

Future proofing EU law – Does the European Union have a legal obligation to protect future generations?

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Abstract

This article analyses the normative landscape of future generations within the current body of European Union (EU) law, including the treaties, the EU Charter of Fundamental Rights, existing and potentially emerging general principles of EU law, as well as relevant international treaties and customary international law. The article argues that, even though there is currently no explicit legal obligation for EU institutions in the treaties founding the Union to respect and protect the long-term needs of future generations, several legal hooks exist in the sources of EU law that invite an intergenerationally conscious reading and reinterpretation of EU obligations and competences. Such a reinterpretation could justify, or even prompt, stronger protection of future generations' interests across all EU policies. Future-proofing EU law primarily depends on how EU institutions, including the Court of Justice of the European Union (CJEU), interpret intergenerational equity-related concepts already embedded in primary EU legislation. Additionally, the contours of EU obligations towards future generations could be influenced by the dynamically evolving rules of international law.

1 | INTRODUCTION

There is no provision in the current text of the treaties founding the European Union (EU) that would explicitly impose an obligation on EU institutions to protect the long-term needs of future generations. Under the conferred powers doctrine, the EU is entitled to enact legislation and adopt measures only with respect to those policy areas where the Member States explicitly conferred competence upon the EU in the founding treaties.¹ This does not mean, however, that concerns for future generations have no room, or normative hooks, in EU law. This article will show several elements in primary EU legislation that justify providing stronger and more effective protection of long-term interests in the exercise of the legislative powers of the EU. Additionally, recent developments in the evolving international legal landscape may shape the contours of the EU's legal obligations,

either as customary law binding on the Union or by contributing to the emergence of new general principles of EU law.

To date, the existing normative grounds have been largely dormant or underutilised by EU institutions or have been interpreted in a way as depriving them from strong normative 'teeth'. This article seeks to inform efforts to change this by identifying several textual footholds in primary EU legislation for intergenerational equity and exploring the normative avenues of injecting a longer-term perspective into EU obligations. It will argue that the current body of EU law provides ample justifications for, and its re-interpretation even warrants, affording more ambitious protection by EU institutions to the needs of future generations across all EU policies.

There is an acute need for the EU to use its powers to protect long-term interests. Science is clear about the grave risks that people around the globe will have to face, and future citizens of EU Member

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States are no exception. The long-term interests of future generations in a liveable planet, stable climate, prosperity and social stability are fundamentally jeopardised by the polycrisis triggered by interlinked problems of climate change, biodiversity loss and pollution.² These challenges are essentially intergenerational, as there is a rapidly closing window of opportunities in which present stakeholders are able to change the course of action to avoid cataclysmic harm to posterity.³ The EU should take efficient legal action against such risks if it aims to sustain its core values in the long run – the prosperity of the Member States and the stability of democracy and the rule of law.⁴

However, tackling such intergenerational conflicts is among the Achilles' heels of democratic decision-making,⁵ including within the EU. At a time when long-term interests are fundamentally at stake, future generations have no representation in EU decision-making. As a result, long-term interests are structurally discriminated against,⁶ as short-term preferences repeatedly override future needs and interests in numerous EU policies.⁷

In response to the lack of representation for future generations, some States have started to establish spokesperson institutions dedicated to raising awareness of long-term needs, with varying mandates and powers.⁸ Recently, there has been renewed interest in creating a representative for future generations at the United Nations (UN) level. In September 2024, the UN hosted the Summit of the Future, and adopted the Declaration on Future Generations, after which the Secretary General announced the appointment of a Special Envoy for the future.⁹ Such efforts have also reached the EU. Experts have long proposed several possible institutional mechanisms,¹⁰ and after several unsuccessful policy initiatives,¹¹ the tide seems to have turned in 2024. NGOs have been calling for a Future Generations Commissioner, an Interinstitutional Agreement safeguarding the rights of future generations and a future generations impact assessment procedure for quite some time.¹² These demands did not fall on deaf ears as soon after her re-election, President von der Leyen announced the appointment of a new Commissioner, whose portfolio explicitly includes intergenerational fairness.¹³ The mission of the Commissioner includes ensuring 'that decisions taken today do no harm to future generations'.¹⁴

The primary focus of this article is, however, not the possible institutional arrangements, but the substantive legal norms that could create an explicit obligation for the EU to consider and protect posterity's interests. There are several existing and emerging sources of EU law partly fuelled by developments in international law, which would justify, and arguably even compel, the EU to protect the needs of future generations in line with the idea of intergenerational equity. The long-term interests of later generations do not enjoy a marked protection in EU policies nor receive a decisive legal weight in EU law-making processes. However, this article will argue that, even without any amendment to the Treaties, primary EU legislation as they stand today contains various norms and concepts that would enable EU institutions to pay better regard to intergenerational interests by adopting protective measures against long-term risks and by factoring in longer-term thinking in the day-to-day balancing of competing interests. This article aims to identify and analyse how such

norms and concepts can be operationalised with a view to future-proofing EU law.

The analysis is structured as follows. Section 2 discusses the normative meaning of the principle of intergenerational equity and how EU institutions have been treating this principle to date. Section 3 maps the normative building blocks of intergenerational equity in EU law, that is, the elements of existing and emerging primary legislation that enable, or may even prompt, the EU to adopt legislative measures to safeguard long-term interests. Section 4 addresses the legal avenues in which these normative foundations could be mobilised by various EU institutions to future-proof EU law by providing stronger legal protection for the long-term needs and interests in the actions and policies of the EU. Section 5 concludes.

