

CLI BACKGROUND PAPER NO. 7

The Recognition of Intergenerational Ecological Rights and Duties in Foreign Law

by Tracy Bach*

The rights of future generations to a protected natural environment are frequently enshrined in other countries' constitutions, statutes, and policies. This section explores the different methods by which selected common and civil law countries incorporate intergenerational justice norms in their governing law.

A. Common law countries

Australia, New Zealand, and the United Kingdom illustrate several ways in which other common law countries (than the United States) have addressed both intergenerational justice and environmental issues. In Australia, broad public concern about climate change has resulted in stronger environmental protections, as reflected in case law. Legislatures in New Zealand and United Kingdom have embraced the concept of protecting future generations, by inserting language regarding the rights of future generations into laws protecting the environment, notably in their NEPA-like planning statutes.

Australia

The Australian Constitution was passed as part of a British Act of Parliament in 1900, and took effect on January 1, 1901.¹ Various acts amending the Constitution followed over the course of the next century and after the Australia Acts of 1986, which officially ended the U.K.'s colonial ties,² Australia's new Constitution came into force on June 1, 2003.³ It has no equivalent to the Bill of Rights found in the United States Constitution, and does not mention the environment or rights of future generations.⁴

Australia has implemented environmental protections by enacting statutes. Nonetheless, Australia has one of the worst environmental records of any developed country.⁵ Public outcry over global climate change and other environmental issues forced the government to take action to protect the environment and to confront the climate change crisis. On November 24, 2007, Labor Party candidate Kevin Rudd was elected Prime Minister in the world's first

* This section of Appendix A was authored by Tracy Bach, Professor of Law at Vermont Law School and Associate Director of the Climate Legacy Initiative, in collaboration with Camille Kadoch, Esq., Vermont Law School '07, Justin Brown, Vermont Law School '09, and Jacob Larson, University of Iowa '08.

¹ The Constitution [of Australia] as in force June 1, 2003, with Overview, Notes and Index by the Attorney-General's Department and Australian Government Solicitor, 2, available at: [http://www.comlaw.gov.au/comlaw/comlaw.nsf/0/19541afd497bc2e4ca256f990081e2cf/\\$FILE/Constitution.pdf](http://www.comlaw.gov.au/comlaw/comlaw.nsf/0/19541afd497bc2e4ca256f990081e2cf/$FILE/Constitution.pdf).

² *Id.* at 81.

³ *Id.*

⁴ *Id.* at 9.

⁵ JOSEPH SMITH & DAVID SHEARMAN, CLIMATE CHANGE LITIGATION: ANALYSING THE LAW, SCIENTIFIC EVIDENCE AND IMPACTS ON THE ENVIRONMENT, HEALTH, AND PROPERTY 43 (2006). For example, Australia still allows the dumping of highly toxic metal waste, chlorine, and other chemicals into its ecologically sensitive waters. *Id.* at 43-44.

climate change election.⁶ Promising to make the issue a priority, Rudd immediately signed the Kyoto Protocol and played an active role in the U.N. climate summit in Bali.⁷

During the past five years, Australian conservation foundations have spearheaded a grassroots movement to use the courts as a tool for climate change reform. In so doing, these environmental advocates have pushed the judiciary to interpret and apply the Environment Protection and Biodiversity Conservation Act of 1999 (EPBC) to climate change. Through a series of cases, courts have decided that environmental impact assessments, required under the EPBC and relevant state environmental planning statutes, must consider climate change and its intergenerational effects.

Specifically, the rights of future generations are considered in Paragraph 3A of the EPBC, outlining “the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.”⁸ While initially viewed as hortatory language, this core principle of intergenerational equity has been used by the courts to assert the government’s responsibility to assess even the indirect impacts of environmentally harmful activities.

The EPBC sets out a schema of environmental impact assessment requirements and guidelines. The EPBC’s environmental impact assessment requirements are similar to the National Environmental Policy Act in the U.S. and the U.K.’s Town and County Planning statutes. EPBC assessment and approval is required for actions that are likely to have a significant impact on: 1) a matter of national environmental significance; 2) the environment of Commonwealth land (even if taken outside Commonwealth land); and 3) the environment anywhere in the world (if the action is undertaken by the Commonwealth).⁹ The EPBC characterizes “action” broadly to include a project, development, undertaking, activity, or series of activities.¹⁰ To determine its impact, the Minister “must consider all adverse impacts (if any) the action “(i) has or will have; or (ii) is likely to have.”¹¹ To apply this language, policy guidelines instruct that:

1. a “significant impact” is an impact which is important, notable, or of consequence, having regard to its context or intensity;
2. whether or not an action is likely to have a significant impact depends on the sensitivity, value, and quality of the environment which is impacted, and on the intensity, duration, magnitude and geographic extent of the impacts; and
3. the significant impact does not need to have a greater than 50% chance of happening. Rather, all that is required is that it has a real and not a simply remote chance or possibility. If there is scientific uncertainty about the impacts of an action but the potential impacts are serious or irreversible, the precautionary principle is applicable.¹²

⁶ Julian Glover, *The Lucky Country?*, GUARDIAN, Nov. 23, 2007, at 1, available at <http://www.guardian.co.uk/environment/2007/nov/23/climatechange.australia>.

⁷ See Barbara McMahon, *Australia’s New Prime Minister Ready to Sign Kyoto Pact*, GUARDIAN, November 26, 2007, at 1, available at <http://www.guardian.co.uk/world/2007/nov/26/australia.climatechange>.

⁸ EPBC, 3A (C).

⁹ EPBC, c. 2, pt. 3, div. 1. Matters of national environmental significance include: (1) world heritage property; (2) national heritage place; (3) wetlands of international importance; (4) listed threatened species and communities; (5) listed migratory species; (6) nuclear actions; and (7) marine environment.

¹⁰ EPBC, c. 8, § 523(1).

¹¹ EPBC, c. 4, § 75(2)(a).

¹² AUSTL. GOV’T, DEPT OF THE ENV’T AND HERITAGE, EPBC ACT POLICY STATEMENT: SIGNIFICANT IMPACT GUIDELINES ON MATTERS OF NATIONAL ENVIRONMENTAL SIGNIFICANCE 4 (2006), available at <http://www.environment.gov.au/epbc/publications/pubs/nes-guidelines.pdf>.

Although a federal statute, individual Australian states and territories look to its principles and structure when formulating their own environmental regulations.

As is clear from the above language, the precautionary principle plays an important role in Australian environmental regulation. It is typically phrased as: Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by:

1. careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and
2. an assessment of risk-weighted consequences of various actions.¹³

While most legislative instruments which contain the precautionary principle only require that the decision makers have “regard” for the principle,¹⁴ more recent legislative mandates have made the principle’s application more stringent. For example, in section 3(1)(b) of the Fisheries Management Act 1991, the following objectives “must be pursued” . . . : (b) ensuring that the exploitation of fisheries resources and the carrying on of any related activities are conducted in a manner consistent with the principles of ecologically sustainable development and the exercise of the precautionary principle.”¹⁵ The legislative directive that the precautionary principle “must be pursued” rather than merely having “regard” for the principle, indicates the legislative intent to impose the principle upon the decision-making entities.

