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Protecting the Rights of Future Generations are constitutional mechanisms an answer?

The nature of the problem

In recent decades, concern has been mounting over whether democratic governments have the necessary incentives and capabilities to protect the long-term interests of their citizens¹, particularly their future citizens. Both the academic literature on governance and everyday political discourse are replete with talk of ‘short-termism’, ‘political myopia’, ‘policy short-sightedness’, a ‘presentist bias’ and weak ‘anticipatory governance’². Such concerns have been intensified by the growing capacity of humanity to cause ‘severe, pervasive

and irreversible’ damage to critical biophysical systems at a planetary level, for example via anthropogenic climate change³. But flawed environmental stewardship is not the only problem. There is also much anxiety in many democracies about poor long-term fiscal management, inadequate investment in public infrastructure, insufficient planning for the consequences of an ageing population, and deficiencies with respect to early

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intervention programmes and emergency preparedness, as well as unsatisfactory management of ethnic, religious and socio-economic cleavages. In short, there are many serious threats to fiscal, social and environmental sustainability.

There are multiple reasons why long-term interests are often poorly protected. In the case of global public goods, such as the atmosphere and the oceans, effective long-term protection requires coordinated international action. But multilateral cooperation is frequently thwarted by weak international institutions, the doctrine of territorial sovereignty, national self-interest, and deep ideological and geopolitical divisions (Ward, 2011). In short, spatial and inter-sectoral conflicts have slowed the adoption of effective policy responses.

But efforts to tackle policy problems with long time horizons, whether global or local in scale, face other challenges. The most formidable of these are distributional conflicts of an *inter-temporal* nature: that is, conflicts regarding the proper allocation of benefits and burdens over extended periods of time. Such conflicts typically involve two distinct, yet overlapping, trade-offs: a clash between the interests of current and future citizens, and a clash between the interests of citizens' current selves and their future selves. If policy makers prioritise short-term interests over long-term interests, there is an obvious risk that those living in the future will be worse off in some way. How, then, might long-term interests, and especially the interests of future generations, be properly protected?

Asymmetries in the democratic process

National democratic institutions, despite their many virtues, often struggle to cope with policy problems involving significant inter-temporal trade-offs. This is particularly the case when timeframes are decadal or more in nature and where the negative impacts of proposed policies (or a failure to act) appear distant and therefore inconsequential. Long-term policy issues are at a constant risk of being neglected in the face of current and near-term concerns, which seem more pressing and immediate. The lack of effective long-term governance is due, or so it is argued,

to certain systemic flaws, pathologies and asymmetries within the democratic process.⁴ Among these are the following:

- a tendency for voters to have positive time preferences (i.e. they are moderately impatient and prefer something today rather than in the distant future);
- relatively short electoral cycles in which vote-maximising politicians have strong incentives to discount the future;
- the often disproportionate power exercised by vested interests with predominantly short-term priorities;
- the difficulty of ensuring that decision-makers do not renege on future-related promises (variously referred to as the 'compliance' or 'time inconsistency' problem);

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- deep ideological divisions over the best solutions even when the nature of the policy problem is widely recognised; and
- the fact that future generations have no voice, vote or bargaining power, yet will be profoundly affected by the policy choices of current governments (see Boston and Lempp, 2011).

Hence, whatever advantages future persons may come to possess in the future, today they face the disadvantage of being abstract, remote, disembodied and dependent. They are utterly reliant on current generations to represent and protect their interests; yet there is no corresponding dependence of current voters on people living in the future (Timlin, 2012). Normal political accountabilities and reciprocities thus do not apply. As Warren Buffet (1977) once stated: 'when human politicians

choose between the next election and the next generation, it's clear what usually happens'. Or to quote Al Gore, 'the future whispers while the present shouts' (Gore, 1992, p.170).

Such asymmetries in the democratic process would not matter if humanity lacked the capacity to inflict harm – and especially *irreversible* harm – on people living in the future. Nor would the challenge be as great if the policies required to secure long-term benefits (whether economic, social or environmental in form) involved no imposition of costs or losses (e.g. extra fiscal expenditure and related increased tax burdens) on people living today. Yet, because short-term sacrifices are often required, protecting the interests of future generations is politically challenging. To compound

matters, the costs of 'policy investments' – for instance, pre-funding future pension costs, reducing greenhouse gas emissions or helping to lower rates of obesity – are typically certain, real and visible, whereas the promised benefits are frequently uncertain, intangible or invisible (Boston and Lempp, 2011; Jacobs, 2011). If voters are uncertain about the benefits – perhaps because they distrust governments or doubt their capacity to deliver, or because the relevant causal chains are highly complex and opaque – they will be understandably reluctant to support such investments (Jacobs and Matthews, 2012). Yet if governments do not invest adequately for the longer term, future citizens will be worse off.