2 | THE PRINCIPLE OF INTERGENERATIONAL EQUITY AND ITS PRESENT STATUS IN EU LAW

Protecting the needs and interests of future generations is conceptually rooted in the principle of intergenerational equity (also called intergenerational fairness,¹⁵ or solidarity¹⁶), which is generally understood as a distributive principle¹⁷ that poses certain obligations for present generations towards respecting the long-term interests, needs¹⁸ and human rights¹⁹ of future generations. It is well accepted as a moral²⁰ or religious²¹ principle, and has entered the body of international law under Principle 2 of the 1972 Stockholm Declaration.²² Having been mentioned in the Brundtland Report,²³ and in the context of the right to development in the Rio Declaration,²⁴ intergenerational equity made its way into several international treaties²⁵ and a host of soft law documents.²⁶ It also 'incarnated'²⁷ into several neighbouring concepts, such as sustainable development or the rights of future generations. As part of its recent revival, the principle has been increasingly relied upon by domestic courts in climate litigation²⁸ and has now reached international courts in advisory proceedings.²⁹

Within EU law, intergenerational concerns and future generations are often referred to in non-binding passages, such as preambular references in environmental secondary legislation³⁰ or the European Green Deal, which mentions future generations only once among its key objectives.³¹ However, substantive provisions of key secondary legislation, such as the European Climate Law, remain conspicuously silent on future generations.

The Treaty on the Functioning of the European Union (TFEU) does not contain an express legal basis for the EU to adopt legislation specifically designed to protect the long-term needs of future generations as part of an EU 'future generations policy'. Nor does it acknowledge intergenerational equity to be an express objective of the Union, and until 2024, there was no dedicated spokesperson among EU institutions that could raise awareness of future interests at stake. An express EU 'policy for the future' would have close ties to many existing policies that are directly relevant to abating long-term risks and, thus, to preserving future interests, such as EU policies regarding environmental protection, agricultural policy, climate action

and digital transformation. To name but an obvious example, the Commission explicitly named the principle of intergenerational equity as the basis of its climate policy.³²

However, at present, EU institutions are legally not compelled to respect the needs of future generations in their legislative acts and other actions. At the same time, subsequent generations have emerged as a powerful rhetorical tool after the pandemic. The EU adopted the NextGeneration EU, a financial instrument aiding post-COVID recovery in the Member States, which provides funds for sector-specific expenditures benefitting future generations, such as health, innovation, education, climate action and digital transformation.³³ Moreover, political leaders of the EU have begun to expressly voice support for ratcheting up their ambition concerning the protection of future generations. President von der Leyen in the 2022 State of the Union Address stressed the importance of mainstreaming intergenerational solidarity across ‘every action that our Union takes’,³⁴ and even expressed a willingness to enshrine intergenerational equity in the Treaties.³⁵ Time will tell whether Member States will be willing to put the issue of a treaty revision on the table any time soon. In the meantime, the commissioner responsible for intergenerational fairness has been appointed, and the EU Commission has launched the process of drafting an Intergenerational Fairness Strategy.³⁶

Importantly, even in the absence of a treaty amendment, intergenerational equity could be better injected into EU law through the long-termist reinterpretation of several provisions that are already present in the primary sources of EU law. Identifying these legal hooks and determining their possible intergenerational dimensions are the main aims of the next section.

3 | LEGAL BUILDING BLOCKS OF PROTECTING FUTURE GENERATIONS IN THE SOURCES OF EU LAW

There are several building blocks of a more future-oriented exercise of the powers of EU institutions in full conformity with the Treaties as they stand today. This section will screen primary EU legislation (Section 3.1), such as the Treaty on the European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), the EU Charter of Fundamental Rights (Charter) and the general principles of EU law (Section 3.2), which are at the top of the norm hierarchy within EU law. This will be followed by obligations under relevant international treaties to which the EU is a party (Section 3.3) as well as obligations arising under customary international law (Section 3.4).

It will be argued that all these sources of EU law, at a minimum, give rise to a mandate, but arguably even pose an obligation for EU institutions to consider and push for more ambitious protection for long-term needs. Besides the obligations, the seeds of which are already present in the written rules of EU law, some obligations may emerge from the dynamically evolving body of intergenerational obligations under public international law and the constitutional traditions of Member States.

3.1 | The Treaties: setting clear objectives to protect future generations

The fundamental aims of the Union, as defined in the Treaty on the European Union, should be pursued by the Union by appropriate means commensurate with its competences.³⁷ The Treaties contain several concepts among the fundamental objectives, which pave the way for protecting posterity's long-term interests in EU law. Factual as well as legal developments in the last decades may warrant taking a fresh look at the Union's objectives by the Court of Justice of the European Union (CJEU or EU Courts) and affording a future-oriented reading of these aims.

Interpreting concepts of EU law in light of their dynamically evolving international legal context is supported by various rules of treaty interpretation. First, an intergenerationally conscious reading is often consistent with the ordinary meaning of the terms. For instance, solidarity between generations intuitively includes intergenerational equity as well. Second, under the principle of systematic interpretation, which is a rule of customary international law,³⁸ EU law must be interpreted in its wider legal context.³⁹ The EU must respect international law in the exercise of its powers, and in particular, rules of customary international law form part of the EU legal order,⁴⁰ and secondary EU legislation must respect EU obligations under international treaties to which the EU is a party.⁴¹ Consequently, secondary EU legislation must be interpreted in light of the relevant rules of international law.⁴² In addition, in so far as the Treaties contain generic terms, as is arguably the case with concepts such as ‘solidarity’ or ‘non-discrimination’, customary law rules of treaty interpretation provide that such terms should be interpreted in light of present-day circumstances, unless the drafters’ intention to the contrary can be clearly established.⁴³ Finally, in interpreting EU law, EU Courts also refer to the general principles common to the legal systems of the Member States,⁴⁴ and therefore, recent trends in constitutional law-making and adjudication in the Member States can have an impact on how EU Courts interpret concepts enshrined in primary EU legislation.

