

The protection of the environmental interests of future human generations in South Africa

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DEDICATION

For my parents.

ABSTRACT

The study explores the extent to which South African law protects the environmental interests of future generations. To achieve this objective, the dissertation explores the definition of future generations and also traces its development and interpretation under international law. Section 24 of the Constitution – the environmental right – expressly provides for the protection of the interests of future generations, and the promotion of sustainable development. Further, framework environmental legislation, the *National Environmental Management Act* 107 of 1998 entrenches the principle of sustainable development. Sustainable development echoes the need to ensure intergenerational equity, and the protection of future generations. While South Africa does not have a single case that expressly cites future generations as parties to the proceedings, in *Fuel Retailers* the Constitutional Court relied on the principle of sustainable development and intergenerational equity – which are central to the protection of future generations. Also, the study makes use of foreign law to investigate how foreign jurisdictions (Philippines, the Netherlands and United States of America) use and interpret the concept and protect future generations. The final observation is that, should the principles of sustainable development and intergenerational equity be used, as they have been used in South Africa, they could provide for the protection of future generations, despite a lack of explicit mention of the concept in legislation.

Keywords: future generations, environmental rights and interests, sustainable development, intergenerational equity, South Africa

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LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
AJIL	American Journal of International Law
AJS	American Journal of Sociology
AULR	American University Law Review
ARRCC	Australian Religious Response to Climate Change
ARP	African Religions and Philosophy
AUJIEL	Australian Journal of Environmental Law
BELJ	Buffalo Environmental Law Journal
AQA	National Environmental Management Air Quality Act 39 of 2004
CCR	Constitutional Court Review
CRC	Convention on the Rights of the Child
CRU	Climatic Research Unit
CUP	Cambridge University Press
DLJ	Dalhousie Law Journal
ECHR	European Convention of Human Rights
EJCL	Electronic Journal of Comparative Law
ELQ	Ecology Law Quarterly
ESEP	Ethics in Science and Environmental Politics
GCI	Getty Conservation Institute

GEP	Global Environmental Politics
GJPLR	Global Journal of Politics and Law Research
ICLR	International and Comparative Law Review
IEE	Infection ecology and Epidemiology
IIEED	International Institute for Environment and Development
IEL	International Environmental Law
IJHSS	International Journal of Humanities and Social Sciences
IJARSE	International Journal of Advance Research in Science and Engineering
ILSA	Journal of International and Comparative Law
IPCC	Intergovernmental Panel on Climate Change
ITBLR	International Trade and Business Law Review
JBV	Journal of Beliefs and Values
JENRL	Journal of Energy and Natural Resources Law
JHCS	Journal of Hindu-Christian Studies
JHRE	Journal of Human Rights and the Environment
JGE	Journal of Global Ethics
MDPI	Multidisciplinary Digital Publishing Institute
MJSDL	McGill Journal of Sustainable Development
NCCRWP	National Climate Change Response White Paper
NEMA	National Environmental Management Act 107 of 1998

NGO	Non-Governmental Organisation
NFSD	National Framework for Sustainable Development
OECD	Organisation for Economic Cooperation and Development
OUP	Oxford University Press
OWD	Our World in Data
PAIA	Promotion of Access to Information Act 2 of 2000
PAJA	Promotion of Administrative Justice Act 3 of 2000
PELJ	Potchefstroom Electronic Law Journal
PULP	Pretoria University Law Press
PUP	Princeton University Press
PER	Potchefstroom Electronic Law Journal
RECIEL	Review of European, Comparative and International Environmental Law
RLT	Roman Legal Tradition
SA	Scientific American
SA	South Africa
SAJELP	South African Journal of Environmental Law and Policy
SCA	Supreme Court of Appeal
SC L Rev	South Carolina Law Review
SDGs	Sustainable Development Goals
SAJHR	South African Journal on Human Rights

SEMA	Specific Environmental Management Acts
Stell LR	Stellenbosch Law Review
TECLF	Tulane European and Civil Law Forum
TEL	Transitional Environmental Law
UDCLR	University of California Davis Law Review
UDHR	Universal Declaration of Human Rights
UNEP	United Nations Environment Program
UNFCCC	United Nations Framework Convention on Climate Change
UNU	United Nations University
UNUP	United Nations University Press
USA/ US	United States of America
VLS	Vermont Law School
WCED	World Commission on Environment and Development
WCST	World Congress on Sustainable Technologies
WFSB	World Future Society Bulletin
WHP	White Horse Press

1 INTRODUCTION

1.1 Background

Socio-ecological threats to the earth system have resulted in unprecedented environmental degradation, ocean acidification, over-exploitation of natural resources and climate change; posing a threat to present and future human generations.¹ The United Nations Special Rapporteur on Human Rights and the Environment² notes that environmental degradation, lack of clean air and water, loss of biodiversity, the effects of climate change and exposure to chemical disposals interfere with the enjoyment of human rights of the present generation,³ as well as with the interests of future generations.

Considering this observation, international environmental law (hereafter IEL)⁴ seeks to address the challenges associated with environmental threats and socio-ecological degradation through governance and regulatory frameworks. There are various aspects to IEL,⁵ and the principle of intergenerational equity is one of the key principles that is used to highlight environmental justice.⁶ Under international law, the principle of intergenerational equity guides states in the development and

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- ¹ Kotzé 2019 *Transnational Environmental Law* 11-13; Atapattu and Schapper *Human Rights and the Environment* 34; Boyd "Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment" 17-41.
- ² *Report of the Special Rapporteur on Human Rights and the Environment on Safe Climate* A/74/161 (2019) para 1; Global Challenges Foundation 2018 <https://globalchallenges.org>.
- ³ *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* A/HRC/37/58 (2018) para 35; Kinhal 2019 *WCST* 1. See also *World Declaration on the Survival, Protection and Development of Children* (1990) para 5.
- ⁴ Sands *et al Principles of International Environmental Law* 13. IEL is referred as a body of laws created by states to mitigate, protect and manage natural resources in a sustainable manner. It governs, regulate, manage and promote natural resources as well as environmental equality.
- ⁵ Soto 1996 *ILSA* 194-207. For instance, sustainable development, intergenerational equity, sustainable use of natural resources and integration of environmental development.
- ⁶ Kiss and Shelton *Guide to International Environmental Law* 32. Environmental ethicists construe the concepts of justice and equity as cornerstone to environmental protection. See Kidd *Environmental Law* 292-307; Loura 2014 *IJARSE* 4. Apart from the principle of intergenerational equity, the intra-generational equity principle also addresses environmental concerns. Intra-generational equity particularly focuses on the equal utilisation of resources among the same generation where rights and duties are placed upon every individual of a single generation, to preserve and conserve the environment; See also Maggio 1997 *BELJ* 193.

implementation of legal and policy frameworks to ensure the protection, promotion and enforcement of the environmental rights of the present and interests of future human generations.⁷

The term "future generations" is amorphous and difficult to define.⁸ Different scholars have offered different views on what the term "future generations" means. For example, Gear⁹ notes that the concept of future generations applies not only to humans, but also extends to non-humans. This view is premised on the "understanding of the interdependence of human beings and the environment". Abate and Herstein¹⁰ argue that future generations are "future members of a certain future group or type of future people".¹¹ Their argument provides the moral significance upon which one can base the protection of the interests and claims of and duties owed to future generations.¹² For the purposes of this study, and in the interest of scope, the definition and reference to future generations only includes humans.¹³

Future generations must be understood in the context of intergenerational equity. The principle of intergenerational equity is a notion which proclaims that "each generation holds the environment in trust, and in common with all members of the human generation."¹⁴ This means that the current generation has a duty to take care of the planet in public trusteeship for the benefit of present and future generations just as the past generation had the duty to take care of the planet for

⁷ Ahemed and Mustofa 2016 *GJPLR* 3. Environmental rights include the right to an environment that is not harmful to human health, well-being and a safe environment. Also, while environmental issues affect humanity at large, children are, primarily due to their weakness and susceptible to danger, at risk of severe harm, both in today's generation and in the one to come.

⁸ See, Abate "Protection of Future Generations: Prior to and during the Anthropocene Era" 44; Herstein 2009 *Geo Wash Law Rev* 1173-1174.

⁹ Gear 2014 *JHRE* 6.

¹⁰ Abate "Protection of Future Generations: Prior to and during the Anthropocene Era" 43-44; Herstein 2009 *Geo Wash Law Rev* 1173.

¹¹ For a detailed discussion, see 2.3 below.

¹² See Lawrence *Justice for Future Generations: Climate Change and International Law* 17-18.

¹³ Any subsequent reference to future generations means future human generations.

¹⁴ Spijkers 2018 *MDPI* 4.

its descendants.¹⁵ As Brown-Weiss notes, the concept bestows intergenerational trusteeship upon present generations for the benefit of future generations. She argues that:

human species hold the natural and cultural environment of our planet in common with all members of our species: past generations, the present generation, and future generations. As members of the present generation, we hold the earth in trust for future generations. At the same time, we are beneficiaries entitled to use and benefit from it.¹⁶

Put differently, intergenerational equity could be viewed as a partnership of the human community with all other generations, past, present and future.¹⁷ This partnership is conceptualised in the notion of stewardship in many traditions and cultures, connecting the dead, the living and those yet to be born.¹⁸ The current generation is inextricably connected to other generations, and the current generation's legacy to the next generation occurs when the present becomes the past.¹⁹ However, there are challenges regarding the determination of the rights and interests of future generations, and more importantly, to determine how to enforce the rights and interests of future generations.²⁰

¹⁵ For a comprehensive discussion on the principle of public trusteeship and future generations, see Du Plessis 2015 *SAHRJ* 273-276.

¹⁶ Brown-Weiss- "Intergenerational Equity and Rights of Future Generations" 603.

¹⁷ Brown Weiss 1990 *AJIL* 199; Burke *Reflections on the Revolution in France* 139-400, describes the partnership as "the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living but between those who are living, those who are dead, and those who are to be born".

¹⁸ See Brown Weiss *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* 38; Collins 2007 *DLJ* 94-103; Behrens 2012 *JGE* 180. In African society, the dead are referred to as ancestors and the present generation is obligated to treat the environment with care as a sign of respect to both the ancestors and those to be born, hence the interconnectedness of all three generations. See also chapter 3.5, a discussion on African customary law. Essentially, the present generation holds a dual moral responsibility for the past and future generation. Muslim and Hindu societies also acknowledge the connection between generations, as it emanates from their belief in justice, reincarnation and *karma*.

¹⁹ Weston and Bach 2009 *VLS* 18. There seems to be potential in the notion of temporality to facilitate understanding of the complex and vague concept of future persons.

²⁰ Brown Weiss 1990 *AJIL* 200, argues that this is premised on the understanding that "no generation knows beforehand when it will be the living generation, how many members it will have, and even how many generations there may be."

Under international law, the importance of the protection of future generations can be traced back to the *Universal Declaration of Human Rights*, 1948 (hereafter UDHR),²¹ the *United Nations Conference on Human Environment*, 1972 (Stockholm Declaration),²² and other successive international and regional treaties.²³ The Stockholm Declaration, in particular, introduced the concept of future generations, and despite its being a soft law instrument, the concept has been included into subsequent international documents. Subsequently, in 1987 a United Nations (hereafter UN) commissioned report titled *Our Common Future: Report of the World Commission on Environment and Development*, 1987 (hereafter Brundtland Report)²⁴ specifically referred to the notion of future generations in the context of sustainable development. The Brundtland Report defines sustainable development as "development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs".²⁵

In addition, the *Rio Declaration on Environment and Development*, 1992 (hereafter Rio Declaration)²⁶ and the *United Nations Framework Convention on Climate Change*, 1992 (hereafter UNFCCC)²⁷ also include the concept of the protection of future generations, with explicit reference to intergenerational equity. Some other instruments such as the *Convention on the Rights of the Child*, 1989 (hereafter CRC) implicitly refer to the protection of the interests of future generations. In its preamble the CRC underscores that the child needs special protection, including

²¹ Preamble to the *Universal Declaration of Human Rights* (1948). The treaty recognises the rights of mankind and the preamble mentions the term "all" which can be interpreted to include future generations. The preamble reads: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". A detailed discussion follows in chapter 2.

²² The *United Nations Conference on Human Environment* A/CONF48/14/REV1 (1972). The Declaration aims at protecting the well-being of future generations together with fundamental goals of peace and global world-wide economic social development.

²³ See, for example the *Convention Concerning the Protection of the World Cultural and Natural Heritage* (1972); the *Convention on International Trade in Endangered Species* (1973); and *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (1973).

²⁴ *Our Common Future: Report of the World Commission on Environment and Development* (1987) (Brundtland Report).

²⁵ Brundtland Report para 27.

²⁶ Principle 3 Rio Declaration.

²⁷ The preamble, article 1 and 3 of UNFCCC.

suitable legal protection, before and after birth. Reference to protection before birth through legal means, may be construed to incorporate future generations. This interpretation offers the prospect foundation for buttressing the recognition of the interests of future generations, also through other non-environmental legal instruments.²⁸ Thus, it can be seen that the protection of the environmental interests of future generations is enshrined in some of the rules of international (environmental and human rights) law.

From a theoretical perspective, the protection of the interests of future generations can also be viewed, construed and understood through the public trust doctrine. In Sand's view, public trusteeship means that:

certain natural resources – e.g., watercourses, wildlife, or wilderness areas – regardless of their allocation to public or private users are defined as part of an 'inalienable public trust', certain authorities – e.g. federal agencies, state governments, or indigenous tribal institutions – are designated as 'public trustees' for protection of those resources; every citizen, as 'beneficiary' of the trust, may invoke its terms to hold the trustees accountable and to obtain judicial protection against encroachments or deterioration.²⁹

Essentially, the public trust doctrine is a concept which regards natural resources of the state as a trust, wherein the state holds the role of a trustee, and the public is considered as beneficiaries who have full inalienable user rights and enjoyment of the public trust. Thus, in the context of future generations, the public trust doctrine stipulates that the state keeps, maintains and safeguards the environment and its natural resources for the benefit of the present generation and for the unborn.³⁰ For Marx,³¹ the existing society (the present generation) is "not the owners of the earth, they are simply the possessors or beneficiaries who will have to bequeath the earth, in an undeteriorated state, to succeeding generations as *boni patres familias*". This entails the fiduciary duty that comes with public trusteeship.³² Also, such a fiduciary duty shows how the public trust doctrine is a tool that can be used to protect the

²⁸ See Brown Weiss 2002 *International Justice Review* 6.

²⁹ Sands 2004 *GEP* 47-48.

³⁰ See Du Plessis 2015 *SAJHR* 269-293.

³¹ Marx *Capital* 199.

³² Van der Schyff 2011 *WRC* 8.

environmental interest of future generations.³³ The public trust doctrine is part of the South African legal order,³⁴ particularly in that it has found expression in the constitutional³⁵ and legislative frameworks.³⁶

Furthermore, in the South African context, the *Constitution of the Republic of South Africa, 1996* (Constitution) entrenches the environmental right as a justiciable constitutional right. Section 24, in particular, provides for the protection of the environmental rights and interests of present and future generations through reasonable legislative and other measures.³⁷ It is a directive principle that places responsibility on the government to protect the environment in the interest of both present and future generations. Kidd³⁸ notes that the phrase "future generations" was not included in the 1993 interim Constitution,³⁹ but was later incorporated in the final Constitution, thereby signifying constitutional recognition and the need to protect the interests of future human generations.⁴⁰ The constitutional duty to ensure that the environment is sustainably protected and preserved in a manner that future generations will not inherit the environment in a more depleted state than it presently is, is placed upon all spheres of government.⁴¹

The concept of future generations is also entrenched in national environmental framework legislation, the *National Environmental Management Act 107 of 1998* (NEMA).⁴² NEMA acknowledges the need to protect the interests of future

³³ Van der Schyff 2011 *WRC* 8.

³⁴ Blumm and Guthrie 2012 *University of California Davis Law Review* 745. USA adopted this notion by way of legal and philosophical argument whilst countries like the Philippines, Kenya, Brazil and South Africa (just to mention a few) adopted it through statute law.

³⁵ Blackmore *The Rediscovery of the Trusteeship Doctrine in South African Environmental Law and its Significance in Conserving Biodiversity in South Africa* 61. See also section 24 of the Constitution.

³⁶ Section 2(o), 11(1) and 12 of NEMA; Also see chapter 3 for a detailed discussion.

³⁷ Section 24 of the Constitution. See Chapter 3.2.

³⁸ Kidd *Environmental Law* 22.

³⁹ 200 of 1993.

⁴⁰ Kidd *Environmental Law* 22.

⁴¹ See chapter 3.2 below, specifically the discussion on the South African constitutional framework.

⁴² NEM:BA and NEM:AQA serve as key examples of how NEMA influences the promulgation and implementation of specific environmental instruments in relation to future generations.

generations.⁴³ Further, NEMA places emphasis on "sustainable development" as the bedrock of South African environmental law.⁴⁴ NEMA defines sustainable development as:

the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations.⁴⁵

What this entails is that the principle of sustainable development embodied in NEMA advances, at least on paper, the protection of future generations.⁴⁶ Arguably, the drafters of NEMA were deliberate in incorporating sustainable development to ensure the protection of the interests of future generations.