Recent case law has underscored the EPBC’s core sustainability principles, by requiring consideration of intergenerational equity during the environmental assessment process.¹⁶ In *Gray v. The Minister for Planning*,¹⁷ the court relied explicitly on ecologically sustainable development principles, particularly intergenerational equity and the precautionary principle.¹⁸ It reasoned that environmental impact assessments are key considerations because they include the public interest and they enable the “present generation to meet its obligation of intergenerational equity by ensuring the health, diversity and productivity of the environment is maintained and enhanced for the benefit of future generations.”¹⁹

¹³ *Id.*

¹⁴ *Id.* at 185.

¹⁵ *Id.* (emphasis added) .

¹⁶ *Id.* at ¶ 126. See also *Taralga Landscape Guardians Inc. v. Minister for Planning* (2007) NSWLEC 59 (in upholding a permit for a wind farm development project, the Court looked to two requirements of intergenerational equity in the energy sector, namely 1) mining of fossil fuel resources in a sustainable manner and 2) substituting energy sources that result in less greenhouse gas emissions for energy sources that result in more greenhouse gas emissions).

¹⁷ (2006) NSWLEC 720.

¹⁸ This invocation of the precautionary principle was long anticipated. See, e.g., Fraser K. Cameron, *The Greenhouse Effect: Proposed Reforms for the Australian Environmental Regulatory Regime*, 25 COLUM. J. ENVTL. L. 347, 367 (2000) (arguing for the strengthening of the precautionary principle by requiring its enforcement as a legal rule, rather than as a general principle of statutory interpretation).

¹⁹ 2006 NSWLEC 720, ¶ 116 (quoting *Bentley v. BGP Properties* (2006) NSWLEC 34, 67–70). When discussing intergenerational equity, the court relied heavily on the three conservation principles that Edith Brown Weiss explored in *In Fairness to Future Generations*: 1) options (requiring each generation to conserve the natural and cultural diversity to make development options available to future generations); 2) quality (requiring each generation to maintain the quality of the earth to pass it on in no worse condition than it was received); and 3) access (ensuring that each generation has a reasonable and equitable right of access to the earth’s natural and cultural resources). 2006 NSWLEC 720, ¶ 119.

New Zealand

New Zealand is a parliamentary democracy with a constitutional monarch. While Queen Elisabeth II serves as the head of state, the Prime Minister and his Cabinet control the government. The elected House of Representatives is the only law making body in New Zealand. New Zealand is a unitary state; the central government creates and provides limited power to regional governments. Thus, local government in New Zealand is independent of, but nonetheless subordinate to, the central government.

The rights of future generations are acknowledged and enshrined in nineteen legislative acts in New Zealand. These acts address environmental concerns, including conservation land acts and laws governing hazardous materials.²⁰ Most far reaching is the Resource Management Amendment Act (RMA) of 1996, which seeks “to promote the sustainable management of natural and physical resources”²¹ and is credited as the first statutory planning regime to incorporate the principle of sustainability.²² The Act highlights the need to manage resources in a way “which enables people and communities to provide for their social, economic, and cultural well being and for their health and safety” and at the same time “[s]ustain the potential of natural and physical resources (excluding minerals) to *meet the reasonably foreseeable needs of future generations*; [s]afeguard the life-supporting capacity of air, water, soil, and ecosystems; and [a] void, remedy, or mitigate any adverse effects of activities on the environment.”²³ Under the RMA, councils manage the natural and physical resources of the region.²⁴

New Zealand, like Australia and the United Kingdom, requires environmental impact assessment before conducting an activity which may have harmful effects for the environment. One of the matters considered is whether the proposed activity would have “[a]ny effect on natural and physical resources having aesthetic, recreational, scientific, historical, spiritual, or cultural, or other special value for present or future generations.”²⁵ Thus, on paper, the rights of future generations are a required consideration in the environmental impact assessment statement.

The environment court established under the RMA²⁶ has interpreted the Act as requiring affirmative consideration of intergenerational equity. Most notably, in a case pertaining to global climate change, *Genesis Power Limited v. Franklin District Council*,²⁷ the court stated that “[c]limate change is a silent but insidious threat that scientists

²⁰ Future generations are mentioned in the following environmental acts: Hazardous Substances and New Organisms Act 1996 No 30 (as at 09 April 2008), Public Act; Fisheries Act 1996 No 88 (as at 01 April 2008), Public Act; Resource Management Act 1991 No 69 (as at 01 January 2008), Public Act; Ngai Tahu Claims Settlement Act 1998 No 97 (as at 01 January 2008), Public Act; Climate Change Response Act 2002 No 40 (as at 01 January 2008), Public Act; Te Arawa Lakes Settlement Act 2006 No 43 (as at 01 April 2008), Public Act; Queen Elizabeth the Second National Trust Act 1977 No 102 (as at 03 September 2007), Public Act; Environment Act 1986 No 127 (as at 03 September 2007), Public Act; Conservation Act 1987 No 65 (as at 03 September 2007), Public Act; New Zealand Antarctic Institute Act 1996 No 38 (as at 03 September 2007), Public Act; Ngai Tahu (Tutaepatu Lagoon Vesting) Act 1998 No 16 (as at 03 September 2007), Public Act; Energy Efficiency and Conservation Act 2000 No 14 (as at 03 September 2007), Public Act; Fiordland (Te Moana o Atawhenua) Marine Management Act 2005 No 36 (as at 03 September 2007), Public Act.

²¹ Section 5, Resource Management Act 1991, available at <http://www.legislation.govt.nz/act/public/1991/0069/latest/DLM230265.html>.

²² G. Smith, *The Resource Management Act 1991- A Biophysical Bottom Line vs. A More Liberal Regime*, (1997) CANTA LR 501.

²³ *Supra* note 21 (emphasis added).

²⁴ Under the RMA, regional councils shall have the following functions: “The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region.” Section 30, Resource Management Act 1991, available at <http://www.legislation.govt.nz/act/public/1991/0069/latest/DLM230265.html>.

²⁵ *Id.*

²⁶ Ministry of Justice, Environment Court, available at <http://www.justice.govt.nz/environment/>.

²⁷ *Genesis Power Ltd. v. Franklin Dist. Council*, Environment Court Decision A148 [2005] NZRMA 541, at ¶ 227 (first wind farm appeal case heard in the New Zealand Environment Court).

tell us threatens to improperly deprive future generations of their ability to meet their needs.” Consequently, the court concluded that climate change must be addressed, and that in this case, one way to do so was through renewable energy.²⁸ The precautionary principle appears in New Zealand legislation, but its implementation is frequently left up to the discretion of an individual decision-making entity and thus there is considerable variation in its application.²⁹ The Fisheries Act of 1996 and the Hazardous Substances and New Organisms Act of 1996 explicitly apply a precautionary approach and both the Biosecurity Act of 1993 and the RMA do so implicitly. Section 10 of the Fisheries Act puts the precautionary principle into practice by requiring that: 1) decisions should be based on the *best available* information; 2) decision-makers should consider any *uncertainty* in the information available in any case; 3) decision-makers should be *cautious* when information is uncertain, unreliable or inadequate; and 4) the absence of, or any uncertainty in, any information *should not be used* as a reason for postponing or failing to take any measure to achieve the purpose of this Act.³⁰

United Kingdom

The U.K. does not have a unified, written constitution like the United States or most other European nations, and thus Parliament’s acts serve as the final source of governing law.³¹ However, the U.K.’s participation in the European Union has the potential to create certain overarching rights that might invalidate domestic legislation.³² For example, with respect to a right to a healthy environment, the 1998 Human Rights Act (HRA) incorporates most of the rights granted under the European Convention on Human Rights (ECHR) into U.K. law.³³ One of these, Article 8, has been interpreted by the European Court of Human Rights to imply a right to a healthy environment.³⁴ It is unclear, however, how the U.K. courts will interpret Article 8 as the HRA incorporates it³⁵ and thus how this E.U. right to a healthy environment will be enforced by U.K. courts.

