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The Politics of Silence: Hannah Arendt and Future Generations' Fight for the Climate

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The tragedy is that tomorrow's generations aren't here to challenge this pillaging of their inheritance. The great silent majority of future generations is rendered powerless and needs a voice.

Supreme Court of Pakistan, *DG Khan Cement* (C P1290-L/2019)

Abstract: Silence, a political category in democratic theory, has proven starkly unjust toward future generations, who are practically voiceless in intergovernmental fora, a notable feature of the international climate regime. This article first explores the status of future generations' fight for the climate by articulating the solidarity implications of climate change as a common concern of humankind. Second, the analysis offers a brief overview of the recent constitutionalization trend concerning future generations' interests in the environment as a meaningful counterweight to the politics of silence. Third, the article discusses climate change litigation as a catalyst of the constitutionalization trend and a proxy for political participation. Throughout the analysis, the article turns to the thought of political theorist Hannah Arendt to illustrate the potential of legally protecting future generations' role in fighting for a stable climate through post-sovereign constitutionalism. By way of a case study, the analysis argues that in *Neubauer et al v Germany* Germany's Federal Constitutional Court offered practical ways to offset the politics of silence and increase the political space for future freedoms. Conclusively, the article offers a snapshot of open and fluid post-sovereign constitutional institutions and participative practices that could advance freedoms for future generations.

Keywords: future generations, climate change, international climate regime, Hannah Arendt, post-sovereign constitutionalism

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1 Introduction

The year 1990 witnessed the conflagration of two events with longstanding reverberations for future generations. First, the IPCC published its first comprehensive report, followed by five additional assessment cycles and new reports in 1995, 2001, 2007, 2013/2014, and 2021/2022. The main scientific findings and policy implications have consistently pointed to the need for more ambitious efforts to tackle climate change.¹ Second, the US Court of Appeals for the District of Columbia Circuit rendered a decision, *City of Los Angeles v National Highway Traffic Safety Administration*, widely viewed as the first judicial decision in climate change matters. This case broached the standing and grounds of review of a petition brought by NGOs and polities (a group of cities and states) against the lack of an Environmental Impact Statement for standards designed by the National Highway Traffic Safety Administration (NHTSA) to improve the fuel economy of vehicles sold in the United States.²

Future generations motivated the policy efforts behind both the IPCC and the first instance of climate litigation. In 1988, the General Assembly of the United Nations endorsed the establishment of the IPCC through resolution 43/53, which was explicitly devoted to the ‘protection of global climate (sic) for present and future generations of mankind.’³ In terms of climate litigation, *City of Los Angeles v National Highway Traffic Safety Administration* revolved around the decision by the NHTSA not to prepare an Environmental Impact Statement over fuel standards under the 1969 National Environmental Policy Act (NEPA). Importantly, NEPA was the first statute worldwide to set environmental impact duties, expressly mentioning among its goals the fulfillment of ‘the social, economic, and other requirements of present and future generations of Americans.’⁴

More than 30 years after these momentous events, nearly half of all children worldwide live in countries where climate risk is extreme.⁵ Further, almost every

¹ See also SM Gardiner, ‘Protecting future generations: intergenerational buck-passing, theoretical ineptitude and a brief for a global core precautionary principle’ in JC Tremmel (ed), *Handbook of Intergenerational Justice* (Elgar 2006) p 151.

² *City of Los Angeles v National Highway Traffic Safety Administration*, 912 F2d 478 (DC Cir 1990). See also J Peel and HM Osofsky, ‘Litigation as a Climate Regulatory Tool’ in C Voigt (ed), *International Judicial Practice on the Environment: Questions of Legitimacy* (CUP 2019) p 325.

³ UNGA, Protection of Global Climate for Present and Future Generations of Mankind, Res 43/53 (6 Dec 1988), paragraph 5.

⁴ National Environmental Policy Act, 42 USC §§ 4331. N Craik, ‘Environmental Impact Assessment’ in L Krämer (ed), *Principles of Environmental Law* (Elgar 2018) pp 196–197.

⁵ UNICEF, *The Climate Crisis is a Child Rights Crisis: Introducing the Children’s Climate Risk Index* (2021) p 11.

child on earth is exposed to at least one major climate and environmental hazard, shock, or stress.⁶ Although the science is clear, international climate law has not yet developed institutional guarantees for protecting future generations. The weakness of international climate law lies in the limited protection of future generations in the treaties and the lack of representativeness in diplomatic conferences.

The Paris Agreement mentions intergenerational equity in one preambular provision, which falls short of the bindingness of the agreement's operative part.⁷ A further preambular provision on human rights does not offer an appropriate umbrella for the protection of children, now and in the future, for at least two reasons. First, it is not settled in international law that generations yet to be born enjoy human rights connected to climate change.⁸ Second, the Paris Agreement's recital on human rights is intrinsically weak as it is aimed at state actions to address climate change rather than their contribution to climate change. In fact, in the making of the COP21 Agreement, the triad constituted by the US, Norway, and Saudi Arabia strongly opposed the inclusion of human rights in the operative provisions.

Further, opposition to a rights-based approach at COP21 purged the preambular provision of its justiciable formula. Under the current formula, states are obligated to respect, promote, and consider human rights as opposed to the enforceable obligation in international human rights law, where states must respect, promote, and fulfill human rights.⁹ Overall, the Paris Agreement has failed to set tangible duties on states parties toward the youth and those yet to be born.¹⁰

On points of representativeness, future generations are practically voiceless in intergovernmental fora, notably within the international climate regime. The 2021 global climate summit in Glasgow (COP26) should have been the COP for children,¹¹ but no youth representatives were included in the negotiations.¹² Consequently, more than 250,000 people gathered to protest this omission during Glasgow's 'Climate March' on November 6, 2021, which was replicated

6 Ibid.

7 B Lewis, 'The Rights of Future Generations within the Post-Paris Climate Regime' (2018) 7 TEL 69, 76. On the limited protection of future generations in the UNFCCC and Kyoto Protocol, see P Lawrence, *Justice for Future Generations. Climate Change and International Law* (Elgar 2014) pp 103–112.

8 N Van Dijk, 'From exacerbating the Anthropocene's problems to intergenerational justice: An analysis of the communication procedure of the human rights treaty system' (2021) 10 Earth System Governance 100123, p 2.

9 Ibid.

10 Ibid, pp 72–78.

11 UNICEF, FACT SHEET: COP26 – Children and climate change (1 Nov 2021) <<https://www.unicef.org/press-releases/fact-sheet-cop26-children-and-climate-change>> accessed 8 Nov 2022.

12 E Morgera and M Lennan, 'COP26: Reflections on Human Rights at the Ocean-Climate Nexus' <<https://gnhre.org/community/cop26-reflections-on-human-rights-at-the-ocean-climate-nexus/>> accessed 8 Nov 2022.

with takeovers by the youth during the ‘Youth and Science Day’ at COP27.¹³ As maintained by UNICEF, the youth are currently underrepresented in global summits and policy discussions on climate change, ‘despite being the major stakeholder in their outcomes.’¹⁴ Future generations are therefore limited in their ability to influence decisions critical to their future. This situation persists despite the acknowledgment that climate change is a common concern of humankind, an argument that, in principle, surpasses the temporal limits of one generation.¹⁵

With the meager results achieved at COP rounds, one may wonder whether the UN climate process has become a venue for public catharsis. By expressing and purging the intense emotions around climate injustice and fears of a climate breakdown – through dogged negotiations and unrelenting media coverage – the international community risks perpetuating a system of policy washing and missed opportunities. Because consensus on either stringent obligations or effective voluntary measures is difficult to achieve, we often hear that next year’s climate summit will be crucial, the ‘last chance’ to tackle climate change. Expectations about the international climate regime may be overly high, but the shouts of disaffected youth are difficult to dodge.

This article first explores the status of future generations’ fight for the climate by articulating the solidarity implications of climate change as a common concern of humankind. It argues that solidarity is presently negated by a politics of silence toward the voiceless community, namely future generations, wildlife, and natural resources.¹⁶ Second, the analysis offers a brief overview of the recent constitutionalization trend concerning future generations’ interests in the environment as a meaningful counterweight to the politics of silence. It argues that global environmental constitutionalism helps devise institutions and practices that can offset the politics of silence and help reconcile individuality with collective climate action for future generations. Conversely, human rights law and theories of justice have proven ambivalent and minimally pragmatic for securing future generations. Third, future generations’ fight for the climate has notably come to the fore in climate change litigation, which is found to constitute a proxy for political participation and a catalyst of constitutionalization. In this regard,

13 ‘Twenty years too late’ – Our review of COP26 (2 Dec 2021) <<https://www.wecf.org/twenty-years-too-late-our-review-of-cop26/>> accessed 8 Nov 2022. ‘Our futures are being stolen!’ Youth activists tell COP27 negotiators it’s past time to tackle ‘loss and damage’ (10 Nov 2022) <<https://news.un.org/en/story/2022/11/1130422>> accessed 22 Nov 2022.

14 UNICEF, FACT SHEET: COP26 – Children and climate change (op cit).

15 1992 United Nations Framework Convention on Climate Change, 1771 UNTS 107. 2015 Paris Agreement on Climate Change, FCCC/CP/2015/L.9/Rev1. L Horn, ‘The Implications of the Concept of Common Concern of a Human Kind on a Human Right to a Healthy Environment’ (2004) 1 *Macquarie journal of international and comparative environmental law* 233, 244.

16 R Abate, *Climate Change and the Voiceless* (CUP 2019) p xii.

the article shows how a landmark decision handed down by Germany's Federal Constitutional Court in April 2021, *Neubauer et al v Germany*, offers practical ways to counterweigh the politics of silence and increase the political space for future freedoms. Conclusively, the article offers a snapshot of the types of open and fluid institutions and participative practices that could advance freedoms for future generations. It does so by calibrating the underlying values of participation with the entrenched limitations of representative democracies.

Throughout the analysis, the article turns to the thought of political theorist Hannah Arendt to illustrate the potential of legally protecting future generations' role in fighting for a stable climate through post-sovereign constitutionalism. Ultimately, this article argues that Hannah Arendt provides meaningful insights to counterweigh the accumulation of sovereignty among public authorities to the detriment of future life. The upshot is a possibly citizen-oriented future, where politics accounts for future generations through more participative constitutionalism.

Duties toward future generations have been theorized in law, philosophy, and economics. The relevant literature is usually concerned with one field of study, emphasizing theory over practical arrangements for protecting future generations from climate change. To my knowledge, Hannah Arendt's insights have yet to be operationalized in an interdisciplinary manner regarding future generations and climate matters. This article aims to fill this gap by combining political theory with international law and global environmental constitutionalism.

The following is premised on several assumptions, and limitations. By future generations, this analysis means both present generations, notably the youth, and generations yet to be born.¹⁷ Further, it addresses both overlapping and non-overlapping generations.¹⁸ In terms of political theory, this article cannot possibly exhaust the complexity and intellectual profundity of Hannah Arendt's thought. Rather, it builds on some of Arendt's works that are most relevant to the research topic. It should be noted that Arendt's engagement with the law is not systematic, but questions on the democratic underpinnings of law and the significance of political action for posterity's freedoms are scattered throughout. Arendt's *oeuvres* hold extraordinary potential for 'reassessing the relationship between law and politics from an international perspective.'¹⁹ Further, Arendt's

¹⁷ See similarly D Shelton, 'Equity' in D Bodansky, J Brunnée and E Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007) p 644, and H Graham and Siân Bell, 'The representation of future generations in newspaper coverage of climate change: A study of the UK press' (2021) 35 *Children & Society* 465.

¹⁸ JC Tremmel, *A theory of intergenerational justice* (Earthscan 2009) p 11.

