



# **Protecting the Interests of Future Generations by the European Union**

**An overview of the  
existing powers  
and legal bases  
in EU law**

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## **Introduction**

This report lays the foundations of our advocacy work for establishing a formal representation for Future Generations within the European Union. Initiated from a profound belief in our ethical obligation to Future Generations, we recognize that today's decisions and inactions carry significant long-term impacts. We need institutional solutions to take these impacts into account and we need to address explicitly the potential conflicts that may arise between current and future generations.

Securing a place for their representation in the EU institutions however requires more than just a moral conviction; it necessitates a robust legal foundation affirming the EU's competency and legal mandate to take action. This document consolidates our legal rationale, explaining why and how Future Generations part of the law of the European Union are already. The study also highlights where we see gaps in the existing law and how should those gaps be addressed in future legislation.

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# 1 Protecting future generations by the EU - An idea whose time has come

Currently, there is no provision in the Treaties that would explicitly impose an obligation on the EU to protect the needs of future generations. Future generations are often referred to in non-binding passages, such as preambular references in environmental secondary legislation<sup>1</sup> or the European Green Deal, which mentions future generations only once among the key objectives of the European Climate Pact.<sup>2</sup> However, substantive provisions of key secondary legislation such as the European Climate Act remain noticeably silent on future generations.

The need to protect the interests of future generations has long been conceived as a mere moral aspiration that is peripheral and external to the main mission of the EU, the creation of the common market. Under the current state of EU law, EU legislators could accommodate the needs of future generations in designing legislative measures, should they wish to, however, they are not compelled to do so. In fact, reaching a future-oriented outcome is highly unlikely given the short-term decision-making model currently prevailing in the EU.

At the same time, there are several elements already built into the current body of primary EU legislation, which would justify affording stronger and more effective protection to long-term interests during the exercise of EU powers. Indeed, the creation of the Union and its predecessor the European Communities were rooted in the idea of ensuring lasting peace and prosperity for Europe, a project which at its core concerns the well-being of future generations. This report provides an overview of those elements in the sources of EU law, which leave considerable room for the EU to adopt legislation to protect posterity in full conformity with the Treaties as they stand today.

There is an acute need for the EU to use its powers to protect long-term interests. The sciences are clear about the grave risks faced by humanity and communities in Europe are no exception. Scientists unequivocally confirmed the start of a new geological epoch, the Anthropocene, where humanity has become the dominant force of change on the planet.<sup>3</sup> We are witnessing a triple planetary crisis caused by the interlinked problems of climate change, biodiversity loss, and pollution.<sup>4</sup> These trends, coupled with pervasive digital transformations, impose existential risks over the long term. The EU should take efficient legal action against such risks if it aims to sustain its core values in the long run – the prosperity of the Member States and the stability of democracy and the rule of law.<sup>5</sup>

Protecting the interests of posterity with binding legal safeguards is, therefore, an idea whose time has come, also as a matter of EU law. The challenges humanity faces in this century are essentially intergenerational. Our failure to take timely and ambitious protective measures will likely deprive our descendants of a liveable planet and a stable society. There is a rapidly

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<sup>1</sup> Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010.

<sup>2</sup> The Green Deal sets the overall goal of “improving the quality of life of current and future generations”.

<sup>3</sup> Paul Crutzen, ‘Geology of Mankind’ (2002) 415 Nature.

<sup>4</sup> UNFCCC Secretariat: What is the Triple Planetary Crisis? (13 April 2022), available at:

<https://unfccc.int/news/what-is-the-triple-planetary-crisis>

<sup>5</sup> See Preambles of TEU and TFEU.



closing window of opportunity in which present stakeholders are able to change course to avoid cataclysmic harm to posterity.<sup>6</sup>

However, tackling such intergenerational conflicts is among the Achilles heels of democratic decision-making. Although long-term interests are fundamentally at stake today, youth and future generations have no representation in the EU's democratic decision-making model. As a result, long-term interests are structurally discriminated against, as short-term preferences repeatedly override future needs and interests in numerous EU policies.

Protection of the needs and interests of future generations is conceptually rooted in the principle of intergenerational equity, which first appeared in the 1972 Stockholm Declaration.<sup>7</sup> This concept has recently been increasingly relied upon by domestic courts in climate litigation<sup>8</sup> and has now reached the level of international courts.<sup>9</sup> The need to safeguard posterity's long-term interests vis-à-vis short-term preference is captured by a host of legal concepts, such as generational equity, intergenerational fairness,<sup>10</sup> justice<sup>11</sup> or solidarity,<sup>12</sup> solidarity between generations,<sup>13</sup> the rights of future generations,<sup>14</sup> and sustainable development<sup>15</sup> - many of which already appear in EU law.

Moreover, political leaders in the EU have begun to expressly voice support for protecting the needs of future generations as a matter of EU law. Most eminently, President Von der Leyen in her State of the Union Address delivered in 2022 stressed the importance of mainstreaming intergenerational solidarity across "every action that our Union takes",<sup>16</sup> and expressed a willingness to enshrine intergenerational equity in the Treaties.<sup>17</sup>

Irrespective of any Treaty change, it is possible to create new institutional arrangements within the EU to speak for and consider long-term interests. The present report will argue that the current body of EU law gives ample room for EU institutions to push for a more ambitious protection of the needs of future generations, even without amending the Treaties.

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<sup>6</sup> IPCC, 6th AR Climate Change 2023 Synthesis Report, Summary for Policymakers, B.6.1, where the report states that, in order to keep the 1,5°C temperature goal with at least 50% likelihood, global emissions must peak the latest before 2025.