The U.K. has enacted pollution control legislation similar to that of other industrialized nations. The Environmental Protection Act of 1990 regulates air pollution and some solid waste removal.³⁶ In the solid waste section, the statute renders the creators of a statutory nuisance liable whether or not the creator, by themselves, would create the nuisance.³⁷ This may prove useful for undercutting polluters’ contentions that their contribution to climate change was minimal, a frequently asserted defense in public nuisance-based climate change suits brought in U.S. courts.³⁸

The Town and Country Planning Regulations require environmental assessment for certain economic development projects or facilities, including the main effects the development is likely to have on the environment; the

²⁸ *Id.*

²⁹ Application of the Precautionary Principle in New Zealand, available at <http://www.treasury.govt.nz/publications/research-policy/ppp/2006/06-06/06.htm>.

³⁰ *Id.*

³¹ Ben Pontin, *Environmental Rights Under the UK’s Intermediate Constitution*, 17 NAT. RESOURCES & ENV’T 21, 22 (2002).

³² *Id.*

³³ *Id.*

³⁴ Article 8(1) of the ECHR states: “Everyone has the right to respect for his private and family life, his home and his correspondence.” European Convention on Human Rights, 8(1), November 4, 1950. *Id.* (citing *Lopez-Ostra v. Spain* (1995) 20 EHRR 277).

³⁵ *Id.*

³⁶ ENVIRONMENTAL LAW IN EUROPE 579–80 (Niels S.J. Koeman ed., 1999).

³⁷ Ethan T. James, *An American Werewolf in London: Applying the Lessons of Superfund to Great Britain*, 19 YALE J. INT’L L. 349, 371 (1994).

³⁸ *Id.*

significant direct and indirect effects upon human beings, flora and fauna, soil, water, air, climate, and cultural heritage; and any preventive or avoidance measures needed to remediate the environmental problems.³⁹ While climate change is not expressly mentioned in the requirements, it could be implied in the term “climate.” However, like EIAs in the U.S., U.K. EIAs are solely a procedural remedy.

Rather than asking courts to read these statutes to include regulating climate change, the U.K. has enacted a climate change levy that is imposed upon energy consumption.⁴⁰ The levy was developed “as a ‘downstream’ energy tax based primarily on industrial use of energy rather than an ‘upstream’ carbon tax on energy suppliers.”⁴¹ This tax, primarily on electricity, gas, and coal, contributes to the funding of the Carbon Trust, a private company set up by U.K. government in 2001 in response to the threat of climate change. The Trust is a U.K.-wide organization with a mission to “accelerate the move to a low carbon economy, by working with business and the public sector to develop commercial low carbon technologies and help organisations reduce their carbon emissions.”

Interestingly, U.K. legislation and courts rarely invoke the precautionary principle.⁴² In fact, the only time U.K. legislation makes the precautionary principle directly applicable is when it is transposing EU requirements into national legislation. That said, there are numerous instances of U.K. governmental policy documents invoking the precautionary principle, most notably in the government’s new strategy for sustainability.⁴³ The precautionary principle is one of the founding principles enumerated in the Government’s Sustainable Government Policy paper, entitled “Securing the Future: Delivering U.K. Sustainable Development Strategy.” The new policy is to ensure that “policy is developed and implemented on the basis of strong scientific evidence, whilst taking into account scientific uncertainty (though the precautionary principle) as well as public attitudes and values.”⁴⁴ Despite this potential, the precautionary principle has not received favorable treatment in court decisions, where courts have held that the policy documents do not create legal obligations.⁴⁵

The United Kingdom has recognized future generations in recently enacted legislation. In the Heather and Grass Burning (Wales) Regulations, the Welsh Ministers may grant a license to burn only if the burning is necessary or expedient for “the conservation, enhancement or management of the natural environment for the benefit of present and future generations.”⁴⁶ This provision is also present in the 2007 regulations for England. Consideration of future generations is not limited to environmental matters. The Education Curriculum Minimum Content Order for Northern Ireland contains an objective which requires education systems to “explore how we can exercise environmental stewardship and to help promote a better quality of life for present and future generations, both locally and globally.”⁴⁷

The United Kingdom, like the U.S., is a common law country where environmental problems were often solved historically through the private law of torts.⁴⁸ But unlike the U.S., where at least four cases characterizing climate change

³⁹ *Supra* note 36, at 539.

⁴⁰ Benjamin J. Richardson & Kiri L. Chanwai, *The UK’s Climate Change Levy: Is it Working?*, 15 J. ENV’T L. 39, 45 (2003).

⁴¹ *Id.* at 46

⁴² *PRINCIPLES OF EUROPEAN ENVIRONMENTAL LAW: PROCEEDINGS OF THE AVOSSETTA GROUP OF EUROPEAN ENVIRONMENTAL LAWYERS* 195 (Richard Macrory ed., 2004).

⁴³ *Id.*

⁴⁴ *Securing the Future: Delivering UK Sustainable Development Strategy*, March 2005, The Stationary Office, pg 18 of 188, http://www.sustainable-development.gov.uk/publications/pdf/strategy/SecFut_complete.pdf on 3/8/08.

⁴⁵ *Supra* note 42, at 204-07.

⁴⁶ Heather and Grass etc. Burning (Wales) Regulations 2008 (No. 1081 (W.115)), 7(3)(b)(i).

⁴⁷ The Education Curriculum Minimum Content Order (Northern Ireland) 2007, No. 46, Schedule 2, Part 5.

⁴⁸ Andrew Waite, *Regulatory Obstacles to Development in Europe*, ALI-ABA (Sept. 24, 1992).

as a public nuisance have been filed in federal court,⁴⁹ no such cases have occurred in the United Kingdom. It appears that advocates have favored using climate change administrative policies, rather than the courts, to address harms to present and future generations.

B. Civil law countries

This section examines the measures enacted by four civil law countries: France, Germany, Japan, and Sweden. These countries were chosen to illustrate the methods by which different systems of government have sought to protect the environment and address climate change, while directly or indirectly recognizing the rights of future generations.

France

France has enacted environmental laws that are command and control oriented,⁵⁰ contained in the environmental section of the French legal code. France also has a constitution that supersedes any contrary legislation. There are provisions in both the Constitution and statutes that may be useful to implement climate change and intergenerational justice legislation.