¹⁹ A Kemmerer, 'Kelsen, Schmitt, Arendt, and the Possibilities of Constitutionalization in (International) Law: Introduction' (2010) 23 *Leiden Journal of International Law* 717, 719. See also M

engagement with constitutionalizing moments emboldens an analysis of global environmental constitutionalism.²⁰

International law and global environmental constitutionalism are not utterly discrete perspectives. In fact, they entwine in meaningful ways.²¹ The article defines constitutionalization as the limit of governmental power by the juridification of politics rather than the founding of a new political order.²² Constitutionalization thus aims to ‘subject the exercise of all types of public power, whatever the medium of its exercise, to the discipline of constitutional procedures and norms.’²³ In this theorization of constitutionalization, it is no surprise that courts hold a central role in adjudicating future generations’ interest in a stable climate.²⁴

The methodological choice of considering climate litigation as an enhancer of the constitutionalization trend, as well as a proxy for political participation, is due to the increase of climate change litigation brought by the youth and representatives of future generations²⁵ and recognizing the rights and interests of future generations.²⁶

Goldoni and C McCorkindale, *Hannah Arendt and the law* (1st edn, Hart 2012) and JAN. Klabbers, ‘Possible Islands of Predictability: The Legal Thought of Hannah Arendt’ (2007) 20 *Leiden Journal of International Law* 1.

20 See, for instance, H Arendt, *On Revolution* (Penguin Books 1990).

21 On the latter point, see M Loughlin, ‘What is Constitutionalism’ in P Dobner and M Loughlin (ed), *The twilight of constitutionalism?* (OUP 2010) p 47.

22 C M Möllers, ‘Pouvoir Constituant – Constitution – Constitutionalisation’, in A v Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2nd revised edn, Hart and Verlag CH Beck 2009) pp 173–176, with references to Arendt.

23 M Loughlin, ‘What is Constitutionalism’ in Dobner and Loughlin (op cit) p 47.

24 *Ibid.*

25 For instance, *Greenpeace Nordic Ass’n and Nature & Youth v Norway Ministry of Petroleum and Energy*, HR-2020-2472-P (Norway’s Supreme Court, 22 Dec 2020). *Do-Hyun Kim et al v South Korea* (Constitutional Court of South Korea, filed 2020, pending), Case T-330/18 *Armando Ferrão Carvalho and others v The European Parliament and the Council (People’s Climate Case)* (EU General Court, 24 May 2018, complaint). *Youth for Climate Justice v Austria et al* (Application to the ECtHR, filed Sept 2020). <<https://perma.cc/9VP2-TZZE>> accessed 18 Sept 2020, *A Sud et al v Italy* (Civil Court of Rome, filed 2021, pending).

26 *Urgenda v The Netherlands*, The Hague District Court, ECLI:NL:RBDHA:2015:7196 (24 Jun 2015) (original language: ECLI:NL:RBDHA:2015:7145). *The Netherlands v Urgenda*, Court of Appeals of The Hague, ECLI:NL:GHDHA:2018:2610 (9 Oct 2018) (original language: ECLI:NL:GHDHA:2018:2591). *The Netherlands v Urgenda*, Netherlands’ Supreme Court, ECLI:NL:HR:2019:2007 (20 Dec 2019) (original language: ECLI:NL:HR:2019:2006). *Leghari v Federation of Pakistan and others*, WP No 25501/2015 (Lahore High Court, 4 Sept 2015). *Leghari v Federation of Pakistan and others*, WP No 25501/2015 (Lahore High Court, 14 Sept 2015). *Leghari v Federation of Pakistan and others*, WP No 25501/2015 (Lahore High Court, 5 Oct 2015). *Leghari v Federation of Pakistan and others*, WP No 25501/

2 Climate Change as a Common Concern of Humankind, and Its Confrontation With the Politics of Silence

2.1 Climate Change as a Common Concern of Humankind: Whither Solidarity?

In Resolution 43/53 from 1988, the UN General Assembly welcomed Malta's initiative for the 'conservation of climate (sic) as part of the common heritage of mankind.'²⁷ It remains uncertain why the General Assembly failed to bring the initiative to fruition. What seems assured is that diplomats at that time viewed global warming as science fiction.²⁸

The first preambular paragraph of the UN Framework Convention on Climate Change (UNFCCC) identifies climate change as a common concern of humankind.²⁹ The same wording was chosen at the same 1992 Earth Summit for the Convention on Biological Diversity (CBD), which was meant to imply international equity and fair burden sharing.³⁰ However, acting on a common concern for future generations has proved much more difficult than uniting to protect the common heritage of mankind.³¹ While the concept of a common heritage of mankind

2015 (Lahore High Court, 20 Nov 2015). *Leghari v Federation of Pakistan and others*, WP No 25501/2015 (Lahore High Court, 18 Jan 2016). *Leghari v Federation of Pakistan and others*, WP No 25501/2015 (Lahore High Court, 25 Jan 2018). *Demanda Generaciones Futuras v Minambiente*, 11001-22-03-000-2018-00319-00 (Supreme Court of Colombia, 5 Apr 2018). *DG Khan Cement*, CP1290-L/2019 (Supreme Court of Pakistan, 15 Apr 2021). *Neubauer et al v Germany* (German Federal Constitutional Court, 24 Mar 2021, Case Number BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20). *Commune de Grande-Synthe v France*, no 427301 (Council of State, 1 Jul 2021). *Notre Affaire à Tous et al v France*, no 1904967, 1904968, 1904972, 1904976/4–1 (Administrative Tribunal of Paris, 14 Oct 2021). *Sharma* [2021] FCA 560 (27 May 2021).

27 UNGA, Res 43/53 (op cit) paragraph 1.

28 D Bodansky, Prologue to the Climate Change Convention in IR Mintzer and JA Leonard, *Negotiating Climate Change: The Inside Story of the Rio Convention* (CUP 1994) p 52.

29 See UNFCCC, preambular paragraph 1.

30 Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity, Report of the Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity on the Work of its Second Session (7 Mar 1991) p 4 <<https://www.cbd.int/doc/meetings/iccbd/bdn-02-awg-02/official/bdn-02-awg-02-05-en.pdf>> accessed 8 Nov 2022.

31 See, for instance, on the conservation of marine resources, CC de Oliveira and S Maljean-Dubois, 'The contribution that the concept of global public goods can make to the conservation of marine resources' in E Couzens et al (eds), *Protecting Forest and Marine Biodiversity* (Elgar 2017) p 296ff.

questions the principle of permanent sovereignty over natural resources,³² the common concern of humankind fails to do so.³³ As a result, climate change as a common concern of humankind has not yet spurred the solidarity toward future generations that is needed to tackle super-wicked problems, where future scenarios may lead us to think that the situation is ambiguous—prompting action avoidance.³⁴

This theorization of climate change is a political-normative concept that escapes consensus. Nevertheless, soft law and theoretical sources suggest that climate change as a common concern of humankind infers solidarity with future generations. The 2021 International Law Commission's (ILC) draft guidelines on the protection of the atmosphere recognize atmospheric pollution and atmospheric degradation as a common concern of humankind,³⁵ enshrining the interests of future generations in the long-term conservation of the quality of the atmosphere.³⁶ Guideline 6 is devoted to the equitable and reasonable utilization of the atmosphere, taking into account the interests of present and future generations.³⁷ One often overlooked source of soft law is the 2017 Declaration of Ethical Principles in relation to Climate Change, which restates climate change as a common concern but adds new elements. Under Article 6, on solidarity, not only states but also those actors who have the capacity to address climate change are called on to act and cooperate by considering 'the well-being, livelihoods, and survival of future generations which depend on our current use of resources and the resulting impacts thereof.'³⁸

Regarding theoretical sources, experts have shown that increasing commitments toward future generations are taking place within domestic legal systems.³⁹

32 R Wolfrum, 'The Principle of Common Heritage of Mankind' (1983) 43 ZaöRV 312, 336.

33 T Cottier, 'The Principle of Common Concern of Humankind' in Z Ahmad and T Cottier, *The prospects of common concern of humankind in international law* (CUP 2021) p 18.

34 See also P Taylor, 'Governing the global commons: an ethical-legal framework' (2017) 13 Policy Quarterly 43, 47, tracing a weakening of the concept to the Paris Agreement.

35 ILC, Protection of the atmosphere: Texts and titles of the draft guidelines and preamble adopted by the Drafting Committee on second reading (26 Apr–4 Jun and 5 Jul–6 Aug 2021), 3rd preambular para.

36 *Ibid.*, 7th preambular para.

37 *Ibid.*, Guideline 6. See also 1992 Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol I); 31 ILM 874 (1992), Principle 3, and 1997 UNESCO Declaration on the Responsibilities of the Present Generations Towards Future Generations, Res 44/1997 (12 Nov 1997) Article 3.

38 2017 Declaration of Ethical Principles in relation to Climate Change (SHS/BIO/PI/2017/2), Article 6(2) (b). See also *In re Greenpeace Southeast Asia and Others*, CHR-NI-2016-0001 (Human Rights Commission of the Philippines, 6 May 2022, National Inquiry on Climate Change Report) pp 110ff.

39 Taylor, 'Governing the global commons: an ethical-legal framework' (op cit) p 47.

Commitments toward future generations have thus limited effects in the realm of international *realpolitik*. However, they challenge state-centered international law in important ways by embedding a communitarian perspective, that of humankind, beyond the usual perspective of national interests.⁴⁰

Overall, international law's qualification of climate change as a common concern of humankind has posed more questions than it provides answers.⁴¹ If we are to intellectualize climate change as a common concern of humankind, the concept of solidarity ensuing therefrom defies solidarity as classically held among peers and aimed at mutual understanding, as Habermas has influentially held.⁴² In fact, future generations are not properly peers, nor are discussions on their climate-related interests generally devoted to mutual understanding. However, a procedural guarantee of those discussions is that future generations will be somehow represented, notably through generations of the current youth.

Head-on, Arendt tackles solidarity in her conception of politics. More specifically, politics is coterminous to a public space where differences are irreducible: they cannot be reduced to a common measurement or denominator. Irreducibility in political views still allows for dialogue and understanding, but not without dispute and frustration. In this context, solidarity is not a moral imperative society sets for itself. Rather, it stems from different gatherings of people—through speech and action—around central aspects of a particular issue. People thus constitute a public space of discussion that inspires collective action. Along these lines, Arendt emphasizes that the unity of humankind and its solidarity consist not in a universal agreement but rather in the commonality ‘that diversity conceals and reveals at the same time.’⁴³ Arendt thus rejects the ideal of rational consensus espoused later by Habermas, whereby consensus and solidarity unfold out of people's shared rationality. Rather, she stresses disagreement and contestation, which mirrors a web of plurality—of diverse individuals who decide to engage in the public sphere. Only within this web of plurality can inter-spaces of agreement emerge.⁴⁴

40 Ibid. See similarly M Takle, ‘Common concern for the global ecological commons: solidarity with future generations?’ (2021) 35 *International relations* 403, 410.

41 See also J Brunnée, ‘The Stockholm Declaration and the Structure and Processes of International Environmental Law’ in A Chircop and T McDorman (eds), *The Future Of Ocean Regime Building: Essays In Tribute To Douglas M Johnston* (Kluwer 2008) p 51.

42 A Falch-Eriksen, ‘Solidarity and tension across generations in welfare democracies,’ in M Takle, B Slagsvold and A Falch-Eriksen, *Generational Tensions and Solidarity Within Advanced Welfare States* (Taylor and Francis 2021) p 192, referring to Habermas to present solidarity as part of the human potential for living social lives through ‘the ability to create mutual understanding among peers within the social system.’

43 H Arendt, *Men in Dark Times* (Harcourt Brace & Company 1968) p 90, calling this commonality ‘oneness.’

44 Ibid, p 31.

The entwinements between solidarity and collective action, as sketched above, are particularly relevant to comprehending the reasons for the current lack of solidarity with future generations, which is impinging collective action on climate change as a common concern of humankind. Some of the most decisive reasons can be found in the lack of political space for future generations, whose prerogatives thus fail in political terms and who, moreover, lack legal means of protection.

