

Intergenerational equity: implementing the principle in mainstream decision-making

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'We borrow environmental capital from future generations with no intention or prospect of repaying ... We act as we do because we can get away with it: future generations do not vote; they have no political or financial power; they cannot challenge our decisions.'

Brundtland Report *Our Common Future* 1987

Introduction**

States have adopted a number of international agreements referring to 'present and future generations'. Many of these relate specifically to the environment, and at least nine are binding on the United Kingdom.¹ This clearly indicates that the principle of intergenerational equity (IGE) is influential enough in international negotiations to encourage decision-makers to include references to protecting the interests of present and future generations in legal texts. At a national level there are several examples of both primary and secondary legislation where reference to 'future generations' is made;² this is further substantial evidence that UK legislators too have had such a vision.

Safeguarding the interests of young and future generations is one way of expressing the principle of IGE both in theory and practice and goes a long way towards putting the issue on the agenda of legislators, negotiators, politicians and civil society alike. This article argues that the principle of IGE, which builds on the thinking of prominent philosophers, can be recognised as a live principle that has reached the statute books and international negotiating tables, offering both a written realisation of the theory and obliging states to incorporate it into mainstream decision-making.

However, the question remains as to how IGE is implemented. What steps that can be taken to safeguard

the interests of future generations without knowing who those future generations might be and what they might wish? This philosophical conundrum has the potential to render the task impossible. That is not to suggest, however, that the task cannot be achieved, and this article offers a simple overview of how IGE could be implemented in mainstream decision-making in the United Kingdom. It is argued that its integration within the three spheres of governance – the legislature, executive and judiciary – must first be considered. Drawing on examples that have been used to good effect internationally as well as domestically, the article suggests how to learn from these and, by way of analogy, how the United Kingdom might strive to take steps in a similar direction.

This could be regarded as the right time to consider the practical implementation of IGE in the United Kingdom, not least because of the impending demise of the Sustainable Development Commission (SDC).³ The SDC advised the UK government on how to fulfil its obligations to promote and implement the principle of sustainable development (SD), although its influence remains questionable; the view was expressed in this journal that the decision to axe the SDC 'is predictable in that it is unclear that its impact over the past decade has justified a place for it in any governmental structure'.⁴ Nevertheless, its absence will result in a gap in the UK political system such that the SD principle is at risk of being left out of policy-making altogether.

It is hoped that offering this review and supplementary suggestions might lead to wider institutionalisation of the rights of future generations not only in the United Kingdom but in countries the world over. The author welcomes responses and further (lively) debate about the practical application of IGE, including additional examples of where the principle is successfully being implemented.

Context

In the late 1980s, the World Commission on Environment and Development (now widely known as the Brundtland Commission) published a report known as the 'Brundtland

* Think2050 – the intergenerational equity advocacy platform <http://think2050.org/>. The views expressed in this paper reflect Kirsty's own opinions and do not represent the Youth Advisory Panel nor do they reflect the views of DECC.

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1 P Roderick *Taking the Longer View: UK Governance Options for a Finite Planet* (Report for the Foundation for Democracy and Sustainable Development and WWF-UK London December 2010) 'Future Generations Recognised in Domestic and International Legislation' table 1 pp 13–14 www.fdsd.org/2010/12/taking-the-longer-view/.

2 An example can be found in the legislation relating to Natural England and the Marine Strategy Regulations 2010. See eg Roderick *Taking the Longer View* (n 1) p 15.

3 Environmental Audit Committee (2011) *Embedding Sustainable Development across the Government, after the Secretary of State's Announcement on the Future of the Sustainable Development Commission First Report of Session 2010–2011* (HC Paper (2011) 504) full report www.publications.parliament.uk/pa/cm201011/cmselect/cmenvaud/504/504.pdf.

4 B Pontin 'The Royal Commission on Environmental Pollution' (2010) 22 ELM 3 103.

Report', entitled *Our Common Future*.⁵ The first reference in that report to 'sustainable development' states: 'Humanity has the ability to make development sustainable to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs'.⁶

It is well understood from this definition that the notion of SD incorporates a safeguard for future generations. The duty to ensure that the present generation's activities (such as resource use) do not compromise the subsequent generation's ability to share equally in the use of that resource is widely accepted as a cornerstone of IGE. Indeed, in his recent separate Opinion in *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Cançado Trindade J states that '[s]ustainable development disclosed an ineluctable temporal dimension, in bringing to the fore present and future generations altogether'.⁷

The idea of 'responsible use of resources' has been relevant to decision making, at even the most local level, for centuries. The story of the oak beams of New Hall College, Oxford, often traced back to the anthropologist Gregory Bateson (1904–80) and now raised to almost mythological heights, perfectly illustrates this.⁸ Founded in 1379, New Hall College is one of the oldest of the Oxford colleges. Gregory Bateson told the story of its great dining hall being built with huge oak beams to form the roof; an extract follows.⁹

A century ago, some busy entomologist went up into the roof of the dining hall with a penknife and poked at the beams and found that they were full of beetles. This was reported to the College Council, which met the news with some dismay, beams this large were now very hard, if not impossible to come by. "Where would they get beams of that calibre?" they worried.

In response to this worry and the need to replace the beams the College Forester relayed the information that had been passed down through the generations that when the College was built a grove of oak trees had been planted to mature and when needed, be used to replace the oak beams in the dining hall, because "oak beams always become beetly in the end".

While the validity and exact details of the story have been questioned, it nonetheless serves to illustrate what 'sustainable development' can mean in practice. It can also be used as an example of how IGE can be applied to

the decision-making processes that affect every day activities, and how these decisions will often have an impact on succeeding generations.

