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Enforcing Constitutional Sustainability Clauses in the Age of the Climate Crisis: Insights from Social Contract Theory on How to Take Account of Future Generations

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Abstract: Climate change is one of the most alarming events today, which will very likely have devastating effects on a lot of people worldwide. This paper addresses the question as to how constitutional sustainability clauses can be enforced in the age of the climate crisis. It does so by looking into some difficulties of making the notion of future generations operable. First, the paper will briefly analyze two decisions by the Austrian Constitutional Court and the Norwegian Supreme Court, which have both rejected claims based on constitutional sustainability clauses referring to future generations. This is juxtaposed with a recent decision by the Federal Constitutional Court of Germany which invigorated Article 20a of the German Basic Law and thereby also future generations. Second, this paper aims at shedding light on the notion of future generations by looking into philosophical debates on the so-called non-identity problem. The question as to how to include future generations in the social contract and selected philosophical strategies to address it are discussed and introduced to the legal discourse. This seems to be a worthwhile goal as by now several scholars from various disciplines such as geography, political science, and applied ecology have opened up a debate on the role of social contracts concerning climate change. This paper seeks to further the debate by aiming to suggest a connection between philosophical social contract reasoning and constitutional sustainability clauses taking the example of Austria, Norway, and Germany.

Keywords: climate justice, social contract theory, future generations, the non-identity problem, constitutional sustainability clauses, climate law decision of the Federal German Constitutional Court

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1 Introduction: The Climate Crisis and the Necessity to Act

Climate change is one of the most alarming events today, which will very likely have devastating effects on a lot of people worldwide. The latest report by the Intergovernmental Panel on Climate Change (IPCC) on 9 August 2021 is a strong warning. Changes in the climate 'are unprecedented in thousands, if not hundreds of thousands of years, and some of the changes already set in motion—such as continued sea level rise—are irreversible over hundreds to thousands of years'.[1] These effects do and will hit people mostly not responsible for this development. Sinking island states are but one example in this regard.[2] Future generations which are still too young in order to have a say[3] or those which are not yet born are another important group not responsible for these developments.[4] Often such groups are not represented adequately either. Due to the dimension and

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1 IPCC, Climate change widespread, rapid, and intensifying – IPCC (9 Aug 2021) <https://www.ipcc.ch/2021/08/09/ar6-wg1-20210809-pr/> accessed 18 February 2022.

2 Cf Carolin König, 'Small island states, the international community, and the challenge posed by the rising seas' (Dissertation at Universität der Bundeswehr München 2020).

3 For an interesting analysis on children's suffrage for sustainability reasons, see András Jakab, 'Kinderwahlrecht für Nachhaltigkeit?: Rechtsdogmatische Einordnung und rechtspolitische Effektivität' (2020) 28(1) Journal für Rechtspolitik 27.

4 For an early account of future generations and international law, see Edith B Weiss, *In fairness to future generations: International law, common patrimony, and intergenerational equity* (Transnational Publishers 1988) 103 (considering at the time of publication, the concern for future generations 'a moral protection of interests'). For more recent accounts, see eg Edward A Page, *Climate change, justice and future generations* (Elgar 2006) 161 (putting forward an 'intergenerational responsibility argument' using the tools of analytical philosophy); Marc D Davidson, 'Wrongful harm to future generations: The case of climate change' (2008) 17(4) Environmental Values 471 (arguing for a principle of self-ownership requiring taking 'reasonable care' of products of future labor and a precautionary approach until the non-identity problem is solved); Richard L Revesz and Matthew R Shahabian, 'Climate change and future generations' (2011) 84 Southern California Law Review 1097–1162; Peter Lawrence, *Justice for future generations: Climate change and international law* (Edward Elgar 2014); Randall Abate, *Climate change and the voiceless: Protecting future generations, wildlife, and natural resources* (Cambridge University Press 2019) (referring to joint vulnerabilities of the voiceless, ie, future generations, wildlife, and natural resources, and suggesting enhanced stewardship and rights-based protections for them focusing on sustainable development).

foreseeable negative consequences, many serious actors speak of a 'climate crisis'.[5] This crisis asks for a joint reaction.[6] In the words of one of the most renowned scientists of the twentieth century, *Stephen Hawking*, 'the really concerning aspect of this is that now, more than at any time in our history, our species needs to work together'.[7] The wording is important. *Hawking* stated that 'our species', not only dominant political and economic actors etc, but everyone – potentially also unborn future generations – 'need to work together'. This is not an easy task.

This paper seeks to address this challenge by making an argument for the enforcement of constitutional sustainability clauses. Taking the examples of Austria (2.1), Norway (2.2), and Germany (2.3), the paper aims at searching for arguments which might help to make the notion of 'future generations' operable in constitutional sustainability clauses.[8] This endeavor shall be inspired by looking into conceptualizations of social contracts including future generations (2.4). After having identified this possibility, the paper looks at this challenge and selected philosophical strategies to address it in some more detail in order to introduce some philosophical arguments to the legal discourse in general and constitutional sustainability clauses in particular (3). Finally, some tentative conclusions will be made looking also at the generalizability of the findings (4).

