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Three Crises: Saving the World

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Abstract

Advancing an original interlocked analysis of equality, democracy, and climate change in honor of the priorities and contributions of Prof. Dr. Susanne Baer of the German Constitutional Court.

Keywords

Substantive equality, democracy, climate change, male dominance, comparative constitutional law, international law, androcentrism, colonialism, anthropocene, environment, prostitution, Nordic Model, Equality Model, authoritarianism, speech, First Amendment, judging, crises

As we speak, the world continues to be thrust even deeper into crisis— intensifying conflicts, profound inequalities, and climate change as overhanging threats to our very existence.

--Michele Bachelet (2022)[1]

A. Introduction

Taken together, our triad of topics—equality, democracy, climate—to each of which the incomparable Susanne Baer has made major contributions—represents a troika rushing toward apocalypse: Inequality increasing exponentially within and between nations, authoritarianism metastasizing with the rise of despots worldwide, and the natural world hurtling toward an irretrievable unliveable abyss. These interconnected dynamics will be stopped at the precipice in our lifetimes, perhaps in this decade, or not at all.

The problems they pose interact, as do their potential solutions. They are driven and controlled by the same people for the same interests by some of the same mechanisms toward the same ends against many of the same people. They sweep from the personal, group, and communal sphere through social, civic, political, and institutional terrain to the planetary physical ecosystem, both natural and man-made. Constitutional courts and the judges that sit on them can have a key role in each of them. Some of those intersections converge on the role that equality—a constitutional value or guarantee in most countries and an aspiration in democracies—has or could have: First on its own; second to preserve or extend democracy as a political system and make it meaningful; and third to retard or repair the climate change that threatens us all, but not all equally or equally soon.

Behind the realities and their analysis is the treatment of inequality in constitutional and wider theories, doctrines, and conversations, which in turn foregrounds the potential illumination and guidance that substantive equality—a philosophical and theoretical concept as well as a legal and jurisprudential one—can provide for each area.

My central thesis and through-line, sketched on an expansive yet compressed canvas, is that substantive inequalities, meaning structural collective dynamic social hierarchies of domination and subordination, within and between polities, characterize inequality as such, have challenged and continue to undermine democracy within nations and the international order, and have supercharged climate change and made it difficult to impossible to stop or reverse. Equality, understood substantively, when embraced by constitutional courts, can

[1] Michelle Bachelet, U.N. High Commissioner for Human Rights, at a High-Level Event Marking the 50th Session of the Human Rights Council (June 15, 2022), https://www.ohchr.org/en/statements/2022/06/statement-michelle-bachelet-un-high-commissioner-human-rights.

end social inequality and contribute powerfully to reversing democratic deficits, at least retarding democratic decay and climate catastrophes.

B. Formal vs. Substantive Equality

The conventional approach to equality, still largely adhered to in most countries and in the European system, is the formal Aristotelian one of sameness and difference, of treating "likes alike, unalikes unalike."[2] As a legal doctrine in structurally unequal societies—neither of which Aristotle had in mind—it proves remarkably resilient as well as uninquisitive about the determinants of what it terms "differences," which are overwhelmingly produced by the deprivations built into the social hierarchies it produces. Likewise it fails to specify or inquire into the referents of its standards for sameness, which it fails to notice involve those indulgences and privileges endemic to hierarchically superior social locations, resulting in many of the qualities permitted to the people who occupy them. Absent this inquiry, Aristotelian equality builds in and imposes its view of natural hierarchy. In its circular essentially tautologous closed system, its effects are considered its causes and pointed to as its justifications. In case you ever felt claustrophobic in its logic and wondered why we have a century or so of equality law and no equality, even increasing inequality, start here.[3]

Take sex as one familiar example, roughly the inequality of half the human race to the other half (plus some men unequal to other men). Methodologically, this approach, confronted by allegations of a sex inequality, searches society for sex-based distinctions that correspond to a claimed legal or policy inequality. If it finds one, it thinks it has found sex: A sex difference, not a sex inequality, hence not sex discrimination. It calls this method, this correspondence of discriminatory law to discriminatory life, this naturalization of socialization, "reasonable" or sometimes "proportional." The purported emptiness of the content of its principle, its abstraction, is regarded as its primary virtue.

Systemically, this analysis of equality imagines that liberty or freedom is a question distinct from it, when much deprivation of freedom is a result of systemic inequality, and much of what is considered freedom is a habitual, customary, or legally entrenched practice of the dominion of some over others. Inverting the demography while keeping the hierarchy is no improvement. This approach imagines dignitary violation as a separate problem, rather than mostly being one measure of the damage done by enforced status inequality. The approach casts hate as its motivation, hate being seen as an emotional outburst of group identification, an attribution of feeling or motive, focusing on a subjective internal state rather than on the expression of outraged hierarchical superiority that is determined to

[2] CATHARINE A. MACKINNON, SEX EQUALITY 5–11 (3d ed. 2016) (analyzing and excerpting Aristotle) [hereinafter MACKINNON, SE3]; *id*. at 5 (quoting Aristotle).

