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INSTITUTE OF SOCIAL SCIENCES
DEPARTMENT OF PUBLIC LAW**

**RIGHTS OF FUTURE GENERATION: RIGHT TO ENVIRONMENT AND
ACCESS TO NATURAL RESOURCES**

MASTER'S THESIS

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AUGUST 2023

ACKNOWLEDGEMENTS

I would like to thank first to my advisor Ass. Prof. Demirhan Burak Celik not only for his kind support throughout the process but for his unconditional and endless intention to create a more livable world for the future generations and his respect to the environment. I am grateful to be able to work freely on a subject, about which there are few studies in the literature, under his supervision.

Secondly, Ass. Prof. Serkan Yolcu for his support and encouragement to me not only for this thesis but for my all academic dreams.

Then I would like to express my gratitude to Dr. Meriç Karagözler for mentoring me and encoring me to continue the academic journey, Prof. Dr. Sevilay Uzunallı for her understanding and aid through the preparation of this thesis and all academic and administrative members of İzmir Ekonomi University Law Faculty for providing a research friendly university environment to me.

I would also like to thank my esteemed professors who took part in the thesis jury, spared their valuable time, read the thesis meticulously, and contributed to the development and enrichment of the thesis by sharing their valuable opinions and criticisms.

Then ofcourse, my beloved family for providing all necessary material and moral support for years now. Their appreciation and encouragement have always been the propellant of my desire and capacity to create. First my father, Ass. Prof. Ercüment Gürlüler who is my ultimate idol to become an enthusiastic and productive academician. Then my mother Dr. Jale Gürlüler, without your endless support I would never be able to pursue my dreams. The last member of the family, Köpük, who attended all online LLM classes with me and witnessed the preparation of this thesis, your unrequited love makes me work to protect all animals and nature.

Finally, this work is dedicated to young activists who stood up for our world, rose without fear, despair, or dismay, only to keep up the good fight. You shall overcome one day!

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ABBREVIATIONS

ATL: Atmospheric trust litigation

ECHR: European Convention on Human Rights

ECOSOC: United Nations Economic and Social Council

EPBCA: Environment Protection and Biodiversity Conservation Act 199

EU: European Union

Maastricht Principles: Maastricht Principles on The Human Rights of Future Generations

PUC: Public Utilities Commission

Rio Conference: The United Nations Environment and Development Conference

Rio Declaration: Rio Declaration on Environment and Development

Stockholm Declaration: Stockholm Declaration and Action Plan for the Human Environment

UDHR: Universal Declaration of Human Rights

UN: United Nations

UNEP: United Nations Environment Program

UNFCCC: United Nations Framework Convention on Climate Change

USA: United States of America

WWII: Second World War

RESUME

Le sujet de la thèse est de discuter de la manière de réglementer les droits des générations futures à la lumière du changement climatique et des problèmes environnementaux qui sont les plus grands problèmes de notre temps et les plus grandes catastrophes auxquelles l'humanité est confrontée. Cette thèse porte sur les droits environnementaux parmi les droits des générations futures. Les droits des générations futures sont mis en danger jour après jour en raison de la crise climatique et des catastrophes environnementales. Le débat sur les droits des générations futures s'amplifie de jour en jour. Parce que la crise climatique et les problèmes environnementaux affectent directement les droits fondamentaux des personnes, en particulier la génération future. Il ne sera pas possible pour les générations futures d'atteindre le droit à une vie saine, l'un des droits humains les plus fondamentaux, sans air pur, sans eau, sans sol et sans ressources adéquates. L'objet de cette étude, qui a été menée dans le domaine du droit constitutionnel, est le droit environnemental des générations futures, mais afin de refléter pleinement l'étendue du sujet, les questions pertinentes du constitutionnalisme, des droits de l'homme et du droit environnemental sont également discutés de manière limitée dans l'étude.

Les droits des générations futures sont un enjeu qui remet en question le concept de représentation dans les démocraties. Parce qu'il n'est pas possible que les générations futures soient l'un des centres de pouvoir qui façonnent les lois parce qu'elles ne sont pas encore dans le monde. Cependant, d'autre part, leurs vies sont également affectées à la suite de chaque décision, arrangement et action pris aujourd'hui et de l'inaction d'aujourd'hui. Actuellement, des accords et réglementations internationaux ont commencé à entrer en vigueur dans ce domaine. Cependant, compte tenu des problèmes d'applicabilité du droit international, l'importance d'une réglementation juridique au niveau des constitutions nationales augmente en termes de protection des droits de l'homme. De plus, étant donné que les constitutions sont des contrats sociaux et affectent les générations en restant en vigueur pendant une longue période, l'étude se concentre sur la manière dont la justice intergénérationnelle peut être réalisée au niveau constitutionnel.

L'objectif principal de l'étude est d'identifier les insuffisances des réglementations existantes et de proposer des réglementations légales efficaces en analysant les raisons de ces insuffisances. Cependant, avant de passer à ces déterminations et suggestions, il est nécessaire d'examiner l'évolution historique et la nécessité du concept de droits des générations futures aussi détaillé et aussi clair que possible. Pour cette raison, il est important de comprendre les justifications constitutionnelles des libertés et droits fondamentaux qui existent déjà, en particulier le droit à l'environnement. Ainsi, il vise à comprendre la place des droits des générations futures dans la théorie des droits de l'homme et à fournir des explications sur la manière dont les réglementations juridiques produiront des solutions aux attentes sous l'influence de la crise climatique à la lumière des réglementations juridiques actuelles. . La thèse se compose de deux sections, en lien avec les études académiques sur les droits des générations futures, les réglementations locales et internationales, et les études des organisations opérant dans ce domaine. Dans la première partie, afin d'exprimer le contexte

théorique des droits des générations futures, les droits de l'homme en général et le droit à l'environnement sont exprimés. Dans la deuxième partie de la thèse, la protection des droits des générations futures est discutée.

Dans la première partie de la première section intitulée les droits de la génération future, on explique d'abord la naissance des droits de l'homme, son développement historique et les accords internationaux importants. Avec cette partie de la thèse, une base est posée pour le sujet des droits des générations futures, qui sera détaillé plus tard. Dans cette partie, il s'agit d'établir ce que sont les droits humains fondamentaux et leur lien avec la dignité humaine. Comme il n'y a pas de définition des droits de l'homme acceptée par le monde entier, il a été affirmé que les droits de l'homme découlent de l'être humain et sont des droits indispensables. Cette définition est également importante pour expliquer l'importance de l'accès des générations futures aux ressources environnementales au regard de leurs droits fondamentaux. Cette partie couvre également l'évolution historique des droits de l'homme et des conventions internationales et régionales.

Dans la suite de la première partie, la classification des droits de l'homme est donnée. La classification des droits de l'homme est expliquée afin de caractériser la mesure dans laquelle les droits des générations futures seront pris en compte. Les devoirs et obligations imposés à l'État par différentes catégories de droits de l'homme sont également soulignés dans cette section. La distinction entre droits classiques, droits sociaux et droits de solidarité a été expliquée. Dans cette partie de la thèse, les raisons de l'émergence du débat sur les droits des générations futures dans les conditions d'aujourd'hui ont été clarifiées en soulignant pourquoi différents droits ont émergé.

Dans la deuxième partie de la première section, le droit à l'environnement est discuté. Le droit à l'environnement doit être expliqué en détail afin que les droits des générations futures puissent être compris et que le concept de justice intergénérationnelle puisse être discuté de manière fructueuse. Bien que le droit à l'environnement soit considéré comme le droit des personnes d'aujourd'hui à accéder à un environnement sain dans de nombreuses réglementations existantes, il est en fait la principale source d'enracinement des droits des générations futures. Pour cette raison, il est important d'expliquer les réglementations en vigueur et les interprétations judiciaires du droit environnemental. Au début de cette partie, la définition du droit à l'environnement est faite et son évolution historique est expliquée. La conférence de Stockholm, qui est le début le plus visible du droit environnemental dans le domaine du droit international, et d'autres conférences et conventions ont également été mentionnées. Dans ce sens, l'évolution du droit à l'environnement a été révélée par l'évocation de la Charte mondiale de la nature et des premiers principes relatifs à la protection des ressources naturelles. Ces documents, conventions et conférences internationales sont importants car ils constitueront la base des mesures que les États doivent prendre en matière de protection du droit à l'environnement et des réglementations juridiques qui doivent être prises. L'émergence du concept de développement durable et des documents internationaux sur ce sujet sont également expliqués dans cette section. Il est important d'inclure ici le concept de développement durable, car les frontières de la durabilité doivent être tracées afin de définir et de protéger les droits environnementaux des générations futures.

Après avoir expliqué l'évolution historique, l'objet et le sujet du droit sont mentionnés. Il est important de comprendre ce que le droit environnemental protège fondamentalement.

Pour cette raison, qui et quoi le droit protège sont discutés dans cette partie de l'étude. Il existe différentes approches de l'interprétation du droit à l'environnement. Même si l'on constate que l'espace de protection du droit à l'environnement s'est élargi, il ne serait pas faux de dire qu'il existe toujours une approche centrée sur l'humain. En effet, du fait que le droit à l'environnement est encore orienté vers l'homme, les notions de droits de la nature et de droits des animaux ne se sont pas encore développées et généralisées. Puisque les droits des générations futures concernent les personnes, elles peuvent se faire une place dans le droit à l'environnement. Cependant, il convient de noter qu'il existe un débat temporel en plus du champ d'application en termes de protection du droit à l'environnement. Selon certaines approches, ce droit ne devrait être pris en compte que pour les personnes vivant actuellement, tandis que selon d'autres conceptions, les générations futures devraient également être prises en compte en termes de ce droit. Dans le cadre de cette étude, il est avancé que les générations futures ont droit à l'environnement et que les droits de l'homme n'ont pas de limitation temporelle.

Dans la partie suivante, la constitutionnalisation du droit environnemental est évoquée. Un autre point qui attire l'attention tout en soulignant la constitutionnalisation du droit à l'environnement est la relation entre les constitutions et les droits de l'homme. Dans ce contexte, il convient de comprendre l'importance du droit à l'environnement, qui est nécessaire à la jouissance des droits et libertés fondamentaux, au regard des constitutions. Pour cette raison, on constate que le droit à l'environnement commence à trouver plus de place dans les constitutions. Des exemples de différents pays sont également donnés dans cette section. Dans les exemples donnés dans cette partie de la thèse, des pays comme les États-Unis et l'Angleterre, où la production industrielle est répandue et les émissions de carbone élevées, sont inclus. Le but du traitement des exemples constitutionnels concernant le droit à l'environnement est que les exemples qui peuvent constituer la base de la réglementation des droits constitutionnels des générations futures découlent du droit environnemental. Dans la suite des exemples de constitution locale, d'importantes conventions et réglementations internationales sont également incluses dans cette section. Comme dans les exemples de la Constitution, la raison d'inclure les accords sur ce droit à l'environnement est que les droits des générations futures sont réglementés de manière similaire à ces accords.

La dernière partie de la première section est consacrée à la définition des droits des générations futures. Tout d'abord, une définition générale des droits des générations futures a été faite. Ensuite, l'impact de la crise écologique et, bien sûr, de la crise climatique sur les générations futures a été évoqué. Il est dit que la crise écologique ne ressemble à aucune crise vécue auparavant et que ses conséquences potentielles ne peuvent être prédites même par les experts. Dans la partie suivante, des discussions sur la protection juridique des droits des générations futures sont incluses.

Dans la deuxième section, le sujet principal de la thèse qui est la protection des droits des générations futures est abordé. Cette section est divisée en sous-sections en son sein. Il est dit que la crise écologique ne ressemble à aucune crise vécue auparavant et que ses conséquences potentielles ne peuvent être prédites même par les experts. Dans la première partie de la deuxième section, diverses décisions judiciaires concernant les droits des générations futures sont mentionnées, puis des réglementations légales sont mentionnées. Cet

ordre a été préféré puisque la protection des droits des générations futures a commencé par des décisions judiciaires et commence ensuite à prendre place dans des textes juridiques.

Dans la partie suivante, les décisions judiciaires concernant les droits des générations futures sont discutées. Alors que les décisions judiciaires sont discutées, les doctrines de base utilisées dans ce sujet sont également incluses. Parce que les interprétations judiciaires dérivent de ces doctrines et théories. La doctrine de la confiance du public est expliquée et comment la doctrine de la confiance du public peut être utilisée en relation avec le changement climatique et les dommages environnementaux est discutée. Selon cette doctrine, l'État a l'obligation de protéger le citoyen contre les dommages environnementaux, et en plus, le citoyen a le droit de poursuivre si l'État viole cette obligation. Le lieu de naissance de cette doctrine est l'Amérique, et des exemples tirés des affaires sous-jacentes et des commentaires du juge sont également présentés.

Le concept de justice intergénérationnelle est également abordé dans la deuxième section. La justice intergénérationnelle est un principe fondamental pour comprendre les droits des générations futures. Les constitutions n'existent pas uniquement pour réglementer la vie des personnes existantes. Les constitutions sont un ensemble de règles créées pour survivre pendant de longues générations. Par conséquent, ils doivent être fondés sur la justice intergénérationnelle. C'est précisément à cet égard que le développement durable doit être pris en compte.

Dans la partie suivante intitulée Cas de confiance atmosphérique, l'approche de la manière dont la doctrine de la confiance publique peut être utilisée contre la protection de l'atmosphère, c'est-à-dire en particulier contre le changement climatique, est exprimée. Dans cette section, le concept est expliqué en donnant lieu aux commentaires des juges. Il est expliqué comment les tribunaux peuvent protéger le citoyen contre l'État dans le cadre de la protection de l'environnement. Il est également souligné comment ce concept sera utilisé pour la justice intergénérationnelle. La protection de l'atmosphère est importante pour le droit des générations futures à un environnement sain. Pour cette raison, chacune des approches judiciaires et des affaires dans ce domaine sert effectivement à protéger les droits des générations futures.

Une autre question abordée dans la deuxième section est le problème de la représentation des générations futures. Comme ce ne sont pas des personnes vivantes, il ne leur est pas possible de s'exprimer, et bien sûr, il ne leur est pas possible d'élire un représentant pour les représenter, puisqu'ils ne vivent pas. Cependant, la représentation est essentielle pour les générations futures, les animaux et la nature elle-même, sinon le monde ne peut pas survivre. S'ils ne sont pas représentés, il n'est pas possible de parvenir à une justice intergénérationnelle. Afin de résoudre le problème de représentation, l'opinion suggérant que les droits et les intérêts des générations futures doivent être déterminés efficacement est incluse. Il est précisé que la protection peut être assurée en fonction des droits et intérêts déterminés.

Dans la suite de la deuxième section, des cas et des décisions concernant les droits des générations futures sont inclus. En vertu de cette section, les tribunaux nationaux et internationaux sont sous surveillance. L'approche des décisions judiciaires est importante lorsqu'il s'agit de proposer des règles constitutionnelles. Par conséquent, cette section se

concentre sur le cadre juridique dans lequel les tribunaux traitent des droits des générations futures. Les affaires pendantes devant la Cour européenne des droits de l'homme ont également été particulièrement mises en avant. Lorsque ces décisions seront rendues, l'interprétation motivée du tribunal aura un poids important dans la communauté juridique. Pour cette raison, après avoir mentionné les décisions actuelles, des commentaires sur le type de décisions attendues des tribunaux internationaux à l'avenir ont été ajoutés. Dans les décisions des tribunaux nationaux, des exemples sont donnés en Colombie, en Australie, aux États-Unis et en Allemagne.

Après le résumé des décisions de justice, les explications concernant la législation en vigueur ont été adoptées. Dans cette section, comme dans les sections précédentes, les réglementations internationales et les réglementations locales sont abordées ensemble. Les réglementations internationales sont également examinées séparément en tant que réglementations régionales et universelles. Un autre point frappant ici est que les réglementations universelles et régionales sont parallèles les unes aux autres.

Après les réglementations internationales, la partie sur la manière d'établir une justice intergénérationnelle avec les réglementations légales locales a été adoptée. Dans les réglementations locales, des exemples ont été examinés sous deux rubriques distinctes, à savoir la constitution et la législation juridique. L'inclusion de ce chapitre dans la thèse a deux significations différentes. Avant toute chose, il est important de considérer ces exemples afin de voir comment les débats théoriques sur les droits des générations futures se traduisent dans les réglementations juridiques. Deuxièmement, il est nécessaire d'examiner ces réglementations afin de voir les lacunes des réglementations légales existantes.

Au Pays de Galles et en Australie, les lois qui protègent directement les droits des générations futures sont mentionnées. En plus des lois, bien sûr, des exemples constitutionnels sont également partagés dans l'étude. Les constitutions sud-africaine, allemande et hawaïenne ont été proposées comme contenant des dispositions pour la protection directe des générations futures. Bien sûr, la différence entre les réglementations de ces États a également été mentionnée.

Compte tenu de ces exemples d'arrangements constitutionnels, des discussions sur la manière de protéger les droits des générations futures avec un arrangement constitutionnel efficace sont également incluses dans la thèse. Dans cette section, un règlement inclusif et exemplaire qui donnera aux citoyens le droit de les traduire en justice est également présenté. Cette recommandation est importante pour la protection des droits. Parce que les réglementations juridiques et constitutionnelles existantes ne garantissent pas suffisamment la protection de l'environnement et des droits des générations futures.

La suite de la deuxième section se concentre sur les institutions et les structures mises en place pour travailler sur les droits des générations futures. Des exemples d'exemples et de formats de ces organisations dans différents pays sont donnés. En examinant les exemples en Israël, au Pays de Galles et en Hongrie, les différences entre ces institutions sont également notées. En parlant de ces différences, leur efficacité est en fait remise en question. Une réponse a été cherchée à la question de savoir comment une organisation efficace devrait être basée sur ces différences. L'importance de l'accès des citoyens à cette institution a été soulignée et il a été souligné que la continuité de ces institutions devrait être assurée.

Dans la dernière partie de l'étude, l'exemplarité de la législation et des réglementations constitutionnelles et l'efficacité des institutions par rapport aux droits des générations futures ont été examinées. Une discussion relative aux conditions pour rendre cette réglementation plus efficace est présentée dans cette partie. Des qualités telles que la transparence, l'accès à l'information et la légitimité des institutions sont répertoriées comme critères d'un travail efficace dans cette section. L'importance de l'arrangement constitutionnel nécessaire pour établir un équilibre entre les droits de la génération actuelle et ceux des générations futures a également été rappelée.

Dans la conclusion, il est mentionné que cette étude se concentre uniquement sur les droits environnementaux des générations futures et la nécessité d'une réglementation constitutionnelle de ces droits. Il a été soutenu que l'arrangement le plus approprié de la justice intergénérationnelle se situera au niveau des constitutions, puisque les droits des générations actuelles devront être restreints. Cependant, il a été dit que seule une disposition constitutionnelle n'est pas suffisante et que les qualifications de cette disposition constitutionnelle et l'existence et la continuité d'institutions qui protégeront des droits supplémentaires sont également nécessaires. Le monde nous appartient à tous, et nous devons vivre de manière juste et équilibrée pendant des générations, avec tous ses éléments, et des méthodes juridiques doivent être développées sur la manière d'atteindre cet équilibre avec cette étude et des études similaires.

ABSTRACT

The subject of the thesis is to discuss how to regulate the rights of future generations in the light of climate change and environmental problems which are the biggest problems of our time and the biggest disasters facing humanity. This thesis focuses on environmental rights among the rights of future generations. The rights of future generations are endangered day by day due to the climate crisis and environmental disasters. The debate on the rights of future generations is increasing day by day. Because the climate crisis and environmental problems directly affect the fundamental rights of people especially the future generation. It will not be possible for future generations to reach the right to a healthy life, one of the most basic human rights, without clean air, water, soil and adequate resources. The focus of this study, which was carried out in the field of constitutional law, is the environmental right of future generations, but in order to fully reflect the scope of the subject, the relevant issues of constitutionalism, human rights and environmental right are also discussed in a limited manner in the study.

The rights of future generations are an issue that causes the concept of representation in democracies to be questioned. Because it is not possible for future generations to be one of the power centers that shape the laws because they are not yet in the world. However, on the other hand, their lives are also affected as a result of every decision, arrangement and action taken today and today's inaction. Currently, international agreements and regulations have started to come into force in this field. However, considering the enforceability problems of international law, the importance of a legal regulation at the level of domestic constitutions increases in terms of protection of human rights. In addition, since constitutions are social contracts and affect generations by staying in force for a long time, the study focuses on how intergenerational justice can be achieved at the constitutional level.

The primary aim of the study is to identify the inadequacy of existing regulations and to propose efficient legal regulations by analyzing the reasons for these inadequacies. However, before moving on to these determinations and suggestions, it is necessary to examine the historical development and necessity of the concept of the rights of future generations as detailed and as clear as possible. For this reason, it is important to understand the constitutional justifications of the fundamental rights and freedoms that already exist, especially the right to the environment. Thus, it is aimed to comprehend the place of the rights of future generations in the theory of human rights and to provide explanations on how the legal regulations will produce solutions to the expectations under the influence of the climate crisis in the light of current legal regulations. The thesis consists of two sections, in line with academic studies on the rights of future generations, local and international regulations, and the studies of organizations operating in this field. In the first part, in order to express the theoretical background of the rights of future generations, human rights in general and the right to the environment is expressed. In the second part of the thesis the protection of the rights of future generations is discussed.

In the first part of the first section titled the Rights of Future Generation, first the birth of human rights, its historical development and important international agreements are

explained. With this part of the thesis, a foundation is laid for the subject of the rights of future generations, which will be detailed later. In this part, it is aimed to establish what basic human rights are and their connection with human dignity. Since there is no definition of human rights accepted by the whole world, it has been stated that human rights stem from being human and are indispensable rights. This definition is also important to explain the importance of future generations' access to environmental resources in terms of their fundamental rights. This part also covers the historical development of human rights and international and regional conventions.

In the continuation of the first part, the classification of human rights is given. The classification of human rights is explained in order to characterize the extent to which the rights of future generations will be addressed. The duties and obligations imposed on the state by different categories of human rights are also underlined in this section. The distinction between classical rights, social rights and solidarity rights has been explained. In this part of the thesis, the reasons for the emergence of the debate on the rights of future generations in today's conditions have been clarified by underlining why different rights have emerged.

In the second part of the first section, the right to the environment is discussed. The right to the environment should be explained in detail so that the rights of future generations can be understood, and the concept of intergenerational justice can be discussed fruitfully. Although the right to the environment is considered as the right of today's people to access a healthy environment in many existing regulations, it is actually the main source of roots of the rights of future generations. For this reason, it is important to explain the current regulations and judicial interpretations of the environmental right. At the beginning of this part, the definition of the right to the environment is made and its historical development is explained. The Stockholm conference, which is the most visible beginning of the environmental right in the field of international law, and other conferences and conventions were also mentioned. In this direction, the development of the right to the environment has been revealed by mentioning the World Charter for Nature and the first principles regarding the protection of natural resources. These international documents, conventions and conferences are important because they will form the base of the measures that states should take in terms of protecting the right to environment and the legal regulations that should be made. The emergence of the concept of sustainable development and international documents on this subject are also explained in this section. It is important to include the concept of sustainable development here, because the boundaries of sustainability must be drawn in order to define and protect the environmental rights of future generations.

After explaining the historical development, the object and subject of the right are mentioned. It is important to understand what the environmental right basically protects. For this reason, who and what the right protects are discussed in this part of the study. There are different approaches to the interpretation of the right to the environment. Although we observe that the protection area of the right to the environment has expanded, it would not be wrong to say that there is still a human-centered approach. As a matter of fact, as a result of the fact that the right to the environment is still human-oriented, the concepts of nature rights and animal rights have not yet developed and become widespread. Since the rights of future generations are about people, they can find a place for themselves in terms of the right to the environment. However, it should be noted that there is a time debate in addition to the scope

in terms of protecting the right to the environment. According to some approaches, this right should be taken into account only for the people currently living, while according to other views, future generations should also be taken into account in terms of this right. Within the scope of this study, it is argued that the future generations have the right to the environment and the human rights do not have temporal limitation.

In the next part, the constitutionalization of the environmental right is mentioned. Another point that draws attention while underlining the constitutionalization of the right to the environment is the relationship between constitutions and human rights. In this context, the importance of the right to the environment, which is necessary for the enjoyment of fundamental rights and freedoms, in terms of constitutions should be understood. For this reason, we see that the right to the environment has started to find more place in the constitutions. Examples of different countries are also given under this section. In the examples given in this part of the thesis, countries such as the United States and England, where industrial production is widespread and carbon emissions are high, are included. The purpose of dealing with the constitutional examples regarding the right to environment is that the examples that can form the basis for the regulation of the constitutional rights of future generations arise from the environmental right. In the continuation of the local constitution examples, important international conventions and regulations are also included under this section. As in the examples of the Constitution, the reason for including the agreements on this right to the environment is that the rights of future generations are regulated in a similar way to these agreements.

The last part of the first section is devoted to the definition of the rights of future generations. First of all, a general definition of the rights of future generations has been made. Afterwards, the impact of the ecological crisis and, of course, the climate crisis on future generations was mentioned. It is stated that the ecological crisis is unlike any crisis experienced before and its potential consequences cannot be predicted even by experts. In the following part, discussions on the legal protection of the rights of future generations are included.

In the second section, the main subject of the thesis which is the protection of the rights of future generations is discussed. This section is divided into subsections within itself. It is stated that the ecological crisis is unlike any crisis experienced before and its potential consequences cannot be predicted even by experts. In the first part of the second section, various judicial decisions regarding the rights of future generations are mentioned and then legal regulations are mentioned. This order has been preferred since the protection of the rights of future generations started with judicial decisions and then begins to take place in legal texts.

In the following part, judicial decisions regarding the rights of future generations are discussed. While the judicial decisions are being discussed, the basic doctrines used in this subject are also included. Because the judicial interpretations derived from these doctrines and theories. The public trust doctrine is explained and how the doctrine of public trust can be used in relation to climate change and environmental damage is discussed. According to this doctrine, the state has the obligation to protect the citizen against environmental damage, and in addition, the citizen has the right to sue if the state violates this obligation. The

birthplace of this doctrine is America, and examples from the underlying cases and judge's commentary are also presented.