5 UN, The Climate Crisis – A Race We Can Win <https://www.un.org/en/un75/climate-crisis-race-we-can-win> accessed 18 February 2022. At the 2019 Climate Action Summit on 23 September 2019, UN Secretary General António Guterres spoke of 'the climate emergency [which] is a race we are losing, but it is a race we can win' <https://www.un.org/sg/en/content/sg/speeches/2019-09-23/remarks-2019-climate-action-summit> accessed 18 February 2022. The Cairo Compact spoke already in 1990 of the 'climate crisis', see 'Selected International Legal Materials on Global Warming and Climate Change' (1990) 5 (2) American University Law Review 513 (631).

6 For a general overview on climate science law suits, see eg Quirin Schiermeier, 'Climate science is supporting lawsuits that could help save the world' (2021) 597(7875) Nature 169; Francesco Sindico and Makane M Mbengue (eds), *Comparative climate change litigation: Beyond the usual suspects* (Springer 2021).

7 Stephen Hawking, 'This is the most dangerous time for our planet' *The Guardian* (1 December 2016) <https://www.theguardian.com/commentisfree/2016/dec/01/stephen-hawking-dangerous-time-planet-inequality> accessed 18 February 2022.

8 The examples were selected in order to demonstrate the approach in this paper and do not in any way claim to cover all instances where future generations are referred to in constitutions. For a list of – at least (Austria, for instance, is not mentioned) – 13 countries with explicit references to future generations in their constitution, see Abate (n 4) 60 mentioning 'Belgium, Bolivia, the Czech Republic, Ecuador, Estonia, France, Germany, Kenya, Luxemburg, Norway, Poland, South Africa, and Sweden' as well as five constitutions with indirect references to future generations (via the concept of heritage): 'Finland, Italy, Portugal, Slovakia, and Slovenia'.

2 Enforcing Constitutional Sustainability Clauses in Austria, Norway, and Germany

2.1 The Example of Austria and Section 1 Federal Constitutional Act on Sustainability

The Austrian Constitution is based upon an original document (the *Bundes-Verfassungsgesetz*) stemming from 1920. However, with a two-thirds majority in parliament (and the presence of a majority of parliamentarians) every act can be elevated to constitutional rank (if explicitly designated as such). In 2013, a Federal Constitutional Act on various programmatic provisions directed to the legislator was adopted.[9] This act also includes a provision on sustainability and holds in Section 1 that

> [t]he Republic of Austria […] is committed to the principle of sustainability in using natural resources to ensure that future generations will also benefit from optimal quality of life.[10]

This provision does not enshrine a 'subjective right' and thus sustainability is not a right enforceable by individuals. Rather, it is a programmatic provision which is, as mentioned, primarily directed at the democratic legislator.[11] Due to its constitutional rank it is also a touchstone for reviewing the constitutionality of all laws and decisions.[12] Nevertheless, the vague wording entails much leeway for the legislator and usually laws are not found to be unconstitutional because they do not live up

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9 BGBl I 2013/111 idF BGBl I 2019/82. The preceding act (which did not address future generation, but addressed environmental protection 'only') was introduced in 1984 (BGBl 1984/491).

10 For an English translation provided on the official website of the Legal Information System of the Republic of Austria (*Rechtsinformationssystem*, RIS), see <https://www.ris.bka.gv.at/Dokumente/Erv/ERV_2013_1_111/ERV_2013_1_111.pdf> accessed 18 February 2022.

11 See Karl Weber, 'Grundrecht auf Umweltschutz' in Gregor Heißl (ed), *Handbuch Menschenrechte: Allgemeine Grundlagen – Grundrechte in Österreich – Entwicklungen – Rechtsschutz* (facultas.wuv 2009) 499, stating that this provision unfolds legal effects for all three powers. In relation to the preceding act see Doris Hattenberger, *Der Umweltschutz als Staatsaufgabe: Möglichkeiten und Grenzen einer verfassungsrechtlichen Verankerung des Umweltschutzes* (Verlag Österreich 1993).

12 See eg Austrian Constitutional Court Decision VfSlg 20.185/2017 – *Dritte Piste-Erkenntnis*, para 206 'Der Verfassungsgerichtshof hat in ständiger Rechtsprechung das BVG Umweltschutz zur Prüfung von Gesetzen auf ihre Verfassungsmäßigkeit und von Verordnungen auf ihre Gesetzmäßigkeit herangezogen (vgl VfSlg 11.990/1989, 12.009/1989, 12.485/1990, 12.486/1990, 13.102/1992, 13.718/1994, 14.551/1996 und 19.584/2011)'.

to the standards of such objectives.[13] Inaction on the part of the legislator cannot be controlled for either as there is no adequate procedure to bring such instances to the constitutional court.[14]