Notably, the notion of future generations may also be interpreted through South African private law. *In casu*, the "*nasciturus pro iam nato habetur quoties de commodis eius agitur*" (hereafter *nasciturus* fiction),⁴⁷ a private law concept, establishes how the unborn may presumably hold rights in order to have their interests protected. Legally defined, the *nasciturus* fiction is a principle in which fetuses presumably acquire rights of born children, if they are born alive, whenever it is in their best interest to do so.⁴⁸ This implies that the unborn assume legal subjectivity together with the rights that come with it.⁴⁹ Subsequently, similarities can be drawn between the *nasciturus* fiction and the concept of the protection of future generations.⁵⁰ Environmental interests of future generations may be addressed despite the fact that future generations are not yet in existence and they arguably bestow no interests.⁵¹

⁴³ The preamble and section 1 of NEMA.

⁴⁴ Kidd *Environmental Law* 18.

⁴⁵ Section 1 of NEMA.

⁴⁶ Section 2 of NEMA principles, and section 24N of NEMA.

⁴⁷ A concept that originated in Roman law and was subsequently adopted in South Africa through Roman-Dutch Law.

⁴⁸ Robinson *Introduction to South African Law of Persons* 17.

⁴⁹ Schulman *The Nasciturus Non-fiction* 69.

⁵⁰ See chapter 3 for a detailed discussion.

⁵¹ See chapter 3 for a detailed discussion.

In the words of Venter,⁵² "society is a lawmaker by means of development of custom and usage, where 'custom and usage' include, amongst others, religious and customary laws".⁵³ For that reason, it is crucial to understand and explore the South African society's understanding of the concept of future generations. As such, the Constitution contains an equality clause,⁵⁴ which clause justifies the way South African communities interpret the concept of the protection of future generations through the religious and customary context. For that reason, the protection of future generations is also explored in the context of African customary law, Islamic law, Hindu law, Jewish law and Christianity.

As far as could be ascertained, there is limited scholarship on the protection of the environmental interests of future generations in South Africa. South African courts have not yet explicitly dealt with a matter in which the concept of future generations is the basis of the case (except merely mentioning it *obiter*).⁵⁵ Consequent to the lack of an elaborate interpretation of the concept in South Africa, it is useful in the present study to refer to legal developments in other jurisdictions,⁵⁶ and specifically to rely on foreign case law to see how foreign courts have interpreted the concept.⁵⁷ This approach is supported by section 39(1) of the Constitution.⁵⁸ Some of the developments in foreign jurisdictions include the incorporation of the concept in

⁵² Venter 2014 *TECLF* 40.

⁵³ See chapter 3 for a detailed discussion.

⁵⁴ Section 9 of the Constitution.

⁵⁵ *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC) para 42-118; *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance* 2015 1 SA 515 (SCA) para 41-84; *Earthlife Africa Johannesburg v Minister of Environmental Affairs* [2017] 2 All SA 519 para 81-82.

⁵⁶ There is an increase in foreign cases being handled by foreign courts brought on behalf of future generations. For instances, there is a plethora of cases from the United States of America, Netherlands, Philippines, Canada, Uganda and Korea amongst others, have recorded suits of such nature in the recent past. Whilst some cases are still on going and others were dismissed, lessons can still be borrowed, particularly on standing, procedure and arguments in favour of future generations.

⁵⁷ Wiener 2001 *ELQ* 1297. This is deemed to be empirical legal evolution where national law borrows from other national law, better known as horizontal or transitional borrowing.

⁵⁸ Section 39(1)(c)-(d) of the Constitution.

legislation and courts' proclamations on the need to protect the interests of future generations.

The study will consider cases from the Philippines,⁵⁹ the Netherlands⁶⁰ and the United States of America.⁶¹ These cases could offer insights on how foreign jurisdictions interpret and apply the concept of future generations, particularly related to issues of the *locus standi* of future generations, adherence and implementation of international and national environmental law, and government's responsibility to future generations under the public trust doctrine.⁶² While some cases are under appeal,⁶³ lessons can be drawn specifically on the strengths and weakness of the arguments submitted. The analysis will also present insights on how to interpret the concept in South Africa and propose the best approaches to protect the interests of future generations.

1.2 Research question

The research question of this study is: to what extent does South African law explicitly provide for the protection of the environmental interests of future generations and which comparative lessons could be learnt from foreign law?

⁵⁹ *Oposa et al v Fulgencio S Factoran* (G.R. No. 101083) 1993 (hereafter referred as the Oposa case). The Supreme Court of the Philippines had an opportunity to preside over a climate change suit brought by children against the Department of Environmental and Natural Resources (hereafter the department). The department had allegedly unreasonably granted licences to numerous corporations, enabling them to cut timber which resulted in severe deforestation. This therefore amounted to a violation of the rights of children to a healthy and safe environment and subsequently affected generations to come. The court ruled in favour of the children both the present and future generations as the court also granted a prohibitory interdict against the cutting of timber. A detailed discussion follows in chapter 4.

⁶⁰ *Urgenda Foundation v The Netherlands ECLI: NL:HR:2019:2007* (hereafter the Urgenda case). The Dutch Supreme Court passed a judgment directing the state to reduce greenhouse gas emissions by at least 25% by the end of 2020 after an association, acting in the interests of future generations, had brought claims against the state of Netherlands. For a detailed discussion, see chapter 4.

⁶¹ *Juliana v United States of America*. No.18-36082 D.C. (hereafter referred as the *Juliana* case). A group of 21 youth plaintiffs, representing themselves and the interests of future generations, brought a suit against the federal government for violating the constitutional right to a safe environment and violating the public trust doctrine. They claimed that this violation does not only affect present children, but it also extends to violate the interests of future generations. Although the Court of Appeals for the Ninth Circuit dismissed the case on redressability under Article III standing, any lessons can be drawn from this case. See chapter 4.

⁶² For a detailed discussion of these cases, see chapter 4.

⁶³ *Juliana case*.

1.3 Objectives

The central aim of the study is therefore to determine to what extent South African law provides measures that explicitly protect the environmental interests of future generations, by also taking learning points from foreign jurisdictions.

To answer the research question and achieve the main aim, additional objectives are formulated. This study further aims to:

- a. Define what future generations are and offer a critique of this notion;
- b. Explore the extent which South African law provides provisions that could protect the interests of future human generations by reviewing South African legislation, case law and scholarly work; and
- c. Discuss case law and academic opinion from foreign jurisdictions to determine how courts dealt with the interpretation of the concept of future generations.

1.4 Research Methodology

The study is conducted as desktop research, relying on primary and secondary legal sources. These sources include European law, international law, regional law, human rights law and domestic legislation such as the South African Constitution and NEMA. The study also refers to case law and academic articles in the context of environmental law. In exploring the role of courts, generally, as guardians of the interests of future generations,⁶⁴ the study will consider the interpretation of the concept of future generations as interpreted by international environmental law and foreign law as learning points for South Africa.⁶⁵ It has been established, as Miller argues, that over the years legal transplantation has assisted in developing legal

⁶⁴ *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products* 2004 (2) SA 393 (E). See *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management; Department of Agriculture; Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC). Whilst the cases major focus dwells on the principles of well-being and sustainable development, both cases cannot be divorced from the protection of environmental rights of the future human generations to come.

⁶⁵ See the discussion in chapter 4.

systems and has also facilitated development and legal reformation of states.⁶⁶ Thus, the discussion of foreign law aims to provide a persuasive framework for South Africa to learn from when pursuing cases relating to the protection of the interests of future human generations.⁶⁷

In line with section 39(1) of the South African Constitution which declares that "when interpreting the Bill of Rights, courts must consider international law and may consider foreign law",⁶⁸ the study explores developments from foreign jurisdiction for insights. The study focuses on South Africa, and uses foreign law as reference points and guidance on how the concept could be interpreted in South Africa. Foreign law potentially provides a useful yardstick and standards upon which to measure South Africa's approach to matters concerning the protection of the environmental interests of future generations.⁶⁹ In order to limit the scope of reference, primary focus will be given to foreign case law,⁷⁰ to ascertain if there are guidelines on how to interpret and/or fulfil section 24 of the Constitution in relation to the protection of interests of future human generations.

Chapter 2 of this study unpacks the concept of the protection of future human generations in the environmental context. It reflects on the history and background of the concept. Furthermore, it defines future human generations as a concept in IEL. Lastly, the chapter focuses on three issues, namely, the uncertainty of the concept, the legal standing of future generations, and if present generations have a duty of responsibility towards future generations.

⁶⁶ Miller 2003 *AJCL* 840. See also Hoecke 2015 *Law and Method* 1-29.

⁶⁷ Wiener 2001 *ELQ* 1297.

⁶⁸ Section 39(1)(c) -(d) of the Constitution; Frankenberg *Comparative Constitutional Studies – Between Magic and Deceit* 111- 155. Legal transfer, which may not be entirely comparative, serves to educate and assist in development.

⁶⁹ A mini-dissertation is limited in scope, and as such, the study will not be a full-blown comparative study of all the laws in the specific countries that may make provision for the protection of future generations. For that reason, focus will mostly be on case law of the selected countries.

⁷⁰ Where need be reference will be made to the Constitutions of the different countries as well as applicable legislation to which the courts may refer.

Chapter 3 will explore the South African Constitution and environmental laws related to the protection of future human generations. The exploration establishes the extent which the concept has been recognised in South Africa. Such a discussion will explore the current environmental legal framework to evaluate how the interests of future generations have been recognised and protected. Subsequently, the discussion on the environmental framework will also include the public trust doctrine and case law in order to comprehend the extent to which South Africa protects the interests of future generations in the environmental context. To further comprehend the concept of future generations in South Africa, the study will unpack how this concept may be regarded under South African private law. Essentially, the *nasciturus* fiction will be discussed as a potential template that can be borrowed to protect the interests of future generations. South Africa has a plural legal system,⁷¹ and against that background, the study will further explore how co-existing traditional and religious legal frameworks recognise the notion of future human generations. The chapter analyses African traditional law, Islamic law, Hindu law, Jewish law and the doctrines of Christianity⁷² on how they potentially contribute to the understanding of the concept of future generations in South Africa.

Chapter 4 discusses how the concept of future generations is framed and interpreted in foreign jurisdictions, particularly the Philippines, the Netherlands and the USA. These jurisdictions, specifically, have case law dealing with environmental interests of future generations, hence, justifying why they have been used in this study. The primary focus is on how courts interpret the concept of future generations, with appropriate reference to the national legislation providing for the protection of the interests of future generations. The use of case law is meant to bring insights into the interpretation of future generations, rather than a focus on legislative

⁷¹ Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* 7.

⁷² Although Christianity does not have specific legal rules as in the case of the other religious traditions (except the Roman Catholic Church) they influence how people think about the law and its application. See *Humby et al Introduction to Law and Legal Skills in South Africa* 21-44, 169-184. There are many Christian beliefs and those practiced in churches follow their own internal rules. See Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* 231-253.

frameworks which may be reiterating the provisions with similar wording as the one in section 24 of the Constitution.

Chapter 5 is the conclusion. The chapter will conclude by highlighting the findings of the study and it will also determine the extent to which South African law protects the interests of future generations.

2 CONCEPT OF THE FUTURE GENERATIONS IN THE ENVIRONMENTAL CONTEXT

2.1 Introduction

This chapter explores the theoretical underpinnings of the concept of future human generations by investigating the historical development and definition of the concept. The chapter also discusses scholarly critique in relation to its definitions, as well as legal challenges associated with the application of the concept.

2.2 Historical development of the concept of future generations

The concept of future generations is not a new phenomenon.¹ For instance, Atapattu argues that the concept has been in existence for some time, although it was not necessarily named as it is at present.² Primitive societies made judgements based on the foreseeable impacts that were to be encountered in the future such as seven generations ahead of the present time.³ This, in Atapattu's view, signifies that the conceptualisation of future generations long existed but was simply phrased "in seven generations to come".⁴ Notably, the reference to "seven generations" could be intrinsically linked to diversity of cultures and traditions,⁵ where for instance, the Confederation of the Six Nations of the Iroquois notes that decisions were made after consideration of the welfare and well-being of the seventh generation.⁶

Brown-Weiss argues that the concept of future human generations is traceable from the preamble of the Universal Declaration of Human Rights (UDHR), where "all" members of the human race are subject to equal and alienable rights.⁷ Both

¹ Atapattu "Intergenerational Equity and Children's Rights" 168-190; Collins 2007 *DLJ* 81-84; Collins 2007 *RECIEL* 322-323; Wood 1996 *Geo. Int'l Envtl L Rev* 293-332.

² Atapattu "Intergenerational Equity and Children's Rights" 168-191.

³ See, Atapattu "Intergenerational Equity and Children's Rights" 168-191.

⁴ Atapattu "Intergenerational Equity and Children's Rights" 168-191.

⁵ *Report of the Secretary-General on Intergenerational Solidarity and the Needs of Future Generations* A/68/x.

⁶ *Bemidji Statement on Seventh Generation Guardianship*, issued in 2006 by representatives of American indigenous peoples.

⁷ *Universal Declaration of Human Rights* (1945). Article 6 entail that "everyone" has a right to recognition as a person before the law. See Brown Weiss 1990 *AJIL* 200. Brown Weiss

Huneus and Brown-Weiss, in their separate arguments, generously adopt a broader interpretation of the UDHR, claiming that the phrase "all members of the human family" may be construed to inclusively mean all human generations from the past, present and future.⁸ They infer this from the fact that human generations are not defined in the UDHR, and that the wording does not exclude non-existent generations. However, the argument by Brown-Weiss that the phrase "equal and inalienable rights" guarantees that all the three generations (past, present and future) should be recognised in uniformity and hold commensurate absolute rights,⁹ may be deemed as plausibly contentious. In Brown-Weiss's defence, although the UDHR creates controversy by its undeniable failure to define who a human being is, it does not invalidate "future generations" from the class of human beings either. Instead, it places responsibility upon each human generation - the past, current or future generation thus upholding and protecting the interests of future generations.¹⁰ It is justifiably impracticable, and even challenging, to enforce the "rights" of and/or for the past or future generations.

Under IEL, the concept of future generations can be traced to the Stockholm Declaration which recognises the link between environmental and ecosystem degradation from pollution, climate change, over-exploitation of natural resources, disposal of chemicals and human rights. For instance, it calls on governments:

To defend and improve the human environment for present and *future generations* has become an imperative goal for mankind - a goal to be pursued together with, and in harmony with, the established and fundamental goals of peace and of worldwide economic and social development.¹¹

maintains that the terms "all" and "everyone" when broadly interpreted, mean that all humans including those still to come are subject to equality and justice before the law.

⁸ Brown Weiss 1990 *AJIL* 200-201; Huneus 2018 *SA* 1. Brown Weiss maintains that the term "all" brings an intertemporal dimension to humanity thus the past, present and future. Tremmel *Theory of Intergenerational Justice* 22 indicates that "intertemporal generational justice is defined as justice between people who lived in the past, people alive today, and people who will live in the future".

⁹ Brown Weiss 1990 *AJIL* 200-201. Inalienable meaning that this right is not capable of being taken away.

¹⁰ Brown Weiss 1990 *AJIL* 200-201; Huneus 2018 *Scientific American* 1.

¹¹ See the preamble, para 6 of the Stockholm Declaration. (Emphasis added).

Further, in terms of Principles 1 and 2, the Stockholm Declaration explicitly refers to the protection of the interests of future generations, proclaiming 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, and he bears a solemn responsibility to protect and improve the environment for present and *future generations*...

The natural resources of the earth, including the air, water, land, flora and fauna and ... natural ecosystems, must be safeguarded for the benefit of present and *future generations* through careful planning or management, as appropriate.¹²

The Stockholm Declaration illuminates the relationship between development and the protection of the environment.¹³ However, the downside of the Stockholm Declaration is the lack of comprehensive framework for the weighing of the interests of present and future generations.¹⁴ Despite this criticism, the principles set in this non-binding instrument are, however, of persuasive value to inform decision makers on the protection of the interests of future generations.

Following the Stockholm Declaration, the World Commission on Environment and Development compiled the Brundtland Report titled "Our Common Future"¹⁵ under the mandate of the United Nations General Assembly. The report notes that threats to the environment have the potential to undermine sustainable development, particularly for "future generations".¹⁶ The report defines sustainable development as "development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs".¹⁷ Principle 2 of the Proposed Legal Principles for Environmental Protection and Sustainable Development, which were annexed to the Brundtland report, notes that the use and conservation of the environment and natural resources should be for the benefit of present generations and by taking into account the interests of future generations.¹⁸

¹² See Principles 1 and 2 of the Stockholm Declaration. (Emphasis added).

¹³ Feris 2008 *CCR* 240.

¹⁴ Collins 2007 *Dalhousie Law Journal* 99.

¹⁵ Brundtland Report.

¹⁶ See the Brundtland Report.

¹⁷ See the Brundtland Report.

¹⁸ *WCED Summary of Proposed Legal Principles for Environmental Protection and Sustainable Development* 339–342.

The Brundtland Report and the annexed Principles have no legal force, but they provide a framework for how to view and interpret the concept of future generations.

The concept of sustainable development is also entrenched in the Rio Declaration which sets out the principles of sustainable development and recognises the need to protect the interests of future generations. For instance, Principle 3 of the Rio Declaration notes that "development must equitably fulfil and meet the environmental needs of present and future generations".¹⁹ Accordingly, it illustrates that the concept of sustainable development is universally accepted as a guiding principle to, among others, regulate the environmental relationship between the present generation and the interests of future generations.²⁰ For Brown-Weiss, the concept of future generations is interconnected with the notion of sustainable development that seeks to preserve the environment for the benefit of generations yet to be born.²¹

Furthermore, the concept of future generations occurs in various IEL and climate change instruments. For instance, article 3 of the UNFCCC notes that "states should protect the climate system for the benefit of present and future generations of humankind".²² The recently adopted 2030 Agenda for Sustainable Development, 2015²³ which sets out 17 Sustainable Development Goals (SDGs) to shape global development until 2030, notes that:

We will implement the Agenda for the full benefit of all, for today's generation and for future generations. In doing so, we reaffirm our commitment to

¹⁹ See also principle 21 that states that; "The creativity, ideals and courage of the youth of the world should be mobilized to forge a global partnership in order to achieve sustainable development and ensure a better future for all" (emphasis provided).