The concept of intergenerational justice is also discussed in the second section. Intergenerational justice is a fundamental principle for understanding the rights of future generations. Constitutions do not exist solely to regulate the lives of existing people. Constitutions are a set of rules created to survive for long generations. Therefore, they have to be based on intergenerational justice. Exactly in this regard, sustainable development has to be considered.

In the next part titled Atmospheric trust cases, the approach to how the public trust doctrine can be used against the protection of the atmosphere, that is, especially against climate change, is expressed. In this section, the concept is explained by giving place to the comments of the judges. It is explained how the courts can protect the citizen against the state within the scope of environmental protection. It is also emphasized how this concept will be used for intergenerational justice. Protecting the atmosphere is important for the right of future generations to have a healthy environment. For this reason, each of the judicial approaches and cases in this field actually serves to protect the rights of future generations.

Another issue discussed in the second section is the problem of representation of future generations. Since they are not living persons, it is not possible for them to express themselves, and of course, it is not possible for them to elect a representative to represent them, since they do not live. However, representation is essential for future generations, animals and nature itself, otherwise the world cannot survive. If they are not represented, it is not possible to achieve intergenerational justice. In order to solve the representation problem, the opinion suggesting that the rights and interests of future generations should be determined efficiently is included. It is stated that protection can be provided according to the determined rights and interests.

In the continuation of the second section, cases and decisions about the rights of future generations are included. Under this section, both domestic and international courts are under scrutiny. The approach of judicial decisions is important when proposing constitutional regulations. Therefore, this section focuses on the legal framework in which the courts deal with the rights of future generations. Cases pending before the European Court of Human Rights were also particularly highlighted. When these decisions come out, the reasoned interpretation of the court will have an important weight in the legal community. For this reason, after mentioning the current decisions, comments on what kind of decisions are expected from international courts in the future have been added. In domestic court decisions, examples are given from Colombia, Australia, the United States and Germany.

After the summary of the court decisions, the explanations regarding the current legislation were passed. In this section, as in the previous sections, international regulations and local regulations are discussed together. International regulations are also discussed separately as regional and universal. Another striking point here is that universal and regional regulations are parallel to each other.

After the international regulations, the part about how to establish intergenerational justice with local legal regulations has been passed. In local regulations, examples were

examined under two separate headings as constitution and legal legislation. The inclusion of this chapter in the thesis has two different meanings. First of all, it is important to consider these examples in order to see how the theoretical debates on the rights of future generations are reflected in legal regulations. Secondly, it is necessary to examine these regulations in order to see the deficiencies of the existing legal regulations.

In Wales and Australia, laws that directly protect the rights of future generations are mentioned. In addition to the laws, of course, constitutional examples are also shared in the study. The South African, German and Hawaiian constitutions have been proposed as containing provisions for the direct protection of future generations. Of course, the difference between the regulations in these states has also been mentioned.

Considering these examples of constitutional arrangements, discussions on how to protect the rights of future generations with an efficient constitutional arrangement are also included in the thesis. In this section, an inclusive and exemplary regulation that will give citizens the right to bring them to court is also presented. This recommendation is important for the protection of rights. Because the existing legal and constitutional regulations do not provide sufficient assurance for the protection of both the environment and the rights of future generations.

The next part of the second section focuses on the institutions and structures established to work on the rights of future generations. Examples of examples and formats of these organizations in different countries are given. While examining the examples in Israel, Wales and Hungary, the differences between these institutions are also noted. While talking about these differences, their effectiveness is actually questioned. An answer has been sought to the question of how an effective organization should be based on these differences. The importance of citizens' access to this institution was emphasized and it was underlined that the continuity of these institutions should be ensured.

In the last part of the study, the exemplary legislation and constitutional regulations and the effectiveness of institutions in relation to the rights of future generations were examined. A discussion in relation to the conditions to make these regulations more effective is presented in this part. Qualities such as transparency, access to information, and legitimacy of the institutions are listed as criteria for effective work under this section. The importance of the constitutional arrangement required to establish a balance between the rights of the present generation and the future generations was also reminded.

In the conclusion, it is mentioned that this study focuses only on the environmental rights of future generations and the necessity of constitutional regulation of these rights. It has been argued that the most appropriate arrangement of intergenerational justice will be at the level of constitutions, since the rights of current generations will have to be restricted. However, it has been said that only a constitutional provision is not sufficient and that the qualifications of this constitutional provision and the existence and continuity of institutions that will protect additional rights are also necessary. The world belongs to all of us, and we have to live in a fair and balanced way for generations, with all its elements, and legal methods should be developed on how to achieve this balance with this study and similar studies.

ÖZET

Tez çalışmasının konusu günümüzün en büyük sorunlarının başında gelen ve insanlığın karşı karşıya olduğu en büyük felaket olan iklim değişikliği ve çevresel sorunların ışığında gelecek nesillerin haklarının nasıl düzenleneceğinin tartışılmasıdır. Bu tez ile gelecek nesillerin hakları arasında çevresel haklara odaklanılmıştır. Gelecek nesillerin hakları iklim krizi ve çevresel afetler ile her geçen gün tehlike altına girmektedir. Bu nedenle de gelecek nesillerin hakları tartışması her geçen gün artmaktadır. Zira iklim krizi ile çevre sorunları doğrudan insanların temel haklarını etkileyecek boyutlara taşınmaktadır. Gelecek nesillerin en temel insan haklarından olan sağlıklı yaşam hakkına erişimleri temiz hava, su, toprak ve yeterli kaynakları olmaksızın mümkün olmayacaktır. Anayasa hukuku alanında gerçekleştirilmiş bu çalışmanın odağında gelecek nesillerin çevre hakkı bulunuyor fakat konunun kapsamının tam aksettirilebilmesi için anayasacılık, insan hakları ve çevre hakkının ilgili hususları da çalışmada sınırlı olarak ele alınmıştır.

Gelecek nesillerin hakları demokrasilerdeki temsil kavramının da tekrar sorgulanmasına yol açan bir konudur. Çünkü aslında yasaları şekillendiren güç odaklarından biri olmaları henüz dünyada olmadıkları için mümkün değildir. Fakat diğer bir taraftan bugün alınan her karar, her türlü düzenleme ve aksiyon ile hareketsizliğin sonucunda da onların hayatları etkilenmektedir. Günümüzde uluslararası anlaşmalar ve düzenlemeler bu alanda ön plana çıkmaya başlamıştır. Fakat uluslararası hukukun bağlayıcılık sorunları göz önünde bulundurulduğunda insan haklarının korunması bakımından anayasalar düzeyinde bir hukuki düzenlemenin önemi yadsınamaz. Ayrıca anayasaların toplum sözleşmesi niteliğinde olmaları ve uzun süre yürürlükte kalarak nesilleri etkilemeleri yönü de dikkate alındığından çalışmada nesiller arası adaletin anayasal düzeyde nasıl sağlanabileceği konusu üzerine odaklanılmıştır.

Çalışmanın öncelikli amacı mevcut düzenlemelerin yetersizliğini tespit etmek ve bu yetersizliklerin gerekçelerini analiz ederek verimli yasal düzenlemeler önermektir. Ancak bu tespit ve önerilere geçilmeden önce gelecek nesillerin hakları kavramının tarihsel gelişimini ve gerekliliğini mümkün olduğunca ayrıntılı ve açık şekilde irdelenmek gerekmektedir. Bunun için de hali hazırda mevcut temel hak ve özgürlüklerin anayasal gerekçelerinin ve özellikle de çevre hakkının anlaşılması önem arz etmektedir. Böylece, gelecek nesillerin haklarının insan hakları teorisindeki yerinin anlaşılması ve mevcut hukuki düzenlemeler ışığında hukuki düzenlemelerin iklim krizi etkisi altında beklentilere nasıl çözüm üreteceği konusunda açıklamaların sunulması hedeflenmektedir. Gelecek nesillerin hakları üzerine akademik çalışmalar, yerel ve uluslararası düzenlemeler ve bu konuda faaliyet gösteren kuruluşların çalışmalarının incelenmesi doğrultusunda tez iki bölümden oluşmaktadır. İlk bölümde gelecek nesillerin haklarının teorik alt yapısının ifade edilmesi adına genel olarak insan hakları ve çevre hakkı, ikinci bölümde ise gelecek nesillerin haklarının korunması anlatılmaktadır.

Gelecek nesillerin hakları başlıklı ilk bölümde öncelikli olarak insan haklarının doğuşu, tarihsel gelişimi ve önemli uluslararası anlaşmalar anlatılmıştır. Tezin bu kısmı ile devamında detaylandırılacak olan gelecek nesillerin hakları konusu için bir temel atılmaktadır. Bu bölümde temel insan haklarının ne olduğu, insan onuru ile bağlantısının kurulması amaçlanmıştır. Hali hazırda tüm dünya tarafından kabul edilmiş bir insan hakları tanımı bulunmadığından insan haklarının insan olmaktan kaynaklandığı ve vazgeçilmez haklar olduğu belirtilmiştir. Bu tanım gelecek nesillerin çevresel kaynaklara erişiminin temel hakları bakımından önemini de açıklamak bakımından önemlidir. Bu bölümde insan haklarının tarihsel gelişimine ve uluslararası ve bölgesel sözleşmelere yer verilmiştir.

Birinci bölümün devamında ise insan haklarının sınıflandırılmasına ilişkin açıklamalara yer verilmiştir. İnsan haklarının sınıflandırılmasına gelecek nesillerin haklarının ne kapsamda ele alınacağına nitelendirilmesi için yer verilmiştir. Farklı insan hakları kategorilerinin devlete yüklediği ödev ve yükümlülüklerin de bu bölümde altı çizilmiştir. Klasik haklar, sosyal haklar ve dayanışma hakları ayrımı açıklanmıştır. Tezin bu kısmında farklı hakların neden ortaya çıktığının altı çizilerek günümüz koşullarında gelecek nesillerin hakları tartışmasının doğmasının gerekçeleri aydınlatılmıştır.

Birinci bölümünün ikinci kısmında ise çevre hakkı ele alınmıştır. Çevre hakkı gelecek nesillerin haklarının anlaşılması ve nesiller arası adalet kavramının verimli şekilde tartışılabilmesi için detaylı olarak açıklanmalıdır. Çevre hakkı mevcut pek çok düzenlemeye günümüzdeki insanların sağlıklı çevreye erişim hakkı olarak ele alınsa da aslında gelecek nesillerin hakları bakımından temel yol göstericidir. Bu nedenle çevre hakkının günümüzdeki düzenlemelerinin ve yargısal yorumlarının anlatılması önem taşımaktadır. Bu kısmın başlangıcında çevre hakkının tanımı yapılmış ve tarihsel gelişimi anlatılmıştır. Çevre hakkının uluslararası hukuk alanında en bilinen başlangıcı olan Stockholm konferansından ve diğer konferans ile sözleşmelerden de bahsedilmiştir. Bu doğrultuda Dünya Doğa Şartları ile doğal kaynakların korunmasına ilişkin belirlenen ilk prensiplerden bahsedilerek çevre hakkının gelişimi gözler önüne serilmiştir. Bu uluslararası belgeler ve sözleşmeler ile konferanslar önem arz etmektedir çünkü devletlerin çevre hakkının korunması bakımından alması gereken önlemler ile yapması gereken hukuki düzenlemelerin alt yapısı bu belgelerdir. Sürdürülebilir kalkınma kavramının ortaya çıkışı ve bu konuda ortaya konulan uluslararası belgeler de bu bölümde anlatılmıştır. Sürdürülebilir kalkınma kavramının burada yer bulması önemlidir çünkü gelecek nesillerin çevre haklarının tanımlanabilmesi ve korunabilmesi için sürdürülebilir kalkınma kavramının sınırlarının belirlenmesi gerekmektedir.

Tarihsel gelişim açıklandıktan sonra hakkın özü ve öznesine değinilmiştir. Çevre hakkının temelde neyi koruduğunun anlaşılması önem arz etmektedir. Bu nedenle de hakkın kimi ve neleri koruduğu çalışmanın bu bölümünde tartışılmıştır. Çevre hakkının yorumlanmasında farklı yaklaşımlar mevcuttur. Her ne kadar çevre hakkının koruma alanının genişlediğini gözlemlese de halen yaygın olarak insan merkezli bir yaklaşımın var olduğunu söylemek yanlış değildir. Nitekim çevre hakkının halen insan odaklı olmasının sonucunda doğa hakları ve hayvan hakları kavramları halen henüz gelişmemiş ve yaygınlaşamamıştır. Gelecek nesillerin hakları ise yine insanlar hakkında olduğu için çevre hakkı bakımından kendine yer bulabilmektedir. Fakat çevre hakkının korunması bakımından kapsama ek olarak bir zaman tartışması olduğunu da belirtmekte yarar vardır. Bazı yaklaşımlara göre bu hak yalnızca hali hazırda yaşayan insanlar için geçerliyken başka bazı görüşlere göre ise gelecek nesiller de bu hakkın öznesidir. Bu çalışma kapsamında ise insan hakları bakımından

zamansal bir kısıtlama olmadığı ve gelecek nesillerin çevre hakkı olduğu görüşü savunulmuştur.

Bu kısmın devamında ise çevre hakkının anayasallaşmasından bahsedilmiştir. Çevre hakkının anayasallaşmasının altı çizilirken dikkat çekilen bir diğer nokta ise anayasalar ile insan hakları ilişkisidir. Bu bağlamda temel hak ve özgürlüklerin yaşanabilmesi için gerekli olan çevre hakkının anayasalar açısından önemi de anlaşılmalıdır. Bu nedenle de anayasalarda çevre hakkının daha fazla yer bulmaya başladığı görülmektedir. Bu kısmın altında farklı ülke örnekleri de verilmiştir. Tezin bu kısmında verilen örneklerde Amerika Birleşik Devletleri ve İngiltere gibi sanayi üretiminin yaygın olduğu ve karbon salımı yüksek ülkelere yer verilmiştir. Çevre hakkına ilişkin anayasa örneklerinin ele alınmasının amacı gelecek nesillerin anayasal olarak haklarının düzenlenmesinde temel oluşturabilecek örneklerin çevre hakkından doğmasıdır. Anayasal örneklerin devamında bu bölüm altında uluslararası önemli sözleşme ve düzenlemelere de yer verilmiştir. Anayasa örneklerinde olduğu gibi bu çevre hakkına ilişkin sözleşmelere yer verilmesinin sebebi de gelecek nesillerin haklarının bu sözleşmelere benzer şekilde düzenlenmesidir.

İlk bölümün son kısmı ise gelecek nesillerin haklarının tanımlanmasına ayrılmıştır. Öncelikli olarak gelecek nesillerin haklarının genel tanımı yapılmıştır. Sonrasında ekolojik krizin ve pek tabii iklim krizinin gelecek nesillerin üzerindeki etkisinden bahsedilmiştir. Ekolojik krizin daha önce yaşanan hiçbir krize benzemediği ve potansiyel sonuçlarının uzmanlar tarafından dahi öngörülemediği belirtilmektedir. Devamındaki kısımda ise gelecek nesillerin haklarının hukuki korunmasına ilişkin tartışmalara yer verilmiştir.

İkinci bölümde ise tezin asıl konusu olan gelecek nesillerin haklarının korunması konusuna geçilmiştir. Bu bölüm de kendi içinde alt kısımlara ayrılmaktadır. İkinci bölümün ilk kısmında gelecek nesillerin haklarına ilişkin çeşitli yargı kararlarından bahsedilirken sonrasında da hukuki düzenlemelere değinilmiştir. Gelecek nesillerin haklarının korunması öncelikle yargı kararları ile başlayıp sonrasında hukuki metinlerde yer edinmeye başladığı için bu sıralama tercih edilmiştir.

Yargı kararları tartışılırken bu konuda kullanılan temel doktrinlere de yer verilmiştir. Çünkü yargı kararları asıl olarak kaynağını bu doktrin ve teorilerden alıyor. Kamu güveni doktrini ve kamu güveni doktrinin nasıl iklim değişikliklerine ve çevre zararlarına ilişkin kullanılabileceğinden bahsedilmiştir. Bu doktrin uyarınca devletin vatandaşı çevre zararlarına karşı koruma yükümlülüğü vardır ve buna ek olarak da vatandaşın devletin bu yükümlülüğünü ihlal etmesi halinde dava açma hakkı da bulunmaktadır. Bu doktrinin doğuş yeri Amerika'dır ve temelini oluşturan davalardan ve yargıç yorumlarından örnekler de sunulmuştur.

Devamında ise nesiller arası adalet tartışılmıştır. Nesiller arası adalet gelecek nesillerin haklarını anlamak için temel prensiptir. Anayasalar yalnızca mevcut insanların hayatını düzenlemek için yoktur. Anayasalar nesiller boyu ayakta kalmak için oluşturulmuş kurallar bütünüdür. Bu nedenle de nesiller arası adaleti temel almak zorundadırlar. Tam olarak bu hususta da sürdürülebilir kalkınma gözetilmek zorundadır.

Atmosferik güven davaları başlıklı bir sonraki kısımda ise kamusal güven öğretisinin atmosferin korunmasına yani özellikle iklim değişikliğine karşı nasıl kullanılacağına dair yaklaşım ifade edilmiştir. Bu bölümde de yargıçların yorumlarına yer vermek suretiyle kavramın açıklaması yapılmıştır. Mahkemelerin vatandaşları devlete karşı çevrenin korunması kapsamındaki koruma yükümlülükleri anlatılmış ve kavramın nesiller arası adaletin sağlanması için nasıl kullanılacağına da vurgu yapılmıştır. Atmosferin korunması gelecek nesillerin sağlıklı bir çevreye sahip olma hakkı bakımından önem taşımaktadır. Bu nedenle de bu alandaki yargısal yaklaşım ve davaların her biri aslında gelecek nesillerin haklarının korunmasına hizmet etmektedir.

İkinci bölümde tartışılan bir diğer husus ise gelecek nesillerin temsil sorunudur. Gelecek nesiller, yaşayan kişiler olmadıkları için kendilerini ifade etmeleri mümkün değil ve tabii yaşamadıkları için kendilerini temsil etmek üzere vekil seçmeleri de mümkün değildir. Ancak gerek gelecek nesillerin, gerek hayvanlar gerekse doğanın kendisi için temsili zorunludur aksi halde dünyanın varlığını sürdürmesi mümkün değildir. Temsil edilmedikleri takdirde nesiller arası adaletin sağlanması mümkün değildir. Bu nedenle temsil sorununun çözülmesi için gelecek nesillerin hak ve menfaatlerinin verimli şekilde belirlenmesini öneren görüşe yer verilmiştir. Belirlenen hak ve menfaatlere göre koruma sağlanabileceği belirtilmiştir.

İkinci bölümün devamında gelecek nesillerin hakları hakkında davalara ve kararlara yer verilmiştir. Bu kısım altında hem yerel hem de uluslararası mahkemeler incelenmiştir. Anayasal düzenlemeler önerirken yargı kararlarının yaklaşımı önem arz etmektedir. Bu nedenle bu kısımda mahkemelerin gelecek nesillerin haklarını hangi hukuki çerçevede ele aldıklarına odaklanılmıştır. Avrupa İnsan Hakları Mahkemesi önünde beklemekte olan davalara da özellikle yer verilmiştir. İnsan hakları hukukunda önemi yüksek olan bu mahkemenin, gelecek nesiller hakkında vereceği kararlardaki gerekçeli yorumu hukuk camiasında önemli bir ağırlığa sahip olacaktır. Bu nedenle de mevcut kararlardan bahsedildikten sonra da uluslararası mahkemelerden gelecekte ne gibi kararlar beklendiğine ilişkin yorumlarda tezde öne sürülmüştür. Yerel mahkeme kararlarında ise Kolombiya, Avustralya, Amerika Birleşik Devletleri ve Almanya'dan örnekler verilmiştir.

Mahkeme kararlarının özetlendiği kısımdan sonra ise mevcut mevzuata ilişkin açıklamalara geçilmiştir. Bu kısımda da yine bir önceki bölümlerde olduğu gibi uluslararası düzenlemeler ve yerel düzenlemeler bir arada ele alınmıştır. Uluslararası düzenlemeler de bölgesel ve evrensel olarak ayrı ayrı ele alınmıştır. Burada dikkat çeken bir nokta da evrensel ve bölgesel düzenlemelerin birbirine paralel oluşudur.

Uluslararası düzenlemelerden sonra da yerel hukuki düzenlemeler ile nesiller arası adaletin nasıl tesis edilebileceğine ilişkin kısma geçilmiştir. Yerel düzenlemelerde ise yasal mevzuat ve anayasal düzenlemeler olarak iki ayrı başlık altında örnekler incelenmiştir. Bu bölüme tezde yer verilmesinin iki farklı önemi vardır. Öncelikle teorik gelecek nesillerin hakları tartışmalarının yasal düzenlemelere nasıl yansıdığını görmek için bu örneklerin dikkate alınması önemlidir. İkinci olarak da mevcut yasal düzenlemelerin eksikliklerini görmek ve etkili düzenleme önerilerinde bulunmak için de bu düzenlemeleri incelemek gerekmektedir.

Galler ve Avusturalya’da doğrudan gelecek nesillerin haklarının korunmasına yönelik yasalardan bahsedilmiştir. Yasalara ek olarak anayasal örnekler de çalışmada paylaşılmıştır. Güney Afrika, Almanya ve Hawaii anayasaları gelecek nesillerin korunmasına ilişkin açık hükümler içeren anayasalar olarak öne sürülmüştür. Tabii ki bu devletlerdeki düzenlemeler arasındaki farktan da bahsedilmiştir.

Bu anayasal düzenleme örnekleri dikkate alınarak verimli bir anayasal düzenleme ile gelecek nesillerin haklarının nasıl korunabileceğine ilişkin tartışmalara da tezde yer verilmiştir. Bu kısımda kapsayıcı ve vatandaşa da konuyu yargıya taşıma hakkı verecek örnek bir düzenleme de sunulmuştur. Bu öneri hakların korunması bakımından önem taşımaktadır. Zira mevcut yasal ve anayasal düzenlemeler gerek çevre gerekse gelecek nesillerin haklarının korunması için yeteri kadar güvence sağlamamaktadır.

İkinci bölümün bir sonraki kısmında ise gelecek nesillerin hakları üzerine çalışmak için kurulmuş olan kuruluş ve yapılar üzerinde durulmuştur. İsrail, Galler ve Macaristan’da yer alan örnekler incelenirken bu kurumlar arasındaki farklar da ele alınmıştır. Bu farklardan bahsedilirken de aslında etkinlikleri sorgulanmaktadır. Bu farklıklar üzerinden etkili bir kuruluşun nasıl olması gerektiği sorusuna cevap aranmıştır. Vatandaşların bu kuruma erişebilmelerinin önemi vurgulanmış ve bu kurumların sürekliliğinin sağlanması gerektiğinin ise altı çizilmiştir.

Bölümün son kısmında ise örnek verilen yasal ve anayasal düzenlemeler ile kuruluşların gelecek nesillerin hakları üzerindeki etkinliği incelenmiştir. Hangi durumlarda ve ne koşullarda bu düzenlemelerin daha etkili olacağına ilişkin bir tartışma yapılmıştır. Etkili çalışma için kurumların sahip olması gereken şeffaflık, bilgiye erişme imkanı, meşruluk gibi niteliklerden de bu kısımda bahsedilmiştir. Şimdiki nesil ve gelecek nesillerin hakları arasında bir denge kurulması için gereken anayasal düzenlemenin önemi de tekrar hatırlatılmıştır.

Sonuç bölümünde ise bu çalışmanın gelecek nesillerin yalnızca çevre hakkına odaklandığı ve bu hakların anayasal olarak düzenlenmesinin gerekliliği sonucundan bahsedilmiştir. Mevcut nesillerin haklarının kısıtlanması gerekeceği için nesiller arası adaletin en uygun düzenlemesinin anayasalar düzeyinde olacağı tezi savunulmuştur. Ancak yalnızca anayasal bir hükmün yeterli olmadığı ve bu anayasal hükmün nitelikleri ve buna ek hakları gözetecek kurumların varlığı ile sürekliliğinin de gerekli olduğu söylenmiştir. Dünya hepimize ait ve tüm unsurları ile nesiller boyunca adaletli ve dengeli bir biçimde yaşamak zorundayız, bu çalışma ve benzeri çalışmalar ile bu dengenin nasıl sağlanacağı konusunda hukuki yöntemler de geliştirilmelidir.

INTRODUCTION

“The very right to be human is denied every day to hundreds of millions of people as a result of poverty, the unavailability of basic necessities such as food, jobs, water and shelter, education, health care and a healthy environment.”¹

This thesis has been written during the very interesting times of humanity. The world faced with Covid-19 pandemic followed by mass wildfires, mucilage, mass pollution and drought while this thesis has been written. Unfortunately, this is just a start, with the effect of climate change and global warming, the future generations will face more problematic issues and catastrophes. Just like Nelson Mandela said currently millions of people are denied to basic needs and unfortunately with the rise of environmental crises whole new generations might face with a denial of basic rights and live without dignity that every human being is entitled. The striking point of this thesis was that problem. The natural changes and problems caused us to think about how the decisions and actions of the current governments affect the lives and rights of the future generations. We have to discuss whether the constitutions are present only to protect the current citizens or whether they have responsibilities towards to the future generations as well and what might be the constitutional steps to protect the rights of future generation.

The rights of future generation was chosen as a topic of thesis because the environmental crises are increasing every day and the future generations are the ones that will be affected from these challenges more than us. For this reason, it is important to envisage the potential issues and discuss current generation's upside regulations for the future generations. It is important to note that the topic of rights of future generation is not limited only with the environmental issues however this study only focuses on the environmental aspects of the rights.

¹ Mandela's speech At the 53rd UN General Assembly, New York, 1998.