The French Constitution was recently amended to include environmental rights. It now states “[e]ach one has the right to live in a balanced and respectful environment of health.”⁵¹ However, it is unclear how this right has been enforced or implemented, since it was only recently enacted.

General principles of the French legal code “organize the individual’s right to a healthy environment” and state that not only does “each person [have] a duty to safeguard and contribute to the protection of the environment,” but also that “public bodies and private bodies must, in all their activities, comply with the same requirements.”⁵² One of these expresses the objective of sustainable development, which is necessary to “protect the health of current generations without compromising the ability of future generations to meet their own needs.”⁵³ The same legal provision goes on to cite the precautionary principle as a guide to achieving this goal.⁵⁴ However, these general principles do not necessarily lead to directly enforceable rights, since they are “general principles” which form the lens through which the rest of the legal code should be interpreted. Rather, these overarching principles apply to the enactment and execution of the Code’s more specific laws.

The French environmental statute, enacted on July 10, 1976 to protect nature, declares that nature is a general interest of the state.⁵⁵ Courts have used this principle when weighing the costs and benefits of certain development projects.⁵⁶ The law also mandates that all projects comply with environmental protection requirements.⁵⁷ A system of environmental impact assessments/studies (EIAs), outlined in a governmental decree of Oct. 12, 1977,⁵⁸ are required of

⁴⁹ See Background Paper No. 6, section VI.C.

⁵⁰ Pierrick B. Le Goff, *The French Approach to Corporate Liability for Damage to the Environment*, 12 TUL. EUR. & CIV. L. F. 39, 46 (1997).

⁵¹ James R. May, *Constituting Fundamental Environmental Rights Worldwide*, PACE ENVTL. L. REV. 113 (2005–2006).

⁵² Civ. Article L110-2 (2002), available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=40> (emphasis added).

⁵³ C. Civ. Article L110-1(II) (2002), available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=40>.

⁵⁴ *Id.*

⁵⁵ *Supra* note 42, at 231.

⁵⁶ *Id.*

⁵⁷ *Id.* at 231–32.

⁵⁸ *Id.*

any project “due to the significance of its size or the consequences it bears on the environment, [which] may affect the environment.”⁵⁹ If a facility is required to produce an assessment, it must include analysis of the direct and indirect effects on the environment; the temporary and permanent environmental effects of the project; and any preventative measures implemented, or measures to reduce the overall environmental impact.⁶⁰ Climate change could arguably be included in the indirect effects portion; however, similar to other industrialized nations, the EIA is solely a procedural right.

Interestingly, French law regulating radioactive waste disposal provides a source for legal mandates to consider the needs of future generations. Article L542-1 states that “[h]igh-activity radioactive waste with a long life must be managed in full respect of the protection of nature, the environment and health, taking into consideration the rights of future generations.”⁶¹ In conjunction with the Planning Act of 28 June 2006’s provisions on radioactive waste and materials,⁶² the nuclear energy industry is required to submit feasibility studies to the French Government for the disposal of radioactive waste that actively consider future generations. Proposals have ranged from “reversible disposal” ideas which allow “future generations freedom of decision in waste management”⁶³ to the creation of an institutional “memory” for a site to “inform future generations about the existence and the contents of the site, especially with regard to the risk of human intrusions, in case the facility was forgotten. . . and to allow for future generations to make any decision concerning the future of the site, especially in response to technical and societal developments.”⁶⁴ Thus, legislative inclusion of the rights of future generations clearly affects practice within industry and commerce.

France has also taken a proactive approach to dealing with climate change. It has declared that fighting global warming is a matter of national priority.⁶⁵ As a start, France created a National Observatory for the Study of Global Warming, which prepares reports and studies for the government.⁶⁶ To meet its commitment under the Kyoto Protocol, as well as to address national global warming goals, France has also enacted greenhouse gas emission quotas.⁶⁷ These quotas establish a limit to green-house gas emissions for French facilities that seek permits from the government.

Finally, France also has traditional tort remedies available for environmental harms.⁶⁸ French law, through the law of July 10, 1976, “recognizes the right of all associations which aim to protect nature and the environment to present complaints to the administrative jurisdiction regarding any grievance affecting them.”⁶⁹ However, this provision is limited

⁵⁹ *Id.* at 259. However, there is an exception for projects that “do not exceed 6 million francs” (which is around \$1.3 million in U.S. dollars, after converting Francs to Euros to U.S. dollars). This could be a problem for green-house gas emissions because many of the contributors are small producers, whose construction costs are likely to be less than \$1.3 million dollars. MICHEL DESPAX & WILLIAM COULET, *THE LAW AND PRACTICE RELATING TO POLLUTION CONTROL IN FRANCE* 137 (1982).

⁶⁰ *Supra* note 42, at 260.

⁶¹ C. Environment. Article L542-1(2006), available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=40&r=5069>.

⁶² http://www.icgr2007.org/Proceedings/Session%204/Papers/Session4_2_Dupuis_Text.pdf.

⁶³ P. Landais, *Perspectives for Deep Geological Formation Disposal Research in France Beyond 2006*, 4.3, for the TopSeal International Topical Meeting, Finland, September 17-20, 2006 available at: <http://www.euronuclear.org/events/topseal/transactions/TopSeal-Transactions.pdf>.

⁶⁴ M. Dutzer, J.P. Vervialle, P. Charton, *Present Issues for Centre de la Manche Disposal Facility*, 3.3, for the TopSeal International Topical Meeting, Finland, September 17-20, 2006 available at <http://www.euronuclear.org/events/topseal/transactions/TopSeal-Transactions.pdf>.

⁶⁵ C. Civ. Article L229-1 (2003), available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=40&r=8040>.

⁶⁶ *Id.*

⁶⁷ C. Civ. Article L229-6 (2004), available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=40&r=8041>.

⁶⁸ DESPAX & COULET, *supra* note 59, at 47.

⁶⁹ *Id.* at 16.

to administrative claims and the association bringing the claim must have been approved by the French government.⁷⁰ French tort law includes a defense for polluters, which can absolve a polluter of liability when it has “fully complied with all relevant administrative regulations.”⁷¹ This defense, however, is only available for claims on behalf of the government and is not available for third party claims.⁷²

Germany

The right of future generations to a protected natural environment is expressly stated in the German Constitution. Article 20a originally required that “[t]he State, in light of its responsibility for future generations, shall protect the natural bases of life within the framework of the constitutional order by legislation, and in accordance with the law by enforcement power and case-law.”⁷³ A few years ago, however, Germany amended the constitutional provision, which now reads “[t]he state takes responsibility for protecting the natural foundations of life and animals in the interest of future generations.”⁷⁴ The phrase “foundations of life” “embraces all components of the environment which are necessary for the maintenance of life over long periods.”⁷⁵ In addition, the new provision places responsibility for protection of the natural environment squarely on the state.