Within each sphere of governance, decisions must be made about legislation and policy on myriad issues ranging from the economy, health, education and the environment. The impact of each decision on society, a society made up of people who are governed by their representatives, should be carefully considered, especially where there is the potential for a decision to have a negative impact. If a decision does have such an impact, constituents can hold the government to account through a number of means, such as at a general election (usually held every four to five years), or by pursuing the matter in the courts and seeking a judicial review. In theory, then, it should be in the government's interests to govern in a responsible manner that benefits society.

The situation differs somewhat if we consider adding IGE to the decision-making equation. If we attempt to alter the equation, it should theoretically follow that the government will consider the impact of any decision it takes on succeeding generations before taking it. In practice, however, other than a sense of moral duty there is little by way of an incentive for the UK government to represent the interests of the unborn, especially as there is no mechanism by which the unborn can hold that government to account. Future generations do not participate in general elections or lobby Parliament to represent their interests in the legislature, nor can they submit an application for a judicial review. Consequently, it might not be a priority for elected members of Parliament to consider safeguarding the rights of a constituency that will not be able to vote for them. If IGE is to be implemented in a representative democracy such as the United Kingdom, this deficit in the decision-making process must be addressed.

Intergenerational equity in theory

Contemporary and past philosophers and social theorists have written and discussed the philosophical definition of IGE, and many logicians have studiously prepared logical propositions for the soundest arguments to support these definitions.¹⁰ This article does not offer its own definition of IGE but rather simply draws on the works of leading academics in the field, upon which the substantial arguments (about implementation) are developed. Edith Brown Weiss, a leading thinker on this subject, offers the following:

The basic concept is that all generations are partners caring for and using the Earth. Every generation needs to pass the Earth and our natural and cultural resources on in at least as good condition as we received them. This leads to three principles of intergenerational equity: options, quality and access.

5 Report of the World Commission on Environment and Development (1987) UN DOC A/42/427 (1987) <http://worldinbalance.net/pdf/1987-brundtland.pdf>.

6 *ibid* ch 1 'The Global Challenge' para 27 'Sustainable Development' p 24.

7 *Pulp Mills on the River Uruguay (Argentina v Uruguay)* 2010 ICJ (20 April 2010) (*Pulp Mills*); separate Opinion of Cançado Trindade J www.icj-cij.org/docket/files/135/15885.pdf.

8 The story about the oak beams is often attributed to the anthropologist Gregory Bateson; for example Brand, Stewart *How Buildings Learn: What Happens After They're Built* (Penguin 1994) pp 130–31.

9 Adapted from several sources including the Long Now Foundation; <http://atlasobscura.com/place/oak-beams-new-college-oxford>.

10 For example G B Asheim *Intergenerational Equity Annual Review of Economics* (2010) pp 197–222 <http://www.annualreviews.org/doi/abs/10.1146/annurev.economics.102308.124440?prevSearch=10.1146%252Fannurev.economics.102308.124440&searchHistoryKey=>

The first, comparable options, means conserving the diversity of the natural resource base so that the future generations can use it to satisfy their own values. The second principle, comparable quality, means ensuring the quality of the environment on balance is comparable between generations. The third one, comparable access, means non-discriminatory access among generations to the Earth and its resources.¹¹

There is also much literature that develops arguments around social choice theory, which is offered to resolve the 'normative question' of the conflict surrounding intergenerational distribution, and academics suggest that '[n]ormative analysis of intergenerational equity must combine sensitivity for the interests of people living in the present with respect for the interests of the large number of people that may exist in the future.'¹² Such a balancing act between establishing what is in the best interests of a present generation compared with the interests of a future generation often relates back to John Rawls and the 'veil of ignorance' theory.¹³ This idea is used as a means to tease out the various responses to establishing an IGE doctrine to which different generations would agree if they did not know when they would appear from behind the veil.

Many of these discussions offer invaluable theories as to how IGE can be defined and no doubt many of them have been influential in the international as well as domestic spheres of governance. Indeed, the references to 'protecting' or 'promoting' the 'rights' or 'interests' of future generations in both international and domestic law suggest that such theories have already been taken into account by negotiators and drafters of legislation. For instance, the UN Framework Convention on Climate Change, Article 3 states: 'Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities.'¹⁴

In addition, the UNECE Aarhus Convention offers two distinct references to future generations. The first is in the Preamble:¹⁵

Recognising also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.

and the second in Article 1:

Objective

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

It is especially relevant that references to future generations are made in environmental or climate change legal texts, because climate change is often seen as:

a test case for axiomatic analyses of intergenerational equity ... it is likely that the climate policies that the present generation chooses in the first decades of this century will be important for generations that live hundreds and thousands of years from now. Hence, normative literature on intergenerational equity should offer useful structure in the discussion of such policies.¹⁶

In addition to policy-makers appreciating and understanding the theory of IGE, it is important to consider how society as a whole can be guided by IGE principles, both in asking that its interests be represented in the policy-making process and also in every day activities. Consider that:

[a]xiomatic analyses of intergenerational equity and other systematic normative discussions of intergenerational distribution may promote normative reflections about intergenerational equity in society at large. If it becomes known that our actions appear not to lead to a good long-term outcome, according to some ethical norm, then people may adjust their behaviour by changing what they bequeath to their children, and by giving increased intrinsic value to nature.¹⁷

Although these international texts, influenced by normative literature, may contain distinct references to protecting the interests of future generations, there is little explanation of how states should adhere to these obligations. The remainder of this article discusses how some states have already begun to do so – and how the United Kingdom might do the same.