The legal and ethical issues of rights of the future generations and natural disasters have deep philosophical roots however this study will focus on the legal aspects and especially the constitutional framework due to the constraints and limitations of the thesis. We have to note that even the legal aspects of such problem concern different branches of law, this study will discuss the constitutional framework and constitutional issues but also will refer the current legislations of different levels. The constitutional legal matters are chosen because above all, unless the environmental crises and challenges are not addressed at the highest level of the legal system it is impossible to lessen their effect and protect the current nations as well as the future generations. In addition to this claim, fundamental rights and freedoms are better protected in case they are envisaged under the constitutions since the environmental problems will affect the fundamental rights and freedoms of people as it will be discussed later in this paper they are better addressed through the constitutional regulations. Last but not least, constitutions are drafted to be effective for long period of time and since the current legislative framework will affect the rights of future generations, the constitutions shall consider potential infringements and protect their rights.

For these reasons, this study will focus on the constitutional aspect of the rights of future generation in relation to the right to environment and natural resources. The main aim of this thesis is to explain the relationship among the constitutionalism and right of future generation in relation to environment and set out the framework of a constitutional design to protect such rights.

Methodologically the thesis will be composed of three sections. The first section focuses on the concept of human rights in the beginning. This section aims to underline the concept of human rights in order to connect the rights of future generation to current legal system through understanding the meaning and requirements of the human rights. In addition to this explanation in the section, the focus will be mostly on the constitutionalism and the roots of human rights to create a better understanding of why to regulate environmental rights of future generation at constitutional level.

Then in the following section, right to healthy environment will be discussed. Under the second section a better understanding of the healthy environment right is aimed. Historical

roots, the classification of the right as a fundamental human right will be explained and legal regulation examples will be given as well as the judicial decisions and interpretation of the right. The understanding of the right to healthy environment is important since this thesis focus on the environmental rights of the future generation without the understanding this right it is impossible to connect and interpret its reflections for the future generation. The current interpretation, especially the judicial interpretation of the right to healthy environment will be the guide for the rights of future generations and in many cases the future generations are mentioned in the current decisions.

In the last section, finally the rights of future generations will be explained. The definition within the scope of this thesis and limits of the definition will be discussed. The historical roots of the rights of future generations will be analyzed and then current regulations around the world and different judicial decisions will be given as examples. In conclusion the necessity of constitutional level regulation will be discussed with the influence of international developments. The potential problems in relation to regulating the rights of future generation will also be addressed. The legal and constitutional regulation examples and their shortcomings will be identified. Finally, potential constitutional regulation will be proposed. In addition to the constitutional norms, the institutional examples will also be discussed and they will be also analyzed through comparison of existing examples. Accordingly the question of how to create a strong constitutional protection with institutions will be tried to answer.

FIRST SECTION: RIGHTS OF FUTURE GENERATIONS: FOUNDATIONS AND DEFINITION

A. Healthy Environment as a Fundamental Right

1. Human Rights in General

a. Foundations and Definition

Currently a universally accepted human rights definition is not set yet. There is a wide meaning of human rights which is all rights that arise from being a human, in the narrow interpretation these are the fundamental rights that are indispensable.²

For the sake of this study the following definition shall be accepted. Human rights mean “*Rights and freedoms to which every human being is entitled*”.³ Human rights term envisages the rights that people have just because they are human. These are the rights that are protected globally which means one can allege that his/her right has been infringed by any government, the person does not have to be citizen of the relevant state.⁴ Human rights are entitled by every single individual, and these are accepted as universal rights. They are also accepted to be unconditional⁵.

Human rights term is an old concept founding its roots even in Persian Empire.⁶ The concept growth further with the enlightenment and formulized especially following the WWII. The UN was founded after the end of the WWII. Following the formation of the UN, the UDHR was adopted by the UN on 10 December 1948.⁷ After the adoption the

² Durmuş Tezcan/ Mustafa Ruhan Erdem/ Oğuz Sancakdar/Murat Önok, **İnsan Hakları El Kitabı**, 9. Baskı, İstanbul: Seçkin Yayınları, 2021, p. 27.

³ **Oxford Dictionary of Law**, 7.ed, New York: Oxford University Press, 2009, p.269.

⁴ Rona Aybay/Demirhan Burak Çelik, **İnsan Hakları Hukuku**, 5.Bası, İstanbul:Der, 2021, p.5.

⁵ René Provost, **International Human Rights and Humanitarian Law**, Cambridge: Cambridge University Press, 2002, p.25.

⁶ Aybay/Çelik,op.cit. p.30.

⁷ <https://www.un.org/en/about-us/universal-declaration-of-human-rights>, accessed on 12/04/2022.

principles and rules reflected in the UDHR influenced many national constitutions. In addition to national constitutions, many international documents directly refer to the UDHR such as Inter-American Convention on Human Rights. Another milestone treaty in the human rights area is the European Convention of Human Rights. The European Convention of Human Rights is adopted on 4 November 1950.

The classification of the human rights will be discussed under the next section; however we have to note that even though it has been stated that they are universal and unconditional, the number and nature of human rights are changing dramatically. This is not surprising because the nature of the human rights depend on the conditions under which individuals are granted to these rights.⁸ In 19th and 20th century the economic structure was totally depended on the growth. The human rights were also shaped around this ideology. Thus, the human rights have centered around the economic development and human as the center while ignoring the environment and any other part of the environment apart from human. Environment was considered only as a source to utilize for the growth. However, in recent years, with the rise of ecological crisis, effects of climate change, exploitation of the natural resources forced humans to reconsider the concept of human rights in a more nature centric way and to consider environment more than just a source for human.

b. Classification of Human Rights

There are different types of classification of human rights. One of them is the “Thirty Rights of Universal Declaration of Human Rights”. According to this classification there are civil and political rights. And there are also economic, social, and cultural rights. The first category is honored against the other. This theory is called full belly thesis.⁹ One of the classification methods is named generation theory. The generation theory was first proposed by Karel Vasak in 1977.¹⁰ For the purpose of this thesis generation theory will be used. According to this theory human rights are divided into generations. Traditionally rights are divided into 3 categories. This is

⁸ Provost, op.cit., p.24.

⁹ <https://www.humanrightscareers.com/issues/how-are-human-rights-classified/> accessed on 12/05/2023

¹⁰ Spasimir Domaradzki/Margaryta Khvostova/David Pupovac1, **Karel Vasak’s Generations of Rights and the Contemporary Human Rights Discourse**, 2019,p.424.

called “Three Generations Theory of Human Rights”.¹¹ Currently there is discussion amongst the members of academia regarding the number of the generations. There are some authors who increase the number of generations to the eight categories.¹² For the sake of this study, we will focus on the first three generations of the human rights and note that the rights of future generations are discussed to be classified under the fourth generation of human rights by revising the categories.

The theory classifies the human rights according to their generations for three reasons.¹³ First, the generations are formed in accordance with the historical development of the human rights. Second, the generations facilitate the understanding of the social dynamics which shape the relevant right. The last reason is the generation classification generally overlaps with other classification methods.¹⁴ According to this theory human rights are divided into different generations according to their nature and historical development time. While briefly explaining the right categories the time period and historical developments behind each category will be discussed here as well. Because the historical developments shape the origin and birth of the relevant rights and for the purpose of this thesis it’s important to understand the birth and necessity of rights of future generation.

The first generation rights are also called as the classical rights are the civil and political rights. These rights were rooted in the ideology of the 17th and 18th centuries’ philosophers and the wide acceptance and application of these rights began following the American and French Revolution. These rights were based upon the request and needs of the bourgeois. This generation includes but not limited with right to life, freedom of expression, right to vote, right to property. First generation creates a sphere where the government cannot interfere to the individuals.¹⁵ These rights are protected through the negative obligation of the state.

¹¹ <https://www.openglobalrights.org/putting-to-rest-the-three-generations-theory-of-human-rights/>, accessed on 12/04/2022.

¹² Oktay Uygun, **Devlet Teorisi**, 9.Baskı, İstanbul: On İki Levha Yayıncılık, 2022, p.498.

¹³ Uygun, op.cit., p.497.

¹⁴ Ibid.

¹⁵ Uygun, op.cit., p.499

The second generation rights are called as social rights. The rights under this generation were born and developed during 18th and 19th due the pressing conditions and low-quality standards of work life. It has been understood that without the second generation rights such as right to work, right to nutrition, housing right the first generation right were only realized by small prestigious groups.¹⁶ Thus demand for the second generation rights arose due to the social needs. The second generation rights require government to take positive actions to protect these rights.

Lastly there are third generation rights which are called as solidarity rights. These rights arose following the end of WWII. The need for the protection of identity of cultural groups and the technical and scientific developments, right to cultural identity, right to environment, right to peace are enlisted under this generation. The necessity of these rights and the birth of these rights are directly related with the tragedies witnessed during the WWII.

As explained in each generation, the types of generation and number of rights protected under increase according to the social and economic needs and request of the people. Thus, since world and humanity are now facing one of the biggest threats of history, human rights are forced to be shaped accordingly just like the third generation rights arose due to the WWII tragedies, protection of new rights is necessary against the environmental tragedies.

Moving on the next generation shall be the fourth generation. The fourth generation rights are a new concept to be shaped. Just like the first three generation, this category arose due to historical developments and necessities. This category is defined as the intangible rights. Bio ethical rights and future generations' rights are mostly mentioned under this category.¹⁷ Some categorize the rights of future generation under the third generation since they mostly related with the environmental rights. However, it is crucial to distinguish the rights of future generation from the classical understanding of the right to clean and healthy environment.¹⁸

¹⁶ Uygun, op.cit., p.500

¹⁷ Mathias Risse, "The Fourth Generation of Human Rights: Epistemic Rights in Digital Lifeworlds", **Carr Center For Human Rights Policy Harvard Kennedy School**, 2021, (accessed through https://carrcenter.hks.harvard.edu/files/cchr/files/risse_fourth-generation.pdf).

¹⁸ Adrian Vasile Cornescu, "The Generations of Human Rights", **Days of Law: the Conference Proceedings**, 1. edition. Brno : Masaryk University, 2009 (accessed through

c. Constitutionalism and Human Rights

When we are measuring the human rights standards in a country, we review the constitutional guarantees and the public authorities' respect level to constitution.¹⁹ The constitutions are at the top of the hierarchical legal system as Kelsen formed the hierarchy of the legal norms. So, the protection of human rights is best provided with the constitutions from the top of the norm hierarchy since whole legal system has to be in compliance with the constitution.

Constitutionalism envisages the idea of institutionalization of a legal regime through limiting the powers of the state and foresees the duties of the state.²⁰ The functions of constitutions are (i) creating national governments and separating powers, (ii) dividing power between the federal and state governments in case of federal states' existence, (iii) protecting individual liberties.²¹ The protection of individual liberties function is crucial to this study. Since the discussion of this study focuses on the rights and liberties of the people, the connection between the human rights and constitution is important. The close connection between the human rights and constitutions causes us to write this thesis in the area of constitutional law. In the modern states human rights are the core of the constitutional legal system.²² Constitutions not only define the rights of the citizens but also provides institutional safeguards. Under the constitutions, states have obligation to respect, protect and fulfill the human rights of the individuals.²³ Accordingly, states are required to refrain from interfering, prevent others to interfere and create conditions for access.²⁴

https://www.law.muni.cz/sborniky/dny_prava_2009/files/prispevky/tvorba_prava/Cornescu_Adrian_Vasile.pdf).

¹⁹ OCHR, **Human Rights and Constitution Making**, New York: United Nations Publications, 2018, p.1.

²⁰ Norman Dorsen/Michel Rosenfeld/András Sajó/Susanne Baer/Susanna Mancini, **Comparative Constitutionalism: Cases and Materials**, 4th Ed., West Academic Publishing, 2022, p.41.

²¹ Erwin Chemerinsky, **Constitutional Law Principles and Policies**, 5th Edition, New York: Wolters Kluwer, 2015, p.3.

²² OCHR, op.cit., p.3.

²³ OCHR, op.cit., p.24.

²⁴ Ibid.

Significant number of rights and freedoms are protected and regulated by constitutions in different states. It will be not wrong to say that all constitutions include regulations regarding the human rights.²⁵ The reason behind this lies in the constitutionalism idea. Constitutions birth point was the limitation of the government and the foundation of the human rights' concept is same. They both aim to limit the governments in some aspects in order to liberalize the individual. Human rights are setting the limit for the power of the government in order to protect the individuals. Protection of human rights against the government is the essence and reason of existence of constitutionalism movement.²⁶ On the other hand the individual liberation is not limitless. It has been accepted that the states are entitled to limit the rights and freedoms of some individuals on the ground of protecting the rights of others. However, this may not be arbitrary. A balance among the rights of each have to be created. Also the limitations must serve a greater good and the aim of the limitation must be legitimate.

Constitutionalism is a fluid and varying concept and it does not only follow the positive legal norms but also searches for ideal constitution.²⁷ There are different types of constitutional making trends. The trends are shaped according to necessities of the societies and governments. Currently ecological constitutionalism is one the most efficient method to search for the ideal constitution.²⁸ Because the environment is one of the most imminent and staggering threat over the human rights. For this reason, the limitation of government and limitation of the human rights has to be shaped according to the environmental realities. The environmental constitutional making trend is not only about the human rights aspect but also environmental issues are creating sovereignty problems as well and it must be listed as one of the biggest insecurities of states now.

²⁵ Kemal Gözler, **İnsan Hakları Hukuku**, 4.Baskı, Bursa: Ekin Yayınevi, 2022, p.48.

²⁶ Gözler, op. cit., p.49.

²⁷ Zühtü Arslan, **Anayasa Teorisi**, 1.Baskı, İstanbul: Seçkin, 2008, p.21.

²⁸ There are several discussion in relation to making the nature a right subject. Some believes that ecological constitutions are not possible on the other hand some scholars like Köybaşı argue that the ecological constitutionalism has more aspects than just identifying rights of nature and this makes ecological constitutions possible. Ecological constitutionalism offers need mode of economic model, new protection against the sexism as well. For further details please see Mahmut Boynudelik, **Ekolojik Anayasa**, İstanbul:Yeni İnsan Yayınevi,2022, p.94.

For these ongoing reasons, since there is a strong connection between the constitutions and protection of human rights, if the rights of future generations need to be protected, then they shall be protected at the constitutional level. Otherwise, the real protection cannot be provided for the future generation. Also, constitutions are meant to last for a long period of time and serves as the social contract among the generations not only between the current people and the current government. Since the constitutions are binding over the succeeding generations the constitutionalism requires their rights to be protected as well.



2. Right to Environment

Right to environment is characterized as the recognition of a fundamental entitlement of individuals to enjoy environmental conditions of a defined and certain standard.²⁹ There are different approaches to the right to the environment. Some approaches interpret the right to environment placing the human in the center while some other approaches place the environment and its components in the center. These differences will further be reviewed belloved under the b section. Right to healthy environment is categorized as a third generation right. It is important to understand the right to environment in order to understand how the future generations are entitled to this right. In order to comprehend this fully, the scope and the subject of the right shall be fully analyzed and defined.

a. Historical Development of the Right to Healthy Environment

While the human rights have been codified in last 200 years, the right to environment is relatively new and started to be regulated within last 20-30 years.³⁰ The importance and the discussion in relation to the right to environment are increased more and more in the last decade with the rise of scientific information in relation to the potential threats over the humanity due to environmental problems. In this section of the thesis, the historical developments regarding environmental rights will be summarized.

Unfortunately, the right to healthy environment is still mostly interpreted through human centric vision. For this reason, the right to a healthy environment protects the natural environment and its components in order to create a dignified life for humans. Thus, when

²⁹ <https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what>, accessed on 20/06/2022.

³⁰ İbrahim Kabaoglu/Nihan Yancı Özalp, **Çevre Hakkı**, 1.Basım, İstanbul:Tekin Yayınevi, 2021, p.21.

we talk about the rights of future generations, we must consider the right to a healthy environment as a fundamental right for them as well. On the other hand, hopefully with the increase of current discussions and debates the right to healthy environment will be able to move forward from human centric approach to the protection of the environment for the sake of environment itself soon.

However even if the human centric approach continues, still a great protection of the nature is necessary. Since without a healthy environment, many other fundamental rights such as the right to life cannot be fulfilled. Thus, the right to clean and healthy environment is accepted as a human right already for the current generation for some time now.

On 8 October 2021, UN passed a resolution numbered 48/13 to stress out that right to clean, healthy and sustainable environment is a human right.³¹ The international recognition of this right at the UN level is crucial to ensure that the governments recognize such right and domestic protection is increased. Even though we state that the right to clean and healthy environment is accepted as an important human right by UN in 2021, it has a long-standing international history. The history is generally told to be starting with the Stockholm conference, however international recognition of the issue and discussion started with the resolution 1346 (XLV) of the ECOSOC on 6 December 1968.³²

i. Stockholm Conference

The first clear declaration and acceptance of the right to healthy environment was made in the Stockholm Declaration dated 16 June 1972. We celebrated the 50th year of the conference last year. Unfortunately, in 50 years the protection of the environment has not yet been reach at the level it should have reached. The Stockholm Conference is a watershed in the environmental rights. The conference was gathered in order to accept environmental challenges and issues as a major and core issue in the human rights agenda.³³

³¹ <https://www.iucn.org/news/world-commission-environmental-law/202110/right-a-healthy-environment>, accessed on 22/02/2021.

³² Lavanya Rajamani/Jacqueline Peel, **The Oxford Handbook of International Environmental Law**, 2.ed, Oxford:Oxford University Press,2021, p.34.

³³ <https://www.un.org/en/conferences/environment/stockholm1972>,accessed on 22/02/2022.

The Stockholm Declaration states that “*Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being*”.³⁴ Following the Stockholm Declaration, many other national and international steps were taken, and instruments were utilized to accept the right to environment as a fundamental human right. In addition to declaration, UNEP is established in this conference. Even though the Stockholm Declaration is important and accepts the right to the environment as a fundamental human right, it must be noted that the document is just a declaration and does not have any binding effect on governments.

ii. World Charter for Nature

Another important step towards the regulation of right to environment is World Charter for Nature dated 28 October 1982.³⁵ This document is important because it objectified the duties of governments. The documents underline that the UN is founded to create peace and security among the nations and the protection of natural resources falls within the scope of its aim.

According to this document the five general principles are;

“1. *Nature shall be respected and its essential processes shall not be impaired.*

2. *The genetic viability on the earth shall not be compromised; the population levels of all life forms, wild and domesticated, must be at least sufficient for their survival, and to this end necessary habitats shall be safeguarded.*

3. *All areas of the earth, both land and sea, shall be subject to these principles of conservation; special protection shall be given to unique areas, to representative samples of all the different types of ecosystems and to the habitats of rare or endangered species.*

4. *Ecosystems and organisms, as well as the land, marine and atmospheric resources that are utilized by man, shall be managed to achieve and maintain optimum sustainable*

³⁴The full copy of the declaration can be reached at <https://wedocs.unep.org/bitstream/handle/20.500.11822/29567/ELGP1StockD.pdf>.

³⁵ Kaboğlu, op.cit., p.30.

productivity, but not in such a way as to endanger the integrity of those other ecosystems or species with which they coexist.

*5. Nature shall be secured against degradation caused by warfare or other hostile activities.”*³⁶

Following these principles, the documents set out how governments should work on the protection of the environment in order to fulfill their duties. The document clearly states that the governments shall make all legislative arrangements nationally as individual stakeholder and internationally as collectively. As a soft law instrument, the document is effective to call out the governments and important step to start legislations all around the world however it does not have any binding nature.

iii. Report of World Commission Environment and Development

The commission was founded in 1983 and in 1987 released the report known as the Brundtland Report. This commission the report is crucial since a codified international definition of the sustainable development was first made in this report. According to the report, sustainable development is providing the needs of present people without effacing the ability of future generations to meet their needs.³⁷ While addressing the sustainable development the report underlies two key concept. These are; (i) *“the concept of ‘needs’, in particular the essential needs of the world’s poor, to which overriding priority should be given; and (ii) the idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs.”*³⁸ So the report aimed to define the sustainable development and also understand the limitations of it by referring the needs concept and social gap among the global north and global south.

³⁶ The full copy of the charter can be reached at <https://digitallibrary.un.org/record/39295#record-files-collapse-header>.

³⁷ World Commission on Environment and Development, **Our Common Future**, available at <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>, p.41 accessed on 22/11/2022.

³⁸ Ibid.

It is clear that the report is addressing the rights of future generations and responsibility of the current people, thus the current government responsibility towards the future generation. Actually, it is quite interesting that the report is published with the title of “Our Future”. The first steps toward the international discussion of sustainable development were laid down in the report and followed by the UN Sustainable Development Commission.

iv. The UN Environment and Development Conference

As mentioned above right to clean and healthy environment recognition and emphasizes has a long-standing history. The Rio Conference is one of the landmarks in this right’s history. From Stockholm Conference to Rio Conference the treaty regime in the subject doubled compared to the time period before the Stockholm Conference.³⁹

The Rio Conference was held between 3-14 January 1992 in Rio de Janeiro. The conference is monumental and was an international conference affective in the issue.⁴⁰ The conference was especially important because the “sustainable development” was defined and accepted as legal term during the meetings. Four different outcome documents were accepted and published at the conference: (i) Rio Declaration; (ii) UNFCCC; (iii) the Convention on Biological Diversity; (iv) Declaration on the principles of forest management.⁴¹

In 1992, the Rio Declaration was issued under which 27 principles were set up, the first one being *“human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature”*.⁴² It is clear that the international community started to stress that the development must be in line with the right to healthy and sustainable environment. This principle is not only protecting the current

³⁹ Rajamani/Peel, op.cit., p.35.

⁴⁰ Berdal Aral, **Üçüncü Kuşak İnsan Hakları Olarak Kolektif Haklar**, 1.Bası, İstanbul:Siyasal Kitabevi, 2010, p.230.

⁴¹ <https://www.un.org/en/conferences/environment/rio1992> accessed on:28/01/2023.

⁴² The full copy of the declaration can be reached at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CO_NF.151_26_Vol.I_Declaration.pdf accessed on 22/02/2022.

human beings but the future generations have to be included under the protection umbrella. Because if the development is not sustainable then the living conditions of the future generation will be in a way that they are unable to continue their existence and fulfill their potential.

Right to environment is a fundamental necessity in order to live a healthy and dignified life. For this reason, right to environment is not only crucial for the protection of the environment but also necessary for future generations to have a dignified life.

b. Subject and Object of the Right to Environment

The object of the right to environment is protection and enhancement of the environment in general. The environment is not only limited to nature but includes the environment created by humans including the historical and cultural environment. The definition and limitation of the subject are important because in order to define the rights of future generation, right to environment has to be taken into account. The future generation should be able to access the historical and cultural environment as well. The right to environment shall protect air, water, flora, fauna and cultural environment.⁴³

Subject of a right means the owner of such right which also means who can request the compliance with the relevant right. As mentioned above there are different approaches to the right to environment. These approaches differ through their understanding of the subjects of the right. According to a more anthropocentric approach, the rights are for the people and for this reason the subject of the right is human.

Another approach accepts that human, nature and environment are each piece of an entire and they should all be considered as subject of this right. In such approach the right to environment is not accepted as an human right but accepted as a right belonging to all living creatures.

⁴³ Kabaoğlu/Yancı Özalp, op.cit., p.89.

Understanding these two different approaches is important. Because in the rest of this paper, the regulations will be referred and analyzed and in the legal regulations the difference among these approaches will be directly reflected.

Even though there are different approaches, the content of the right can be accepted to include protection of the environment in any of the approaches. The protection of environment includes protection of all living and nonliving elements of the environment including the nature.⁴⁴ It is not easy to list all elements of the environment however we can say that right to environment protection includes natural habitats such as water, air, steams; natural resources; climate; vegetation; human population; cultural and natural properties; biodiversity as mentioned above in the description of the subject of the right.⁴⁵

Another different discussion regarding the subject of such right is the time limitation. Some approaches limit the subject of the right with the living people on the other hand some approaches believe future generations are also subject of such right. Most of the legislation that will be reflected in this paper is limiting the subject with the current generation and excluding the future generations. If the future generations are accepted to be subject of such a right, new discussions will arise. In such situation, the current generation will be obliged to protect the rights of future generations.⁴⁶ This thesis supports that the future generations are also subject of this right. This distinguishes right to environment from other rights. Another reflection of including future generation as a subject of the right give arise to the climate litigation. The climate litigation does not directly look for the relation among the harm and injured party.⁴⁷ We can see that there is an acceptance of potential victim or incidental victim status for the protection.

In this paper the subject of the right will be accepted as the current and future generations. The future generations cannot be subject of many of the other rights however for the right to environment and right to access to the natural resources, future generations

⁴⁴ Yasemin Semiz, Çevre Hakkı Kavramı ve Avrupa İnsan Hakları Mahkemesi'nin Çevre Hakkına Yaklaşımı, (Yüksek Lisans Tezi), Galatasaray Üniversitesi Sosyal Bilimler Enstitüsü, İstanbul, 2016, p.12.

⁴⁵ Semiz, op.cit., s.13.

⁴⁶ Kaboğlu /Yancı Özalp, op.cit.,p.87.

⁴⁷ Kaboğlu /Yancı Özalp, op.cit.,p.89.

are subject. For this reason, the right to healthy environment shall be seen as a solidarity right because the right creates solidarity among the human and other living beings of the nature as well as solidarity among the current and future generations. The right to environment puts a responsibility to current generation since the other subjects are the following generations and since the actions and decisions of some subjects effect the consequences of others and potentially cause inaccessibility to the right. Solidarity in relation to the protection of the environment shall be created among the generations.

c. Constitutionalisation of the Right to Environment

The constitutions' first aim was accepted to be limitation of the governments. Until the 20th century protection of fundamental rights and freedoms of the people under constitutions was not common concept of the constitutionalism. Through the constitutionality supervision the constitutional norms gain normative importance.⁴⁸ Following this, rights and freedoms became a constitutional law subject.