There is a further complication. Inter-temporal conflicts take different forms. Sometimes they involve a non-simultaneous exchange between 'goods' that are part of a similar system of value

(e.g. upfront financial costs in return for future financial benefits). Other times the exchange is between 'goods' constituting different systems of value (e.g. near-term financial costs in return for the better long-term protection of important environmental 'goods'). The latter types of non-simultaneous exchange are particularly difficult because the 'goods' in question are non-commensurable and the hoped-for benefits may have few advocates in the policy process.

How should the problem of protecting long-term interests be addressed? Are there any feasible and effective 'solutions'? And are there ways of countering the inter-temporal asymmetries evident in contemporary democracies without generating new and unintended problems? This article briefly

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outlines four possible approaches, giving particular attention to proposals to protect the interests of future generations by constraining the decisions of policy makers, both now and in the future, through constitutional means. While such reforms have been championed by various international bodies, interest groups and scholars, we acknowledge that they are not without limitations and drawbacks. Accordingly, we also outline a number of other constraining mechanisms (or 'commitment devices', as they are sometimes called) which may serve a similar purpose. While we consider the options for constitutional reform across a range of democratic jurisdictions, we pay particular attention to the specific constitutional context of New Zealand, which, unlike almost all other democracies, lacks an entrenched constitution with the status of supreme law. But first let us clarify what is meant by 'future generations' and the nature of their 'interests', 'needs' and 'rights'.

Who are 'future generations'?

If the term 'present generations' is limited to those alive today (including their 'future selves'), then the term 'future generations' must logically refer to all those born *after* today, regardless of where or when. On this basis, significant overlaps are inevitable: future generations will co-exist with current generations, often over long stretches of time and in a constantly evolving manner. For the purposes of this discussion, we are concerned with the well-being of all those who will be alive at some future point in time, including the distant future. This includes the 'future selves' of people alive today, some of whom are likely to live well into the 22nd century. Their long-term interests ought to be protected, not only the interests of those who are as yet unborn.

But such a stance immediately begs many more questions. For instance, what exactly are the 'interests' of future generations? Are they the same as the interests of present generations, or might they be different? Further, should the focus be on the 'interests' of future generations, or on their 'needs' or 'rights' (Ward, 2011)? Additionally, how should the 'interests' ('needs' or 'rights') of future generations be balanced against the 'interests' ('needs' or 'rights') of present generations? Aside from this, there are important questions about whether, and to what extent, policy makers should discount the future (Caney, 2008, 2009) and over the implications of following a 'precautionary' approach to the management of future risks. Such issues are complex and daunting. There are many different philosophical approaches and a plethora of competing principles. It is not possible to address such matters here in any detail, but several brief comments are in order.

First, there are good ethical reasons for placing a high, and *equal*, moral value on all human beings irrespective of when or where they are born. As Rawls has argued, 'from a moral point of view, there are no grounds for discounting future well-being on the basis of pure time preference' (Rawls, 1972, p.287). Hence, people living in the future should be valued equally to those alive today. An alternative view, under which, for example, people in the future are deemed to be of less value, is difficult to defend morally or logically.

Secondly, it is unlikely that the 'interests' or 'needs' of people living in the future will change dramatically, at least over the next century or so, from those of people living today. Of course, the further we venture into the future, the more difficult it becomes to know what humanity will need. Even planet Earth, for instance, may cease to be essential for human life. Yet, even then, it is reasonable to assume that citizens in the far future will continue to value Earth as their original home planet and for its many life-supporting qualities (Mank, 2009).

Thirdly, assuming that the interests of future generations are broadly congruent with those of humanity today, what might such interests include? With little doubt, one such interest will be preserving a physical environment that is fit for human health, flourishing and well-being (Ekeli, 2007). This in turn implies that pollution levels must be within 'safe' thresholds, that high levels of biodiversity are maintained, and that there is sufficient fertile soil to enable the production of an adequate quantity of food (Rockström et al., 2009). Aside from a healthy environment, future generations will almost certainly also have an interest in sound and sustainable public finances, proper planning for disasters, the mitigation of serious risks, the maintenance of democratic institutions and basic liberties, the provision of public goods and services, and the preservation of their cultural heritage.

Fourthly, the words 'interests', 'needs' and 'rights' have different (albeit overlapping) meanings. As implied above, the term 'interests' has a relatively broad meaning, covering both general and specific matters, some of which are vital

for the *maintenance* of human life, while others are more relevant to the *enjoyment* of life. The term ‘needs’ refers to things that are more ethically demanding, or of a higher moral order, than ‘interests’. If something is a ‘need’, then it is essential for the particular purpose in question. If the need is not satisfied, there will be significant loss or harm. ‘Rights’ refer to morally justifiable claims, often based on specific human ‘needs’. If accorded legal status, such rights will be both morally and legally binding. Having said this, few rights can be regarded as absolute or unconditional (Feinberg, 1973) and the use of ‘rights’ in a legal context is highly contested. Moreover, since rights are often in conflict, they must be balanced against each other – and against other morally relevant considerations.