11 E Brown Weiss 'Climate Change, Intergenerational Equity, and International Law' (2008) *The Vermont Journal of International Law* Vol 9 pp 615–28. Originally published as Appendix D in E Brown Weiss *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Transnational Publishers Inc 1989) 345–51. The introduction for this reprinted edition has been newly added by the author p 624.

12 Asheim *Intergenerational Equity* (n 10) p 201.

13 J Rawls *A Theory of Justice* (Harvard University Press 1971).

14 UN Framework Convention on Climate Change art 3 http://unfccc.int/essential_background/convention/background/items/1355.php.

15 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus 25 June 1998) 38 ILM 517 (1999) (entered into force 30 October 2001) (Aarhus Convention) <http://www.unece.org/env/pp/documents/cep43e.pdf>.

16 Asheim *Intergenerational Equity* (n 10) p 218.

17 *ibid.*

Guardians for future generations

During the preparatory conference in the build up to the 1992 UN Conference on Environment and Development (UNCED), the delegates from Malta made a proposal to institute an 'official Guardian to represent posterity's interests'.¹⁸ This proposal was based upon the fundamental premise that 'future generations' by their very nature cannot represent themselves, and so a guardian must be appointed to speak on their behalf. As in other instances where guardians are appointed to represent those who are unable to or incapable of representing themselves,¹⁹ the law could establish a role for guardians to represent 'posterity'.

In the latest edition of *Should Trees Have Standing?*, Christopher Stone has included a chapter entitled 'Should We Establish a Guardian for Future Generations?', which sets about answering some of the main questions related to the proposal.²⁰ It is outside the scope of this paper to explore these arguments in more detail, important though they are. Suffice to say that Stone's analysis and expansion on the legal theory is valuable and should be read by others keen to further the debate on establishing guardians.

Hungarian Parliamentary Commissioner for Future Generations and the legislature

The Hungarian Parliamentary Commissioner for Future Generations (the Commissioner) has been in office since 2008, following his election by the unicameral Hungarian Parliament. The Commissioner is an environmental ombudsman, one of four ombudsmen in the country.²¹ The Hungarian Constitution enshrines the 'right to a healthy environment' and the Commissioner's principal responsibility is to safeguard that constitutional right.²² There are also examples around the world of the former existence of similar portfolios, or of portfolios still in existence, in Canada, Finland, Israel and New Zealand.²³

The Commissioner's powers and procedure are governed by primary legislation, in ss 27/A-H of Act LIX of 1993 on the Parliamentary Commissioner of Civil Rights (the Ombudsman Act).²⁴ In May 2009, the Commissioner

further specified the rules of his office's investigations by Resolution No 1/2009 (V 4).²⁵ The Office of the Commissioner is made up of four units: the Legal Department, Strategy and Science Department, Department for International Relations, and Coordination Department. Together, these departments assist the Commissioner in fulfilling his role.

The Commissioner is empowered to carry out investigations in relation to all issues that may affect citizens' constitutional rights to a healthy environment. These do not only concern typical issues pertaining to air, water, waste etc but also all cases with a likely impact on the long term sustainability of the environment in the broadest sense.²⁶

At the beginning of 2010 the Commissioner had received over 400 petitions from the public, and of those had completed 97 investigations, many of which focused on planning, noise and air pollution.²⁷ The Commissioner's reports, following investigation, are submitted to the relevant public bodies and he is also involved in legislative consultations and proposals.

On 25 February 2010, the Commissioner, Dr Sándor Fülöp, spoke at an event hosted by the UK Environmental Law Association, the Ministry of Justice, and the Foundation for Democracy and Sustainable Development (FSDS); the latter prior to the event had written about what the United Kingdom could learn from the Commissioner.²⁸ At the event, the audience learned more about the role of the Commissioner and debated the relative merits of looking to establish a similar portfolio in the United Kingdom.²⁹ A follow-up initiative, led by the FSDS, invited interested organisations and individuals to participate in a brainstorming session in April 2010, which led to the jointly commissioned WWF-FSDS options paper already mentioned.³⁰

The impending demise of the UK Sustainable Development Commission

The SDC was established in October 2000 to embed the principle of SD in the government's decision-making process and act as '[t]he Government's independent watchdog on sustainable development'.³¹ Its role and work have been wide-ranging and varied. Since its inception, it has been the body through which the UK government has addressed its SD commitments, and has offered advice on implementing the principle of SD at a national level.

In 2010 it was announced that the government would withdraw funding from the SDC. As was stated in a previous

18 Preparatory Committee for the United National Conference on Environment and Development, United Nations, *Principles on General Rights and Obligations* (Working Group III 4th Session) (New York 2 March–3 April 1992) A/CONF.151/PC/WG.III/L.8/REV.1/ADD.2 (21 February 1992).

19 Guardians of, for instance, the mentally impaired or children.

20 C Stone 'Should We Establish a Guardian for Future Generations?' in *Should Trees Have Standing? Law, Morality and the Environment* (3rd edn Oxford University Press 2010) pp 103–114.

21 The four Hungarian Parliamentary Commissioners are: Data Protection and Freedom of Information; National and Ethnic Minorities Rights; Future Generations; and Civil Rights. See www.obh.hu/indexen.htm.

22 Parliamentary Commissioner for Future Generations, Hungary <http://jno.hu/en/>.

23 Roderick (n 1) p 23 The Hungarian example will be looked at in more detailed as the one that offers the most detailed understanding of how such a role could work in practice.

24 See Parliamentary Commissioner's website for more details, and the text of, the Ombudsman Act: http://jno.hu/en/?menu=legisl_t&doc=LIX_of_1993.