Section 1 of this act does not explicitly define sustainability[15] but closely aligns it with future generations and the usage of natural resources. This usage shall also enable future generations to have an 'optimal quality of life'.[16] Intuitively this will speak to many persons. Yet it is quite a difficult task to make this programmatic provision operable. Future generations are hard to address by the law and an 'optimal quality of life' is rather vague, especially for distilling guiding principles for the legislator and concrete standards of review for the constitutional court. It is, thus, not much of a surprise that the Austrian Constitutional Court (*Verfassungsgerichtshof, VfGH*) is reluctant to base its decisions (only) on this provision. In fact, in a much criticized judgment in 2017, the Austrian Constitutional Court lifted a decision of the Federal Administrative Court (*Bundesverwaltungsgericht*) which rejected the request to establish a third runway at Vienna Airport due to environmental concerns.[17] This judgment was criticized in the literature.[18] Section 1 on sustainability, of the discussed Federal Constitutional Act 111/2013, for instance,

13 For the qualification that only gross violations of the '*Staatsziel*' on environmental protection would violate this act, see Christian F Schneider, 'Verfassungs- und europarechtliche Grundlagen und Schranken einer österreichischen Klimaschutzpolitik' [2021] Österreichische Zeitschrift für Wirtschaftsrecht 95, 96; Brigitte Gutknecht, 'BVG Umwelt' in Karl Korinek and others (eds), *Österreichisches Bundesverfassungsrecht: Kommentar* (Verlag Österreich 1999) para 28.

14 Teresa Weber, 'Staatsziele – Grundrechte – Umwelt- und Klimaschutz: Spielräume des Gesetzgebers' [2019] Juridikum 514, 516–517. For further references on the question as to whether actions of the executive might be based upon this act, see Priska Lueger, 'Recht auf Umweltschutz und Recht der Umwelt auf Schutz: Ansätze zur rechtlichen Sicherstellung einer langfristig intakten Umwelt' [2020] Juridikum 260–269, 262.

15 Jakab, 'Kinderwahlrecht für Nachhaltigkeit?' (n 3) 28.

16 For various other generally possible understandings of sustainability, see András Jakab, 'Sustainability in European constitutional law' [No 2016-16] MPIL Research Paper Series.

17 VfGH (n 12) *Dritte Piste-Erkenntnis*. For an English summary of the findings of the case, see Birgit Hollaus, 'Austrian Constitutional Court: Considering climate change as a public interest is arbitrary – Refusal of third runway permit annulled' (2017) 11(3) ICL Journal 467.

18 See, eg, Verena Mader and Eva Schulev-Steindl, 'Dritte Piste – Klimaschutz als Willkür?: Anmerkungen zu VfGH 29.06.2017, E 875/2017, E 886/2017' (2017) 72 Zeitschrift für öffentliches Recht 589; Franz Merli, 'Ein seltsamer Fall von Willkür: Die VfGH-Entscheidung zur dritten Piste des Flughafens Wien' (2017) 31 Wirtschaftsrechtliche Blätter 682; Alexander Balthasar, 'Zu kurz gegriffen: Besprechung VfGH 29.06.2017, E 875/2017, E 886/2017' (2017) 72 Zeitschrift für öffentliches Recht 577; Sigmar Stadlmeier, 'Zur dritten Piste des Flughafens Wien' (2019) 74(1) Zeitschrift für öffentliches Recht 21.

has been taken into account, but not given absolute priority, in the given case.[19] One of the reasons for this might have been that future generations are hard to grasp. This provision and its reference to future generations entails open questions such as who is included in these future generations and what does it mean that they shall also profit from an optimal quality of life. Before we look into philosophical arguments in favor of the inclusion of future generations in the social contract, we will consider more examples: Norway and Germany.

2.2 The Example of Norway and Article 112(1) of the Norwegian Constitution

The Norwegian Constitution also recognizes – since 1992 (then as Article 110b Norwegian Constitution) – 'comprehensive long-term considerations' in relation to the environment including future generations. Article 112(1) of the Norwegian Constitution reads:

> Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.[20]

Para 3 of Article 112 Norwegian Constitution enshrines the duty that the 'authorities of the State shall take measures for the implementation of these principles'. And yet, in the first climate judgment before the Norwegian Supreme Court decided on 22 December 2020, petroleum licenses issued by the Norwegian Government were found to be in line with the Norwegian Constitution.[21]

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19 VfGH (n 12) *Dritte Piste-Erkenntnis,* para 206 'Weder aus dem BVG Umweltschutz noch aus § 3 BVG Nachhaltigkeit ist hingegen – entgegen der zumindest missverständlichen Passage im Ergebnis der angefochtenen Entscheidung (S 126) – ein absoluter Vorrang von Umweltschutzinteressen gegenüber anderen, der Verwaltung obliegenden Entscheidungsdeterminanten ableitbar (vgl VfSlg 16.242/2001)'.