Fifthly, it is sometimes objected that ascribing rights to future generations is neither legitimate nor practical because ‘rights’ can only be assigned when there are clearly identifiable interests to protect. Non-existing individuals, it is argued, cannot be granted moral or legal rights because there is no defined right-holder and no consensus on the specific rights they ought to possess. Sceptics argue that a specific legal obligation to protect future generations cannot and should not be placed on present generations or their governments. Against these objections, defenders of the notion that future generations should be accorded rights argue that such rights are not individual rights but rather ‘generational rights’, ‘group-specific rights’ or ‘community rights’ (United Nations General Assembly, 2013). Hence, they are decoupled from the strict requirement for an identifiable right-holder. From this standpoint, the values or interests being ‘protected do not depend upon knowing the kinds of individuals that may exist or the numbers in any given future generation’ (Brown Weiss, 1992, p.24). Although relatively few international or domestic legal instruments currently refer to, or clearly protect, the rights of future generations (Brown Weiss, 1989; Ward, 2011), there are plausible ways of incorporating the language of ‘rights’ in such instruments and doing so in a manner which is meaningful, fair and effective.

In what ways might future generations’ interests be protected?

To the extent that the interests (needs or rights) of future generations are not adequately protected by contemporary democratic institutions, there are at least four broad options available, each of which rests on a distinctive intervention logic (or set of logics). Such options are not mutually exclusive. All four could be applied simultaneously, although not necessarily in the same policy domain. The four options are:

1. *insulating* decision-making from short-term democratic pressures;
2. *incentivising* elected decision-makers to give greater priority to long-term considerations;
3. enhancing the *capacity* of elected decision-makers to think about and plan for the long term; and

4. *constraining* the policy choices available to elected decision-makers, especially in relation to issues with significant long-term impacts.

The first option is to shift decision-rights on important policy issues away from democratically-elected officials to independent bodies and/or global institutions. The aim here is to *insulate* decisions from the short-term pressures and biases of the democratic process. Such an approach is already widely employed across the democratic world with respect to many regulatory matters and the oversight of monetary policy. But such a strategy poses serious questions. What decision-rights should be transferred to non-elected bodies? What assurance is there that the decisions of such bodies will better protect the interests of future generations? And how are important values, such as democratic control, accountability and legitimacy,

to be preserved if an increasing number of vital decision-rights are no longer the responsibility of elected representatives?

A second option is to increase the *incentives* for democratically-elected officials to consider the interests of future generations (Boston and Lempp, 2011). One possibility under this approach would be to enhance the ‘voice’ of the future by establishing new institutions (or strengthening existing institutions) which have future-oriented missions and responsibilities. Examples might include a Parliamentary Committee for the Future (as in Finland), a Parliamentary Commissioner for Future Generations (as in Hungary), a Sustainable Development Commission (as previously in Britain) or a Commission for the Future (as previously in New Zealand). More radical proposals could include establishing, perhaps via a

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random ballot, an additional legislative chamber with specific responsibilities to promote measures designed to protect the interests of future generations. But many of these ideas have already been implemented somewhere in the democratic world and their effectiveness, thus far, has been limited. Moreover, many future-oriented institutions have not survived.

A third option is to enhance the *capacity* of governments to think long-term, to undertake various kinds of foresight activities and to engage in ‘anticipatory governance’ (Fuerth, 2012). By building such capacity, it is argued, governments would have a deeper knowledge of long-term risks, threats and vulnerabilities and thus would be better equipped to plan for the future. Under this approach, governments should strengthen their investment in strategic foresight, establish long-term think tanks,

and improve their capability in areas like strategic planning, urban planning and infrastructure management. Yet many governments have already implemented such strategies, and, again, their effectiveness is by no means clear.

The fourth and final option is to *constrain* the decisions of democratically-elected officials in various ways. As noted earlier, among the problems afflicting democratic processes in relation to inter-temporal trade-offs are those of 'compliance' and 'time inconsistency'. The challenge, in brief, is how to ensure that policy makers pursue a consistent long-term strategy over time and are not deflected from a prudent policy path, once adopted, by short-term electoral pressures

At one end of the spectrum, they include constitutional provisions that are designed to limit the actions of future decision-makers and are deliberately difficult to change or circumvent (see Holmes, 1988; Sunstein, 1988). For instance, such devices are frequently used to safeguard the interests and rights of minority groups in the face of intolerant majorities by giving power to the judiciary to strike down laws that breach basic rights. At the other end of the spectrum are such things as election promises and verbal commitments. The latter are reinforced by the risk of embarrassment, shame and the loss of credibility if they are not upheld.

Between these two extremes are a wide range of mechanisms: incorporating

being costly to change). Yet if the device is to be durable, there must also be the flexibility for policy makers to respond to unexpected contingencies. Designing devices that strike a sensible balance between these contrary imperatives requires skill and dexterity. In the end, governments can only constrain their successors to a modest degree. Whereas Odysseus in Homer's epic poem could rely on others to limit his future agency, governments always retain the power to unbind themselves – even if it may be difficult and politically costly.