25 See the Parliamentary Commissioner's website for more details on the Rules of Investigation: http://jno.hu/en/?&menu=legisl_t.

26 Taken from the Annual Report of the Hungarian Parliamentary Commissioner 2009.

27 Roderick *Taking the Long View* (n 1) p 24.

28 H Ward (November 2009) *Learning from the Hungarian Parliamentary Commissioner* published in the UKELA's electronic journal, e-law www.fdsd.org/wordpress/wp-content/uploads/UKELA-magazine-piece.pdf.

29 For details of the event see www.fdsd.org/2009/09/learning-from-hungarys-green-ombudsman/.

30 Roderick *Taking the Longer View* (n 1).

issue of ELM: '[t]he announcements triggered predictable responses from those who consider sustainable development to be a central issue for any government, and from others who never took the trouble to understand what sustainable development really involved'.³² This perhaps illustrates the diverging views of the SDC held by those inside and outside government.

Those who support its abolition argue that 'it will save money; sustainable development has been embedded in every department; it will avoid duplication; sustainable development is too important to delegate to an external body'.³³ In contrast, the House of Commons Environmental Audit Committee (EAC) has stated that the impending 'disappearance of the SDC ... will leave a gap in the structures for embedding sustainable development across Government'.³⁴ Such a 'gap' will create an uncertain time for government and civil society alike, during which it remains to be seen how SD will be 'embedded within' the UK's decision-making process, whether anything will be established to replace the SDC, and what the role and function of any such replacement will be.

If the UK government is to adhere not only to commitments made in international agreements to protect and promote the interests of future generations but also to be 'the greenest government ever',³⁵ the mechanisms by which SD and IGE will be implemented into mainstream decision-making must be seriously considered. It might be that a Parliamentary Commissioner for Future Generations would be appropriate in the UK legislative process; primary legislation would need to be enacted to bring this into being. Other suggestions have included establishing a 'future generations committee' in the House of Lords, where, as part of its scrutinising function, peers would review legislation through a future generations prism; or establishing a committee of both the Houses of Parliament which would provide a forum in which MPs and peers would together 'take the longer view'.³⁶

The Executive and decision making

It is suggested that the Executive – as the policy-driving sphere of governance – must ensure that IGE is integrated into its core decision-making role. As each secretary of state has a responsibility to promote the interests of his or her government department in a cabinet meeting, for instance, there are likely to be detailed deliberations over how best to represent the interests of, say, business and industry, as well as meeting the requirements of the environment. This discussion must also take into account

the interests of society as a whole and the resulting decision taken by the Prime Minister must address all of these – often competing – interests.

Without a secretary of state to represent future generations to the Executive, we must consider how and if their interests are represented at all. Policy decisions now being taken by the coalition government suggest that the interests of future generations are not being represented or considered. A recent government proposal relating to the country's forests provides a pertinent illustration. The Secretary of State for the Department of Environment, Food and Rural Affairs (Defra) announced a proposal 'to fundamentally reform the public forestry estate, with diminishing public ownership and a greater role for private and civil society partners'.³⁷ It is also relevant to note that the Public Bodies Bill, currently at committee stage in the House of Lords is: '[t]o make provision for conferring powers on Ministers of the Crown in relation to certain public bodies and offices, to confer powers on Welsh Ministers in relation to environmental public bodies, to make provision in relation to forestry [...]; and for connected purposes'.³⁸

The announcement about the forests was followed by the launch of a public consultation, offering society a chance to respond to the proposal.³⁹ Many of the objections voiced cited the need to protect the forests for the benefit of present and future generations.⁴⁰ On 11 February 2011, the government announced that: '[t]he planned sale of 15 per cent of state-owned forests will be put on hold . . . as they 're-examine the criteria' for disposing of them'.⁴¹ Finally, on 17 February, it was announced that the 'consultation was being scrapped and the relevant clauses in the Public Bodies Bill...removed'.⁴² The Defra Secretary of State announced 'if there is one clear message it is that people cherish their forests and woodlands and the benefits they bring'.⁴³ This is a fine example of civil society speaking up to protect the interests of present and future generations, which can arguably be construed as an attempt to fill the gap in the Cabinet where the interests of future generations are not being adequately considered by the Executive.

It is important to remove politics from this example, and look at the process relevant to this article. It would be improper simply to assert that a cabinet minister is incapable of thinking beyond a single parliamentary term to consider the impact of a decision on younger

31 For more details see www.sd-commission.org.uk/pages/about-us.html.

32 D Pocklington 'Industry Soundings' (2010) 22 ELM 144.

33 *ibid.*

34 Environmental Audit Committee *Embedding Sustainable Development* (n 3).

35 See the transcript of the announcement made by the Prime Minister (14 May 2010) to the Department of Energy and Climate Change www.number10.gov.uk/news/speeches-and-transcripts/2010/05/pms-speech-at-decc-50113.

36 Roderick *Taking the Long View* (n 1) p 28.

37 Defra *Forestry in England: A New Strategic Approach* (29 October 2010) www.defra.gov.uk/news/2010/10/29/forestry/.

38 Public Bodies Bill (HL 2010–2011) available 15 February 2011. www.publications.parliament.uk/pa/ld201011/ldbills/025/11025.1-7.html.

39 Defra Consultation 'Future of the Public Forest Estate' (opened 27 January 2011, closed 17 February 2011) www.defra.gov.uk/corporate/consult/forests/index.htm.

40 This received wide-ranging coverage. See the BBC report (23 January 2011) 'Celebrities Voice Opposition to Forests Privatisation' (23 January 2100) www.bbc.co.uk/news/uk-england-12261103.