20 The Constitution, as laid down on 17 May 1814 by the Constituent Assembly at Eidsvoll and subsequently amended, most recently in May 2018, available at <https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf> accessed 18 February 2022.

21 See Norwegian Supreme Court, *Greenpeace Nordic Association v Ministry of Petroleum and Energy*, Judgment of 22 December 2020, Case 20-051052SIV-HRET (majority expressed by the first-voting Justice Høgetveit Berg). For an unofficial translation, see <www.klimasøksmål.no/wp-content/uploads/2021/01/judgement_translated.pdf> accessed 18 February 2022. For a brief analysis, see eg Esmeralda Colombo, 'People v Arctic Oil and Its Discontents: The Norwegian Paradox in Global Climate and Energy Justice' (2021) 51 Environmental Law Reporter 10462.

Similarly to the Austrian Federal Constitutional Act on Sustainability, Article 112 of the Norwegian Constitution too 'is undoubtedly relevant for the interpretation of statutes'.[22] Furthermore, Article 112 is of relevance 'for the exercise of administrative discretion' as well as 'a directive for the Storting's legislative power and other measures by the authorities under the third paragraph of Article 112'.[23] Interestingly, the Norwegian Supreme Court held that – except for 'statutory voids' – the 'wording does not provide a clear answer as to what legal relevance Article 112 otherwise has for decisions the Storting has made or consented to'.[24] Article 112 thus basically does not constitute a ground for judicial review in environmental matters when the Storting has deliberated on the matter. Consequently, the 'threshold' for the application of Article 112 is 'very high' and rather regarded as a 'safety valve' for 'grossly disregarded' duties by the Storting, the Norwegian Parliament.[25] Article 112 Norwegian Constitution thus comes close to a so-called '*Staatszielbestimmung*' like the Austrian Federal Constitutional Act on Sustainability, as the Norwegian Supreme Court states that this Article is 'not a pure manifesto but a provision with a certain legal substance. However, a right can only be directly based on the constitutional provision to a limited degree in a case before the courts'.[26] In the view of the Norwegian Supreme Court, 'it is [firstly] uncertain whether or to what degree the decision actually will lead to emissions of greenhouse gases. Secondly, the possible effect for the climate is a good piece into the

22 Norwegian Supreme Court (n 21) *Greenpeace v Ministry of Petroleum and Energy*, para 138.
23 Ibid.
24 Norwegian Supreme Court (n 21) *Greenpeace v Ministry of Petroleum and Energy*, para 139.
25 Norwegian Supreme Court (n 21) *Greenpeace v Ministry of Petroleum and Energy*, para 142, 157 (finding that in the given case this high threshold has not been met). For a critique of this point, see Christina Voigt, 'The first climate judgment before the Norwegian Supreme Court: Aligning law with politics' (2021) 33(3) Journal of Environmental Law 697, 706–707.
26 Norwegian Supreme Court (n 21) *Greenpeace v Ministry of Petroleum and Energy*, para 144. Cf Input from the Norwegian Government to the Thematic Report Focusing on Good Practices in the Implementation of the Right to a Safe, Clean, Healthy and Sustainable Environment from the Special Rapporteur on Human Rights and the Environment, available at <https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/SafeClean/State/Norway.pdf> accessed 18 February 2022, stating the following: 'Section 112 has not been formulated to provide individual rights in the traditional sense. Instead, the first and second paragraphs express principles regarding societal aims with regard to environment, conservation of nature and management of natural resources'. For the thematic report on Norway, see the Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Human Rights Council, 43rd Session, 24 February–20 March 2020, A/HRC/43/53/Add.2, para 12.

future'.[27] Hence, the Norwegian Supreme Court rejected the claim that petroleum licenses violate Article 112 of the Norwegian Constitution.[28]

The Norwegian Supreme Court, and this is of particular relevance for the purpose of this paper, did not make use of the term 'future generations' enshrined in Article 112 of the Norwegian Constitution. The 'Court failed to even once consider the inter-generational aspect of the climate challenge in the context of rights of future generations, as explicitly laid down in Article 112 of the Constitution'.[29] In the next subsection we will see that the Federal Constitutional Court of Germany has been more progressive than the Austrian Constitutional Court and the Norwegian Supreme Court in relation to climate change and future generations.

2.3 The Example of Germany and Article 20a Basic Law

Article 20a of the German Basic Law (*Grundgesetz*, *GG*), which was introduced in 1994, states that the German state is

> '[m]indful also of its responsibility towards future generations'. Therefore, 'the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order'.[30]

This provision is similar to the Austrian act and Article 112 of the Norwegian Constitution referred to above as it does not enshrine a subjective right which would be enforceable by individuals.[31] Nevertheless, all these constitutional provisions are binding law.[32] Article 20a GG is similarly directed at the German state which is mindful of its responsibility to future generations. Similar to the