²⁰ Feris 2008 *CCR* 240. The Rio Declaration generated principles and a framework on sustainable development. Collins 2007 *RECIEL* 322. See also the criticism of the concept of sustainable in that it "is descriptive than it is normative. Subsequently, the principle of sustainable development describes a destination whilst lacking the map as to how to get to the destination. The model of sustainable development is not specific, particularly in regards to the question of implementation".

²¹ Brown Weiss 1990 *AJIL* 200.

²² Article 3 of the UNFCCC. See also the preamble of the UNFCCC.

²³ *Transforming our World: the 2030 Agenda for Sustainable Development* A/RES/70/1 (2015).

international law and emphasize that the Agenda is to be implemented in a manner that is consistent with the rights and obligations of States under international law.²⁴

The future of humanity and of our planet lies in our hands. It lies also in the hands of today's younger generation who will pass the torch to future generations. We have mapped the road to sustainable development; it will be for all of us to ensure that the journey is successful and its gains irreversible.²⁵

While the Stockholm Declaration, Rio Declaration and SDGs do not have legally binding force, it is vital to note that they illustrate that the concept of future human generations has developed into a prominent aspect in IEL.

2.3 Defining future human generations

There are contentious debates, without a definitive conclusion, as to what the concept of future generations means in law.²⁶ From the onset, it is imperative to note that the notion of future generations is versatile, potentially in reference to various different future groups of people.²⁷ Linguistically, any reference to future generations means all future people.²⁸ In order to fully comprehend the future generations as legal subjects, scholars have sought to explore the discourse to ascertain whether future generations are future groups or individuals who live in the future.

One argument is that future generations can be seen as "future members of a certain future group", as opposed to individuals.²⁹ The categories of future groups refer to age groups (young middle aged or elderly who are alive at the same time) and cohorts (millennials, and centennials).³⁰ This argument emanates from the postulations by Brown-Weiss that "planetary rights of future generations are group

²⁴ Paragraph 18 of the 2030 Agenda.

²⁵ Paragraph 53 of the 2030 Agenda.

²⁶ Abate "Protection of Future Generations: Prior to and during the Anthropocene Era" 44; Herstein 2009 *Geo Wash Law Rev* 1173-1174.

²⁷ See argument on types of people below; Herstein 2009 *Geo Wash Law Rev* 1183. See also Abate "Protection of Future Generations: Prior to and during the Anthropocene Era" 44.

²⁸ Herstein 2009 *Geo Wash Law Rev* 1174.

²⁹ Abate "Protection of Future Generations: Prior to and during the Anthropocene Era" 43-44; Herstein 2009 *Geo Wash Law Rev* 1173.

³⁰ Tremmel *A Theory of Intergenerational Justice* 19-22; See also Lawrence *Justice for Future Generations* 15.

rights, not individual rights - asserted by a representative for the group as a whole".³¹

The benefit of seeing future generations as groups is that it accords them group rights, and the rights, interests, and duties of a group may then be viewed collectively to protect communal interests.³² The challenge that arises with this viewpoint is that it gives less attention to individual rights, interests and duties of distinct individual members within that group such as the interests of the poor over the rich. Taking South African history into account, such a process may lead to the discrimination and exclusion of some groups or to the benefit of others, for instance on the basis of race or any other ground.³³

Also, it relates to a second argument where future generations may be viewed as future individual persons. According to this argument future generations in the context of intergenerational justice do not refer to "a group, but to all the individual people alive during a certain period or born during a certain time frame".³⁴ It is argued that the use of future generations as "a group", as set out above, detracts focus from the individual future people.³⁵ Notably, this approach also receives criticism as some scholars disregard the individualistic approach to future generations. Scholars such as Roberts argue that:³⁶

...there are no future individuals. An individual is a particular person with a certain personal identity making him or her into the particular person he or she is. Future people are not individuals as they have no personal identity; "they" do not yet exist and who "they" will turn out to be is in most cases indeterminate. At best there are potential future individuals, only a very small number of whom will actually end up coming into existence.

³¹ Brown Weiss *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* 96. See also Collins 2007 *DJL* 105.

³² Herstein 2009 *Geo Wash Law Rev* 1179.

³³ For instance, the exclusion of other groups during apartheid. Thus, this perspective may be problematic as it does not take the reality of communities into the account.

³⁴ Herstein 2009 *Geo Wash Law Rev* 1180.

³⁵ Herstein 2009 *Geo Wash Law Rev* 1180.

³⁶ Roberts *Child versus Childmaker: Future Persons and Present duties in Ethics and the Law* 89-90. See also Herstein 2009 *Geo Wash Law Rev* 1181.

Weston and Bach define future human generations using the trajectory of "the two-hundred-year present".³⁷ In this case the two-hundred-year time horizon is described as:

a continuously moving moment, always reaching out one hundred years in either direction from the day we are in. We are linked with both boundaries of this moment by the people among us whose lives began or will end at one of those boundaries, three and a half generations each way in time. It is our space, one we can move around in directly in our lives, and indirectly by touching the lives of the linkage people, young and old, around us.³⁸

The use of a prescribed time trajectory, as indicated above, is an attempt to illustrate the interconnectedness of generations with the earth as their common denominator. For instance, it aims to draw attention to the partnership involving all generations – the dead, the living and those yet to come.³⁹ This is closely linked to the idea of inter-temporality and the overlapping of generations.⁴⁰ To illustrate this point, a child born in 2020 shares the planet with subjects that existed in 1948.⁴¹ In other words, a subject of legal rights and obligations that exist today can share the planet with persons that will exist in the next decade or century.

Brown-Weiss proposes a four-pronged criteria in terms of which any theory of intergenerational equity for the protection of future generations must be viewed

³⁷ Weston and Bach 2009 *VLS* 18. The "two-hundred-year present" shows the interconnectedness of generations and how generations cascade through each other. It can even be that generations chronologically exist after each other but that they are intertwined.

³⁸ Boulding 1978 *WFSB* 7. Lawrence *Justice for Future Generations* 15, in a bid to define future generations, borrows an argument by Tremmel that defines future generations through the idea of chronological intertemporal - thus justice between people who lived in the past, present people and people to come in future. In some African communities, the community exists of those who passed away, the present generation (the living) and the future generation (the unborn); Marumo *Christianity and African Traditional Religion in Dialogue: An Ecological Future for Africa* 81. For example, in Tsonga and Shona communities, traditional leaders have a responsibility to please the ancestors (past generation) through good environmental stewardship, in the interests of past, present and future generations. Also, in Hindu communities' reincarnation may relate to a person in various stages of his or her life, either past, present or future. For a detailed discussion, see 3.1.3 - 3.1.5.

³⁹ Brown Weiss 1990 *AJIL* 199-200.

⁴⁰ Throsby 2002 *GCI* 101-117 maintains that overlapping of generations is "an intergenerational equity dilemma thus, a classic inter-temporal allocation problem – between present and future consumption".

⁴¹ Robinson 2017 *OECD* 1.

and understood. It is contended that intergenerational equity has four qualities. First, it must be equitable among generations, without giving the present generations the authority or power to exploit the natural resources at the expense or to the exclusion of generations to come.⁴² Also, being equitable among generations implies not imposing unreasonable burden on the current generation, so as to meet the needs of an indeterminate future generation.⁴³ Second, it must be value-neutral, which means that future generations must be afforded the flexibility to achieve their goals according to their own values, needs and demands.⁴⁴ Third, the concept must be reasonably clear in application to foreseeable situations, and there has to be a degree of certainty to guide generations that follow. Finally, it has to be generally shared by different cultural traditions and generally acceptable to different economic and political systems.⁴⁵

In the context of this study, future generations are understood as the generation yet to be born, in other words, the generation where none of its members are alive at the time the reference is made. ⁴⁶ It is also the case that future generations overlap into each other and can never be a distinct group where one group chronologically follows on the next group.⁴⁷

2.4 Criticism against the concept of future human generations

The value of protecting the environment for the benefit of future generations stands on unstable ground. This is because the concept has been criticised as being

⁴² See, Brown Weiss "In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity" 38.

⁴³ Brown Weiss "In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity" 89.

⁴⁴ Brown Weiss "In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity" 89.

⁴⁵ Brown Weiss "In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity" 89. See also Collins 2007 *DJL* 101.

⁴⁶ Tremmel *Theory of Intergenerational Justice* 24 gives a similar illustration to this. Applied to my own circumstances: As I write this part of the study, the date is 30 October 2020, time 04:30 am. Thus, future generation as I write, refers to baby 'Y', born immediately after the completion of this sentence and any other beings born in succeeding time after reference. Therefore, when children (through representation) file suits, they do so for themselves and for future generations. See also Lawrence *Justice for Future Generations* 15.

⁴⁷ Lawrence *Justice for Future Generations* 15.

shrouded in uncertainties, the lack of legal standing of future generations and questions about who has the responsibility to protect the interests of future generations. The criticism relating to uncertainty, legal recognition and responsibility are discussed below.

2.4.1 *Uncertainty*

The Cambridge Dictionary defines uncertainty as a situation wherein something is not known.⁴⁸ In other words, it may mean circumstances where one is not sure of the details, particularly of an event in the future. Certainty refers to the certitude or firm conviction that something is the case or where the details are known.⁴⁹ Therefore, a lack of such certitude or conviction yields uncertainty. In light of this definition, it is argued that future generation interests are uncertain, thereby the protection of the interests of future generations are either impractical or inappropriate.⁵⁰ This is so because it is impossible for the present generation to determine, with absolute certainty, what the future generation requires.⁵¹ There are uncertainties regarding the number of generations that are or will be in the future, and the nature of interests that will require protection.⁵² Further, there is uncertainty as to what future generations would need for their interests to be protected. Also,

⁴⁸ Cambridge 2020 <https://dictionary.cambridge.org/dictionary/english/uncertainty>.

⁴⁹ Cambridge 2020 <https://www.lexico.com/definition/certainty>.

⁵⁰ Collins 2010 *DLJ* 105; Hiskes *The Human Right to a Green Future* 2.

⁵¹ Collins 2010 *DLJ* 105; Wedderburn 2014 *AUJIEL* 63.

⁵² Davidson 2008 *WHP* 471; Lukas 2020 <https://plato.stanford.edu/entries/justice-intergenerational/>. Some of the uncertainties relates to the extent of harm, the costs associated and the population involved; Roser 2020 *OWID* 1. The UN projects an increase in global population to 11.2 billion towards the end of this century. However, the projections are based on statistics taken at that precise moment giving leeway that in the event that health care improves, population growth is likely to increase whereas if health care depletes, then the population growth decreases. This touches base on things like natural disasters and the existence of unexpected infectious diseases leading to critical dependence on health care systems. See also Lindahl and Grace 2015 *IEE* 1. Other notable examples that are population altering include viruses such as HIV, SARS, COVID-19 and Ebola. Subsequently, population matters are not clearly ascertainable, hence, creating uncertainty for future generations.

another contention is the extent of the protection they need.⁵³ That said, the present generation can do little for the protection of the unknown.⁵⁴

There are also uncertainties about what resources will be needed, the extent to which the resources will be available, and the effort which future generations will require to attain these resources.⁵⁵ It is difficult to ascertain if the resources will be sufficient for future generations since their numbers and needs are indeterminable - the number of generations to come remains a mystery and the precise population of each generation is indefinite.

Saugstad⁵⁶ argues that it is difficult to preserve the environment in the interest of future generations when their existence is shrouded in uncertainty. To illustrate the point, Saugstad gives an analogy of cake sharing. He believes that "one cannot determine a fair share of the cake unless the number [of beneficiaries] to be shared upon is known".⁵⁷ This is to say that, the present generation is not able to comprehend the exact share of natural resources that must be consumed at present, and/or ascertain the share that has to be preserved (for future generations) without

⁵³ Wedderburn 2014 *AUJIEL* 63.

⁵⁴ Criticism on the protection and interests of future generations maintains that the existing generation can do little or nothing to protect the interests of future generations due to the uncertainty surrounding the needs and interests of future generations. Passmore *Man's Responsibility for Nature* 78, alludes that any mitigation that the human species does over millions of years will have extremely minimal effects on the interests of future generations. Even current reduction of human consumption on resources will not warrant the availability of similar quantities to the distant descendants. Therefore, the notion that future generations must inherit the earth in a condition similar to which the current generation inherited appears to be unachievable.

⁵⁵ Lindahl and Grace 2015 *IEE* 1. At present, the earth inhabits more than seven billion humans which increasingly require/demand basic resources to survive. However, there is a continuous population threat on humanity leading to food and water scarcity, natural disasters, displacement of populations and increase on infectious diseases. Once the population increases, future generations will likely be at risk of insufficient resources. On the other hand, natural disasters and infectious diseases are rapidly wiping away the human generation and animals as well as slowing down economies. This means that if the present era is a mystery in itself, then the future also becomes a mystery to which mystery cannot guarantee the interests or protection of future human generations.

⁵⁶ Saugstad date unknown Moral Responsibility towards Future Generations of People <http://folk.uio.no/jenssa/Future%20Generations.htm>.

⁵⁷ Saugstad date unknown Moral Responsibility towards Future Generations of People <http://folk.uio.no/jenssa/Future%20Generations.htm>.

determining the number of future people.⁵⁸ In the view of Wedderburn,⁵⁹ "it is necessary to decide how much of current interests should be sacrificed for the benefit of the future". Although the concept of future generations is founded on the equity model, which Brown-Weiss also advocates for,⁶⁰ this argument does not specify the ratios that each generation could use. Also, the argument is not informative on how the duty to future generations will be applied in practice in order to achieve proper decision making.⁶¹

However, some may argue that there is a degree of certainty that can be attached to the immediate generation. For instance, under the law of persons the principle of the *nasciturus* fiction provides that legal action can be taken in the interest of the unborn.⁶² In this case, the unborn is deemed as though it was born in order for it to retain the interests in question.⁶³ Although the concept is borrowed from private law (the law of persons), this rule is an example illustrating that future interests may be protected despite the physical non-existence of the subject in question. Under the principle, a foetus falls within the class of the "future generation". Nolt⁶⁴ presents a real-life allegory stating that once a lady is pregnant, she procures baby clothing in preparation for, and in the interest of a non-existent baby.⁶⁵ Others create trust funds for children that may only come into existence a decade later.⁶⁶ This reveals

⁵⁸ Saugstad date unknown Moral Responsibility towards Future Generations of People <http://folk.uio.no/jenssa/Future%20Generations.htm>. See detailed discussion in chapter 3.

⁵⁹ Wedderburn 2014 *AUJIEL* 65.

⁶⁰ Brown-Weiss 1989 *UNU*.

⁶¹ Wedderburn 2014 *AUJIEL* 65.

⁶² *S v Mshumpa* 2008 1 SACR 126; *Pinchin No v Santam Insurance Co Ltd* 1963 2 SA 254; *M obo M v Road Accident Fund* 2005 3 All SA 340 (SCA). For a detailed discussion, refer to chapter 3.4.

⁶³ Robinson *Introduction to South African Law of Persons* 17.

⁶⁴ Nolt date unknown web.mnsu.edu>~jvessel>futurepeople-obligations.

⁶⁵ Nolt date unknown web.mnsu.edu>~jvessel>futurepeople-obligations.

⁶⁶ See the *Trust Property Control Act* 57 of 1988. Trust means "the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed - (a) to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or (b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person

that at some point, safeguarding and the need to protect the interests of future generations is essential, despite the certainty of the future generations' actual existence.

2.4.2 Legal standing

The second criticism relates to the question of whether future generations have legal standing. In law, legal standing (*locus standi*) entails the competency, eligibility and status of a person, whether natural or juristic, to sue or to be sued.⁶⁷ Legal standing arises when the person has a direct or substantial interest in the matter and/or has the necessary capacity to litigate, claim and enforce their rights and interests.⁶⁸ Direct or substantial interest in a matter refers to one being significantly affected by the subject matter, meaning that the interests must be actual to the subject in question.⁶⁹ As a rule of procedure, courts require that the person must show "legal interest" in the matter and not merely a hypothetical interest.⁷⁰ If the occurrence or outcome of the matter significantly affects the person's rights and interests, then that person has *locus standi*.⁷¹

A fundamental question remains: do future generations have legal standing? In response to this question, it is important to note that future generations, as defined above, are not presently in existence which makes it difficult to confer on them legal rights and interests. As such, this may disqualify future generations from

or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument".

⁶⁷ Peté *et al Civil Procedure a Practical Guide* 35-54.

⁶⁸ Peté *et al Civil Procedure a Practical Guide* 35-54.

⁶⁹ See, in the context of South Africa, *Polokwane Taxi Association v Limpopo Permissions Board* (490/2016) ZASCA 44 paras 7-18; *Ex-TRTC United Workers Front v Premier, Eastern Cape Province* 2010 2 SA 114 (ECB) para 25; *Ahmadiyya Anjuman Ishaati-Islam Lahore (SA) v Muslim Judicial Council (Cape)* 1983 SA 4 855 (C) at 863H-864A; *P E Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd* 1980 4 SA 801 (T) at 804B; *United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd* 1972 4 SA 409 (C).