41 BBC report 'Ministers Halt Some Forests Sale After Public Outcry' (11 February 2011) www.bbc.co.uk/news/uk-politics-12428814.

42 BBC News 'Government Performs U-turn on Forest Sell Off' (17 February 2011) www.bbc.co.uk/democracylive/hi/house_of_commons/default.stm.

43 *ibid.*

generations – and those yet to be born. However, the Public Bodies Bill and forestry example do call into question the processes by which the Executive takes policy decisions, and whether or not the interests of future generations are being adequately addressed.

Incorporating the interests of future generations within the Cabinet

There are two possible suggestions to overcome this inadequacy in the Executive decision-making process. The first could be to establish a portfolio within the Cabinet that would look out for the interests of future generations. This would not necessarily have to be a secretary of state with a department to run and churn out policy but could at least be an advocacy role filled by a member of the government.⁴⁴ This could feasibly be a member of the Commons or Lords who, in addition to his or her cabinet role, could also sit on the House of Lords/House of Commons Future Generations Committee as mentioned above.

The EAC, in its 2011 Report, suggested that:

[w]hile Defra has the expertise to help departments become more sustainable, it is not the best place from which to drive improved sustainable development performance across Government. After many years with the policy lead in this area, a different approach now needs to be taken, to provide greater political leadership for the sustainable development agenda. A new minister for sustainable development, ideally in the Cabinet Office, would provide a more effective base for driving action in departments.⁴⁵

Alternatively, the portfolio of each secretary of state could include a duty or responsibility to consider the long-term impact of any policy decision on future generations. The question would remain as to whom the Secretary of State would be answerable and how this 'responsibility' would be checked, but it is well worth considering as an option nonetheless.

A new approach for the judiciary

History informs us in many ways about our heritage, cultural development and how humanity has progressed through the ages to invent new technologies and make life-changing discoveries. The UK legal tradition learns from history through common law and applying precedence from cases already settled. The application of IGE is a relatively new approach for the judiciary to take, just as 10 or 15 years ago the application of environmental law principles was also new. There are notable instances where the judiciary has applied IGE in cases, and these can be seen as paving the way for other

judicial systems to consider how they might depart from the traditional process of looking back to interpret the will of national parliaments or UN representatives and instead look ahead in drawing conclusions:

International Law, which dates back to the early seventeenth century and the rise of the sovereign nation-states, has been spatially oriented. To the extent that it considers the temporal dimension, it focuses mainly on the relationship of the present to the past. Problems of global climate change, which focus on the relationship of the present to the future, demand that it turn to the future.⁴⁶

It is not just the problems of global climate change that require the judiciary to turn to the future in passing judgments, but the need to address other environmental and SD issues as well. In response to the challenge that faced – and arguably continues to face – the judiciary throughout the world in 2002, the UN commissioned a Symposium of Global Judges to be held in Johannesburg to speak 'decisively to the need for the institutions of government, including the judiciary, to do their part to ensure the long-term sustainability of human activity'.⁴⁷

In the introduction to the UNEP *Judicial Handbook on Environmental Law*, produced after the 2002 symposium, Weeramantry J stated that:

[i]nstitutions charged with responsibilities for the protection of the environment are therefore under a special duty to do what they can to avoid a situation where the judiciary is left unprepared to face this momentous challenge [...] Judges, as guardians of the rule of law, are uniquely positioned to give environmental law force and effect. They can bring integrity and certainty to the process of environmental protection, and help to ensure environmental responsibility and accountability within the government and the private sector.⁴⁸

The UNEP *Judicial Handbook* provides a thorough analysis of the many environmental law cases heard at the national level or in the International Court of Justice which apply environmental and SD principles, offering instructive judgments that could be applied, by way of analogy, in a range of national environmental law contexts. What follows draws on some, but by no means all, of the most important cases where IGE and the rights of future generations have been discussed in case law.

Public trust doctrine

In international law as early as 1893, the United States government argued in the Behring Sea Fur Seals

44 For instance Environmental Audit Committee *Embedding Sustainable Development* (n 3) pp 17–19.

45 *ibid* para 34 p 18,

46 Weiss *Climate Change* (n 11).

47 The Commission then published a report submitted to the UN: D Shelton and A Kiss *Judicial Handbook on Environmental Law* (UNEP 2005) Foreword, UN Environment Programme, Earth Print UK, www.unep.org/law/PDF/JUDICIAL_HBOOK_ENV_LAW.pdf.

48 *ibid* Hon C G Weeramantry 'Introduction – Judges and Environmental Law'.

Arbitration of 1893⁴⁹ that 'no possessor of property has an absolute title to it – his title is coupled with a trust for the benefit of mankind. . . . [T]hings themselves are not given him, but only the usufruct or increase – he holds the thing in trust for the present and future generations of man'.⁵⁰

In *Willoughby City Council v The Minister Administering the National Parks and Wildlife Act*⁵¹ the applicant brought a challenge to the decision of the National Parks and Wildlife service to lease parts of the recreation reserve for private development. Stein J said:

... national parks are held by the State in trust for the enjoyment and benefit of its citizens, including future generations. In this instance the public trust is reposed in the Minister, the director and the service. These public officers have a duty to protect and preserve national parks and exercise their functions and powers within the law in order to achieve the objects of the National Parks and Wildlife Act. (emphasis added)

Two Sri Lankan cases, *Gunaratne v Ceylon Petroleum Corporation* and *Premachandra and Dodangoda v Jayawickreme and Bakeer Markar*⁵² illustrate that the public trust concept is based upon the notion that the present generation holds on trust natural resources of the earth for future generations. 'When applicable as a legal principle, public trust contemplates that certain things, such as natural resources and the exercise of public power, are held by governments in trust for the citizenry and must be used for the public benefit'.⁵³

Natural and cultural heritage rights

The UN Educational Social and Cultural Organisation (UNESCO) Convention⁵⁴ recognises that items of cultural and natural heritage are increasingly threatened, not simply by natural decay but also by changing social and economic conditions. The convention calls for participation in the protection of cultural and natural heritage by the international community. Under the convention, each state party 'ensures the identification, protection, conservation, presentation and transmission to future generations (emphasis added) of the natural heritage situated in its territory'.