In climate matters, theories drawn from Arendt help re-center the debate on citizen-oriented politics. This re-centering extends the political realm beyond the international and state levels, where collective actions have so far failed to materialize (supra 1). Only by being seen and heard by others can we overcome futility and establish a common world because ‘a common world can survive the coming and going of the generations only to the extent that it appears in public.’⁴⁵ I argue that appearing in public means endowing the youth with a voice to be heard and space to act. This space most likely opens up first at the domestic and local levels, where Arendt identifies the nearest political community for the individual⁴⁶ and the only one that can grant individuals rights.⁴⁷ Reliance on the domestic and local levels helps identify climate action as polycentric and based on human equality rather than hierarchy.⁴⁸ From a polycentric perspective, local government offers the average (young) citizen the opportunity to participate directly in public affairs and a sense of belonging to their community.⁴⁹ In this context, contestation and local fragmentation benefit the health of participatory democracy⁵⁰ and can legitimately unfold as ‘democratic rebellious politics’ that value chronic contestation.⁵¹ In Arendtology, politics does not accrue from consensus but through divergence because better discussions and agreements can emerge through argumentation.⁵²

Conclusively, the solidarity implications of climate change as a common concern of humankind reveal the potential of a new political space for future generations, notably today’s youth. By valuing discussion and dissent rather than

⁴⁵ H Arendt, *The Human Condition* (2nd edn, The University of Chicago Press 1998) p 55.

⁴⁶ H Arendt, *The origins of totalitarianism* (2nd edn, Harcourt Brace & Company 1973) p 297.

⁴⁷ *Ibid.*

⁴⁸ On this perspective by the polycentrists, see BP Janiskee, ‘The Structure of American Local Government’ (2004) 33 *Perspectives on political science* 89, 91.

⁴⁹ See similarly Janiskee, ‘The Structure of American Local Government’ (op cit) pp 91–94, with reference to Tocqueville and Arendt.

⁵⁰ *Ibid.*

⁵¹ CI Jeffrey, *Arendt, Camus, and Modern Rebellion* (Yale University Press 1992) p 15 (quotation marks omitted).

⁵² H Arendt, *Between Past and Future* (enlarged edn, Penguin 2006 (first published 1968)) p 93.

rationality and consensus, Arendt allows for reconstituting politics polycentrically at a time when many expectations have been dashed, and international politics is perceived in a nihilistic way.⁵³ Solidarity toward future generations concerns present and future freedoms, thus becoming a quintessential problem in law and politics. What remains unclear is how solidarity toward future generations, thus conceived, can unfold with the current limits of their political participation, which I term the politics of silence (infra 2.2).

2.2 The Politics of Silence and Future Generations

Silence has become a political category in democratic theory.⁵⁴ Its limit for politics has notably emerged in the critique of the social contract tradition.⁵⁵ Over the centuries, the social contract tradition has proved exclusionary toward young citizens and other societal actors, such as women and people with disabilities.⁵⁶ In the social contract tradition, liberalism hails citizens' institutional voice, notably that citizens are represented in a parliament that makes decisions that are justifiable or acceptable to all represented persons. However, liberalism has long side-lined actors who lack parliamentary representation to fit the ideal of public reason—the capacity to consent to the social contract, which endows citizens with the right to have a voice and be part of a socially contracted polity. Over the years, women and other political minorities have achieved better recognition of their capacity, leading to their inclusion in the social contract.

Conversely, future generations cannot routinely provide consent to political decisions concerning their lives through an established institutional voice. After three centuries of social contract theory and practice, it is fair to say that future generations lie structurally outside of the social contract, which hampers their chance to be considered in meaningful collective actions on climate change. I deem the missing reconciliation between future generations and collective action part of the above-described politics of silence.

⁵³ Jeffrey, *Arendt, Camus, and Modern Rebellion* (op cit) p 15.

⁵⁴ T Rollo, 'Democratic silence: two forms of domination in the social contract tradition' (2021) 24 *Critical Review of International Social and Political Philosophy* 316. See also the positive aspects of the politics of silence in M Brito Vieira, 'Silence in political theory and practice' (2021) 24 *Critical Review of International Social and Political Philosophy* 289.

⁵⁵ Rollo, 'Democratic silence: two forms of domination in the social contract tradition' (op cit) pp 316ff.

⁵⁶ *Ibid*, p 316.

At its core, the social contract tradition addresses how individuals can live together and be free. Hannah Arendt was never a contractarian and explicitly criticized Jean-Jacques Rousseau. In *The Social Contract*, Rousseau embarks on an intellectual journey to identify a form of association by which one unites with all, obeys himself alone, and remains as free as before. Rousseau postulates that individuals could unite as citizens in a single will, the General Will, that will legislate to maintain individuals' freedom. The General Will opposes private wills and interests: by definition, it is always right. Obeying the laws set forth by the General Will equals obeying one's will: upon refusal of the General Will, one can be forced to be free, namely to participate to the constitution of and compliance with the General Will and its laws.⁵⁷ Rousseau presupposes a homogenous group of individuals uniting as citizens to constitute the General Will: not too rich nor too poor, sharing a civil rather than a confessional religion, free from groups or factions that can splinter the General Will. Such a voluntaristic idea of the public realm⁵⁸ presupposes that reason will lead all members to the same conclusion about specific problems.

Arendt disputes Rousseau's view of the body politic, which ignores diversity⁵⁹ and human plurality, which is the human condition 'of living as a distinct and unique being among equals'⁶⁰ rather than as an undifferentiated component of the General Will. In her view, politics starts from the plurality of human beings. A healthy body politic thus depends on a plurality of opinions.⁶¹ What the French would call *l'union sacrée* is to be shunned 'because this would already be a kind of tyranny, or the consequence of a tyranny, and the tyranny or tyrant could very well be the majority.'⁶² Although she disagrees with Rousseau, Arendt recognizes in him one of the two intellectuals who most influenced modern political philosophy, along with Montesquieu.⁶³ Montesquieu's insights, however, were, in her view, much more revolutionary than Rousseau's, as well as seminal for Arendt's thought.⁶⁴

Montesquieu's greatest discovery was that power is divisible into three powers: 'the making of the laws, the executing of decisions, and the deciding

57 JJ Rousseau, *The Social Contract & Discourses* (ed by A Uyl, Devoted Publishing 2016) p 28. SG Affeldt, 'The Force of Freedom: Rousseau on Forcing to Be Free' (1999) 27 *Political Theory* 299, 325.

58 M Canovan, 'Arendt, Rousseau, and Human Plurality in Politics' (1983) 45 *The Journal of Politics* 286, 298.

59 Arendt, *On Revolution* (op cit) pp 76–77.

60 Arendt, *The Human Condition* (op cit) p 178.

61 H Arendt, *Thinking Without a Banister: Essays in Understanding, 1953–1975* (Knopf Doubleday Publishing Group 2018) p 491.

62 *Ibid.*

63 *Ibid.*, p 56.

64 *Ibid.*

judgments that must accompany both'.⁶⁵ These three powers mirror the three main political activities of human beings and are devoid of connotations of violence.⁶⁶ Uninterested in a fictitious contractual state, Montesquieu focuses on political dynamics and posits political action as the driving motor of change in history.⁶⁷ Politics is action: it is not a means to reach an agreement and accomplish certain goals, as modern discourse theory and deliberative democracy would have it.⁶⁸ With Montesquieu, Arendt holds that action does not merely belong to governments, nor has it a prescribed direction.⁶⁹ Through her active conception of power, Arendt downplays 'the distinction between ruling and being ruled, between rulers and subjects', which is traditionally held to be the essence of all political organizations.⁷⁰ Arendt's critique of the social contract constitutes a critique of the essentially passive conception of power that social contract theory perpetuates:

In the so-called social contract between a given society and its ruler, on the other hand, we deal with a fictitious, aboriginal act on the side of each member, by virtue of which he gives up his isolated strength and power to constitute a government; far from gaining a new power, and possibly more than he had before, he resigns his power such as it is, and far from binding himself through promises, he merely expresses his 'consent' to be ruled by the government, whose power consists of the sum total of forces which are monopolized by the government for the alleged benefit of all subjects.⁷¹

Not belonging merely to governments, in Arendt, all human beings can exercise power. Power can be articulated as a structure of government based on lawfulness. Thus, lawfulness offers the relative permanence to power, a structure where the changing circumstances and actions of individuals can find safe harbor.⁷² Permanence is relative because the realities of political life are contingent.⁷³ Nevertheless, permanence is real, which bears upon future generations. In future-oriented lawfulness, made of institutions and norms, each generation can be metaphorically seen as enlarging its mentality by including future generations, thus allowing for the representation of their interests.⁷⁴

⁶⁵ Ibid, pp 56–57.

⁶⁶ Ibid.

⁶⁷ Ibid, p 58.

⁶⁸ Klabbers, *Possible Islands of Predictability: The Legal Thought of Hannah Arendt* (op cit) p 8.

⁶⁹ Arendt, *Thinking Without a Banister: Essays in Understanding, 1953–1975* (op cit) p 58.

⁷⁰ Ibid, p 64.

⁷¹ Arendt, *On Revolution* (op cit) p 170.

⁷² On both points, Arendt, *Thinking Without a Banister: Essays in Understanding, 1953–1975* (op cit) p 58.

⁷³ Ibid.

⁷⁴ On enlarged mentality, see *ibid*, p 235.

Overall, Arendt elaborates on some general characteristics of political action through which current generations can overcome parochial interests and pass the baton of the public space to the next. As penned by Arendt, '[i]f the world is to contain a public space, it cannot be erected for one generation and planned for the living only; it must transcend the life-span of mortal men.'⁷⁵ Within this public space, in Arendt, the law is 'the framework within which people move and act',⁷⁶ a framework 'of ties and bonds for the future.'⁷⁷ Laws and constitutions, treaties, and alliances are such ties and bonds, all of which are intrinsically connected to the future. In fact, they depend on 'the faculty to promise and to keep promises in the face of the essential uncertainties of the future.'⁷⁸

Conclusively, solidarity toward future generations, conceived as a space where they possess a voice and the right to act, challenges the current limits of political participation for future generations, which I previously termed the politics of silence. By reviewing some of the most relevant insights from Arendt, we have surveyed how politics can be extracted from the transcendental and exclusionary aspects of social contract theory, the instrumentality of modern discourse theory, and deliberative democracy. In Arendt, politics is action, a concrete place where individuals join together, in all their plurality, to 'take care of the world, and assume responsibility for it.'⁷⁹ The trouble, and Arendt acknowledges it outright, is that we do not know the future: 'everybody acts into the future, and nobody knows what he is doing.'⁸⁰ This exponential uncertainty about the future recrudesces the debate on how future generations' interests should be constitutionally protected and whether future generations should participate, also through proxies, in political life. The debate is crucial to devise a meaningful counterweight to the politics of silence (infra 3).

3 The Constitutional Protection of Future Generations

3.1 Global Environmental Constitutionalism

I have so far argued that climate change as a common concern of humankind implies solidarity duties toward future generations, which concerns present and

⁷⁵ Arendt, *The Human Condition* (op cit) p 55.

⁷⁶ Arendt, *Thinking Without a Banister: Essays in Understanding, 1953–1975* (op cit) p 58.

⁷⁷ Arendt, *Between Past and Future* (op cit) p 127.

⁷⁸ *Ibid*, p 164.

⁷⁹ Klabbers, *Possible Islands of Predictability: The Legal Thought of Hannah Arendt* (op cit) p 8.

⁸⁰ Arendt, *Thinking Without a Banister: Essays in Understanding, 1953–1975* (op cit) p 493.

future freedoms and thus constitutes an archetypical problem in law and politics. In elaborating on Arendt's writings, I have shown that a new political space should unfold for future generations, notably today's youth, at the domestic and local levels rather than through the representation of governments in international fora. First, by valuing plurality and dissent, Arendt helps transcend the current limits of political participation for future generations, namely the politics of silence, which partly derives from social contract theory and its exclusion of the voiceless. Second, Arendt goes beyond the conception of power as monopolized by the state. Instead, she articulates politics as action supported by lawfulness, which offers ties and bonds through which the average citizen participates in the political realm. As such, the political realm holds the potential to eschew parochial interests and account for future freedoms. In this space, individuals can be inspired to collective action for the protection of future generations, notably in climate matters. The problem is that Arendt stops short of specifying the institutions and practices that offset the politics of silence and help reconcile individuality with collective climate action.⁸¹

With these aspects of political theory, I will briefly outline the recent constitutionalization trend concerning future generations' interests in the environment as a meaningful counterweight to the politics of silence sketched above. Up to 2019, around 30 countries have included ecological protection clauses for future generations in their constitution,⁸² which belongs to a larger trend of 'posterity protection provisions' (PPPs).⁸³ PPPs pertain to global environmental constitutionalism—the increasing global constitutional protection of the environment—in constitutional texts and through vindication by constitutional courts.⁸⁴ Originating and departing from domestic environmental constitutionalism, global environmental constitutionalism can enable the state to constitutionally enshrine the protection of the global space beyond its jurisdiction.⁸⁵ Accordingly, global environmental constitutionalism seems appropriate to address climate change,

81 See similarly LJ Disch, *Hannah Arendt and the Limits of Philosophy* (Cornell University 1994) p 45.

82 M Takle, 'Solidarity with Future Generations? Protection clauses in constitutions' in M Takle, B Slagsvold and A Falch-Eriksen, *Generational Tensions and Solidarity Within Advanced Welfare States* (Taylor and Francis 2021) p 60.

