

EDITORIAL

## Transnational Environmental Law and the Future

### 1. Back to the Future

The re-election of United States (US) President Donald Trump in November 2024 has evoked a sense of *déjà vu*. In 2017, a *Transnational Environmental Law* (TEL) editorial following his initial election expressed deep concerns about potential upheavals in environmental law while highlighting the resilience that polycentric mechanisms might offer in the face of disrupted US environmental policies.<sup>1</sup> Since then, scholarly interest in the interplay between populism and environmental law has flourished.<sup>2</sup> A subsequent TEL editorial lamented the ongoing challenges to established environmental legal systems, including Trump's rollback of US environmental protections as well as the impact of Brexit on United Kingdom (UK) environmental law.<sup>3</sup> Today, those reflections gain renewed relevance, illustrating that revisiting the past is often essential for navigating the future.

Indeed, it can feel as if progress in environmental law is caught in a loop. Familiar debates resurface, and old obstacles reappear. The 2023 emissions gap report of the United Nations Environment Programme (UNEP), aptly entitled 'Broken Record', captured this sentiment: the world faces a 'disturbing acceleration' of climate records,<sup>4</sup> but calls for decisive action remain unanswered, as underscored by the, expectedly, conservative outcomes of the 29<sup>th</sup> Conference of the Parties (COP-29) to the United Nations Framework Convention on Climate Change (UNFCCC).<sup>5</sup> As we assess what transnational environmental law might look like in coming years, the outlook is sobering. Short-term prospects appear fraught, and long-term projections of environmental degradation paint a bleak picture.

Nevertheless, the international community has begun to set its sights on long-term governance. The Pact for the Future, adopted in September 2024 by the United Nations General Assembly (UNGA), outlines 56 objectives aimed at protecting the interests of present and future generations.<sup>6</sup> The pact aims to strengthen multilateral

<sup>1</sup> T.F.M. Etty & V. Heyvaert et al., 'Transnational Environmental Law on the Threshold of the Trump Era' (2017) 6(1) *Transnational Environmental Law*, pp. 1–10.

<sup>2</sup> See Symposium of the *Journal of Environmental Law* (2019) 31(3), pp. 383–7.

<sup>3</sup> T.F.M. Etty & V. Heyvaert et al., 'Transnational Environmental Law in an Era of Radical Rethinking and Widespread Law Reform' (2018) 7(3) *Transnational Environmental Law*, pp. 387–96.

<sup>4</sup> UNEP, *Emissions Gap Report 2023: Broken Record – Temperatures Hit New Highs, Yet World Fails to Cut Emissions (Again)* (UNEP, 2023), available at: <https://www.unep.org/interactives/emissions-gap-report/2023>.

<sup>5</sup> New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: <https://unfccc.int>.

<sup>6</sup> UNGA, Resolution 79/1, 'Pact for the Future', 22 Sept. 2024, UN Doc. A/RES/79/1, available at: <https://www.un.org/en/summit-of-the-future/pact-for-the-future>.

cooperation on pressing global issues such as climate change, digital governance, and international peace, aiming to avert ‘a future of persistent crisis and breakdown’.<sup>7</sup> Central to this vision is the ‘Declaration on Future Generations’, a guiding document promoting national and international policy coherence on future-focused governance.<sup>8</sup> The appointment of a UN Special Envoy for Future Generations<sup>9</sup> – while less ambitious than the fictitious but visionary ‘Ministry for the Future’ of novelist Kim Stanley Robinson<sup>10</sup> – represents a step towards institutional advocacy for those yet to come. Despite immediate political and economic pressures often overshadowing long-term concerns, the future is undeniably trending.<sup>11</sup>

In this issue, we revisit themes that *TEL* contributors have previously explored, examining the emerging focus on future generations and its potential impact on legal systems and doctrines.<sup>12</sup> This exploration raises critical questions: Is the concept of future generations sufficiently concrete to drive meaningful change, or too ambiguous to be effective? How should we balance the needs of present and future populations? Does an emphasis on future generations risk justifying inaction today, relying on speculative future technologies or policies? Who has the authority to speak for future generations? How should we define sustainability?