⁷⁰ See *Trustco Insurance t/a Legal Shield Namibia v Deed Registries Regulation Board* 2011 2 NR 726 (SC) at para 16; *Alexander v Mbumba* (A 179/2007) [2012] NAHC 303 (6 August 2012).

⁷¹ Namibia Law Reform and Development Commission "LRDC 27 Locus Standi Discussion Paper" March 2014; also see *Tergniet and Toekoms Action Group v Outeniqua Kreosootpale (Pty) Ltd* Case 10083/2008 (C) 23 January 2009 (unreported).

participating in legal proceedings on the premise of not being able to be physically present⁷² and prove substantial interest. However, some argue that future generations have standing in limited and exceptional circumstances, for example, through representation by a guardian *ad litem*.⁷³ In this light, Ekei⁷⁴ refers to the guardianship model and maintains that this model is the best way of establishing *locus standi* for future generations. He further states that "existing agents (for instance private individuals, groups or organisations, such as environmental NGOs) are ascribed a procedural right or the power to initiate legal proceedings on behalf of posterity", therefore, establishing legal standing.⁷⁵

One way to safeguard the interests of future generations is through the present generation utilising public interest litigation (hereafter PIL).⁷⁶ PIL can be used as a vehicle of transformation permitting judicial hearings on environmental, social and economic matters.⁷⁷ Usually, PIL challenges, for example, injustices on issues concerning disadvantaged or vulnerable groups, thus promoting social, environmental and economic justice.⁷⁸ As such, future generations, which may also be classified as a vulnerable group, can be legally represented through PIL where the court does not require the aggrieved party to be present, but simply require a representative to allege a substantial interests and declare their interests in relation to the protection of future generations.⁷⁹ The *Oposa*⁸⁰ case, for example, buttresses

⁷² It is necessarily a legal requirement for one to be physically present to make a claim, in any judicial forum. There are always exceptions.

⁷³ Atapattu "Intergenerational Equity and Children's Rights" 168-191.

⁷⁴ Ekei 2006 *Res Publica* 388.

⁷⁵ Ekei 2006 *Res Publica* 388.

⁷⁶ Collins *Public Interest Litigation and Climate Change: An example from Kenya* 818. Although *locus standi* was an essential requirement for all matters before the judiciary, the law expanded its frontiers of justice by recognising litigation through individuals and groups with no need to demonstrate personal interest or injury in the matter.

⁷⁷ Swarte 2009 *IIED2*; Collins *Public Interest Litigation and Climate Change: An example from Kenya* 818. Kenya saw the need to utilise PIL particularly in matters concerning the environment. PIL became a tool that delivers the populace from the obstacles that came through the notion of *locus standi*.

⁷⁸ Swarte 2009 *IIED2*.

⁷⁹ Swarte 2009 *IIED2*.

⁸⁰ *Oposa et al v Fulgencio S Factoran*, 1993. For a detailed discussion, see chapter 4.2.1.

the point on the legal standing of future generations, because the court recognised future generations as legal persons.⁸¹

In short, it is possible to argue that future generations do not have legal standing in any court because they cannot represent themselves and cannot have justiciable claim on their own. However, the interests of future generations can be protected through PIL and the use of a guardian *ad litem*, such as a commissioner for future generations, for example.⁸² This means that although future generations cannot retain legal standing of their own, their interests can still be recognised and protected.

2.4.3 Responsibility

There is a debate on who has the responsibility to protect the interests of future generations.⁸³ To begin with, the meaning of "responsibility" in the legal context is correlated to a "duty" because it comprises an obligation to act in a certain positive way.⁸⁴ Thus, the question of who should act, under what obligation, is a contentious one. According to Feinberg,⁸⁵ in contrast to a duty, a responsibility gives considerable discretion to the person upon whom the duty is placed (sometimes referred to as authority).⁸⁶ Essentially, a responsibility is accompanied by a target, which target must be achieved by the responsible party.⁸⁷ Morally, the meaning of responsibility encourages a conservationist approach to the environment.⁸⁸ Agora describes this approach in the words of D'Amato to say, "there is a proverbial sense

⁸¹ Allen *The Philippine Children's Case: Recognizing Legal Standing for Future Generations* 717.

⁸² This is the case in some jurisdictions, like the Wales. Anon date unknown <https://www.futuregenerations.wales/about-us/future-generations-commissioner/>.

⁸³ Brown-Weiss 1992 *AJIL* 20 argues that the responsibility of protecting the planet is in the hands of the present generation for the benefit of the generations to come. According to her the present generation has the responsibility of preserving and conserving the environment for the interest of future generations.

⁸⁴ Collins 2010 *DLJ* 77.

⁸⁵ Feinberg 1980 *PUP* 137.

⁸⁶ Feinberg 1980 *PUP* 137.

⁸⁷ Collins 2010 *DLJ* 77.

⁸⁸ Agora 1990 *AJIL* 207.

of morality that tells people not to waste resources".⁸⁹ The basis of this moral duty is drawn from the equal concern and respect deserved by every human, despite the generation they are born into.⁹⁰ In Lawrence's view, the present generation has moral obligations towards future generations premised on the fact that " 'respect for human dignity' requires respect for core human rights of life, health and subsistence".⁹¹ This implies that the current generation has moral responsibilities towards succeeding generations.

In the view of Brown-Weiss and Gündling,⁹² the responsibility or moral obligation is placed upon the present generation. The responsibility lies on the present generation because it also depends on the state of the planet in order to survive.⁹³ This responsibility to act does not solely protect the interests of posterity,⁹⁴ but also caters for the needs of the present generation. The same sentiments have been shared by world leaders in the 2030 Agenda, that the present generation has a responsibility to pass the torch to future generations.⁹⁵ The responsibility is a duty to preserve the environment in a sustainable manner for the benefit of future generations. In other words, it is a duty to manage energy use, water resources, biodiversity, and guard against over exploitation of natural resources that will endanger sustainable livelihoods for future generations. As such, the concept of future generations limits the liberty of the present generation from over exploitation of the environment for the benefit of the future generations.

2.5.1 Summary

The chapter unpacked the concept of future generations from a legal perspective. In doing so, it traced the history and background of the concept, the definition and the challenges in the application or implementation of the concept. The concept of

⁸⁹ Agora 1990 *AJIL* 207.

⁹⁰ *Report of the Secretary-General on Intergenerational Solidarity and the Needs of Future Generations* A/68/x.

⁹¹ Lawrence *Justice for Future Generations* 61.

⁹² Brown-Weiss 1992 *AUJLR* 20; Gündling 1990 *AJIL* 209.

⁹³ Gündling 1990 *AJIL* 209.

⁹⁴ Gündling 1990 *AJIL* 209.

⁹⁵ See para 53 of the Agenda 2030.

future generations is traceable to the Stockholm Declaration, the Brundtland Report, the Rio Declaration and the 2030 Agenda for Sustainable Development Goals (SDGs), amongst others, as it relates to sustainable development and its links to IEL. The protection of the environment and the climate system for the benefit of future generations is now part of IEL.

It has been argued that the definition of future generations relates to future individuals or groups of persons who will live at a future time. This argument is balanced with the understanding that it may lead to the discrimination and exclusion of some groups or to the benefit of others, for instance, on the basis of race or any other ground. The benefit of envisaging future generations as a group is the collective and inclusive approach that is responsive to the individual needs of future persons. In the context of this study, future generations are those persons born after the time of reference. They do not exist distinctly in a chronological sense, and generations overlap into each other where a seventy-year old may live to see the birth of a newly born at that precise moment.

Despite the criticism on the understanding and use of the concept of future generations within the legal discourse, it has been established that future generations could have access to the courts through PIL or a commissioner for future generations that looks after the interests of these generations. Further, it is clear that IEL places obligations and legal responsibilities on the present generation, to warrant that the environment is protected for the benefit of present and future generations. This could also be true for South Africa. The next chapter examines the South African legal framework to explore how the law protects the rights and interests of future generations.

3 THE PROTECTION OF THE ENVIRONMENTAL INTERESTS OF FUTURE GENERATIONS IN SOUTH AFRICA

3.1 Introduction

In this chapter, it is argued that the South African constitutional and legislative framework, explicitly and implicitly, provides for the protection of the environmental interests of future generations. To begin with, the chapter outlines the constitutional framework upon which environmental law and policy rests, and it explores how the interests of future generations are protected. Secondly, the chapter explores whether, and if so, how, the legislative framework protects the interests of future generations. However, in the interest of scope, attention will be given to environmental framework legislation, particularly the NEMA. The NEMA is discussed as a key example to illustrate how the principle of sustainable development (as provided in legislation) is a vehicle used to safeguard the interests of succeeding generations, for example, with regards to biodiversity and air quality.¹ Thirdly, the chapter gives a brief analysis of how the concept of future generations is interpreted in other branches of the law such as the law of delict.² Finally, since many in the South African population subscribe to religious and African traditional customs, the final part investigates the perspectives of these communities on the concept of future generations.

3.2 The constitutional protection of future generations

The Constitution entrenches the environmental right imposing the protection of the environment for the benefit of present and future generations. In particular, section 24 of the Constitution reads:

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

¹ Aspects of biodiversity and air quality are not discussed in-depth, see chapter 1.

² See chapter 1.

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

A clear reading of the provision indicates two important aspects. Firstly, the protection of the environment is for the present generation. Secondly, a similar duty is placed for the protection of the environment for the benefit of future generations. It is this second aspect which this study explores. On the basis of the constitutional entrenchment of the protection of the environment for the benefit of future generations, it could be argued that there is explicit constitutional protection of the interests of future generations.³ Thus, the state, and all spheres of government, have a constitutional duty to ensure the protection of the interests of future generations.⁴ The state is given the responsibility to act as a guarantor representing the present generation to fulfil its environmental obligations to future generations.⁵

A brief analysis of section 24 of the Constitution indicates that the environmental right is a comprehensive composite right.⁶ Section 24(a) encompasses two aspects: the right to an environment not harmful to health, and the right to an environment not harmful to well-being.⁷ In other words, it protects the health and well-being of the living from harm.⁸ Du Plessis⁹ argues that this part of the environmental right focuses on health and well-being of human beings only, and that it protects the fundamental right for everyone to the exclusion of inanimate objects.¹⁰

³ Feris and Tladi *Environmental Rights* 258.

⁴ Section 24(b) of the Constitution.

⁵ Van der Schyff 2011 *WRC* 9; Fuggle and Rabie *Environmental Management in South Africa* 394-424. Sections 2(4)(o), 5(d), 28(4)(e) of NEMA and its preamble; see the public trust doctrine discussed below.

⁶ Feris 2008 *SAJHR* 30.

⁷ Kidd *Environmental Law* 22; Kidd "Environment" 518.

⁸ Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* 419; See also Feris 2008 *SAJHR* 36.

⁹ Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* 240.

¹⁰ See also Feris and Tladi *Environmental Rights* 258 state that when interpreting this section, questions of whether this right is an individual or group right may arise. They maintain that this section is framed as an individual right. Brown-Weiss confers that environmental rights of future generations are group rights "intergenerational planetary rights"; however, Gutto *Environmental Law and Rights* 32, suggests that whichever way section 24 is framed, the Constitution caters for all, thus group and individual rights. Hence the interests of future

Section 24(b) protects the environment for the benefit of present and future generations through the adoption of reasonable legislative and other measures.¹¹ Future generations are vulnerable to environmental harm, and section 24(b) places a duty on the state to adopt measures and actions for the protection of future fundamental entitlements.¹² It imposes a constitutional duty on the state to secure the environmental protection for the benefit of everyone, born and unborn – a duty placed upon all spheres of government.¹³ The provision (implicitly), requires inter-generational protection of the environment by the state, for the benefit of succeeding generations and equitable access to its resources and benefits.¹⁴ To this end, section 24 can be construed through the lens of the public trust doctrine.

In terms of the public trust doctrine, the state holds the environment and natural resources as a trustee. The doctrine has also found expression in the Constitution, legislation such as NEMA, amongst others, and environmental policy such as the

generations are protected. Van der Linde *Introduction to a Healthy Environment in the South African Constitution* 16 argues that the present and future generations can be viewed as groups, that do not have distinct rights and that hence section 24(b) should be viewed collectively.

¹¹ These measures include procedural rights that are provided in the Constitution. See sections 32, 33 and 34 of the Constitution. However, sections 32 and 33 have to be read with the *Promotion of Access to Information Act* 2 of 2000 (PAIA) and the *Promotion of Administrative Justice Act* 3 of 2000 (PAJA). Fashioned in a similar manner, section 32 of the Constitution and the PAIA, embody that everyone has a right to access information including environmental information. See *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance* 2015 1 SA 515 (SCA). *Baleni v Regional Manager Eastern Cape Department of Mineral Resources* [2020] 4 All SA 374 (GP). Information must be accessed for the realisation of the environmental right. See Currie and De Waal *The Bill of Rights Handbook* 521- 522. Section 33 of the Constitution provides for just administrative action through procedural fairness and the PAJA gives effect to this right. This stimulates accountability, transparency and accessibility in public administration of environmental matters. Section 34 of the Constitution makes provision for access to courts thus, environmental matters may be heard in the court of law. Arguably, this right guarantees three separate rights thus (i) access to courts and tribunals, (ii) independence and impartiality of courts and tribunals, (iii) fair and public hearing of disputes.

¹² Du Plessis 2015 *SAJHR* 275-276.

¹³ Du Plessis 2010 *STELL LR* 256-298; Kidd "Environment" 522; Du Plessis 2008 *PELJ* 1-31.

¹⁴ Du Plessis 2015 *SAJHR* 284, argues that section 24(b), as read with section 7(2), places a constitutional duty of a fiduciary kind upon authorities to ensure intergenerational protection of the environment. Also see Brown Weiss 1992 *AUJLR* 21.

White Paper on Environmental Management (hereafter the White Paper).¹⁵ The public trust doctrine, as defined in chapter 1, places a fiduciary duty on the government as the trustee, to ensure that it protects the environmental interest as a public trust.¹⁶ Humans are included in the definition of the environment in section 1 of NEMA, and accordingly it can be argued that the public trust can be extended to include not only the present human generation but also future human generations.¹⁷

Another important aspect within the context of section 24(b)(iii), is the inclusion of the term "sustainable development" into domestic law.¹⁸ It states that the environment must be protected, for the benefit of present and future generations, through securing sustainable development and sustainable use of natural resources. As noted in chapter 2, the central focus of sustainable development is to ensure that the utilisation of resources does not undermine and jeopardise the ability of future generations to fully lead their lives. Arguably, reference to sustainable development in the Constitution intends, to preserve the future integrity and benefits. In other words, it means that the concept of future generations and that of sustainable development are inherently associated and inseparable from each other in terms of the Constitution.¹⁹ A purposive reading of the environmental right

¹⁵ Department of Environmental Affairs and Tourism White Paper on Environmental Management - Policy for South Africa, 1998.

¹⁶ Sand "The Concept of Public Trusteeship in the Transboundary Governance of Biodiversity" 64. Also see *Waweru v Republic* (2007) AHRLR 149 (KeHC 2006) para 40.

¹⁷ See also 4.2.1 and 4.2.3 where the public trust doctrine is discussed in the Oposa and Juliana case.

¹⁸ Henderson 2001 *SAJELP* 149.

¹⁹ The meaning of sustainable development incorporates a tripod balance of three interdependent pillars: the environmental, social and economic dimensions. See Myerson 2007 *Sustainable Development* 27; Kotzé 2003 *PELJ* 7. Kotzé maintains that social sustainability is described as the sustenance of all moral capital of a particular society. The Preamble of NEMA entails that all three dimensions are fundamental to achieve sustainable development. Hawkes *The Fourth Pillar of Sustainability* 25, describes the three dimensions to say, environmental responsibility is represented by ecological balance, economic viability is represented by material prosperity and social equity is represented by justice, engagement, cohesion and welfare. It has been argued that "development cannot subsist upon a deteriorating environmental base and promotion of development requires the protection of the environment".

is indicative of the idea that the interests of future generations are constitutionally protected, and that there is a duty upon the state to act accordingly, as postulated in the public trust doctrine.²⁰

The linkages on the relationship between the concept of sustainable development and future generations can be construed from case law. In *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province (Fuel Retailers)*²¹ the Constitutional Court had the opportunity to define and explain what the concept of future generations entails. Yet, no definition or conceptualisation was explicitly made of the concept. The only reference that the court made to the concept of future generations was *obiter* in an attempt to interpret sustainable development.²² The lack of a definition or explanation of what future generations entails may be attributed to the failure by litigants to plead their case in such a way that would have required the court to focus on the concept. As far as could be ascertained, no court in South Africa has ever explained what the concept future generation means at its core, except to refer to it when elaborating the principle of sustainable development.

²⁰ NEMA sections 2(4)(o), 5(d), 28(4)(e); See also a discussion on NEMA below.

²¹ 2007 6 SA 4 (CC).

²² *Fuel Retailers* para 43. However, interpreting section 24(b)(iii), seemingly unravels a conflict between sustainable development and environmental conservation. The Constitutional Court construed that when interpreting the concept of sustainable development, all three dimensions of sustainable development (social, economic and environmental) must be balanced. (see para 60). Sachs J maintained that: "sustainable development presupposes accommodation, reconciliation and (in some instances) integration between economic development, social development and environmental protection" (see para 113). It does not envisage social, economic and environmental sustainability as proceeding along three separate tracks, each of which must be weighed separately and then somehow all brought together in a global analysis. The essence of sustainable development is balanced integration of socio-economic development and environmental priorities and norms. Sustainable development, as envisaged in the Constitution, aims at achieving a balance between environmental protection and socio-economic development (paras 44-45). Sustainable development is a vehicle towards the harmonisation of environmental protection and development, with the ultimate aim of ensuring that the interests of future generations are protected. Tladi 2002 *SAJELP*178.