[3] The third edition of my casebook, *Sex Equality*, provides an extended analysis documenting this claim. For an introduction, see MACKINNON, SE3, *supra* note 2, at 22–26.

maintain its supremacy by imposing inferiority on its targets, restoring what its practitioners often coldly see as their rightful place in a natural order. Genocide, too, is considered something apart, rather than being the extreme of enforced inferiority, the destruction of a group as such being the final enforcement practice of inequality. Deprived by this conceptual apparatus of its motivation, measure of damages, and ultimate consequences, discrimination is defanged as an analysis, politics, and legal claim.

Equality's doctrinal form, as widely adopted or paralleled in world constitutions, is often predicated in part on U.S. equality jurisprudence—not a good place to start, observing its outcomes. This equality law is typically divided into the forms its U.S. racist history, and resistance to it, have produced. The primary form is "facial," or explicit, discrimination, as if inequalities with a trait or group that are named are the most real or pervasive or worst or hardest to stop. Are they? Its secondary form is termed "impact discrimination," which requires that distinctions, to be discriminatory, be facially neutral but affect groups differentially, when often they are not neutral to start with. Vast swaths of reality are simply left out of this doctrine. Sexual harassment, as both or neither form, shows one instance of the lack of fit between this doctrine and discrimination's realities. It is not considered facial because it can affect men as well as women, and is more gender-based than neutral with disparity of impact on one sex, particularly when individuals are its victims. Criminalized abortion is another potential example. Pregnancy is not considered sex-based in this model, so abortion prohibitions are rendered not facially discriminatory, but it does not comfortably fit the neutrality impact model either, even when doctors as well as pregnant patients are criminalized.

Forms of impact discrimination are sometimes termed "indirect discrimination" or "adverse effect"; they are considered second-class discrimination and are always under pressure.[4] Attempts to correct for the intrinsic bias in this approach, such as against pregnancy (discrimination based on it not being facially sex-based, amazingly)[5] or test results that differ by sex and/or ethnicity,[6] are termed "affirmative action" or considered "positive

[4] *See* MACKINNON, SE3 113–21, 220, 620 (excerpting and examining *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

[5] MACKINNON, SE3 310–16 (excerpting and discussing *Geduldig v. Aiello*, 417 U.S. 484 (1974)); *id*. at 478–84 (excerpting & discussing *General Electric Co. v. Gilbert* 429 U.S. 125 (1976)).

[6] *See, e.g.,* LAURA A. LAUTH & ANDREA THORNTON SWEENEY, LSAT PERFORMANCE WITH REGIONAL, GENDER, AND RACIAL AND ETHNIC BREAKDOWNS: 2011–2012 THROUGH 2017–2018 TESTING YEARS 26–36 (Law School Admission Council, LSAT Technical Report Series, LSAT Technical Report TR 22–01 (October 2022)); ROBERT KELLY & JAMES MORGAN, LSAT PERFORMANCE WITH REGIONAL, GENDER, RACIAL AND ETHNIC, REPEATER, AND DISABILITY BREAKDOWNS: 2018–2019 THROUGH 2022–2023 TESTING YEARS 22–31 (Law School Admission Council, LSAT Technical Report Series, LSAT Technical Report 24–01 (February 2024)). Analysis of these and similar data shows that women of color have long been especially disserved by the LSAT. As William C. Kidder reported in his widely cited 2000 article, "the LSAT works to the

discrimination.," What they are, is actually doing something about inequality for a change, or relief from bias, not discrimination at all.

Substantive equality theory, rather than beginning with abstractions like sameness and difference begins with the substance of concrete social hierarchies. However, specifying the substance of the inequality is typically left out. Most writers on the subject, as more have taken it up, assume that substantive equality is just another word for disparate impact or adverse effect or indirect discrimination doctrine finally being applied. Actually, it is an entirely different approach. It asks whether a challenged regularity is a practice of structural domination, whether it enforces social inferiority and disadvantage of some and social superiority and advantage of others over them. Its question is, does the challenged practice participate in, reinforce, reproduce, or promote group-based hierarchy?[7]

This is an empirical approach, not a moral one. It recognizes the fact that no human group is actually inferior or superior to another; that groups are humans equals, inaccurately organized and treated as socially unequal on concrete grounds. Equality here is not a value, but a fact denied its realization in social, political, and legal life.