This issue of *TEL* delves specifically into the role of courts in shaping environmental law, featuring a Symposium collection on future generations litigation and two additional articles, including a case comment, on climate litigation.

## 2. Future Generations in Court

The Symposium collection, entitled ‘Future Generations Litigation and Transformative Changes in Environmental Governance’ and convened by Ole W. Pedersen and Katalin Sulyok, marks a significant evolution in transnational environmental law. While judicial recognition of future generations is on the rise in both international and domestic contexts, it remains inconsistent and fraught with legal challenges.<sup>13</sup> The Symposium underscores how litigation aimed at protecting future generations is challenging legal norms and reshaping governance frameworks. The contributions explore the transformative potential of such litigation by holding states accountable

<sup>7</sup> Ibid., p. 1.

<sup>8</sup> Ibid., Annex II, p. 52.

<sup>9</sup> Ibid., para. 52.

<sup>10</sup> K.S. Robinson, *The Ministry for the Future* (Orbit, 2020).

<sup>11</sup> See also T. Hale, *Long Problems: Climate Change and the Challenge of Governing across Time* (Princeton University Press, 2024).

<sup>12</sup> B. Lewis, ‘The Rights of Future Generations within the Post-Paris Climate Regime’ (2018) 7(1) *Transnational Environmental Law*, pp. 69–87; D. Bertram, ‘“For You Will (Still) Be Here Tomorrow”: The Many Lives of Intergenerational Equity’ (2023) 12(1) *Transnational Environmental Law*, pp. 121–49.

<sup>13</sup> O.W. Pedersen & K. Sulyok, ‘Future Generations Litigation and Transformative Changes in Environmental Governance’ (2024) 13(3) *Transnational Environmental Law*, pp. 464–74, at 465.

for long-term impacts and integrating future-focused policies into present-day legal structures.

The Symposium collection features six articles, introduced in a Foreword by the convenors.<sup>14</sup> They position this collection as a mapping exercise of the doctrinal frontiers in future generations litigation and come to the conclusion that intergenerational equity ‘presents a challenge of constitutional proportions’.<sup>15</sup> As demonstrated in the articles, this challenge involves reconfiguring domestic governance structures, redefining fundamental concepts such as the rule of law and sovereignty, and transforming both plaintiffs’ strategies and judicial reasoning.<sup>16</sup> Importantly, the conveners emphasize that ‘courts *do* need the future to be able to restrain the present’.<sup>17</sup> Based on the findings of the Symposium collection, they identify three structural impacts of future generations litigation: (i) a decentralizing force that empowers new voices, including local communities; (ii) a diversifying power that gives rise to new rights holders; and (iii) an expansive force that brings soft law aspirations into binding legal standards.<sup>18</sup>

The first two articles explore common trends in future generations litigation across jurisdictions. Katalin Sulyok opens the Symposium by critiquing the anthropocentric and presentist nature of the rule of law,<sup>19</sup> arguing for its extension to posterity.<sup>20</sup> Sulyok considers that framing cases around future generations can be a powerful litigation strategy, with tangible impacts.<sup>21</sup> Drawing from an analysis of global litigation strategies and court decisions, she identifies structurally similar legal standards used worldwide, which correspond to five requirements flowing from the rule of law: respect for human rights, certainty of law requirements, prohibition of arbitrary exercise of governmental powers, non-discrimination, and access to justice.<sup>22</sup> She concludes that embedding intergenerational dimensions in rule of law obligations could help to shape a legal order more resilient to future risks.<sup>23</sup>

Emma Lees and Emilie Gjaldbak-Sverdrup are also interested in the spread of ideas and concepts across jurisdictions. They delve into the global convergence of judicial approaches in climate litigation. They argue that the era of climate litigation has transitioned from an era of innovation to one of harmonization,<sup>24</sup> a process they term ‘fuzzy universality’.<sup>25</sup> They identify an emerging prototype in climate litigation,

<sup>14</sup> Pedersen & Sulyok, *ibid.*

<sup>15</sup> *Ibid.*, p. 470.