83 JC Tremmel, 'Whose Constitution? Constitutional Self-Determination and Generational Change' (2019) 32 *Ratio Juris* 49, 61. On the origin of ecological PPPs in Switzerland, through the 1983 private outline for a new federal constitution by Kölz and Müller, see Tremmel, *A Theory of Intergenerational Justice* (op cit) p 216.

84 With reference to the past few decades, see J May and E Daly, *Global Environmental Constitutionalism* (CUP 2015) p 17.

85 LJ Kotzé, *Global environmental constitutionalism in the anthropocene* (Hart Publishing 2016) pp 131 and 203.

which is unbounded by jurisdictional limits. In this context, constitutional provisions constitute gap-fillers where international and domestic law fail to offer adequate environmental protection.⁸⁶

Global environmental constitutionalism also serves as a useful lens to examine future generations, where other perspectives have left a confusing space. Before turning to how global environmental constitutionalism can specify the institutions and practices for collective climate action (infra 4), it is worth considering why other perspectives, notably based on human rights and theories of justice, have proven ambivalent and minimally pragmatic.

3.2 A Global Present Without a Common Future

For the purpose of this article, two considerations exemplify why a human rights approach and theories of justice have failed to reconcile individuality with collective climate action toward future generations. Notably, tensions have emerged from the difficult dialogue between philosophers and lawyers. I deem such perspectives inconsequential to establish a global present with a common future, namely a present where climate change is addressed as a common concern of humankind by accounting for future generations.

First, human rights law has proved unable to maintain a safe climate for future generations, including today's youth.⁸⁷ Discussions revolve around whether future individuals can have rights, with philosophers outright denying such possibility⁸⁸ and lawyers assertively recognizing it.⁸⁹ Since the 1970s, the so-called non-identity problem or future individual paradox has plagued the philosophical theorization of our duties to future generations.⁹⁰ Under the non-identity problem, from a utilitarian perspective, only identifiable persons count because only they possess identifiable interests.⁹¹ In political terms, this quandary is dubbed

86 See also May and Daly, *Global Environmental Constitutionalism* (op cit) p 264.

87 Van Dijk, 'From exacerbating the Anthropocene's problems to intergenerational justice: An analysis of the communication procedure of the human rights treaty system' (op cit).

88 See notably W Beckerman, 'Sustainable development – Is it a useful concept?' (1994) 3 *Environmental Values* 101. For a helpful discussion, see Tremmel, *A Theory of Intergenerational Justice* (op cit).

89 Van Dijk, 'From exacerbating the Anthropocene's problems to intergenerational justice: An analysis of the communication procedure of the human rights treaty system' (op cit). and D Shelton, 'Intergenerational Equity' in R Wolfrum and C Kojima, *Solidarity: A Structural Principle of International Law*, vol 213 (Springer 2010) p 127.

90 Tremmel, *A Theory of Intergenerational Justice* (op cit) p 34.

91 See D Parfit, *Reasons and Persons* (3rd revised edn, OUP 1987) p 359, and GS Kavka, 'The paradox of future individuals' (1982) 11 *Philosophy and Public Affairs* 93.

presentism, namely the ‘short-term thinking in both the mindset and structure of democratic systems.’⁹² Conversely, legal pioneers of the international law of solidarity have long held that the non-identity problem is not a dilemma from a legal perspective, as legal systems have already recognized rights for legal persons that are societal fictions (for instance, corporations).⁹³

Beyond discussions on future generations’ rights, theories of justice have proven of no better avail. Liberal and deliberative democratic theories perpetuate future generations’ practical exclusion from the social contract by restricting theories of justice to adult speakers.⁹⁴ Among those, John Rawls’s insights are the most influential.⁹⁵ Since its pioneering paper, *Justice as Fairness*, in 1958, and his classic book, *A Theory of Justice*, Rawls can be said to culminate the contractarian approach to justice.⁹⁶ To mitigate *A Theory of Justice*, which concerned generations of people already born,⁹⁷ Rawls assigns his ideal decision makers, also called heads of families, an interest in their immediate descendants. Generation after generation, all humans would be contained in this chain of solidarity.⁹⁸ Beyond the doubtful hypothetical of Rawls’s theorization and the lack of specificity of what the heads of families would will for their descendants, the protection of the earth system routinely expands well beyond the interests of enchainning generations, thus questioning the effectiveness of this theory for

92 M Takle, ‘Solidarity with Future Generations? Protection clauses in constitutions’ (op cit) p 64.

93 D Shelton, ‘Intergenerational Equity’ in R Wolfrum and C Kojima, *Solidarity: A Structural Principle of International Law*, vol 213 (Springer 2010) p 127, fn12. See also *ibid*: ‘While there may be practical problems with determining who can speak for future generations, there is no theoretical reason why legal systems cannot recognize future generations to have claims on the present that can be denominated rights.’

94 J Rawls, *A Theory of Justice. Revised Edition* (The Belknap Press of Harvard University Press 1999) p 195. J Rawls, *Political liberalism* (enl edn, Columbia University Press 2005) p 471. J Habermas, *The theory of communicative action: Reason and the rationalization of society* (Beacon Press 1994) pp 98–99. J Habermas, *On the pragmatics of communication* (MIT Press 1998) pp 47, 53, 89–90. See on this, Rollo, ‘Democratic silence: two forms of domination in the social contract tradition’ (op cit) pp 318–319.

95 See similarly with regard to the 20th century, P Smith, ‘John Rawls’s Theory of Justice’ in *Moral and Political Philosophy* (Palgrave Macmillan 2008) <https://doi.org/10.1007/978-0-230-59394-7_12> accessed 8 Nov 2022 p 185.

96 A Sen, *The Idea of Justice* (Allen Lane 2009) p xvi.

97 On the difficulties of an intergenerational theories, see Rawls, *A Theory of Justice* (op cit) p 251. Short of mentioning the *quality* of nature that is passed through generations, Rawls refers to the quantity of resources to be left to future generations through the ‘just savings principle,’ by which a society cannot distribute an amount that is different from the amount it will save for upcoming generations (*ibid*, p 252).

98 Rawls, *A theory of justice* (op cit) p 92.

environmental protection purposes.⁹⁹ In *Political Liberalism*, Rawls attempts to correct this rational maximization logic by stating that all generations would adopt principles of justice that they would want preceding generations to have followed.¹⁰⁰ Again, Rawls's principle of justice is based on hypotheticals and seems enmeshed in strictly symmetric exchanges based on human reciprocity.¹⁰¹ The exclusion of justice toward non-human animals and nature rules out the practicability of this approach to reconcile individuality with collective climate action toward future generations.

4 Climate Litigation as Participation: *Neubauer et al v Germany*

4.1 Legal Mobilization as Participation

Following the article's methodological leads, I focus next on legal mobilization through the courts to show how climate change litigation is poised to catalyze and enforce the trend constitutionalizing future generations' interests and even provide a space for political participation. As a caveat, courts are not here construed as exclusionary of other forms of public engagement. A later subchapter exemplifies spaces of participation and deliberation outside of the court system (infra 5.2).

It has been held that the rationale of a national constitution is to preserve a free political life for coming generations.¹⁰² Because of the difficulties in endowing future generations with a voice, express constitutional clauses have begun to embed future generations' interests in the environment. As seen previously, posterity protection clauses are increasingly enshrined in national constitutions, which arguably are 'the most important intergenerational contract in modern society.'¹⁰³

⁹⁹ C Dierksmeier, 'John Rawls on the rights of future generations' in Tremmel (ed), *Handbook of Intergenerational Justice* (op cit) p 76.

¹⁰⁰ Rawls, *Political liberalism* (op cit) p 160.

¹⁰¹ Dierksmeier, 'John Rawls on the rights of future generations' (op cit) p 80. See also Rawls, *A Theory of Justice* (op cit) pp 5–9.

¹⁰² H Ehmke, *Grenzen der Verfassungsänderung* (Duncker & Humblot 1953) pp 129ff, p 137, as cited by the P Häberle, 'A constitutional law for future generations – the 'other' form of the social contract: the generation contract' in Tremmel (ed), *Handbook of Intergenerational Justice* (op cit) p 223.

¹⁰³ Tremmel, *Whose Constitution? Constitutional Self-Determination and Generational Change* (op cit) p 49.

Notwithstanding, posterity protection provisions (PPPs) enshrined in constitutions are barely enough to protect future generations. For instance, some PPPs have weak binding commitments to collective actions by present-day state institutions.¹⁰⁴ This situation was revealed in Norway's constitution as interpreted by Norway's Supreme Court in *People v Arctic Oil*, the first and so far only climate change case in Norway. In this case, environmental organizations, including *Natur og Ungdom* representing future generations, unsuccessfully challenged a governmental decision to issue licenses to drill for oil and gas in the Barents Sea. The plaintiffs sued the Norwegian government based on a number of legal sources, including future generations' right to the environment (§ 112 of Norway's Constitution).¹⁰⁵

The disappointing decision rendered by Norway's Supreme Court in 2020 was partly caused by the fact that the court has been more cautious in interpreting and applying individuals' constitutional rights compared to other constitutional/*de facto* constitutional bodies.¹⁰⁶ Although it was one of the first courts to establish the power of judicial review, the Norwegian Supreme Court is considered 'one of the last to engage in its regular usage.'¹⁰⁷ Notwithstanding, constitutional judges may consider the protection of future generations. In fact, they are often seen as more future-oriented than other judges or politicians because they usually escape the short-sighted logic caused by re-election goals.¹⁰⁸ Overall, constitutional litigation does not need to unfold before constitutional courts. Its hallmark simply rests on the invocation of the constitution.¹⁰⁹

In constitutional climate litigation, plaintiffs worldwide have recently invoked constitutional environmental provisions,¹¹⁰ with mixed results. Some decisions

104 Takle, 'Solidarity with Future Generations? Protection clauses in constitutions' (op cit) p 73.

105 *People v Arctic Oil*, complaint (Oslo District Court, 18 Oct 2016).

106 *People v Arctic Oil*, 16-166674TVI-OTIR/06 (Oslo District Court, Norway, 4 Jan 2018). *People v Arctic Oil*, 18-060499ASD-BORG/03 (Oslo Court of Appeals, Norway, 23 Jan 2020). *People v Arctic Oil*, HR-2020-2472-P (Norway Supreme Court, 22 Dec 2020). See also C Voigt, 'The First Climate Judgment before the Norwegian Supreme Court: Aligning Law with Politics' (2021) *Journal of environmental law*.

107 M Langford and BK Berge, 'Norway's Constitution in a Comparative Perspective' (2019) 6 *Oslo law review* 198, 222.

108 JC Tremmel, 'Establishing intergenerational justice in national constitutions' in JC Tremmel (ed), *Handbook of Intergenerational Justice* (op cit) p 207.

109 See similarly, M Wallack, 'Justice between generations: the limits of procedural justice' in JC Tremmel (ed), *Handbook of Intergenerational Justice* (op cit) p 98ff.