Legally, substantive equality was first accepted in Canada;[8] it has been embodied in some language of Germany's Grundgesetz[9] and embraced in some parts of the international system, including soft law.[10] It is predicated—as to sex for example—on leaving

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disadvantage of women in general, and women of color in particular." William C. Kidder, *Portia Denied: Unmasking Gender Bias on the LSAT and Its Relationship to Racial Diversity in Legal Education*, 12 YALE J.L. & FEMINISM 1, 37 (2000). After reviewing the literature and applying an intersectionality lens to the results, the authors of the most recent study as of this writing (July 24, 2024) similarly concluded that "the overreliance on the LSAT in selective admissions—and to stratify the market for legal education—seems to disadvantage Black women's 'individual experiences . . . within mutually constitutive sociohistorical systems and structures of inequality.'" Nicholas A. Bowman, Frank Fernandez, Solomon Fenton-Miller & Nicholas R. Stroup, *Strategically Diverse: An Intersectional Analysis of Enrollments at U.S. Law Schools*, 8 RSCH. HIGHER EDUC. 1 (2024), available at https://doi.org/10.1007/s11162-024-09787-6.

[7] *See* Catharine A. MacKinnon, *Substantive Equality*, *in* BUTTERFLY POLITICS 110 (2017) (publishing a speech from 1989 in Canada that was the first time the term was used and the concept argued in public). *See also* Catharine A. MacKinnon, Essay, *Substantive Equality: A Perspective* 96 MINN. L. REV. 1 (2011) (discussing the concept further).

[8] *See* Andrews v. Law Society of B.C., [1989] 1 S.C.R. 143. *See also* MACKINNON, SE3, at 6, 28–36 (excerpting and analyzing *Andrews*).

[9] GRUNDGESETZ [GG] [Constitution] art. 3 (Ger.)

[10] *See* Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 25, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 14, art. 4 ¶ 1 (entered into force Sept. 3, 1981) (using "substantive equality" as a temporary measure to expedite sex equality), http://www.un.org/womenwatch/daw/cedaw/cedaw.htm. *See also* Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19, Violence Against Women, U.N. Doc. No. A/47/38 (1992) (embracing the content of substantive equality without using the term).

androcentrism behind, moving away from the fictions and artifices of masculine/male superiority—also termed male dominance—toward embracing sex and gender equality within manifold diversity. Instead of requiring, say, race-based recognitions be the same for all groups, regardless of their situated social inequalities, it inquires, for example, into white supremacy. Diversity, such as is institutionalized in affirmative action or French parité,[11] for instance, is a non-Aristotelian value, in that it treats unlike persons alike on the basis of their unalikeness. Which has put it on thin ice, conceptually and politically, for decades.

In contrast with the recent U.S. majority opinion in *Students for Fair Admissions*, which invalidated race-based affirmative action in U.S. higher education on a purportedly "colorblind" analysis,[12] Justice Sotomayor's dissent in that case is animated by keen insight into white supremacy. She exemplifies a substantive analysis of the realities that affirmative action moves against.[13] A similar substantive grasp of reality animates the equality dimension of the German Constitutional Court's decision—one in which Judge Baer participated—that struck down a legislative Act that violated the constitutional guarantee to a "dignified minimum existence" to both Germans and foreign nationals living in country regardless of their official residency status.[14]

Approaches to prostitution clarify the distinction between these two equality theories. Under Aristotelian equality, since men as well as women so-called "sell sex"—really, they are mostly sold by others for sexual use—and most legal systems criminalize both those who are bought and sold and those who buy and sell them, prostitution is not considered an institution of sex-based discrimination. The hierarchical facts, which align perfectly with patriarchy, become invisible.[15] Nor are disproportionate arrests of women in prostitution, including trans women, made visible, compared with their buyers and sellers, who are disproportionately men (so designated at birth). When legalized across the board, as in

[11] Constitutional Amendment on Gender Parité of Aug. 7, 1999, art. 3 & 4 (Fr.); Gender Parité Act of June 6, 2000 (requiring equal numbers of candidates by sex in certain election lists).

[12] Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181 (2023).

[13] *Students for Fair Admissions*, 600 U.S. at 318 (criticizing majority for "foreclosing any limited use of race in college admissions that "cements a superficial rule of colorblindness as a constitutional principle . . . [and] subverts the constitutional guarantee of equal protection by further entrenching racial inequality in education") (Sotomayor, J., dissenting).

[14] BVerfG, Judgment of the First Senate of 18 July 2012, 1 BvL 10/10 ¶¶ 1–113. This right is founded on Basic Law, Article 1.1 (recognizing existential benefits, a fundamental and human right), in conjunction with Basic Law, Article 20.1 (establishing the principle of the social welfare state). *See* id. ¶¶ 1–62.

[15] Justice Sachs and Justice O'Regan provide an excellent analysis of the problem in their dissent in *Jordan*, a landmark case decided by the Constitutional Court of South Africa. *See S v Jordan and Others* 2002 (6) SA: (CC) at 16 ¶ 34 (S. Afr.) (O'Regan & Sachs, JJ., dissenting) [hereinafter *Jordan* dissent].