In the *Commonwealth of Australia v The State of Tasmania*,⁵⁵ the High Court of Australia had to consider

whether the convention duties contained legal obligations to protect sites. The court decided, ruling 4–3, that obligations of the convention were legal in nature.

International Court of Justice

In *Gabcikovo-Nagymaros Project (Hung v Slov)*, the case concerning the Gabcikovo Nagymaros Project of locks and dams on the Danube river, the principle of SD was given much attention by the court, which recognised as a 'developing norm' of environmental law that the 'need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development'.⁵⁶

In his dissenting opinion in the *Nuclear Tests Case (New Zealand v France)*, Weeramantry J argues that '[t]his Court, as the principle judicial organ of the United Nations, empowered to state and apply international law, with an authority matched by no other tribunal must, in its jurisprudence, pay due recognition to the rights of future generations'.⁵⁷

Further, in the recent *Pulp Mills* case Cançado Trindade J offered a separate Opinion analysing in detail how IGE must be applied in judicial deliberations:

[n]owadays, in 2010, it can hardly be doubted that the acknowledgment of inter-generational equity forms part of conventional wisdom in International Environmental Law...It is not surprising that, in the course of the proceedings before the ICJ in the present case...inter-generational equity has significantly been kept in mind by both contending parties, Uruguay and Argentina, in their arguments presented to the Court in the written and oral phases.⁵⁸

Intergenerational Equity in the Philippines Supreme Court

Perhaps the most cited case addressing the rights of future generations is *Minors Oposa v Secretary of State for the Department of Environment and Natural Resources*.⁵⁹ In this case the claimants – a group of children – sought an order to the government to discontinue existing and further timber licence agreements. The claimants alleged that deforestation was causing environmental damage which affected not only young but also future generations and they sought to establish standing for both present and future generations. The government argued that the claimants were not successful in stating a cause of action and 'that the issues raised were non-justiciable political ones'. The trial court dismissed the complaint but the claimants appealed to the Supreme Court.

49 *Behring Sea Fur Seals Arbitration (Great Britain v United States)* Moore's International Arbitrations (1893) 755.

50 J B Moore *History and Digest of the International Arbitrations to which the United States has been a Party* (1989) Vol I p 833.

51 *Willoughby City Council v The Minister Administering the National Parks and Wildlife Act* (1992) 78 LGERA 19 (Australia).

52 *Gunaratne v Ceylon Petroleum Corporation* (1996) 1 Sri L R 315 (Sri Lanka); *Premachandra and Dodangoda v Jayawickreme and Bakeer Markar* (1993) 2 Sri L R 294 (Sri Lanka).

53 Shelton *Judicial Handbook* (n 46) p 23.

54 UNESCO Convention for the Protection of the World Cultural and Natural Heritage (1972).

55 *Commonwealth of Australia v The State of Tasmania* No C6 of 1983, 46 ALR 625, 68 ILR 266.

56 *Gabcikovo-Nagymaros Project (Hung v Slov)* 1997 ICJ 7 (25 September 1997); full judgment at www.icj-cij.org/docket/files/92/7375.pdf.

57 *Nuclear Tests Case (New Zealand v France)* ICJ Reports 1995 Dissenting Opinion of Weeramantry J p 17.

58 *Pulp Mills*; Opinion of Cançado Trindade J (n 7) p 34.

59 *Minors Oposa v Secretary of State for the Department of Environment and Natural Resources* [30 July 1993] 33 ILM 173 (1994) www.jstor.org/pss/20693894.

The Supreme Court reversed the trial judge's ruling, and held that the standing was granted to the claimants who were able to 'represent their yet unborn posterity'. It was also held that the claimants had adequately asserted a right to a balanced and healthful ecology, based on the right expressed in the Constitution.⁶⁰

It is worth considering whether or not a claimant in the United Kingdom would be able to bring a case on behalf of future generations, as was successfully achieved in *Minors Oposa*. Just as Christopher Stone famously asked 'should trees have standing', arguably establishing some of the core foundations upon which environmental law cases are brought, the time is now ripe for us to consider 'should future generations have standing'. While the case law of the Philippines' Supreme Court does not set precedent for UK courts, this and the developing body of international case law could help to establish a persuasive argument for a UK claimant to bring a case on behalf of future generations.

The precautionary principle

When applying and interpreting environmental legislation and decisions that affect and could result in irreversible harm to ecosystems, biodiversity, marine habitats, resource use and depletion, and climate change, the precautionary principle⁶¹ must prevail if IGE is to be implemented. The widely used and understood definition of the precautionary principle was formulated at the 1992 Rio UNCED. Significantly, only a few years later, the ICJ stated that it 'may now be a principle of customary international law'.⁶²

When we consider the possible impacts of irreversible harm on future generations and the role of the executive and legislature in safeguarding their interests and rights, it could be argued that the precautionary principle should be applied when a decision is being made and not left to be made by the courts when reviewing a decision. Many decisions made today are likely to have long-term far-reaching consequences; it might not be enough for future generations to ask the judiciary to review a decision or hear a case where the precautionary principle has not been applied. By that time the harm might be permanent and the exercise simply an academic one. I would argue that it is more than important to apply the precautionary principle when arriving at a decision or scrutinising legislation – it is imperative.