110 L Slobodian, 'Defending the Future: Intergenerational Equity in Climate Litigation' (2020) 32 *Georgetown environmental law review* 569, 580ff. May and Daly, *Global Environmental Constitutionalism* (op cit) p 98ff. E Colombo, 'Enforcing International Climate Change Law in Domestic Courts: A New Trend of Cases for Boosting Principle 10 of the Rio Declaration?' (2017) 35 *UCLA Journal of Environmental Law & Policy* 98, 122 and 125ff.

have successfully recognized and accounted for future generations' interests in the climate.¹¹¹ Unfortunately, even when judicial decisions were masterfully crafted and ambitious, the remedies therein contained have met enforcement hurdles.¹¹² Nevertheless, climate litigation does not need to provide a win for strengthening the underlying values on which it is grounded, such as future generations' interests in the climate.¹¹³ Similarly, the fact that courts are increasingly providing a space where the youth can act and speak is in itself meaningful in terms of the model of participative politics discussed previously.

Beyond catalyzing and enforcing the trend of constitutionalizing future generations' interests, climate litigation can also provide future generations with space for political participation. The point that I would like to drive home is that legal mobilization through the courts can constitute a proxy for youth participation, particularly for young people who are currently unrepresented in representative democracies and generations of individuals yet to be born.

First studied in the 1960s, legal mobilization unfolds 'when a desire or a want is translated into a demand as an assertion of rights.'¹¹⁴ The emphasis usually rests on nonofficial legal actors, on litigation as a dimension of a larger contestation process (for instance, protest and strikes), and on the unequal opportunities for citizens to mobilize the law.¹¹⁵ Legal mobilization can occur through the action of either individuals or collectives. Within the latter case, legal mobilization is notably a tool for people to act together.¹¹⁶ Litigation is not only part of legal mobilization: it often coalesces with it.¹¹⁷ Within legal mobilization, climate change lawfare is a relatively novel concept to signify the increasing legalization

111 See, for instance, *Earthlife Africa Johannesburg v Minister of Environmental Affairs*, 2 All SA 519 (High Court of South Africa, Gauteng Division, Pretoria (2017)). *Demanda Generaciones Futuras v Minambiente* (Supreme Court of Colombia, 5 April 2018) number 11001-22-03-000-2018-00319-00. *Milieudefensie v Royal Dutch Shell*, ECLI:NL:RBDHA:2021:5337 (District Court of the Hague, 26 May 2021). *Sharma* [2021] FCA 560 (27 May 2021).

112 In *Demanda Generaciones Futuras v Minambiente* (Supreme Court of Colombia, 5 April 2018) number 11001-22-03-000-2018-00319-00, plaintiffs returned to court requesting a declaratory decision to determine that the government failed to comply with the court order.

113 On the expository justice that climate litigation can provide, see J Peel and HM Osofsky, *Climate Change Litigation. Regulatory Pathways to Cleaner Energy* (CUP 2015) pp 26ff.

114 F Kahn Zemans, 'Legal Mobilization: The Neglected Role of the Law in the Political System' (1983) 77 Am Polit Sci Rev 690, 700.

115 M McCann, 'Litigation and Legal Mobilization' in KE Whittington, RD Kelemen and GA Caldeira (eds), *Oxford Handbooks of Political Science* (1st edn, OUP 2008) pp 523–526.

116 E Lehoucq and WK Taylor, 'Conceptualizing Legal Mobilization: How Should We Understand the Deployment of Legal Strategies?' (2020) 45 Law & Social Inquiry 166, 187.

117 Ibid.

of climate change politics and the various uses of the law therein.¹¹⁸ It is particularly accurate to note that law is today ‘the new politics’ due to the increasing purview of the legal field, notably ‘in the contexts where other governance structures are weak,’¹¹⁹ as international climate politics has proven to be (supra 1).

I would like here to clarify how legal mobilization works within the political process, specifically as a proxy for political participation. By proxy, I mean a vehicle of participation in decision-making processes, as well as of communication and contestation with public authorities and other actors that would be able to address climate change substantially.¹²⁰ The use of litigation as a political strategy by the traditionally disenfranchised and those ‘lacking an effective voice in (and access to) political institutions’ is a recurring topic in socio-legal scholarship.¹²¹ Nevertheless, legal-philosophical studies limit legitimate litigation to encroachment on fundamental rights, usually addressing legal mobilization in relation to the limits of judicial review and a Habermasian perspective on law and politics.¹²² As seen previously, future generations can and should be given a voice when enforceable human rights are not yet bestowed upon them. Similarly, endowing nature with rights is not a prerequisite for judicial review for the protection of nature as such—besides the fact that such rights would be outright different from human rights. In other words, considering judicial review as an exception rather than the norm cuts short meaningful possibilities of participation for the voiceless.

The exclusion of the voiceless from legal mobilization is often based on the grounds that courts are not elected bodies and thus cannot legislate in climate matters. Such consideration would assertively be an application of the separation of powers principle.¹²³ The paradox that ensues is that elected individuals, and more generally the political branches, currently craft climate policy with intergenerational repercussions even though the youth and future generations are unable to elect those same individuals, which is a major limitation of representative democracies.

118 S Gloppen et al, ‘Collaborative Global Centre for Law and Social Transformation: Application/Concept Note’ (CMI, Nov 2021). S Gloppen and A Lera St Clair, ‘Climate Change Lawfare’ (2012) 79 *Social Research* 899, 899–900.

119 S Gloppen and A Lera St Clair, ‘Climate Change Lawfare’ (op cit) p 899.

120 As a point of departure for what I mean by proxy of political participation, I considered G Dor and M Hofnung, ‘Litigation as Political Participation’ (2006) 11 *Israel Studies* 131.

121 See similarly, *ibid*, p 132.

122 Based on Habermas, see L Burgers, ‘Should Judges Make Climate Change Law?’ (2020) 9 *Transnational Environmental Law* 55.

123 L Bergkamp, ‘A Dutch Court’s ‘Revolutionary’ Climate Policy Judgment: The Perversion of Judicial Power, the State’s Duties of Care, and Science’ (2015) 3–4 *JEEPL* 241.

Excluding climate policy from judicial review turns out to be profoundly undemocratic. It amounts to granting immunity to the political branches vis-à-vis voiceless minorities, which is quite different from the separation of powers principle. This conceptualization of judicial review and litigation fuels tyranny by the majority, as Arendt's thought and legal doctrine help elucidate. In fact, in *Revolution*, Arendt lays bare the misconception of the separation of powers principle as the compartmentalization of the legislative, executive, and judicial powers. The three powers had been identified by Polybius and explained by Montesquieu.¹²⁴ Arendt explains Montesquieu's take on the separation of powers principle as the creation of power to stop power abuses.¹²⁵ The separation of powers principle is thus not aimed to avoid friction but rather implies friction to avoid autocracy.

The term separation of powers can be easily misunderstood and may lead to judicial avoidance of climate adjudication. I would call this the 'separation trap'. In climate change litigation, the separation of powers principle routinely has been broached by courts. Some have fallen into the separation trap, while other courts have grounded the legitimacy of their judicial powers in climate matters on a non-compartmentalized understanding of the use of power in the rule of law. Such courts have often construed the principle in ways that dispel the separation trap: *trias politica*,¹²⁶ the ecological constitutional state,¹²⁷ the outer boundaries of norms with a normative essence that cannot be sacrificed.¹²⁸

Further, legal doctrine is helping reconceptualize the separation of powers principle as prods and pleas.¹²⁹ In the prods and pleas approach, power is created for another body to act, meaning that courts signal to other institutional actors that a problem demands action. In this context, courts can communicate the need to act on behalf of groups that are not represented by the political branches—notably the youth—thus allowing for a more participative and democratic conceptualization of the separation of powers.

Conclusively, by conceptualizing climate litigation as participation, we are able to see how courts can provide the political space where future generations are seen and heard, thus offsetting the ongoing politics of silence.¹³⁰ Considering

124 Arendt, *On Revolution* (op cit) pp 150–151.

125 Ibid, p 149.

126 *Urgenda's First Instance* (2015) (the Netherlands) (op cit) paragraph 4.97.

127 *Demanda Generaciones Futuras* (Colombia) (op cit) p 27.

128 *Neubauer* (Germany) (op cit) paragraph 206. But see also more conservative conceptions of the separation of powers principle in *Juliana v United States*, 947 F.3d 1159, 1175 (2020) and *People v Arctic Oil* (Norway) (op cit) paragraph 141.

129 B Ewing and DA Kysar, 'Prods and pleas: limited government in an era of unlimited harm' (2011) 121 *Yale Law Journal* 350.

130 On this concept, supra 2.2.

judicial review as an exception rather than the norm cuts short the meaningful possibilities of participation for the voiceless, fueling tyrannical moves by the majority. As Arendt shows, compartmentalizing the three political powers in the separation of powers principle undermines its very meaning. Arendt helps construe the separation of powers as originally conceived: a bulwark against autocracy. Keeping the courts outside of the climate arena as a matter of principle, based on a supposedly democratic principle, amounts to autocracy. A compartmentalized version of the three political powers thus renders its application paradoxical. Recognizing courts in the climate debate still allows for parliamentary and government discretion. Parliaments and governments may undo most courts' decisions, rendering the opposition to judicial review paradoxically nugatory.

More concretely, climate litigation is already delegitimizing the separation of powers principle as a compartmentalizing principle. It should be recognized, however, that the separation of powers principle is a cultural and legal artifact.¹³¹ Its conceptions depend on several variables, notably long-time deference by the courts to the political branches in representative democracies, including in non-climate matters.¹³² Judicial review cannot possibly be uniform across legal cultures, but at least future generations' voices in climate change matters reveal the paradoxical invocation of the separation of powers principle in matters concerning their lives.

4.2 A Case Study: *Neubauer et al v Germany*

Through a case study of *Neubauer et al v Germany*, I aim to show how courts can offer practical ways to deflect the politics of silence against future generations and increase the political space for future freedoms. As surmised previously, Arendt fails to specify the constitutional guarantees that ensure plurality in political life.¹³³ For this paper, no benchmark can thus be explicitly drawn from Arendt's writings for the political participation of future generations through courts.¹³⁴ Such consideration motivates a case study based on the most influential climate decision on future freedoms to date.

¹³¹ On legal artefacts, see M Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (Bloomsbury 2020).

¹³² *People v Arctic Oil* (Norway) (op cit) paragraph 141.

¹³³ See also Disch, *Hannah Arendt and the Limits of Philosophy* (op cit) p 56.

¹³⁴ Cf Klabbers, *Possible Islands of Predictability: The Legal Thought of Hannah Arendt* (op cit) p 22, holding that Arendt was likely not 'overly optimistic about the capacities of courts either to protect the political process or to function as a useful check on the exercise of political power.'

On April 29, 2021, the First Senate of Germany's Federal Constitutional Court (FCC) adjudicated *Neubauer et al v Germany*, a case brought by a group of German youth, some non-German citizens living in Bangladesh and Nepal, and two environmental organizations. Plaintiffs argued that Germany's first comprehensive climate statute, the Federal Climate Protection Act ('KSG' in the German acronym), pursued an insufficient climate mitigation policy. Specifically, the policy of reducing GHGs by 55% from 1990 levels by 2030 was deemed to violate the youth's human rights as protected by Germany's constitution, the Basic Law.¹³⁵ The KSG set emissions reduction targets up until 2030, whereas further targets would have been set in 2025 by ordinance with the consent of the Bundestag, with no obligations in terms of process, timing, or knowledge regarding how further targets were to be set.¹³⁶ It is noteworthy that the youth derived 'a fundamental right to a humane future' from Article 1 (1), the first sentence of the Basic Law, on the duty of all state authority to respect and protect human dignity, and Article 20a, on the protection of the natural foundations of life and animals. The fundamental right to a humane future is thus an ecological minimum where the foundations of life are joined with human dignity.¹³⁷

The FCC found the constitutional complaint admissible and granted standing, including the non-German youth living in Bangladesh and Nepal.¹³⁸ The FCC maintained that the KSG was poised to have an 'advance interference-like effect'

135 The youth challenged the KSG based on the alleged violations of the right of human dignity, life and physical integrity (Article 1, Article 2.2 paragraph 1 of the Basic Law, each in conjunction with Article 20a of the Basic Law), of freedom of occupation and of the guarantee of property (Article 12.1 and Article 14.1 paragraph 1 of the Basic Law), as well as the violation of these rights in conjunction with Article 20.3 of the Basic Law with regard to Articles 2 and 8 of the ECHR.