<sup>16</sup> *Ibid.*, p. 470.

<sup>17</sup> *Ibid.*, p. 469.

<sup>18</sup> *Ibid.*, pp. 470–1.

<sup>19</sup> K. Sulyok, ‘Transforming the Rule of Law in Environmental and Climate Litigation: Prohibiting the Arbitrary Treatment of Future Generations’ (2024) 13(3) *Transnational Environmental Law*, pp. 475–501, at 481.

<sup>20</sup> *Ibid.*, p. 477.

<sup>21</sup> *Ibid.*, p. 481.

<sup>22</sup> *Ibid.*, pp. 483–97.

<sup>23</sup> *Ibid.*, p. 484.

<sup>24</sup> E. Lees & E. Gjaldbak-Sverdrup, ‘Fuzzy Universality in Climate Change Litigation’ (2024) 13(3) *Transnational Environmental Law*, pp. 502–21, at 509.

<sup>25</sup> *Ibid.*, p. 508.

characterized by three features: (i) a focus on impacts upon youth and future generations, (ii) claims grounded in rights-based language, and (iii) reliance on reports of the Intergovernmental Panel on Climate Change.<sup>26</sup> This pattern allows courts to transform complex factual issues into legal problems, underscores the interconnected nature of environmental harm, and bypasses political questions.<sup>27</sup>

The next two Symposium articles focus on the individuals represented by the term ‘future generations’. Aoife Nolan addresses the conceptual ambiguity surrounding this group,<sup>28</sup> particularly the unclear relationship between future generations and living children.<sup>29</sup> She argues that courts should recognize and address the definitional lacuna, which is important to identify concrete rights holders.<sup>30</sup> Without this clarity, existing legal frameworks risk being diluted, potentially creating divisions between the interests of these groups, and undermining constitutional tenets and rights protection.<sup>31</sup>

Margaretha Wewerinke-Singh and Alofipo So’o alo Fleur Ramsay emphasize the importance of humanizing the abstract concept of future generations in climate litigation. They point out that future generations can appear impersonal and distant because they do not ‘yet have stories of their own’.<sup>32</sup> To foster ‘more ethical and inclusive outcomes’, they advocate narratives that bring the human impacts of climate change to life.<sup>33</sup> This approach aligns with Nolan’s observation that involving children as claimants in litigation personalizes the otherwise abstract claims of climate victims.<sup>34</sup> Wewerinke-Singh and Ramsay argue that compelling narratives, which awaken ‘the moral imagination to our shared destiny across generations’, can drive meaningful climate action.<sup>35</sup> To do so, they draw inspiration from Indigenous cosmologies that challenge dominant narratives<sup>36</sup> and reveal the cultural impacts of climate change, as well as the sacred interconnectedness between human communities and the natural world.<sup>37</sup>

The final two Symposium articles delve into the operationalization of the concept of future generations in domestic and international environmental law. Elen Stokes and Caer Smyth examine the Well-being of Future Generations (Wales) Act 2015,<sup>38</sup> a landmark piece of legislation that mandates public bodies to pursue sustainable development aligned with the ‘well-being goals’ of Wales. While some critics dismiss

<sup>26</sup> Ibid., pp. 510–15.

<sup>27</sup> Ibid., pp. 516–20.

<sup>28</sup> A. Nolan, ‘Children and Future Generations Rights before the Courts: The Vexed Question of Definitions’ (2024) 13(3) *Transnational Environmental Law*, pp. 522–46.

<sup>29</sup> Ibid., pp. 528–42.

<sup>30</sup> Ibid., p. 541.

<sup>31</sup> Ibid., pp. 542–5.

<sup>32</sup> M. Wewerinke-Singh & A.S.F. Ramsay, ‘Echoes Through Time: Transforming Climate Litigation Narratives on Future Generations’ (2024) 13(3) *Transnational Environmental Law*, pp. 547–68, at 548.

<sup>33</sup> Ibid., p. 557.

<sup>34</sup> Nolan, n. 28 above, p. 527.

<sup>35</sup> Wewerinke-Singh & Ramsay, n. 32 above, p. 567.