<sup>7</sup> Principle 2 of Stockholm Declaration.

<sup>8</sup> Katalin Sulyok: A rule of law revolution in future generations' litigation: intergenerational equity and the rule of law in the Anthropocene, Re:Constitution Working Paper series, Forum Transregionale Studien (2023), available at [https://www.reconstitution.eu/fileadmin/bilder/re\\_constitution/14-2023\\_WorkingPaper\\_Sulyok\\_final.pdf](https://www.reconstitution.eu/fileadmin/bilder/re_constitution/14-2023_WorkingPaper_Sulyok_final.pdf)

<sup>9</sup> Requests submitted with the International Court of Justice and the Inter-American Court of Human Rights interrogate the obligations of States in the context of climate change. See Request adopted by UNGA Resolution A/77/L.58 on 29 March (submitted to the ICJ) and the Request for an advisory opinion on the scope of the state obligations for responding to the climate emergency, filed by Chile and Colombia to the IACtHR.

<sup>10</sup> Edith Brown Weiss, In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity (The United Nations University 1989).

<sup>11</sup> Joerg Chet Tremmel, Handbook of Intergenerational Justice (Edward Elgar 2006).

<sup>12</sup> UN Secretary General Ban Ki-moon's report: Intergenerational solidarity and the needs of future generations - Report of the Secretary-General, A/68/322 [2013].

<sup>13</sup> TEU, Article 3.

<sup>14</sup> Maastricht Principles on the Human Rights of Future Generations adopted on 3 February 2023, available at <https://www.rightsoffuturegenerations.org/>

<sup>15</sup> 1987 report of the World Commission on Environment and Development (Brundtland Report), para. 27.

<sup>16</sup> Ursula von der Leyen, President of the EU Commission, State of the Union 2022 address, delivered on 14 Sept 2022. available at

[https://ec.europa.eu/commission/presscorner/detail/en/speech\\_22\\_5493](https://ec.europa.eu/commission/presscorner/detail/en/speech_22_5493)

<sup>17</sup> Ibid.



The remainder of the report is structured as follows. Section 2 maps out the elements of the existing sources of EU law that enable, or may even prompt, the EU to adopt legislative measures to safeguard long-term interests. Section 3 provides examples showing that EU institutions currently do not utilize these powers or the legal bases to protect future generations in an ambitious way. Finally, Section 4 provides an overview of opportunities in the current body of EU law to provide stronger protection for intergenerational equity and the long-term needs and interests by EU institutions.



## 2 Protection of future generations in the sources of EU law

There are several legal hooks at the level of primary legislation, such as the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), the EU Charter of Fundamental Rights (Charter), and the general principles of EU law, which can accommodate enforcing a more marked protection for long-term interests of future generations by the Union.

### 2.1 The Treaties: setting clear objectives to protect future generations.

The Treaties contain several concepts among the objectives of the EU, which pave the way for protecting future generations and their long-term interests in EU law. These objectives are particularly important given the established practice of the Court of Justice of the European Union (CJEU) in interpreting the Treaties in light of such objectives,<sup>18</sup> and their relevance for adopting EU legislation to protect such objectives under the flexibility clause of TFEU, as discussed above.

#### 2.1.1 Solidarity between generations: intergenerational equity as a fundamental aim of the Union

The most explicit reference to intergenerational equity in the Treaties can be found in the concept of solidarity between the generations. It is stipulated under Article 3(3) of the TEU as one of the fundamental aims of the Union. The Court addressed intergenerational solidarity, mostly in cases concerning the medical insurance market.<sup>19</sup>

However, this language lends itself to another reading that refers to the broader concept of intergenerational solidarity and equity, which serves as a principle of international environmental law. Intergenerational equity is generally understood to require sustaining the well-being of future generations by preserving the natural foundations of human life. This includes an obligation not to restrict the options of posterity in satisfying their own needs,<sup>20</sup> and not to place a disproportionate burden on them by our present-day omissions to tackle systemic socio-environmental challenges.<sup>21</sup>

Article 3(3) TEU, therefore, arguably also envisages such a balance and would be possible to interpret as posing a duty for the EU institutions not to sacrifice the long-term needs of later generations for the sake of present-day interests across all EU policies.

#### 2.1.2 Non-discrimination

A related concept appears in age-based discrimination, which has its roots in Article 3(3) TEU, which commits the Union to fight discrimination, and in the horizontal clause of Article 10 of TFEU, requiring mainstreaming non-discrimination, including that of based on age, across all union policies. In the same vein, the CJEU has recognized the notion of equal treatment as a general principle of EU law.<sup>22</sup> All of these concepts would justify taking measures by the EU to promote the protection of the long-term interests of posterity.

<sup>18</sup> Case C-26/62 Van Gend en Loos v. The Netherlands.

<sup>19</sup> Court of First Instance, Case T-289/03, British United Provident Association Ltd (BUPA) v Commission (12 February 2008).

<sup>20</sup> Brown Weiss (n 11) 38.

<sup>21</sup> German Constitutional Court, Neubauer decision (24 March 2021), para. 193.

<sup>22</sup> Case C-144/04 Mangold v. Rüdiger Helm, para 75, C-149/10 Chatzi v Ipourgou Ikononikon para. 63.



To date, non-discrimination based on age has mostly been applied by the CJEU in employment-related cases.<sup>23</sup> However, there is certainly room for interpreting these concepts to be responsive to acute differences in the living conditions of people belonging to different age groups or generations.