While each of the four options is worthy of consideration, our focus here is on *constraining* solutions, and in particular constraining democratically-elected decision-makers by giving constitutional protection to future generations. In what follows, we consider how the interests of future generations have been given expression in democratic constitutions, the advantages and disadvantages of the various approaches available, and the possibility of granting constitutional protection to future generations in New Zealand.

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or other temptations. The literatures in the fields of social psychology and behavioural economics suggest that one solution may lie in using 'commitment devices', as these can be powerful drivers of human behaviour (Bryan et al., 2010; Hagemann, 2011; Sunstein, 1988, 2014). The aim of such devices is to bind decision-makers to particular courses of action, thereby helping to mitigate any problems arising from inconsistent or fluctuating motives, a weak will or countervailing external pressures.

Commitment devices are relevant to all spheres of life, but are particularly applicable where the policy pay-offs may contribute to decisions dominated by short-term expediency. They work by limiting actors' future discretion or by reinforcing their desire to exercise self-restraint – whether by increasing the rewards for good behaviour or by penalising bad behaviour (or both). Commitment devices are common in politics, although the term is rarely used.

particular protections, procedures or requirements into legislation; establishing institutions with long-term missions; negotiating bipartisan or multi-party agreements on important long-term policy issues; and designing policies and programmes in ways that make them more difficult politically to alter – for instance, establishing endowments and trust funds, creating social insurance arrangements based on individualised, earnings-related benefits, and so forth. Of relevance to this article, it is common in New Zealand (and many other jurisdictions) for the interests and needs of future generations to be given limited recognition in ordinary statutes: e.g. the Local Government Act 2002 (sections 10 and 14) and the Resource Management Act 1991 (section 5).

If the aim of the commitment device is to help encourage a consistent pattern of behaviour over time, then the device needs to be workable and credible and impose a genuine constraint (e.g. by

How can constitutions protect future generations?

A constitution is the fundamental building block of a nation's legal system. It defines the powers and responsibilities of the various executive, legislative and judicial institutions, the relationship between citizens, and, most importantly, the relationship between citizens and the state (Hiskes, 2009). Constitutions are not, however, consistent across borders, cultures or legal systems. They differ greatly in terms of their supremacy, entrenchment and form. On the one hand, many constitutions are written, entrenched and supreme. This means that they are formally incorporated in law, can be amended only with a supermajority and take precedence over ordinary legislation (Ekeli, 2007). On the other hand, some constitutions, such as New Zealand's, are found not in one document but in many documents, conventions and judicial decisions, none of which enjoy the status of supreme law (Palmer, 2006). Yet, regardless of the particular features of constitutions, they all perform the same dual roles of regulating relationships and

limiting government power (Keith, 2008).

Such roles make constitutions an ideal space in which to promote the interests of future generations (Gosseries, 2008; Hayward, 2005). By their nature, they guarantee rights for citizens today and into the future (Hiskes, 2009). Developing explicit constitutional recognition for future generations, therefore, has the potential to ensure that rights today are not unduly valued over rights tomorrow. With the inclusion of appropriate wording, a constitution can give future generations greater moral and legal status and increase the extent to which executive, legislative and judicial bodies consider the long-term consequences of their actions (Wright, 1990). In a democracy with a written constitution, such a provision would bind successive generations of legislators to account for future interests; in a democracy like New Zealand with an unwritten constitution it would give added legal recognition to future generations and, depending on the specific wording, could elevate their interests to the level of enforceable fundamental rights.

Do constitutions protect future generations at present?

There are references to 'future generations' in numerous domestic and international legal instruments. For instance, at the international level, a recent survey by Ward (2011) identified no fewer than 45 references to 'future generations' in a wide range of binding and non-binding instruments. While this is positive, the majority of these instruments deal solely with environmental matters, such as the protection of wild fauna and flora, the climate system, the marine environment and biological diversity.⁵ Such agreements include the United Nations Framework Convention on Climate Change (1992), the United Nations Convention on Biological Diversity (1992) and the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management (2001). Although 'future generations' also feature in a number of international agreements and declarations dealing with diverse subjects like peace and security, education, cultural heritage and scientific matters,

the level of recognition is limited.⁶

The large number of references in international law indicates that global governance is fundamentally guided by a concern for the long-term well-being of humanity. That said, in most cases such references are contained in preambles or in statements of objectives rather than the operative text of such instruments. They are thus purely aspirational and do not place legally enforceable obligations on states. In some cases there are specific duties requiring states to protect future generations. The UNESCO Convention for the Protection of the World Cultural and Natural Heritage (1972) requires all states to ensure the 'protection, conservation, presentation and transmission to future

Switzerland and Ukraine. But in other cases, including Bolivia, Cuba, Ecuador, France, Germany, Poland, South Africa and Sweden, national constitutions contain substantive provisions regarding future generations. The constitution of Bolivia, for example, provides that among the purposes and functions of the state are the 'responsible use of natural resources, the promotion of industrialisation, and the conservation of the environment for the welfare of current and future generations'. Similarly, the constitution of Ecuador requires the state to 'exercise sovereignty over biodiversity, whose administration and management shall be conducted on the basis of responsibility between generations'. Both provisions

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generations of identified cultural and natural heritage ... situated on their territory' (article 4), and the United Nations Declaration on the Rights of Indigenous Peoples (2007) grants indigenous peoples the 'right to transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures' (article 13). On the whole, however, the international community has not sought to extend, at least in a significant way, any of the human rights universally accorded to current generations to future generations (Ward, 2011).