27 Norwegian Supreme Court (n 21) *Greenpeace v Ministry of Petroleum and Energy*, para 168.
28 For a detailed and critical analysis of the case, see Voigt (n 25).
29 Ibid 707.
30 The quite complicated wording is a compromise, see Sommermann, 'Art 20a GG' in von Münch and Kunig (eds), *Grundgesetz-Kommentar* (7th edn 2021) para 57. The legal meaning would arguably not change if it simply read 'Der Staat schützt auch in Verantwortung für die künftigen Generationen die natürlichen Lebensgrundlagen und die Tiere'. For details, see also Klaus F Gärditz, 'Art 20a GG' in Martin Beckmann (ed), *Landmann/Rohmer Umweltrecht: Kommentar* (CH Beck 2021).
31 German Constitutional Court (BVerfG), Decision of the First Senate, 1 BvR 2656/18 – Klimabeschluss, para 112; cf Scholz, 'Art 20a GG' in Maunz and Dürig (eds), *Grundgesetz-Kommentar* (94. EL 2021) paras 32–34.
32 BVerfG (n 31) Klimabeschluss, para 205–6; cf Murswiek, 'Art 20a GG' in Sachs (ed), *Grundgesetz* (9th edn 2021) para 12-3.

Austrian and the Norwegian provisions, not only the legislator and the judiciary but also the executive is addressed.

For quite some time, Article 20a GG did not play a major role in German constitutional law either.[33] On 24th March 2021, this changed, with the so-called 'climate law-decision' of the Federal Constitutional Court of Germany.[34] The court held that Article 20a GG obliges the organs of the German Republic to protect the climate and therefore to facilitate climate neutrality.[35] This includes that in the case of scientific uncertainty in relation to environmental causality, Article 20a GG entails a specific duty of care in relation to future generations to consider evidence and potential grave and irreversible damages.[36] Moreover, Article 20a GG is 'justiciable', which has the effect to force the political process to take ecological issues especially concerning future generations into account.[37] In brief, Article 20a GG demands to

33 Sommermann (n 30) para 58 speaks of a '*besonnene Anwendung*', a mindful application of this provision in case law (in contrast to some skeptics who were afraid that a fundamental change had been introduced based upon this provision).

34 The Court apparently considers this decision to be of great importance. Therefore, the decision has been translated into English (<https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html> accessed 18 February 2022) and French (<https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/FR/2021/> accessed 18 February 2022).

35 BVerfG (n 31) Klimabeschluss, guiding principle 2 as well as 198.

36 BVerfG (n 31) Klimabeschluss, guiding principle 2b, cf para 206 particularly highlighting the fact that future generations do not have a voice in the democratic process of today. See also para 212 for the duty of the legislator to constantly adapt climate law to the most recent scientific findings.

37 BVerfG (n 31) Klimabeschluss, guiding principle 2e as well as para 112. The intergenerational duty to protect is, however, 'only' of an objective nature as future generations which are not yet born are not capable to be the bearers of subjective (ie enforceable) rights. See ibid para 146. The question as to whether there are duties to protect fundamental rights such as the right to life which might extend to future generations has been excluded from the scope of this paper. According to the Federal German Constitutional Court (para 145–6), Article 2 para 2 first sentence GG, the right to life, entails duties to protect which relate to Article 20a GG, a provision including state objectives to pay attention to future generations. However, this duty to protect is 'only' of an objective nature as well, because future generations neither as a whole nor as the sum of these individuals can be the bearers of fundamental rights (para 146). For an interesting judgment in relation to future generations and subjective human rights concerning deforestation in the Amazon rainforest (affirming the admissibility of the '*acción de tutela*', due to the connectedness of the environment with fundamental rights), see the Colombian Supreme Court, *Andrea Lozano Barragán, et al v Presidencia de la República et al*, Judgment of 5 April 2018, STC 4360-2018, Radicación No 11001-22-03-000-2018-00319-01, espec p 15. For a partial unofficial English translation by Dejusticia, see <https://www.dejusticia.org/wp-content/uploads/2018/04/Tutela-English-Excerpts-1.pdf> accessed 18 February 2022. For an analysis of this judgment, see Paola A Acosta Alvarado and Daniel Rivas-Ramírez, 'A milestone in environmental and future generations' rights protection: Recent legal developments before the Colombian Supreme Court' (2018) 30(3) Journal of

respect the freedom of future generations.[38] This paper does not provide a detailed analysis of this comprehensive decision.[39] It is rather interested in the potential role of social contract theory in general and the problem of including future generations in the contract in particular which might be somehow related to the Austrian, Norwegian, and German provisions concerned. Particularly, the following subsection will look at whether and how philosophical reasoning might facilitate making the reference to future generations operable and potentially ease transplanting progressive arguments on addressing future generations from Germany to the Austrian, Norwegian, and potentially further similar, provisions in other countries.

2.4 Enforcing Constitutional Sustainability Clauses by Social Contract Theory?

Might social contract theory inform constitutional sustainability clauses? This paper wants to shed light on this question using the example of future generations which is referred to in the constitutional sustainability clauses in Austria, Norway, and Germany. Future generations are very suitable to this end because there is a lively philosophical debate on the question as to whether future generations could be included in social contract theory.[40] Legal scholars might learn from this debate.