There is no case law where the future generations are cited as either as litigants or as acting through a representative. Section 34 of the Constitution provides that:

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.²³

At face value, reference to "everyone", referred to in section 34 and section 24, implies a human person existing at the time of the dispute. As argued above,²⁴ everyone may refer to the future generations if viewed and pursued from the perspective of PIL.

Also, section 38 of the Constitution provides a solution for how the interests of future generations could be adjudicated by the courts. It provides an extensive list of persons with the requisite standing to approach a court for any alleged violation of constitutional rights.²⁵ It provides that²⁶:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

Given that future generations may be regarded as a group, type or class of persons, section 38(c) enables any person, non-governmental organisation or legal entity to represent the interests of future generations and hold government to account. Thus, the interests of future generations can be represented through PIL or a

²³ Section 34 of the Constitution.

²⁴ See 2.4.2 above.

²⁵ Du Plessis and Du Plessis "Striking the Sustainability Balance in South Africa" 427-433.

²⁶ See also section 32(e) NEMA that further includes that a person may act on behalf of the environment.

commissioner, as well as by individuals or organisations that have substantial interests in the interests of future generations.²⁷

In *Earthlife Africa Johannesburg v Minister of Environmental Affairs* (hereafter *Thabametsi* case),²⁸ the first climate change case in South Africa, the court decided whether the environmental authorisation of a coal-fired power station was properly decided, administratively and procedurally. As such, the judgment was anchored in section 24 of the Constitution and NEMA in the context of sustainable development.²⁹ Since the power station was a form of development, the court had to strike a balance between the components of sustainable development, socio-economic development and environmental development. The court established that sustainable development is integrally linked with intergenerational justice hence the "state must take all reasonable measures to protect the environmental interests of the present and future generations" as affirmed by the environmental right in the Constitution.³⁰ In the court's interpretation, environmental protection outweighs socio-economic development; meaning that the authorisation of the power station was not acceptable and it was not compliant with section 24O(1) of NEMA.³¹ The case further notes that "short-term needs must be evaluated and weighed against long-term consequences".³² Significantly, the environmental protection for present and future generations supersedes socio-economic development that may potentially cause environmental damage through the impacts of climate change resulting from the power station. Essentially, the concept of sustainable development provides for the protection of future generations, given the balancing exercise that has to be done presently.

²⁷ See 2.4.2 above.

²⁸ *Earthlife Africa Johannesburg v Minister of Environmental Affairs* [2017] 2 All SA 519 (GP).

²⁹ Section 24(b)(iii) of the Constitution. See *Thabametsi* case para 81-86.

³⁰ *Thabametsi* case para 82. See also Humby 2018 *JEL* 149.

³¹ *Thabametsi* case para 98-100.

³² *Thabametsi* case para 82.

3.3 The protection of future generations in legislation: NEMA

Principally, NEMA,³³ gives effect to the implementation of the constitutional environmental right and by implication the protection of future generations as referred to in its section 2 principles.³⁴ Du Plessis³⁵ argues, that framework legislation that gives effect to a constitutional right "enjoys a considerable status and has a very special role to play in the fulfilment of crucial constitutional objectives".

In support of the Constitution, NEMA echoes section 24 in its preamble, regarding the protection of the interests of future generations, noting that:

many inhabitants of South Africa live in an environment that is harmful to their health and well-being: everyone has the right to an environment that is not harmful to his or her health or well-being; the State must respect, protect, promote and fulfil the social, economic and environmental rights Sustainable development requires the integration of social, economic and environmental factors in the planning. Implementation and evaluation of decisions to ensure that development serves present and *future generations*; [and] everyone has the right to have the environment protected, for the benefit of present and *future generations*.³⁶

It is established practice that the preamble of a legal instrument plays an important role in the interpretation of the purpose and content of an Act of Parliament.³⁷ As such, the reference to future generations inform that NEMA should be interpreted in light of the concept. In addition to the preamble, section 1 of NEMA defines sustainable development as "the integration of social, economic and environmental factors into planning, implementation and decision-making", focused towards ensuring, the said (sustainable) development serves the present generation, and

³³ See Nel and Du Plessis 2001 *SAJELP* 1-2, who argue that "framework legislation aims to define overarching and generic principles in terms of which sectoral-specific legislation is embedded, as well as to enhance co-operative environmental governance amongst fragmented line ministries. It furthermore provides general basic norms that may be used to introduce new environmental legislation or to amend or maintain existing legislation".

³⁴ *Fuel Retailers* para 59.

³⁵ Du Plessis 2011 *PER* 97.

³⁶ Preamble of NEMA. (Emphasis added)

³⁷ Du Plessis *The Interpretation of Statutes* 37. Also see *Gavric v Refugee Status Determination Officer, Cape Town* 2019 1 SA 21 (CC) paras 16 and 23; *Mohunram v National Director of Public Prosecutions* 2007 4 SA 222 (CC) paras 78-79; *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 8 BCLR 872 (CC) para 111.

also integrating the principle of inter-generational equity to protect the interests of future generations.³⁸

The concept of sustainable development is the overarching theme of the environmental principles.³⁹ Section 2 of NEMA notes that sustainable development requires the integration of approaches that mitigate the degradation of the environment and environmental justice, among other things. As Sachs J notes in the *Fuel Retailers* case, the objective of NEMA is to preserve the environment for present and future generations.⁴⁰ Subsequently, to preserve the environment for the present generations is to promote the interests of future generations, as illustrated in the public trust doctrine, which is also provided for in NEMA.⁴¹

NEMA echoes the constitutional provision on legal standing but adds that a person or a group of persons may also act on behalf of the environment.⁴² Providing this possibility, the argument could be raised that the environment should also be protected not only for the present but also for future generations. Adding to this, it must be understood that all principles of the NEMA are entrenched in other environment related instruments.⁴³ Thus, in light of the constitutional interpretation of sustainable development, NEMA and other environment related legislation can be viewed to protect the interests of future generations.

³⁸ Section 1 of NEMA.

³⁹ *Fuel Retailers* para 113.

⁴⁰ *Fuel Retailers* para 118. See, Henderson 2001 *SAJELP*155.

⁴¹ The founding principle of the public trust doctrine in NEMA is section 2(4)(o) which states that "the environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage". The term common heritage may be interpreted to serve both present and future generations.

⁴² Section 32(1)(e). Also see Du Plessis and Du Plessis "Striking the Sustainability Balance in South Africa" 427-433 who argue that "it is therefore possible, in line with more eco-centric thinking, to seek legal recourse in matters affecting the environment without necessarily affecting the legal interests of people *per se*".

⁴³ Most of the SEMAs, like any other South African environmental laws, protect the interests of future generations through the concept of sustainable development.

3.4 Future generations under South African private law

This part of the study explores private law, specifically, the law of persons in South Africa.⁴⁴ The perspectives from other branches of the law may inform the discussion on how the concept of future generations may be perceived by other non-environmentally related areas of the law.

The law of persons in South Africa mainly addresses issues pertaining to legal subjectivity, when legal subjectivity comes into existence and when it ends.⁴⁵ On that note, legal subjectivity comes into existence at birth and the subject is granted protection of the law once it has been determined that the subject was born alive.⁴⁶ With the interests of the unborn in mind, the law was subsequently developed to also protect the interests of the unborn through a fiction.⁴⁷ The fiction is known as the *nasciturus* fiction, which basically transcribes that if it is to the advantage of the unborn, the unborn is deemed to have already been born in order to keep the unborn's interests open.⁴⁸ This fiction has been widely used in inheritance and succession to property by children not yet born, and courts have used it protect the interests of the unborn under private law.⁴⁹

Thus, one could argue that since the law recognises the *nasciturus* fiction under private law to protect the interests of the unborn, the same legal basis could be extended to environmental interests of future generations. Slabbert describes the fiction as follows:⁵⁰

⁴⁴ See chapter 2.

⁴⁵ Robinson *Introduction to South African Law of Persons* 18.

⁴⁶ Schulman *The Nasciturus Non-fiction* 69; Robinson *Introduction to South African Law of Persons* 17. Common law requirements entail that "the foetus must be separate from the mother's body, the foetus must have lived independently after separation". *S v Mshumpa* 2008 (1) SACR 126; *Pinchin No v Santam Insurance Co Ltd* 1963 2 SA 254; *Mobo M v Road Accident Fund* 2005 3 All SA 340 (SCA).

⁴⁷ Robinson *Introduction to South African Law of Persons* 17. The law was first developed under Roman Law then it later became a part of Roman Dutch law of succession. The *nasciturus* fiction was subsequently subscribed into South African Law, and at present, it is mostly used in law of delict and law of succession.

⁴⁸ Robinson *Introduction to South African Law of Persons* 18.

⁴⁹ Schulman *The Nasciturus Non-fiction* 69; Pillay 2010 *STELL LR* 236.

⁵⁰ Slabbert 1997 *SALJ* 234.

the fiction protects the interests of the (future) *persona iuris* in a flexible manner by anticipating that the foetus or embryo *in utero*, by virtue of its unique position must be afforded some form of protection. The rationale behind the protection is a future directed one: to protect interest which can only really be at stake *after birth*, in other words, when legal subjectivity has commenced. The fiction thus remains only a fiction: by affording the *nasciturus* this form of protection; no legal subjectivity is in fact afforded. It is the child, who has already been born and who has become a legal subject, whose interests are protected in a conditional manner.

This suggests that actual existence of persons is not the sole requirement for legal protection. Although rights may not be attached to unborn people, it is evident that their interests may be protected. Essentially, South Africa, through the *nasciturus* fiction, may then offer protection to the interests of the future generations.

3.5 Future generations in the context of religious and African customary law

In South Africa, religion and customs are intertwined with many aspects of life.⁵¹ Africans are, for example, regarded as "incurably" religious and in Mbiti's words:

It is religion, more than anything else, which colours Africans' understanding of the universe and their empirical participation in that universe, making life a profoundly religious phenomenon.⁵²

Accordingly, it is necessary and relevant to determine how the concept of future generations is interpreted within African customary law and South African religious systems,⁵³ since about 93.3% of the South African population adheres to one or more of these legal systems.⁵⁴ South Africa is a religious and multicultural society,

⁵¹ Naaman 2015 *IJHSS* 5.

⁵² Mbiti 1969 *ARP* 262.

⁵³ Mbiti *African Religions and Philosophy* 2, elaborates that in Africa, all activity centres around religion. It is through religion that Africans know how to live with others, how to react or communicate and most importantly, how to address issues. This underpins why it is crucial to explore religion in South Africa in a bid to understand how South African communities interpret the concept of future generations.

⁵⁴ Department of Statistics South Africa on <http://www.statssa.gov.za/>. Statistics for religious affiliations according to Stats SA, Christianity – 43 423 717, Islam – 892 685, Traditional African religion – 2 454 887, Hinduism – 561 268, Judaism – 49 470, Other – 1 482 210; Stats South Africa in an article by Schoeman 2017 *Theological Studies* 2, shows the statistics of the 2001 statistics which correlate to the figures provided by Central Intelligence Agency below. <https://www.cia.gov/library/publications/the-world-factbook/fields/401.html>. The Central Intelligence Agency World book made statistical recordings in 2015 which show that in South

and according to Rautenbach and Bekker,⁵⁵ it has various legal systems, and religion is intertwined with African customary law.

Section 9 of the Constitution provides that everyone has a right not to be discriminated on the basis of religion, belief or culture.⁵⁶ Section 211 provides for the recognition of African customary law,⁵⁷ and section 15(3)(a)(ii) of the Constitution endorses tradition and adherence of religion by persons.⁵⁸ In terms of sections 30 and 31 of the Constitution, people have religious and cultural freedoms.⁵⁹ It is therefore evident that religious and cultural rights are constitutionally recognised rights.⁶⁰ This view is supported and reflected by decisions of South African courts, namely, that people have the right to enjoy African customary law and religious legal systems.⁶¹ Hence, it is necessary to explore the

Africa, Christian 86%, ancestral, tribal, animist, or other traditional African religions 5.4%, Muslim 1.9%, other 1.5%, nothing in particular 5.2%.

⁵⁵ Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* 5. South Africa is encompassed of legal religions and living customary law. Living customary law is the law that is applied to indigenous people. Also see Glavovic 1996 *SAJELP* 71-72.

⁵⁶ Section 9(3) of the Constitution entails that "the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth".

⁵⁷ Section 211 of the Constitution states that, "(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution. (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs. (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law".

⁵⁸ Section 15(3)(a)(ii) of the Constitution states that "this section does not prevent legislation recognising systems of personal and family law under any tradition or adhered to by persons professing a particular religion".

⁵⁹ Section 30 of the Constitution maintains that, "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights; (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community— (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights".

⁶⁰ Herbst and Du Plessis 2008 *EJCL* 3. The Constitution in sections 9, 15, 30, 31 and 211, give an indirect obligation on government to recognise customary law and religion but subject to the Bill of Rights.

⁶¹ Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* 5; *Mabena v. Letsoala* 6698 (2) SA 1068 (T). The *Mabena* case entails of how the court had to determine if a marriage had been validly celebrated in accordance to customary law. The court applied customary law and the groom was requested to pay bride price to the bride's mother. For judicial recognition

perspectives of these legal religions on the notion of future generations from the perspective of African customary law, Islamic law, Hindu law, Jewish law and Christianity.

3.5.1 African customary law

African customary law develops from local African traditions, customs and religion.⁶² Pre-colonial law in Africa was predominantly customary with its sources rooted in the customs and practices of the traditional people.⁶³ Essentially, African religion, traditions and customs are intertwined and consequently developed into what is known as African customary law.⁶⁴ However, in order to understand how the concept of future generations is interpreted in African customary law, it is crucial that one first understands African religion, customs and traditions and how these traditions and customs regard or rather, protect the interests of future generations.

The predominant character of African customary law is that information, tradition, culture and religion are passed from generation to generation.⁶⁵ Therefore, the involvement of all generations (past, present and future) is a common feature within the African traditional religion. For instance, the belief that land is never individually owned but rather that it is communally owned by society, which society comprises

of customary law also in access to land and environmental matters, see *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC); *Gongqose v Minister of Agriculture, Forestry* 2018 5 SA 104 (SCA).

⁶² Herbst and du Plessis *EJCL* 3, referring to Olivier, defines African customary law as "those legal systems that originated from African societies as part of the culture within particular tribes or groups that have maintained, supplemented, amended and/or superseded in part by a) changing community views and the demands of the changing world; (b) contact of societies with other legal systems; (c) contact with the influence of other legal systems and (d) the direct and indirect influence of foreign government structures"; Ndulo 2011 *IJGLS*88; Marumo *Christianity and African Traditional Religion in dialogue: An Ecological Future for Africa* 21. Religion in Africa is centered on traditionalism. Wall 2015 *South African History Online* 1; Ogwurike 1996 *UGLJ* 1. It should be understood that African customary law, although reflecting some common values or rules, is not universal. It differs by community and sometimes, from community to community.

⁶³ Ndulo 2011 *IJGLS*88.

⁶⁴ Ndulo 2011 *IJGLS*94.

⁶⁵ Mbiti *African Religions and Philosophy* 3. African tradition relied and still relies on oral transmission. Wisdom of it flows from the heart and minds of people.

of past, present and future generations.⁶⁶ Ancestors (the past generation) are believed to be the guardians of lands and all ecology,⁶⁷ who entrust traditional leaders (the present generation) as overseers of the land and the environment,⁶⁸ in order to pass it to their born and unborn children (future generations). In most cases, the ancestors are informed before any environmental action (for example, ploughing and rain making ceremonies) is taken. This practice illustrates the interconnectedness of past, present and future generations under African customary law. The traditional leaders, as custodians of authority from past generations and representatives of the current generation, have obligations to preserve the environment for posterity.⁶⁹ In the words of Wiredu,⁷⁰ some of the duties include:

that of husbanding the resources of the land so as to leave it in good shape for posterity. In this moral scheme the rights of the unborn play such a cardinal role that any traditional African would be nonplussed by the debate in Western philosophy as to the existence of such rights. In upshot there is a two-sided concept of stewardship in the management of the environment involving obligations to both ancestors and descendants which motivates environmental carefulness, all things being equal.

In an African context, the present generation bestow a dual responsibility (as stewards of the environment) to past generations and to posterity (future generations).⁷¹

The concept of future generations in the African customary context is also understood by the way African communities interact with nature; for instance, the belief in myths, taboos and totems. Taboos are cultural aspects prohibitory in

⁶⁶ Behrens 2012 *JGE* 180.

⁶⁷ Behrens 2012 *JGE* 181. Ancestors are believed to exert influence over the lives of contemporary generations by guiding their behaviour and even reprimanding and rewarding them. See Marumo *Christianity and African Traditional Religion in Dialogue: An Ecological Future for Africa* 21-81. Traditional leaders are known to consult ancestors on matters, and it is through the ancestors that the present man can fore-tell the future. It is therefore the traditional leader's duty to maintain the environment for the sake of the past (ancestors), present and future generations.

⁶⁸ Marumo *Christianity and African Traditional Religion in Dialogue: An Ecological Future for Africa* 81.

⁶⁹ Wiredu "Philosophy Humankind and the Environment" 30-48.

⁷⁰ Wiredu "Philosophy Humankind and the Environment" 46.