Germany and New Zealand for instance, these systems are not considered gender-based persecution, for example, although the drastically gender-skewed numbers of people pulled into the flesh markets, with well-documented attendant harms and violations, increase dramatically.[16] Under decriminalization, so do the crimes against humanity of enforced prostitution, sexual slavery, and sex trafficking.[17]

A substantive equality approach to prostitution, by distinction, begins with recognition of the place of coercively enforced sex on women and girls, coupled with feminized and racialized poverty, such that material inequality makes it difficult if not impossible for most women to earn an independent living. Prostitution, which metastasizes on legalization, is an intrinsically sex, age, race- and gender-unequal practice largely contingent on class and caste. Disadvantaged racial, ethic, national, and religious groups in every society are massively overrepresented in the sex trade,[18] making prostitution clearly biased on a substantive equality intersectional analysis. Prostitution is a massive engine of social inequality, feeding on it and reproducing it, including through sex trafficking, meaning third party exploitation of prostitution, once the reality is recognized that on average 84% of those in prostitution worldwide are documented to be pimped.[19]

By contrast, the Nordic also termed the Equality Model, which decriminalizes the bought and sold and strongly criminalizes the demand, the buyers, and the suppliers, the sellers—exemplifying an asymmetrical approach to an asymmetrical reality—takes a substantive equality approach. The South African Constitutional Court's decision in *Jordan* exemplifies this distinction, the majority taking the formal equality approach, the brilliant dissent by Albie Sachs and Kate O'Regan taking a far more substantive one.[20] While treating sex formally under gender neutrality results in treating hierarchical unequals the same, often increasing the inequalities between them or leaving them standing, treating sex substantively results in the Equality Model, equalizing against an unequal reality.

Many groups and advocates, including in the climate emergency space, increasingly use the term "equity" instead of equality for their end state vision. This may be because, without

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[16] *See generally*, Reem Alsalem (Special Rapporteur on Violence against Women and Girls, Its Causes and Consequences), Prostitution and Sexual Violence against Women and Girls, delivered to the Human Rights Council, U.N. Doc. A/HRC/56/48 (May 7, 2024) [hereinafter Alsalem Report].

[17] *See* Catharine A. MacKinnon & Max Waltman, *Legalized Prostitution: A Crime Against Humanity?* 66 HARV. INT'L L.J. __ (forthcoming Jan. 2025) [hereinafter MacKinnon & Waltman].

[18] This is comprehensively documented in Alsalem's report. *See* Alsalem Report, *supra* note 16 at 8; MacKinnon & Waltman, *supra* note 17 at __.

[19] Melissa Farley, Kenneth Franzblau & M. Alexis Kennedy, *Online Prostitution and Trafficking*, 77 ALB. L. REV. 1039, 1042 (2014).

[20] *See S v Jordan and Others* 2002 (6) SA: (CC) at 2 ¶ 1 (S. Afr.) [hereinafter *Jordan* majority]; *Jordan* dissent.

really understanding why, they perceive the conventional formal equality model—sold as sameness defining the laws of equality the way gravity defines the laws of earth's physics—sells their transformative goals short. Substantive equality actually provides everything they are looking for, along with the constitutional basis for achieving it that "equity" fails to provide.

As a final aside on this theoretical distinction, it is sometimes thought that substantive equality is political and formal equality is not. In fact, formal equality builds in status quo politics, taking existing power arrangements as neutral, while substantive equality permits a politics of change in circumstances in which the status quo is found substantively unequal. If "politics" is defined as "power-structured relationships," as I do, or even as simply as "who gets what, when, and how,"[21] both equality approaches are unavoidably political. They are just animated by different politics.

C. Democracy vs. Authoritarianism

Equality is built into democracy as a value, but no democratic country (or any other country I know of) has ever been characterized by substantive equality as a fact. "Democracy" is a term commonly used to describe countries that have elections for political leadership that meet certain minimal standards. Democratic backsliding is real, but it is sliding back from a benchmark that contains deficits, such that democracy has never really been achieved. Political science has long documented that most people who can, don't vote in many countries;[22] many people and communities who want to and try to vote are not permitted

[21] KATE MILLET, SEXUAL POLITICS 23 (1979) (defining "politics" as "power-structured relationships"); HAROLD D. LASSWELL, WHO GETS WHAT, WHEN, HOW (1936). My book, *Toward a Feminist Theory of the State*, argues that the relation between men and women is political (*passim*). CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

[22] HANNAH HARTIG ET AL., PEW RESEARCH CENTER, REPUBLICAN GAINS IN 2022 MIDTERMS DRIVEN MOSTLY BY TURNOUT ADVANTAGE (July 2023) (examining U.S. voter turnout in semiannual general elections held between 2016–22), https://www.pewresearch.org/politics/2023/07/12/republican-gains-in-2022-midterms-driven-mostly-by-turnout-advantage/; Drew Desilver, Pew Research Center, "Turnout in U.S. Has Soared in Recent Years But by Some Measures Still Trails That of Many Other Countries" (Nov. 1, 2022), https://www.pewresearch.org/short-reads/2022/11/01/turnout-in-u-s-has-soared-in-recent-elections-but-by-some-measures-still-trails-that-of-many-other-countries/; ABDURASHID SOLIJONOV, INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE (IDEA), VOTER TURNOUT TRENDS AROUND THE WORLD (Dec. 31, 2016), https://www.idea.int/publications/catalogue/voter-turnout-trends-around-world (calculating voter turnout in a growing list of countries with different forms of government that hold direct national elections).