Environmental Law 519. Cf for another leading case on future generations, Supreme Court of the Philippines, *Minors Oposa v Secretary of the Department of Environment and Natural Resources (DENR)*, Decision of 30 July 1993, 33 ILM 173 (1994) holding that '[t]hese rights [of children and future generations to take legal action] need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now specially mentioned, it is because […] unless it is written in the Constitution itself, the day would not be too far when all else would be lost, not only for this generation but also for succeeding generations, generations which stand to inherit nothing but a parched earth incapable of sustaining life'. Quoted after Antonio Oposa, 'Let me tell you a story' (2020) 149(4) Daedalus 207, 215, who acted as counsel for 43 Filipino children (some of them his own) in this landmark case of the Philippine Supreme Court, in his touching background story about his time 'caring for the Life-sources of Land, Air, and Waters – the LAW of Life'.

38 BVerfG (n 31) Klimabeschluss, guiding principle 4, para 193.

39 Cf for an analysis, eg Christoph Möllers and Nils Weinberg, 'Die Klimaschutzentscheidung des Bundesverfassungsgerichts' (2021) 76(22) JZ 1069; Rike Sinder, 'Anthropozänes Verfassungsrecht als Antwort auf den anthropogenen Klimawandel' (2021) 76(22) JZ 1078; Claudio Franzius, 'Die Figur der eingriffsähnlichen Vorwirkung. Zum Klimabeschluss des Bundesverfassungsgerichts' (2021) FEU Research Paper No 11/2021.

40 See on this below 3.

A first (1) possibility how legal scholars might learn from philosophers in the realm of the topic of this paper is that the philosophical discourse on how to include future generations in the social contract provides for sophisticated reasoning. This might inform the legal question as to how to interpret the somewhat vague notion of future generations in constitutional sustainability clauses. Another (2), somewhat related but nevertheless distinct possibility is that philosophical solutions to the so-called non-identity problem might contribute to transplanting the reasoning of one (constitutional) court to another court like the reasoning of the German to the Austrian Constitutional Court. The non-identity problem, briefly put, is the difficulty related to the extension of the social contract to future generations as the existence of future generations depends on the actions of present generations. Finally (3), philosophical arguments on future generations could support new legislation providing for the protection of future generations in new constitutional sustainability clauses.

The first option (1) is confronted with the methodological conservatism often present in legal discourse. Firstly, it might be considered to be a problem that moral obligations should inform legal obligations. We might label this the problem of the doctrine of 'positive law' and the aversion to 'impure' moral influences. Hence, according to doctrinal legal solutions, legal provisions are interpreted according to the canon of legal methodology (and not philosophy). This canon consists of grammatical interpretation, looking at the wording of the provision, historical interpretation, analyzing, eg, the motives of the legislator to adopt this provision, systematic interpretation, taking the context of other legal provisions into account, and finally teleological interpretation, inferring the objective of the provision. Philosophical arguments do not fit in well with this classical legal canon.

Secondly, it is not the purpose of philosophical reasoning to convince the judge and, thus, neither is it the (primary) goal of social contract theory to provide arguments for choosing a specific interpretation of a legal provision over another. And yet the philosophical discourse on future generations and how to include them in the social contract might help to shed light on the possibilities of how we can refer to future generations in legal language. This is of interest to our understanding of the law. While it might not be the case that a judge will directly base a decision on philosophical reasoning only, it will help to explore the possible understandings. Judges might, thus, not start to enforce constitutional sustainability clauses purely because of philosophical arguments. Philosophical arguments might, however, support, for instance, a teleological legal interpretation. In this vein, philosophical reasoning could provide arguments for why it is (morally) right to protect future generations (in a specific and concrete way). In relation to

the first option (1), thus, social contract theory might strengthen the application of classical legal interpretation methods.

Philosophical arguments might also be helpful for transplanting legal interpretations from one legal order to another, the above-mentioned option (2). If, as in our case, a specific constitutional court like the German one has already concretized the role of future generations in the constitution, this might constitute a role model for other courts such as the Austrian Constitutional Court. For such arguments from comparative law,[41] philosophical arguments, such as the reasoning referenced here that future generations can be included in the social contract because the social contract is about the relationship between rational beings (instead of only specific existing individuals),[42] could further strengthen the transplantation. While court decisions might act as role models, the philosophical reasoning (together with the anchor of future generations respected in the Austrian and Norwegian constitutions as well) might provide for arguments as to the right thing to do. In our case the solution of the non-identity problem submitted by *Rahul Kumar*[43] might, furthermore, help to enforce the provision on future generations in other constitutions. It is not only specific existing individual persons who might enjoy protection by the law. Also, the standpoint of rational beings which come into existence in the future can be included in the social contract and might, thus, also be protected by the law. A concrete legal consequence of this argument could be, that in administrative procedures not only existing neighbors but also potential future neighbors are considered. Hence, in relation to the second option (2), philosophical discourse on future generations and their inclusion in the social contract might support arguments of comparative law.