The imperative to adopt such an approach goes beyond the international or national legal framework establishing guidance on how to apply the precautionary principle. The imperative is a moral one, which can – and must – guide the creation, application and enforcement of the law. Cançado Trindade J's recent separate Opinion

in *Pulp Mills* supports this assertion where he states: '[i]n my own understanding, it is not possible to conceive the legal order making abstraction of the moral order, just as it is not possible to conceive the advancement of science making abstraction of the ethical order either'.⁶³

Indigenous culture and IGE

The *UNEP Judicial Handbook* includes many references to examples of indigenous cultures practising IGE as part of everyday activities, and quotes the UN Special Rapporteur Fatma Zohra Ksentini who has stated that: 'In nearly all indigenous cultures, the land is revered; "Mother Earth" is the core of their culture. The land is the home of the ancestors, the provider of everyday material needs, and the future held in trust for coming generations'.⁶⁴ It is therefore instructive to consider some examples where indigenous communities have established principles or constitutional frameworks that protect the future for 'coming generations'.

The Confederation of the Six Nations of the Iroquois in North America adopted something called the *Gayanshagowa*, or Great Binding Law. This serves as the constitution of the confederation and defines the duties, rights, and qualifications of Iroquois lords. The *Gayanshagowa* states:⁶⁵

Look and listen for the welfare of the whole people and have always in view not only the present but also the coming generations, even those whose faces are yet beneath the surface of the ground — the unborn of the future Nation.

In addition, the Bemidji Statement outlines the commitment of indigenous peoples to establish a future generations guardian. It states:

By returning to the collective empowerment and decision making that is part of our history, we are able to envision a future that will restore and protect the inheritance of this, and future generations. Therefore, we will designate Guardians for the Seventh Generation.⁶⁶

This approach, where the well-being of the seventh generation is considered, should be seen as no less than enlightened. Its incorporation into mainstream UK political and legal decision-making should be explored and a new paper published in February 2011 by scientists from the University of Oxford and climate experts from the Hadley Centre argues for just that. The crux of the findings support the argument that climate modelling to the year 2050 may not be long-term enough and that experts should consider using scientific models that extend to

60 *ibid.*

61 Rio Declaration on Environment and Development, United Nations Conference on Environment and Development 3–14 June 1992) UN Doc A/CONF.151/5/Rev. 1 reprinted in 31 ILM 874 (1992).

62 Request for an Examination of Situation in Accordance with para 63 of Court's Judgment of 20 December 1974 in *Nuclear Tests (NZ v Fr)* 1995 ICJ 288 412 (Sept 22).

63 *Pulp Mills*; Opinion of Cançado Trindade J (n 7) p 26.

64 Ms Fatma Zohra Ksentini. Compare Shelton *Judicial Handbook* (n 46) p 5.

65 The Constitution of the Iroquois Nations *The Great Binding Law, Gayanshagowa*, art 28 www.constitution.org/cons/iroquois.htm.

66 Bemidji Statement on Seventh Generation Guardianship www.guardiansofthefuture.org/bemidji.

the year 2200.⁶⁷ The argument maintained here is that modelling the cumulative emissions to 2200 could provide a more appropriate way to frame scientific and evidence-based policy relating to carbon emissions. The paper also calls on policy-makers to frame policy-making decisions in light of the longer-term scientific climate model trajectories that are suggested. As a rule of thumb it is considered that a generation is made up of cycles of 20–25 years, thus between the present 2011 and 2200 there are about 190 years, or to put another way, seven to eight generations. It is just such a convergence of scientific ideas for climate modelling and the principles of the Bemidji Statement that could go a long way to support such enlightened long-term thinking in the UK.

A community in Devon, called Embercombe, already runs a council of decision-making modelled on the practice of looking forward to the seventh generation.⁶⁸ The councillors who represent the Embercombe community gather together to discuss and agree upon matters that affect the future of the community as a whole, in a process called the 'Circle of Law'. Traditionally, this practice has incorporated a symbolic representation of this approach to decision making, such as a small fire burning at the centre of the circle: often called the Children's Fire, this reminds those making decisions of the children of the community and their future.

Involving young people in the decision-making process

The younger generations will inherit the legacy of decisions made by those in power. This article has offered examples of how the rights and interests of young and future generations can be safeguarded by politicians and lawyers acting on their behalf in the decision-making process or as 'guardians'. It will now look at examples where the youth constituency has proactively sought to be involved in the process to represent itself.

Recognising the interests of youth at the United Nations

Since the Rio Earth conference in 1992, where a young girl made a speech imploring negotiators to consider their responsibility to put the youth perspective at the heart of decision-making,⁶⁹ young people from all over the world have been participating in the international negotiating process. In 2009 the youth community formally submitted an application to the UNFCCC secretariat, requesting that it be granted official stakeholder status. The application was approved, the YOUNGO (youth constituency)

established, and the channels for participation in UNFCCC negotiations formalised for young people. The YOUNGO is able to offer interventions to the UNFCCC plenary or subsidiary body groups and in December 2010, at the COP 16 in Mexico, it successfully worked with country delegates to strengthen Article 6 of the UNFCCC. Article 6 relates to 'education, training and public awareness' for civil society and the COP 16 decision includes specific reference to 'public participation in addressing climate change and its effects and developing adequate responses'.⁷⁰

This successful intervention has paved the way for young people to be involved and participate in legislative processes at the national level and serves as a pertinent illustration of IGE in practice. It is especially notable because the youth community has worked hard to protect its own interests and safeguard its own future where it appeared that those in positions of responsibility were failing to do so.