access or live lives that don't allow it;[23] and the policy preferences of even those who do vote are not systematically reflected in policy outcomes by those they elect.[24]

The substantive deficits of democracy within democracies need to be faced. Access to the franchise and its exercise, for one measure, is ever more challenged in most places, including the U.S. where voting rights are being vitiated. "Let the people decide," a bromide in the *Dobbs* case that overturned a half century of abortion rights in the U.S.,[25] is too convenient when voting rights have been eviscerated. Constitutional and statutory approaches to this problem, quite strong historically, have collapsed case by case, pillar by pillar in the United States.[26] A substantive equality approach to voting rights would strengthen them considerably. Another way of putting this point is that the failure to address substantive inequality socially, politically, and in election law, principally on the basis of race, has produced crises in democracy leading to authoritarianism, making it facilely far more possible. Authoritarian rulers, who appeal to the most misogynistic, racist (including xenophobically anti-immigrant), and ethnically supremacist interests of some groups of voters, are observably being democratically elected more and more frequently all around the world.[27] They also threaten judicial independence,[28] which can resist principled rights

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[23] PIPPA NORRIS & MAX GROMPING, ELECTORAL INTEGRITY PROJECT, ELECTORAL INTEGRITY WORLDWIDE (May 2019), https://www.electoralintegrityproject.com/s/Electoral-Integrity-Worldwide-d6xe.pdf; Stephanie M. Burchard, *Get Out the Vote—Or Else: The Impact of Fear of Election Violence on Voters*, 4 DEMOCRATIZATION 588 (2020); Mascha Rauschenbach & Katrin Paula, *Intimidating Voters with Violence and Mobilizing Them with Clientelism* 56 J. PEACE RSCH. 682 (2019), https://doi.org/10.1177/0022343318822709.

[24] Martin Gilens & Benjamin Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERS. ON POL. 564 (2014), https://doi.org/10.1017/S1537592714001595; Michael W. Sances, *When Voters Matter: The Limits of Local Government Responsiveness*, 57 URB. AFF. REV. 402 (2021); David S. Lee, Enrico Moretti, & Matthew J. Butler, *Do Voters Affect of Elect Policies? Evidence from the U.S. House*, 119 Q.J. ECON. 807 (2004), https://doi.org/10.1162/0033553041502153.

[25] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

[26] For one crucial example, the Voting Rights Act, 52 U.S.C. Section 1030, was enacted in 1965 to enforce and partially track the Fifteenth Amendment, as in its § 2 providing that "the right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude." For recent cases undermining or demolishing sections of the Act, see, for example., *Shelby County v. Holder*, 570 U.S. 529 (2013) (holding § 4 of the Voting Rights Act unconstitutional), although it essentially equates to racial gerrymandering; *Rucho v. Common Cause*, 588 U.S. 684 (2019) (finding partisan gerrymandering claims present a political question); *Brnovich v. Democratic National Committee*, 594 U.S. 647 (2021) (weakening § 2 of the Voting Rights Act). *But cf. Allen v. Milligan*, 599 U.S. 1, 9–10, 42 (2023) (rejecting racial neutrality when interpreting § 2 against a backdrop of Alabama's discriminatory district lines favoring white voting blocs).

[27] *See* Kim Lane Scheppele, *in* [Conference Paper], INTERNAL CITE (summarizing this development) (on file with author).

[28] Movement for Quality Governance in Israel v. Knesset, HCJ 5658/23 (Feb. 14, 2024) (voiding Amendment No. 3 to Basic Law prohibiting courts from reviewing reasonableness of governmental decisions as exceeding Knesset's constituent authority).

being contingent upon voting or power, fear or favor. The appeal of rampant toxic—becoming lethal—masculinity is a largely neglected dimension of analysis of such despots, both domestically and in terms of foreign policy.[29] Male dominance also includes the dominance of some men over other men as well as over all women—sexual politics being an arm of politics. Wars, as one expression, often appear to be started and continued because these men are obsessed with their power, including postures of strength, relative to other men. They do not want to lose power or "look weak," so display and practice masculinity on steroids with often murderous results.

The relation of demography—the "who" that is in power—to equality as a mission in democracy—to "what" ends that power is exercised—is not perfect, but there is something to it. As pornography ever more saturates societies, men feel the need to perform masculinity, appear sexy by its standards, to win elections (was Biden sexy?). Women are ever more marginalized, stigmatized, denigrated, excluded from raising the necessary funding and reduced to sexual object status via social media, reduced to second class citizens, particularly if they identify with and as women, often excluding women from democratic representation. Can a cunt be a leader?