<sup>36</sup> Ibid., pp. 561–6.

<sup>37</sup> Ibid., p. 561.

<sup>38</sup> E. Stokes & C. Smyth, ‘Hope-Bearing Legislation? The Well-being of Future Generations (Wales) Act 2015’ (2024) 13(3) *Transnational Environmental Law*, pp. 569–87.

the Act as purely aspirational and unenforceable, Stokes and Smyth offer a more nuanced perspective. They identify specific provisions with enforceable potential and highlight the limited but vital role that courts can play in ensuring compliance.<sup>39</sup> The authors underscore that the Act's significance lies in its comprehensive infrastructure rather than any isolated element.<sup>40</sup> They contend that the Act has 'constitutional significance because it was intended to effect a fundamental change in governance structures and the culture of Wales'.<sup>41</sup> By fostering structural conditions conducive to hope, the Act opens new possibilities for environmental governance.<sup>42</sup>

Caroline Foster concludes the Symposium by examining how international legal norms, particularly the no harm rule and the principle of state sovereignty, intersect with the emerging recognition of future generations' rights.<sup>43</sup> Through a detailed analysis of international case law, she argues that the concept of 'due regard' could operationalize the no harm rule in respect of future generations' interests.<sup>44</sup> Foster emphasizes that international courts can make transformative contributions in the context of advisory proceedings on climate change to protect the interests of future populations.<sup>45</sup>

### 3. The Climate in Court

Complementing the Symposium collection are two articles on climate litigation that showcase the richness of cases brought to protect the climate system. The first article, by Angela Hefti, examines the individuals who are driving climate litigation, particularly those at the intersection of multiple vulnerabilities (in relation to gender, age, and disability).<sup>46</sup> Hefti explores how these 'intersectional victims' are disproportionately affected by climate change but also emerge as crucial agents of change in human rights-based litigation. She argues that systemic inequalities often marginalize these individuals, strengthening their claim to victim status under international human rights frameworks, particularly the European Convention on Human Rights.<sup>47</sup> Hefti's nuanced framework highlights how climate-related harms intersect with social inequalities, urging legal systems to adopt socio-legal concepts like intersectionality. This approach opens new avenues for climate litigation, emphasizing procedural justice for marginalized communities.

Hefti's focus on today's climate victims resonates with the Symposium's exploration of future generations. In their Symposium Foreword, conveners Pedersen and Sulyok reference one of the cases Hefti examines: *KlimaSeniorinnen*.<sup>48</sup> They provide a bridge

<sup>39</sup> Ibid., p. 577.

<sup>40</sup> Ibid., p. 573.

<sup>41</sup> Ibid., p. 580.

<sup>42</sup> Ibid., pp. 583–7.

<sup>43</sup> C.E. Foster, 'Due Regard for Future Generations? The No Harm Rule and Sovereignty in the Advisory Opinions on Climate Change' (2024) 13(3) *Transnational Environmental Law*, pp. 588–609.

<sup>44</sup> Ibid., pp. 599–606.

<sup>45</sup> Ibid., pp. 606–8.

<sup>46</sup> A. Hefti, 'Intersectional Victims as Agents of Change in International Human Rights-Based Climate Litigation' (2024) 13(3) *Transnational Environmental Law*, pp. 610–35.

<sup>47</sup> Rome (Italy), 4 Nov. 1950, in force 3 Sept. 1953, available at: [https://www.echr.coe.int/documents/d/echr/Convention\\_ENG](https://www.echr.coe.int/documents/d/echr/Convention_ENG).

<sup>48</sup> Pedersen & Sulyok, n. 13 above, p. 466.

between the two perspectives. Indeed, the European Court of Human Rights (ECtHR) paid due regard to ‘intergenerational burden-sharing’,<sup>49</sup> while also acknowledging that ‘the members of society who stand to be most affected by the impact of climate change can be considered to be at a distinct representational disadvantage’.<sup>50</sup> This case illustrates how references to both future generations and vulnerable communities can impose specific obligations on states,<sup>51</sup> reinforcing the interconnectedness of these issues.

