group, specifying its members remains uncertain; their societal position, values, political preferences, and living conditions are unpredictable. In the face of these unpredictable circumstances, making rights-based considerations is complex. Just as no present generation shares uniform rights, needs, or interests, neither will future generations show this homogeneity; defining them as a cohesive group is unrealistic and might be misleading.

A question may illustrate the problem: what cohesive legal interest could plausibly exist between an unborn child in Sweden and one in Guinea? While grouping present and future generations may make sense in extreme cases, such as planetary survival, other contexts require a more nuanced approach. Concerns for future generations in political and legal discourse must avoid using the notion of future generations as a rhetorical shield that deflects attention from current social and economic inequalities or the universal protection of fundamental rights. Intergenerational equity must go hand in hand with intragenerational justice. Addressing generational heterogeneity is essential for equitable climate action.

Which rights are given to future generations?

As pointed out above, the key issue in invoking future generations lies in their definitional ambiguity and their status as rightsholders. Specifically in constitutional adjudication, approaching the category "rightsholders" is crucial for balancing rights, assessing the constitutionality of state action, and enforcing obligations. This is equally important when balancing environmental human rights with, among others, intellectual property protection (see the following blog posts in this symposium for more on this topic). To handle rights rationally and proportionally, clarity is needed—but future generations remain too vague a category to qualify as (present) rightsholders. And even if we consider the not-yet-born, the core question remains: which rights belong to which rightsholders? This is neither trivial nor easy to answer.

In current discourse, it is often unclear whether future generations' rights are legally recognized or merely aspirational claims. Many references are vague, failing to distinguish between interests, moral rights, and legal rights. In addition, the assertion that future generations have at least minimum rights does not resolve this ambiguity. Defining such rights faces similar hurdles as the concept of future generations itself.

One contributing factor to this confusion is the misinterpretation of non-binding texts and case law, sometimes portrayed as granting future generations legal rights when they may not. The Maastricht Principles on the Human Rights of Future Generations, for example, while non-binding, are gaining attention and could influence interpretations of international law and domestic constitutional systems. According to these principles, future generations are not entitled merely to minimum rights; rather, they are said to possess the same rights as present generations, with equality and non-discrimination often invoked to support this claim.

Constitutional provisions are similarly subject to overinterpretation. While many claim that constitutions protect future generations' rights, research conducted by Araújo and Koessler shows that there is variation among constitutional texts, with most constitutions imposing state duties rather than granting future generations rights. In other words, there is no broad constitutional recognition of future generations as rightsholders.

This raises another issue, the so-called nonexistence argument. It is problematic to grantfuture generations the same rights as living individuals, as rights require justiciability. As Aiofe Nolan points out, balancing the constitutional rights and interests of future generations and present generations, especially when they conflict, is difficult if the scope of future generations' rights is unclear. Beyond justiciability, recognizing future generations' rights would impact foundational principles of constitutional law, including the separation of powers and democracy.

Within the framework of constitutional adjudication, rights are legal norms with specific content, holders, and addressees, and they require justiciability to ensure protection and promotion. Recognizing future generations as rightsholders could lead to hierarchies between rights, potentially undermining certain rights, such as social rights. Moreover, given the uncertainty about the future, predicting potential conflicts between rights is nearly impossible, leading to complex and endless legal debates that could dilute the current legal meaning and effectiveness of rights.

From another perspective, it is crucial to distinguish between rights as concrete subjective entitlements (held by individuals) and rights as abstract legal norms embedded within a legal system. On the one hand, specific rights (held by individuals) can conflict with other rights, constitutional values, and public interests. These conflicts are typically resolved by administrative bodies or, ultimately, by courts, which interpret abstract legal provisions while adjudicating cases. These conflicts may involve violations or risks to rights, leading to reparations, injunctions, or prohibitions.

On the other hand, rights can also be analyzed as abstract legal norms, which may also come in conflict with other legal goods or norms at a similarly abstract level. In this context, rights may either trump other legal goods or face justified and proportional restrictions, such as in budgetary priorities or public policy design. These abstract conflicts can lead to legislative limitations on rights, often subject to constitutional review in Western democracies.

Constitutional theory and practice cannot accommodate the simultaneous and equal existence of rights for both present and future generations as specific subjective rights held by individuals. Legal rights held by individuals require an existing rightsholder, and while legal fictions, like the *nasciturus*, can extend protection in exceptional cases, they cannot apply to the vague category of future generations. As abstract norms, rights are there to be held by all subjects existing within the legal system, whether in the present or future.