Since the right to environment is directly related with the fundamental rights and freedoms of the people, it was inevitable for constitutions to start regulating the right to environment. The constitutions first had regulated and limit the government, then regulating the rights and freedoms and later territory of the governments became subject of constitutions. Since the earth is now irrecoverable damaged, the states must get adopted to the new conditions urgently.

The people exist thanks to environment, the government exist due to people. For this reason, three main contents of the constitutions are first the territory, second people and then lastly government.⁴⁹ Thus, the governments and people have obligations to the territory hence the environment.

For the ongoing reasons and with the trending approach many countries are increasingly starting to regulate environmental rights under constitutions. Even though many

⁴⁸ Kabaoğlu/Yancı Özalp, op.cit., p.48.

⁴⁹ Kabaoğlu/Yancı Özalp, op.cit., p.49.

countries constitutionalize the right to environment there are differences among the wording of the clauses and regulations.⁵⁰ Different examples will be provided in the following sections. However, if we ask the question why many countries tend to regulate right to environment through constitutions, the answer will refer to the constitutionalism movement. Regulating the right to environment in constitutions creates a stronger legal framework for lower levels of legislation, increase enforcement of environmental law, fill the gaps in the environmental legislation and enhance the governmental accountability.⁵¹ It must be noted that even though many believe that constitutionalizing this right has effective outcomes without proper judicial review and institutions, it cannot be enough.

d. National Legislations

As explained above recently the importance of right to environment ascends and currently many countries regulate this right in their constitutions. In this section examples from the globe will be provided to show how this right is envisaged in different states. However it should be noted that there are many other constitutional regulations, this thesis only includes some examples to show the framework.

i. European Countries

Portugal is the first country to enshrine right to healthy environment in its constitution, in 1976. The importance of right to healthy environment is visible in Portuguese constitution with different regulations. First of all, Article 66 of the Portuguese constitution titled “*Environment and quality of life*” is as follows:

“1. Everyone shall possess the right to a healthy and ecologically balanced human living environment and the duty to defend it.

⁵⁰ Prayekti Murharjanti, The Effectiveness Of The Constitutionalisation Of Environmental Rights In Indonesia: Judicial Application And Government Compliance, (PHD Thesis), University of Sydney, Law Faculty, Sydney, 2019, p.13.

⁵¹ Murharjanti, op.cit., p.14.

2. In order to ensure enjoyment of the right to the environment within an overall framework of sustainable development, acting via appropriate bodies and with the involvement and participation of citizens, the state shall be charged with:

a. Preventing and controlling pollution and its effects and the harmful forms of erosion;

b. Conducting and promoting town and country planning with a view to a correct location of activities, balanced social and economic development and the enhancement of the landscape;

c. Creating and developing natural and recreational reserves and parks and classifying and protecting landscapes and places, in such a way as to guarantee the conservation of nature and the preservation of cultural values and assets that are of historic or artistic interest;

d. Promoting the rational use of natural resources, while safeguarding their ability to renew themselves and maintain ecological stability, with respect for the principle of inter-generational solidarity;

e. Acting in cooperation with local authorities, promoting the environmental quality of rural settlements and urban life, particularly on the architectural level and as regards the protection of historic zones;

f. Promoting the integration of environmental objectives into the various policies of a sectoral nature;

g. Promoting environmental education and respect for environmental values;

h. Ensuring that fiscal policy renders development compatible with the protection of the environment and the quality of life.”⁵²

The first paragraph of the article stipulates that living in an healthy and ecologically balanced environment is a right and in addition to being a right, the article stipulates it as duty for everyone as well. Accordingly, everyone has the duty to defend the right to environment. This formation of the right is important and influential since it envisages the concept of being a right and a duty at the same time. Every single member of the society is responsible from the protection of the environment. This is important in the context of the

⁵² The constitution can be reached at https://www.constituteproject.org/constitution/Portugal_2005.pdf accessed on 22/03/2023.

rights of future generations as well. Because the living generation is also responsible to protect and preserve the environment and natural resources, not only for their fellow generation members but also for the next generations. The protection duty cannot be framed to only protect the current generation.

In Portuguese constitution, Article 9 regulates state's fundamental duties. Article 9 paragraph d is as follows: *"To promote the people's well-being and quality of life and real equality between the Portuguese, as well as the effective implementation of economic, social, cultural and environmental rights by means of the transformation and modernisation of economic and social structures;"* paragraph e states that *"To protect and enhance the Portuguese people's cultural heritage, defend nature and the environment, preserve natural resources and ensure proper town and country planning.* According to Article 9, we can stipulate that the constitution of Portugal sees the protection of the environment as a fundamental duty of the government. The government is obliged to preserve the resources. Preservation is necessary for the future generation. From this stipulation, it can be understood that the government is obliged to defend the nature and natural resources for the future generation. From this point of view, it can be accepted that the concept and the limits of right to environment is important for the framing of the rights of future generation. The explicit mention of the future generation is not necessary.

Last but not least, the constitution of Portugal includes a special litigation right regarding the protection of environment. According to the Article 52 under which right the petition and right to popular action is granted; *"Everyone shall be granted the right of actio popularis, to include the right to apply for the appropriate compensation for an aggrieved party or parties, in such cases and under such terms as the law may determine, either personally or via associations that purport to defend the interests in question. The said right shall particularly be exercised in order to Promote the prevention, cessation or judicial prosecution of offences against public health, consumer rights, the quality of life or the preservation of the environment and the cultural heritage"*. Since the environment is such an important part of human's life, people are entitled to protect themselves from potential endangerments through legal opportunities. Providing this legal protection umbrella in the constitution underlies the pressure over government' duties. *Actio popularis* right is not

provided for every right or provision however there is a limited amount of topic that the *actio popularis* can be used. Protection of the environment is listed as one these important protection areas. From this perspective, we can understand that the constitutional importance given to protection of environment is real. Without a legal protection option, the legislations are not effective.

In addition to all these regulations, the protection of environment and importance of the environment highlighted in other articles and other rights envisaged in the Portugal's constitution such as right to health. Portugal is a great example to analyze in relation to the right to environment. Because it's constitution explicitly provides the right and creates additional barriers to protect it instead of just stating the right exists.

Germany is another example to be discussed under this section. In Germany the Basic Law was amended in 1994 to include the protection of environment as a state duty.⁵³ The protection sphere of the environment is expanded in 2002. Currently, Article 20a reads as follows; *“Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.”*⁵⁴ Compared to Portugal's Constitution, Germany's Basic Law has more limited information regarding the right to environment and protection of the environment. But still, we can see that Germany puts an importance over the protection of environment and addresses the environmental challenges at the constitutional level. The reference to the future generations is another key point. But the regulations in relation to the future generations will be discussed further in this study. At this point of the study, it is important to note that with the wording of the article the constitution accepts the importance of protection of nature for the benefit of future generations.

ii. United States of America

⁵³ Norman Weiss, **Revue juridique de l'Océan Indien**, “How to integrate environmental law into constitutional law: The German experience”, 2021, accessed through <https://hal.univ-reunion.fr/hal-03328965/document>, p.171.

⁵⁴ The full text of the German Basic Law can be reached at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.

USA is not a unitary state for this reason each state has its own constitution. The federal government has one constitution and each state has different constitutions. The federal constitution does not have any clause in relation to right to environment. On the other hand some states' own constitutions include relevant regulations. Different states have different regulations in relation to the right to healthy environment. Some examples will be provided here but it is important to note that many other states already have or now working on such constitutional regulation and there is a general campaign in USA to adopt the constitutional regulation for the right to healthy environment.⁵⁵

Article 27 of the Pennsylvanian Constitution titled Natural Resources and the Public Estate stipulates as follows; *“The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”*⁵⁶

The Pennsylvanian Constitution recognizes the right to the environment and not only accepting this right for the current generation but the future generations as well. The most important point of this regulation is that it underlies that the natural resources belong the people and it shall be protected by the government. This is a direct reflection of the public trust doctrine which will be explained later on in this thesis. The protection definitely includes the future generation. Environmental protection always needs to bear future generation in mind.

Another example from USA is State of Montana. Section 1 of the Article IX of the Constitution of Montana titled Environment and Natural Resources stipulates as follows; *“(1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.*

⁵⁵ <https://www.nrdc.org/bio/corinne-bell/every-state-should-have-right-healthy-environment> accessed on 27/03/2023.

⁵⁶ The full text of the Pennsylvanian Constitution can be reached at <https://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=00&div=0&chpt=1>.

(2) *The legislature shall provide for the administration and enforcement of this duty.*

(3) *The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.”*⁵⁷

State of Montana’s constitutional level protection of environment is impressive because the article does not only recognize the healthy environment right for the current/living people but also openly addresses this right’s necessity for the future generation as well. The constitution underlies the importance of environmental protection by not only recognizing the right but also enforces the duty of the government and its organs in relation to provision of right to clean and environment.

Another state which has constitutional regulation is Massachusetts. According to Article XCVII of its constitution; *“The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose. The general court shall have the power to enact legislation necessary or expedient to protect such rights. In the furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefor, or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.”*⁵⁸

In Massachusetts’ constitution the right to environment is recognized very detailly. Obviously, the right to environment definition includes water and air rights as well as esthetic quality and hearing quality. The supreme court of the state is recognized as the authority to maintain the protection and loading this duty clearly increases the importance of such right.

⁵⁷ The full text of the Pennsylvanian Constitution can be reached at <https://leg.mt.gov/bills/mca/index.html>.

⁵⁸ The full text of the Massachusetts’ Constitution can be reached at <https://malegislature.gov/Laws/Constitution>.

As we can see from the above provided examples, different constitutional regulations regarding the right to healthy and clean environment are present in states which helps us to understand that the importance of right to environment and among these in two future generations, unborn people are recognized and already entitled to this right through putting a weight on the government to protect and preserve the resources for them.

iii. India

Including India as an example in this thesis is preferred because as a huge production economy India has many environmental problems and cause world to face with serious amount of carbon emission. Article 48A of Indian Constitution is as follows; “*The State shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country.*”⁵⁹ In addition to that in Article 51 A it has been stated that “*It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures.*”

Indian constitution mentions the right to healthy environment very briefly. Instead of directly recognizing the right, it imposes duties of the state as well as the citizens. However, still it’s a step to recognize the right and require the government to take action to protect the environment as well as its components.

iv. Indonesia

Indonesia’s constitution also has a regulation in relation to the right to environment. The Article 28 H of the constitution stipulates “*(1) Each person has a right to a life of well-being in body and mind, to a place to dwell, to enjoy a good and healthy environment, and to receive medical care.*”⁶⁰ Also, the Article 33 paragraph 4 states that “*The organization of the national economy shall be based on economic democracy that upholds the principles of solidarity, efficiency along with fairness, sustainability, keeping the environment in*

⁵⁹ The full text of Indian constitution can be reached at <https://cdnbbsr.s3waas.gov.in/s380537a945c7aaa788ccfcdf1b99b5d8f/uploads/2023/05/2023050195.pdf>.

⁶⁰ The full text of Indonesian constitution can be reached at <http://www.humanrights.asia/indonesian-constitution-1945-consolidated/>.

perspective, self-sufficiency, and that is concerned as well with balanced progress and with the unity of the national economy.”

It can be interpreted from the above regulations that the Indonesian constitution recognizes right to healthy environment as part of a citizen’s wellbeing and right to life. Accepting the right to environment as part of the right to life clearly signifies the importance given to such right.

v. Turkish Republic

Turkey will be the last national example of this section. Turkish constitution also recognizes the right to healthy environment. Article 56 of its constitution states that *“Everyone has the right to live in a healthy and balanced environment. It is the duty of State and citizens to improve the natural environment, to protect the environmental health and to prevent environmental pollution.”*

Turkish constitution recognizes the right to healthy environment as a fundamental right and underlies that it is a duty of government to protect the environment. Turkish constitution does not mention this right specifically for the next generations. But still accepting this right as a fundamental right in constitutional level shall be appreciated.

e. International Legislations

There are many international legal texts recognizing the right to healthy environment. Some examples will be provided here however it shall be noted that this list is far from being exhaustive.

European Union Charter of Fundamental Rights is an international agreement among the member states of EU. Article 37 stipulates as follows; *“A high level of environmental protection and the improvement of the quality of the environment must be integrated into the*

*policies of the Union and ensured in accordance with the principle of sustainable development.”*⁶¹

As we can see from here member states are expected to be respectful to the environment and the right to a healthy environment of people. Thus the right to environment is recognized at the level of supra-nations.

One of the most important agreements in the international area is definitely Paris Agreement. Article 23 of the Paris Agreement stipulates as follows; *“1. Parties recognize that some Parties choose to pursue voluntary cooperation in the implementation of their nationally determined contributions to allow for higher ambition in their mitigation and adaptation actions and to promote sustainable development and environmental integrity. 2. Parties shall, where engaging on a voluntary basis in cooperative approaches that involve the use of internationally transferred mitigation outcomes towards nationally determined contributions, promote sustainable development and ensure environmental integrity and transparency, including in governance, and shall apply robust accounting to ensure, inter alia, the avoidance of double counting, consistent with guidance adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement.”*⁶²

Even though Paris Agreement is accepted as one of the most important agreements concerning the environment when we review the wording of the agreement we can see that voluntary actions are encouraged. This wording has been chosen after long negotiations. It is impossible to convince large number of countries to accept mandatory actions. For that reason, compared to the constitutional regulations international regulations are less binding and mostly they choose softer language. Constitutional regulations are more effective and binding over the countries. International treaties generally have their own limitations, and their capabilities are less effective.

⁶¹ The full text of the agreement can be reached at <http://fra.europa.eu/en/eu-charter>.

⁶²The full text of the agreement can be reached at https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf.

Another international legal instrument to be mentioned here is United Nation's Resolution adopted by the General Assembly dated 25 September 2015 stating that "*We are determined to end poverty and hunger, in all their forms and dimensions, and to ensure that all human beings can fulfil their potential in dignity and equality and in a healthy environment.*"⁶³

Clearly the international area accepts that the human dignity requires a healthy environment. As mentioned above and accepted by many scholars human rights phenomenon is directly connected with human dignity. For this reason, clean environment is a must for human rights and in order to create an effective human rights protection clean and healthy environment must be provided to people.

B. Rights of Future Generations

1. Rights of Future Generations Definition and Foundation

As Hannah Arendt stated, "*The idea of humanity, purged of all sentimentality, has the very serious consequence that in one form or another men must assume responsibility for all crimes committed by men, and that eventually all nations will be forced to answer for the evil committed by all others.*"⁶⁴ Human rights are evolved in order to protect the dignity of humanity. Since the future generations are also part of humanity their dignity shall be protected under the human rights umbrella as well. There can't be a temporal limitation over the humanity's dignity.

As explained above, rights are not discovered, they evolved over time according to needs and dynamics of the society. The framework and the scope of rights cannot be shaped and analyzed without the economic, social and political environment and facts of the time period and the society.⁶⁵ For this reason, the academics started to discuss the rights of future

⁶³The full text of the resolution can be reached at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf.

⁶⁴ Hannah Arendt, **The Origins of Totalitarianism**, New Edition with Added Prefaces, United States of America: A Harvest Book Harcourt Brace & Company, 1973, p. 235.

⁶⁵ Aybay/Çelik op.cit., p.31.

generations. With the effect of global climate crisis, the legal framework is already started to transform from environmental law to ecology law, the discussion is moving forward from right to environment to rights of future generations.⁶⁶

Rights of future generations concept derives from intergenerational justice. The concept and scope of rights of future generations have been argued for centuries in philosophical and religious context. However recently, the discussion is widened to diplomatic, political, and legal areas.⁶⁷ In many of the current legal system future generations are generally not explicitly entitled to rights since legal rights are granted to living people and legal entities. However, without protection of the rights of future generation the mankind's existence will become a questionable reality. With this point of view some framework rights of future generations should be taken into consideration. In order to determine details of the rights of future generations, the framework should be drawn and according to common understanding three principles are essential. These principles are (i) physical survival, (ii) dignity and (iii) realization of human potentials.⁶⁸ Then the discussions in relation to the scope and application of the rights of future generations shall shape around these principles.

The physical condition principle refers to the habitat that we live in. In other words, the environment is the physical condition. For this reason, protecting the habitat through the fight with the climate change and biodiversity extinctions, the physical condition of the future generations could be protected. According to scientists, the damage cannot be repairable and fully reversable any more however still some time can be gained for preservation of the environment with the aid of some precautions. Moving on with the second principle, the human dignity principle needs to be defined. Even though it has many aspects but in general the human dignity principle means to be recognized dignified as a creature regardless of nation, religion, sex or any other determinant. Dignity derives from being human itself, it does not require any other specialty. Human dignity is accepted to be source of all fundamental human rights and codified in constitutions, international human rights

⁶⁶ Aybay/Çelik op.cit., p.21.

⁶⁷ <https://www.diplomacy.edu/blog/are-we-responsible-for-the-rights-of-future-generations/> accessed on 25/02/2022.

⁶⁸ Ibid.

documents. The last principle is the realization of human potential. This principle interdepends with the former two principles. Because the humankind cannot fulfill their potential without dignity and healthy habitat. From this perspective as everyone else the future generations have the right to fulfill their potential in a dignified way in a healthy habitat. These three principles has to satisfied for future generations.

The rights of future generations are divided into two main categories. The first category is the environmental rights and the second category is the bioethical rights. The first category entails sustainable development while the bioethical rights concept is mostly focused on human condition.

This paper will focus on the former and will try to answer whether constitutions can be used as a mechanism to protect rights of future generations and establish intergenerational justice. The technological and scientific developments cause some potential threats. Protection of the current people and future generations against these threats became necessary and this cause the birth of solidarity rights.⁶⁹ These rights were initialized by right to environment but gather around the protection of mutual heritage of humankind. In this paper the development of the rights of future generations will center around the solidarity rights concept through environmental rights.

2. Environmental Crises' Effect on Future Generations

The biggest threat over the life quality of the future generations is environmental crises including climate change, extinction of species, deforestation. Since environmental crises will affect the life quality it will directly possess threat to their rights as well. The environmental crises are defined unprecedented thus we are unable to foresee full threats and effects. On the other hand, the experts list some potential effects including but not limited to climate change, degraded air and water quality, droughts, water scarcity and

⁶⁹ Kaboğlu/Yancı Özalp, op.cit, p.23.

deforestation. Human rights cannot be fully enjoyed by the people without right to environment.

Effects of the environmental crises are especially important in the case of future generations because the climate change is directly related with carbon emissions and the heat response of nature to the emissions takes 50 to 100 years.⁷⁰ Consequently, the current emissions will affect the lives of the future generations more than the current ones and more importantly current decisions will affect the lives of the latter drastically. Therefore, current legislation and legal framework shall be structured accordingly. The right to healthy and clean environment is regulated in different levels in many jurisdictions however as explained the most effective method is to regulate on constitutional level. This shall create a base for more environmentally friendly constitutions which will protect the rights of future generations.

3. Duty to Protect Rights of Future Generations Under Constitutions

Constitutions are defined as “*a body of fundamental principles or established precedents according to which a state or other organization is acknowledged to be governed.*”⁷¹ Constitutions in modern time regulates mainly two issues: (i) the bodies of the government and their functions and (ii) the human rights. As explained in the above sections human rights are best protected in the constitutional level most of the time. Especially in the case of environmental protection the constitutional regulations are important. If the constitutions are ecologically adopted the other legal regulations in the norm hierarchy must be environmentally friendly. The legal system can be adopted from top in domestic framework. There are also international regulations however international agreements and other legal instruments are not enforceable over the governments easily. Thus, they cannot be qualified as effective. According to scientific research we have to take action as soon as possible and the rapid action is only possible through constitutional regulations. Otherwise the future generations will be lack of a dignified life opportunity.

⁷⁰ Marc D. Davidson, “Wrongful Harm to Future Generations: The Case of Climate Change.” **Environmental Values**, vol. 17, no. 4, 2008, p.1.

⁷¹ The definition is collected from the Oxford English Dictionary.

In the following sections the possible constitutional approaches to the issue will be discussed. The judicial review will be used as a landmark point for the discussion over the potential regulations.



SECOND SECTION: PROTECTION OF RIGHTS OF FUTURE GENERATIONS

A. Judicial Review of Right of Future Generations

In the first section of the thesis, the theoretical foundation of the rights of future generations was discussed. In the second section, the protection of these rights will be studied. In this section of the thesis, some judicial decisions and comments will be analyzed in relation to the rights of future generations followed by the legal regulations in relation to the subject. While discussing the protection of the rights of future generations, the judicial approaches and decisions are reviewed first. Because the protection was established by judicial decisions and then hard law developed accordingly. Thus, the interpretations are discussed first herein.

The approaches will be discussed and examples from globe will be provided. This section is important because when the conclusion of thesis provides potential examples of constitutional regulation for rights of future generations and the judicial approaches shall guide the way. Accordingly, judicial review will be used methodologically to understand the scope and interpretation of the rights. Before looking at some examples of judicial decisions the related academic doctrines and approaches will be referred herein. Academic doctrines and theories will create the foundation of the judicial interpretation.

1. Public Trust Doctrine

“By the law of nature these things are common to mankind – the air, running water, the sea, and consequently the shores of the sea..... All rivers and ports are public: hence the right of fishing in a port, or in rivers, is common to all men.”⁷²

In the following section, the Atmospheric Trust Litigation will be discussed as a judicial approach to the issue. However, before explaining the ATL, the general trust doctrine should be understood first. PTD is a very old legal doctrine. The doctrine first originated in Roman law and then developed in medieval England and applied in the United States in the early nineteenth century.⁷³ Even though the PTD is mostly viewed as a common law doctrine, many countries used the doctrine in their constitutional regulations in relation to the origin of the protection of the environment.⁷⁴

In the beginning, according to roman law some resources such as sea, air, forest plays an important role in every human’s life and since they are the product of nature, everyone should be able to access them regardless of their social status.⁷⁵ This principle mandates that the government safeguard these resources for the benefit of the general public, rather than allowing them to be owned privately or used for commercial gain.⁷⁶ Even though government’s duty to protect was explicit in this doctrine, the availability of legal remedies to prevent infringement to citizens’ right was not definite.⁷⁷ However, within time especially with the American approach to the issue through judicial review, now it is generally accepted that the citizens have right to legally challenge the government if citizens’ rights are infringed

⁷² Institutes of Emperor Justinian, Book 2, Div. 1 (535 A.C.E) accessed at https://droitromain.univ-grenoble-alpes.fr/Anglica/just2_Moyle.htm accessed on 12/04/2023.

⁷³ Michael C. Blumm/ Mary C. and Wood, “The Public Trust Doctrine in Environmental and Natural Resources Law”, **Carolina Academic Press 2021**, 3rd Edition, 2021, p.3.

⁷⁴ Sean Lyness, “The Constitutional Public Trust in a Warming World”, **Pace Environmental Law (PELR) Review, Forthcoming**, 2023, p.1.

⁷⁵ Tanvi Kapoor, **Public Trust Doctrine**, accessed through <https://www.legalserviceindia.com/articles/ptdoc.htm> accessed on 25/04/2023.

⁷⁶ Ibid.

⁷⁷ Joseph L. Sax, “The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention.” **Michigan Law Review** 68, no. 3 (1970), p.475.

by the negligence or positive action of the government in relation to the natural resources belonging to the public.⁷⁸

Accordingly, this doctrine has two functions; the first one is to present an affirmative obligation of the state to manage the natural resources effectively. Secondly, in addition to this obligation, the citizens have right to challenge the government through legal remedies against the ineffective actions of their governments.⁷⁹

In a broad sense the public trust doctrine limits governments' utilization of natural resources. Because the government only holds the resources as a trust and resources belong to the public. Since the government is only a trust, its authority to transfer and develop these resources are limited.⁸⁰ The government is not the owner of the nature and its parts. As a trust the government is obliged to hold the resources in a way that the real owner will benefit in a good condition. Even though this doctrine is reflected a lot in the United States of America's judiciary, the limitations of the public trust doctrine are still vague. For example, the Supreme Court of California widened the notion by including the ecological and aesthetic considerations.⁸¹ For this reason, it is not possible for us to define the limits and scope of the doctrine herein. This thesis will focus on the intergenerational importance of this principle.

Public trust doctrine has three different types of limitations over the governments: (i) the resources shall be kept available to the public use by the trust; (ii) resources cannot be subject to sale in any case (even when a fair amount of money is paid) and (iii) the sources have to be upheld for specific types of utilization.⁸² The first two limitation is It might be important to elaborate on the third limitation. According to this limitation, the resources can

⁷⁸ Sax, op.cit., p.491.

⁷⁹ Sax, op.cit., p.475.

⁸⁰ Ipshita Mukherjee, Atmospheric Trust Litigation – Paving the Way for a Fossil-Fuel Free World accessed on <https://law.stanford.edu/2017/07/05/atmospheric-trust-litigation-paving-the-way-for-a-fossil-fuel-free-world/> accessed on 20/11/2021.

⁸¹ Many courts in the United States refer to this doctrine. In most of their decisions, judges apply the public trust doctrine in order to protect navigable and non-navigable waters, public land sand parks including both public and private lands and ecological resources. However the Supreme Court of California did not limit the protection with these sources but included aesthetic considerations to be protected as well.. Tanvi Kapoor, **Public Trust Doctrine**, accessed through <https://www.legalserviceindia.com/articles/ptdoc.htm> accessed on 25/04/2023.

⁸² Sax, op.cit., p.477

only be upheld for the traditional use or can only be used in a way that it is directly related to the traditional use.⁸³ Providing an example here might be helpful to understand the issue. For example, a coastal line might be used for to build a deck however it cannot be used as a place to dispose trash.⁸⁴

Some American states have this doctrine codified in their constitutions as well. So, the doctrine is not only an academic doctrine or discussion or a judiciary approach but also codified as a hard law already in connotational level.