In domestic and international human rights-based climate litigation, anti-discrimination clauses have been increasingly used as vehicles to demand protection for later generations.<sup>24</sup> The disparate adverse climate and environmental impacts that future generations will experience in their lifetimes can be legally framed either as age-based discrimination or as birth cohort discrimination.<sup>25</sup> Scientific studies clearly suggest that people belonging to younger cohorts will experience a manyfold increase in exposure to climate change-induced weather extremities compared to earlier birth cohorts. For instance, Thiery et al. showed that a person born in 2020 will suffer six times more heat waves in a 2°C warmer world than a person born in 1960.<sup>26</sup>

These marked differences between the living conditions and safety of the older and younger generations within the EU can be legally framed as a problem of discrimination based on age. Therefore, they make a compelling case for reading the protection of future generations into the fundamental objective of solidarity between the generations.

### 2.1.3 Sustainable development

According to the Brundtland Report's famous words, sustainable development is understood as a development that meets the needs of present generations without compromising the ability of future generations to meet their own needs.<sup>27</sup> As the language of the definition also clearly shows, protecting the interests of future generations is inherently embedded in the concept of sustainable development.

Sustainable development is the fundamental aim of the EU under Article 3(3) of the TEU, which guides all EU policies. This may also be relevant when interpreting and applying other provisions of the Treaty.<sup>28</sup> Moreover, Article 11 of the TFEU calls for integrating environmental protection measures into all areas of EU actions with a view to promoting sustainable development and, hence, to protect the interests of future generations. On the same conceptual basis, Article 37 of the Charter also refers to sustainable development, which we will be analysed later in more detail.

Thus, the Treaties, as a matter of legal obligation under primary EU law, could be read as providing that EU policies must be designed and implemented in a way that serves the ultimate aim of achieving a balance between a competitive market economy and a high level of environmental protection.<sup>29</sup>

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<sup>23</sup> Case C- Marshall,

<sup>24</sup> See e.g. the applications in the Duarte Agostinho and Others v. Portugal and Others, Application no. 39371/20; KlimaSeniorinnenSchweitz and Others v Switzerland, Application no. 53600/20.

<sup>25</sup> Axel Gosseries, 'Environmental Degradation as Age Discrimination Degradação Ambiental Como Forma de Discriminação Em Razão Da Idade' (2015) 2 Revista Eletrónica de Direito Público 25; Refia Kaya, 'Environmental Vulnerability, Age and the Promises of Anti-Age Discrimination Law' (2019) 28 RECIEL 1.

<sup>26</sup> Wim Thiery, Stefan Lange and Joeri Rogelj, 'Intergenerational Inequities in Exposure to Climate Extremes' (2021) 374 Science 158.

<sup>27</sup> See Brundland Report's definition on sustainable development and Reflection Paper Towards A Sustainable Europe by 2030, available at [https://commission.europa.eu/system/files/2019-02/rp\\_sustainable\\_europe\\_30-01\\_en\\_web.pdf](https://commission.europa.eu/system/files/2019-02/rp_sustainable_europe_30-01_en_web.pdf) (last accessed 28 October 2023).

<sup>28</sup> See e.g. the Cartagena Opinion of the European Court of Justice, Opinion of the Court of 6 December 2001.

<sup>29</sup> Kingston et al: European Environmental Law (Cambridge University Press, 2017), p. 14.





Overall, sustainable development, as a matter of EU primary law, also provides a firm foundation for injecting a long-term perspective into the traditionally short-term policies of the EU.

### 2.1.4 Protection of human rights - obligations without temporal limitation

Protection of human rights is also one of the fundamental goals of the EU under Article 3(3) TEU. Human rights are guaranteed by the EU under the EU Charter and as a general principle of EU law, as recognized by the European Convention on Human Rights (ECHR) and the constitutions of the Member States. Before delving into these distinct sources of human rights obligations in the coming sections, some general remarks are made on the relevance of human rights safeguards to protect future generations.

Importantly, even though future generations are not deemed as express rights holders under human rights law, human rights guarantee nevertheless provide important legal anchors for the protection of future generations' long-term interests.

First of all, human rights guarantees have no express temporal limitations under the major international human rights treaties,<sup>30</sup> including the ECHR. This implies that the full enjoyment of human rights guaranteed to EU citizens cannot be dependent on the date of birth of the given individual.<sup>31</sup> TEU and TFEU have also been concluded for an indefinite period of time, with the ultimate goal to promote the living conditions and an environmentally sustainable form of economic and social progress of the "people" of the Member States - without any temporal specifications.<sup>32</sup> Therefore, promoting the interests of future peoples of EU Member States is inherently consistent with the underlying rationale of the Treaties.

Second, socio-ecological crises, together with climate change, pose a clear and unequivocal threat to the full enjoyment of human rights, as repeatedly confirmed by the UN human rights organs.<sup>33</sup> The UN Human Rights Committee expressly stressed that „[e]nvironmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.“<sup>34</sup> The adverse effects of climate change will not be felt only by subsequent generations, as they have already severely impacted the human rights of present-day rights holders, even in Europe.

Third, there is an emerging consensus among legal experts that human rights obligations should be interpreted with a view to future generations. The recently adopted Maastricht Principles on the Human Rights of Future Generations confirm, as a matter of principle, that future generations who will inherit the Earth "are legally entitled to human rights" based on various international and domestic legal sources.<sup>35</sup> The Strasbourg Principles on International Environmental Human Rights Law also stress that intergenerational equity is one of the factors that courts ought to consider in assessing whether interference with basic human rights is necessary in a democratic society, and therefore, could be deemed lawful.<sup>36</sup>

These legal developments all point to the conclusion that fulfilling the EU's mandate to protect human rights necessitates, and justifies, protecting the long-term interests of future generations through Union policies.