Turning to the national level, over 20 countries (and several states and provinces) have incorporated protections for future generations in their constitutions (see IHRC and SEHN, 2008; McLeod, 2013; United Nations General Assembly, 2013; World Future Council, 2010). As in the international arena, often such provisions are contained in the preamble and are essentially aspirational – as, for instance, in Armenia, the Czech Republic, Estonia,

are worded to encourage positive action on behalf of the state; but there is no guarantee of rights.

By contrast, the South African constitution states that everyone has the 'right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures'. Similarly, the Andorran constitution guarantees 'an environment fit for life for the coming generations'. These constitutions recognise the interests of future generations more fundamentally, in a way that is enforceable in the courts. Yet, probably to avoid undue uncertainty or constraints on future parliaments, they tie this right closely to environmental protection. It is uncommon for a constitution to protect future generations of their own accord, independent of environmental considerations. While a small number of nations do have such protection, the relevant provisions are worded as statements of policy rather than as fundamental rights. In Estonia,

for instance, the constitution's preamble declares that '[the state] shall serve to protect international and external peace and provide security for the social progress and general benefit of present and future generations'. This provides a positive direction for agenda setting, but it has little practical or judicial value; there is no ambit for enforcement if it is not complied with.

How effective are these constitutional protections?

Currently, almost all of the provisions in national constitutions concerning future generations are rather vague, and, as a result, provide little guidance for judges in cases brought before the courts (Ekeli, 2007). In Norway, the Supreme Court has not once referred to the provision in the constitution protecting future generations, despite its introduction more

the Ecuadorian constitution, the Supreme Court of Justice of Nueva Loja found in favour of the coalition and held Chevron liable for \$8.6 billion in damages.

At the state level in the United States there has also been some judicial recognition of the rights of future generations. In Montana and Hawaii, where environmental protections for future generations have been constitutionally safeguarded (albeit broadly) since the 1970s, the Supreme Court of each state has upheld the rights of future generations (Raffensperger, 2003). In Montana, the Supreme Court held that Montanans have the right to prevent irreversible harm before it occurs, while in Hawaii a precautionary principle has been adopted in protecting resources for future generations. While such outcomes are to be welcomed, they are the exception rather than the norm.

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than 20 years ago.

There have been a handful of cases in which constitutional protections for future generations have been successfully invoked in a court of law, but they are few and far between. In the case of *Minors Oposa v Secretary of the Department of Environment and Natural Resources* (1994), the Supreme Court of the Philippines held that a group of schoolchildren had standing to challenge timber leasing of old-growth forests 'for themselves, for others of their generation and for the succeeding generations' (Mank, 2009). In the *Chevron-Texaco (Pollution) Case* (2010), an international coalition of environmental activists invoked Ecuador's constitutional rights of nature in a case against Chevron regarding oil contamination in the Ecuadorian rainforest (Cress, 2012). Relying in part on

How can constitutional protections for future generations be drafted effectively?

When considering how constitutional provisions might be utilised to protect future generations, there is a fundamental tension at work. On the one hand, incorporating substantive guarantees has the potential to protect later generations from the actions of the generations preceding them. Yet, on the other hand, the more that constitutional protection is relied on for such purposes, the more the generational sovereignty of future legislatures is undermined (Sunstein, 1988; Thompson, 2005). In other words, constitutions (through a variety of amendment restrictions) reduce the freedom of each generation of decision-makers to adopt their own rules. They subject future generations to the laws of the past, creating constitutional rigidity and resistance to change (Gosseries,

2008). Thomas Jefferson, for one, was an outspoken critic of such constitutional rigidity. In his view:

a generation may bind itself as long as its majority continues in life; when that has disappeared, another majority is in place, holds all the rights and powers their predecessors once held, and may change their laws and institutions to suit themselves.⁷

While this perspective fails to account adequately for intergenerational issues, including the need to protect a world with 'planetary boundaries' and finite resources from severe and irreversible damage (Rockström et al., 2009), it highlights the fact that constitutional protections can be a double-edged sword (Gosseries, 2008). In Westminster systems of democracy, constitutional rigidity is limited by the doctrine of parliamentary supremacy. This doctrine holds that current parliaments can only bind future parliaments on matters of 'manner and form'; they cannot limit their autonomy substantively (Eleftheriadis, 2009). In other systems, however, procedures for amending constitutional provisions must not be so restrictive that they make it almost impossible for future generations to adopt new or revised provisions as needs and circumstances change. That said, if any constitutionally guaranteed rights are to be effective, they must have some level of supremacy and should not be easily trodden on by future parliaments.