Finally (3), when establishing new legal provisions on future generations, philosophical arguments might back up the democratic process. Admittedly, this is a rather speculative argument. Yet, a sound argument as to why we should protect future generations might well start off or enforce a democratic law-making process. It might, for instance, empower a social movement or a political party aiming at introducing such a provision by underlining the momentum with the force of arguments. It might show ways how to include future generations in current legal orders and additionally provide arguments as to why this is the right thing to do.

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41 For the approach that arguments from comparative law are a fifth method of interpretation, see Peter Häberle, 'Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat: zugleich zur Rechtsvergleichung als fünfter Auslegungsmethode' (1989) 44(20) JuristenZeitung 913.

42 See below 3.

43 See below 3.

3 Social Contract Theory and the Challenge of Including Future Generations

Social contract theory basically holds that moral obligations depend on a contract between the members of society. While already *Socrates* is associated with contractarian arguments, *Thomas Hobbes*, *John Locke*, and *Jean-Jacques Rousseau* are the most famous names in relation to classical social contract theory.[44] *Immanuel Kant* is usually referred to as the first person who clearly stipulated the hypothetical nature of the contract. Prominent names in modern social contract theory are *John Rawls* as well as his pupil *TM Scanlon*.[45] Despite all the important differences in the versions of these scholars, social contract theory can be understood as an idea to conceptualize the notoriously complex phenomenon of social order such as how to design just institutions which are in charge of distributing rare goods. Climate change leads to considerably worse living conditions in the future and, figuratively speaking, a functioning environment will thus become sort of a rare good. Questions of intergenerational justice arise and social contract theory is a specific take on addressing such questions.[46] Indeed, climate crisis in the twenty-first century has led several scholars from various disciplines to (re)enforce 'a debate on the role that social contracts may play in a new and dynamic global context that will be increasingly shaped by the impacts of and responses to climate change'.[47] This is an important and interesting movement. Yet there are challenges for social contract theory to address the climate crisis such as to conceptualize the problem that climate change affects people not responsible for it. Generally speaking, and related to this issue, is the question as to how to conceptualize the problem of long-term consequences induced by climate change. Social contract theory would have to be expanded in the sense that all affected people – including future generations – are part of the contract (which then might contribute to conceptualizing how to order the relations of all these

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44 For an overview, see Celeste Friend, 'Social contract theory' Internet Encyclopedia of Philosophy <https://iep.utm.edu/soc-cont/> accessed 18 February 2022.
45 Cf Fred D'Agostino and Gerald Gaus, 'Contemporary approaches to the social contract' [2021] Stanford Encyclopedia of Philosophy <https://plato.stanford.edu/entries/contractarianism-contemporary/> accessed 18 February 2022.
46 Giving an overview, Lukas Meyer, 'Intergenerational justice' [2021] Stanford Encyclopedia of Philosophy <https://plato.stanford.edu/entries/justice-intergenerational/> accessed 18 February 2022.
47 Karen O'Brien, Bronwyn Hayward and Fikret Berkes, 'Rethinking social contracts: Building resilience in a changing climate' (2009) 14(2) Ecology and Society 1 <https://www.ecologyandsociety.org/vol14/iss2/art12/>.

people in a legitimate way) in order to address such consequences. This is more difficult than might seem at first.

TM Scanlon in his work entitled *What We Owe To One Another* states that '[a] ccording to contractualism, our concern with right and wrong is based on a concern that our actions be justifiable to others on grounds that they could not reasonably reject insofar as they share this concern'. Furthermore, he highlights that '"[o]thers" figure twice in this schema: as those to whom justification is owed, and as those who might or might not be able reasonably to reject certain principles'.[48]

Future generations, however, do not yet exist. This is a problem for social contract theory as highlighted above in the version of *Scanlon*. The so-called 'non-identity problem' describes the difficulty related to the extension of the social contract to future generations as the existence of future generations depends on the actions of present generations.[49] Therefore, expanding social contract theory to future generations is confronted with the argument 'that any choice we make that affects the interests of future generations will be justifiable to them, as long as they are left with lives worth living'.[50]

Rahul Kumar, however, responds that 'a more detailed look at contractualist reasoning' reveals that such an objection to expanding the social contract to include future generations is misguided. If one pays attention to what contractarianism is actually about, it becomes clear 'that the reasons that shape any principle, which no one can reasonably reject […] are the generic reasons associated with the standpoints of those who stand to be affected by the type of conduct that such a principle licenses or prohibits'.[51] Shifting the focus to a standpoint (instead of a specific individual) allows to take into account that we can foresee what a specific action might imply for a standpoint (of a person) in a certain circumstance.[52]

There is, however, another, somewhat related, skepticism towards including future generations in the social contract. Even if we grant that it might be worthwhile to justify actions to those 'with whom one can potentially interact', someone could criticize that 'there is no reason to be concerned about the justifiability of one's choices or conduct to future generations that one cannot, in principle, ever

48 Thomas Scanlon, *What we owe to each other* (Belknap Press of Harvard Univ Press 2000) 202.

49 M A Roberts, 'The nonidentity problem' [2019] The Stanford Encyclopedia of Philosophy <https://plato.stanford.edu/archives/fall2021/entries/nonidentity-problem/> accessed 18 February 2022. For an interesting illustration thereof, see Derek Parfit, *Reasons and persons* (Clarendon 1984) 371–372.