As this implies, in terms of constitutional challenges to democracy, the law of speech or expression deserves special focus. If it is impossible to stop lies, individually (as in libel) or collectively (as in group libel, hate propaganda, or pornography), democracy is undermined. It cannot flourish. I think many people believe that United States standards for freedom of speech are a peculiarly American obsession. To some extent, it is true that other countries have more robust protections against libel[30] and hate speech[31] if not yet pornography. But the technology of the Internet, its algorithms, and AI were developed in the context of the First Amendment, and build in its inequality and impunity for it. In fact, its algorithms do what pornography pimps have long done: Hook their users and increasingly give them, so conditioned, more and more of the conflict and violation they have determined they want and will pay for. Both AI and pornography are way ahead of critical thinking or democracy-preserving tools in their manipulation and spread of disinformation and electronic

[29] Vladimir Putin, in his aggression against Ukraine, is an instance. *See* Prosecutor Karim A.A. Khan KC, Statement on the issuance of arrest warrants against President Vladimir Putin and Ms Maria Lvova-Belova (Mar. 17, 2023), https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin (announcing arrest warrants for Putin by ICC prosecutor).

[30] In the U.K., classically and still, a libel defendant must prove a publication is true that does or is likely to do serious harm and has a defamatory meaning to prevail. Defamation Act 2013. In the U.S., plaintiffs must prove falsity. Other potential defenses in the U.K. under recent reforms include honest opinion (formerly fair comment), privilege (absolute or qualified), innocent dissemination (e.g., some websites), and others. *Id*. But the burden of proof distinction remains major.

[31] Germany, for example, prohibits Nazi speech and symbols. *See* Strafgesetzbuch § 86a.

networking (including dark web) of extremist ideologies and radicalization of bigotry and terrorism. When there is no access to accurate information, the airwaves flooded by propaganda that sexualizes and repeats and escalates, democracy's fragility lies exposed. In a marketplace of ideas, the most money buys the most speech, incentivizing exploitive dynamics that sell. Nothing guarantees truth will triumph. Goebbels would have had a field day with social media and its legal protections.[32]

The abstract notion of freedom of expression has never—other than in the scattered milestones of the Supreme Court of Canada (*Keegstra* on antisemitism,[33] *Butler*[34] and *Little Sister's*[35] on pornography), Germany's laws against Nazi propaganda,[36] and the ICTR's Media Case on genocide[37]—recognized that freedom of expression, as guaranteed, is also a substantive and substantively unequal system. In the result, protected free speech, under the U.S. model, unbalanced by robust equality considerations, can create an unequal hostile, threatening, even terrorist social environment, through rampant antisemitism and Islamophobia for just two examples.

The model is not neutral. The power to inflict injury through speech with impunity is intrinsic to social inequality which, when legally protected, is institutionalized and legitimated. Constitutional courts have the contervailing ability, by implementing substantive equality in this area—using tests of harm not hatred, empirical evidence not value judgment, reality not morality—to ensure that inflicting damage and endangering groups is no longer an entitlement called "speech," This analysis, applied, would powerfully promote a multiracial, multiethnic and -religious, sex and gender-inclusive democracy.

To counter authoritarianism, constitutions are also going to have to come to grips with poverty, with concomitant social and economic class as a virulent form of inequality produced by the very economic democracy that capitalism purports to promote. The language of most constitutions makes this difficult (although South Africa, say, recognizes

[32] The Communications Decency Act of 1996, amending the Communications Act of 1934, § 230, 47 U.S.C. 230 (providing limited but extensive immunity to providers and users of interactive computer services). Essentially, the Internet is treated as if it is the phone company, like other common carriers merely conveying content provided by others. *Id.*

[33] Keegstra v. R. [1990] 3 S.C.R. 697 (Can.).

[34] Butler v. R. [1992] 1 S.C.R. 452 (Can.).

[35] Little Sisters v. Canada [2000] 2 S.C.R. 1120 (Can.).

[36] *Supra* note 31.

[37] Prosecutor v. Nahimana et al. (Media Case), Case No. ICTR-99-52-T, Judgment and Sentence (Dec. 3, 2003).

it[38]). As to this, as well as with elections, if constitutional democracies do not face economic inequality in all its gendered and racialized dimensions, democracy contains the seeds of its own destruction in this respect as well as others. In one interconnected dynamic, this failure provides the opportunity for undemocratic forces to enhance their popularity and support among the desperately poor by pushing developmental projects claimed to reduce poverty that in fact escalate climate deterioration with differential consequences for the already impoverished. I actually think that if sex, race, and caste inequality were substantively economically rectified, meaning discrimination on these bases in income and property was seriously tackled—these grounds are already part of the constitutional equality framework in most democracies[39]—a massive chunk of class-based inequality would be rectified. How much would be left? Lacking this, economic inequality, within nations and across them, will continue to increase, as it has to now. This is both a consequence of a lack of systemic democracy and an indication that it is moving ever further toward conditions, including real deprivations as well as rising resentments and embittered disappointments, that racialist and misogynistic "strong men" (academically euphemized as hyperpresidentialism) are widely exploiting toward fascism.