136 KSG, Section 4(6).

137 For references to this para, see *Neubauer*, Complaint to the German Constitutional Court (6 Feb 2020) <http://climatecasechArticlecom/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200206_11817_complaint.pdf> accessed 8 Nov 2022 see p 105. More generally, the youth challenged the KSG based on the alleged violations of the right of human dignity, life and physical integrity (Article 1, Article 2.2 paragraph 1 of the Basic Law, each in conjunction with Article 20a of the Basic Law), of freedom of occupation and of the guarantee of property (Article 12.1 and Article 14.1 paragraph 1 of the Basic Law), as well as the violation of these rights in conjunction with Article 20.3 of the Basic Law with regard to Articles 2 and 8 of the ECHR. For the period after 2030, complainants rely on fundamental freedoms. Cf on the legal basis pursued by the ENGOS, Petra Minnerop, 'The 'Advance Interference-Like Effect' of Climate Targets: Fundamental Rights, Intergenerational Equity and the German Federal Constitutional Court' (2021) *Journal of Environmental Law*, p 6. Cf *Neubauer* (Germany) (op cit) paragraph 38, where the complainants were deemed to derive a fundamental right to an ecological minimum subsistence level from Article 2(1), on the free development of one's personality, in conjunction with Article 1(1), on human dignity.

138 *Neubauer* (Germany) (op cit) paragraph 108.

on future freedoms, a new theory it elaborated in *Neubauer* to signify that the KSG would encroach on the fundamental rights of the complainants by, in principle, offloading emissions reduction burdens from 2031 onward.¹³⁹ However, the FCC denied standing to two environmental associations that aimed to represent nature.¹⁴⁰ Further, the claimants had not attempted to represent unborn people, who were not entitled to subjective fundamental rights before the FCC.¹⁴¹

On the merits, the FCC considered the existence of a duty to protect and its infringement. In terms of duties, it found that the first sentence of Article 2 (2) and Article 14 (1) of the Basic Law determine state duties to protect and promote the legal interests of life and physical integrity and to safeguard these interests against unlawful interference by others.¹⁴² Such duties can involve a duty to protect future generations, especially for irreversible processes like climate change. Because it construed future generations as individuals not yet born, the FCC established the objective legal nature of obligations to protect, thus ruling out future generations' subjective fundamental rights.¹⁴³ In terms of infringements, the FCC found no violation of the duty to protect. It recognized that state protective measures enjoy considerable discretion and set the threshold of judicial review on three limited sets of scenarios: (1) if no precautionary measures have been taken; (2) if the adopted provisions and measures prove manifestly unsuitable or completely inadequate for achieving the required protection goal, or (3) if the provisions and measures fall significantly short of the protection goal.¹⁴⁴ None of these scenarios had emerged in the case. However, the FCC found a lack of precautions to mitigate the burdens post-2031 emissions reduction would have.

Based on the newly coined theory of 'advance interference-like effect', the FCC stated that the challenged KSG provisions were already *de jure* interfering with the youth's future freedoms because they were poised to largely consume the carbon budget in the decade up to 2030, short of annual emissions amounts or target years determined by parliament.¹⁴⁵ However, interference with rights

139 On both points, see *ibid*, paragraph 116. On the novelty of the theory, see Minnerop, 'The "Advance Interference-Like Effect" of Climate Targets: Fundamental Rights, Intergenerational Equity and the German Federal Constitutional Court' (op cit) in particular p 12.

140 *Neubauer* (Germany) (op cit) paragraph 136.

141 *Ibid*, paragraph 109.

142 *Ibid*, paragraph 145. The Court found it unnecessary to rule on duties of protection arising from fundamental rights vis-à-vis the complainants living in Bangladesh and in Nepal, *ibid*, paras 173–176.

143 *Ibid*, paras 108 and 146. Separate positive duties arise also from the fundamental right to property under Article 14(1) Basic Law, see *Neubauer* (Germany) (op cit) paragraph 147.

144 *Neubauer* (Germany) (op cit) paragraph 152. The level of judicial scrutiny is higher for defensive rights against state interference. *Ibid*.

145 *Neubauer* (Germany) (op cit) paras 182 and 183.

can only be justified under strict constitutional standards.¹⁴⁶ Accordingly, the KSG was found unfit to distribute freedom proportionately across generations,¹⁴⁷ a recognition of the principle of intergenerational equity. Instead of declaring the provisions null and void, the FCC granted lawmakers until December 31, 2022, to establish post-2030 emissions reduction targets coherent with the court's decision.¹⁴⁸

Neubauer is noteworthy in many aspects. Here, I would only focus on how the FCC offered practical ways to deflect what I termed the politics of silence toward future generations. First, by entwining state protection duties with climate science, the court elevated science to a common ground for the review of climate legislation and identified it as a constitutional tool to intertemporally guarantee freedom. Although the last word on emissions targets is still left to parliament, which does not represent future generations, the FCC carved out the representation of future interests through the mandatory deployment of climate science, based on IPCC reports and the related carbon budget approach. In a way, the carbon budget approach helps lawmakers embrace what Arendt called an enlarged mentality (supra 2.2), representing the impact of climate legislation on future freedoms. Beyond Arendt, such an enlarged mentality seems synchronized with non-human beings and, more generally, with planetary stewardship and earth system vulnerability.¹⁴⁹ Notwithstanding some limitations, *Neubauer* was rightly dubbed the first example of 'planetary climate litigation', possibly spurring an active engagement of courts with earth system science and its legal operationalization.¹⁵⁰

Second, through the 'advance interference-like effect' of present climate policies on future fundamental rights, the FCC equated advance effects with current interference and was thus able to apply the stricter constitutional review that characterizes the constitutional adjudication of fundamental rights. Although it ruled out future generations' subjective rights in the context of climate change, the FCC's focus on the future effects of current legislation was unprecedented.¹⁵¹ The court set a special duty of care on legislators, including responsibility for future generations, grounded in Article 20a of the Basic Law. The special duty of care entails that the legislature shall account for mere

146 Ibid, paras 184–187.

147 Ibid, paras 192 and 243.

148 Ibid, paragraph 268 of the German translation.

149 LJ Kotzé, 'Neubauer et al. versus Germany: Planetary Climate Litigation for the Anthropocene?' (2021) 22 German Law Journal 1423, 1432ff.

150 Ibid, p 1433.

151 Minnerop, 'The "Advance Interference-Like Effect" of Climate Targets: Fundamental Rights, Intergenerational Equity and the German Federal Constitutional Court' (op cit) p 15.

indications or threats of potentially serious or irreversible effects caused by climate change, as long as these indications are sufficiently reliable.¹⁵² As stated by the court, the law must therefore mimic climate science to craft precautionary mitigation policies: it must account for the IPCC's estimates on the size of the remaining global carbon budget, evaluate the consequences of the global budget at the national level, and consider whether the country will exceed 'the constitutionally relevant temperature limit'.¹⁵³

Third, by finding the KSG unconstitutional, as based on the principle of proportionality and the subsequent violation of fundamental rights, the court shaped a rule of justice that is particularly forward-looking. Because Article 20a requires emissions reductions to achieve climate neutrality, the FCC held that inadequate action today reverberates on losses of freedom in the future. It follows from the principle of proportionality that the associated losses of freedom must be reasonable.¹⁵⁴ Here, the court shaped a rule for protecting future freedom, including future generations' fundamental rights, by asserting that one generation shall not consume the carbon budget with few reduction efforts, thus undermining future freedom. In so stating, the FCC refused a compartmentalized idea of the separation of power principle and increased the juridical protection of future freedoms by limiting legislators' leeway in climate mitigation policy.¹⁵⁵ It is noteworthy that the court imposed the carbon budget approach on the German state, which opposed it during the proceedings.¹⁵⁶ The carbon budget approach is not required by either international law or EU law, but *Neubauer* elevated it to a requirement of future-oriented climate policy, at least in Germany.

It should be stressed that the FCC was very generous with the German legislature as it granted broad discretion in determining the carbon budget, both at the global and national levels.¹⁵⁷ Moreover, it dodged more substantive portions of the complaints, deeming it unnecessary to determine the existence and scope of the rights newly coined by the applicants, namely the 'fundamental right to an ecological minimum standard of living' and the 'right to a future consistent with human dignity'.¹⁵⁸ As an *obiter dictum*, the court seemed to limit the scope of the fundamental right to a minimum ecological standard of living, with policy scenarios dominated by adaptation rather than mitigation measures.¹⁵⁹ Moreover, the

152 *Neubauer* (Germany) (op cit) paragraph 229.

153 *Ibid.*

154 *Ibid.*, paragraph 192.

155 *Ibid.*, paragraph 229.

156 *Ibid.*, paragraph 69.

157 *Ibid.*, paras 210ff.

158 *Ibid.*, paras 113ff.

159 *Ibid.*, paragraph 114.

intertemporal and intergenerational constitutionalization of climate policy in *Neubauer* is limited to Germany's territorial jurisdiction. In this decision, the FCC missed the opportunity to clarify the intragenerational aspects of Germany's climate policy.¹⁶⁰

In sum, the FCC established a safety valve for adjudicating climate policy matters in *Neubauer*, notwithstanding the broad leeway enjoyed by the legislature. The upshot is functional rather than substantive. Instead of deciding the minimum regulations and targets that legislators should set by 2030, the FCC pointed to the function of fundamental rights as intertemporally safeguarding freedom. Such function entails the need to constitutionally *justify* the legal interference-like effect of current mitigation legislation. Accordingly, complainants' fundamental rights can be protected from a unilateral shifting of the greenhouse gas reduction burden through Article 20a of the Basic Law.¹⁶¹ *Neubauer* is particularly relevant in terms of democratic theory and the role of litigation as a proxy for political participation. An overly short-sighted distribution of the carbon budget equals not only an unequal freedom budget—it impinges on the 'natural foundations of life' and forces future generations to 'radical abstinence' in the time ahead.¹⁶² The FCC tied emissions reduction legislation to transparent and controllable processes in parliament, seemingly mindful that currently, 'the greatest danger of tyranny is from the executive'.¹⁶³

The FCC's decision unleashed and made justifiable a new level of mitigation policy ambition that politicians were previously unable to achieve.¹⁶⁴ In a snowball effect of sorts, a few weeks after the judgment was published, the German government set in motion new targets and policies, exceeding the requests of the judgment and including a 'Contract for Generations', which was approved in August 2021. Still, the youth—supported by Deutsche Umwelthilfe—has already lodged a constitutional complaint against the amended KSG before the FCC on January 24, 2022,¹⁶⁵ illustrating the difficulties of operationalizing court judgments in climate matters.

160 R Krämer-Hoppe, 'The Climate Protection Order of the Federal Constitutional Court of Germany and the North-South Divide' (2021) 22 German Law Journal 1393.

161 *Neubauer* (Germany) (op cit) paras 117 and 187.

162 *Ibid*, paragraph 193.

163 Arendt, *Thinking Without a Banister: Essays in Understanding, 1953–1975* (op cit) p 491.

164 S Koch, *Den tyske klimadommen viser at domstolene kan hjælpe politikerene å handle langsiktig om klima* (Juridika Innsikt 3 Jun 2021).

165 S Spancken and J Köster, *Deutsche Umwelthilfe (DUH) brings further climate-related constitutional complaints against several German states' legislation* (Freshfields Bruckhaus Deringer LLP 27 Jan 2022).

5 Theorizing Post-sovereign Constitutionalism

5.1 Why Post-sovereign Constitutionalism?

Previously, through *Neubauer et al v Germany*, I argued that legal mobilization through the courts catalyzes the constitutionalization of future generations' interests and provides a space for political participation. Most recently, academics have considered whether litigation for future generations should be encouraged in Europe to increase future generations' political participation. It was held, for instance, that the judge is the sole institution where future generations can be represented in the Netherlands.¹⁶⁶

Notwithstanding the snowball effect that courts can have on climate policy, I would like to broaden the discussion beyond the courtrooms, to how constitutionalism can be reconceived more generally toward legally protecting future generations' role in fighting for a stable climate. Ultimately, enduring mechanisms of solidarity toward future generations will depend on a global polity that can live together without repressing the individual's capacity to speak and act for the voiceless.