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<sup>30</sup> Maastricht Principles on the Human Rights of Future Generations.

<sup>31</sup> Ibid.

<sup>32</sup> Preambles of TEU and TFEU.

<sup>33</sup> HRC Resolution 10/4 on Human Rights and Climate Change (2009).

<sup>34</sup> UN Human Rights Council: General Comment No. 36 on Article 6 of ICCPR (Right to Life) (31 October 2018), para. 62.

<sup>35</sup> Maastricht Principles on the Human Rights of Future Generations, Section 2.1.

<sup>36</sup> Strasbourg Principles on International Environmental Human Rights Law, Section 32.



### 2.1.5 The protection of the rights of the child

Under Article 3 of TEU, the Union also has the fundamental aim of protecting the rights of the child. The rights and interests of children and future generations are distinct legal categories, even though there are obvious synergies and overlaps between the needs and interests of present-day children and generations yet to come. Due to children's proximity in time to future generations, children have a distinguished role to play in raising awareness about and demanding protection against long-term risks.<sup>37</sup>

The rights of the child are also recognized by the Charter, which will be examined in detail in Section 2.2.2 below.

## 2.2 EU Charter of Fundamental Rights: recognition of duties towards future generations

The Charter contains the most direct and express reference to future generations on the level of primary EU legislation. Its Preamble unequivocally states that the rights guaranteed in the Charter "entail responsibilities and duties with regard to other persons, to the human community and to future generations."

The Charter is binding upon EU institutions. However, it does not create any new tasks for the EU or modify the content of existing obligations under the Treaties due to the expressly recognized limitations of its scope under Article 6 of TEU and Article 52 (2) of the Charter.<sup>38</sup> Furthermore, Article 52(3) states that Charter rights, which correspond to those recognized under the ECHR, shall have the same scope as guaranteed by the Convention, as long as EU law does not explicitly provide more extensive protection.<sup>39</sup>

There is also room for further elaboration of the doctrine of positive obligations under the Charter. Unlike the ECtHR, the CJEU has also been reluctant to discern positive obligations for States or EU institutions under the Charter. This means that rights under the Charter mainly function as "shields" protecting individuals from State interference, rather than "swords," which would trigger the need to take protective steps to realize human rights. Thus far, the CJEU has only mandated taking such protective measures in a handful of cases in the context of data protection. However, these decisions do suggest that EU institutions could be required to take positive action to safeguard the freedom rights guaranteed under the Charter within the scope of application of existing EU law.<sup>40</sup>

Furthermore, Article 52(1) of the Charter recognizes the principle of proportionality, which provides that any restriction on the substantive rights of the Charter may only be lawful to the extent that they are necessary and proportionate to protect the general interest. If the CJEU develops more future-oriented dimensions to certain rights under the Charter to consider the interests of future generations, the proportionality requirement would be an essential tool in balancing competing short-term and long-term interests.<sup>41</sup> This could justify finding short-term policies disproportionate and, thus, unlawful under the Charter.

In the final analysis, despite all its limitations, the Charter sets forth an unequivocal recognition that EU institutions and Member States do owe obligations towards posterity. Several rights are directly relevant to preserving the well-being and prosperity of future generations.

<sup>37</sup> Maastricht Principles, Preamble, Section VII.

<sup>38</sup> Article 52(2) of the Charter.

<sup>39</sup> Article 52 (3) of the Charter.

<sup>40</sup> See e.g. C-362/14, Maximilian Schrems v Data Protection Commissioner (6 October 2015), Case C-511/18, La Quadrature du Net and Others, ECLI:EU:C:2020:79

<sup>41</sup> Gerd Winter, 'Armando Carvalho and Others v. EU: Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation' (2020) 9 Transnational Environmental Law 137, 144.



Somewhat disappointingly, however, the CJEU thus far has refrained from clarifying the legal content of the protection, which these rights entail for present and future generations in the face of the climate crisis. In the Peoples' Climate Case, the CJEU did not allow the plaintiffs to satisfy the strict standing requirement of the Plaumann-test, and therefore the case could not reach the merits discussion, which would have focused on the content of EU institutions' human rights obligations under EU law.<sup>42</sup>

### **2.2.1 Freedom rights and non-discrimination**

The Charter guarantees a number of rights, such as the right to life, respect for family life, and property, all of which could be relevant in the context of protecting posterity's needs. The right to life enshrined under Article 2 has obvious implications for EU measures to protect individuals in its territory against the harmful impacts of climate change. This is also aptly illustrated by a number of climate lawsuits, where plaintiffs invoked such rights before national courts.<sup>43</sup>

Moreover, Article 21 of the Charter prohibits any form of discrimination based on any ground, including that of age. As noted above, the disproportionate adverse climate impacts imposed on younger and future generations by inadequate measures of today could be framed legally as an indirect form of age-based discrimination. The Charter prohibits any such discrimination in the implementation of EU laws.

### **2.2.2 Protection of the rights of the child**

Under Article 24 of the Charter, in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. This concept has relevance reaching beyond the scope of the Charter, as several decisions of the CJEU suggest that "the primacy of the best interest of the child is the prism through which the provisions of EU law must be read."<sup>44</sup>

Children's rights in the EU must be interpreted with a view toward the UN Convention on the Rights of the Child, which is ratified by all EU Member States. As reaffirmed by the EU Council itself, the principles and standards of that Convention "must [...] guide EU policies and actions, which have an impact on the rights of the child".<sup>45</sup>

The Convention also requires long-term thinking and taking action against long-term risks to protect children's rights. In 2023, the UN Committee on the Rights of the Child issued General Comment No. 26 to interpret the provisions of the Convention in the context of climate change and environmental degradation. The General Comment stresses that in determining the best interests of the child, "the possibility of future risk and harm" should also be taken into account.<sup>46</sup> It also recognizes the principle of intergenerational equity and stresses that "States bear the responsibility for foreseeable environment-related threats arising as a result of their acts or omissions now, the full implications of which may not manifest for years or even decades."<sup>47</sup>

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<sup>42</sup> Case C-565/19 P, *Armando Carvalho v. European Parliament and the Council of the European Union*, for more details see Winter (n 48).