To date, policy makers in most democracies have been cautious about future generations' rights, favouring legislative sovereignty over intergenerational protection. They have focused on providing broad statements of policy rather than endowing future generations with specific rights. Admittedly, incorporating general statements of policy in a constitution can provide a useful reference point and serve as an interpretive aid, but such approaches do not facilitate legal enforcement or bind later parliaments (Timlin, 2012). While constitutional policy-making should never be rash, it should strive to develop provisions that serve the purpose for which they are intended. Hence, such

provisions should be designed in ways that give genuine additional protection to future generations, rather than merely paying them lip service. They should strive to change behaviours and policy settings, to extend time horizons, and to alter the priorities of legislators and governmental decision-makers.

Accordingly, in our view serious consideration should be given to incorporating specific 'rights' for future generations which can be effectively upheld in the courts. Framing constitutional protection in terms of rights would provide an avenue for current citizens to hold the state to account for its actions, potentially giving the courts the power to strike down legislation which clearly threatens the specified rights.

In this context, the International Human Rights Clinic (IHRC and SEHN, 2008) has identified criteria to guide the drafting of such provisions and has proposed some suggested wording. The IHRC places considerable emphasis on striking an appropriate balance between a general, open-ended right and a specific, articulated and enforceable right. An overly broad or general right might be ignored and difficult to enforce, while rights that are too specific may be easily circumvented. Highly specific rights may indicate to would-be violators that the courts are unlikely to enforce violations unless they fall under the relevant, tight wording of the constitutional provision. They may also unintentionally serve as a temporal restraint, as new scientific discoveries and technological advances may not be adequately accounted for in any narrow list of applications. The IHRC further emphasises that any such provision must be compatible with widely shared notions of distributive justice and principles of sustainable development. This includes ensuring that the needs of the present generation are met without compromising the ability of future generations to meet their own needs.

The particular wording proposed by the IHRC is tied to environmental protection, and is as follows:

Present and future generations of citizens of the state have the right to an ecologically healthy environment.

This right includes but is not limited to: the enjoyment of clean air, pure water, and scenic lands; freedom from unwanted exposure to toxic chemicals and other contaminants; and a secure climate. (IHRC and SEHN, 2008, p.10)

Such a provision is specific enough to guide judges, yet sufficiently broad to avoid confinement to a narrow set of facts. However, it is not complete in isolation. The IHRC emphasises that a constitution must also clearly highlight that the rights of future generations are to be weighed equally with other fundamental rights and must specify who has standing to enforce the right, to what standard and against whom.

This, however, is no easy task. The traditional doctrine of standing, which governs who can bring proceedings

presently tangible, and are often difficult to remedy or redress.

Fortunately, however, this is not the end of the road. Courts in many parts of the world have expressed a willingness to depart from these more traditional standing principles in respect of new rights of action which fit awkwardly into the common law model (ibid.). In New Zealand, the standing requirement is largely gone for judicial review claims, and in the US, Congress has relaxed the requirements of imminence and redressability in respect of claims regarding environmental impact statements, claims regarding the Freedom of Information Act, claims brought on behalf of a state, and more generally where procedural injury is concerned. In *Massachusetts v EPA* (2007), a judicial review of the Environmental Protection Agency's refusal to regulate tailpipe

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before a court of law, appears to rule out altogether the possibility of invoking the rights of future generation in courts. Before being granted standing, plaintiffs must demonstrate that they have suffered an imminent injury-in-fact which is caused by the defendant's conduct and which is redressable through the remedy they seek (Mank, 2009). In other words, this doctrine requires plaintiffs to demonstrate a 'real-world' tangible harm as well as a legal cause of action, to prove some degree of imminence in respect of that harm, and to show a 'personal stake in the outcome' before their claim can proceed (ibid.). This high standard, aimed at avoiding generalised grievance claims, is impossible to meet in respect of the rights of future generations. By their very nature, such rights protect long-term interests which are not imminent or

emissions, the US Supreme Court considered redressability to be a matter of degree rather than a minimum standard and relaxed the standard of imminence to include the long-term effects of climate change. This was a landmark decision, establishing beyond doubt that Congress has the power to relax the traditional requirements of imminence and redressability. It also indicated a broader trend of judicial willingness to relax standing requirements in respect of environmental and procedural claims (Mank, 2009). This more flexible approach can be traced back to the case of *Lujan v. Defenders of Wildlife* (1992), in which Justice Kennedy commented that:

as government programs and policies become more complex and far reaching, we must be sensitive to the

articulation of new rights of action that do not have clear analogs in our common law tradition . . . In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.