UK DECC Youth Advisory Panel

The UK Department of Energy and Climate Change (DECC) Youth Advisory Panel⁷¹ was established as a pilot in February 2010 in response to youth advocates drawing on the Aarhus Convention to support their proposal, in addition to the then Secretary of State wishing to 'institutionalise the rights of future generations' and 'go beyond the politics of now'.⁷² The young people of the panel work together, led by the guiding principle of 'incorporating intergenerational equity' into government decision-making.⁷³ During monthly meetings at DECC, the panel engages in discussion and dialogue about energy and climate change policy and how decisions relating to these matters may positively or negatively impact on their lives and futures. The panel also has the opportunity to meet policy-makers and ministers to share ideas and discuss how the interests of younger generations could be incorporated into the policy-making process. At the end of the series of visits in 2010, the panel compiled a report, *Energy: How Fair Is It Anyway?*, giving a young person's perspective on the application of IGE to decisions relating to energy.⁷⁴

One way in which the international youth community is working with governments to implement Article 6 is by establishing youth advisory panels in other countries across the world. By running the UK scheme as a one-

67 N H A Bowerman, David J Frame et al (2010) 'Cumulative carbon emissions, emissions floors and short-term rates of warming: implications for policy' *Phil. Trans. R. Soc. A* 2011 369, 45–66 doi: 10.1098/rsta.2010.0288, available: <http://rsta.royalsocietypublishing.org/content/369/1934/45.abstract>.

68 For more information about Embercombe see www.embercombe.co.uk.

69 Severn Suzuki (1992) calling on the UNCED delegates to recognise youth and make decisions with the interests of young people at their core www.youtube.com/watch?v=uZsDliXzyAY.

70 Draft decision -/CP.16: 'Progress in, and ways to enhance, the implementation of the amended New Delhi work programme on Article 6 of the Convention' http://unfccc.int/files/meetings/cop_16/conference_documents/application/pdf/20101204_cop16_cmp_art6.pdf.

71 See the Department of Energy and Climate Change website for more information on the Youth Advisory Panel: http://decc.gov.uk/en/content/cms/about/youth_panel/youth_panel.aspx.

72 Secretary of State for Energy and Climate Change Ed Miliband *The Road to Copenhagen: A Global Deal on Climate Change* (Ralph Miliband memorial lecture at the London School of Economics 19 November 2009) www2.lse.ac.uk/publicEvents/events/2009/20090826t1654z001.aspx.

73 Note 70.

74 Department of Energy and Climate Change Youth Advisory Panel (5 December 2010) *Energy: How Fair Is It Anyway?* (5 December 2010).

year pilot and successfully showing how young people can engage and interact with their governments on issues of national importance, the Youth Advisory Panel has paved the way for inclusive and collaborative integration of IGE.⁷⁵

The Youth Advisory Panel will continue to offer a practical means for young people to collaborate and share their ideas with decision-makers and those who are writing the country's law and policies through government.

Conclusions

The body of academic literature has evolved over many years to offer interpretations and definitions of IGE that go a long way towards illustrating what the principle itself looks like, as well as producing challenging approaches that might not appeal to decision-makers and legislators. Such approaches include considering how the present generation must alter its perception of what it 'deserves' and has a right to do, if it is going to work actively to safeguard the interests of those who are yet to be born. The discussion that teases out the morally appropriate course of action in light of the responsibilities of decision-makers is often a deeply philosophical one. Perhaps the most challenging aspect of incorporating IGE into mainstream decision-making has been bridging the division between moral philosophers and policy-makers, or it could have been the anxiety felt by elected representatives that 'taking the long view', while beneficial to those who are yet to come into existence, might be misinterpreted as ignoring the interests of the present day electorate. The threat of electoral discontent is a powerful force that frequently influences policy and legislation, and, as future generations cannot vote for the present day government, their interests lag behind every other interest in Parliament.

That said, this article has served to illustrate that legislation measuring up to the challenge of incorporating IGE does exist, and that throughout the world the

obligations of IGE have been transposed into everyday decision and policy-making processes in intelligent and innovative ways. It has shown that mechanisms exist in the legislature in the form of parliamentary commissioners or guardians; that increasingly influential recommendations are being made to establish relevant portfolios in the executive; that young people themselves are being integrated into governing and policy-making processes; and that the courts have offered cogent judgments conferring rights to future generations and elucidating on the significance of the principles of SD and IGE.

Above all, this article has sought to show that, although discussion about legislative frameworks and political machinations is important, the thinking of our executives, legislators and judges alike must be guided by a much more powerful imperative. What adequate remedy can there be for a generation that has had its future compromised by those in positions of power, the people who were meant to be looking out for it and its future? What adequate remedy can there be for a generation which comes into being only to find that the forests have been logged and the species its ancestors once adored and marvelled at have been lost forever? Perhaps the courts would declare that previous generations of decision-makers had acted irresponsibly and had not protected the interests of the claimants, in spite of the existence of appropriate international and domestic law. However, by then such a declaration would be of little comfort, since it would not be able to bring back the trees and other flora and fauna that had once made up the beautiful, intricate, awe-inspiring, biodiverse fabric of the earth.

In implementing IGE, governments will not only be living up to their legally binding commitments, and adhering to the precautionary and sustainable development principles, they will be fulfilling their moral responsibility to safeguard the future for generations to come.

75 For more information about the implementation of art 6 and Youth Advisory Panels see the blog (11 February 2011) *Importance of Article 6*; <http://blog.decc.gov.uk/?p=164>.