Despite this progressive language, the provision is only “an objective.”⁷⁶ The provision does not describe what level of environmental protection is required, and effectively gives the legislature discretion to ascertain it.⁷⁷ The provision does not create an “actionable right to the citizen” and thus is not considered “a fundamental environmental right”⁷⁸ that citizens may enforce through legal action. It remains, nonetheless, an objective to aspire to—a favorable policy that broadly influences regulations. The new provision has not altered German laws, judicial decisions, or administrative practice, but fortunately, this is mainly due Germany’s already environmentally friendly practices.⁷⁹

The precautionary principle, which implicitly recognizes future generation rights, has historically been at the center of German environmental law. It can be found in the Environmental Impact Assessment Act, the Emission Control Act, the Law of the Waters, Atomic Energy Law, the Law of Waste Disposal, the Chemicals Act, and in the Planning Law.⁸⁰ More importantly, as a result of the unification treaties of East and West Germany, the precautionary principle is now directly applicable to federal law.⁸¹ However, as it currently exists in German environmental law, the precautionary principle only facilitates intervention by the government.⁸² German case law has regularly denied the

⁷⁰ *Id.* at 16.

⁷¹ *Id.* at 48.

⁷² *Id.*

⁷³ GERMAN ENVIRONMENTAL LAW FOR PRACTITIONERS 16 (Jane Martens trans.) (Dr. Horst Schlemminger & Dr. Claus-Peter Martens eds., 2004).

⁷⁴ *Germany Votes for Animal Rights*, CNN, <http://archives.cnn.com/2002/WORLD/europe/05/17/germany.animals/index.html> (last visited 12/18/07).

⁷⁵ INTERNATIONAL, REGIONAL AND NATIONAL ENVIRONMENTAL LAW 544 (Fred L. Morrison & Rudiger Wolfrum eds., 2000).

⁷⁶ *Id.* at 545.

⁷⁷ *Id.*

⁷⁸ COMPARATIVE ENVIRONMENTAL LAW IN EUROPE: AN INTRODUCTION TO PUBLIC ENVIRONMENTAL LAW IN THE EU MEMBER STATES 157 (Rene Seerden & Michiel Heldeweg eds., 1996).

⁷⁹ *Id.*

⁸⁰ *Id.* at 160.

⁸¹ *Id.* at 159–60.

⁸² *Supra* note 73, at 35.

ability of private citizens or associations to enforce the precautionary principle against a polluter.⁸³ Interestingly, the new constitutional provision may give the government more impetus to enforce the precautionary principle as it appears in various environmental acts.

Several German environmental acts show both explicit and implicit recognition of intergenerational equity. For example, the Federal Nature Protection Act seeks to prevent future deterioration of the “existing quality of nature,”⁸⁴ by focusing on “the protection, care, development and re-establishment of nature and the landscape, also as a responsibility to future generations.”⁸⁵ The federal government requires that, when considering development proposals, the protection of nature is an equal factor to economic benefits.⁸⁶

The Federal Emission Control Act, which regulates air pollution, seeks to “protect humans, fauna and flora, the soil, water, the atmosphere and cultural . . . goods from harmful effects on the environment.”⁸⁷ The language of “harmful effects on the environment” includes emissions that are likely to cause “hazards, considerable disadvantages or considerable nuisance to the general public.”⁸⁸ The Act requires that “[t]he establishment and operation of installations which, on account of their nature or their operation, are particularly liable to cause harmful effects on the environment, or otherwise endanger or cause considerable disadvantages or considerable nuisance to the general public or the neighbourhood, as well as the establishment and operation of stationary waste disposal plants designed to store or treat wastes, shall be subject to licensing.⁸⁹ Installations subject to licensing are required to be operated so that 1) they are not harmful to the environment; 2) precautions are taken to prevent harmful effect on the environment, using state of the art technology; 3) waste is avoided, recycled, or otherwise safely disposed of; and 4) any waste heat generated in the installation is utilized as an energy source within the installation.⁹⁰ Requirements such as these are instrumental to achieve the goal of protecting “humans, fauna and flora, the soil, water, the atmosphere and cultural goods from harmful effects on the environment,” both for this generation, and future generations.

The Environmental Liability Act imposes strict liability for environmental damage from certain kinds of facilities.⁹¹ If emissions from one of the statute’s listed facilities cause a “harmful effect on the health or the property of third parties,” then the owner of the facility must compensate the third party.⁹² The statute even applies to facilities that are no longer in operation; the Act contains a presumption of causality, which eases the plaintiff’s burden of proof.⁹³ Such legislation encourages facilities to preemptively utilize a “precautionary principle” approach in the execution of their business ventures lest they incur the strict liability provisions of the Act. As a result, such strict liability punishments

⁸³ *Id.*

⁸⁴ *Supra* note 75, at 548.

⁸⁵ *Supra* note 78, at 133.

⁸⁶ *Id.* at 135.

⁸⁷ *Supra* note 78, at 50.

⁸⁸ *Id.* at 51.

⁸⁹ Federal Immission Control Act, (Bundes-Immissionsschutzgesetz, BImSchG) Article 4, available at: <http://www.iuscomp.org/gla/statutes/BImSchG.htm#4>. With the exception of waste control plants, this licensing procedure is only applicable to installations for “commercial purposes” within the “framework of business undertakings.”

⁹⁰ Article 5, Obligations of Operators of Installations Subject to Licensing.

⁹¹ Monika T. Neumann, *The Environmental Law System of the Federal Republic of Germany*, 3 ANN. SURV. INT’L & COMP. L. 69, 108 (1996).

⁹² *Supra* note 78, at 181–82.

⁹³ *Id.* at 88.

create an impetus for installations to develop environmentally friendly methods of business and industry that yields a healthier environment for future generations.

Germany also requires environmental impact assessments (EIAs) for certain projects. The Environmental Impact Assessment Act of 1990 requires most large-scale projects to carry out an EIA.⁹⁴ The assessment requires that “all direct and indirect environmental effects of the planned project, including ecological interaction, shall be described and assessed with public participation.”⁹⁵ The goal is to provide a comprehensive assessment of all environmental affects.⁹⁶ The Act states that “[e]nvironmental impact assessment comprises identification, description and assessment of the direct and indirect impacts of a project on 1) human beings, animals and plants; 2) soil, water, air, climate and landscape; 3) cultural heritage and other material assets; and 4) the interactions between the protected assets.”⁹⁷ However, like NEPA, the remedy here is a procedural one, since it would only require the facility to redo the assessment while taking climate change harms into account.

Procedural hurdles could impede a suit on behalf of future generations. There are very few German environmental laws that authorize citizen suits.⁹⁸ German law also precludes private parties from suing on behalf of the public interest and environmental groups are unable to sue on behalf of their members.⁹⁹ Also, the German legal system tries to limit claims to “those persons whose individual rights are affected.”¹⁰⁰ Thus, it may be difficult to bring a cause of action on behalf of future generations unless the statute explicitly allows this, since the harms to future generations are by definition not “individual.”

Japan

Japan, which has a complex environmental regulatory system, has a constitution and a legislature that enacts environmental laws. Notably, the Japanese Constitution recognizes the rights of future generations, stating that “the fundamental human rights guaranteed to the people by the Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights.”¹⁰¹ The right to a protected environment is not recognized under the Japanese Constitution, but many Japanese statutes have progressive environmental provisions.