<sup>43</sup> For an overview see: Josephine van Zeben: *The Role of the EU Charter of Fundamental Rights in Climate Litigation*, *German Law Journal* (2021), 22, pp. 1499-1510.

<sup>44</sup> Opinion of Advocate General Szpunar delivered on 8 September 2016 in Case C-133/15, para. 45, citing prior CJEU case-law on that point.

<sup>45</sup> Council conclusions on the EU Strategy on the Rights of the Child, Preamble section b), 9 June 2002.

<sup>46</sup> CRC General Comment No. 26., para. 17.

<sup>47</sup> CRC General Comment No. 26., para. 11.



### 2.2.3 Principle of sustainable development

Article 37 of the Charter specifically refers to the ‘principle’ of sustainable development. Even though this provision was deliberately not couched as a human right, it nevertheless mainstreams the idea of protecting future generations across existing EU policies.

The CJEU, building on the opinions of Advocates-Generals,<sup>48</sup> also deems Article 37 as an interpretative tool, which may inform the interpretation of other EU norms.<sup>49</sup> Furthermore, Article 37 is invoked in the balancing exercise whenever the CJEU has to evaluate whether Member States have unduly interfered with the four economic freedoms of the EU.<sup>50</sup> Given that the needs of future generations are embedded in the concept of sustainable development, Article 37 could also adjust the balancing between these competing interests.

In sum, the principle of sustainable development also justifies a more long-term, future-oriented reading of existing obligations under EU law in taking EU action.

## 2.3 General Principles of EU Law

The general principles of EU law stand as a distinct source of primary EU legislation. They enjoy the same ranking in the hierarchy of norms as the Treaties. Article 6 of TEU specifically affirms that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law. There is no established list of these principles; hence, their content, scope, and development depend on the interpretation of the CJEU.

Should the Court be willing to announce certain new general principles, they could be important leverage points to future-proofing EU law. There are a number of existing, and potentially emerging, general principles of EU law, which support preserving long-term interests.

### 2.3.1 Existing general principles: the precautionary principle and the prohibition of age-based discrimination

(i) The precautionary principle

From the already announced general principles in the CJEU case-law, the precautionary principle stands out as an important normative tool, which allows taking action to prevent future risks. Article 192 of TFEU enshrines the precautionary principle as part of the EU's environmental policy. It has its roots in international environmental law, specifically Principle 15 of the Rio Declaration. The principle is interpreted as a matter of EU law that “where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.”<sup>51</sup>

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<sup>48</sup> See e.g. Opinion of AG Sharpston in Case C-557/15, *Commission v Malta*, ECLI:EU:C:2017:613, paras 44

<sup>49</sup> E.g. Case C-197/18, *Proceedings brought by Wasserleitungsverband Nördliches Burgenland and Others*, ECLI:EU:C:2019:824, Case C-24/19, *A. and others (Wind turbines at Aalter and Nevele)*, ECLI:EU:C:2020:503, C-900/19, *One Voice and Ligue pour la protection des oiseaux*, ECLI:EU:C:2021:211,

<sup>50</sup> E.g. Case T-614/13, *Romonta v Commission*, ECLI:EU:T:2014:835

<sup>51</sup> Cases C-157/96 and C-180/96 in the BSE case (*Judgements of 5 May 1998, cases*), para. 63.



The scope of application of the precautionary principle is much wider than that of EU environmental policy. This is confirmed by the position of the Commission<sup>52</sup> and the CJEU, which elevated the precautionary principles to become an autonomous general principle of EU law, which should be factored into other policies as well.<sup>53</sup>

As the Commission itself stressed, the principle „also concerns the longer run and the well-being of future generations.“<sup>54</sup> Indeed, the precautionary principle is inherently future oriented. It also allows the consideration of the potential costs of inaction in the long term.<sup>55</sup> In a strong reading, the principle would allow EU institutions to take protective action against future risks, amounting to a transformative change in the so far presentist governance scheme.

(ii) Prohibition of discrimination based on age.

The CJEU announced that it deems the prohibition of age-based discrimination a general principle of EU law. Discrimination occurs either when individuals in different situations are treated equally or when individuals in comparable situations are treated differently. Discrimination is unlawful even if it is indirect, meaning that discriminatory treatment is not committed on purpose, yet it imposes a disparate adverse impact on certain individuals compared to others. As shown above, current minors and subsequent generations will have to endure significantly harsher living conditions in adulthood than current adults experience in their lifetimes. In essence, this entails discriminatory treatment of EU citizens based on their age.

The general principle of non-discrimination carries great legal potential to articulate new obligations for EU institutions vis-à-vis future generations. In *Chatzi*, the CJEU relied on the equal treatment principle to interpret a directive in a way as to require Member States to provide guarantees of non-discrimination that were not listed in the directive.<sup>56</sup> This shows that age-based discrimination could be used as a source of a standalone obligation for EU institutions to prevent discriminatory treatment of future generations.