As this critique implies, substantive equality institutionalizes the democratic ideal in legal form. It is a perfect way to "judicialize democracy."[40] In the absence of this recognition, democracies have never squarely faced the role of misogyny, indeed of stratified unequal social power in all its forms, that is substantive inequality, in them. (To be fair, Rawls tried.[41]). Democrative theory has never seriously looked into whether male supremacy is integral to it and can flexibly exploit it for its own ends, or whether democracy is or could be a counter to the power of men over women, say. Clearly, there is no power in numbers, or women of color and their children would run the world. If a democratic deficit can be built into democracy itself—its institutions intrinsically as designed as fragile against the forces of cynical autocracy as they are proving, and I think corruption is one crucial nexus of its

[38] This recognition—or potential to be recognized—is reflected in a number of passages in South Africa's Constitution. *See, e.g.*, S. AFR. CONST. (1996), Ch. 2 Bill of Rights, 9 (1) ("Everyone is equal before the law and has the right to equal protection and benefit of the law."); *id.* at 9(2) ("To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."); especially *id*. at 9(3) ("The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including . . . social origin, . . . culture, language and birth."); *id*. at 9(4) ("National legislation must be enacted to prevent or prohibit unfair discrimination."); *id.* at 9(5) ("Discrimination on any of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.").

[39] For instance, Article 15 of the Constitution of India prohibits discrimination on the basis, *inter alia*, of caste, which can be seen as one form of class discrimination. *See* India Const. art. 15.

[40] *See* Daniela Salazar, *in* [Conference Paper], INTERNAL CITE (recognizing legal equality as judicializing democracy) (on file with author).

[41] *See*, *e.g.*, John Rawls, *The Idea of Public Reason Revisited*, 64 UNIV. CHICAGO. L. REV. 765 (1997).

concealed congealed masculinity; if democracy as designed can promote its own decay; democracy is on an extinction curve. The rule of law will be impotent against these forces. Until that moment, constitutional courts armed with substantive equality can still be a countervailing weight to strengthen the core equality principle against democracy's annihilation.

D. Environment vs. Anthropocene

The damage done to society's relational space and polities' governing space is intimately connected to the human destruction of the globe's physical space. Looking at the climactic extinction trajectory through a substantive inequality lens reveals how social and political inequality, including among nations and regions, has contributed to disastrous climate change: The ecosystem destabilized through industrialization, colonization, and the exploitation of resource extraction and use of fossil fuels that fuel greenhouse gasses, thus global warming under capitalist incentives. And has stymied addressing it. Those who have benefited in comfort and profit from the processes that produce the climate emergency are mainly the elites of the global north and west, its harms disproportionately and sooner afflicting the global south and east (China being exceptional, as neither north nor west yet disproportionately contributing to climate emergency for others). As with inequality generally, when it is institutionalized in democratic deficits, those peoples and areas with the least power, exploited the most, are detrimentally affected the most severely and earliest, including by environmental racism within countries, and on the bases of poverty, age, sex and gender, indigenous status, and disability.[42] The possibilities of stopping climate change short of further rising temperature above pre-industrial levels (below 1.5 degrees Celsius, per the 2015 Paris Agreement[43]), which is bringing sea level rise, catastrophic storms, and ocean acidification along with it, is exacerbated by the same imposed inequalities in and among human societies that produce it in the first place.

Frequently overlooked is the fact that the disasters of the climate emergency affect women disproportionately, typically women of color. Not only are women of poorer countries, including Small Island Nations and coastal populations, are already in relatively more exposed positions to the floods, droughts, food insecurity, and poisoned fisheries, air and

[42] *See, e.g.,* Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, p. 5 (Jan. 9, 2023) https://jurisprudencia.corteidh.or.cr/vid/corte-idh-solicitud-opinion-926239275 ("[T]he adverse effects of climate change are felt more acutely by those segments of the population that are already in vulnerable situations owing to factors such as geography—rural and coastal areas—poverty, gender, age, indigenous or minority status, national or social origin, birth or other status, and disability.").

[43] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

water, along with the habitat destruction for flora and fauna and agricultural conditions.[44] Women are routinely raped alongside the earth being penetrated for extraction by multinational corporations for resources destined for the west's use in compounding carbon and other pollution.[45] Women are also more often drowned in its floods because they refuse to flee without their children, animals, or elders; are caught up and pulled under in debris fields by their hair; do not run once their clothes are stripped off for what may appear to be modesty but is actually fear of rape.[46] If they survive climate disasters like fires or cyclones in refugee camps—as is also the case when they run from conflicts among men—they become intensively vulnerable to plagues of disease and sexual assault and ever-opportunistic sex traffickers, who scoop them up for prostitution.[47] It is estimated that 80% of those displaced by climate-related events are women and girls, although very little is done