In addition to all of the ecological application and reflections we have to focus on the intergenerational affects and understandings of this doctrine. When we see a trust doctrine we shall think about the future generations as well, because if the governments are holding the protection of the natural resources, it is not only for the current people but actually protecting the natural resources and the habitat from the current people for the future generations. The real owners include the future generation as well as the current citizens. Since the future generations are also the owners then the governments have to serve as trust for them too. According to trust doctrine, we are living as the beneficiaries of the public trust protecting the natural resources.⁸⁵ Public trust doctrine is a legal concept which recognizes that certain natural and cultural resources as being safeguarded for public use. The public is accepted as the rightful owner of all of these resources and governments are only there to protect the sources for them and this protection includes protection of the sources from the other fellow citizens. The doctrine is really important since the ideology includes both duty of the government and accountability of the government. We can understand that the protection duty is rightfully related to the future generations in the means of protecting the natural resources for them. But also, the accountability is important. In recent years we start to see many climate litigations in relation to governments' failure to combat with climate change and in many cases the claimants are the young people who shall be considered as the

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Mary Christina Wood, "Atmospheric Trust Litigation: Securing a Constitutional Right to a Stable Climate System", *Colo. Nat. Resources, Energy & Env'tl. L. Rev.*, Vol.29:2, 2017, 322 accessed via https://www.colorado.edu/law/sites/default/files/attached-files/wood_online_copy.pdf.

future generations. Thus, we can say that the seeds of future generations litigation started to be drilled already.

The idea of constitutionalism is very related to government being a trust idea. The constitutionalism movement's first aim was to limit the government and in addition to that make government use its power to protect citizens' rights in exchange for the power granted to government by its citizens. If the government is a trust, then it shall protect the given resources for its living and future citizens. Since right to environment, right to dignified life, right to health are accepted as the human rights. These rights fall in the scope of the protection of government whether from government itself or other citizens. Keeping these in mind this protection shall be created under constitutions by considering the effectiveness of the constitutional protection compared to other means. Especially when the public trust doctrine is analyzed with the notion of the state of law which requires state to act in accordance with the law within the limits of law and all acts of the states to be open to the judicial review, state's act or negligence regarding the natural resources shall be understood within the context of constitutionalism and the rights of future generations shall be regulated through constitutions. Because accountability against the future generations is required according to public trust doctrine and state of law principle.

2. Intergenerational Equity Principle

Intergenerational equity principle is another important notion to understand in this study area. The definition of intergenerational equity is holding and promoting prosperity and qualified life for all through taking administrative decisions and actions in order to provide balance between the current people and the future generations.⁸⁶ The intergenerational equity principle is especially important in the context of constitutional law. Constitutions are created not only for current people but also for the unborn people since they are expected to be amended less than other legislations and stay in effect for long time period. Constitutions are expected to be broader than the regular legal regulations and they are

⁸⁶<https://publicadministration.un.org/en/Intergovernmental-Support/Committee-of-Experts-on-Public-Administration/Governance-principles/Addressing-common-governance-challenges/Intergenerational-equity#:~:text=What%20is%20it%3F,term%20needs%20of%20future%20generations> accessed on 26/04/2023.

expected to be more rigid, which means that they shall change less in years. For this reason, constitutions should be inclusive for the future generations' rights as well. Thus, intergenerational equity must be considered while creating the constitutional norms.

Sustainable development must be aimed in order to create balance between the current and future generations. Sustainable development can be defined as having the three basic elements which are environmental protection, social development and economic development.⁸⁷ As explained in the above sections the Rio Conference plays an important role in relation to sustainable development.⁸⁸ According to the principles listed in the Rio Declaration, the importance of sustainable development, youth, woman, right to healthy environment were highlighted.⁸⁹ Following the Rio Declaration, the Johannesburg Declaration was published in 2002. The declaration starts by saying "*from our origin to future*".⁹⁰ The declaration directly underlines the importance of future generations and calls out for the governments to work together in order to protect the rights of future generations. The declaration accepts that the world belongs to current and unborn people and adds that the governments hold responsibility to keep the world safeguarded for the future generation too.⁹¹ Thus, we can say that international legal voices have already been speaking about intergenerational equity. In addition to international area, some countries have already addressed sustainable development in their constitutions in order to refer the intergenerational equity. These references will be mentioned in the section below.

The intergenerational equity requires each generation to transfer the world and its resources to the next generation in the same condition they receive from the preceding

⁸⁷ Oya Boyar, "Anayasa ve Sürdürülebilir Kalkınma", **İstanbul Hukuk Mecmuası**, 78/4,2021,p.1928 accessed through <https://doi.org/10.26650/mecmua.2020.78.4.0007> The constitutionalism has started to change following the 1980s. The individual- government relation has started to change and more collective understanding has started to be adopted with the rise of sustainability concept.

⁸⁸ According to Rio Declaration sustainable development is not possible without the protection of the environment. Declaration accepts that if the governments want a long term development they have to adopt ecological standards otherwise economic prosperity in long term will be also impossible.

⁸⁹ Boyar, op.cit., p.1928.

⁹⁰ The full text of the Johannesburg Declaration on Sustainable Development can reached at https://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI_PD.htm accessed on 26/04/2023

⁹¹ Boyar, op.cit., p.1935.

generation.⁹² The resources include both natural resources and cultural heritage. There are many philosophical discussions in relation to this theory however legal normative result and especially the constitutional implications are the duty to protect the environment and the natural resources. Providing justice among different generations requires both (i) distribution of the benefit and status and (ii) compensation of the damage caused.⁹³

The intergenerational equity recognizes that the current generation's actions create burden over the succeeding generations thus the balance among the benefits of the current and following generations shall be created.⁹⁴ Some argue that the generations' moral responsibilities towards each other is not a real issue.⁹⁵ However, according to us the generations hold great responsibility each other. Especially with the modern state system in post Westphalian order. With the climate change and the environmental challenges this moral responsibilities are increasing each day.

3. Atmospheric Trust Litigation

ATL shall be discussed in this subject. Because it is based on the public trust doctrine and since climate change is one of the biggest threats for the future generation the ATL will be important for future generations to require compensation damage for the destroyed atmosphere and climate. ATL is an approach, according to which the atmosphere is considered to be held in trust for the public.⁹⁶ From this explanation it is clear that the public

⁹² The protection of resources is important at this point. The transfer of the resources is not enough, the resources have to be in a condition that the previous generation has acquired. Otherwise the resources will not allow the future generations to enjoy their life in a dignified way. Patricia Birnie/Alan Boyle/Catherine Redgwell, **International Law & the Environment**, 3rd edn, Oxford: Oxford University Press, 2009, p.119.

⁹³ Ceylan Ş. Şahin, "Nesiller arası adaletle faydacı yaklaşım", **Ankara Üniversitesi Hukuk Fakültesi Dergisi**, 61, 2012, p.751.

⁹⁴ The balance is not only related to the rights. The balance includes the financial burdens and outcomes as well. The generation equity includes the fiscal balances as well. Judith C. Bessant/Michael Emslie/Rob Watts, "Accounting for Future Generations: Intergenerational Equity in Australia", **Australian Journal of Public Administration**, 70, 2012, p.145 accessed via <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1467-8500.2011.00723.x>.

⁹⁵ Cass. R.Sunstein, **Worst-Case Scenarios**, Cambridge: Harvard University Press, 2009, p.269.

⁹⁶ This approach was reflected in *Juliana v. United States* case. 15 young plaintiff sued the government. They were represented by "Our Children's Trust", an organization representing youth in climate cases. The main claim of the case was that the governments are holding the resources as trustee and the government has to protect the prosperity and quality of the resources for the children and unborn generations. The claimant main request was adoption of a climate plan that will protect the rights of future generations through protecting the

trust doctrine is directly reflected. The government is holding the atmosphere as a trust for all of the people. ATL is important because the legal responses to the climate change and governments' and current generation's responsibility have been insufficient and ATL offers an alternative judicial review opportunity. The conventional legal approach is a small-scale approach and its scope is very limited. For this reason holding people accountable for climate-related damages through lawsuits has not yet really been successful and effective.⁹⁷ But we have to keep in mind that the climate emergency is very pressing and effective measures have to be taken immediately and as soon as possible. In that sense there may not be sufficient time for individual lawsuits and disconnected policy reactions to effectively address the threat of catastrophic climate change⁹⁸. In order to solve this issue, ATL was developed to fill the gap in the existing legal system.⁹⁹

ATL is based on the public trust doctrine and supports that atmosphere belongs to public including current people and unborn generation and governments are accountable to protect it and take the necessary measures to decrease the potential harms over the atmosphere and climate¹⁰⁰. Gravity of the potential harm of climate change and atmospheric damage requires the remedies to match with the gravity of the problem. ATL is created around this belief. ATL is basically the application of public trust doctrine to climate crisis.¹⁰¹ This approach was defended by Our Children's Trust foundation. They defended the ATL approach through their legal and administrative applications stating that youth are the beneficiaries of public trust under which the governments are responsible to protect and restore the atmosphere.¹⁰²

natural resources <https://law.stanford.edu/2017/07/05/atmospheric-trust-litigation-paving-the-way-for-a-fossil-fuel-free-world/> accessed on 9/11/2021. The case was filed in 2015 and in the beginning of 2023 the District Court Judge Ann Aiken accepted the plaintiffs' claims. Even though the youth won the case, unfortunately the government and its representatives continue to file motions to dismiss the judgment. More details in relation to the status of the case can be reached at <https://www.ourchildrenstrust.org/juliana-v-us>.⁹⁷<https://law.stanford.edu/2017/07/05/atmospheric-trust-litigation-paving-the-way-for-a-fossil-fuel-free-world/> accessed on 9/11/2021.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Wood, op.cit., p.331.

¹⁰² Ibid.

One of the most important and leading judicial reviews depending on the ATL is present in a case before Pennsylvania Supreme Court in 2013 in the case of Robinson Twp. v. Commonwealth¹⁰³. Chief Justice Castille defended ATL approach in the plurality opinion. According to Justice Castille, the citizens have “*inherent and inalienable rights*” in relation to the environment.¹⁰⁴ He also added that these rights are basic rights and constitutions are obliged to protect them.¹⁰⁵ As Justice Castille stated, environmental rights are not donated rather they are inherited to each and every citizen, hence to every generation by the nature of human dignity.¹⁰⁶

Under this approach the courts are entitled to compel the public authorities to protect human health and the environment. The trust in this doctrine underlines that we as humankind from past to future are the beneficiaries of the public trust which grants us the water, air, wildlife, forest, soil.¹⁰⁷ According to Castille’s words citizens have inherent and inalienable rights to these essential parts of environment.¹⁰⁸ Within this scope since governments are entitled to protect people’s right to ecology as the trustee of the natural resources.

ATL is accepted to have three stages. In the first stage the relevant court shall acknowledge their crucial role in safeguarding the plaintiffs' rights; in the second stage the legal authorities shall declare what principle that the public authorities follow and lastly the court shall decide the proper remedy in practical means.¹⁰⁹ These stages are necessary in order to become effective. In the first stage the courts shall have judiciary enforcement capacity to balance the power. The judiciary power shall be used as a check and balance function over the government's failure to deal with the imminent threat against all humanity and especially succeeding generations.¹¹⁰ While courts are analyzing the case regarding the

¹⁰³ Robinson Township v. Commonwealth of Pennsylvania, Pennsylvania Supreme Court, 83 A.3d 901, 623 Pa. 536 (2013).

¹⁰⁴ Robinson Township v. Commonwealth of Pennsylvania, 947.

¹⁰⁵ Robinson Township v. Commonwealth of Pennsylvania, 36.

¹⁰⁶ Wood, op.cit., p. 322.

¹⁰⁷ Ibid.

¹⁰⁸ RobinsonTwp.v.Commonwealth,83A.3d901,947.

¹⁰⁹ Mary Christina Wood/Charles W. IV Woodward, **Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last**, “6 Wash. J. Environmental Law & Policy”, Volum:6, 2016, p.656.

¹¹⁰ Wood, op.cit., p.657.

ATL, they have to understand that the public trust is related to constitutional rights of the future generation.¹¹¹ As Justice Castille mentioned in the majority opinion, these rights shall be interpreted as the inherited constitutional rights. Then the courts shall see that the potential threat is imminent, urgent and unprecedented threat.¹¹² This urgency will lead the swift of general understanding and notion of the public trust approach and will enable shift to application of the ATL approach to the climate cases. Also since the potential harm and damage of the climate change is unprecedented and unpredictable the ATL has an historic importance.¹¹³ An unprecedented crisis is on the corner and the humanity especially the future generations will most likely to suffer the undignified life for that reason the legislation and the administrative actions are not enough the judiciary branch has to take more progressive actions and measures as well.

In the second step of the ATL cases, the courts shall define the governments' duties in relation to environmental protection, especially to climate change.¹¹⁴ Under these duties as trusts governments are obliged to protect the resources for people from unrecoverable damage. The duty of course includes the repair and compensation of the damage which has been already done. These are the essential questions of this thesis, the author believes that the government shall act as a trust and provide these functions to its citizens including the future generation. The fiduciary nature of the government shall be underlined in the second step of the ATL cases by the courts.¹¹⁵ According to such duty the government has to both protect and restore the existing damage and these obligations are not passive, they rather require active role of the authorities. In the Robinson Township v. Commonwealth case the active duty of the government was underlined.¹¹⁶

The last but definitely one of the most important stage of the ATL is the third one which is the management of the remedy. In this step ATL cases are distinguishing from the

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Wood, op.cit., p.660.

¹¹⁴ Wood, op.cit., p.662.

¹¹⁵ Wood, op.cit., p.665.

¹¹⁶ In the Robinson Township v. Commonwealth at 958 the government is stated as the trustee and as the trustee the government is obliged the protect the natural resources by not giving permission or by not encouraging to degrade, detract through both direct and indirect actions of the state.

other public trust cases. Generally, in the public trust cases court decide on the infringement but do not directly get in the position of the trust and decide on the remedy. However as mentioned over and over in the case of climate the potential threat is unprecedented and there is no time to waste, for this reason the court shall provide a more intense judicial review.¹¹⁷ The judicial remedy shall be clear and have a time limitation. The remedy shall include a plan and this plan has to be consisted of step tasks which are measurable and the judicial oversight over the application of the plan shall be continuous.¹¹⁸ The climate crisis is not in the door any more. We are already living in the time of crises therefore, the judicial remedies shall be strict and have the oversight to create structural injunction to protect the future generations.

ATL is an important approach within the scope of constitutional law because it derives from the public trust doctrine. Public trust doctrine and its relevance to constitutionalism is mentioned above in this thesis. Since the constitutions are created by one generation to serve for many other succeeding generations, they should have overreaching nature and if the governments are not seen as the trust this function cannot be fulfilled by the constitutions. Thus, if we request constitutions to serve for all of its constitutional duties then the governments shall be seen as the trust of the future generations' resources. Government is formed by the people and for the people, thus its main duty is to be the trustee against all the potential damages that might cause harm. Since the formation of the government by the people includes the unborn generation, government has to work for them as well and ATL plays an important role there. ATL doctrine and judicial approaches shall be taken into account while forming the national constitutions' clauses to protect future generations. The world does not have new atmosphere for each generation so if the existing natural resources are hold as the common heritage the atmosphere has to be protected and this has to be regulated.

¹¹⁷ Wood, op.cit., p.667.

¹¹⁸ Ibid.

4. Future Generations Representation Problem

*“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”.*¹¹⁹

Right to environment litigation is a key issue in relation to rights of future generation. The importance of judicial review and judicial progressiveness’ importance is explained above in the ATL section of this thesis. Climate litigation is relatively a new concept. In the case of climate litigation, the question of who has right to sue the governments and who will be able to present unborn generation in front of the court remains as a both legal and philosophical question. Short term vision is not applicable in the case of climate. For longer-term solutions future interests must be addressed in the climate litigation by institutionalizing the representation of the succeeding generations.¹²⁰

Living people have many means to advocate for their rights. They can do it through political pressure, voting, become part of financial interest groups and finally they can go to courts to fight for their rights. However, in the case of future generations they have no such power to defend their rights and they do not have any means to carry political bargaining power. So how they will defend their rights? Even though this question has a long-standing history it’s gravity increase with the growing scale of the climate crisis. This question might be important in case of all rights however in the case of right to a healthy environment the question becomes the core of the issue because their most important right which is right to dignified life will be breached due to the actions of the current generation.

Due to the increasing discussions about the climate change and future generations, different approaches, and theories in relation to representation of the future generation have

¹¹⁹ Report of the World Commission on Environment and Development: Our Common Future, paragraph 25, the whole report can be reached at <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf> accessed on 22/11/2022. The report underlines that the in recent decades the industrialization increased a lot and while farmers are loosing their land and resources the cities are getting bigger. One important note to take here is that while the industrialized countries are the biggest polluters they are also the key decision makers in international legal area.

¹²⁰ Inigo Gonzalez-Ricoy/Felipe Rey, “Enfranchising the future: Climate justice and the representation of future generations”, **Wiley Interdisciplinary Reviews: Climate Change**, 2019, p.1.

also started to be discussed. For the sake of this paper one approach is taken into consideration and accepted. According to this normative approach the representation of the succeeding people is essential for the democracy because the current people are entitled and able to use world's resources and they are consuming such sources as well as creating carbon emission which will end up future generation with unalterable and terrifying living conditions.¹²¹ Without representing the future generation, the intergeneration justice will be impossible to reach.¹²² According to this theory, representation of the future generation is an obligatory mean to enhance the climate and intergenerational justice.¹²³ It has to be noted that in this approach the future generation representation is accepted as a tool rather than the result.

Under this theory three sub issues are regarded. The first issue to be considered is the relation of the climate justice and the future generation and determine demand of the future generations from the climate justice. The second one is analyzing the factors that could prevent the fulfillment of the demands. The potential factors which might prevent the satisfaction of the demands may include the timing of elections, uncertainty about what lies ahead, or a lack of coordination.¹²⁴ The last issue is to how the representation of the future generations deals with the potential determining factors in relation to climate challenges.¹²⁵

The question of whether the future generations are affected from current legislation is presented in many issues and debated over to what extend the democratic inclusion should understand the meaning of effect.¹²⁶ This question shall be considered irrelevant in the case of climate and environmental rights. It is crystal clear that the current legislation and administrative actions steel from the succeeding generations because the utilization of resources and damages over the nature stays for long term. For this reason, the democratic inclusion's requirement of "being affected" is satisfied in relation to this issue.

¹²¹ Ricoy/Rey,op.cit.,p.2.

¹²² Peter Lawrence/ Lukas Kohler, "Representation of future generations through international climate litigation: A normative framework", **German Yearbook of International Law**, Vol. 60,2018, p.640.

¹²³ Lawrence/Kohler, op.cit., p.2

¹²⁴ Alan M. Jacobs, **Governing for the long term: Democracy and the politics of investment**, Cambridge: Cambridge University Press, 2012,p.35.

¹²⁵ Ricoy/Rey,op.cit.,p.2.

¹²⁶ Ricoy/Rey,op.cit.,p.3.

Representation of the future generations is crucial in relation to environmental rights and the democratic inclusion principle requires their representation.

But another problem is that since they are unborn, who will be their proxy to represent them? Some scholars defend that an office for protection of the environment can be formed and this can represent the rights of both future generations and unhuman members of the environment.¹²⁷ Currently representation of the children and some future generations started to be seen in the litigation however litigation representation is not enough thus, such committees or offices will be more effective since they will also create representation in the legislature and administrative levels as well which is necessary for the proper protection of their environmental right. Because the litigation takes time and even though it affects the legislature and the administrative organs as well, it might be too late. Since the protection of environment and resources is a time sensitive issue the representation shall be greater than the litigation.

According to some opinion, the selection and accountability of the representative problem can be overcome if the rights and benefits of the future generations can be identified accurately. If the problems can be identified, then the actions of the representative can be evaluated, and the representative can be hold accountable.¹²⁸ If this view is accepted, then the representation of future generations in relation to the environmental rights will be possible. Since the environmental rights and protection of the resources is an identifiable benefit for all the future generations even though they are not a homogenous group.

It is crucial to note that in relation to the representation of the future generations it can be said that the future generations can be regarded as a constitutional minority.¹²⁹ They can be regarded as minorities since they are underrepresented in democratic regimes. Since

¹²⁷ Discussion in relation to the representation of the future generations might be similar to the representation of the animals. Environmental ombudsman, committee might be formed in order to defend the rights of nature, animals or future generations. Serkan Köybaşı, “Yeni Bir Anayasal Hak Öznesi Olarak Hayvan – II”, **Anayasa Hukuku Dergisi**,

C: 7, S:14, 2018, p. 401. This will be further discussed in the institutions section of the thesis.

¹²⁸ Ricoy/Rey, op.cit., p.3.

¹²⁹ Jan Linehan/ Peter Lawrence, op.cit., p.187.

the constitutional democracies do not only protect the majority, but minority rights are also inseparable part of the constitutional democracies.

Even though there are many debates over the representation of the future generations, luckily many countries, as we will see some examples later in this thesis, amended their legal framework to include protection of the future generations. We also started to see many climate litigations mentioning the rights of future generations.

5. Case-law

In recent years we started to see many climate litigation cases both in international courts and in domestic courts. Under this section these cases will be briefly explained and analyzed. It is important to note that the number of the climate cases are increasing, however for the sake of this study cases that are directly mentioning the rights of future generations are chosen as examples.

a. International Case-law

i. European Court of Human Rights

The first important court to be mentioned is the ECHR. Unfortunately, until now a case directly regarding the rights of future generations has not been brought in front of the Court. For this reason, here under this section the Court's approach and cases in relation to environmental rights related to climate change and children's cases in relation to the same subject will be discussed. Because the approach and legal reasoning in these cases will be influential.

Currently the European Convention of Human Rights does not directly include a right to healthy environment or rights of future generations. However, recently many climate change cases and environmental cases started to come before the court. Thus, the court is asked to develop a case law in relation to such issue and such rights. The rights of future generations issue is brought before the court in relation to climate change. In 2023 there were

three cases pending before the Grand Chamber of the ECHR and the Court finally had a procedural meeting in relation to these cases. These cases are Verein Klimaseniorinnen Schweiz and Others v. Switzerland, Carême v. France and Duarte Agostinho and Others v. Portugal and 32 Others.¹³⁰

The hearing for the Verein Klimaseniorinnen Schweiz and Others v. Switzerland took place on the 29 March 2023. The interesting point about this case is that the applicants are the old people. Even though the climate and environmental issues are mostly seen as a problem and issue for the younger people and future generations in this case a group of old people filed the case. The applicants are worried about the living conditions and worried about their health due to the environmental harm to which Swiss government failed to act. According to applicants the Swiss government has many shortcomings and this failure of the government affect their right to life and right to private and family life as protected under Article 2 and Article 8 of the European Human Rights Convention. The applicants also add that their right to fair trial and right to fair remedy are also infringed throughout the process.¹³¹ The ruling in relation to the case has not yet been given and/or published. However even though applicants are old people and applied for their own living conditions the ruling will definitely have positive impact over the future generations. This is what makes the case interesting as well. Because the elderly people find the climate change problematic for the elderly people's health and the case will have beneficial effect over the youth. In any case the decision of the ECtHR is really important because since the right to a healthy environment is not directly regulated in the Convention. The case law is very crucial to foresee the potential developments in the rights of future generations because we will see how the court will interpret the procedural issues and the merits. Many other governments and institutions requested to become third party to the case. This situation also shows how this case plays an important position in the growing case law in the right to environment, right to be protected against the climate change and eventually rights of future generations.

¹³⁰ ECHR Fact Sheet on Climate Change, p.4 can be reached at https://www.echr.coe.int/documents/d/echr/fs_climate_change_eng.

¹³¹ Press Release regarding the Grand Chamber to examine case concerning global warming, p.2 can be reached <https://hudoc.echr.coe.int/eng-press#%7B%22itemid%22:%5B%22003-7374717-10079435%22%5D%7D>.

Another case before the Grand Chamber is Duarte Agostinho and Others v. Portugal and Others. This case is chosen to be mentioned here since the first case mentioned above is brought before the Court by the elders while this one is brought by young people who are aged between 10 and 23.¹³² The applicants are all Portuguese national while there are 33 respondent states including Portugal, Turkey, Russia, Germany and Norway. In this case applicants underline that the forest fires occurring in Portugal since 2017 is an outcome of the climate change, and claim that also all of these fires have physical harm over them.¹³³ Even though this case is brought by young people and against many governments, the case is about the already occurred affects. So still this litigation is not about the potential threats of current acts or negligence of the governments. Just like the first case they assert that their right to life and right to private and family life have been violated. However, in this case the applicants have another and very important claim regarding the prohibition of discrimination protected under the European Convention on Human Rights by Article 14. They rely on this discrimination issue in relation to right to life and right to private and family life and state that their generations is disproportionately disadvantaged compared to other. Thus we can say that a clear generational inequality mention is present in this case. It's important to note that especially the minors among the applicants directly refers to the intergenerational equity principle by referring to international legal instruments such as Rio Declaration. The ruling of the court is not published yet. Even though in this case the applicants' claims include and mention the intergenerational equality, still their claim relies on the injustice between their own generation and the previous generations. Thus, still their claims are not particularly in relation to the future, unborn generations. But this will be influential over the discussions regarding the rights of future generations.

Other than the grand chamber there are some other cases related to the climate change. The court go over the procedural meetings and decided to wait for the decisions to be taken by the Grand Chamber. For this reason, importance of the Grand Chamber's approach is increased. Hopefully some of these cases will be finalized within 2023 and we will be able to understand ECHR's approach to the climate cases which will give us hint regarding the rights of future generations interpretation.

¹³² Press Release regarding the Grand Chamber..., p.1.

¹³³ Ibid.