3.1.1 | Solidarity between generations

The most explicit reference in the Treaties to intergenerational equity can be found in the concept of ‘solidarity between the generations’, which is stipulated under article 3(3) of the TEU as one of the fundamental aims of the Union. Thus far, the CJEU has addressed intergenerational solidarity mostly in cases concerning the medical insurance market.⁴⁵ However, this language lends itself to another reading that refers to the broader concept of intergenerational solidarity and equity. As shown above, intergenerational equity is generally understood to require sustaining the well-being of future generations by preserving the natural foundations of human life. This includes an obligation not to restrict the options of posterity in satisfying their own needs,⁴⁶ and not to place a disproportionate burden on them to tackle systemic socio-environmental challenges by taking insufficient

measures in the present.⁴⁷ Such a reading is also underpinned by the mission letter for the Commissioner-designate responsible for Intergenerational Fairness, which explicitly acknowledges in connection with the goal of intergenerational solidarity that ‘the decisions we take today have long-term consequences for the next generations to come’.⁴⁸

Article 3(3) of the TEU, therefore, also arguably envisages striking a fair balance between short- and long-term interests. It is possible to interpret this provision as posing a duty for EU institutions across all EU policies not to sacrifice the long-term needs of later generations for the sake of present-day interests and thereby pursuing the goal of solidarity between generations across all EU policies.

3.1.2 | Solidarity and the wellbeing of the people: the fundamental values and aim of the EU

Furthermore, solidarity is also mentioned in article 2 of the TEU among the fundamental values of the EU. Bart and Bogdandy propose that solidarity in this provision is more than a symbolic declaration and in fact forms part of the ‘constitutional core’ of the EU legal order.⁴⁹ This understanding is confirmed by recent case-law, with the CJEU declaring that ‘the principle of solidarity, mentioned in article 2 TEU, (...) is itself one of the fundamental principles of EU law’.⁵⁰ A particular understanding of solidarity, as mentioned above, is called as ‘intergenerational solidarity’, which requires, among others, ‘ensuring equity among generations and protecting the integrity and sustainable use of the environment’.⁵¹

Based on such a reading, the solidarity principle is applicable to the intergenerational challenges of the climate and environmental crisis, given the close link between inter-generational solidarity and one of the components of the EU's aim, namely, promoting the well-being of the peoples of the Union.⁵² The CJEU has already deemed another component of that aim, namely peace, to be a general interest that is capable of trumping competing rights. In the case of *RT France*, the court found that the protection of peace allowed EU legislators to lawfully constrain competing fundamental rights, i.e. the freedom of expression of broadcasters, in cases of war propaganda.⁵³

This gives further support for the proposition that inter-generational solidarity, which serves the well-being of present and future peoples of the EU, could also be given special importance in EU law as a specific aspect of the fundamental values and the aim of the EU.

3.1.3 | Non-discrimination

A related concept lies in age-based discrimination, which has its roots on the one hand in article 3(3) of the TEU, committing the Union to fight discrimination, and, on the other hand, in the horizontal clause of article 10 of the TFEU, requiring mainstreaming non-discrimination, including that based on age, across all union policies. In the same vein, the CJEU has recognised the notion of equal treatment as a general

principle of EU law.⁵⁴ All these legal bases may justify taking EU measures to promote the protection of the long-term interests of posterity within EU policies.

To date, non-discrimination based on age has mostly been applied by the CJEU in employment-related cases.⁵⁵ However, there is certainly room for interpreting this concept to be responsive to the acute differences in the living conditions of people belonging to different age groups or generations. Anti-discrimination clauses are increasingly being used in domestic and international climate litigation as vehicles to demand protection for later generations.⁵⁶ The disparate adverse climate and environmental impacts that future generations will experience in their lifetimes can be legally framed either as age-based discrimination or as birth cohort discrimination.⁵⁷ Scientific studies attest that people belonging to younger cohorts will experience a manyfold increase in exposure to climate change-induced weather extremes compared to earlier birth cohorts. For instance, Thiery et al showed that a person born in 2020 will suffer six times more heat waves in a 2°C warmer world than a person born in 1960.⁵⁸

These marked differences between the living conditions and safety of older and younger generations within the EU could be legally framed as discrimination based on age, making a compelling case for reading the protection of future generations into the EU's fundamental objective of non-discrimination.

3.1.4 | Sustainable development

According to the Brundtland Report's famous definition, sustainable development is understood as a development that meets the needs of present generations without compromising the ability of future generations to meet their own needs.⁵⁹ As the language of the definition also clearly shows, protecting the interests of future generations is inherently embedded in the concept of sustainable development.

Sustainable development is the fundamental aim of the EU under article 3(3) of the TEU, which guides all EU policies. This may also be relevant when interpreting and applying other provisions of the Treaty.⁶⁰ Moreover, article 11 of the TFEU calls for integrating environmental protection measures into all areas of EU actions with a view to promoting sustainable development and, hence, to protect the interests of future generations. On the same conceptual basis, article 37 of the Charter of Fundamental Rights of the EU also refers to sustainable development, which will be analysed later in more detail.

As to its meaning, scholars suggest that the goal of sustainable development mandates a balancing duty for EU lawmakers, as it requires that EU policies be designed and implemented in a way that serves the ultimate aim of achieving a balance between a competitive market economy and a high level of environmental protection.⁶¹

3.1.5 | Protection of human rights

The protection of human rights is also one of the fundamental goals of the EU under article 3(3) of the TEU. Human rights are guaranteed

by the EU under the EU Charter and as a general principle of EU law, as recognised by the European Convention on Human Rights (ECHR) and the constitutions of the Member States. Before delving into these distinct sources of human rights obligations in the coming sections, some general remarks are made on the relevance of human rights safeguards to protect future generations.

Although future generations are not explicitly recognised as rights holders under human rights law, human rights guarantees nevertheless serve as important legal anchors for protecting their long-term interests. First of all, human rights guarantees have no express temporal limitations under major international human rights treaties,⁶² including the ECHR. This implies that the full enjoyment of human rights guaranteed to EU citizens cannot be dependent on the date of birth of a given individual.⁶³ The TEU and TFEU have also been concluded for an indefinite period of time, with the ultimate goal of promoting the living conditions and an environmentally sustainable form of economic and social progress of the 'people' of the Member States—without any temporal limitation.⁶⁴ Therefore, promoting the interests of future peoples of EU Member States is inherently consistent with the underlying rationale of the Treaties.