⁷¹ Similarly, the concept of public trusteeship.

nature,⁷² most of them aiming at inculcating certain attitudes. For example, Tsonga and Sesotho traditional leaders, including the Shona, sanction people against cutting particular trees, hunting particular animals and polluting specific water bodies.⁷³ This is done to preserve and conserve the environment for the present and future generation.

In the interest of the past generation, it is believed that ancestors communicate and sometimes exist in nature; hence nature should be preserved. For the current generation, the benefit lies in preservation and conservation of nature as much as it does for future generations. Totemism is a concept that highlights the interconnectedness of animals with people.⁷⁴ Each clan or tribe subscribes to a certain totem, for instance, an elephant (*tlou* in Sesotho and *nzou* in Shona), buffalo (*nare* in Setswana and *nyati* in Shona), among others.⁷⁵ Each person is therefore prohibited from eating their totem. The inculcation of totems was to protect endangered species and therefore protect the interests of future generations.⁷⁶

Therefore, the African customary law worldview on future generations has its roots in the past generation, who is perceived to be the guardians of the environment. Ancestors place responsibility on chiefs to ensure that the environment is preserved and conserved for succeeding generations.

⁷² Gumo et al 2012 *Religions* 534.

⁷³ Marumo *Christianity and African Traditional Religion in Dialogue: An Ecological Future for Africa* 78.

⁷⁴ Marumo *Christianity and African Traditional Religion in Dialogue: An Ecological Future for Africa* 78.

⁷⁵ Maluleke 2019 https://www.academia.edu/33977463/History_of_Xitsonga-Speaking_Tribes; Marumo *Christianity and African Traditional Religion in dialogue: An Ecological Future for Africa* 78.

⁷⁶ Marumo *Christianity and African Traditional Religion in Dialogue: An Ecological Future for Africa* 78.

3.5.2 Islamic law⁷⁷

Islamic law has been developing in South Africa since the 17th century. Muslims regard Islamic law as divine law. Islamic law is closely intertwined with Islamic beliefs (*aqidah*) and moral values (*akhlaq*).⁷⁸ As such Islamic law advocates that humans are trustees (*khalifah*) of Allah,⁷⁹ and each trustee lives on earth in accordance to spiritual moral values and principles.⁸⁰ These principles and values all aim at achieving three primary objectives: to educate an individual (*tahdhib al-fard*); establish justice (*adl or qist*); and consider public interest (*maslahah*).⁸¹ However, justice as a primary objective is an overarching Islamic value, particularly within Islamic legal matters.⁸²

Islamic law defines justice as "due but not absolute regard for human freedom and equality".⁸³ Islamic law views justice and equity differently but it is paramount that people have equal chances in enjoyment of Allah's blessings.⁸⁴ An inference can be made that the concept of justice,⁸⁵ under Islamic law, is connected to intergenerational justice, where all generations are entitled to equal enjoyment to the environmental blessing.⁸⁶ It is believed that the environmental blessing is to all

⁷⁷ I acknowledge Ms Naeema Gabru, North-West University, for her valuable input in this part of the work. See Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* 10.

⁷⁸ Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* 10-352.

⁷⁹ See the above discussion on the public trust doctrine.

⁸⁰ Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* 10-352.

https://shodhganga.inflibnet.ac.in/bitstream/10603/73994/11/11_chapter%204.pdf.

Trustees are entrusted to oversee the integrity of the earth including then flora and fauna.

⁸¹ Kalami 1989 *Islamic Quarterly* 220.

⁸² Frenche 2010 *Global Justice and Sustainable Development* 133. It is a constitutional principle inherently intertwined to divine law. Akhtar *Islam as Political Religion: The Future of an Imperial Faith* 2 reveals that the Quran links faith with justice and believers are ordered to be just. Quran 5:8. Justice is next to godliness and injustices must be avoided. Quran 4.3; Quran 57.

⁸³ Frenche 2010 *Global Justice and Sustainable Development* 133.

⁸⁴ Najafi and Nikjou 2018 *IJHSS* 3. It is believed that justice surpasses all legal systems and faiths hence, justice is an absolute ideal ordained by God.

⁸⁵ Quran 2:18; 4:9-10; 7:159; 26:181-183.

⁸⁶ Najafi and Nikjou 2018 *IJHSS* 3.

generations; the past, present and future.⁸⁷ Dien⁸⁸ indicates that this notion is supported in the writings of *Surat al-Baqara*,⁸⁹ which say that Allah made the planet and environment for every generation. As such, all humans are entitled to enjoy equal rights with equal protection of life, property and honour.⁹⁰ This means that the interests of future generations can be protected.

The Quran stresses that good deeds must be done not only for the sake of mankind, but also as reciprocation of Allah's goodness to mankind.⁹¹ As such, the goodness extends to environmental protection because Allah neither envies those that transgress, nor those who deplete the environment.⁹² Abu Bakr, the first caliph of Islam, highlights some of the transgressions as:

you must not mutilate, neither kill a child or an aged man or woman. Do not destroy a palm tree, nor burn it with fire and do not cut any fruitful tree. You must not slay any of the flock or the herds or the camels.⁹³

Essentially, environmental transgressions are prohibited to secure the environmental interests of future generations.⁹⁴ Lastly, the Islamic Declaration on Global Climate Change was drafted with concerns for the needs of future generations.⁹⁵ Therefore, in the context of Islamic law, future generations are entitled to a good and healthy environment as much as preceding generations. It is therefore vital that the environment is protected for the interest of all generations, including future generations.

⁸⁷ Surah2:29. Anon date unknown
<https://shodhganga.inflibnet.ac.in/bitstream/10603/73994/11/11chapter%204.pdf>.
 Furthermore, the disturbance to nature comes with a penalty thus showing the significance of environment.

⁸⁸ Dien 1997 *JBV* 55.

⁸⁹ Verse 22 of 22 of *Surat al-Baqara* reads "[He] who made for you the earth a bed [spread out] and the sky a ceiling and sent down from the sky, rain and brought forth thereby fruits as provision for you. So do not attribute to Allah equals while you know [that there is nothing similar to Him]". Dien 1997 *JBV* 55 interprets that the term "for you" refers to all generations. Abdullah and Nadvi 2011 *GALE* 270-288.

⁹⁰ *Al Qasas* 28:77.

⁹¹ Abumoghli 2019 <https://www.ecomena.org/islam-sustainable-development/>.

⁹² Khadduri *War and Peace in the Law of Islam* 102.

⁹³ Haneef 2002 *ALQ* 249-254.

⁹⁴ ARRCC date unknown https://www.arrcc.org.au/islamic_declaration

3.5.3 Hindu Law

Hindu law⁹⁶ is greatly influenced by customs and traditions.⁹⁷ It is holistic in nature and consists of elements of human life, including morality and justice.⁹⁸ However, Hindu law has an environmental inclination through *dharma* (duty, virtue, cosmic order and religion), a concept that sees Hindu life as intrinsically connected to the environment,⁹⁹ the doctrine of *Ahimsa* (non-violence),¹⁰⁰ *karma* (actions or deeds) and reincarnation.¹⁰¹

Reincarnation is the belief that every human soul is immortal,¹⁰² hence the soul may return to earth in a different form (for instance, human of a higher or lower order, bird, fish or animal).¹⁰³ Moreover, special attention is paid to the human's past, present and future life, thus indicating an intertemporal dimension and its significance in Hinduism. Resultantly, this ignites the need for people, under Hindu law, to protect the environment for both present and future interests. Also, the cycle of birth and death, although in pursuit of salvation (*moksha*), is highly dependent on *karma*, which asks of humans to live a good life (environmental protection forms part of the good life) to avoid a compromised future.¹⁰⁴

⁹⁶ Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* 271. Although Hindu law is not legally recognised in South Africa, it is sometimes acknowledged as common law and there are few examples where South African courts assisted Hindu litigants who struggled as a result of applying South African law; *M v M* 1991 4 SA 587. However, the facts of these cases seemingly show that although the litigants reside in South Africa, the Hindu community lives in line with Hindu law which is intrinsically connected to their culture.

⁹⁷ Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* 259.

⁹⁸ Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* 259.

⁹⁹ Jain 2011 *Hindu Environmental Teachings* 10.

¹⁰⁰ Dwivedi 1993 JHCS 22; Anon date Unknown <https://shodhganga.inflibnet.ac.in/bitstream/10603/73994/11/11chapter%204.pdf>. Men are forbidden from exploiting nature and requested to live with nature in the harmony of God thus environmental protection and conservation. As such, the Hindu law demands non-violence of humanity upon nature.

¹⁰¹ Anon date unknown https://shodhganga.inflibnet.ac.in/bitstream/10603/73994/11/11_chapter%204.pdf.

¹⁰² Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* 261.

¹⁰³ Anon date unknown https://shodhganga.inflibnet.ac.in/bitstream/10603/73994/11/11_chapter%204.pdf.

¹⁰⁴ Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* 261.

Karma seems to voice out two main things. Firstly, that all beings on earth have a continuity (after life) and an intimate relationship such that it is crucial not to harm any of them.¹⁰⁵ Secondly, a person's conduct towards the environment has consequences, to which good *karma* may be guaranteed by good environmental conduct.¹⁰⁶ The desire for good *karma* therefore fosters an earnest life coupled with environmental conservation, where animals and nature are treated with dignity and respect. Interpreted, the desire for good *karma* is in pursuance of sustainable development because it encourages the present generation to achieve their needs without compromising those of the future generations.¹⁰⁷

Furthermore, according to Rautenbach and Bekker¹⁰⁸ *karma* entails the law of cause and effect; what one sows is what they also reap. Since there is a belief of reincarnation, it means that one's past life is a mirror of their future life.¹⁰⁹ Subsequently, the current actions of the present generation towards the environment replicate the future. If the contemporary generation preserves the environment now, then the environment will be in a good state in future.¹¹⁰ More so, the *Iṣa Upaniṣad*,¹¹¹ a primary source of the *Vedas*,¹¹² encourages sustainability and upholds the interests of future generations through advocating that

¹⁰⁵ Coward "Hindu Views of Nature and the Environment" 411-419.

¹⁰⁶ Jain 2011 *Hindu Environmental Teachings* 10.

¹⁰⁷ As this study has highlighted in chapter 2.3 that future generations may arguably be viewed as any human person born ahead of our present moment of existence, it may be apparent to suggest that the Hindu concept of reincarnation exhibits the need of present generations to preserve and conserve the environment for future's sake, because of the likelihood that one may live in both generations. Also, the Hindu concept of *karma* encourages people to preserve the environment.

¹⁰⁸ Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* 261.

¹⁰⁹ Dwivedi 1993 *JHCS* 1-8. Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* 261.

¹¹⁰ Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* 261. Karma means that what one will be in the future is a result of one's past.

¹¹¹ Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* 261. The Upanisad makes up the knowledge and last part section of the Vedas.

¹¹² Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* 261. The Vedas are the primary sources of Hindu law and are acknowledged as the most significant scriptures.

consumption must not exceed current needs.¹¹³ Believers are urged to shun wasting resources, and encouraged to conserve and preserve resources.¹¹⁴

The Hindu community understands the concept of future generations at a religious or traditional level. Hindu Declarations were also drafted, such as the *Hindu Declaration on Climate Change* 2009 followed by the *Hindu Declaration on Climate Change* 2015. In these Declarations, the Hindu community vowed to protect the earth and her resources for the present and future generations.¹¹⁵

Hindu law therefore embraces all generations of people where each generation is equally important. This means that every generation bestows an environmental responsibility, with particular focus on reincarnation and *karma*. Knowing that there is life after death, it is important for present generations to safeguard the interests of the future, for instance, environmental interests. Also, *karma* entails that good deeds mirror a good future, therefore, the contemporary generation preserves and conserves the environment for the interests of succeeding generations.

3.5.4 Jewish law

Jewish law is founded on Jewish tradition and religion and Jewish teachings significantly contribute to environmental discussions.¹¹⁶ Most of the Jewish legal traditions are centred on the concept of *bal tashchit* meaning "do not destroy or waste".¹¹⁷ The teaching emanates from the *Torah* verse that says:¹¹⁸

When you lay siege to a city for a long time, fighting against it to capture it, do not destroy its trees by putting an axe to them, because you can eat their fruit. Do not cut them down.

¹¹³ Isavasya Upanishad, Hymn 1.

¹¹⁴ Isavasya Upanishad, Hymn 1.

¹¹⁵ Hindu Declaration on Climate Change 2009; Hindu Declaration on Climate Change 2015.

¹¹⁶ Hüttermann *The Ecological Message of the Torah* 204.

¹¹⁷ Deuteronomy 20 v 19-20; Schwartz 1997 *EE* 335. This is regarded as the most predominant Jewish precept often cited in environmental contexts.

¹¹⁸ Deuteronomy 20 v 19-20.

Whilst the verse is prohibitory in nature, it also shows a symbolic aspect of trees which are regarded as signs of growth and development within Jewish culture. According to the *midrash*,¹¹⁹ trees represent a life support system hence the statement that "just as you came and found trees planted by others, you must also plant trees for your children".¹²⁰ Evidently, those that plant trees do not plant them for themselves but for the generations yet to come.¹²¹ It is in this regard that the interests of posterity are upheld.

Many *Rishonim* (Commentators of the *Torah* between 1000 and 1500 CE) also concluded that the *Torah* prohibits wastage of resources which are beneficial to other human beings because the *Torah* advocates for selflessness.¹²² To that end, it is clear that *bal tashchit* is selfless in nature and serves to protect the interest of posterity.

Furthermore, the concept of *pikuach nefesh* (save a life) prevails over all other Jewish *mitzvot* (commandments). However, two main sources, *Maimonides* and *Nahmanides*, highlight that human life is of utmost importance and must be preserved by all means, which may pose a danger if interpreted that, for example, extensive development would benefit the current generation.¹²³ The sources, nonetheless, state that to save lives is to protect the environmental interests of future generations.¹²⁴ Ultimately, the Jewish worldview on future generations is

¹¹⁹ *Tanchuma Kedoshim 76*. A *midrash* is a Jewish commentary subdivided into two categories: *midrash halacha* (law and religious practice) and *midrash Aggadah* (ethics or theology).

¹²⁰ Wolff *Bal tashchit: The Jewish prohibition against needless destruction* 19.

¹²¹ *Avot d'Rebbe Natan 31b*. A Talmudic parable illustrates the interests of future generations. The story entails of a man named Honi, who met a tree planting man and asked him when the tree will bear fruit. The man responded that the tree will bear fruit in 70 years and although he may not live another 70 years, his descendants will enjoy the fruits of the tree just as he benefited from those left by his ascendants.

¹²² Neril Date Unknown
https://www.chabad.org/library/article_cdo/aid/1892179/jewish/Judaism-and-Environmentalism-Bal-Tashchit.htm.

¹²³ Lopatin date unkown <https://www.myjewishlearning.com/article/pikuach-nefesh-the-overriding-jewish-value-of-human-life/>.

¹²⁴ SAFCEI date unknown <https://safcei.org/project/jewish/>; See also Deuteronomy 30:19 maintains that the land that the contemporary generation lives in, is the same land meant for the next generation.

primarily founded on *bal tashchit* and *pikuach nefesh*. In short, Jewish law upholds the concept of future generations by preserving nature and planting trees for posterity as well as saving the lives of those to come by being God ordained stewards to the environment.

3.5.6 Christianity

Christianity has various branches and although some of the religious groups have prescribed rules according to which they organise their churches, they do not have legal rules similar to Islamic, Hindu and Jewish law. The only exception is the Roman Catholic Church that lives according to religious law, referred to as canon law.¹²⁵ Approximately 86% of South African society subscribes to some form or another of Christianity.¹²⁶ Therefore, it is important to explore the Christian worldview on future generations.

Christians believe that the earth and everything in it belong to the Supreme being, God,¹²⁷ and He created the heavens and earth.¹²⁸ God subsequently created men as stewards of the environment.¹²⁹ Stewardship encompasses "love of nature and the endeavour to promote harmony among the inhabitants of the earth".¹³⁰ Meaning that all human generations must be united, and to achieve this, the present generation is obligated to protect environmental interests for the generation to come. However, it must also be acknowledged that some Christians regard

¹²⁵ Vatican Code of Canon Law date unknown http://www.vatican.va/archive/cod-iuris-canonici/cic_index_en.html.

¹²⁶ Department of Statistics South Africa, available on <http://www.statssa.gov.za/>.

¹²⁷ Psalms 21 v 1.

¹²⁸ Genesis 1 v 1.

¹²⁹ Genesis 1 v 26 "Now we will make humans, and they will be like us."; Genesis 2v 19, 20. "Now the Lord God had formed out of the ground all the wild animals and all the birds in the sky. He brought them to the man to see what he would name them; and whatever the man called each living creature, that was its name. So, the man gave names to all the livestock, the birds in the sky and all the wild animals".

¹³⁰ Marumo *Christianity and African Traditional Religion in Dialogue: An Ecological Future for Africa* 30.

stewardship of the earth as the right to rule over the earth's resources and using as much of the earth resources for its own purposes.¹³¹

God, as the creator of the universe, will reconcile His creation, with humanity and the entire cosmic order in future.¹³² Resultantly, Christians have the responsibility to maintain the environment in preparation of the reconciliation day.¹³³

The World Council of Churches (WCC) in November 2018,¹³⁴ appealed to world leaders for a decrease in greenhouse gas emissions to protect future generations.¹³⁵ Furthermore, the current Pope of the Roman Catholic, wrote a letter addressed to the president of the UN Climate Conference of Parties (COP) 24 in December 2019 urging the president and the participants of the session to impose urgent climate change mitigation.¹³⁶ In that letter, the Pope also mentioned that "young people are showing heightened sensitivity to environmental matters" and he described the situation as an "emergency" to which the next generation must be pardoned from environmental catastrophes caused by an ignorant generation.¹³⁷

Ultimately, Christianity regards the interests of future generations from the belief that every man was created by God to be a steward of the environment around him and that God created nature. Stewardship aims at harmonising the inhabitants of the earth, including future generations. While the above discussion does not constitute Christian law, it reflects how Christians view the protection of the environment as well as their interpretation of the current generation's obligations

¹³¹ Genesis 1:25-28; also see Geneva College date unknown https://www.geneva.edu/community/environmental-stewardship/why_care.