Currently unfortunately there is not any ECtHR judgement or decision directly addressing the climate change or rights of future generations. However, with the increasing expansion of the climate litigation, we believe soon we will see results of such cases.

ii. European Court of Justice

ARMANDO FERRÃO CARVALHO and Others case before the European Court of Justice is another filing in front of an international court. The case is filed to court by minors and their parents. The applicants claim that the environmental changes and climate crisis directly affect their physical well-being as well as their family's business.¹³⁴ The plaintiffs claim that the European Union does not take necessary measures to limit the carbon emission and protect the rights of their citizens. The applicants' main argument is that the EU is obliged to take more harsh steps and set up more adequate standards for reducing the carbon emission rate. The applicants and the members of the Court underline the higher ranking norms in the EU and state that the current legislation and regulations regarding the green gasses emission is not in compliance with the requirements¹³⁵. The applicants requested nullification of the legislation since they contradict with the higher legal norms.¹³⁶

The applicants underline that the Treaty on European Union and Treaty on the Functioning of the European Union requires European Union to take actions bearing in mind the rights of future generations and work on the sustainable development¹³⁷. This note from the claims of the applicants is important because the rights of future generations is mentioned. As repeatedly said the rights of future generations in relation to environmental rights are not legally fully developed yet. For this reason every single new approach and mention is important to develop the case law and interpretation in the area.

¹³⁴ ARMANDO FERRÃO CARVALHO and other and THE EUROPEAN PARLIAMENT THE COUNCIL, p.5 available at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2018/20180524_Case-no.-T-33018_application.pdf.

¹³⁵ ARMANDO FERRÃO CARVALHO and other and THE EUROPEAN PARLIAMENT THE COUNCIL, p.38.

¹³⁶ <https://www.germanwatch.org/en/constitutional-complaint> accessed on 01.06.2023.

¹³⁷ ARMANDO FERRÃO CARVALHO and other and THE EUROPEAN PARLIAMENT THE COUNCIL, p.47.

The Court unfortunately did not accept the claims of the plaintiffs on the ground that the applicants could not prove that they were individually affected by the environmental problems and climate change. This interpretation of the Court defers from the other examples in this work. The Court's such approach is not logical according to us, since many people will be affected from the climate change and each and every citizen especially the youth shall be accepted to have right to sue. The most upsetting part of this case is that the Court stated that the applicants did not have a locus standi and made the plaintiffs pay all cost incurred by the European Parliament and Council of Europe. Such approaches obstruct the potential further applicants especially the young people since they do not have sufficient means to cover such expenses.

iii. United Nations Committee on the Rights of the Child

United Nations Committee on the Rights of the Child is not an ordinary judicial organ however their interpretation shall be important in the international legal area. For this reason it would be suitable to include an example of a file before them.

This case is included in this paper for two main reasons. The first one is that the case is filed by the famous climate activist Greta Thunberg and 15 other minor. The second reason is that the case is filled against more than one country. For these reasons case is significant and worthy to discuss. The case is filed by the applicants in September 2019.¹³⁸ The applicants claim that the following countries are responsible for not taking necessary measures; Argentina, Brazil, Germany, France and Turkey.¹³⁹ The applicants are from 12 different countries which also makes this case unique. Because the climate change and environmental damages are global and affects people worldwide. In the previous sections

¹³⁸Communication To The Committee On The Rights Of The Child in the Case Of Chiara Sacchi (Argentina); Catarina Lorenzo (Brazil); Iris Duquesne (France); Raina Ivanova (Germany); Ridhima Pandey (India); David Ackley, Iii, Ranton Anjain, And Litokne Kabua (Marshall Islands); Deborah Adegbile (Nigeria); Carlos Manuel (Palau); Ayakha Melithafa (South Africa); Greta Thunberg (Sweden); Raslen Jbeili (Tunisia); & Carl Smith And Alexandria Villaseñor (Usa) available at <https://childrenvsclimatecrisis.org/wp-content/uploads/2019/09/2019.09.23-CRC-communication-Sacchi-et-al-v.-Argentina-et-al-Redacted.pdf>, p.4.

¹³⁹<https://www.unicef.org/turkiye/en/press-releases/16-children-including-greta-thunberg-file-landmark-complaint-united-nations> accessed on 20.01.2022.

while discussing the human rights theory, we have mentioned that the human rights are global and people have these rights regardless of their national identity. For this reason climate litigation is especially important for the future generations. The applicants claim that these countries failed to comply with the requirements of the fight against the climate change and by their failure they infringe the rights of children. They underline that the not taking effective measure by the respondent states cause special harm to the future generations. Thus the applicants again mention the rights of future generations by stating that if the failure continues by the governments the state of the climate change will be irreversible. Safe live hood for the future generations will not be able to provide.¹⁴⁰ It must be noted that since the measures are not taken properly and on time, the future generations will have to face and handle the burdens of climate change and environmental problems more than the current people. Thus the intergenerational justice will be damaged irrecoverably.¹⁴¹

Unfortunately, the decision in 2021 was devastating for many of the climate activists and legal professionals working on the climate rights. The United Nations Committee decided that the applicants should first apply to their national courts and then apply to international measures.¹⁴²

iv. Future International Court Expectations

The climate litigation grows all around the world as it can be seen, the national court decisions are important but just like in any emerging norms in the case of environmental rights especially the rights of future generations international judicial interpretations are important and influential over the national case-law. For this reason, the potential international court decisions are important and must be followed.

In March 2023, UN General Assembly requested an advisory opinion from International Court of Justice. In the request the General Assembly openly recognizes that

¹⁴⁰ Communication To the Committee On The Rights Of The Child..., p.3.

¹⁴¹ Communication To the Committee On The Rights Of The Child..., p.6.

¹⁴² <https://www.globenewswire.com/en/news-release/2021/10/12/2312125/27401/en/UN-Committee-on-the-Rights-of-the-Child-Turns-Its-Back-on-Climate-Change-Petition-From-Greta-Thunberg-and-Children-From-Around-the-World.html> accessed on 05.06.2023.

the climate change and the environmental harm will have an unprecedented and irrecoverable to the life and conditions of the future generations.¹⁴³ The General Assembly refers back to its previous resolutions and underlines that the governments have duty to satisfy the climate protection for the rights of future generations.¹⁴⁴ They also recognize that without taking proper measures it will be impossible for us to talk about right to clean, healthy and sustainable environment. It is important to note here that right to clean, healthy and sustainable environment is recognized as a human right in General Assembly resolution 76/300 dated 28 July 2022. Keeping in mind this information the General Assembly requested advisory opinion on two main and two sub issues from the International Court of Justice.¹⁴⁵ The General Assembly wanted to have a legal opinion in order to assess the obligations of the states in relation to green house gas emissions, environmental damages and climate change against the current people as well as the future generations. Again, the future generations are specifically mentioned in their request. In addition, the General Assembly asked consequences of both the actions and omission of states. From this request, we understand that the legal obligations of both state's acts and omission in relation to the climate change and environmental damage needs to be determined.

After receiving this request from the General Assembly, the International Court of Justice made a press release and determined the time limit for written statements. According

¹⁴³ Report of the International Court of Justice dated 01/03/2023 available at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2023/20230301_18913_na.pdf page:1 accessed on 01/05/2023.

¹⁴⁴ Ibid.

¹⁴⁵ General Assembly requested information in relation to the following. *“Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,*

(a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;

(b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?

(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?” The full text can be reached at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2023/20230301_18913_na.pdf.

to Court of Justice's President's order the written statements can be provided on the questions until 20 October 2023 and the deadline for the written comments on the written statements is 22 January 2024.¹⁴⁶

Accordingly, we shall expect the advisory opinion in the middle of 2024. This decision will be influential in international law especially in the area of human rights law. Since the question includes both actions and omissions of the states it will also affect the domestic law of many countries. Because, if their legal standards are not sufficiently well regulated to protect rights of future generations against the climate change and environmental damages then they will be in the status of omission and there will be international legal consequences in such case.

b. Domestic Case-law

In the recent years number of domestic case law in relation to climate change and environmental rights has begun to increase.¹⁴⁷ Accordingly, courts started to mention the rights of future generations. Because the environmental rights are analyzed in accordance with the potential future effects over the current generations and unborn generations. For this reason, the courts' stipulations are essential for over future references. Hereunder different examples from different national courts are explained. The case-law is really crucial since the representation of future generations is limited and since the case-law is always influential over the legislator in relation to legal developments that are necessary due to sociologic, environmental and technologic changes.

¹⁴⁶ The opinions of the ICJ does not have a binding nature. However the moral implications cannot be disregarded. The opinion will have a weightfull effect on the international area in relation to the climate change obligations of the states. The full text of the press release can be reached at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2023/20230415_18913_press-release-1.pdf.

¹⁴⁷ The applications in relation to the climate change's and environmental damages over the individuals also gained rise as well. For example, in France some individuals claim that they have chronic lung disease due to air pollution. Recently Paris administrative court ordered French government to pay compensation to these individuals.

i. Colombia: Future Generations v. Ministry of the Environment and Others

Colombia's future generations right case is one of the landmark cases in this subject. In the following section the details of the case will be discussed. It is important to note that the case is influential all around the world. For this reason the Future Generations v. Ministry of the Environment and Others case will be analyzed below under this section.

"Future Generations v. Ministry of the Environment and Others" case was filed by 25 young people in 2018.¹⁴⁸ The plaintiffs were aged between 7 and 26 at that time and they claimed that several organs and organizations in the Colombian government caused infringement to their right to healthy environment, water, life, health and food.¹⁴⁹ These youth asserted that the government's inability to tackle the deforestation strategy obliged under the Paris Agreement and National Development Plan in addition to the effects of the climate change caused infringement to their rights. Even though the first instance courts did not find their case right and ruled against them the Colombian Supreme Court was in a different view.

In this case a special approach under the constitutional law was adopted by the Supreme Court which is called "*tutela*" process. Tutela means guardianship in Spanish and it has special meaning and weight in Colombian constitutional law. In Colombian constitutional law, tutela is a process used in order to protect the fundamental rights of a person in Colombia in case person's constitutional rights are infringed. The infringement may be caused by a private person or public authority.¹⁵⁰ The tutela approach is specified in

¹⁴⁸ The name of the case is "Demanda Generaciones Futuras v. Minambiente" in the original language.

¹⁴⁹ The details in relation to the case can be reached at <http://climatecasechart.com/non-us-case/future-generation-v-ministry-environment-others/#:~:text=On%20April%205%2C%202018%2C%20the,Amazon%20as%20a%20subject%20of> accessed on 20/06/2023.

¹⁵⁰ Article 86 of the Colombian Constitutions states that "*Every person has the right to file a writ of protection before a judge, at any time or place, through a preferential and summary proceeding, for himself/herself or by whomever acts in his/her name for the immediate protection of his/her fundamental constitutional rights when that person fears the latter may be violated by the action or omission of any public authority.*

The protection will consist of all order issued by a judge enjoining others to act or refrain from acting. The order, which must be complied with immediately, may be challenged before a superior court judge, and in any case the latter may send it to the Constitutional Court for possible revision.

the Article 86 of the Colombian Constitution. The protection provided therein ensures immediate reliefs for the victims of the human rights violation. The lower level of court stated that the *tutela* protection cannot be applied in this case because this is a group action under which many people is protected so *tutela* can only be applied in individual cases.¹⁵¹ But as mentioned above Supreme Court adopted a different approach. The Supreme Court stated that the *tutela* can be adopted in the collective cases as well and listed some conditions for the *tutela* approach. These conditions are listed as;

- i) *“the connection between the violation of collective and fundamental or individual rights,*
- ii) *the person filing the tutela is the person directly affected,*
- iii) *the violation of a fundamental right is not hypothetical but fully proved, and*
- iv) *the judicial order must be oriented towards restoring individual rights, and not collective ones.”*¹⁵²

By relying on these conditions, the Supreme Court accepted and applied the *tutela* principle to protect constitutional rights of the youth as well as the environment itself. While applying this principle, the Court underlines that without the healthy environment none of the fundamental rights shall be practiced. Court’s this opinion is parallel with the approach of this thesis, the rights of future generations can only be protected if the environmental rights can be protected. For this reason, if we want to protect the rights of future generations we have to deal with the current environmental problems and solve them. By nature the right to health, right to life and right to a dignified life can only be practiced in an healthy environment. The court also underlines the fact that the rights of future generations are based

This action will be available only when the affected party does not dispose of another means of judicial defense, except when it is used as a temporary device to avoid irreversible harm. In no case can more than 10 days elapse between filing the writ of protection and its resolution.

The law will establish the cases in which the writ of protection may be filed against private individuals entrusted with providing a public service or whose conduct may affect seriously and directly the collective interest or in respect of whom the applicant may find himself/herself in a state of subordination or vulnerability.” The full text of the Colombian constitution can be reached at https://www.constituteproject.org/constitution/Colombia_2015.

¹⁵¹Translation of the Supreme Court decision can be reached at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2018/20180405_11001-22-03-000-2018-00319-00_decision.pdf. Paragraph 10 of the translation summarizes the position of the lower-level court in relation to the application of the *tutela* principle.

¹⁵² Translation of the Supreme Court Decision, para.15.

on two issues. The first one is ethical duty of solidarity among the species. The second one is core value of the nature.¹⁵³

In the decision of the Colombian Supreme Court the judges accepted that the rights of these youth have been violated. They also adopted an interesting and novel approach stating that in addition to rights of the youth and future generations, the Colombian Amazon forests were also subject of rights. Accordingly in order to protect the rights of both the people and the Amazon the government is obliged protect the environment and ordered that deforestation plan has to be implemented immediately.¹⁵⁴

Another important consideration by the Colombian Supreme Court is actually based on the trust doctrine underlying that the natural resources belong to every present and future inhabitant of the Earth. The older generations and future generations also have right over these resources, they also own these resources. Even though the future generations do not physically possess them at the current time they still own them. For this reason, we are responsible against them.¹⁵⁵ Accordingly, the current generation has to adopt a fair and cautious approach otherwise the future of humanity will be endangered.

In the previous sections in relation to the right to healthy environment the international developments and international agreements and treaties was explained and in the following sections the international legal documents will be mentioned in relation to the rights of future generations. These acknowledgements are important because the national legal legislations are influenced by the international developments. Also the rights of future generations in relation to the environmental rights cannot be protected by actions of single governments since the ecosystem is interconnected. For this reason, the national legislations shall be in line with each other. The Court also underlined the issue and mentioned the international soft and hard law in relation to the environmental rights and global ecological public order which serves as a guideline for national regulations.¹⁵⁶ The Supreme Court also

¹⁵³http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2018/20180405_11001-22-03-000-2018-00319-00_decision.pdf para.10.

¹⁵⁴ Translation of the Supreme Court Decision, p.15.

¹⁵⁵ Ibid.

¹⁵⁶ Translation of the Supreme Court Decision, p.5.

refers to the Constitutional Court of Colombia in relation to environmental rights and states that Constitutional Court of Colombia create the legal area for the interpretation of the environmental issues and concepts and states that environment is a fundamental right.¹⁵⁷

As we can see from the Supreme Court decision and its reference to Colombian Constitutional Court, the interpretation of the courts in relation to the rights of future generations is important. Since the hard law is not yet developed enough the constitutional approach and judicial review will light the way.

ii. Australia: Sharma v. Minister for the Environment (2021)

Australia is a country where environment plays an important role in daily life and politics. From that perspective the nature is discussed to be a subject of rights. As we have discussed the rights of future generations discussion generally starts with the right to a healthy environment. For this reason, these discussions are important in Australia. Rights of future generations is also discussed in Australian politics and law theory. We will discuss the environmental case as well as the hard law in this paper.

Sharma v. Minister for Environment Case is referred as the judgment that changed the climate law in Australia. In the Sharma v. Minister for the Environment case a group of young people sued the authorities in order to stop a coal project. The interesting point of this case is that the claimants state that they represent all minors. So actually, they are filling a case as a class action for the benefit of all minors and future generations. They assert that the government has a duty to protect nature because the government is obliged to protect the future generations' rights. The plaintiffs state that the authorities have to protect the youth from any harm against them according to EPBCA.¹⁵⁸ The main point of the plaintiffs'

¹⁵⁷ Translation of the Supreme Court Decision, p.6.

¹⁵⁸ The Section 130 of the EPBCA is as follows: "*Timing of decision on approval Basic rule (1) The Minister must decide whether or not to approve, for the purposes of each controlling provision for a controlled action, the taking of the action. (1A) The Minister must make the decision within the relevant period specified in subsection (1B) that relates to the controlled action, or such longer period as the Minister specifies in writing. (1B) The relevant period, in relation to a controlled action, is as follows: (a) if the action is the subject of an assessment report--the period of 30 business days beginning on the first business day after the Minister receives the assessment report; (b) if Division 3A of Part 8 (assessment on referral information) applies to the action--*

application is to underline that the government has a duty to care for young people against the climate change.¹⁵⁹ The protection request by the applicants was for the future harm. Thus, the case is crucial in the context of rights of future generations because the case is not about a current danger however about a coming danger. While requesting the acceptance of the duty to care the plaintiffs also request the judges to order an injunction decision to stop the coal project.

In the judgment the Court decided that the ministry has a duty to protect the children. In the case, the applicants repeatedly underlined that the climate crisis' effects are disproportionate among different groups such as women, colored people, marginalized groups and future generations (children and unborn generations). Duty of care argument again relies on common law doctrine of public trust by stating that the resources and environment belong to everyone and the government is obliged to protect it for the people. The court recognized the "duty of care" principle in this case.¹⁶⁰ This is defined as a landmark moment for the Australian climate litigation. While discussing the duty of care the reasonable foreseeability issue was mentioned. According to EPBCA section 130 and section 133, the minister has right to approve or not to approve a project. While approving the project the minister can analyze the risks and potential danger. However, the discussion is that whether the future harm or damage is foreseeable and whether it falls under the scope of duty of care. In the decision the court concluded that the causation link is created and the potential

the period of 20 business days beginning on the first business day after the Minister receives the finalised recommendation report under subsection 93(5);(c) if Division 4 of Part 8 (assessment on preliminary documentation) applies to the action--the period of 40 business days beginning on the first business day after the Minister receives the documents under subsection 95B(1) or the statement under subsection 95B(3), as the case requires; (d) if Division 5 (public environment reports) or Division 6 (environmental impact statements) of Part 8 applies to the action--the period of 40 business days beginning on the first business day after the Minister receives the finalised public environment report or the finalised environmental impact statement, as the case requires; (e) if a commission has conducted an inquiry relating to the action--the period of 40 business days beginning on the first business day after the Minister receives the report of the commission." can be reached at [http://classic.austlii.edu.au/au/legis/cth/consol_act/epabca1999588/s130.html#:~:text=ENVIRONMENT%20PROTECTION%20AND%20BIODIVERSITY%20CONSERVATION%20ACT%201999%20%2D%20SEC.%20130,-Timing%20of%20decision&text=\(1\)%20The%20Minister%20must%20decide,the%20taking%20of%20the%20action](http://classic.austlii.edu.au/au/legis/cth/consol_act/epabca1999588/s130.html#:~:text=ENVIRONMENT%20PROTECTION%20AND%20BIODIVERSITY%20CONSERVATION%20ACT%201999%20%2D%20SEC.%20130,-Timing%20of%20decision&text=(1)%20The%20Minister%20must%20decide,the%20taking%20of%20the%20action) accessed on 01/06/2023.

¹⁵⁹ Judgment Federal Court of Australia Minister for the Environment v Sharma (No 2) [2022] FCAFC 65 can be reached at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2022/20220422_VID-389-of-2021-2021-FCA-560-2021-FCA-774-2022-FCAFC-35-2022-FCAFC-65_judgment.pdf para 1.

¹⁶⁰ Judgment Federal Court Of Australia Minister for the Environment v Sharma..., para.12.

harm is foreseeable according to scientific data. The foreseeable harm shall not be far-fetched and fanciful.¹⁶¹ The court also states that foreseeable harm does not have to be faced by the plaintiffs themselves it is enough if the harm is to a “*class of persons of which the plaintiff was one might reasonably have been foreseen.*”¹⁶² For this reason, the court accepted that the harm of the climate change is a potential danger over each and every child.

Even though the court recognized the duty of care, the court did not issue an injunction decision in relation to the coal project. But the reasoning behind the rejection of injunction was rather technical. The court stated that since the minister is not yet approved the request for the mining project the injunction is not necessary.

The decision is important in relation to the rights of future generations. As it has been mentioned over and over in this paper, the protection of rights of future generation requires protection of right to environment and protection against the climate change in the first instance and this case recognizes the rights of children which can easily interpreted for the rights of future generations. Another important aspect is that the case and decision was relying on the common law’s tort law through duty of care principle. This is accepted as an important step as well because litigant in the climate change area tried different legal approaches and this one seems to work. For this reason, starting from this case the lawyers working in the area can combine torts law with human rights law to defend the rights of future generations. This is one of the reasons making this case novel. Establishing a duty of care important because once it is confirmed on appeal, it is difficult to be overridden by legislation. The Commonwealth lacks constitutional power to make drastic alterations to tort law.

The case is influential because the climate litigators and activities are looking for a way to hold governments and authorities responsible from carbon emission and climate change. This responsibility path is crucial and monumental for the rights of future generations legal framework.

¹⁶¹ Decision Federal Court Of Australia Minister for the Environment v Sharma [2022] FCAFC can be reached at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2022/20220315_VID-389-of-2021-2021-FCA-560-2021-FCA-774-2022-FCAFC-35-2022-FCAFC-65_decision.pdf, para.131.

¹⁶² Ibid.

iii. United States of America: In re Hawai'i Electric Light Co.

In the different sections of this work, many different court approaches and case law in United States of America is mentioned. As stated before, the trust doctrine is mostly applied in USA jurisdiction and its connection with the environmental law is mentioned. Atmospheric trust litigation has many reflections in USA courts.

The decision of the Supreme Court will be summarized here. The case is very recent and was filed in 2023 and accepted as a landmark decision regarding the environmental rights. The case is filled by a biomass power plant developer because PUC rejected the power purchase agreement between two private companies. The Supreme Court unanimously found that the PUC's decision was correct and in place. Even though the decision was taken unanimously there was a concurring opinion by Justice Wilson and the concurring opinion reasoning will be mentioned hereunder as well. The PUC rejected the project because according to scientific reports the project will produce a huge mass of greenhouse gases.

In the majority opinion the Court underlined that PUC had a public interest approach and had to consider constitutional rights of the State's citizens. According to Hawaii Revised Statutes Chapter 269 under which the PUC is regulated, the authorities are obliged to create a climate secure system and perform their duties and approve or reject the projects by keeping this in mind.¹⁶³

The influential part of the case is that the Court underlines that the requirements continue to evolve thus the legislation and courts' interpretation will evolve in time as well. Hawaii is an important case study state in relation to environment and climate change because of the geographic reasons. The increasing sea levels threatens the cultural and economic existence of the State. We always have to keep in mind that the decisions and legislation in relation to the climate change and environmental protection will always start in places,

¹⁶³ Opinion of the Supreme Court of Hawaii by Judge Eddins in the matter of the Application of HAWAI'I ELECTRIC LIGHT COMPAN, INC. for Approval of a Power Purchase Agreement for Renewable Dispatchable Firm Energy and Capacity, p.18 can be reached at http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2023/20230313_docket-SCOT-220000418_opinion.

countries and states where the environment is core of the economic development and where the environmental emergency occurs. For this reason in USA, the Hawaii state will be a great example to follow since the State already decelerated climate emergency. The requirements are changing each day and the Court states that the public authorities have to renew their approach and review their mechanisms according to environmental changes. The Court's opinion states that if the actions are not taken rapidly and precautions then the life for the future generations will be destroyed irreversibly. The protection of future generations is mentioned by the Court here as well through this declaration.

A concurring opinion is written by Justice Wilson. Justice Wilson agreed with the rest of the Court on the point that the public authorities of Hawaii has to protect the environment due to their obligation under the Hawaiian Constitution. However Justice does not settle with this reasoning but adds that the public trust doctrine also has to be taken into account while reviewing the actions of the PUC.¹⁶⁴ He underlines that since Hawaiian Constitution includes a clause stating that the natural resources shall be protected for the benefit of future generations. As we can understand from his explanation he believes that the future generations' right shall be taken into account and the public trust doctrine shall be used in this sense as well. Accordingly, Wilson states that public trust doctrine is an inseparable and fundamental part of Hawaii's constitution¹⁶⁵. As public trust doctrine implies that the state acts as fiduciary to all natural resources and all elements of the environment shall be protected by the government for the benefit of current and future generations. Justice Wilson also mentions the necessity of change in legislation and legal interpretation especially in the case climate emergency.

¹⁶⁴ Concurring Opinion of the Supreme Court of Hawaii by Judge Wilson in the matter of the Application of HAWAI'I ELECTRIC LIGHT COMPAN, INC. for Approval of a Power Purchase Agreement for Renewable Dispatchable Firm Energy and Capacity, p.3 can be reached at http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2023/20230313_docket-SCOT-22-0000418_opinion-2.pdf.

¹⁶⁵ Concurring Opinion of the Supreme Court of Hawaii by Judge Wilson..., p.30.

iv. Germany: Constitutional complaints against the Federal Climate Change Act (Neubauer, et al. v. Germany)

Germany is an important country example to discuss in relation to the rights of future generations. Historically the discussions in relation to the rights of future generations derived from Germany. Here we will focus on one important and influential case however it has to be noted that the rights of future generations discussions take important and weighted point in legal and political area.

The case is filed in relation to a legislation named Climate Change Act.¹⁶⁶ The legislation was enacted in 2019. The case was filed by several climate activists including Greenpeace and Germanwatch. The Climate Change Act was enacted to satisfy the obligations of Germany under the Paris Agreement. The German Constitution includes right to environment as well as protection of natural resources for the future generations as it will be mentioned in the hard law section of this thesis. The constitutional regulation regarding the rights of future generations in Germany will be discussed in the following section of this thesis. But it is noteworthy to state that German constitutions directly mentions the future generations as the right subjects.

In this Climate Change Act, the emission rates annual amounts are regulated and limited. The Court decided that some provisions under this Act violate constitutional norms in 2021. The applicants believe that the legislation was not strong enough to hamper climate change and environmental problems and they underline that the government is obliged to protect the rights (i.e., right to life and physical integrity, to property and to work) of the future generations.¹⁶⁷ This case is a great example of the balance between the rights of the current generation and the rights of future generations. Because the reduction of the greenhouse gases emission requires restrictions over the actions of current generations since unfortunately the production and consumption methods still rely on high emission. For this

¹⁶⁶ The original name of the Act in German is Klimaschutzgesetz – “KSG.