Second, socio-ecological crises, together with climate change, pose a clear and unequivocal threat to the full enjoyment of human rights, as repeatedly confirmed by the UN human rights organs.⁶⁵ The UN Human Rights Committee expressly stressed that '[e]nvironmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life'.⁶⁶ The adverse effects of climate change will not be felt only by subsequent generations, as they have already severely impacted the human rights of present-day rights holders, even in Europe.

Third, there is an emerging consensus among legal experts that human rights obligations should be interpreted with a view to future generations. The recently adopted Maastricht Principles on the Human Rights of Future Generations confirm, as a matter of principle, that future generations who will inherit the Earth 'are legally entitled to human rights' based on various international and domestic legal sources.⁶⁷ The expert drawn-up Strasbourg Principles on International Environmental Human Rights Law also stress that intergenerational equity is one of the factors that courts ought to consider in assessing whether interference with basic human rights is necessary in a democratic society, and therefore, could be deemed lawful.⁶⁸ Several constitutions of EU Member States also posit future generations as a legal qualifier of the right to a healthy environment.⁶⁹

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

3.1.6 | The protection of the rights of the child

Under article 3 of the TEU, the Union also has the fundamental aim of protecting the rights of the child. Children form a link between the

present-day generation and those yet to come; however, children and future generations constitute distinct legal categories despite the obvious synergies and overlaps between their needs and interests.⁷⁰ Due to children's proximity in time to future generations, children have a distinguished role to play in raising awareness about and demanding protection against long-term risks.⁷¹ The rights of the child are also recognised by the Charter of Fundamental Rights of the EU, which will be examined in more detail in Section 3.2.2.

3.2 | Duties towards future generations in the EU Charter of Fundamental Rights

The above goals of the Union, if reinterpreted with a view to recent normative and factual developments, would justify taking measures by the EU within its existing powers to better cater to the needs of future generations. These goals, in and of themselves, however, only enable but do not compel such actions. However, one may find legal hooks for crystallising a duty to that effect in primary EU legislation, such as the Charter.

3.2.1 | General remarks

The Charter of the Fundamental Rights of the EU contains the most direct and express reference to future generations on the level of primary EU legislation. Its Preamble unequivocally states that the rights guaranteed in the Charter 'entail responsibilities and duties with regard to other persons, to the human community and to future generations'. The Charter is binding upon EU institutions and guarantees a number of rights, such as the right to life, respect for family life, and property, all of which could be relevant in the context of protecting posterity's needs. The right to life enshrined under article 2 has obvious implications for EU measures to protect individuals in its territory against the harmful impacts of climate change.⁷² In addition, article 21 of the Charter prohibits any form of discrimination based on any ground, including that of age, the relevance of which has been addressed above in the climate context.

Disappointingly, the CJEU has, thus far, not clarified the scope of protection that the rights under the Charter entail for present and future generations in the face of the climate crisis. The *Armando Carvalho v. European Parliament and the Council of the European Union* case would have provided an apt opportunity to discuss the content of EU institutions' human rights obligations under EU law, however, the CJEU maintained the strict standing requirement of the *Plaumann* test, and therefore, the case could not reach the merits discussion.⁷³

The Charter has several limitations. First, it does not create any new tasks for the EU nor does it modify the content of existing obligations under the Treaties, due to the expressly recognised limitations of its scope as set out in article 6 of the TEU and article 52 (2) of the Charter.⁷⁴ Furthermore, Charter rights that correspond to those recognised under the ECHR shall have the same scope as guaranteed by the Convention, as long as EU law does not explicitly provide more

extensive protection.⁷⁵ In the absence of a standalone environmental or climate right in the ECHR, long-term environmental interests are protected through the right to life and private life. The environmental dimension of these provisions are, however, construed rather narrowly by the ECtHR, which caps the legal potential of any reinterpretation of the principle of intergenerational equity rights under the Charter.

Moreover, the CJEU has also been reluctant to discern positive obligations for States or EU institutions under the Charter. This means that rights under the Charter mainly function as 'shields' protecting individuals from State interference, rather than 'swords' triggering protective steps to realise relevant human rights. In contrast, the ECtHR has been quite active in developing environmental obligations for States under the doctrine of positive obligations in environmental cases.⁷⁶ The CJEU, however, has only mandated taking such protective measures in a handful of cases, typically in the context of data protection.⁷⁷ Nevertheless, these decisions do suggest that EU institutions could be required to take positive action to safeguard the freedom rights guaranteed under the Charter within the scope of application of EU law.

Furthermore, under the proportionality requirement of article 52(1) of the Charter any restriction on the substantive rights of the Charter may only be lawful to the extent that they are necessary and proportionate to protect the general interest. In the final analysis, despite all the limitations, the Charter sets forth an unequivocal recognition that EU institutions and Member States do owe obligations towards posterity.

3.2.2 | Protection of the rights of the child

Although children and future generations are doctrinally distinct categories,⁷⁸ children living today are important proxies for the interests of the generations yet to come.⁷⁹ Unsurprisingly, minors are also a dominant type of claimants in climate lawsuits seeking to enforce ambitious climate protection for their future.⁸⁰ The rights of the child can serve as a special legal avenue to discern future-oriented obligations for EU institutions.