¹³² Colossians 1 vs 15–20. "This is so that all things may be reconciled to God in Christ; 1 Corinthians 15 v 28 and that "God may be all in all".

¹³³ Marumo *Christianity and African Traditional Religion in Dialogue: An Ecological Future for Africa* 112.

¹³⁴ WCC is a fellowship of Christian churches. It was founded to bring denominations together so that they may worship and respond to world crises together.

¹³⁵ Global Catholic Climate Movement 2017 World Council of Churches encourages renewed Climate Efforts <https://catholicclimatemovement.global/world-council-of-churches-encourages-renewed-climate-efforts/>.

¹³⁶ Anon date unknown http://www.vatican.va/content/francesco/en/messages/pont-messages/2019/documents/papa-francesco_20191201_messaggio-carolina-schmidt.html.

¹³⁷ Anon date unknown http://www.vatican.va/content/francesco/en/messages/pont-messages/2019/documents/papa-francesco_20191201_messaggio-carolina-schmidt.html.

towards future generations may influence the manner in which the law is implemented or enforced in South Africa. The fact that Christians do not necessarily follow the same interpretation (except for the Roman Catholic Church), and the fact that their faith is not supported by a legal order, may jeopardise the proposed argument.

3.6 Summary

This chapter provided an analysis of how South African law, customs and religions interpret the concept of future generations. Firstly, section 24 of the Constitution provides two main objectives: to ensure an environment that is not detrimental to one's health and well-being, and the obligation on the state to take positive measures in order to achieve this safe environment. Furthermore, sustainable development was discussed where it was revealed that the three dimensions of sustainable development work in harmony to ensure that interests of future generations are protected. Secondly, the NEMA provides an overarching governance framework for environmental governance, and particularly it provides for the concept of sustainable development, thereby protecting the interests of future generations. Also, the case law discussed in this chapter indicates that courts have not yet defined the concept, except to refer it in relation to intergenerational equity and sustainable development.

While the concept of the protection of future generations is mainly used in public law, particularly environmental law, it has footprints in private law. For instance, the *nasciturus* fiction has been widely used in South Africa to benefit the unborn and protect their interests as if they were already born. Similar expansive interpretations could be used in the context of environmental law to ensure that rights and interests of future generations are protected. The chapter also explored African customary and religious perspectives, in line with the pluralistic legal system that South Africa ascribed to. It has been established that customary law practiced in South Africa reflects the belief that the ancestors are guardians of the ecology while the traditional leaders are the overseers of land and nature. Traditional leaders play a crucial role in the protection of the environment through, for example, prohibiting

the cutting of trees or the killing of certain animals as well as to safeguard ecology for present and future generations. African customs make use of totems and taboos in order to preserve and conserve environment, in the interest of all generations. From an Islamic law worldview, future generations is depicted through Islamic justice. It is believed that Allah's blessings are meant for all generations and these blessings include the environmental blessing to future generations. Other than that, Allah does not applaud transgressions, which transgressions also include environmental degradation. He advocates for environmental protection for the interest of future generations.

Also, Hindu law perspectives on the concept of future generations, as in South African practices, are reflected in the belief of reincarnation and *karma*. Since there is life after death, it is important that one protects the environment, in preparation for their next life, in which one may possibly be reborn. In the *karma* concept, it is encouraged that one exhibits good environmental deeds in order to secure a good future. Jewish law regards the notion of future generations through the concept *bal tashchit*, which means do not waste or destroy. Preservation is therefore a selfless act which serves the interests of the generations to come. Jewish law also has the concept, *pikuach nefesh* (save a life), which can be interpreted in the context of future generations. It is believed that human life is important above any other thing hence it is encouraged that people do all they can to save a life. Interpreted, this entails that environmental protection may be done to the interests of succeeding generations.

Finally, the Christian worldview on future generations is centrally based on the belief that God is the creator of the universe and everything in it, to which He created man as stewards of the environment. Stewardship includes harmonising all earth's inhabitants thus all generations, and to achieve this, the environmental interests of future generations must be protected. "Ruling" over the earth should be regarded as stewardship and not a licence to exploit the earth. All of these religious world views include therefore the idea or the concept of stewardship and protecting the earth or ecosystems for future generations. In interpreting the Constitution and

section 24, for example, these worldviews could be considered depending on the case before the court.¹³⁸

¹³⁸ See for example, *Gongqose v Minister of Agriculture, Forestry and Fisheries* 2016 2 All SA 130 par 40-69 where the court stressed the importance to consider cultural practices. Although the court did refer to African customs and not religion, an analogy could be considered when members of different faiths defend the right of, for example, future generations in relation to environmental protection.

4 THE CONCEPT OF FUTURE GENERATIONS IN SELECTED FOREIGN JURISDICTIONS

4.1 Introduction

This chapter examines case law in foreign jurisdictions to explore how the realisation and protection of the interests of future generations have been interpreted. As stated in the introductory chapter, exploring foreign jurisdiction gives a different perspective, and perhaps a better understanding of how other jurisdictions safeguard the interests of future generations.¹ Importantly, this chapter discusses foreign jurisdictions pursuant to section 39(1) of the Constitution. In this chapter case law in the Philippines, the Netherlands and the United States of America are discussed.

4.2 The conceptualisation of future generations in foreign case law

4.2.1 Philippines

The Philippines' case of *Oposa et al v Fulgencio S Factoran*, 1993, is of significance within the jurisprudence related to future generations.² It is regarded as one of the first cases worldwide to address the issue of how natural resources may be valued for present and future generations.³ The facts of the case reveal that the plaintiffs consisted of 43 minors who were represented by their parents and the Philippine Ecological Network, a non-profit organisation.⁴ The suit, filed against the then Secretary of the Department of Environmental and Natural Resources (DENR), was brought in the interests of present and future generations.

Initially, this suit was filed as a taxpayer's class action which compelled the defendant to cancel all Timber Licence Agreements (TLA) and refrain from issuing

¹ Smits *Elgar Encyclopedia of Comparative Law* 436. Legal transplants, specifically case-law, are useful tools used to develop different legal systems such as South Africa and Israel; See also *S v Makwanyane* (CCT3/94) [1995] ZACC 3 para 39.

² *Oposa* case.

³ La Vina 1994 *RECIEL* 246.

⁴ Allen 1994 *GIELR* 715.

new licenses since the TLAs were a leeway to deforestation.⁵ The petitioners underscored that "as citizens and taxpayers of the Philippines, they are entitled to the full benefit, use and enjoyment of the natural resources, including the country's virgin tropical forests".⁶ The matter was dismissed by the Makati Regional Trial Court on procedural grounds which found that the plaintiffs lacked a cause of action and that cancellation of the TLAs impaired contracts which is unconstitutional.⁷ The case highlights a cause of action for environmental protection based on the minors' right to a balanced and healthy environment.⁸

In response to this dismissal, the plaintiffs petitioned the Supreme Court. The Supreme Court of the Philippines remanded the case to the lower court for trial. The petitioners pointed out that they have a constitutionally protected environmental right as provided in section 16, Article II of the 1987 *Constitution of the Philippines*.⁹ They further contended that their right to a sound environment is also promulgated in legislation through articles 19, 20 and 21 of the *Civil Code (Human Relations)*,¹⁰ section 4 of Executive Order (E.O.) No. 192 creating the DENR,¹¹ and section 3 of Presidential Decree (PD) No. 1151 (Philippine Environmental Policy).¹² Accordingly,

⁵ La Vina 1994 *RECIEL* 246.

⁶ Allen 1994 *GIELR* 715.

⁷ Allen 1994 *GIELR* 715.

⁸ Gatmaytan 2003 *Geo. Int'l Env'tl L Rev* 462.

⁹ Article 16 of the *Philippines's Constitution*, 1987 promulgates that "the State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.

¹⁰ The *Civil Code of the Philippines* is general law that governs family and property relations. Article 19 articulates that "every person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith". Article 20 states that "every person who, contrary to law, wilfully or negligently causes damage to another, shall indemnify the latter for the same". Article 21 states that "any person who wilfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for the damage".

¹¹ Philippines, executive orders are Acts of the president that provide rules for a character in implementation or execution of constitutional/ statutory powers. However, Executive Order No. 192, s. 1987 mandates the DENR to regulate natural resources as provided by law in order to ensure equitable sharing of the benefits derived therefrom for the welfare of the present and future generations of Filipinos.

¹² The main aim of this presidential decree is to protect the right of the people to a healthy environment through environmental impact assessments. Section 3 particularly recognizes the right of people to a healthy environment and it places a duty on each individual to contribute to the preservation and enhancement of the Philippine environment.

the plaintiffs argued that they were entitled to protection by the state in its capacity as *parens patriae*,¹³ expressing the sentiments embedded in the public trust doctrine.

The case was granted in favour of the petitioners by the Supreme Court as the court cited section 15 of Article II,¹⁴ which obligates the state to protect its people. The court further highlighted that the environmental right, which is constitutionally entrenched, is actionable against the DENR for violating a constitutional provision. Finally, the court referenced section 1 of Article VIII which gives the judiciary the power to settle matters that are controversial in relation to legally demandable or enforceable rights.¹⁵

Dirth¹⁶ is of the view that the *Oposa* case is remarkably significant within the jurisprudence of future generations for five main reasons. Firstly, the court stated that the government's actions violate the constitutional environmental right of citizens, both at present and in the future.¹⁷ Secondly, the government is believed to have contravened the common-law doctrine of public trust which identifies individuals as trustees of the earth for present and succeeding generations.¹⁸ Thirdly, the government contravened statutory law which states that forests belong to present and also to future generations.¹⁹ The fourth reason is that the government broke civil law because its action was against public policy. Finally, the

¹³ *Oposa* case.

¹⁴ The State shall protect and promote the right to health of the people and instil health consciousness among them.

¹⁵ The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law. Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

¹⁶ Dirth *Governance for Future Generations: A Global Review of the Implementation of Intergenerational Equity* 53-54.

¹⁷ Dirth *Governance for Future Generations: A Global Review of the Implementation of Intergenerational Equity* 53-54.

¹⁸ Dirth *Governance for Future Generations: A Global Review of the Implementation of Intergenerational Equity* 53-54.

¹⁹ Dirth *Governance for Future Generations: A Global Review of the Implementation of Intergenerational Equity* 53-54.

government violated natural law and the right to self-perpetuation.²⁰ The central point made by Dirth is that the Philippines government violated the interests of future generations. Thus, the court successfully passed a fair judgment in favour of the plaintiffs making the case a precedent, not only for the Philippines, but also for other countries in the world.²¹ In Gatmaytan's words, the case is "virtually a staple of environmental law scholarship".²²

In addition to other issues dealt with in this case,²³ the *Oposa* case is also an exemplar regarding matters of *locus standi*. The defendants argued that the plaintiffs (who were duly represented and who sued on behalf of present and future generations) had no legal standing. However, the court established that the plaintiffs had a substantial legal interest in the matter and that the matter was identified as a class action, hence the plaintiffs had legal standing.²⁴ Justice Davide, who wrote for the court, believes that the plaintiffs' representation for future generations was "special and novel".²⁵ Their personality to sue on behalf of future generations is premised on the notion of intergenerational responsibility insofar as the right to a balanced and healthy ecology is concerned.²⁶ This is to say that the

²⁰ Dirth *Governance for Future Generations: A Global Review of the Implementation of Intergenerational Equity* 53-54.

²¹ Manguat and Yu III 2003 *Geo Int'l Env'tl L Rev* 494; Gatmaytan 2003 *Geo Int'l Env'tl L Rev* 457.

²² Gatmaytan 2003 *Geo Int'l Env'tl L Rev* 457; Manguat and Yu III 2003 *Geo Int'l Env'tl L Rev* 494- 495 point out that the *Oposa* case has set precedent in caselaw and in national legal jurisdiction e.g. legislation or policy formulation. For instance, *Farooque v. Bangladesh* (1997) 49 DLR (AD) 1, the environmental right as presented by the Constitution of Kenya Review Commission.

²³ Issues such as how issuing TLAs violated the petitioners' environmental right.

²⁴ *Oposa* case, 11.

²⁵ *Oposa* case. Eleven Justices concurred with the decision of the court without writing opinions except for Justice Davide and Justice Feliciano.

²⁶ *Oposa* case 11-12. The court further reiterates that "Such a right as hereinafter expounded, considers the 'rhythm and harmony of nature'. Nature means the created world in its entirety. Such rhythm and nature indispensably include, inter alia, the judicious disposition, utilization, management, renewal and conservation of the country's forest, minerals, land, waters, fisheries, wildlife, off-shore areas and other natural resources to the end that their exploration, development and utilization be equitably accessible to the present as well as future generations. Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the

minors' assertion of their environmental right was twofold - the minors had the obligation to enjoy their right to a healthy environment, whilst they also had an obligation to warrant the protection of that right for succeeding generations.²⁷ As indicated earlier, South Africa has a constitutionally entrenched right to healthy environment, which could also be used to advance the protection of the present and future generations.

The court ruled that the matter falls under class suits because "the subject matter of the complaint is of common and general interest not just to several, but to all citizens of the Philippines".²⁸ Judge Feliciano further indicated that the concept of "class" is very broad, and in the court's interpretation, "class" meant everyone living in the country both at the present time and in future.²⁹

The court in the *Oposa* case determined in favour of the interests of future generations and judged the case against violations of the public trust doctrine and the environmental right. Considerable lessons can be drawn from how an environmental constitutional right may be used to sue and question the government's conduct, particularly when the conduct violates the environmental right of citizens and potentially the interests of future generations. More importantly, the *Oposa* case sets a precedent on the legal standing of future generations and how they can bring environmental suits before a court of law. The court in this case established standing through the principle of intergenerational equity where the plaintiffs were obligated to enjoy their right to a healthy environment and safeguard the environment for the interests of future generations. As such, it could be argued that the lessons to be learnt for South Africa, are in relation to the usefulness of the public trust doctrine, the environmental right and intergenerational equity to advance the interests of future generations.

same time, performance of their obligation to ensure the protection of that right for generations to come".

²⁷ The separate opinion by Feliciano J in *Oposa* case.

²⁸ *Oposa* case 11-12.

²⁹ *Oposa* case 11-12.

4.2.2 Netherlands

The Netherlands case of *Urgenda Foundation v The Netherlands*,³⁰ presents insights on international jurisprudence on climate change litigation. The facts of this case are as follows: Urgenda, a Dutch foundation, filed a suit against the Dutch government because of its failure to mitigate climate change.³¹ Representing 882 citizens (representing both present and future generations) Urgenda stated that the goal of reducing greenhouse gas emissions by 20 percent was insufficient to reduce the impacts of climate change by 2020.³² Urgenda averred that the government must reduce greenhouse gas emissions by about 40 percent lower than it was in 1990. Although the government was acting in line with the *Paris Agreement on Climate Change* (hereafter Paris Agreement)³³ its efforts were insufficient as an Annex 1 country under the UNFCCC, and Urgenda argued that signing the UNFCCC must not be a mere formality.³⁴

The case was firstly heard in 2015 by the Hague District Court, which ruled in favour of Urgenda.³⁵ The case was appealed by the defendants to the Hague Court of Appeal and the appellate court upheld the ruling of the District Court in 2018.³⁶ After both the district and appellate court ruled that the Dutch government had insufficiently mitigated for climate change, the case was taken to the Supreme Court in 2019. The Supreme Court confirmed the decisions of the lower courts. Pursuant to articles 2 and 8 of the ECHR, which stipulated the right to life and right to privacy and family life respectively, the Supreme Court was convinced the Dutch government needed to reduce emissions by at least 25% compared to 1990, in

³⁰ The Urgenda foundation was formed by the Dutch Research Institute for Transitions of Erasmus University Rotterdam, an institute fighting for a sustainable society.

³¹ Zeben 2015 *TEL* 342.

³² Lin 2015 *Climate Law* 69.

³³ *Paris Agreement on Climate Change* (2015).

³⁴ Suryapratim and Woerdman 2016 *JENRL* 165; *Urgenda* case.

³⁵ The district court maintained that the state was breaching its duty of care under Article 6:162 Dutch Civil Code (DCC) – in Dutch *Burgerlijk Wetboek*.

³⁶ The court of Appeal upheld the ruling of the district court and maintained that the States was breaching its duty of care under article 2 and 8 of ECHR.

order to protect the interests of present and future generations.³⁷ The Supreme Court pronounced that the government's failure to adequately mitigate climate change violated the right to life of citizens. Subsequently, the state failed, in its obligation, to take concrete actions of preventing future violations of the interests of future generations, and thus failed in its duty of care.³⁸

The Dutch Constitution³⁹ enshrines an environmental right in Article 21,⁴⁰ and the national law, particularly law of delict, under civil jurisdiction, anchored the court's decision. Urgenda further relied on international law and argued on the basis of "the no harm principle, the doctrine of hazardous negligence, the principle of fairness and the precautionary principle", claiming that states are prohibited from using their territories in a manner that may cause injury to neighbouring states. Urgenda further referenced the sustainability principle enshrined in the UNFCCC,⁴¹ "the principle of a high protection level, the precautionary principle, and the prevention principle", each embodied in Article 191 of the Treaty on the Functioning of the European Union. All these were mentioned in a bid to reiterate the importance of climate change litigation for the interest of current generations and the unborn,⁴² - similar to the *Thabametsi* case in South Africa discussed above.