¹⁶⁷ The decision was given in conjunction with the Article 20a of the Basic Law. Article 20a is as follows “Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.”

reason, the reduction of carbon emission requires drastic change in the daily life of the current generation. Also we have to note that if the reductions are not enough then the limitations will be much more harsh after 2030. Thus, if the climate law is not regulated to work faster then the rights of future generations will be restricted even more.¹⁶⁸ The constitutional balance among the rights as well as the rights among different generations is one of the most important issues in constitutional justice.

The Court underlines that the protection and respect to the rights of the future generations requires government to care the natural resources in a decent way and leave these resources in a good condition.¹⁶⁹ It is also highlighted that the protection of future rights can only be possible by reaching climate neutrality.¹⁷⁰ If climate neutrality cannot be reached on time, fairness among the generations thus intergenerational justice cannot be reached. The Court states that in order to reach such justice the legislation must ensure better reduction of carbon emissions and it has to be concrete. They also add that the planning and orientation to new production models shall be decided and implemented by the state as well.¹⁷¹

Even though the interpretation of the Court is important for the application of rights of future generations, it has to be noted that the plaintiffs were not claiming the rights of future generations, they were claiming protection for their own future rights. But still, the interpretation of the Court is important, especially keeping in mind that the unborn generations do not have a representation opportunity in front of the courts. Also, since the German Constitution have direct duty of government to protect future generations the interpretation of the current youth's future rights will also reflect the constitutional approach against the rights of future generations questions. The Court states that if there is an irreversible threat then the government shall further steps and cautions to protect future rights.¹⁷²

¹⁶⁸ Press Release No. 31/2021 of 29 April 2021 of the Federal Constitutional Court can be reached at <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html>.

¹⁶⁹ Headnotes to the Order of the First Senate of 24 March 2021 can be reached at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html;jsessionid=DDE4E67E5DCE193A4ECA782240ED12E3.internet941.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Headnotes to the Order of the First Senate of 24 March ..., para.109.

The most important notes from the Court's decision shall be considered to understand the significance of this case in relation to the rights of future generations. Accordingly the Court underlines that the climate protection has to be regarded as a human right and climate change is objectively existing and states have to take precautions in a way to be fair to all generations.¹⁷³ In addition to accepting the climate protection as an human right the Court highlights that the protection against the climate change is justiciable for current and future rights.¹⁷⁴

B. Hard Law

In the above section both the international and domestic case-law in relation to the rights of future generations have been discussed. Hereunder this section the legal legislations will be summarized and discussed through international and domestic examples. The correlation between the case-law and hard law will be visible. The different approaches to the hard law in relation to the rights of future generations will be set as examples. In the hard law section the international legislation that is the global and regional agreements will be discussed first. Then the domestic law examples will be summarized. Under the domestic law section both the regular laws and constitutions will be given as examples. Our main argument is that these rights need to be protected under constitutional umbrella rather than other and lower legal norms.

1. International Law Instruments

The international law instruments are important in this subject because as mentioned above they create the base for the national legislation. The international legislation might be global or it can be regional law instruments. Some examples will be given here to set the guideline for the international standards.

¹⁷³ <https://www.germanwatch.org/en/constitutional-complaint> accessed on 01/06/2023.

¹⁷⁴ Ibid.

a. Regional Regulations

Treaty On European Union and Treaty on the Functioning of the European Union are important two legal instruments are protecting rights of future generations. Treaty on European Union Article 3(3) directly mentions the sustainable development of the Member States and at the same article protection of environment is stated as a duty.¹⁷⁵ Also, Article 11 of the Treaty on the Functioning of the European Union requires that European Union's policies and activities shall be taken into account as well.¹⁷⁶ This article also underlines the sustainable development. When we read these two articles together, we can see that not only the environmental protection is mentioned but the sustainability is enshrined. This is important in relation to the rights of future generations. Because not only the protection of environment is mentioned but the long-term plans are also included as a state duty. Sustainability directly indicates the rights of future generations. Thus, these two main agreements of the European Union mandates that the Member States are obliged to ensure the protection of environment for future generations while continuing development for the current generation.

African Charter on Human and People's Rights can be given as a similar example to the above mentioned Treaty On European Union and Treaty on the Functioning of the European Union. The charter recognizes the right to an environment which is beneficial for their own development is necessary.¹⁷⁷ So without any distinction the Charter recognizes that current or future people have right to healthy environment thus we can say that the future generations' right to environment has to be provided by states as well.

¹⁷⁵ Article 3(3) "*The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.*" can be reached at <https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html#new-2-51>.

¹⁷⁶ Article 11 "*Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.*" can be reached at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016E/TXT>.

¹⁷⁷ Article 24 "*All peoples shall have the right to a general satisfactory environment favourable to their development*" can be reached at https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf.

Escazú Agreement is another regional instrument to be taken into consideration.¹⁷⁸ The agreement is a regional agreement signed among the Latin American and the Caribbean states. Escazú Agreement is signed in 2018 thus it is more recent than the previously mentioned regional agreements. For this reason, it is more clearly stating the future generations compared to the others. The Agreement mentions the rights of future generations from the beginning of the Agreement. According to the Article 1 which sets out the objective, the right to environment is essential and it is essential for both current and future generations. Under this regulation the States Parties to this agreement are obliged to provide safety for the rights of future generations.

Another regional agreement to note is Aarhus Convention.¹⁷⁹ Aarhus Convention is similar to the Escazú Agreement but it's for the region of Europe. The Aarhus convention is signed in Denmark on 25 June 1998. The agreement's main aim is to regulate the environmental justice in the State Parties. Just like the Escazú Agreement, Aarhus Convention refers directly to the rights of future generations. The participation to the environmental justice is important because as discussed, the representation of the future generations is a highly discussed and challenging issue in relation to environmental rights. In the preamble of the Aarhus Convention, it is recognized that people have a right to live in an adequate environment and this right belongs to future generations as well.¹⁸⁰ The preamble section does not distinguish among the current people's rights and future generations' rights. In addition to not distinguishing among generations the preamble also recognizes the state's duty to protect and improve the environmental conditions for the future generations. Also, in the Article 1 of the Convention, which states the objective of this agreement, clearly stipulates that the rights of future generations in relation to live in a healthy environment shall be provided by states and in order to do the access to

¹⁷⁸ The full name of the agreement is Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean.

¹⁷⁹ The full name of the convention is Convention On Access To Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters.

¹⁸⁰ Preamble "Recognizing 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," can be reached at

environmental justice and public participation must be provided.¹⁸¹ As the purpose and according to the approach of this thesis the reference to everyone and each person is accepted to be referring to the future generations too. However, here in Aarhus Convention the future generations are directly mentioned. The Aarhus Convention and Escazú Agreement are listed as public participation agreements in relation to the environmental rights and recognizing these rights for the future generation is especially important. The Aarhus convention recognizes that people have right to request and receive documents and information in relation to the environmental matters to protect their rights. Actually, the right of reaching information and documents provided to current generation is necessary to protect the rights of future generations.¹⁸²

b. Global Regulations

In addition to the regional agreements and regulations, there are some global regulations and discussions in relation to the rights of future generations.

Rights of future generations have been discussed in the international area for so long and the direct reflection can be seen in references in many international legal documents. Some examples of direct reference to the future generations and their rights are found in the Convention for the Protection of the World Cultural and Natural Heritage, adopted by the General Conference of UNESCO on 16 November 1972, the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity, adopted in Rio de Janeiro on 5 June 1992, the Rio Declaration on Environment and Development, adopted by the United Nations Conference on Environment and Development on 14 June 1992, the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, and the United Nations General Assembly resolutions relating to the protection of the global climate for present and future generations adopted since 1990.

¹⁸¹ Article 1 “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.” can be reached at <https://unece.org/DAM/env/pp/documents/cep43e.pdf>.

¹⁸² Ahmet M. Güneş, “AARHUS SÖZLEŞMESİ VE ÇEVRESEL BİLGİYE ERİŞİM HAKKI”, *Dicle Üniversitesi Hukuk Fakültesi Dergisi*, Cilt: 17-18, Sayı: 26, 27, 28, 29, Yıl: 2012-2013, p.28.

For example, in 1997 United Nations issued a declaration on the Responsibilities of the Present Generations Towards Future Generations. In this declaration, the potential threats that future generations might face have been recognized and in addition it underlines that the current generation are responsible towards the protection of the rights of future generations.¹⁸³

In March 2023, United Nations published Common Agenda Policy Brief on To Think and Act for Future Generations. A summit in relation to the future will be held in 2024. The United Nations decided to issue the policy brief and held the Summit for Future with the General Assembly Resolution.¹⁸⁴ United Nation's this approach directly suggests the importance of the future generations' rights debate and it directly shows us that the discussion will grow in time. In the Policy Brief, the United Nations underlines that these challenges can only be addressed if the international cooperation is established and it stresses out that the children and future generations might have overlapping rights however they are not same.¹⁸⁵ For this reason, it is important to separately take the rights of future generations in hand. In this respect the United Nation's Policy Brief is important. It directly addresses the future generations and states that the current people have to act in a way to ensure that the forthcoming generations can enjoy all human rights which are necessary for having a dignified life. Actually, United Nations' sustainable development goals are also directly related with the rights of future generations. Accordingly, the development of the current nations shall be limited to the extent that they do not make the lives of future generations miserable. This document offers some practical solutions and precautions for the protection of the rights of future generations. The paper suggests that special envoy shall be created to define and defend the rights of future delegation¹⁸⁶. This envoy is stipulated to be in an

¹⁸³ The full text of the declaration can be reached at <https://en.unesco.org/about-us/legal-affairs/declaration-responsibilities-present-generations-towards-future-generations>.

¹⁸⁴ Resolution adopted by the General Assembly on 8 September 2022, p.2 can be reached at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/587/47/PDF/N2258747.pdf?OpenElement>.

¹⁸⁵ Our Common Agenda Policy Brief 1 To Think and Act for Future Generations, p.4 can be reached at <https://www.un.org/sites/un2.un.org/files/our-common-agenda-policy-brief-future-generations-en.pdf>.

¹⁸⁶ Our Common Agenda Policy Brief..., p.2.

advisory and advocacy nature and the envoy will be required to report to Secretary General annually.¹⁸⁷

In August 2022, General Assembly of United Nations passed the resolution 76/300 which also refers to the future generations. The Resolution is in relation to the human right to a clean, healthy and sustainable environment and it directly states that the sustainable development is necessary in order for future generations to live in an enjoyable human rights conditions.¹⁸⁸ The resolution also recognizes that the current environmental harm will cause irreversible harm to the lives of the future generations. We find that this recognition is crucial because the Resolution actually requires governments to balance out the rights of current generation with the rights of future generations. Thus there is question of the limitation of the fundamental rights and freedoms of current generation. The limitation of the human rights is one of the main topics of the constitutional law. For this reason, according to the author the states shall create this balance over the limitation of the human rights through their constitutional legal framework.

Another milestone in relation to the rights of future generations is the Maastricht Principles on The Human Rights of Future Generations.¹⁸⁹ Clear recognition and identification of the rights of future generations under these principles is thrilling. The aim of these principles is to provide balance of current and future generations through achieving more sustainable world. More than fifty legal experts on human rights gathered in order to draft this document. Among these experts there are professors from prestigious law schools and former and current UN officials and special experts. They aimed to clarify the norms that can be applicable for the protection of the rights of future generations in the light of international law. The preparation of these principles was not a short-term commitment rather it took nearly 6 years. The first question to be answered was “whether the human rights obligations of the governments are limited with current generation or not”. Their answer is oblivious since they drafted these principles. The expert underlines that none of the

¹⁸⁷ Our Common Agenda Policy Brief..., p.13.

¹⁸⁸ Resolution adopted by the General Assembly on 8 September 2022, p.2.

¹⁸⁹ *There are different Maastricht Principles in the international law .For example, Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.* The principles were used as a guide by international and national courts.

international human rights documents has a temporal limitation. The Maastricht Principles underlines that each generation of humanity is connected to each other and the human dignity must be protected for each.¹⁹⁰ Another important point to highlight in relation to the Maastricht Principles is the recognition of the inequality among different groups of societies. There are vulnerable groups such as women, peasants, some ethnic, racial and religious groups. Just like any other crisis the climate crisis has more burden over these groups. For this reason, protection of these groups is important not only for today but for the future as well. The Maastricht Principles clearly recognize that the continuity of humanity lies within the harmony of the human with nature. This document can be seen as a novel point in the human rights history as well because it openly states that the states are obliged to the future generations just like the current generation.¹⁹¹ According to these principles while making any decision and any action the states have to consider and foresee the potential effects over the unborn people. The document listed all potential threats as well such as continuation of usage of fossil fuels, deforestation, failure to regulate the scientific research especially in relation to the genetic engineering. Since the environmental damage is not limited with the territory of the state the extraterritoriality of states' obligations in relation to the rights of future generations is also underlined and regulated in these principles.

Listing the states' obligations is never enough for the protection of human rights. A real protection requires judicial mechanisms in case of a breach. These mechanisms shall be accessible to the public. Maastricht Principles underlines such necessity under effective remedies section. Generally international law documents do not provide detailed means of remedies. On the other hand, Maastricht Principles provide otherwise. Reparation in case of breach is important in all kinds of human rights violations. The reparation provides justice thus peace. According to principles the reparation of the breach shall include restitution, compensation, and satisfaction.

¹⁹⁰ Maastricht Principles on The Human Rights of Future Generations, 2023, p.2.

¹⁹¹ Maastricht Principles on The Human Rights of Future Generations, 2023, p.8.

2. Establishing intergenerational justice in national jurisdictions

We discussed above the international regulations, declarations and some conventions however the national legal framework is of significance importance on this issue. Without the national legislation the rights of future generations cannot be fully be protected. For this reason, with the influence of international discussions and regulations national legislation has to be taken into account.

a. The Structural Issues

Even though there are constitutional norms and constitutional judicial review regarding the right to environment and rights of future generations, it has been clear that the constitutional regulations are influenced by the international law and international legal standards¹⁹². International debates are increasing everyday, these will most definitely affect the future national legislation and judicial reviews. For this reason, until here the international developments have been discussed to reflect their effect over the national regulations. These international developments' most important effect will be the importance of the long-term policies rather than the policies that are created in between the elections will increase. The work over the legislation which will reflect the long-term needs of people and nature will have to be the core of the national policy makers' agenda.

Even though the constitutions are created by one certain generation they are legal documents which affect and rule for long-term, bind future generations. We can consider the constitution as agreements. However even though they are long term agreements and bind the future generations, the future generations are not part of the signatories. They will only become beneficiaries of these agreements. Since the future generations are not represented as the interest groups during the constitution making process they used to be easily excluded in the regulations. However with the increasing influence in the international law, the connection between the constitution making generation and the beneficiaries shall be created.

¹⁹² Alexandre Kiss, 'Les origines du droit à l'environnement: Le droit international', Numéro special: **La charte constitutionnelle en débat**, *Revue juridique de l'environnement*, p.13.

The balance among the nations shall only be created with the constitutions which are social contracts. These social contracts have long-term commitment, for this reason it requires balance among the demands of current generation and the interests of the future generations to allow them to enjoy their human rights.

b. National Legislations

Many countries started directly to mention rights of future generations in their national legislation. This can be either in the form of constitutional level or in a lower level of legislation. Hereunder this section examples from different states will be given.

i. Wales

Wales is a great example to discuss under this section. There is a Well-being of Future Generations Act issued in Wales. The Act was passed in 2015 and Wales is an example setting state in this sense. Prior to this Act, none of the other states had a specific act or law issued in relation to the rights of future generations.

According to this Act, the Wales has a special commissioner for the future generations. Currently Derek Walker is serving in this position.¹⁹³ This position is referred as the “Minister of the Unborn”. This is essentially important because as repeatedly mentioned above the future generations are not represented and their representation is quite important in relation to the constitution making.

The Act focuses on sustainable development. The sustainable development is a key issue for the protection of rights of future generations since the balance among the limitation of the current generation’s rights and providing livable life for the future generations. The Act defines the sustainable development as a means to reach wellbeing goals defined under the Act.¹⁹⁴ Accordingly, government and all of its bodies have to take action in a way to

¹⁹³ The details in relation to the commissioner for the future generations at <https://www.futuregenerations.wales/about-us/our-team/> accessed on 20.06.2023.

¹⁹⁴ Well-being of Future Generations Act 2015, p.3 can be reached at <https://www.futuregenerations.wales/wp-content/uploads/2017/01/WFGAct-English.pdf>.

make sure present generation satisfy their needs while not compromise the opportunity of future generations to fulfil their needs.¹⁹⁵

The wellbeing goals are listed under 7 titles. One of these titles is healthier Wales, under this goal it has been stated that the development shall be able to furnish physical and mental health of the citizens and while doing so the health of the future generations shall be taken into consideration as well.¹⁹⁶ The Act repeatedly underlines that the wellbeing includes the environmental wellbeing too. One of the wellbeing goals is Prosperous Wales. Under this goal, the government is obliged to be aware of the limits of the environment which means that the resources shall be used efficiently in order to let the future generations to reach these resources. Another goal is “A globally responsible Wales”. This goal underlines the importance of global connection in relation to the environment. We find that this is important because the fight against climate change and protection of future generations cannot be reached by only one nation.

Clearly the aim of the Act is to create a balance between the short-term needs and long-term needs. The Act is created in order to allow future generations to enjoy their human rights as much as current generations can do.

ii. Australia

Australia is another example to be reviewed under this section because the Western Australian government issued the Rights of Nature and Future Generations Bill in 2019. The purpose of the Bill includes recognition and protection of current and future generations right to live in a healthy environment.¹⁹⁷ This recognition is important because through this drafting the importance of right to live in a healthy environment is accepted for the future generation as well as the current people. Article 7 under the Part 2 of the Bill lists the rights of future generations. The Article is as follows;

“Rights of future generations

(1) Present and future generations of people in the State have the

¹⁹⁵ Well-being of Future Generations Act 2015, p.5 .

¹⁹⁶ Well-being of Future Generations Act 2015, p.4.

¹⁹⁷ Rights of Nature and Future Generations Bill 2019, p.2 can be reached at <http://files.harmonywithnatureun.org/uploads/upload898.pdf>.

right to —

(a) a healthy environment, including the right to clean air and clean water; and

(b) a healthy and stable climate system; and

(c) a vibrant and biodiverse community of life.”¹⁹⁸

Through this Article the importance of the environmental rights are emphasized for the future generations as well as the current generation. Generally the rights are recognized for the current people and the future generations are ignored. But these kinds of regulations are essential to balance the rights of current and future generations. Actually, by recognizing the right of future generations the protection of environment is promoted as well.¹⁹⁹ Because the connection among the environment and rights of future generations is very explicit. In order to protect rights of future generations the environment must be protected. Thus, even if the states accept anthropocentric approach, the mention of the rights of future generations provides a protection for the environment. Because it is impossible for next generations to enjoy any of their rights without healthy environment. The fact that human are not separable from the nature requires governments to protect the nature. A limit over the usage amount and usage method of the natural resources must be determined in order to maintain the ecosystem and make sure future generations are able to enjoy their rights.²⁰⁰

Another important point that should be highlighted in relation to this Bill is that the regulation in relation to representation and right to have standing. As discussed in the upper sections the representation of both the nature and future generations is a problematic issue. Since nature is not human and cannot take legal actions against the polluters or damagers; since the future generations are not alive standing before the courts shall be defined by the lawmakers. Under the Division 2 Article 13 of the Bill, the standing in case of an infringement of any of the rights granted in the Bill is regulated. Accordingly, any person has a standing. For this reason current generation especially, the youth can take legal actions against the government if the government fails to protect the environment.

¹⁹⁸ Rights of Nature and Future Generations Bill 2019, p.4.

¹⁹⁹ Harriet Harden-Davies/Fran Humphries/Michelle Maloney/Glen Wright/Kristina Gjerde/Marjo Vierros, “Rights of Nature: Perspectives for Global Ocean Stewardship”, **Marine Policy**, V.122, 2020, p.4.

²⁰⁰ Harden-Davies/ Humphries/ Maloney/ Wright/ Gjerde/ Vierros, op.cit., p.8

Australia is one of the most important case studies to take into consideration. For example the government releases reports in relation to intergenerational equity. Accordingly, each generation needs to be treated equally and without proper environmental policy the equality cannot be reached.²⁰¹ It has been noted that a person's wellbeing requires health and quality of environment in addition to material standards.²⁰²

c. Clauses in Constitutions

Different types of constitutional regulations can be created in relation to the rights of future generations. The direct references to future generations in constitutions started to be raised in the recent years after the 1990s. Starting with this shift the future generations started to be seen and accepted as interest groups, benefit holders and right owners.²⁰³

The intergenerational justice is not only about the ecological justice. Ecological justice, financial justice and general posterity can be protected in relation to the future generations and can be framed in the national constitutions. This thesis focuses on the examples in which ecological justice is aimed but it has to be noted that full intergenerational justice requires comprehensive justice in different areas.

Some examples will be given hereunder this section. The examples can be influential for potential constitutional regulations. Even though some examples are listed here, it is important to note that there are more examples in different countries' constitutions such as Iraq 2005 constitution.

²⁰¹ Judith C. Bessant/Michael Emslie/Rob Watts, "Accounting for Future Generations: Intergenerational Equity in Australia", **Australian Journal of Public Administration**, V:70, Issue:2, 2011, p.148

²⁰² Bessant/Emslie/Watts, op.cit.,p.151.

²⁰³ Renan Araújo/ Leonie Koessler, **The Rise of the Constitutional Protection of Future Generation**, 2022 can be reached at <https://verfassungsblog.de/the-rise-of-the-constitutional-protection-of-future-generations/>

i. South Africa

South African constitution making was an influential and inspiring process after the apartheid regime. During the constitution making process in South Africa, different interest groups were taken into account including colored people, women, LGBT and future generations. According to us South Africa is one the most important examples in the transition process in recent years. While transitioning to a more equal state structure the future generations were also taken into account. In the South African Constitution the second chapter is titled Bill of Rights and Article 24 is regulating the right to environment.²⁰⁴ Under this article the wellbeing of people is underlined. This is similar to the Wales Act. The wellbeing is essential in the sense of human rights. According to this constitutional norm the government is obliged to provide a healthy environment to everyone including the future generations. The future generations are directly mentioned in the article. Accordingly the government shall protect the environment and take necessary steps to decrease the pollution, protect the environment and provide a sustainable development for the benefit of current and future generations. The government shall take these necessary measures through all of its organs including the legislative and administrative bodies. Actually, with this regulation the importance of sustainable development is stressed and the balance between the rights of current people and rights of future generations is mentioned. These provisions have been interpreted by the national courts but the amount is still small to understand the general judicial approach.

South African experience is important. Because South Africa must regulate the utilization of the resources as soon as possible. Currently South Africa is already experiencing electricity shortage and each day there are planned power outages. If the state fails to regulate the resources and protect the environment now, future generations will not

²⁰⁴ Article 24 is as follows: “Everyone has the right -

a. to an environment that is not harmful to their health or well-being; and

b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that

i. prevent pollution and ecological degradation;

ii. promote conservation; and

iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

be able to enjoy any of their rights. Another important point to highlight in relation to South Africa is that just like many other African countries the water scarcity is a pressing problem. It is clear that without access to water, future generations cannot be able to enjoy any of their fundamental rights and dignified life.

ii. Germany

Germany is another important example to see the rights of future generations in the constitutional level. Article 20a of the Basic Law of Germany directly mentions the future generations²⁰⁵. In this regulation the government is obliged to protect the environment and animals, while doing that so the rights of the future generations must be kept in mind. With this article, German government is recognizing the duty to protect rights of future generations in the constitutional level. Through this recognition, the German government bind itself for the political process and commit the government to accept the future generations as a constitutional minority or an interest group. The ecological interests are accepted as priority through this drafting.

In Germany, the rights of future generations idea has many supporters and they formed several different NGOs. Foundation for the Rights of the Future Generation is one of the most well-known one. They have been discussing how the rights of future generations can be integrated into the legal system. They hold many meetings with young representatives as well as the political parties at the end of these meeting they actually offered a constitutional regulation as well. They proposed a new article to be numbered as Article 20b. This article will stipulate that the government has to bear in mind the interest of the future generations while making any decision and sustainability principle is accepted as one of the main principles.²⁰⁶ As of August 2023, when this thesis has been written the Article 20b has not been enacted yet.

²⁰⁵ Article 20a of German Basic Law is as follows “*Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.*”

²⁰⁶ Marco Wanderwitz/Peter Friedrich/Anna Lührmann/Michael Kauch, “Changing the German Constitution in Favor of Future Generations – Four Perspectives from the Young Generation”. In: Tremmel, J. (eds) **Demographic Change and Intergenerational Justice**, Berlin: Springer, 2008, p.163.

Even though the proposed article has not yet been included in the Constitution, the debates and actions regarding the rights of future generations in Germany are trending everyday both in legal area and philosophical area. For this reason, Germany must be always observed in relation to the developments in this area.

Greens are politically very active and forceful in Germany in recent years. Their main argument has always been “*We Have Only Borrowed the Earth from Our Children*”. Their motto became relevant with the current environmental problems and the rapid loss of the ecology. Their political stance advocates that the current political decisions cannot create damaging outcomes for the future generations.²⁰⁷ Through this motivation they want to amend German Constitution to address more of the future generations’ rights. Just like in many countries the constitutional law is much depended on the political structure and political debates. Thus, the constitutional amendments and regulations generally focused more on the current political debates and current generation. While doing so, the succeeding generations are ignored. With the new political trends, the constitution makers might have taken the rights of future generations more seriously. In Germany, increasing debate over the intergenerational justice due to environmental problems is not only centered around the green politics but different political groups and political parties support more inclusion of intergenerational justice thus the rights of future generations in the Constitution. Different groups support a potential amendment in the German Constitution with different reasons however creating a fair balance among the rights of the current and future generations through defining the individual and collective responsibilities to each generation is their intersection point.