Under the Charter, children have the right to protection as necessary for their well-being,⁸¹ and in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.⁸² The primacy of the best interest of children has relevance for EU law, reaching far beyond the Charter, as it may function as 'the prism through which the provisions of EU law must be read'.⁸³ This concept is also enshrined under the UN Convention on the Rights of the Child (UNCRC),⁸⁴ which is ratified by all EU Member States. As reaffirmed by the EU Council itself, the principles and standards of the UNCRC 'must [...] guide EU policies and actions, which have an impact on the rights of the child'.⁸⁵

For present purposes, it is of special importance that the UNCRC specifically requires long-term thinking and taking action against long-term risks to protect children's rights. According to the UN Committee

on the Rights of the Child, in determining the best interests of the child, 'the possibility of future risk and harm' should also be taken into account.⁸⁶ General Comment No. 26 also explicitly recognises the principle of intergenerational equity and stresses that 'States bear the responsibility for foreseeable environment-related threats arising as a result of their acts or omissions now, the full implications of which may not manifest for years or even decades'.⁸⁷

Reading these together with the text of the Charter, strong arguments can be made that EU institutions are required to assess the long-term impacts of every EU action that may affect climate and environmental resources in the future, as these are the preconditions of the well-being of children.

3.2.3 | Principle of sustainable development

Another important textual foothold for intergenerational equity concerns in the Charter lies in article 37 on sustainable development. The provision specifically refers to the 'principle' of sustainable development, which was deliberately not couched as a human right, and therefore does not give rise to direct claims for positive action by the Union's institutions or Member States.⁸⁸ It nevertheless mainstreams the idea of protecting future generations across existing EU policies. The CJEU, building on the opinions of Advocate Generals,⁸⁹ deems article 37 as an interpretative tool, which may inform the interpretation of other EU norms.⁹⁰ Furthermore, article 37 is invoked in the balancing exercise whenever the CJEU has to evaluate whether Member States have unduly interfered with the four economic freedoms of the EU.⁹¹ Given that the needs of future generations are embedded in the concept of sustainable development, article 37 can also adjust the balance between competing long-term and short-term interests. While unable to stipulate a standalone obligation for EU institutions to protect long-term interests, the principle of sustainable development could nevertheless justify a more future-oriented reading of the existing obligations of EU institutions.

3.3 | General principles of EU law

General principles of EU law stand as a distinct source of primary EU legislation, enjoying the same ranking in the hierarchy of norms as the Treaties. Article 6 of the TEU specifically affirms that fundamental rights, as guaranteed by the ECHR and as they result from constitutional traditions common to Member States, shall constitute the general principles of the Union's law. There is no established catalogue of these principles; hence, their content, scope and development depend on the interpretation of the CJEU. Two existing general principles of EU law will be examined below, which support preserving long-term interests (Section 3.3.1). In addition, there are two further arguably emerging new general principles of EU law, which could provide important leverage points to future-proofing EU law should the Court be willing to announce such new general principles (Section 3.3.2).

3.3.1 | Relevant existing general principles: the precautionary principle and the prohibition of age-based discrimination

The precautionary principle

From the already announced general principles in the CJEU case-law, the precautionary principle stands out as an important normative tool that allows taking action to prevent future risks. Article 192 of the TFEU enshrines the precautionary principle as part of the EU's environmental policy. The principle is interpreted as a matter of EU law that 'where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent'.⁹²

The scope of application of the precautionary principle is much wider than that of EU environmental policy. This is confirmed by the position of the Commission⁹³ and the CJEU, which elevated the precautionary principle to become an autonomous general principle of EU law, which should be factored into other policies as well.⁹⁴ As the Commission itself stressed, the principle 'also concerns the longer run and the well-being of future generations'.⁹⁵ Indeed, the precautionary principle is inherently future-oriented. It also allows the consideration of the potential costs of inaction in the long term.⁹⁶ In a strong reading, the principle would prompt EU institutions to take protective action against future risks, amounting to a transformative change in the so far presentist governance scheme.

Prohibition of discrimination based on age

The CJEU announced that it deems the prohibition of age-based discrimination a general principle of EU law.⁹⁷ Discrimination occurs either when individuals in different situations are treated equally or when individuals in comparable situations are treated differently. Discrimination is unlawful even if it is indirect, meaning that discriminatory treatment is not committed on purpose but imposes a disparate impact on certain individuals compared to similar individuals. As shown above, current minors and later generations will have to endure unprecedented and significantly harsher living conditions in adulthood than what current adults experience in their lifetimes. In essence, this may satisfy the legal requirements of indirect discrimination of EU citizens based on their age or birth cohort.

The general principle of non-discrimination carries great legal potential to articulate new obligations for EU institutions vis-à-vis future generations. In *Chatzi*, the CJEU relied on the equal treatment principle to interpret a directive in a way that requires Member States to provide guarantees of non-discrimination that were not listed in the respective directive.⁹⁸ This shows that age-based discrimination could be used as a source of standalone obligations for EU institutions to prevent the discriminatory treatment of future generations.

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

The CJEU can declare a new general principle of EU law if it identifies an emerging constitutional guarantee shared among several Member States. The CJEU has found such a common legal tradition among Member States and established a general principle when a legal concept repeatedly occurred in several Member States, even if the scope and legal content of that concept have been slightly different in each country.⁹⁹

There are two emerging trends in the constitutional traditions of Member States that could satisfy the above test and, therefore, may emerge as new general principles of EU law, posing an autonomous obligation under EU law to protect the needs of future generations. Declaring a new general principle is a prerogative of the CJEU. As the forthcoming sections will contend, several arguments can be made for recognising two new general principles of EU law, namely, the principle of intergenerational equity and the right to a healthy environment.