Essentially this case addresses four key issues: Urgenda's standing, climate change, duty of care of the state and separation of powers (which will not be discussed in detail).⁴³ In the context of legal standing, the plaintiffs' arguments state that the

³⁷ Urgenda case para 6.

³⁸ Leijten 2019 *Netherlands Quarterly of Human Rights* 114-115.

³⁹ *Constitution of the Kingdom of the Netherlands*, 2018.

⁴⁰ Article 21 of the *Constitution of the Kingdom of the Netherlands* reads: "it shall be the concern of the authorities to keep the country habitable and to protect and improve the environment".

⁴¹ Stein and Castermans 2017 *MJSDL* 318; The UNFCCC addressed three things, firstly, the protection of the climate system in the interests of present and future generations, secondly, the sustainability principle and lastly, the precautionary principle.

⁴² Likewise, what the court relied on in this case is similar to the *Thabametsi* case. Both cases establish that the impacts of climate change do not comply with the environmental right (including the sustainability principle, precautionary principle and prevention principle) thus subsequently endangering the environment to the detriment of the present and future generations; See also Humby 2018 *JEL* 149-150. See, *Thabametsi* case in chapter 3.

⁴³ Lambret and Itaure-Lima *Envtl L Rev* 60.

defendants lack standing since they were defending the rights of future generations including those that reside beyond the Netherlands jurisdiction.⁴⁴ The court established that Urgenda's action (acting in own capacity) was however admissible as the and not limited to the Dutch territory.⁴⁵ The court also established that since the emissions within the Dutch borders are also detrimental to people that are beyond Dutch borders, Urgenda can base their claims on such detriments.⁴⁶ Urgenda anchored its defence on a "sustainable society", claiming that the emissions are detrimental to the interests of future generations, and therefore Urgenda has standing to protect the members of this group.⁴⁷ Essentially, Urgenda established standing to represent the interests of both present persons and future persons residing in and outside of Netherlands.

The climate component revolved on the question of whether the Netherlands had an obligation to reduce greenhouse gas emissions as per the UNFCCC (which requires about 25-40 percent decrease of greenhouse gas emissions from Annex 1 Parties) or as per the EU's 20 percent target that required Netherlands to reach far lesser emission targets (total reduction of 14-17% in 2020) than those of the Annex

⁴⁴ *Urgenda* case para 2; Suryapratim and Woerdman 2016 *JENRL* 170.

⁴⁵ DCC article 3:303 establishes legal standing if the legal person has a right to bring the cause of action before a court of law. In *Urgenda* case, Urgenda qualified standing because it is a foundation that was protecting general interests as per the by-laws; Article 303 states that "sufficient interest needed to start a legal action, without sufficient interest no one has a right of action". Article 305a states that "collective actions (Class actions): (2) a foundation or association with full legal capacity that, according to its articles of association, has the objection to protect specific interests, may bring to court a legal claim that intends to protect similar interests of other persons. (2) A legal person filing a claim as meant in paragraph 1 is inadmissible if he, in the given circumstances, has made insufficient attempts to reach a settlement over its claim through consultations with the defendant. A period of two weeks after the defendant has received a request for such consultations, indicating what is claimed, shall in any event be sufficient to this end. (3) A legal claim as meant in paragraph 1 may be brought to court in order to force the defendant to disclose the judicial decision to the public, in a way as set by court and at the costs of the persons as pointed out by the court. It cannot be filed in order to obtain compensatory damages. (4) A legal action as meant in paragraph 1 cannot be based on specific behaviour as far as the person from its effect". Lambret and Itaure-Lima 2016 *Envtl L Rev* 60.

⁴⁶ Lambret and Itaure-Lima 2016 *Envtl L Rev* 60.

⁴⁷ The court regarded the term "sustainable society" as an inherent international aspect that is not restricted to the Netherlands thus Urgenda could partially base its claims on this aspect.

1 parties.⁴⁸ The court ruled that since the Netherlands is an Annex 1 Party, it must raise its level of ambition and meet the targets of the UNFCCC in the interests of present and future generations.⁴⁹ Under the duty of care component, the court made it clear that the state has a mandate to reduce emissions for in the interests of future generations.⁵⁰ Failure to do so amounts to the state's serious breach of the duty to care and such failure is deemed an unlawful act.

Notably, this case goes beyond domestic law as it also relies on international and regional instruments to protect the interests of present and succeeding generations.⁵¹ It provides lessons to South Africa on how domestic courts can mandate governments to comply with international treaties in order to mitigate climate change in the interests of the unborn. The court in *Urgenda* also referred to human rights as drivers of climate change mitigation as well as instruments to protect the interests of present and future generations.⁵² This case further reflects how the judiciary can obligate government to meet environmental targets thus subsequently safeguarding the interests of future generations.⁵³ It raises concerns over the 'slippery slope' effect of how 'ignored national climate change issues' may cause problems to neighbouring jurisdictions leading to international environmental crises which may have been prevented if states had met their obligations. The case also encourages judiciaries to impose orders on governments for them to meet environmental targets as the judiciary's role in climate change mitigation is increasingly becoming important.⁵⁴

⁴⁸ Lin 2015 *Climate Law* 69.

⁴⁹ The court founded its decision on the *Intergovernmental Panel on Climate Change* (hereafter IPCC) which predicts that a temperature rise over 2 degrees Celsius will result to dire irreversible climate change.

⁵⁰ Muyunda 2017 *TBLR* 363.

⁵¹ Ferreira 2016 *TEL* 334.

⁵² See Slobodian 2020 *Georgetown Envtl Law Review* 574.

⁵³ Abate *Climate Change and the Voiceless* 26.

⁵⁴ Bellavia 2016 *Denver Journal of International Law and Policy* 470; See also Abate *Climate Change and the Voiceless* 26.

4.2.3 *United States of America*

In the United States of America,⁵⁵ the *Juliana v United States of America*⁵⁶ case is relevant for this study. The case was filed against the USA federal government by 21 young people who petitioned against the government's constitutional violations and violations against the public trust doctrine.⁵⁷ Represented by a non-profit organisation (Our Children's Trust which represented the plaintiffs and future generations), the plaintiffs averred that the government contravened their climate change responsibility, and it also violated the environmental and fundamental rights of young people and generations to come.⁵⁸

The plaintiffs underscored that the federal government has been aware of the impacts of carbon dioxide pollution for about 50 years.⁵⁹ Since then, the federal government failed to act responsibly, and it deliberately compromised the interests of present and future generations. The plaintiffs state that the USA is a signatory to international environmental treaties, particularly the UNFCCC, therefore it bears the responsibility of reducing Greenhouse gas emissions so as to protect its citizens.⁶⁰ They further submit (amongst other submissions), that the White House Report on "Restoring the Quality of Our Environment" in 1965, the Environmental Protection Agency (EPA) in 1990 and the Congressional Office of Technology Assessment (OTA) in 1991, indicated that government would reduce the nation's greenhouse gas emissions for present generations and future generations, but the plans were never implemented.⁶¹

⁵⁵ Young people around the world, especially in the US, are bringing suits for themselves and in protection of the unborn e.g. *Reynolds v Florida*, 37 2018 CA 000819; *Held v State of Montana* 145 P.3d 995 (Mont 2006); *Chernaik v Brown* A159826 2011.

⁵⁶ *Juliana* case.

⁵⁷ Abate *Climate Change and the Voiceless* 46. From the above discussions, it can be noted that the protection of the environmental interests of future generations is intrinsically connected to the public trust doctrine. See details in chapter 1 and 3.

⁵⁸ Meyer and Gravet 2020 *ICLR* 8.

⁵⁹ *Juliana* case para 131 (document 1 filed on 8 December 2015).

⁶⁰ The plaintiffs quoted articles 2 and 3 of the UNFCCC.

⁶¹ Meyer and Gravet 2020 *ICLR* 8-18; *Juliana* case para 3 (document 1 filed on 8 December 2015).

The plaintiffs therefore relied on 42 US Code 4331, a congressional declaration of national environmental policy⁶² which states that the Federal Government has an obligation to "fulfil the responsibilities of each generation as a trustee of the environment for succeeding generations".⁶³ Since the Federal Government is among the trustees for natural resources as per 42 US Code 9607(f)(1), it is the government's responsibility to protect its public beneficiaries.⁶⁴ Violation of the public trust doctrine amounts to a violation of the rights of public trust beneficiaries under the Ninth Amendment.⁶⁵ These rights protect the interest and rights of present generations as well as posterity to natural resources. Against that backdrop, plaintiffs submitted that the most significant public trust resource is the country's life-sustaining climate system, which encompasses the atmosphere, waters, oceans, and biosphere.⁶⁶ Following numerous proceedings in lower courts, in June 2019 the Ninth Circuit Court heard the case and granted the defendants' petition for an interlocutory appeal. In January 2020 the case was dismissed on grounds of redressability and standing. While the matter was dismissed on technical grounds, it is still proceeding to *en banc* review. The value of this case lies in the sound arguments that other jurisdictions could learn from. The arguments of the young plaintiffs set an example, not only to South Africa but to litigants from other jurisdictions on how the interests of future generations could be protected through litigation.

The *Juliana* case shows efforts of plaintiffs through exhausting legal avenues, all done in a bid to protect the interests of future generations, hence showing the

⁶² 42 US Code 4331.

⁶³ 42 US Code 4331. "In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may — (1) fulfil the responsibilities of each generation as trustee of the environment for succeeding generations; this stipulation reinforces on the public trust concept." A concept that was described by Searle 1990 *SC L Rev* 898 as "state ownership of property held exclusively for the benefit of and use by the general public". See discussion of public trusteeship above.

⁶⁴ See 42 US Code 9607 (f)(1).

⁶⁵ Stein and Castermans 2017 *MJSDL* 318; Also see *Alec L v Jackson*, 863 F.Supp2d. 11 (D.D.C 2012).

⁶⁶ Blumm and Wood 2017 *AULR* 1-87.

importance of protecting the interests of the unborn. Despite the elongated process, it is crucial for other jurisdictions to learn lessons on how such matters must be administered and more importantly, how the public trust doctrine serves as a guardian of present and future generations. The *Juliana* case has clearly shown a way in which the USA government was held accountable for its environmental breaches and for their violation of the fundamental rights of citizens (both present and those to come), subsequently giving lessons to other governments. The plaintiffs advocated for a reconciliation of environmental law (in theory) and implementation - a common ill in many governments.

4.3 Summary

The chapter explored how the interests of future generations are being protected in some foreign jurisdictions (through constitutional provisions and legislation) and lessons that may be drawn from these cases. It explored foreign case law with the aim to see how the judiciary interprets and safeguards the interests of the unborn in foreign jurisdictions. The chapter discussed four countries, the Philippines, the Netherlands and the United States of America. These countries all exhibited unique aspects which varied from case to case. The *Oposa* case revealed how *locus standi* for future generations was established through the concept of intergenerational equity. Whilst the case was filed as a class suit, the judge further reiterated that the suit was filed in the common interest of the public therefore the suit was filed for the citizens of Philippines (both present and those yet to be born). The *Urgenda* case revealed how international law may be used to achieve environmental protection in the interest of future generations. Although domestic law was referred to, the Netherlands as a signatory to international environmental law, had to fulfil its international law commitments and implement environmental tasks by reducing carbon emissions. The *Juliana* case shows how government was sued for violation of the public trust doctrine, and it demonstrates the importance of protecting the interest of future generations. More importantly, the case reveals how the public trust doctrine serves as a guardian of present and future generations.

5 CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The study explored the extent to which South African law explicitly protects the environmental interests of future generations. In this mini-dissertation, the term "future generations", refers only to human generations¹ as those that are not alive at the time reference is made.² Future generations cannot be identified as a distinct group as the study determined that generations overlap, therefore, future generations cannot be identified in a chronological manner.³

The study first traced the historical development of the concept of the future generations, especially from the legal foundations such as the UDHR which made provision for "all members of the human family" thus including future generations.⁴ In the IEL context, the notion is traceable to the Stockholm Declaration which, in its preamble, calls governments to defend and improve the human environment for present and future generations.⁵ The study outlined the criticism of the application of the concept of future generations. Included in the criticism is the aspect of the uncertainty of future generations, the question of whether future generations have legal standing and if present generations have responsibilities towards future generations.⁶ The study established that while there is criticism regarding the legal standing of future generations, the interests of future generations can still be represented through PIL using interested parties such as NGOs or a commissioner for future generations.⁷

Having explored the conceptual foundations of the concept of future generations, the study investigated whether, and if so, how South African law protects the interests of future generations. From a constitutional stand point, it has been argued

¹ See chapter 1.1 above.

² See chapter 2.3 above.

³ See chapter 2.3 above.

⁴ See chapter 2.2 above.

⁵ See chapter 2.2 above.

⁶ See chapter 2.3 above.

⁷ See chapter 2.4.2 above.

that section 24 of the Constitution provides for the protection of future generations by the manner in which it imposes the obligation to protect the environment for the benefit of future generations, and also predicated the constitutional imperative on the need to promote sustainable development.⁸ Furthermore, it has been illustrated that section 24 can be construed through the lens of the public trust doctrine of which the state as the trustee has a duty of care.

While there is no explicit reference to "future generations" in case law, it has been observed that courts normally use the concept of sustainable development to implicitly safeguard the interests of future generations. For instance, in the *Fuel Retailers* case the Constitutional Court referred to the future generations but did not elaborate on the concept. However, one could argue that despite the lack of express mention and definition, the reference to sustainable development is an assurance that the interests of future generations are protected. More so, the *Thabametsi* case elucidates an intrinsic connection between sustainable development and the protection of the interests of future generations, as provided for in the Constitution and the NEMA.⁹ In essence, the principle of sustainable development occupies an important place in the discourse for the protection of the environment for the benefit of present and future generations.

Accordingly, the study investigated how South African private law perceives the concept of future generations.¹⁰ It is established that if the *nasciturus* fiction is used to protect the interests of the unborn under private law, it is possible that the environmental interests of future generations may also be protected under public law.¹¹ The non-existence of the "future generations" need not be a barrier that hinders the future generations from enjoying the protection of their interests.

Apart from legislation, insight was drawn from religious and African customary law on how South Africa regards the concept of future generations. Although the

⁸ See chapter 3.2 above.

⁹ See chapter 3 above.

¹⁰ See chapter 3.4 above.

¹¹ See chapter 3.4 above.

concept of future generations is interpreted differently in African customary law, Islamic law, Hindu law, Jewish law and Christianity, it has been established that through the concept of future generations, all the aforementioned religious persuasions uphold the concept of stewardship and protecting the environment or ecosystem for future generations.

To provide lessons and insights from foreign law, the study drew lessons on the protection of interests of future generations from other jurisdictions by highlighting a few foreign court decisions from which South Africa may learn. For instance, the *Oposa* case stood out on *locus standi* issues, where the court decided that *locus standi* of future generations was established from an intergenerational basis. Here, the court addressed that when a class suit is brought in the common interest of the public, that suit is brought on behalf of all citizens of the country, future generations included.¹² The *Urgenda* case is also important in that it highlights how international law may and must be used to protect the interest of the unborn. *In casu*, international law was used as a measure to compel the Dutch government to reduce emissions and mitigate the effects of climate change.¹³ The South African Constitutional Court in *Fuel Retailers* also used international law to interpret the concept of sustainable development, which is further allowed in terms of section 39(1) of the South African Constitution. The *Juliana* case shows the importance of protection of the interests of future generations and how the public trust doctrine may be used as a legal tool for securing the interests of future generations.¹⁴

5.2 Findings and recommendations

This study has established that the concept of future generations is not new in law and can be traced to the UDHR under IEL. However, the term future generations lacks concrete definition due to the contentious debates. In this respect, it has been noted that although there is criticism against the concept of future generations,

¹² See chapter 4.2.1 above.

¹³ See chapter 4.2.2 above.

¹⁴ See chapter 4.2.3 above.

future generations must and may still have their interests protected, in this case, their environmental interests.

Importantly, the study established that the South African Constitution and legislative framework, particularly NEMA, protects the interests of future generations to a greater extent although most of the provisions do not explicitly mention future generations. Notably, most of South Africa's environmental law protects the environmental interest of future generations through the notion of sustainable development. Considerably, the public trust doctrine appears to be vital and interlinked to the notion of future generations. Apart from constitutional provisions and legislation, linkages are drawn from other aspects in South African family law, such as private law, religious and African customary law, and how they seek to protect the interests of future generations.

Thus, it is recommended that there is need to ensure that the interests of future generations are protected using the constitutionally entrenched environmental right that includes the concept of "future generations" and "sustainable development" and that is also echoed in the NEMA preamble and principles. Also, the public interest doctrine, which is part of South African law, could be used to foster the protection of the interests of future generations. In this regard, litigants and courts must ensure that in their pleadings that the concept of future generations is pleaded and proclaimed expressly and not only *in obiter*. Lastly, it is further recommended that in order to adequately protect the environmental interests of future generations in South Africa, the judiciary must appoint *guardians ad litem* to represent future generations in environmental matters. This will ensure a progressive realisation of the protection of the interest of future generations as opposed to the mere mention of the concept in *obiter*, with limited precedent in law.

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