While a constitutional right protecting future generations fits awkwardly in the common law tradition, it is a 'new right of action' for which allowance could be made. If a statutory body, such as a Parliamentary Commission for the Future, was granted specific sole authority to take legal action when the rights of future generations were at risk of being violated, it would

is that it is flexible and capable of adapting to changing circumstances. It lacks much of the rigidity of other constitutions, and there are few entrenched provisions. In such a constitutional landscape, incorporating a fundamental right relating to the environment, and more generally protecting the interests of future generations, would be relatively simple and would not unduly constrain subsequent parliaments.

Currently, no such clause exists in New Zealand legislation, nor is one in the pipeline. In fact, New Zealand is among only 16 countries that have failed thus far to recognise and provide for the right to a healthy environment in their constitution (Browning, 2013). For a state which prides

first written constitution (Glazebrook, 2011). Although such rights would need to be carefully and contextually worded, providing sufficient detail regarding enforceability and the state's obligations, the IHRC's guidelines should provide a useful starting point.

Alternatives to constitutional recognition

Incorporating the rights of future generations into national constitutions is not the only way to help protect and enhance the well-being of future generations. As noted earlier, other kinds of constraints – or commitment devices – are available. Such devices will not impose constitutional limitations on current or future legislatures, but they will help to constrain decisions in other ways or change the incentives facing policy makers: for example, by imposing new reporting obligations on government, by enhancing the quality of information on the likely long-term impacts of policy choices, by increasing the extent of advocacy on behalf of future generations, and, more generally, by enhancing the extent to which governments can be held politically accountable for decisions (or non-decisions) with major long-term impacts. Examples of such devices include:

- public agencies with 'guardianship-type' roles in relation to future generations;
- advisory bodies with responsibilities to promote sustainable development;
- parliamentary committees with specific duties to consider long-term issues;
- legislative requirements for governments to produce regular reports on their efforts to protect citizens' long-term interests (e.g. posterity impact statements); and
- incorporating specific requirements into domestic statutes: for instance, recent amendments to New Zealand's State Sector Act 1988 (section 32) impose specific 'stewardship' responsibilities on departmental chief executives.

None of these mechanisms, whether individually or in combination, represents a fully effective solution to the inter-temporal asymmetries evident in democratic processes. But, if well-

... New Zealand is among only 16 countries that have failed thus far to recognise and provide for the right to a healthy environment in their constitution ...

eliminate any confusion regarding the breadth and scope of standing. However, such institutions are rare and sometimes ineffective. Thus, constitutional provisions also need to make allowance, clearly and carefully, for public plaintiffs or genuine interest groups to bring claims on behalf of their successors.

How might future generations be protected in New Zealand's constitution?

New Zealand is one of only three democracies in the world without a formal written constitution (Chen, 2011). There is no supreme law permitting the judiciary to strike down legislation, and the New Zealand Bill of Rights Act 1990 offers only limited legal recourse to citizens who believe they have been wronged by the state – most particularly because it cannot be used to strike down primary legislation (Palmer and Palmer, 2004). Any constitutional protection for future generations will apply very differently to countries with written constitutions. The benefit of New Zealand's model, however,

itself on constitutional flexibility, our constitution arrangements are, at least in certain respects, surprisingly outdated. An obvious way forward would be to incorporate a new provision in the existing Bill of Rights Act. In our view, there would be merit in including such a clause, provided it is consistent with the IHRC's recommendations. In principle, this could protect future generations in the same way as the Act does other rights, such as free speech or freedom of religion.

An analysis of the merits of a written constitution is not possible here. Nevertheless, many New Zealand academics and legal practitioners are strong advocates for such a step.⁵ Moreover, a recent consultation conducted by the Constitutional Advisory Panel (2013) has identified that intergenerational equity is one of the key themes in public discussions of New Zealand's constitution. If a reform of New Zealand's constitution were initiated, it could provide a unique opportunity to incorporate the rights of future generations explicitly into New Zealand's

designed, they have the potential to shift the balance in the direction of future interests, albeit modestly. There is space here for only a few brief comments on several of these measures.

Internationally, the best known examples of 'guardianship-type' bodies include the Commission for Future Generations in Israel (2001–06) and the Parliamentary Commissioner for Future Generations in Hungary (2007–). The former commission was mandated to review legislation and regulations with implications for future generations and to provide advice to the Knesset on all matters pertaining to future generations. It has since been abolished. The Hungarian commissioner is one of four parliamentary ombudsmen and is charged with safeguarding the constitutional right of citizens to a healthy environment, investigating citizens' complaints regarding environmental issues, advocating on behalf of long-term sustainability, and undertaking research on sustainability issues. Despite the benefit of these institutions in theory, their effectiveness in practice has proved to be limited. This is partly the result of funding constraints; but it is also attributable to their limited powers and a lack of constitutional protection, as witnessed by the abolition of the Israeli commission after only five years.