Intergenerational equity as an emerging constitutional tradition in Europe

The CJEU could clarify that the principle of intergenerational equity constitutes a general principle of EU law on the basis that it is an emerging constitutional guarantee shared among many Member States. A growing number of States have included future generations in their constitution. As of 2022, 41% of all constitutions are listed as containing provisions on future generations.¹⁰⁰ This ratio is even higher in Europe, where more than 50% of EU Member States mention future generations in some form in their constitutions, including Belgium, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Slovakia and Sweden.¹⁰¹ Relevant provisions may range from explicit references to intergenerational solidarity in substantive or preambular provisions to indirect references, such as enshrining the concept of sustainable development,¹⁰² which could be deemed as an emanation or 'incarnation'¹⁰³ of the idea of inter-generational equity. Even in Member States where the constitution does not mention future generations, courts often interpret other provisions in a way that protects posterity's interests in the face of future threats.¹⁰⁴

In sum, the principle of intergenerational equity has been judicially enforced by domestic courts in a growing number of jurisdictions, and thus, States are legally bound to pay due regard to the interests of subsequent generations while adopting measures with long-term impacts. In other words, they are prohibited from arbitrarily harming the needs of future generations.¹⁰⁵ These developments in national laws and jurisprudence may justify declaring intergenerational equity a general principle of EU law. In such a case, Member States and EU institutions would have a new standalone obligation to duly consider and protect their interests in their legislative acts.

The right to a healthy environment in Europe

Since the 1990s, there has been a sweeping trend in national constitutions to enshrine human rights to a healthy environment. In 2022, the UN General Assembly recognised the right to a healthy environment as a human right.¹⁰⁶ In the EU, the majority of Member States, namely 15 countries, recognise the right as a constitutional right.¹⁰⁷ Despite slight variations in the language of such declarations, they signify a clear trend in the constitutional traditions of Member States in that individuals are afforded a standalone right to sustain a functioning and healthy natural environment. This may provide a sufficient basis for the CJEU to declare the right to a healthy environment as a general principle of EU law.

As a separate legal avenue, the right to a healthy environment could also become a general principle of EU law if efforts to adopt a protocol enshrining this right within the Council of Europe's system bear fruit. At present, the ECHR is formally not binding on the EU, and is currently silent on environmental or climate protection and does not contain any reference to future generations. In recent years, there have been renewed efforts to amend the ECHR. The Parliamentary Assembly of the Council of Europe called upon the Council of Europe's Member States to adopt a protocol to the ECHR, recognising a standalone right to a healthy environment.¹⁰⁸ The draft protocol, endorsed by the Parliamentary Assembly, even refers to a 'transgenerational responsibility, equity and solidarity' explicitly and speaks of 'the right of subsequent generations to live in a safe, clean, healthy and sustainable environment'.¹⁰⁹ The Council of Ministers, however, has thus far only set up a drafting group to study the feasibility of devising an instrument (or a series of instruments) that recognises the right to a healthy environment in Europe.¹¹⁰ Currently, several legal instruments are considered options for stipulating the right.¹¹¹

It remains to be seen whether the Council of Europe Member States will recognise the right by adopting a protocol to the ECHR and whether they will indeed refer to intergenerational equity as part of the right's normative content. Should they evade recognition, future-oriented State obligations may be articulated in climate litigation. Interpreting the ECHR as part of their domestic laws, Dutch courts, for instance, found that adopting unambitious GHG mitigation measures in the present violates the right to life and the right to private life even though the harmful effects of such policies may materialise 'only in decades from now'.¹¹²

Even more importantly, the ECtHR also emphasised in the 'importance of intergenerational burden-sharing' in the *KlimaSeniorinnen* case, which formed the cornerstone of the court's assessment.¹¹³ It even went on to impose an obligation for Contracting Parties that 'immediate action needs to be taken and adequate intermediate reduction goals must be set for the period leading to net neutrality' in order to 'avoid a disproportionate burden on future generations'.¹¹⁴ Although the ECtHR found that Contracting Parties owe their obligations under the Convention to those currently alive, who fall within their jurisdiction, it also stressed that 'the intergenerational perspective underscores the risk inherent in the relevant political decision-making processes, namely that short-term interests and concerns may come to prevail over, and at the expense of, pressing needs for

sustainable policy-making, rendering that risk particularly serious and adding justification for the possibility of judicial review'.¹¹⁵ Such a 'distinct representational disadvantage' of future generations was also a legally decisive argument for the Court to find climate litigation claims justiciable.¹¹⁶

3.4 | International treaties to which the EU is a party

International treaties to which the EU is a party constitute an integral part of EU law. In the hierarchy of norms, they are situated below primary EU legislation and above secondary legislation. The EU is a signatory to a range of international conventions, where there is an express obligation for the EU to consider the long-term implications of its actions, with which secondary EU legislation must comply.

First, the EU is a party to both the 1992 UN Framework Convention on Climate Change (UNFCCC) and the 2015 Paris Agreement.¹¹⁷ Both treaties enshrine intergenerational equity. The preamble and article 3(1) of the UNFCCC refer to this concept among the key principles of the climate change regime, whereas the Paris Agreement references equity in several normative provisions.¹¹⁸ Even though the provisions on intergenerational equity are rather vaguely couched in these treaties, the EU Commission itself deems the principle of intergenerational equity to impose normative obligations on the EU to set ambitious climate action measures.¹¹⁹ However, what follows from this obligation is unclear. The Commission considers its current 55% mitigation target to be compliant with intergenerational equity. However, in the view of an NGO, the current trajectory will not guard against future harmful climate impacts and therefore calls for increasing the ambition level of the EU's mitigation efforts to at least –65% gross emission reductions by 2030.¹²⁰

Second, the EU is a party to the 1992 UN Convention on Biological Diversity (CBD).¹²¹ The Convention mentions future generations in the preamble and in the concept of sustainable use, which is a central obligation under the CBD. The EU Commission also recognises in the EU Biodiversity Strategy that protecting biodiversity 'will ensure the wellbeing and economic prosperity of present and future generations' in the Union.¹²²

Third, the EU is a party to the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).¹²³ Its preamble recognises that every person 'has the duty, both individually, and in association with others, to protect and improve the environment for the benefit of present and future generations'. Article 1 sets as the objective of that treaty to 'contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being'. For this purpose, each party should guarantee the basic pillars of environmental democracy, such as the rights of access to information, public participation in decision-making, and access to justice in environmental matters. Some even argue that the Aarhus Convention may potentially help the CJEU justify circumventing the limitations of standing

rights under article 263(4) of the TFEU to allow environmental NGOs to challenge the validity of insufficient climate legislation of the EU as an exceptional case.¹²⁴

3.5 | Customary international law

As an international organisation, the EU is a subject of international law and, therefore, must also respect customary international law in the exercise of its regulatory powers.¹²⁵ The content and scope of customary law obligations vis-à-vis future generations in the context of climate change are currently debated before the International Court of Justice (ICJ or Court) in the pending advisory proceedings.¹²⁶ Two questions in the request for an advisory opinion specifically mention future generations. The Court is asked to clarify, first, the scope and content of States' due diligence obligations under customary international law and various treaties to protect the environment and climate for 'present and future generations', and second, the legal consequences for 'peoples and individuals of the present and future generations'¹²⁷ arising from a breach of those duties.