### 2.3.2 Potential new general principles of EU law: intergenerational equity and the right to a healthy environment

The CJEU could announce a new general principle of EU law based on the emergence of a constitutional guarantee shared among several Member States. In previous cases, common legal traditions of Member States were found to give rise to a general principle of EU law, when the respective legal concept repeatedly occurred in several Member States, even if the scope and legal content of that concept were slightly different in each country.<sup>57</sup>

There are two emerging trends in the constitutional traditions of Member States that could satisfy the above test and, therefore, may emerge as new general principles of EU law, posing an obligation under EU law to protect the needs of future generations. These are the principle of intergenerational equity and the right to a healthy environment. Undoubtedly, declaring a new general principle remains a prerogative of the CJEU, however, the present report argues that the time is ripe for declaring both as a new general principle of EU law.

<sup>52</sup> Communication from the Commission on the Precautionary principle, Brussels, 2.2.2000 COM(2000) 1 final, Para 3.

<sup>53</sup> T-13/99 Pfizer Animal Health SA v Council [2002], para. 114, Cases T-74, 76, 83-85, 132, 137 and 141/00 Artegaodan GmbH v Commission [2002], see also: Craig de Burca, p. 608

<sup>54</sup> Communication from the Commission on the Precautionary principle, Brussels, 2.2.2000 COM(2000) 1 final, p.7.

<sup>55</sup> Communication from the Commission on the Precautionary principle, Brussels, 2.2.2000 COM(2000) 1 final, Para 6.

<sup>56</sup> C-149/10 *Chatzi v Ipourgos Ikononikon*.

<sup>57</sup> Case 155/79 *AM & S Europe Limited v Commission*, AG Werner Opinion, Case 155/79 *AM & S Europe Limited v Commission*, Judgment, para. 19.



(i) Intergenerational equity as an emerging constitutional tradition in Europe

According to a recent study, 41% of all constitutions contain provisions on future generations.<sup>58</sup> This ratio is even higher in Europe, where more than 50% of EU Member States mention future generations in some form in their constitutions, including Belgium, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Slovakia, and Sweden. Relevant provisions may range from explicit references to intergenerational solidarity through the interests of future generations in substantive or preambular provisions to indirect references, such as enshrining the concept of sustainable development.<sup>59</sup> All of these provisions are emanations of the idea of inter-generational equity.

Importantly, in Member States where the constitution does not mention future generations, courts often nevertheless interpret other provisions in a way that protects posterity's interests in the face of future threats. For instance, in *Neubauer*, the German Constitutional Court stressed that the Basic Law serves as an inter-temporal guarantee of freedom, which prohibits the present generation from unilaterally offloading burdensome climate change mitigation measures to future generations.<sup>60</sup> Similarly, Dutch courts in the *Urgenda* case found that the right to life and the right to private life under the ECHR are violated by unambitious GHG mitigation measures,<sup>61</sup> which extend to the future, and hence require States to protect individuals against long-term climate risks as well. These domestic judgments also suggest that the principle of intergenerational equity has been judicially enforced by domestic courts in a growing number of jurisdictions, and thus, States are legally bound to pay due regard to the interests of subsequent generations when they adopt measures with long-term impact.

All these national legal developments suggest that intergenerational equity could be declared a general principle of EU law, creating a new source of obligations for Member States and EU institutions to duly consider and protect their interests in their legislative acts.

(ii) The right to a healthy environment in Europe

Since the 1990s, there has been a sweeping trend in enshrining human rights to a healthy environment in the national constitutions. In 2023, the UN General Assembly recognized the right to a healthy environment as a universal human right.<sup>62</sup> In the EU, the majority of Member States, namely 15 Member States, recognize the right to environment as a constitutional right.<sup>63</sup> Despite slight variations in the language of such declarations, they signify a clear trend that individuals have a right to sustain functioning and healthy ecosystems. As a result, the CJEU could declare the right to a healthy environment as a general principle of EU law, based on the emerging constitutional traditions of Member States.

As a separate legal avenue, the right to a healthy environment could also become a general principle of EU law if the efforts to adopt a draft protocol enshrining the right to environment complementing the ECHR bore fruit. At present, the ECHR is formally not binding on the EU, and is currently silent on environmental or climate protection and does not contain any reference to future generations. In recent years, there has been renewed effort to amend the

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<sup>58</sup> Renan Araújo and Leonie Koessler: The rise of the constitutional protection of future generations, LPP Working Paper No 7-2021, which counts 81 such constitutions around the world.

<sup>59</sup> Constitutions of Greece and Lithuania.

<sup>60</sup> German Federal Constitutional Court: *Neubauer et al.*, the Order of the First Senate of 24 March 2021, 1 BvR 2656/18.

<sup>61</sup> Hoge Raad, Civil Division: *The State of the Netherlands v Stichting Urgenda*, judgment (20 December 2019), Number 19/00135, ECLI:NL:HR:2019:2007

<sup>62</sup> UN GA Resolution 'The human right to a clean, healthy and sustainable environment', A/RES/76/300 (28 July 2022).

<sup>63</sup> See constitutions of Belgium, Bulgaria, Czech Republic, Croatia, Estonia, Finland, France, Greece, Hungary, Latvia, Romania, Slovakia, Slovenia, Spain, Portugal





ECHR. The Parliamentary Assembly of the Council of Europe called upon the Council of Europe's Member States to adopt a protocol to the ECHR, recognizing a standalone right to a healthy environment.<sup>64</sup> The draft protocol, endorsed by the Parliamentary Assembly, explicitly refers to a "transgenerational responsibility, equity and solidarity" and acknowledges "the right of subsequent generations to live in a safe, clean, healthy and sustainable environment"<sup>65</sup>. The Council of Ministers, however, thus far has not adopted such a protocol, and has only created a drafting group to study the feasibility of an instrument recognizing the right to a healthy environment in Europe.<sup>66</sup> Time will tell whether Council of Europe Member States would support the recognition of such a right.