National initiatives of a slightly different nature, focusing instead on sustainable development, are another possibility. Examples include the British Sustainable Development Commission (which was abolished after a decade in 2011), the German Parliamentary Advisory Council on Sustainable Development, the Brazilian Commission on Environment and Sustainable Development, and the Welsh Commissioner for Sustainable Futures. The Welsh example is of particular interest because the government has a legal duty to promote sustainable development. Indeed, the government is in the process of enacting a Well-being of Future Generations (Wales) Bill, which the commissioner played an integral role in drafting (Welsh Government, 2014). The bill aims to embed the principle of sustainability at all levels of government, with the aim

of ensuring that the present needs of citizens are met without compromising the ability of future citizens to meet their needs. It sets ambitious long-term goals, introduces national indicators for measuring well-being, establishes a Future Generations Commissioner to serve as an advocate for future generations, and requires the preparation of well-being plans across the local government sector. It will be interesting to observe how this legislation, once enacted and operative, alters decision-making processes and outcomes. Potentially, it may provide a feasible and effective model for other governments, whether national or sub-national, to adopt.

Currently, New Zealand has no

... we acknowledge that efforts to protect the interests (needs and/or rights) of future generations through constitutional mechanisms raise serious philosophical and legal issues.

public institution specifically responsible for future generations. Nevertheless, the Parliamentary Commissioner for the Environment, established in 1986, partly serves this function, at least in terms of environmental matters. The commissioner has investigative, advisory and auditing roles, with the broad aim of improving environmental governance (Gopel, 2011; Hawke, 1997). The mandate of the Parliamentary Commissioner for the Environment includes reviewing the effectiveness of environmental planning and management, as well as investigating issues where significant environmental impacts are likely. It has been suggested from time to time that the commissioner's responsibilities could be extended to include a general duty to promote and protect the interests of future generations. However, this would substantially broaden the role of the Office, and without a large increase in resources and capabilities could weaken its current mission.

Conclusion

Adequately protecting both the long-term interests of current citizens and the interests of future citizens is vitally important. At present, there are good reasons for doubting whether contemporary democratic institutions have sufficiently strong incentives to achieve this objective. That being the case, further reforms will be required to avoid policy decisions that are excessively biased in favour of the present. Somehow, the political voice representing future interests must be increased beyond a mere whisper, especially where there are risks of irreversible harm.

This article has outlined a range of possible responses, giving particular attention to the idea of incorporating

additional protection for future generations in constitutional documents. We acknowledge that such an approach has limitations. For instance, while constitutional protections have the potential to reduce certain kinds of harm to future generations, they do not necessarily increase the incentives on policy makers to undertake the sorts of policy investments necessary to secure future benefits (e.g. via expenditure on public infrastructure, education or research). Hence, they are by no means sufficient. Further, we acknowledge that efforts to protect the interests (needs and/or rights) of future generations through constitutional mechanisms raise serious philosophical and legal issues. Nevertheless, they also provide a unique opportunity to effect change on a fundamental level and to shift the balance more in favour of longer-term considerations.

Standing back from the particulars, three matters need emphasis. First, the

evidence suggests that if greater weight is to be given by democratic policy makers to the interests of future generations, action will be required on multiple fronts. In effect, a whole-of-government approach is needed, with initiatives at different governmental levels drawing on a range of institutional, regulatory and other policy tools. Second, there is no one 'correct' solution, nor any silver bullets. Responses must have due regard to the constitutional, political and cultural context of each jurisdiction and be designed accordingly. Finally, the challenge of inter-temporal governance is profoundly complex. Policy makers face

deep uncertainty and complicated trade-offs. Hence, responses must be adaptive and experimental: we are in the realm of trial and error. But we must hope that our errors are neither too large nor too permanent in their effects.

- 1 See Oxford Martin Commission, 2013
- 2 Fuerth, 2012; Jacobs, 2011; Read, 2012; Thompson, 2005; Ward, 2011
- 3 IPCC, 2014
- 4 There is no suggestion that non-democratic regimes are any better than democracies at protecting the interests of future generations. Indeed, much of the available evidence, especially in relation to environmental sustainability and resource management, suggests that they are worse.
- 5 See, for instance, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES, 1975), African Convention on the Conservation of Nature and Natural Resources (1968), Bonn Convention on the Conservation of Migratory Species of Wild Animals (1979), ASEAN Agreement on the Conservation of Nature and Natural Resources (1985),

North American Agreement on Environmental Cooperation (1993), Antarctic Treaty (1959) and the United Nations Convention on the Law of the Sea (1982).

- 6 See, for instance, the Council of Europe Convention for the Protection of the Architectural Heritage of Europe (1985), Charter of Fundamental Rights of the European Union (2000), Vienna Declaration and Programme of Action, World Conference on Human Rights (1993), UNESCO Universal Declaration on Bioethics and Human Rights (2005), United Nations Declaration on the Rights of Indigenous Peoples (2007) and the UNESCO Universal Declaration on the Human Genome and Human Rights (1997).
- 7 Thomas Jefferson, Letter to Major J. Cartwright (5 June 1824).
- 8 For a discussion of the arguments for and against a written constitution, see Chen (2011).

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