50 Rahul Kumar, 'Contractualism, interpersonal and intergenerational' in Stephen M Gardiner (ed), *The Oxford handbook of intergenerational ethics* (Oxford University Press 2021) 1.

51 Ibid Section 3.

52 For an overview of different responses to the non-identity problem, see Meyer (n 46).

meet'.[53] Hence, future generations that far in the future that we will never have the chance to meet in person must not be included in the contract.

There is a reply to this skepticism, however. Again *Rahul Kumar*, for instance, holds that 'what lies at the heart of the contractualist account of moral motivation is the idea that we stand in a particular kind of relationship to our fellow *rational* beings, one that binds us to those who will live in the further future'.[54] It is, thus, not another person, but the relationship between rational beings – our species, one might say in *Stephen Hawking*'s words – which is the glue for the contract in this reading.[55] By this abstraction, in all brevity, a binding bond between generations which will never, in principle, ever meet is created. 'The default moral relationship is one that connects all rational beings'.[56] One could say that such a relationship connects us, for instance, with our children, and them, in turn, with their children. There is, in other words, a bond between humans according to which we ought to treat each other in a respectful way. In this sense, future generations could be included in the social contract.

It is this insight that might support the interpretation and concretization of future generations addressed in constitutional sustainability clauses in the Austrian, Norwegian, and German constitutions discussed above. Doctrinal constitutional law could borrow arguments from philosophical social contract reasoning in order to concretize doctrinal legal solutions (which, in turn, might also provide further reasons on how to include future generations in our current actions by enshrining such obligations in positive law).[57]

4 Concluding Remarks

Social contract theory in the twenty-first century provides arguments as to why future generations could and should be included in the social contract as of today. Therefore, legal scholars might borrow arguments from the philosophical discourse. Sophisticated philosophical reasoning could help in order to enforce constitutional sustainability clauses which refer to future generations. The Federal Constitutional Court of Germany has provided legal arguments on how to do

53 Kumar (n 50) 1.

54 Ibid Section 1 [*italics* LK].

55 In Kumar's words (ibid Section 3 this is the 'moral relationship'. In Scanlon (n 48) 154 a 'unity with one's fellow creatures'.

56 Kumar (n 50) Section 4, 14.

57 The discourse on intergenerational justice is vast. The arguments here are necessarily limited to the question as to how to include future generations in social contract theory. For an overview on intergenerational justice, see Meyer (n 46).

so, which might, supported by philosophical arguments, also inspire the Austrian Constitutional Court, the Norwegian Supreme Court, and other courts as well to decide similarly in future cases. The democratic discourse and the possibility of introducing provisions on future generations in other legal orders might also profit from sound philosophical arguments on why we should protect future generations as fellow rational beings who will come into existence in the foreseeable future.

Finally, there might also be a reciprocal reinforcement between philosophical arguments about including future generations in the social contract and constitutional sustainability clauses enforcing us to think of future generations. While philosophical arguments might help to concretize vague legal obligations, legal obligations might, in turn, strengthen moral duties to consider future generations.

In this vein, we might be able to address the challenge identified by *Stephean Hawking* that our species needs to work together. In the words of the Colombian Supreme Court:

> [T]odos los individuos de la especie humana debemos dejar de pensar exclusivamente en el interés propio. Estamos obligados a considerar cómo nuestras obras y conducta diaria incide también en la sociedad y en la naturaleza.[58]

All individuals of the human species need to stop thinking only about their own self-interest. We are obliged to think also as to how our actions affect society and nature. This, so the Supreme Court of Colombia continues, goes along with a necessary shift from 'private ethics' to 'public ethics'; ie, the implementation of values seeking to achieve some sort of social justice also involving duties and not only rights. Maybe philosophy and the law could work together to achieve this end.

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58 Colombian Supreme Court (n 37) *Andrea Lozano Barragán, et al v Presidencia de la República et al*, 18, quoting Gregorio Peces Barba, 'Ética pública – ética privada' (1997) 14 Anuario de Filosofia del Derecho 531. The passage continues in this way 'En palabras de Peces-Barba, es necesario pasar de una "ética privada", enfocada al bien particular, a une "ética pública", entendida como la implementación de valores morales que buscan alcanzar una cierta concepción de justicia social, para etso, deben redefinirse los derechos, concibiéndolos como "derechos-deberes"'.