Legal scholars have long assumed the applicability of States' due diligence obligation in the climate change context.¹²⁸ However, the exact contours and normative content of this obligation remain uncertain. The ICJ has yet to clarify the temporal scope, especially whether it extends to future generations, as was suggested by Hungary in the *Gabčíkovo-Nagymaros Project* case.¹²⁹ If the forthcoming Climate Change Advisory Opinion addresses these issues directly, it could finally clarify any duties that subjects of international law, including the EU, owe to future generations under customary international law.¹³⁰

4 | LEGAL AVENUES AND AGENTS OF CHANGE TOWARDS FUTURE-PROOFING EU LAW

The previous section showed that there are numerous possible legal building blocks of future-proofing EU law, either in the form of express references in the Treaties or as potentially emerging new sources of EU law. The most explicit long-termist turn in EU legislation would likely require an amendment to the Treaties, enshrining intergenerational equity as an explicit EU objective with corresponding powers and responsibilities for EU institutions. Yet, even short of such an amendment, there is still considerable untapped potential in the to date underutilised references in EU law to inject a future-oriented perspective into EU obligations.

This section will map legal avenues for inducing such a change that are currently available under the Treaties. Several EU institutions would have it in their current powers to consider the effects imposed on future generations and respond to long-term risks in discharging their mandates. More specifically, a more pronounced and explicit protection of longer-term interests could be triggered either by the co-legislatures, the European Parliament and the Council of

the European Union (Council), or by the EU Commission. A fourth agent for change may be the CJEU, through its judicial (re)interpretation. Lastly, in exceptional cases, international law developments outside the EU may also trigger changes in the content of EU obligations.

4.1 | The role of the EU Parliament, the Council and the Commission

Co-legislators may start adopting secondary EU legislations that pay heightened regard to future interests, compared to the current relaxed protection, based on the several objectives of the Union already listed in the Treaties that clearly put intergenerational concerns within the scope of EU action. Highlighting the deeply embedded intergenerational dimensions of several fundamental aims of the Union, as proposed above with a focus on intergenerational equity, can have significant practical implications. First of all, it is the established practice of the CJEU in interpreting the Treaties in light of the objectives set forth in the Treaty.¹³¹ The substantive provisions of the TEU and TFEU are 'not an end in themselves, are only means for attaining those objectives'.¹³² As a result, co-legislators may decide to act upon a more future-conscious reading of the Union's fundamental aims, and therefore, to enact EU legislation that is responsive to long-term threats and risks within various existing EU policies.

The precautionary principle, as enshrined in the Treaties, can provide a strong normative foundation for the co-legislatures to justify their new, future-conscious approach towards creating duties. This principle could be read as obliging EU institutions to act upon the risks of adverse effects on the environment or health, even if our scientific understanding of the problem is not yet fully complete. The precautionary principle is a general principle of EU law and hence is not limited to the scope of environmental policy. This means that EU institutions could exercise their existing powers to take measures against long-term climate and environmental risks by ratcheting up the level of protection afforded to long-term interests in various policy settings, such as environmental, climate, agricultural, or fisheries policy.

An additional pathway for EU legislators to change course lies in adopting a non-legislative act detailing the forms and legal content of the protection afforded to future generations. The inescapable vagueness of the rights and interests of future generations highlights the importance of having clear statutory duties to respect the future.¹³³ Such duties could be listed in secondary EU legislation or non-legislative acts, and may create institutional, procedural, or substantive guarantees to that effect. For instance, EU institutions may adopt inter-institutional agreements, as non-legislative acts, focusing on the protection of long-term interests or on the procedures that ensure paying due regard for future risks and interests as part of the impact assessment procedures.¹³⁴

In addition, under the so-called flexibility clause of article 352 of the TFEU, it is possible to adopt EU legislation even if the Treaties do not confer explicit competence on the EU in a certain respect, provided that the respective legislation is necessary to attain one of the

Union's objectives. Despite the current lack of an explicit competence of the EU for 'a future generations policy', as opposed to specific powers conferred on the EU in the Treaties with regard to many areas, the flexibility clause may enable the adoption of legislation to protect future generations. In exceptional cases, the flexibility clause can also be used to create an agency,¹³⁵ as was the case of the Fundamental Rights Agency (FRA), which was set up to help achieve one of the Community's objectives, namely, the protection of human rights.¹³⁶ A new institution, however, is not strictly necessary to afford more marked protection to posterity, as the mandate of existing institutions could also be amended, for instance, that of FRA. Nevertheless, the flexibility clause could exceptionally be used to adopt EU legislation to promote the needs and interests of future generations in the EU by a dedicated institution or a catalogue of substantive safeguards.