The myth of the sovereign nation-state is currently hampering an understanding of future generations' fight for the climate. As Arendt holds, since the mid-19th century, the sovereignty of the people has been conflated with the multiparty system, which has not served democracies particularly well.¹⁶⁷ On the contrary, the nation-state's notion of sovereignty, which stems from absolutism, renders individuals almost always powerless against the monopoly of a centrally organized state apparatus, even when all rights are protected. If, on the one hand, Arendt maintains that the nation-state's notion of sovereignty is preventing real democracy, she also recommends tearing down 'the centralization of power in the nation-state' and replacing it with a diffusion of power where the individual takes 'active responsibility for public affairs'.¹⁶⁸ Such active responsibility, however, should be accompanied by membership in a political community, where the individual has the right to hold and enforce their rights, namely the right to have rights. Couched in her skepticism about the inalienability of human rights as such, Arendt argues that the right to have rights and to enforce them depends on belonging to a political community as a citizen. The paradox of democratic sovereign states is that stateless individuals have no state against which they might enforce their inalienable rights.¹⁶⁹

¹⁶⁶ L Burgers, *The Minimum Principle: Future Generations in the Climate Case against Royal Dutch Shell* (Völkerrechtsblog 19 Jan 2022).

¹⁶⁷ Arendt, *Thinking Without a Banister: Essays in Understanding, 1953–1975* (op cit) p 255.

¹⁶⁸ *Ibid*, p 261.

¹⁶⁹ Arendt, *The origins of totalitarianism* (op cit) pp 230ff.

Transposing Arendt's reflections on the issue of climate justice and future generations, it is by discussing and disagreeing on the principles of climate justice that people can create a public space around the climate system as a common concern of humankind, beyond the nation-state. In Arendtian terms, if future generations, which include the youth, can define and discuss the problems of the world that are most urgent to them and inspire collective action, they can be recognized as members of the public realm in matters of climate justice. However, this type of political engagement cannot be performed through the multiparty system due to the politics of silence toward future generations that it perpetuates. Moreover, generations yet to be born face the same paradox of stateless individuals, where the nation-state does not guarantee their right to have rights. Generations yet to be born, as members of a future community, have yet to have the right to be under the jurisdiction of a particular country and to enjoy the civil rights of a political community.

Nevertheless, constitutionalism can provide a framework for legally protecting future generations' political role in the climate. Defined as the subjection of all types of public power to the discipline of constitutional procedures and norms, constitutionalism can embolden a post-sovereign diffusion of powers where the enforcement of human rights for the youth and unborn generations can be pre-effected through post-sovereign institutions and practices. As exemplified by *Neubauer*, such diffused political space would enable future generations' fundamental rights to be at least accounted for in present climate policy. I call this post-sovereign constitutionalism, which I argue can be operationalized through institutions and practices to offset the politics of silence and help reconcile individuality with collective climate action for future generations.

5.2 Post-sovereign Institutions and Practices for Future Generations

As argued before, post-sovereign constitutionalism is no magic wand to protect future generations' freedoms. Still, in climate matters, it lays bare the limitations of intergovernmental climate politics and representative democracies, as well as the need to shape post-sovereign institutions and practices. The analysis below offers but a snapshot of the types of open and fluid institutions and participative practices that Arendt's work inspires toward advancing freedoms for future generations.

In her 1963 book, *On Revolution*, Arendt disputes the ability of liberal representative democracies to preserve a space for direct citizen participation. In Arendt's view, the trouble is career politics and the lack of public spaces open to

the general populace.¹⁷⁰ Some privileged citizens can rise to public interaction, while others lack any opportunities for political representation. Arendt turns then to two forms of direct political participation: Thomas Jefferson's 'ward system', which was inspired by the town hall meetings of the American Revolution, and the citizens' councils that appeared throughout any genuine revolution in the 19th and 20th centuries. In both cases, short of advocating the outright shattering of modern representative democracies, Arendt's interest is toward localized forms of political engagement that, as 'little republics', can institutionally cement the *pouvoir constituant* of the people.¹⁷¹ This ward system would also hold the central government in check from tyrannical tendencies.¹⁷²

Transposing Arendt's proposal to future generations and climate justice, localized forms of political activity seem better apt to represent future freedoms than impersonal bureaucratic structures and elite state institutions subject to political cycles.¹⁷³ Albeit rife with plurality and disagreement (supra 2.2), Arendt's political space enables citizens to, quoting Jefferson, 'preserve the spirit of resistance' and avoid sinking into 'lethargy, the forerunner of death to the public liberty'.¹⁷⁴ Understanding Arendt's conception of the ward system could open a real possibility to overcome the limitations of intergovernmental climate politics and representative democracies to advance future freedoms.

In terms of intergovernmental climate politics, post-sovereign institutions and practices would, for instance, eschew trusteeships established in international environmental law, which scholars have dwelled upon while tentatively operationalizing intergenerational equity.¹⁷⁵ Endowing international organizations and NGOs with the trusteeship of natural resources does not, in fact, guarantee the intergenerational protection of either nature or individuals' political participation.¹⁷⁶ Regarding the potential for representative democracies to advance future freedom, the long debated consideration of an ombudsman for nature and future generations also seems quite limited. First, it does not entail

170 Arendt, *On Revolution* (op cit), pp 277–278.

171 See similarly J Muldoon, 'The Lost Treasure of Arendt's Council System' (2011) 12 *Critical Horizons* 396, 401.

172 Arendt, *On Revolution* (op cit) p 248–249.

173 On the critique of impersonal bureaucratic structures, see Arendt, *On Revolution* (op cit) p 91. G Rozeboom, 'Social politics and freedom: Incorporating civil society into Arendt's political thought' (Honors Program Theses 18 2008) p 83.

174 Arendt, *On Revolution* (op cit) p 238.

175 PH Sand, 'The concept of public trusteeship in the transboundary governance of biodiversity' in Louis J Kotzé and Thilo Marauhn (eds), *Transboundary governance of biodiversity*, vol Volume 19 (Brill Nijhoff 2014) pp 43–44.

176 See *ibid*, p 64, on the capillarity of public trusteeship in environmental treaty regimes.

the direct participation of present youth generations in political life. Second, such an ombudsman would make sense only if granted the needed competencies and capacities to protect future generations, including the possibility to propose legislation and veto it.¹⁷⁷

Arendt's illuminating proposition of 'little republics' of political discussion and deliberation suggests redesigning existing political processes and institutions to provide the youth with a voice. With regard to processes at the international level, global youth representatives should be included in COP negotiations within the international climate regime. Currently, the Glasgow Climate Pact involves the organization of an annual youth-led climate forum, which nevertheless negates the existential stakes and political roles that the youth shall be allowed to play to protect their present and future freedoms.

A further process to be ameliorated occurs at the domestic level. It is argued, for instance, that the youth could be better heard during the public comment periods on legislation and specific impact assessments, notably environmental impact assessments.¹⁷⁸ While public comment periods presently revolve around transparency through hearings and the record of dissenters, more future-oriented practices can be moored in participation regarding constitutional provisions, or posterity constitutional provisions, and explain, rather than merely record, dissent's framing and assumptions in the solution chosen by administrative bodies. In this way, the dissent would be seen and heard and could constitute the basis for a new formulation of solutions and new dissent. Under the same logic, youthful climate protesters could be recognized as civil-disobedient minorities in a similar way as Arendt argues for organized minorities. As organized minorities, the youth engaged in civil disobedience for climate reasons is 'bound together by common opinion, rather than by common interest, and the decision to take a stand against the government's policies even if they have reason to assume that these policies are backed by a majority'.¹⁷⁹ Recognizing the youth's acts of civil disobedience does not amount to justifying crime. While the criminal avoids the public eye, civil disobedients act in the open. They use group

177 See also Tremmel, 'Establishing intergenerational justice in national constitutions' (op cit) p 196. One of the most promising examples of future generations' representation, in Hungary, has dashed hopes as the office was subsumed in the Hungarian ombudsman, R Read, *Guardians of the Future* (Green House 2012) <https://www.greenhousethinktank.org/uploads/4/8/3/2/48324387/guardians_inside_final.pdf> accessed 8 Nov 2022, pp 7–8 and L Beckman and F Uggla, 'An Ombudsman for Future Generations: Legitimate and Effective?' in I González-Ricoy and A Gossier, *Institutions for future generations* (1st edn, OUP 2017) p 121.

178 Disch, *Hannah Arendt and the Limits of Philosophy* (op cit) p 220.

179 H Arendt, *Crises of the Republic: Lying in Politics, Civil Disobedience on Violence, Thoughts on Politics, and Revolution* (Harcourt Brace Jovanovich, 1972) p 56.

action to reclaim law into their hands and dramatize issues with the ultimate goal to persuade others about the reasons of their basic dissent.¹⁸⁰ The real problem lying with our legal systems nowadays is that, notwithstanding the extent of civil disobedience and its being the hallmark of a free government,¹⁸¹ there is no place for it as an established practice of democracies. The current trend of considering civil disobedients as lone wolves, and of ignoring them, is only exacerbating their protests.¹⁸² What Arendt suggests is to establish civil disobedience as a practice among our political institutions, in the same way as special-interests groups and pressure groups are permitted to influence and ‘assist’ lawmakers in their everyday work.¹⁸³ Applied to youthful climate activists, such as Extinction Rebellion, Arendt’s proposal would entail that their political action can be at home in our political system by being channeled to institutions that are currently failing to represent the non-voting youth, such as Parliaments. A step in this direction is the perception of civil disobedience in climate litigation and its evolution within the spirit of the laws. As Arendt found that civil disobedience is compatible with the spirit of the laws in the United States,¹⁸⁴ courts around the world have also exempted civil disobedients from the application of sanctions, including criminal sanctions,¹⁸⁵ and may suggest their incremental compatibility with the spirit of the laws across legal cultures.

This reconceptualization falls within post-sovereign constitutionalism as it would allow for the diffusion of power among citizens, recognizing that the state is not a neutral arbiter and that participating in the political decision process does not imply participating on an equal footing. Short of claiming to represent a consensus and resolve all differences,¹⁸⁶ public decision-making would rather recognize dissenters’ dignity and visibility. Conversely, liberal democracies currently have a propensity for side-lining dissenters, or ‘remainders’, as accidental to the political system rather than recognizing them as a result of the system and necessary to it.¹⁸⁷

180 On both points, *ibid*, pp 53–54 and 75–76.

181 *Ibid*, p 88.

182 See more recently, France24, “‘More and more desperate measures’: Climate protesters target another priceless artwork” (27 Oct 2022).

183 Arendt, *Crises of the Republic* (op cit) p 101.

184 *Ibid*, p 99.

185 For instance, J Rausch, ‘The Necessity Defense and Climate Change: A Climate Change Litigant’s Guide’ (2019) 44 *Columbia Journal of Environmental Law* 553, 587ff. S Capstick and others, ‘Civil disobedience by scientists helps press for urgent climate action’ (2022) 12 *Nature Climate Change* 773.

186 Disch, *Hannah Arendt and the Limits of Philosophy* (op cit) p 220.

187 B Honig, *Political theory and the displacement of politics* (Cornell University Press 1993) p 127. In a way, the youth protesting climate politics constitute remainders and its dissent is fast dissolved by present politics.