## 2.4 International treaties which the EU is a party to

International treaties to which the EU is a party constitute an integral part of EU law, with which secondary legislation should comply. Several such conventions refer to future generations, and thus they also pose an obligation for the EU to pay due regard to the interests of future generations. The EU is a signatory to such conventions in relation to a wide range of subject matters, where there is an express obligation for the EU to consider the long-term implications of its actions.

### 2.4.1 UNFCCC and the Paris Agreement: obligations for the EU climate policy

The EU is a party to both the 1992 UN Framework Convention on Climate Change and 2015 UN Paris Agreement. Both treaties enshrine intergenerational equity. The preamble and Article 3(1) of UNFCCC refer to this concept among the key principles of the climate change regime and provides that "Parties should protect the climate system for the benefit of present and future generations of humankind." The Paris Agreement references equity in several normative provisions.

The EU Commission itself also deems the principle of intergenerational equity to impose normative obligations on the EU's climate action. It voiced such a position in its submission to the Grand Chambers of the European Court of Human Rights as a third-party intervener in the *Duarte* climate case.<sup>67</sup>

Undoubtedly, intergenerational equity poses a clear obligation for the EU to respect the needs and interests of future generations in its climate policy.

### 2.4.2 Convention on Biological Diversity: obligations for protecting biodiversity.

The EU is a party to the 1992 UN Convention on Biological Diversity (CBD). It mentions future generations in the preamble and in the concept of sustainable use, which is a central obligation under the CBD. The EU Commission also recognizes in the EU Biodiversity Strategy

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<sup>64</sup> Parliamentary Assembly of the Council of Europe, Resolution 2396 (2021)1, Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe.

<sup>65</sup> Article 2 Text of the proposal for an additional protocol to European Convention on Human Rights, concerning the right to a safe, clean, healthy and sustainable environment, prepared by CoE Parliamentary Assembly, Committee on Social Affairs, Health and Sustainable Development.

<sup>66</sup> See the activity of the CoE Steering Committee for Human Rights, Drafting Group on Human Rights and Environment at <https://rm.coe.int/liste-document-cddh-env/1680a1a5d1>

<sup>67</sup> European Union submission before the Grand Chamber - Case Duarte Agostinho and Others v. Portugal and Others (Application no. 39371/20) voiced by Mr Crespo, Head of the Commission Legal Services, submitted on 7 December 2022.



that protecting biodiversity “will ensure the wellbeing and economic prosperity of present and future generations” in the Union.<sup>68</sup>

It would therefore be fully consistent with the international obligations undertaken by the EU to afford more marked protection for the long-term interests of future generations in all policy areas, which may have adverse effects on biodiversity.

### **2.4.3 Aarhus Convention: obligation to maintain environmental democracy.**

The EU is a party to the UNECE Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (Aarhus Convention). Its preamble recognizes that every person “has the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.” Article 1 sets as the objective of that treaty 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.” For this purpose, each party should guarantee the basic pillars of environmental democracy, such as the rights of access to information, public participation in decision-making, and access to justice in environmental matters.

## **2.5 Customary international law**

As an international organization, the EU is a subject of international law, and therefore must also respect customary international law in the exercise of its powers.<sup>69</sup> The content and scope of customary law obligations vis-à-vis future generations in the context of climate change are currently debated before the International Court of Justice in the pending advisory proceedings. The request for the advisory opinion has been submitted by the UN General Assembly with three questions, out of which two specifically mention “future generations.”<sup>70</sup>

The high-profile decision of the International Court of Justice, if touched upon these issues, would finally clarify the duties that subjects of international law, including the EU, owe towards future generations under customary international law.

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<sup>68</sup> EU Commission: EU Biodiversity Strategy for 2030, Brussels, 20.5.2020 COM(2020) 380 final, Section 5. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0380>

<sup>69</sup> Case C-162/96, *Racke v. Hauptzollant Mainz* [1998] ECR I-3655, para. 45: “the European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law...”

<sup>70</sup> Request adopted by UNGA Resolution A/77/L.58 on 29 March, and specifically Questions a) and b) ii.





### 3 Present obstacles to enforce intergenerational equity in EU law

Under the current legal framework, there is no explicit legal obligation on EU institutions to protect the long-term interests of future generations, and several instances confirm that EU institutions are unwilling to do so. In practice, the consideration of long-term adverse impacts does not seem to have a decisive influence on EU decision-making. For instance, NGOs initiated an internal review by the European Commission to revise its implementing decision setting national annual emission allowances between Member States. They also call on EU decision-makers to increase the ambition level of the EU's mitigation efforts to at least -65% gross emission reductions by 2030, as the current trajectory will not guard against future harmful climate impacts.<sup>71</sup>

There are several missed opportunities. First, under the EU Commission's Better Law-Making Initiative,<sup>72</sup> and the ensuing Impact Assessments, the Commission is entitled to evaluate the adverse human rights impacts of legislative proposals. These long-term adverse impacts could be considered by the Commission in proposing new legislation, but it often does not do so, as suggested by for instance the human rights impact assessment in the recent new-GMO proposal.<sup>73</sup>

Moreover, much depends on the CJEU's willingness to interpret existing legal mandates and provisions in line with intergenerational equity. However, thus far, the principles of solidarity between generations and non-discrimination have been applied only in employment- and pension-related contexts.