The second article, by Parul Kumar,<sup>52</sup> presents a case comment on the judgment of the Supreme Court of India in *Vedanta Ltd v. State of Tamil Nadu and Others*.<sup>53</sup> The decision affirmed the closure of the Vedanta copper smelting plant in Tuticorin in southern India, emphasizing human dignity, well-being, and the pursuit of what the Court termed ‘the good life’. The judgment, rooted in the ‘polluter pays’ principle and intergenerational equity, underscores a growing judicial focus on the long-term impacts of industrial activities on communities, an increasingly significant consideration in climate-related cases.<sup>54</sup>

Kumar’s analysis highlights the importance of addressing localized environmental harm, echoing themes from the Symposium collection.<sup>55</sup> The author argues that, although not explicitly framed as a ‘climate case’, the *Vedanta* judgment should be viewed as such because it enhances the accountability of multinational corporations, directly confronting the drivers of climate change.<sup>56</sup> While most definitions of climate litigation encompass cases that have an explicit link with climate change, the *Vedanta* decision emphasizes localized environmental harm and human rights, offering a richer understanding of the different ways in which local communities mobilize the law in response to the climate crisis.<sup>57</sup>

#### 4. Transnational Environmental Law’s Future

This issue of *TEL* offers novel insights into a long-standing principle of environmental law. Once viewed as radical and potentially incompatible with existing systems of law, the principle of intergenerational equity is becoming increasingly important in legal discourses and practice, gaining traction domestically and internationally. Its increasing

<sup>49</sup> ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/200, Judgment, 9 Apr. 2024, para. 420 (*KlimaSeniorinnen*).

<sup>50</sup> *Ibid.*, para. 484.

<sup>51</sup> *Ibid.*, para. 548.

<sup>52</sup> P. Kumar, ‘Striving Towards “The Good Life”: What Environmental Litigation in India Can Tell Us About Climate Litigation in the Global South. *Vedanta Ltd v. State of Tamil Nadu and Others*, Supreme Court of India’ (2024) 13(3) *Transnational Environmental Law*, pp. 636–51.

<sup>53</sup> Judgment in Special Leave Petition (Civil) Nos. 10159–10168 of 2020 with Special Leave Petition (Civil) Nos. 10461–10462 of 2020 and Civil Appeal Nos. 276–285 of 2021 (Supreme Court of India), 29 Feb. 2024, available at: [https://webapi.sci.gov.in/supremecourt/2020/18030/18030\\_2020\\_1\\_1\\_50971\\_Judgement\\_29-Feb-2024.pdf](https://webapi.sci.gov.in/supremecourt/2020/18030/18030_2020_1_1_50971_Judgement_29-Feb-2024.pdf).

<sup>54</sup> Kumar, n. 52 above, pp. 640–1.

<sup>55</sup> Pedersen & Sulyok, n. 13 above, pp. 470–1.

<sup>56</sup> Kumar, n. 52 above, p. 644.

<sup>57</sup> *Ibid.*, p. 650.





prominence reflects a collective recognition of the urgent need to design legal mechanisms better suited to address the long-term impacts of environmental degradation.

The transnational spread of intergenerational equity, coupled with the commonalities observed across diverse litigation strategies and judicial decisions, is a testament to the vitality and importance of global actors exploring options to reimagine the rule of law. This shift represents more than a legal trend; it signals a broader cultural and institutional transformation. By empowering marginalized voices, creating new rights holders, and integrating long-term accountability into existing frameworks, transnational environmental law is charting a course towards more resilient and inclusive governance. At a time when the efficacy of environmental law is under intense scrutiny, this emerging transnational discourse offers a glimmer of hope. It demonstrates that, even amidst uncertainty, legal systems can adapt to confront unprecedented challenges.

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Cite this article: T.F.M. Etty, J. van Zeben, H. van Asselt, L.-A. Duvic-Paoli, S. Jodoin & L. Reins, 'Transnational Environmental Law and the Future' (2024) 13(3) *Transnational Environmental Law*, pp. 457–463. <https://doi.org/10.1017/S2047102524000396>