In 1993, Japan enacted a major environmental statute called the Basic Environmental Law.¹⁰² The statute’s main purpose is to prevent environmental pollution and preserve the natural environment.¹⁰³ One of the general provisions of this law states that:

“environmental conservation shall be conducted appropriately to ensure that the present and future generations of human beings can enjoy the blessings of a healthy and productive environment and

⁹⁴ *Supra* note 78, at 43.

⁹⁵ *Supra* note 91, at 176.

⁹⁶ *Supra* note 78, at 45.

⁹⁷ Gesetz über die Umweltverträglichkeitsprüfung – UVPG (Environmental Impact Assessment Act), Article 2(1), September 5, 2001, BGBl. I p. 2350, available at <http://faolex.fao.org/docs/pdf/ger36861E.pdf>.

⁹⁸ Matt Handley, *Why Crocodiles, Elephants, and American Citizens Should Prefer Foreign Courts: A Comparative Analysis of Standing to Sue*, 21 REV. LITIG. 97, 126 (2002).

⁹⁹ *Id.*

¹⁰⁰ *Supra* note 91, at 184.

¹⁰¹ The Constitution of Japan. KENPŌ, art. 11 (1946).

¹⁰² Shiro Kawashima, *A Survey of Environmental Law and Policy in Japan*, 20 N.C. J. INT’L L. & COM. REG. 231, 248 (1995).

¹⁰³ *Id.*

that the environment as the foundation of human survival can be preserved into the future, in consideration that preserving the healthy and productive environment is indispensable for healthy and cultured living for the people, and that the environment is maintained by a delicate balance of the ecosystem and forms the foundation of human survival, which is finite in its carrying capacity and presently at risk of being damaged by the environmental load generated by human activities.”¹⁰⁴

The statute introduced three basic propositions to Japanese environmental law: first, “the Japanese people must realize that the environment must be preserved for future generations;” second, industry and citizens should strive for sustainable development; and third, “Japan must affirmatively address the concept of global environmental preservation.”¹⁰⁵ The Act, though impressive in its environmental ideals, does not have any enforcement mechanisms.¹⁰⁶ Yet Japan has used the ideals enshrined in the Act to enact various recycling laws.¹⁰⁷ Japan is a country of limited space and natural resources, and thus sustainability is imperative.

Japan has also made a commitment to global warming by enacting the “Law Concerning the Promotion of Measures to Cope with Global Warming.” The law recognizes “that global warming will have severe impacts on the global environment. . . [and] aims to promote the measures to cope with global warming. . . ensuring healthful and cultural lives of present and future generations of people, and to contribute to the welfare of all human beings.”¹⁰⁸ While this law states that entities at all levels of government “shall” formulate action plans, the law only states that governmental ministers “may” appoint persons to carry out the plans.

Japan, similar to other industrialized nations, has an environmental impact statement law. The Environmental Impact Assessment Law, which was amended in 1997, requires certain facilities and projects to conduct an EIA.¹⁰⁹ The purposes of this law are to “ensure that proper consideration is given to environmental protection issues relating to such a project and, ultimately, to ensure that present and future generations of this nation’s people enjoy healthy and culturally rewarding lives.”¹¹⁰ The primary focus of the assessment is “to understand the impact from the standpoint of protecting the environment.”¹¹¹ As of 2003, EIAs had been completed for 97 projects, but its effectiveness remains uncertain.¹¹² With respect to climate change harms, they are not clearly considered in the EIA, and even if they were, the EIA is merely a procedural right.

In addition to statutory law, Japan also has traditional private tort law that can remedy environmental harms. However, Japan doesn’t normally allow class action relief and prefers to have plaintiffs bring their own cases as individuals.¹¹³ This may prove a problem for a suit on behalf of future generations, which by its very definition is a class-based claim. There is also a concern for standing, since some Japanese courts have denied standing to plaintiffs where there was an environmental injury, but the harm did not exceed the limits of tolerance.¹¹⁴ It is uncertain what the judicial limit for “tolerance” is.

¹⁰⁴ Law No. 91 of 1993, Chapter 1, Article 3, available at: <http://www.env.go.jp/en/laws/policy/basic/ch1.html>.

¹⁰⁵ Kawashima, *supra* note 102 at 248–49.

¹⁰⁶ ENVIRONMENTAL LAW AND ENFORCEMENT IN THE ASIA-PACIFIC RIM, 247 (Terri Mottershead ed., 2002).

¹⁰⁷ *Id.* at 247–51.

¹⁰⁸ Law No. 117 of 1998, Article 1, available at: <http://www.env.go.jp/en/laws/global/warming.html>.

¹⁰⁹ *Supra* note 106, at 254.

¹¹⁰ Law No. 81 of 1987, Chapter 1, Article 1, available at: <http://www.env.go.jp/en/laws/policy/assess/chap1.html>.

¹¹¹ *Supra* note 106, at 254.

¹¹² Lara Fowler, *From Technical Fix to Regulatory Mix: Japan’s New Environmental Law*, 12 PAC. RIM L. & POL’Y J. 441, 457 (2003).

¹¹³ *Supra* note 106, at 160.

¹¹⁴ *Id.* at 209.

Sweden

Sweden is a constitutional monarchy and parliamentary state with a legislature.¹¹⁵ The Swedish Constitution is actually comprised of four fundamental laws, including: the Instrument of Government, the Act of Succession, the Freedom of the Press Act, and the Fundamental Law on Freedom of Expression.¹¹⁶

The Swedish government is committed to developing a sustainable development policy.¹¹⁷ The impetus for sustainable development, and the overall goal of environmental policy in Sweden, is to be able to pass on to the next generation a society in which the major environmental problems in Sweden have been solved.¹¹⁸ The rights of future generations are therefore a central goal of Swedish environmental policies.

Sweden has ratified the Kyoto Protocol, and the Swedish Parliament has endorsed the goal of reducing national emissions of greenhouse gases by at least four per cent on average below 1990 levels by 2008–2010.¹¹⁹ In 2001, the Swedish Parliament drafted the Swedish Climate Strategy, Bill 2001/02:55, which outlines a comprehensive strategy to meet the four percent goal. The bill utilizes the following methods to reach the greenhouse gas reduction goal:

1. The Bill continued green tax reform, including higher carbon dioxide taxes in exchange for lower taxes on labor.
2. Measures in the transport policy sector, including tax relief for environmentally friendly cars and biofuels. There is a tax relief for cars classified as a taxable benefit using environmentally-friendly fuels or environmentally-friendly technology. In the Fiscal Policy Bill of 2005 Government suggests that the tax exemption for carbon dioxide-neutral propellants should be extended until 2013.
3. Publication of information to increase awareness of climate change.
4. Climate investment programs enabling municipalities, companies, and others to apply for grants to take measures to reduce greenhouse gas emissions.
5. Preparations for implementing the flexible mechanisms of the Kyoto Protocol. In accordance with the climate strategy, the Government would regularly review progress and offer new climate bills as needed.¹²⁰

These methods have been successful, as data compiled in the 2005 Swedish Report on Demonstrable Progress under the Kyoto Protocol proves. Emissions from 2000-2005 were below the level recorded in 1990 by an average of over 4%.¹²¹ If this level is sustained, Sweden will be able to achieve its greenhouse gas emissions goal.