Representation is a huge question and how the representative democracies will address the rights of the people who are not represented in the parliaments is a core question. However this should not be seen as a problematic issue. Because through regarding the future generations in the constitutions governments do not disregard the parliamentary democratic

²⁰⁷ Wanderwitz/ Friedrich/Lührmann/Michael Kauch, op.cit.,p.168.

rules but instead it means they create additional institutions to support the parliament in relation to the future regarding elements.²⁰⁸

iii. Hawaii

As mentioned in relation to the right to healthy environment in the previous sections, different states in the United States of America have different approaches to the right to a healthy environment. Hawaiian Constitution is a great example to be reviewed in relation to the rights of future generations. Under the section titled “Conservation and Development Of Resources” it has been clearly stated that the State is only the trust of the natural resources and obliged to protect the nature for both the present and succeeding generations.²⁰⁹ Underlining the self-sufficiency is also an important issue. Providing self-sufficiency means the utilization of the resources in a fruitful way which will in the end benefit the future generations. The future generations have the right to live in a dignified way and without natural resources especially without the clean water, air and soil it’s not possible to live a dignified life. For this reason, Hawaiian government is constitutionally obliged to protect the nature. Having this regulation in the constitutional level shows how much the importance given to this issue. Also through this drafting, the succeeding generations are seen as a party to the social contract which is core of the constitutionalism.

United States is one of the biggest polluters and one of the largest industries in the world and it is clear that they are struggling to implement the climate regulations. For this reason it is pretty important for individual states to take actions in the constitutional level.

²⁰⁸ Lucy Kinski/Kerry Whiteside, “Of parliament and presentism: electoral representation and future generations in Germany”, **Environmental Politics**, Vol:32, No:1, 2023, p.37.

²⁰⁹ The full Article is as follows; “*Section 1. For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.*”

All public natural resources are held in trust by the State for the benefit of the people. [Add Const Con 1978 and election Nov 7, 1978]

Note: A proposal of the 1978 Constitutional Convention deleted the former section 1 of the old Article X, which read: “Section 1. The legislature shall promote the conservation, development and utilization of agricultural resources, and fish, mineral, forest, water, land, game and other natural resources.” This deletion appears to be one of the unspecified changes submitted for ratification under Question 34. On whether any of the changes submitted under Question 34 was in fact approved by the electorate, see Kahalekai v. Doi, 60 H. 324, 590 P.2d 543, excerpted in the note preceding the Preamble to the Constitution.”

The public trust doctrine shall be taken into account here. In the United States' constitution the right to property is protected under the Fifth Amendment²¹⁰. Public trust doctrine is one of the few concept that supersedes the right to private property in United States²¹¹. Directly seeing the public trust doctrine approach in a State's constitution is meaningful in this regard. The State gives more importance to protect the nature and rights of future generations by holding public trust doctrine alive in the written constitution. It's to be noted that in the liberal legal environment of the United States of America, this is a huge stance to protect the future generations. Also we have to bear in mind that without the protection of the environment the future generations won't be able to enjoy their right to private property as well since they will not be able to enjoy the right to a healthy life.

Some other states also have constitutional regulations regarding the rights of future generations. For example, state of Montana's constitution include an article in relation to rights of healthy environment for the future generations.²¹² Each state has different types of regulation in different levels. Due process legislation is one of the crucial points in these different levels of protection. In order that these articles be useful due process right must be granted to the citizens.²¹³ Because if the citizens won't be able to sue against the government or the companies their rights will not be effective. Different regulations' effectiveness can set the example and pathway for other states and countries to make their constitutional amendments. United States of America is not expected to have a constitutional level regulation in the federal level in near future however still the state level regulations and case law shall create a protection for the future generations. Even though federal constitutional amendment is not seen possible, some executive orders in relation to the protection of the

²¹⁰ The Fifth Amendment of the U.S. Constitution is as follows "[n]o person shall be ... deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

²¹¹ Lynda Collins, **Ecological Constitution– Reframing Environmental Law**, London and New York: Routledge, 2021 p.57.

²¹² The Article is as follows " *Section 1. Protection and improvement. (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.*

(2) The legislature shall provide for the administration and enforcement of this duty.

(3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources."

²¹³ Andrea White, "Protecting Future Generations from Climate Change in the United States," *Ecology Law Quarterly* 49, no. 2 (2022): 501-526 page:179

rights of future generations has been issued by the President.²¹⁴ This tendency towards the change is inspiring. Political stance will surely show itself in the legislation process too.

d. Potential Constitutional Regulations

In the academia there are several discussions in relation to the potential regulations in constitutions. As we have seen in the examples of different countries and states, the rights of future generations are not detailly regulated but they are mentioned in different ways in different legislations or constitutions. We can understand that there are different types of constitutions in the world. The types can vary such as (i) rigid or (ii) flexible; (i) framework or (ii) regulatory constitutions. So, the regulations and articles under the constitutions can alter depending of the state's constitution type. However, in the case of fundamental rights most constitutions adopt a more detailed approach. In addition, the regulation of the rights of future generations will require limitation of the rights of current generation. So the balance among these two has to be created in a very delicate way. According to us, since there is a limitation over the rights of the citizens the regulation shall be contemplated in the constitutional level. Until very recently the right to property has been seen as a granted right to use and consume the nature as a raw material, without a change in this approach sustainability and intergenerational justice cannot be achieved and the ecological crises cannot be solved²¹⁵. The right to property is regulated in constitutional level in many countries. Rights of future generations restricts the right to property so the limitation limits shall be regulated in the level of the constitution.

In addition currently there are international regulations in force however it is clear that these are not enough and effective. For this reason, the constitutional level regulations in national levels are the most effective means at the moment²¹⁶.

²¹⁴ There are several executive orders that can be mentioned here. One example can be Executive Order numbered 14008 dated 27 January 2021 and issued by Joe Biden. The title of the Executive Order is Tackling the Climate Crisis at Home and Abroad. The Executive Order underlines the pressing effect of the climate change over the country and the world. The order underlines that the climate change has to be accepted as the core of the political decision making process.

²¹⁵ Serkan Köybaşı, "Ekolojik Krize Karşı Yeşil Anayasa", **İstanbul Politik Araştırmalar Enstitüsü**, <https://www.istanpol.org/post/ekolojik-krize-kar%C5%9F%C4%B1-ye%C5%9Fil-anayasa> accessed on 05.01.2022.

²¹⁶ Ibid.

Constitutions' one of the main functions is to limit the government in order to let citizens enjoy their freedoms. In other words, the government is limited in order not to limit the freedoms of the citizens. However mostly these limitations only apply for the current generation²¹⁷. We have started to see more and more environmentalist approach in the constitutions because the climate change and environmental problems raised to a level where it's impossible to disregard.

While discussing the Hawaiian constitutional regulation above, the advantages of including a due process right was stated. For this reason, a potential constitutional regulation shall include a due process right for citizens. Without the due process, the effectiveness of the protection is questionable.

As we have seen, there are several examples in which the constitutions regulate rights of future generations by putting an obligation over states to protect them. However, it is impossible to say that these countries became ecologically sustainable. Without ecological sustainability it is not possible to protect the rights of future generations. Accordingly, it is not enough to regulate the issue at constitutional level. It's constitutional level regulation shall be effective as well. The effectiveness comes from variety of requirement. A potential constitutional clause shall provide base for the ecological sustainability and through that the intergenerational justice might to established in means of the right to environment.²¹⁸ The effectiveness of the clause has to be kept in mind. For this reason regulating at the level of constitution is not enough, the content must be comprehensive. The current examples are not effective enough because of several reasons. The first reason is that they do not state public right for every single citizen rather they state a government's general duty.²¹⁹ The governments are provided with an objective to protect the nature and protect the rights of future generations. However, if the citizens are not individually provided with a right then their right to take action against the government is limited. So if the government fails to act according to its objective the citizens cannot easily claim their rights.

²¹⁷ Marco Wanderwitz/Peter Friedrich/Anna Lührmann/Michael Kauch, op.cit., p.171.

²¹⁸ Joerg Chet Tremmel, **Handbook of Intergenerational Justice**, Cheltenham: Edward Elgar Publishing, Inc., 2006, p.204.

²¹⁹ Ibid.

Another reason is that the regulations are not concrete. This point shall be seen as one of the biggest problems in relation to the regulation of the rights of future generations. The protection is foreseen however the level of the protection is not specified. Without the limits the protection sphere cannot be created.

Some potential constitutional regulations are offered by academicians. Accordingly the potential regulation can be divided up into six parts.²²⁰ In the first part, the state's obligation of protecting the rights and interests of the future generations must be established generally. This part lays down the general obligation of the state just like any other right. So actually, the first part or the first paragraph will be presenting the general framework.

The sections between two and five are prepared in accordance with the ecological sustainability principles. In the second section, the limitation of the pollution shall be drawn. Under this section, the limitation of the allowed pollution should be limited with their natural decomposition capabilities. The aim of this section is to create balance among the rights of current and future generations through allowing the current generation to utilize the natural resources, produce and consume to the extent that they do not leave the natural resources in a condition where the future generations won't be able to enjoy them. Thus, current generation is allowed to enjoy their rights but the rights of future generations are considered at the same time.

The third section is similar to the second section of the potential constitutional regulation. At this section the renewable resources are mentioned. Utilization of the renewable resources is limited. Just like the pollution limitation the renewable resources shall be used until these resources are still renewable. The aim of this regulation is to allow future generations to use the renewable resources just like the current generation does.

On the fourth point, the government is obliged to hinder the dangers that can cause irreversible harm. Irreversible harm also includes the harm that cannot be undone without

²²⁰ Tremmel, op.cit., p.205.

great expenses. Through this regulation the resources of future generations is tried to be protected and if nature is damaged highly then the material obligation of the succeeding generations will be really eminent. The government is responsible to prevent such high burden over them .

Under the fifth section, the natural habitats shall be put under the protection of the government and this section shall not be anthropocentric. The protection of nature has to be key point at that point. It does not always require the government or its constitution to directly recognize the rights of nature but still a general protection shall be underlined against the potential human diminish.

Following these five regulations the sixth point needs to be the compensation clause. If the first sections of such constitutional regulation are breached compensation has to be regulated. Of course, it is not feasible to regulate the exact way and amount of the compensation in the constitution however a requirement for a compensation shall be mentioned.

In conclusion a comprehensive constitutional norm is necessary. In addition to the comprehensive protection guard for ecosystem, a due process right must be included to provide effectiveness. In addition to these regulations, institutions which might be provide a guard for the application of the objectives will be beneficial.

e. Institutionalizing the Rights of Future Generations

Institutionalizing the rights of future generations is another important issue. Different approaches are accepted or presented in the academia. Some believe an environmental office should be formed by the constitution is necessary in order to have an effective mean of protection .²²¹ In order to implement effective policies and make sure these policies are in force some types of institutions are established by several countries in the form of commissions, advisory boards, foundations or ombudsman. These offices and authorities

²²¹ Köybaşı, op.cit., p.401.

generally advise the centralized government or local authorities, review the implementation of policies. Some of them are authorized to inhibit legislation which may have negative impacts over the environment, thus over the future generations. Some examples will be explained and discussed under this section. One of them is parliamentary commission in Israel, the other one is commissioner in Wales and the last one is ombudsman in Hungary. Some of these institutions are limited to advisory role while some have supervisory model and some have legislative scrutiny model.

i. Israel Knesset Commission

Israel does not have a written constitution. In this aspect it is different from the other example countries herein. On the other hand, many scholars and legal experts believe that Israel needs a codified written constitution. They hold some political and academic work formed in order to draft a constitution. However, they still do not have a codified constitution.

Knesset is the legislature organ, the parliament of the Israel. The parliament has different commissions just like many other states. These commissions prepare reports in relation to potential legislation and called Knesset commissions. One of these committees was the “Commission for Future Generations”. This Commission was founded in 2001 and worked for 5 years.²²² This commission’s aim was to review the policies and legislation in regard to the effects over the future generations.²²³ This commission can be assimilated to the Future Generations Commissioner in Wales. The Knesset Commission was a reformist institution and had an informal veto power for the legislations that are proposed. Unfortunately, after 2006 the commission did not continue to work. The Commission was authorized to request information from any public authority and in addition to that is had the right to prepare opinion on a proposed legislation.²²⁴

The authority to provide opinion on the potential legislation included requesting time that is necessary to prepare such opinion. The practical outcome of this authority was right

²²² <https://www.fdsd.org/ideas/knesset-commission-future-generations/> accessed on 11/07/2023

²²³ World Future Council, **Voice of Future Generation**, 2018 can be reached at https://www.worldfuturecouncil.org/wp-content/uploads/2018/07/brochure_guarding2018b.pdf p.7.

²²⁴ Tremmel, op.cit., p.247.

to delay any legislation. The Commission had different fields of activity and these were mainly focused on environmental issues. Some examples were; (i) restoration of the environment, (ii) Mediterranean, (iii) air pollution, (iv) water and (v) pollution of the sea by the land sources.²²⁵ These areas were all listed under the quality of life section. In order to provide qualified life for the future generations the ecological problems shall be decreased and proper habitat has to be left behind.

The Knesset Commission was a novel and thrilling institution because it was formed in order to officially represent the unborn in the parliament. However, the continuation was not achieved and the project was short-termed. The representation is a real issue for the protection of the rights of future generations and official seats will help to satisfy such representation requirement. The Knesset Commission's important because its role was not limited to being an advisory office but it hold an actual capacity in the legislature.²²⁶

ii. Welsh Commissioner for Sustainable Futures

Another example to be discussed under this section is Wales. The legislation in relation to the rights of future generations is discussed above in this thesis and the special Commissioner for the Future Generations institutionalized in the Wales was mentioned as well. Under this section more details will be provided in relation to the Welsh Commissioner for Sustainable Futures. The Commissioner has advising role and guide the Welsh government in order to follow the sustainable development goals. The Commissioner is also entitled to serve in a supervisory role. The Commissioner shall evaluate the performance of the public authorities in relation to the their duties provided by Well-being of Future Generations Act.

The Commissioner has duty to prepare a report in relation to future generation one year before the election.²²⁷ According to the “Wales We Want: A Report on Behalf of Future

²²⁵ **The Knesset/The Israeli Parliament Commission For Future Generation Report** can be reached at <https://www.worldfuturecouncil.org/wp-content/uploads/2016/10/Knesset-Paper.pdf> p.10.

²²⁶ Jan Linehan/ Peter Lawrence, **Giving Future Generations a Voice: Normative Frameworks, Institutions and Practice**, Cheltenham, UK • Northampton, MA, USA: Edwar Elgar Publishing, 2021, p.183.

²²⁷ Marie-Claire Cordonier Segger/Marcel Szabo/Alexandra R. Harrington, **Intergenerational Justice in Sustainable Development Treaty Implementation**, Cambridge: Cambridge University Press, 2021,p.428.

Generations” prepared by the Commissioner seven well-being guideline was identified for the future generations. Under these seven guideline points, it has been emphasized that the environmental protection is essential to provide best start to life for every unborn citizen.²²⁸ By preparing this report the Commissioner serves to its supervisory duty.

The Sustainability objectives are followed and incorporated by the Commissioner. According to the legislation, Public Services Boards are established. These Boards are responsible to ensure the economic, social, environmental and cultural well-being in each local area. The Commissioner is responsible to provide guidelines to these Boards. Apart from the supervisory role mentioned above, here the Commissioner serves as an advisory body.

Establishing such institutions to embed the sustainability to the daily and long-term politics of the government shows trend to regulate the rights of future generations. Instead of just mentioning the rights under a relevant legislation, they institutionalize the rules and create an authority to supervise and advise the public authorities. Providing a dual role to this institution increase the gravity of the institution. Establishment of regulating and controlling institutions will increase the effectiveness of constitutional protection of the rights of future generations.

iii. Hungary Ombudsman for Future Generations

Hungary is another example to be discussed in relation to the institutionalization of the rights of future generations. Hungary had a Commissioner beforehand but then it established Ombudsman for Future Generations. The rights of future generations are openly mentioned in Hungarian Constitution.²²⁹ An ombudsman was established to satisfy the

²²⁸ Ibid.

²²⁹ Article P of the Hungarian constitution is as follows: “*All natural resources, especially agricultural land, forests and drinking water supplies, biodiversity – in particular native plant and animal species – and cultural assets shall form part of the nation’s common heritage, and the State and every person shall be obliged to protect, sustain and preserve them for future generations.*”

requirements under this constitutional regulation. The environmental NGOs and academicians were actively present in the work of the Hungarian Ombudsman.²³⁰

Hungarian Ombudsman has special powers and authority to work to provide prevention the forefront. The Ombudsman is authorized to ask the Constitutional Court to nullify a legislation.²³¹ This is an effective and important authorization. In many countries the application to the constitutional court against a legislation is limited to some applicants, generally the head of state or opposition party. However in Hungarian case the Ombudsman is donated by such an authority.. Currently many scientists state that it is nearly impossible to reverse the effects of environmental damage if it happens. Thus, the most important protection for the rights of future generations is inhibiting a potential threat. If a legislation puts an endangerment over the rights of future generations, it has to be stopped at the beginning.

The Ombudsman can investigate ex officio but the complaint process is also available. The citizens can directly apply to the Ombudsman. The complaint can be made through online system so we can say that the application is easily accessible to the public.

The Hungarian Ombudsman was a well formed system however just like closure of the Israelian Commission the structure was changed in Hungary. Deputy Ombudsperson for Future Generation was established in the Office of Fundamental Rights.

f. Evaluating Impacts of Regulating the Rights of Future Generations in Constitutions

Providing an explicit constitutional regulation is important but as explained above under the potential constitutional clause discussion section, the constitutional regulation is not enough. The regulation shall include concrete limitations and due process rights for

²³⁰ Cordonier Segger/ Szabo/ Harrington, op.cit.,p.550.

²³¹ Cordonier Segger/ Szabo/ Harrington, op.cit.,p.561.

citizens to protect the rights of future generations and inhibit the environmental damage. An effective system should include a protectional institution as well.

As explained the importance of institutions cannot be disregarded. However just like how not having the constitutional regulation is not enough for the effectiveness, the same applies to the institutions as well. These institutions shall have some features to be effective protection mechanism. First of all, they shall be independent. Because if they are not independent the real daily politics can easily affect their work. If real politics affect these institutions, their focus might easily shift from rights of future generations to requests by the current generations. Because unborn people do not have votes yet thus their pressure in the daily politics is not present.

Transparency is another key feature to keep in mind. The work, project and methods of such institution shall be transparent. In any public institution transparency is required for public support. If the concept of the rights of future generations is wanted to be imposed to the current generation, the institution has to be transparent. Otherwise, the current generation won't support limitation over their rights for the protection of the future. This is also directly linked with the legitimacy of the institution. The legitimacy includes the transparency as well as informing the public. All stakeholders must be informed. Focusing over the short-term politics is the biggest obstacle in front of the regulating and promoting effective future generations' rights.

The institution must be able to work adequately. And such work requires being able to retain necessary information from all levels of the government and public bodies. The government must provide all necessary information to these institutions. Without access to concrete and proper information, the institutions cannot work over the issues. A system shall be established under which these institutions are allowed to retain information and documents.

The last but not least feature is accessibility to the institution. As mentioned in the Hungarian system the accessibility is critical for an institution to work effectively. If an institution exist however it's not accessible to the general public, the institution cannot

effectively provide solution and in most cases it losses its legitimacy as well. The accessibility can be provided through direct application. The direct application to an institution can also help with the representation problem.

It has to be noted that in order to create balance among the current and future generations' rights, the current generation has to be put under some burden. In order to effectively implement these burdens the link among the citizens and these institutions shall be created. Reports must be provided to explain the potential future effects of current actions and/or ignorance. In these reports issues must be chosen and explained in detail²³². After the problems are identified and potential solutions and methods are identified by these independent and transparent institutions, effectiveness must be evaluated. In order to evaluate the effectiveness performance indicators has to be set up. These indicators shall be evaluated at each level of the government and the independent institution shall have the role of evaluating these goals.²³³ Any institution must have democratic legitimacy to represent the rights of future generations.²³⁴

Another point that must be highlighted is the continuity of such institutions. For example the Israel Knesset Commission worked for some term then it did not continue. Another example is that in Hungary the Commissioner downgraded to the Ombudsman. Such interruptions in the institutions delays the potential success for the protection of the rights of future generations. For this reason, while establishing these kinds of institutions a longevity must be ensured as well. Because the protection of rights of future generations requires long term policies and continuity.

²³² Inigo Gonzalez-Ricoy/Axel Gosseries, **Institutions of future generations**, Oxford:Oxford University Press, 2016,p.136.

²³³ Gonzalez-Ricoy/ Axel Gosseries, op.cit., p.149.

²³⁴ Gonzalez-Ricoy/ Axel Gosseries, op.cit., p.121.

CONCLUSION

There is a word “Ubuntu” in South African language and it means that “*I exist because of you*” or “*I’m me because of you*”.²³⁵ This saying can be both taken into account for the nature and for the different generations. We exist thanks to the nature and the same must be available to the unborn people. All of our rights, today and future are interconnected to each other. Humanity is bound to each other without any time barrier. Our actions today shape the future of the nature and life of future generations. We are all inhabitants of the world. We have to remember this reality and act accordingly that our acts, actions and decisions are affecting the rights of people who will come after us.

From the start of constitutional movements in the history, the source of constitutionalism is the idea of protection of people from government’s unlimited power. This limitation is not constructed only for the current people since the human rights do not only belong to current people but also to future generations without any temporal boundaries. If we are to accept that rights of future generations especially the right to environment shall be protected, then these rights shall be protected under the constitutions. We used to face with left and right division in the politics however this started to change and right now the current and future rights are new divisions in real politics. With the rise of climate change and environmental harms, the rights of future generations became a pressing issue. Because now with the increasing effects, the climate change is not a predicted future disaster; it is today’s reality. As stated by the USA Supreme Court “*Yesterday’s good enough has become today’s unacceptable*”.²³⁶ For this reason regulating and institutionalizing the rights of future generations in constitutions gathered increasing impetus.

²³⁵<https://ubuntu.com/about#:~:text=Ubuntu%20is%20an%20ancient%20African,of%20who%20we%20all%20are%27> accessed on 07/07/2023.

²³⁶ In re Hawai’i Electric Light Co., Judge Eddins accessed at http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2023/20230313_docket-SCOT-22-0000418_opinion.pdf.

The topic of this thesis was chosen according to these realities and current problems. It has been accepted that the without legal regulations it's not possible to create an environment that will protect the rights of future generations. Legal regulations have to be shaped according to scientific facts to provide better protection. By keeping eye on the current issues, it has been noted that understanding the right to a healthy environment is crucial to analyze the rights of future generations. Because human rights require people to have a dignified life and without proper access to natural resources including clean air, water and soil it's impossible for a person to enjoy any other human right under dignified conditions. On that point, in the beginning of the research right to a healthy environment has been explained and discussed. The current domestic and international regulation examples have been provided and compared to each other. The judicial decisions were also provided because the judicial decisions mostly refer to the future generations while discussing the right to environment.

Following the right to environment the paper moved to the discussions in relation to the rights of future generations. Explaining the rights of future generations was the first step of the research and limitation was drawn to the environmental rights. The main assertion of the thesis was the necessity of regulating these rights under the constitutions. There are several issues for such approach. The most problematic issue in relation to the rights of future generations is the representation problem. The representation problem arises mainly from short term real time politics. Democracies are based on the representation in the parliament thus there is a casual link between the voters and legislation. On the other hand, the constitutions are meant to rest for longer time period and accepted to be social contracts. For this reason, the constitutions have to be respectful to the intergenerational justice. The intergenerational justice has to be provided through constitutional legislation because the intergenerational justice means the limitation of the current generation's rights for the sake of future generations' rights. Human rights limitations shall be regulated at the constitutional level. Through the thesis this representation problem and the balance necessity among the generations are discussed.

Another reason for the requirement of constitutional regulation is the binding nature and effectiveness of the constitutional norms. Currently international regulations are the

most dominant legislations in relation to the rights of future generations and some guidelines are drafted. However just like the right to environment and protection of the nature the binding effect of the international legal instruments are not enough. For this reason domestic legislations are required at the level of constitutions. Protection at the level of constitution is the most binding and effective way of protecting human rights. Through this section existing constitutional norms were analyzed through domestic examples. As Lynda Collins said we believe that in order to serve its citizens and to maintain their existence, the governments have to find ways to constitutionalize the ecologic sustainability.²³⁷ Following this discussion it has been discovered that having constitutional norm is not enough for an effective regulation. So a detailed constitutional article has to be structured with proper, accessible and effective judicial mechanisms.

The institutions were also discussed herein this thesis. Because without the institutions norms and legal framework can never be effective. Different types of institutions are established around the world. The weakness and strong sides of each of them are mentioned. And the necessity for a transparent, accountable, legitimate and continuing institutions is determined.

As mentioned in several times herein, the climate litigation increases all around the world. Governments are facing with different claims from the citizens, especially from the youth since they are the closest ones to the future generations. If the regulation of rights of future generations is not taken seriously the democratic legitimacy of the constitutional order will be questionable since all countries with democratic regimes face with a very challenging issue due to the rise of climate change and environmental problems. In conclusion the discussions of regulating the rights of future generations in constitution are arising each day. This will be probably one of the historical changes in the constitutional order in the history. The question is how to create such balance between the generations effectively. This should be discussed more in further studies.

²³⁷ Lynda Collins, **The Ecological Constitution – Reframing Environmental Law**, London and New York: Routledge, 2021, p. 26.

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ÖZGEÇMİŞ

[REDACTED]



TEZ ONAY SAYFASI

Üniversite : T.C. GALATASARAY ÜNİVERSİTESİ
Enstitü : SOSYAL BİLİMLER ENSTİTÜSÜ
Hazırlayanın Adı Soyadı : Afra Teren GÜRLÜLER
Tez Başlığı : Rights Of Future Generation: Right To Environment and Access To Natural Resources
Savunma Tarihi : 22 / 08 / 2023
Danışman : Doç. Dr. Demirhan Burak Çelik

JÜRİ ÜYELERİ:

Unvan, Ad-Soyadı

İmza

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