Turning now to the role of the Commission, it may steer the EU towards longer-term protection goals through its mandate to propose new legislation. The EU Commission, for instance, has a mandate to take into account scientific data in proposing legislation affecting the internal market under article 114(3) of the TFEU, and setting the EU's environmental policy under article 191(3) of the TFEU. These provisions, therefore, enable the Commission to act on the growing body of scientific evidence that points to the long-term harmful repercussions created by the inaction of the current generation. The Commission also has an express duty to aim for a high level of protection in making legislative proposals concerning the internal market that affect health, safety and environmental protection.¹³⁷

Moreover, under the EU Commission's Better Law Making Initiative,¹³⁸ the Commission should conduct an impact assessment to evaluate the environmental and social impacts of legislative proposals, the results of which should be subjected to quality checks by the Regulatory Scrutiny Board.¹³⁹ The European Climate Law further specifically obliges the Commission to identify whether a legislative proposal is consistent with the 2050 climate-neutrality target set by the Regulation.¹⁴⁰ The long-term adverse impacts and processes identified in these impact assessment processes could be considered by the Commission in proposing new legislation.

Furthermore, strategic foresight, which the Commission treats as a priority, though currently is not compulsory, seeks to embed future insights into EU policymaking.¹⁴¹ Such activities have thus far included an EU-wide Foresight Network consisting of 'Ministers for the Future' from all Member States. Experts have already argued that strategic foresight could also be utilised to better articulate the needs of future generations in the EU.¹⁴²

4.2 | The role of EU Courts

The CJEU could also exercise important leverage for future-proofing EU law. Necessary changes in the prevailing canon of interpretation would pertain to the Charter and general principles of EU law.

The Charter, which acknowledges as a matter of principle that human rights pose correlative obligations for EU institutions and

States vis-à-vis future generations, carries significant untapped legal potential. Several rights could be directly relevant to preserving the long-term well-being and prosperity of future generations, should the CJEU be willing to mandate positive obligations under these rights. By doing so, the EU judiciary could play a decisive role in future-proofing EU law. So far, however, the Charter has been strikingly underutilised by both domestic and EU courts.¹⁴³ The CJEU did not invoke the Charter to justify imposing obligations on States under EU legislation, even when the Advocate General explicitly pointed out clear connections between Charter rights and State obligations under specific EU legislation.¹⁴⁴ Nevertheless, a turn in the CJEU's approach to requiring positive obligations is doctrinally possible. Should the CJEU be willing to do so, it could require adopting EU legislation to protect posterity's needs under existing human rights guarantees.

Another way of future-oriented judicial intervention could be based on the principle of proportionality under the Charter. This could also become an effective legal tool to prevent short-term interests from overriding long-term protection goals in times of inevitable conflict in the context of restricting the applicable rights of the Charter. If the CJEU develops more future-oriented dimensions to certain rights under the Charter to consider the interests of future generations, the proportionality requirement would be an essential tool in balancing competing short-term and long-term interests.¹⁴⁵ This could justify finding short-termist policies disproportionate, and thus, unlawful under the Charter. However, the reach of rights-based litigation for protecting future interests may be limited before EU courts owing to strict rules on standing.¹⁴⁶

Besides developing positive obligations for EU institutions and Member States under the Charter, it could also declare new general principles of EU law, such as intergenerational equity or the right to a healthy environment, based on emerging trends in national constitutional laws to protect future generations.

Finally, the change in the normative landscape may also come from outside EU institutions. The international law of obligations towards posterity is rapidly developing, which may affect the scope of obligations for the Union. The upcoming Advisory Opinion of the ICJ may have an influence on how the rights of future generations will develop at the EU level. Moreover, in case the ECHR is amended with a standalone right to a healthy environment, such a normative development may also tip the scale in favour of more strictly protecting long-term environmental interests by the ECtHR in case of a conflict with competing economic and industrial interests.¹⁴⁷ The right's recognition in the ECHR's system will have an important knock-on effect on the obligations of the EU, as it would stipulate a new general principle of EU law.

5 | CONCLUSION

This article has traced the normative foundations and potential legal pathways for steering the EU towards a more future-conscious path within the existing structure of the Treaties. It argued that based on several aims of the Union and the existing future-oriented concepts

built-in the primary legislation, EU institutions have ample room and normative justifications for using existing EU competences to better safeguard the interests of future generations. The EU arguably even has an obligation to do so; only such a reading of applicable sources of EU law has thus far not been authoritatively articulated by the CJEU nor did co-legislators assume such a protective role over long-term interests in the past. Yet, nothing prohibits EU institutions from reinterpreting existing sources of EU law in such a way. Indeed, the new factual and legal realities of the triple planetary crisis may call for such an intergenerationally conscious (re)reading of EU obligations.

Such a reinterpretation flows, first and foremost, from the precautionary principle, which is an already recognised general principle of EU law. A strong conception of the principle would not only permit but also require ambitious protective measures against risks based on scientific indications. Moreover, the rights of the child under the Charter are now interpreted by the UNCRC as including the principle of intergenerational equity, whose interpretation is authoritative for EU institutions and hence should guide EU action as a matter of primary legislation. Finally, emerging general principles of EU law, including the right to environment and inter-generational equity, together with any possibly emerging customary law obligation towards future generations, only provide further support for such a new understanding of EU rules.

Committing the EU to more ambitious protection for the long-term needs of later generations would set the priorities straight for the Union at a time when it finds itself under fire from all directions. Green NGOs criticise it for not doing enough to tackle environmental risks and future climate hazards,¹⁴⁸ while EU measures that seek to deliver on the Union's net-zero transition pledge are often challenged by mass protests.¹⁴⁹ The appointment of a new EU Commissioner responsible for inter-generational fairness is a crucial first step in the right direction, which will hopefully also trigger the utilisation of the whole palette of normative tools overviewed above for future-proofing EU law.

Acknowledging the normative foundations of the inter-generational equity principle in EU law could shape both new legislation and the judicial interpretation of existing EU obligations and powers across all EU policies. It is time to articulate clear legal obligations for EU decision-makers at all levels to look up and ahead in this 'critical decade'¹⁵⁰ when our present-day actions (and omissions) will fundamentally shape the future of all subsequent generations. Doing so would deeply resonate with the very purpose of the European project, which stemmed from the idea of ensuring lasting peace and prosperity in Europe, a goal that at its core embodies concern for the well-being of future generations.

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