Sweden's success at reducing emissions was brought about, in part, by various initiatives crafted by the government to encourage industry and individuals to conserve. One of these initiatives, "Green Certificates for Promoting Renewable Electricity," encourages trading electricity certificates for renewable electricity. It was launched to increase the proportion of electricity from renewable sources in the country's energy system. All electricity users, with the

¹¹⁵ ALAN GILPIN, *DICTIONARY OF ENVIRONMENTAL LAW* 305 (Edward Elgar Publishing, 2000).

¹¹⁶ Regeringen (Government Offices of Sweden), available at <http://www.sweden.gov.se/sb/d/2707/a/15187> on 2/13/08.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ The Swedish Report on Demonstrable Progress Under the Kyoto Protocol, Ds 2005:57, available at <http://www.sweden.gov.se/content/1/c6/05/47/62/24057533.pdf>.

exception of manufacturing processes in energy-intensive industries, are required to buy certificates corresponding to a certain percentage of their electricity use.

In addition to the national climate policy and legislation enacting the government bill, other environmental statutes in place have an impact on climate policy. In 1999, the Swedish Parliament enacted the Environmental Code, which consolidated fifteen separate acts into one, more cohesive scheme. The precautionary principle is used in many areas of the Environmental Code. Like the other countries previously highlighted, Sweden requires an Environmental Impact Statement prior to granting a permit. The objectives of an environmental impact assessment are to “establish and describe the direct and indirect impact of a planned activity or measure on people, animals, plants, land, water, air, the climate, the landscape and the cultural environment, on the management of land, water and the physical environment in general, and on other management of materials, raw materials and energy. Another purpose is to enable an overall assessment to be made of this impact on human health and the environment.”¹²²

C. Some Special Cases

Israel and the Philippines present unique legal approaches to achieving intergenerational justice. Israel created a Commission for Future Generations, which advocates for future generations in the country’s government. The Philippines Supreme Court declared in *Oposa v. Factorian* that future generations may sue to ensure that their rights to natural resources are not violated by the governmental practices of current generations.

Israel

Israel is a parliamentary democracy consisting of legislative, executive, and judicial branches.¹²³ The governing institutions include the presidency, the Knesset (parliament), the government (cabinet of ministers), and the judiciary.¹²⁴ Like the United States, the principle of separation of powers guides Israel’s democracy, in which the executive branch (the government and the president) operates in balance with the legislative branch (the Knesset) and an independent judiciary.¹²⁵ Given its history pre-independence in 1948, the Israel legal system now combines a unique blend of Ottoman law; British Mandate laws, which incorporate a large body of English common law; Jewish religious law; and some aspects of other legal systems.¹²⁶

Like the United Kingdom, Israel does not have a single constitutional document.¹²⁷ However, in its forty-five years of statehood, it has developed an operative constitution of its own, embodied in a set of written texts that reflect the political system on which the state is based, its social content, and an expanding constitutional tradition.¹²⁸ The Declaration of the Establishment of the State of Israel combines Jewish national aspirations and universal human rights, religious and secular sensibilities, Zionist needs and the political ends of modern democracy.¹²⁹ Israel’s Declaration of Independence has been given quasi-constitutional status by the courts in lieu of a formal bill of rights, since it specifies

¹²² *Id.* at 6 :3, available at <http://www.sweden.gov.se/content/1/c6/02/28/47/385ef12a.pdf>.

¹²³ Ministry of Foreign Affairs, Government, available at <http://www.mfa.gov.il/NR/rdonlyres/EAAB2686-EE20-4866-B348-699AB5981476/0/State.pdf>.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Daniel J. Elazar, *The Constitution of the State of Israel*, available at <http://www.jcpa.org/dje/articles/const-intro-93.htm>.

¹²⁸ *Id.*

¹²⁹ *Id.*

the basic principles of the regime.¹³⁰ Like Australia, Germany, and other countries discussed previously, Israel requires an environmental impact assessment for certain activities which may harm the environment. The Planning and Building Regulations (Environmental Impact Assessments) Law of 1982 requires an environmental impact assessment (EIS) for 1) power stations, airports, seaports and hazardous waste disposal sites; 2) projects that may have significant environmental impact, such as landing strips, marinas, national water supply arteries, dams and reservoirs, wastewater treatment plants, mines and quarries, and waste disposal sites, as well as industrial plants situated outside designated industrial zones; and 3) projects which are expected to have significant environmental impacts.¹³¹ However, once the EIS is submitted to the appropriate agency, the law does not state conditions for approval or rejection of the proposed plan in light of the impact on the environment. The Israeli Environmental Ministry description of the law states that “[f]ollowing an EIS review, conclusions are drawn and the necessary instructions are included in the provisions of the plan.”¹³² What conclusions may be drawn or what are considered “necessary instructions” are not illuminated within the law, and are left to the discretion of the administering agency.

In 2001, Israel enacted a unique method for legally recognizing the rights of future generations. The Knesset created the Commission for Future Generation, the only establishment in the world designed to protect the rights of future generations at the parliamentary and governmental levels.¹³³ It was created as a way to bring the views of future generations into the legislative process, to counter the inclination toward more short-sighted lawmaking. In the explanatory notes of the law establishing the Commission, the legislators observed that “[e]very legislative act is overshadowed by the risk of unforeseen consequences, that is, the legislator may intend to achieve a specific goal, while in fact the result is some other outcome, sometimes negative, that was not taken into account.”¹³⁴ This founding group expressed concern about the ineffectiveness of “band-aid” approaches to current problems, which may have a negative effect for future generations: “politicians have a tendency to seek resolution to problems that are currently of concern to their electors, in the hope that in the long term, the matters will resolve themselves and in any event will become the problem of a different government and different Knesset.”¹³⁵ It also recognized the sheer difficulty of fully understanding the future effects of current policies: “[i]t is sometimes difficult to calculate the effect of a legislative act in a few years time, not to mention its effect in a generation or two.”¹³⁶

The Commission’s function, until it was disbanded by the Knesset in 2007, was to express opinions about the implication of laws on the interests of future generations and advise the Knesset members on issues of particular relevance to future generations.¹³⁷ The Commission had authority over a closed list of twelve subjects, with the exception of defense and foreign affairs,¹³⁸ and was able to demand information from any governmental entity, including ministries,

¹³⁰ *Id.*

¹³¹ Planning and Building Regulations (Environmental Impact Statements), 1982, Israel Ministry of Environmental Protection, available at http://sviva.gov.il/bin/en.jsp?enPage=e_BlankPage&enDisplay=view&enDispWhat=Object&enDispWho=Articals^12353&enZone=en_plan.

¹³² *Id.*

¹³³ Shlomo Shoham & Nira Lamay, *Commission for Future Generations in the Knesset: Lessons Learnt*, in HANDBOOK OF INTERGENERATIONAL JUSTICE 244 (Jörg (Chet) Tremmel, ed., 2006).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 246.