Beyond renewed practices for future generations' voices, two institutional arrangements may be relevant for local political action. The ward system envisaged by Arendt and Jefferson is, in fact, nothing less than a grassroots, polycentric government.¹⁸⁸ The first grassroots arrangement I would like to propose consists of climate citizens' assemblies, a group of randomly selected citizens tasked with policy recommendations on climate policy.¹⁸⁹ Today, only a few countries are limned by the rise of climate citizens' assemblies,¹⁹⁰ and their potential to provide future generations with a voice is carried out by their common interest in the rights of future generations.¹⁹¹ Although assemblies vary depending on the context, they are similar to those that deliberate on other socially sensitive matters, such as same-sex marriage, at the local and regional levels.¹⁹² A climate citizens' assembly includes at least 60 citizens selected by lot who meet (in person or online) to learn about a topic from experts and discuss it in small and large groups.¹⁹³ However, to effectively improve traditional law-making procedures, assemblies should also be composed of youth members, with discussion in plenum and submissions of legislative proposals to referendums and parliamentary votes.¹⁹⁴ Ultimately, the natural development of citizens' climate assemblies is the creation of children's climate assemblies, which have so far appeared in Scotland only.¹⁹⁵ For climate assemblies to endure, their regular meeting and procedures would need to be anchored in legislative texts, notably through constitutional provisions.

A more radical grassroots arrangement lies in introducing a legislative, constitutionally recognized body to the parliament: Guardians for Future Generations. Lawmakers are now accountable only to present generations, providing representative politics with a strong incentive not to deviate from voters' preferences.¹⁹⁶ In this context, Guardians for Future Generations would be selected by lot to ensure independence from the party system. They would be endowed with three prerogatives that can be wielded when substantial interests for future

188 Janiskee, 'The Structure of American Local Government' (op cit) p 94.

189 L-A Duvic-Paoli, 'Re-imagining the Making of Climate Law and Policy in Citizens' Assemblies' (2022) *Transnational Environmental Law* 1, 2.

190 *Ibid*, pp 3–4, referring to Ireland, France, the UK, Denmark, Germany, and Spain.

191 *Ibid*, p 25.

192 *Ibid*, p 5.

193 *Ibid*, p 4.

194 On the better meaning of 'without filters', see *ibid*, pp 20–21. On the need for a special representation of the youth, see JS Serra, 'Balears será la primera comunidad con una asamblea cívica por el clima' (*Periódico de Ibiza y Formentera*, 15 Dec 2021).

195 <<https://www.climateassembly.scot/childrens-parliament>> accessed 7 Feb 2022.

196 K Skagen Ekeli, 'Giving a Voice to Posterity – Deliberative Democracy and Representation of Future People' (2005) 18 *Journal of Agricultural and Environmental Ethics* 429, 431.

society are at stake: veto power over legislation, the right to review major administrative decisions, and the power to initiate legislation to preserve the basic needs and interests of future generations.¹⁹⁷

Arendt's illuminating idea of little republics to catalyze political action has here offered the starting point for five proposals to establish future-oriented institutions and practices that can diminish the current politics of silence toward future generations and resist the logic of political cycles. Complementary to legal mobilization (supra 4.1), the proposals aim to embolden legal participation processes that are constitutionally anchored. We cannot automatically assume that, wherever implemented and tailored to their context, such proposals will yield more protective results than representative politics. However, we can at least expect that the north star of their deliberations will lean further toward the precautionary principle, which enables the protection of future life (supra 4) rather than economic arguments.

6 Revivifying Public Life

6.1 At Home in the World

I have argued that Arendt's theorization of active political life can provide future generations with a voice. In elaborating her critique of sovereignty, I have shown that post-sovereign constitutional institutions and practices may dampen the politics of silence toward future generations in current intergovernmental climate politics and representative democracies. With these aspects of legal participation in mind, I have explained how participation in intergovernmental climate negotiations, public comment periods, the institutionalization of civil disobedience citizens' climate assemblies, and Guardians for Future Generations can promote future generations' interests politically. Such findings connect to a holistic understanding of political participation through litigation (supra 4) and legislation (supra 5). They entail that the right to have rights does not automatically derive from being a human or a future citizen. Simply attributing human rights to future generations, including the youth, does not give them 'a place in the world' and sufficient legal tools to ensure a stable and livable climate.¹⁹⁸ To

¹⁹⁷ Read, *Guardians of the Future* (op cit) pp 9ff. See the alternative proposed by Skagen Ekeli, 'Giving a Voice to Posterity – Deliberative Democracy and Representation of Future People' (op cit) pp 434ff.

¹⁹⁸ See similarly, with no reference to climate matters, C Menke, 'The Aporias of Human Rights and the One Human Right' (2007) 74 *Social Research* 744.

feel at home in the world is a concept dear to Arendt, interpretable as ‘a dense moral culture within which (one) can feel some sense of belonging’.¹⁹⁹

According to Arendt, to feel at home in the world is challenged by a sense of alienation that has affected humanity since the 17th century, when scientists started transforming nature’s resources into weapons of destruction and using knowledge to go beyond the earth, for example, by colonizing space.²⁰⁰ Finding a voice in the political arena through post-sovereign processes counterweighs the tendency to overstep planetary boundaries and can revivify public life for those who have been disenfranchised in climate matters, including future generations. This active and diffuse use of political power can thoroughly kindle the ‘human capacity for building, preserving, and caring for a world that can survive us and remain a place fit to live in for those who come after us’.²⁰¹

6.2 Politics: The Promise to Act Together

Previously, we have surveyed how post-sovereign constitutionalism, based on Arendt’s thought, can revivify public life and provide future generations with a voice. It is, however, necessary to situate Arendt in the political tradition mentioned before and represented by Rousseau, Rawls, and Habermas.

Arendt’s view is radical and challenges a noble tradition of political philosophy on plurality and freedom. Rousseau, Rawls, and Habermas all postulate that, given undistorted communication, individuals would agree on a single truth and find sensible solutions to the problems of political life based on their rationality.²⁰² This view of politics is epitomized by liberalism and has become mainstream in the West. Conversely, in Arendt, an agreement can be found not because individuals are rational but because they engage in the public space and can compromise, usually on formal rules instrumental to institution building. This common space, where speech and action occur and compromise is found, is the very essence of politics.

If we all agreed on rational principles, as mainstream politics would hold, speech and action in public would mean very little. In Arendt, the ideal of the rational individual is an illusion that has perpetuated the conception of power as leverage over others, which leaves minimal space for plurality or solidarity. For Arendt, if power is public, it can be wielded only on the condition of plurality when

¹⁹⁹ Disch, *Hannah Arendt and the Limits of Philosophy* (op cit) p 173.

²⁰⁰ Arendt, *The Human Condition* (op cit) pp 1ff.

²⁰¹ Arendt, *Between Past and Future* (op cit) p 99.

²⁰² See similarly Canovan, ‘Arendt, Rousseau, and Human Plurality in Politics’ (op cit) pp 296 and 299.

people act in concert.²⁰³ Differently from the Western tradition, power is thus not a static quality nor a type of strength to bear passively: it is a promise to act together.²⁰⁴

Arendt theorizes a contentious politics of speech instead of silence.²⁰⁵ Political practice should embody the *agon*, a contest performed through the fire of arguments and counterarguments. This practice targets rationality by catalyzing our power of judgment from other people's perspectives. Arendt's political practice is nonfoundational: it banishes foundational, self-evident truths that political theory has long been moored in, spanning from Rawls's two principles of justice, derived from a hypothetical original position, to Habermas' ideal speech, where the very structures of communication should ensure the basis for consensus.²⁰⁶ Arendt avouches that, if the 20th century has taught us anything, it is that rationality is not inherent to human beings. Instead, it depends on social and institutional contexts promoting plurality. These plural views are 'engendered by (a broader variety of) rather ordinary human attempts systematically to organize the world conceptually, categorically, linguistically, politically, culturally, and socially as well as morally'.²⁰⁷

In Arendt, human beings communicate what is distinct about themselves and acknowledge others as equal through speech.²⁰⁸ Plurality and natality enable such communication, and the public realm provides the forum for this ongoing communication. Short of plurality, political life would vanish altogether because the possibility of community is given by the recognition of our intrinsic sameness in difference—we are all human, and yet none is ever the same as anyone else who ever lived.²⁰⁹ Short of equaling biological birth, natality is the capacity to act on one's initiative and be recognized for such initiative by others.²¹⁰ The public realm is the meeting ground of all,²¹¹ which exists as a space populated by irreducibly different political views rather than the arena for achieving the consensus that liberalism posits.

Nevertheless, Arendt premises the existence of a common realm on a political language for action, notably through principles, which bring political action

203 Arendt, *The Human Condition* (op cit) p 244.

204 *Ibid*, p 245.

205 On the politics of silence, *supra* 2.2.

206 Rawls, *A Theory of Justice* (op cit). Habermas, *The Philosophical Discourse of Modernity* (MIT 1990).

207 Honig, *Political theory and the displacement of politics* (op cit) p 213, fn1.

208 Disch, *Hannah Arendt and the Limits of Philosophy* (op cit) p 32.

209 Arendt, *The Human Condition* (op cit) pp 8 and 215.

210 *Ibid*, pp 177–178.

211 *Ibid*, p 57.

into the light.²¹² Collective action is thus inspired not by the inner selves but rather by a principled common interest in the world. A public space emerges when its participants can be inspired to action and engage in public criticism while admitting the possibility of diverging views on the issue under discussion.

At this point, post-sovereign constitutionalism seems a plausible principle for Arendt's conception of politics. In post-sovereign constitutionalism, equality and rights do not exist because they are inscribed in the heart of human beings: they are secured as human constructs through institutions that individuals decide to erect to protect them.²¹³ Institutions are thus bulwarks against the unpredictability of the decisions by a plurality and a guarantee that individuals can develop a plurality of views even when they make the ultimate decision communally. In this context, the law hedges the possibility of acting together through new beginnings, new forms of political action. Further, laws can guarantee 'the preexistence of a common world, the permanence of a continuity that transcends the individual life-span of each generation, and in which each single man in his mortality can hope to leave a trace of permanence behind him'.²¹⁴

Conclusively, it comes forth that Arendt's conceptualization of politics as the promise to act together is radical when compared with mainstream political philosophy. Moreover, it bestows little importance on rationality and yet identifies a renewed role for institutions as a bulwark of plurality and continuity across generations. It is thus clear that devising post-sovereign processes that are anchored in Arendt's thought can prove more difficult than it appears. No institution worldwide seems future-oriented in the sense that Arendt describes.

7 Conclusions

More than 30 years after the inception of the UNFCCC, annual climate summits have yet to include the youth in negotiations or devote a single decision to climate action for the protection of future generations.²¹⁵ In this article, I attempted to think about 'what we are doing'²¹⁶ with the legal imperative to tackle climate change as a common concern of humankind. I argued that Hannah Arendt is relevant for a future-proof legal reform of climate decision-making at the intergovernmental and domestic levels. Arendt's active conceptualization of

²¹² Arendt, *Between Past and Future* (op cit) p 152.

²¹³ Arendt, *On Revolution* (op cit) p 231.

²¹⁴ Arendt, *Thinking Without a Banister: Essays in Understanding, 1953–1975* (op cit) p 51.

²¹⁵ UNICEF, FACT SHEET: COP26 – Children and climate change (op cit).

²¹⁶ Arendt, *The Human Condition* (op cit), p 5.

political power lays bare the limitations of intergovernmental climate politics and representative democracies, as well as the need to design post-sovereign institutions and practices that are more inclusive and future-oriented. The analysis above offered but a snapshot of the types of open and fluid institutions and participative practices that Arendt's work inspires toward advancing freedoms for future generations. Anchored in post-sovereign constitutionalism, such processes would complement the embryonic but highly significant role of legal mobilization through the courts as a proxy for future generations' political participation.

Beyond the ideals of a fiduciary relationship between politicians and future generations, Arendt prompts radical forms of participation aimed at the creation of a vibrant citizenry. In this context, there is no guarantee that climate justice will be done. However, by speaking about climate justice for future generations—even without fully understanding what it entails—it is possible to inspire collective action that is incrementally more just²¹⁷ and fulfill the promise of a renewed politics that 'is not so much about human beings as it is about the world that comes into being between them and endures beyond them'.²¹⁸

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²¹⁷ Arendt, *Thinking Without a Banister: Essays in Understanding, 1953–1975* (op cit) pp 437–438 'What Socrates apparently believed I'm not so sure Plato believed in it—was talking about justice makes a man more just.'

²¹⁸ H Arendt, *The Promise of Politics* (Schocken 2005) p 175.