While the notion of future generations' rights is rhetorically appealing, taking it seriously reveals several critical challenges. First, we cannot predict nor enforce rights for non-existent, unknown individuals. Second, recognizing these rights as present rights held by future individuals would render governance and societal functioning unworkable, as every action or inaction could violate someone's rights. Adding the idea of reparations further complicates this already untenable scenario. Although law and legal theories evolve – evident in the progressive recognition of social rights or the protection of the unborn – it currently seems legally unviable to grant future generations the same status as subjective rightsholders as actual individuals. Future legal developments may introduce new categories like "prospective" rights, but for now, this approach is not feasible.

The empty allure of future generations

The previous discussion outlined the challenges in defining future generations and argued that even with a concept of future generations as those yet to be born, the category may not solve the underlying problems. Additionally, the concept of future generations can create the illusion of homogeneity, ignoring the inequalities within each generation, especially under the current legal and economic systems.

Two other key aspects should be pointed out: (i) recognizing future generations' rights does not address the structural causes of climate change, and (ii) it could reinforce the idea that climate change is a future problem rather than a pressing present issue.

Granting rights to nature and future generations may seem like a converging strategy, but they are not necessarily aligned. A central rationale for recognizing the rights of nature is that the environmental crisis, driven by climate change and biodiversity loss, stems from the anthropocentric logic of our economic and legal systems. These systems, based on rights, property, and exploitation, enable practices that harm the planet. While factors like population growth contribute to ecological degradation, the deeper issue lies in the need to move away from extractive and exploitative paradigms. Recognizing future generations' rights

does not challenge the anthropocentric logic that rights of nature aim to address. The current legal and economic systems have failed to promote sustainability, including in the context of intellectual property protection, as will be discussed in the following posts from this symposium. Therefore, granting the same rights to future generations is unlikely to change that.

It is true that advocates for future generations' rights often emphasize intergenerational equity, including proposals to limit the rights of present generations to safeguard the rights of future generations. However, this emphasis does not directly tackle the causes of climate change or improve our relationship with nature.

First, it is unclear how the focus on future generations' rights would lead to a fundamental shift in our economic system or whether present rights restrictions would effectively address climate change. Second, each future generation eventually becomes the present generation relative to the next generation. How would this ongoing cycle of restrictions be calculated? My question can be better understood in the light of assertions like this one: *"[w]hile the rights of children who are present on Earth require immediate urgent attention, the children constantly arriving are also entitled to the realization of their human rights to the maximum extent."* For each present generation there would be a future generation entitled to the maximum realization of their human rights. In fact, it may be time to reassess the premise of "maximum extent" rights, especially in light of the urgent need for radical transformations in our current economic system.

I believe Matthias Petel's critique of rights of nature largely applies to future generations' rights, though the latter pose a unique set of problems. The discourse supporting future generations' rights often lacks clarity, as it draws on various legal, philosophical, political, and even religious/spiritual foundations that are not always explicitly stated. These diverse bases can serve different ideologies and goals. Without substantive considerations, future generations' rights risk reinforcing the structural causes of the problem rather than addressing them.

Finally, invoking future generations creates the illusion that climate change is a distant problem—something that still lies ahead and can be dealt with in due time. In reality, it is an urgent crisis of the present, directly affecting those alive today. Moreover, framing the issue as a conflict between present and future generations distracts from the deeper and more pressing inequalities that exist within generations—between rich and poor, the Global North and South, and across social classes. These divisions shape not only who suffers most from climate impacts today but also who will bear the brunt of those consequences in the future. Future generations will certainly inherit many of these injustices, but the real struggle is already happening within our own time.

Concluding remarks

This blogpost aimed to address major inconsistencies in using the concept of future generations' rights within climate discourse. First, it highlighted the vagueness of future generations as a category and argued that recognizing future generations' rights creates unsolvable legal issues, particularly in determining who the rightsholders are and how to balance conflicting rights. Second, it critiqued the romanticized view of future generations' rights, which preserves current power structures and overlooks unequal responsibilities and impacts of climate change. This, in turn, risks perpetuating exploitative relations with nature and inequalities within generations.

The goal is not to undermine future generations' protection but to push for legal consistency, particularly in constitutional law. While future generations' concerns can positively shape law, granting (present-day) rights to future generations is not feasible within the current legal framework. Instead, we should focus on sustainable development and equity without romanticizing future generations' rights in the climate discourse.

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