¹³⁸ *Id.*

public companies, state institutions, and government corporations.¹³⁹ The Commission also had the authority to require parliamentary committees to give it reasonable time to prepare an opinion on the impact of pending bills.¹⁴⁰

The Commission was perceived as an effective representative for future generations. For example, while it had the right to demand time to prepare an opinion on a proposed law, the Commission only used this authority once, in the case of a law concerning integration of children with special needs in the public education system.¹⁴¹ The Commission's threat to request a delay in the governmental session and the budget approval timeline, in order to prepare an opinion, caused the government to draw back from its position and allow the integration of the special needs children.¹⁴²

Even with this success, the Commission's position within the government was not always well regarded, given its lack of pure political power within the legislative body. Rather, the Commission's power came from raising public awareness in a way that puts pressure on the legislative committees discussing bills and on the voting parliamentarians.¹⁴³ Nonetheless, the mere existence of the Commission brought attention to the concept of intergenerational equity, and raised its value in policymaking to both the lawmakers and their voting public.¹⁴⁴ The Commission was used often in parliamentary debates and in decisions of the Supreme Court.¹⁴⁵

Israel's approach to recognizing the impact of current lawmaking on future generations provides a model for other governments. As an advocate within the government, with the sole purpose of advocating for future generations, the Commission commented on, and thereby raised awareness about, the long-term effects of all types of legislation in a way that inspires lawmakers to enact more thoughtful, and ultimately, more durable legislation. Without creating a new set of justiciable rights vested in unborn citizens, such a commission, even within the limited scope of powers granted in its legal framework, provides a powerful voice for taking into account the future effects of legislative acts taken today.

The Philippines

The Philippines is a representative democracy, similar to the United States.¹⁴⁶ The 1987 constitution reestablished a system of government with a president, bicameral legislature, and an independent judiciary.¹⁴⁷ The Philippines recognizes the rights of future generations in its Environmental Policy, which states that "it is the continuing policy of the State ... to fulfill the social, economic and other requirements of present and future generations of Filipino."¹⁴⁸ The 1993 Supreme Court decision in *Oposa v. Factorian*¹⁴⁹ brought international attention to this policy.

Oposa v. Factorian was a class action suit brought by minors, their parents, and the Philippine Environmental Network, claiming the right to "the full benefit, use and enjoyment of the natural resource treasure that is the country's virgin tropical rainforest" and seeking an order for the Secretary of Environment and Natural Resources to cancel all

¹³⁹ *Id.* at 247.

¹⁴⁰ *Id.* at 246.

¹⁴¹ *Id.*

¹⁴² *Id.* at 249.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 250.

¹⁴⁵ *Id.*

¹⁴⁶ The United States Department of State, Country Reports, available at <http://www.state.gov/r/pa/ci/bgn/2794.htm#gov>.

¹⁴⁷ *Id.*

¹⁴⁸ Environmental Policy (PD No. 1151, 1977), available at <http://sunsite.nus.edu.sg/apcel/dbase/filipino/primary/phpenv.html>.

¹⁴⁹ Juan Antonio Oposa, et al. vs. Fulgencio S. Factorian, Jr., et al, G.R. No. 101083, July 30, 1993, available at http://www.lawphil.net/judjuris/juri1993/jul1993/gr_101083_1993.html.

existing timber license agreements (TLAs).¹⁵⁰ On appeal from the trial court's dismissal, the Supreme Court considered whether the plaintiffs had a cause of action, whether the issue was a political question, in which case the court would not have jurisdiction, and whether the TLAs were a contract protected by the Constitution. Before addressing the substantive issues, the Court noted that "[w]e find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned."¹⁵¹ It is from this dictum that *Oposa* has gained international fame for intergenerational equity.

The Supreme Court reversed the district court, holding first that the children had stated a cause of action. Relying on the Declaration of Principles and State Policies of the Constitution, which provides that "the State shall protect and advance the right of the people to a balance and healthful ecology in accord with the rhythm and harmony of nature," the Court explained that this right carries the correlative duty to refrain from impairing the environment and implies the judicious management of the country's forest.¹⁵² The Supreme Court also looked to the country's Environmental Policy, in which the government pledges to "fulfill the social, economic and other requirements of present and future generations of Filipino."¹⁵³ Notably, the Court ruled that the constitutional right to a balanced and healthful environment is a specific, self-executory, and actionable right.¹⁵⁴

While *Oposa* is often cited for the assertion that future generations have standing, there are several reasons why this point is a limited one. First, the Supreme Court's statement recognizing future generations' standing is dicta and therefore has no binding power.¹⁵⁵ Second, the Philippines has a very liberal standing requirement, when compared to the United States; had the defendants contested the children's representation of future generations, the court could have relied on case law and either assumed the children had standing or waived the requirement completely.¹⁵⁶ Finally, as a practical matter, the decision had no impact on the government's conduct. The Supreme Court did not cancel the TLAs, but rather remanded the case for trial. Given that *Oposa* did not pursue the case further, there were no canceled TLAs.¹⁵⁷

Conclusion

Australia, New Zealand, Germany, Japan, France, Israel, The Philippines, the U.K. and Sweden all provide examples of how different countries, with different legal systems, have inserted the rights of future generations into their governing law. Some countries, such as Germany and France, amended their constitutions. Others, like Sweden, instituted a national policy goal, which in turn spurred legislative enactments. Japan did not change its constitution, but rather, enacted a potent environmental law that recognizes the rights of future generations to a clean environment as a founding premise. The U.K. has acted to reduce green house gas emissions through a climate change levy, which

¹⁵⁰ Dante B. Gatmaytan, *The Illusion of Intergenerational Equity: Oposa v. Factoran as Pyrrhic Victory*, 15 GEO. INT'L ENVTL. L. REV. 457, 460 (2003).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Environmental Policy (PD No. 1151, 1977), available at <http://sunsite.nus.edu.sg/apcel/dbase/filipino/primary/phpenv.html>.

¹⁵⁴ Gatmaytan, *supra* note 150, at 460.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* *Oposa* may have dropped the case because while it was pending retrial, the DENR issued an administrative order prohibiting further commercial logging in the country's virgin forests, in residual forests with a slope of 50 percent or greater, and in watershed areas. (See http://www.oposa.com/oposa_family/environment2.htm). However, forests have continued to disappear because enforcement of the mandatory conditions and prevention of illegal logging is lacking, due to insufficient resources. See <http://www.hartford-hwp.com/archives/54a/145.html>.

implicitly protects future generations. Australia and New Zealand each enacted legislation to address environmental concerns and to link them directly to sustainability and intergenerational justice. Israel has created a commission to advocate for future generations from within the government. And the Philippines Supreme Court issued a decision which prompted new policies to protect the environment and the rights of future generations.

Each of these countries has a different legal system, but each has been successful at directly or indirectly recognizing the rights of future generations while acting meaningfully to stem the impact of climate change. These countries have demonstrated that the law can change by amending constitutions; enacting comprehensive environmental legislation; creating a separate intragovernmental advocacy institution; handing down decisions which spur other governmental action; or instituting a national policy objective with corresponding initiatives designed to facilitate conservation on the industrial and individual level. As the Swedish example testifies, these actions can have an impact on climate change in a relatively short period of time. In sum, these countries demonstrate the varied roles that law may play when protecting future generations from climate change's harms.