Finally, the Charter has also been strikingly underutilized by both domestic and EU courts.<sup>74</sup> The Charter has not been invoked by the CJEU to justify imposing obligations on States under EU legislation, even when the Advocate General explicitly pointed out clear connections with Charter rights and state obligations under specific EU legislation.<sup>75</sup>

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<sup>71</sup> Romain Didi: CAN Europe and GLAN legally challenge European Commission to up EU climate ambition (24/08/2023), available at <https://caneurope.org/can-europe-and-glan-legally-challenge-european-commission-to-up-eu-climate-ambition/>.

<sup>72</sup> Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making OJ L 123, 12 May 2016.

<sup>73</sup> Commission Staff Working Document Impact Assessment Report, *Accompanying the document* Proposal for a Regulation of the European Parliament and of the Council on plants obtained by certain new genomic techniques and their food and feed, and amending Regulation (EU) 2017/625, SWD(2023) 412 final.

<sup>74</sup> Jasper Krommendijk and Dirk Sanderink, 'The Role of Fundamental Rights in the Environmental Case Law of the CJEU' [2023] European Law Open 1.

<sup>75</sup> Case C-723/17 Lies Craeynest and Others v Brussels Hoofdstedelijk Gewest and Others, Judgment (26 June 2019), compared to the reasoning of Advocate General Kokott, see: Opinion, para. 53. (28 February 2019).



## 4 Conclusion: Opportunities to future-proofing EU law

This report argues that it is time to change the current landscape of EU decision-making, which too often does not adequately consider and prioritize the long-term interests of future generations. It also highlights that the basis for injecting a long-term perspective into the system of EU laws is already present. In fact, there are numerous legal building blocks of future-proofing EU law, either in the form of express references in the Treaties or as potentially emerging new sources of EU law. We need a new system of EU decision making in which long-term transgenerational interests and needs are protected through normative safeguards. Creating new EU institutional arrangements to advocate long-term interests and give full effect to intergenerational equity through existing procedures would ensure that EU institutions factor in long-term considerations as a high priority in the legislative process.

In the final analysis, the protection of future generations could be strengthened on the bases of the following:

- First, although at present there are no express powers conferred on the EU to promote and protect the interests of future generations, many of the existing powers are directly relevant to abate long-term risks and, thus, to preserve future interests. EU policies regarding environmental protection, agricultural policy, climate action, and digital transformation are only a handful of those where EU measures have direct implications for subsequent generations and, therefore, where obligations could (and should) be formulated in a way that safeguards long-term interests.
- Second, it is possible to adopt EU legislation promoting the interests of posterity even if the Treaties do not confer explicit powers on the EU in that respect, provided that the respective legislation is deemed necessary to attain one of the objectives of the Union. The Treaties already specify several objectives that embody the need to protect future generations, such as solidarity between generations, sustainable development, and the protection of human rights. The adoption of EU legislation in such cases is possible under the flexibility clause of Article 352 of the TFEU. This is illustrated by the creation of the Fundamental Rights Agency, which was set up on the same legal basis in order to help achieve one of the Community's objectives, the protection of human rights.<sup>76</sup> Similarly, this procedure could also be used to adopt EU legislation to require and specify the scope of legal protection of the needs and interests of future generations in the EU.
- Third, the Treaties already obliged the Union to consider scientific information when designing EU action. The Commission has a mandate to take into account scientific data in proposing legislation affecting the internal market under Article 114(3) of TFEU and setting the EU's environmental policy under Article 191(3) of TFEU. The sciences are clear about the long-term harmful repercussions of the inaction of the current generation. The EU institutions are entitled to act on this growing body of scientific evidence.
- Fourth, the Charter is also an important legal hook, which acknowledges as a matter of principle that human rights pose correlative obligations for EU institutions and States vis-à-vis future generations. The Charter also carries significant untapped legal potential. Currently, discerning positive obligations for EU institutions from the rights of the Charter is still very much in its infancy in the CJEU's case-law. However, a turn in the CJEU's approach to requiring positive obligations is doctrinally possible. Should the CJEU be willing to do so, it could require adopting EU legislation to protect posterity's needs under existing human rights guarantees. In other words, the Court could interpret existing human rights obligations in a

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<sup>76</sup> Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights.



way to be responsive to long-term risks. Moreover, the principle of proportionality under the Charter could also become an effective legal tool to prevent short-term interests from overriding long-term protection goals in times of inevitable conflict. Finally, the Court could also craft a generally applicable test requiring that lawmakers at the EU and national level, as well as legal and natural persons, act in a way that does not create prejudice to future generations' interests.

- Fifth, the precautionary principle obliges EU institutions to act upon risks of adverse effects to the environment or health, even if our scientific understanding of the problem is not yet fully complete. The precautionary principle is a general principle of EU law and hence is not limited to the scope of environmental policy. It therefore provides an adequate basis for taking proactive protective measures to safeguard long-term interests in the face of future threats under several policies.
- Sixth, the prohibition of age-based discrimination, as a general principle of EU law, could serve as a source of standalone obligations for taking action against activities that threaten to impose disproportionate adverse impacts on future generations compared to present generations.
- Moreover, the interpretation of CJEU could be an important leverage point for future-proofing EU law. Besides developing the doctrine of positive obligations under the Charter, it could also announce new general principles of EU law, such as intergenerational equity or the right to a healthy environment. Emerging trends in national constitutional laws to protect future generations may elevate to the level of a general principle of EU law.
- Finally, international law governing obligations towards posterity is rapidly developing, and may change the legal landscape of the EU. The proceedings of the International Court of Justice are specifically relevant to the obligations that the EU may have towards future generations under international law.