[44] *See, e.g.*, CLIMATE CHANGE 2023: SYNTHESIS REPORT. CONTRIBUTION OF WORKING GROUPS I, II AND III TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE § 2.1.2 at 51, doi: 10.59327/IPCC/AR6-9789291691647; CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY. CONTRIBUTION OF WORKING GROUP II TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE at 1346, 1389, doi:10.1017/9781009325844; DIMENSIONS AND EXAMPLES OF THE GENDER-DIFFERENTIATED IMPACTS OF CLIMATE CHANGE, THE ROLE OF WOMEN AS AGENTS OF CHANGE AND OPPORTUNITIES FOR WOMEN. SYNTHESIS REPORT BY THE SECRETARIAT, U.N. Doc. FCCC/SBI/2022/7 (2022), available at https://unfccc.int/documents/494455; Herrera Carrion et al. v. Ministry of the Environment et al. (Caso Mecheros), Provincial Court of Justice, Juicio No: 21201202000170 (Jul. 29, 2021) [Ecuador] (reporting case brought by nine Ecuadorian girls from Sucumbio and Orellana provinces that resulted in the Court ordering the Government to take action to eliminate gas flaring in the country due to its harmful impact on health, the environment, and human rights); Maria Khan v. Federation of Pakistan (W.P. No. 8960 of 2019) (reporting constitutional claim by Pakistani women against the State alleging violations of human rights resulting from failures to take action to combat climate change); National Inquiry on Climate Change Report, In Re: National Inquiry on the Impact of Climate Change on the Human Rights of the Filipino People and the Responsibility Therefore, if any, of the 'Carbon Majors,' case nr. CHR-NI-2016-0001, Commission on Human Rights of the Philippines (May 6, 2022).

[45] The correlation between extractive industries and sexual violation has been reported to me by women over and over for several decades, especially in Africa. For some documentation of this general pattern, yet to be exhaustively researched, see, for example, KIMBERLY MARTIN, KELLE BARRICK, NICHOLAS J. RICHARDSON, DAN LIAO AND DAVID HELLER, VIOLENT VICTIMIZATION KNOWN TO LAW ENFORCEMENT IN THE BAKKEN OIL-PRODUCING REGION OF MONTANA AND NORTH DAKOTA, 2006–2012, Natl. Crime Stats. Exchange (Feb. 2019), abstract available at https://www.ojp.gov/ncjrs/virtual-library/abstracts/violent-victimization-known-law-enforcement-bakken-oil-producing (reporting Bureau of Justice Statistics finding increased violence in region corresponding with oil boom); Anna von Gall, *Litigation (im)possible? Holding companies accountable for sexual and gender-based violence in the context of extractive industries,* European Center for Constitutional and Human Rights Policy Paper (2015), https://www.ecchr.eu/fileadmin/Publikationen/PolicyPaper_Mining_Gender_litigation_impossible_20150730.pdf (listing half a dozen such incidents); Jennifer Hinton, Marcello Veiga, and Christian Beinhoff, *Women and Artisanal Mining: Gender Roles and the Road Ahead*, *in* THE SOCIO-ECONOMIC IMPACTS OF ARTISANAL AND SMALL-SCALE MINING IN DEVELOPING COUNTRIES 149, 166 (Gavin M. Hilson ed., 2003).

[46] *See* MACKINNON, SE3, at 25–27 (documenting effects on women fleeing tsunamis).

[47] Alsalem Report, *supra* note 16 at ¶¶ 7–14.

with all this in litigation.[48] Indigenous and Afro-descendant communities experience intensified forced migration pressures from climate disasters.[49] As social conditions of inequality escalate the anthropocene, intersectional human rights of equality including gender and race are wantonly violated, and the other way around.

Children are frequently identified by attribution science as the most vulnerable human group to the long-term risks to life and well-being of climate change.[50] One of the most promising constitutional approaches to litigation to stop it is, accordingly, by children claiming the right to "intergenerational equity."[51] In this rapidly moving and expanding body of law, only a few notable developments can be highlighted. As to rights as such, it seems necessary to say that there is nothing intrinsically individualistic or unstructural about the container; the question is the content contained. Internationally, the intergenerational equity idea tends to arise under sustainable development, and is sometimes linked to it in national cases.[52] Importantly for constitutional judging, however, a wide range of national

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[48] MACKINNON, SE3, at 25 (quoting Ritu Sharma's presentation of Asia Pacific Forum's study of post-tsunami villages in Indonesia, Sri Lanka, and Thailand that arrived at the 80% figure (examining women's particular vulnerabilities in disasters). *See also id*. at 25 (excerpting and discussing post-tsunami findings of grassroots women's groups studying the district of Batticaloa, Sri Lanka, that women represent 91% of those killed).

[49] UNGA Report, A/77/189, *passim*, Felipe González Morales (Special Rapporteur on Human Rights of Migrants) July 19, 2022, https://www.ohchr.org/en/documents/thematic-reports/a77189-report-special-rapporteur-human-rights-migrants.

[50] The Office of the UN High Commissioner for Human Rights (OHCHR) has stated:

> Children are disproportionately impacted by climate change due to [children's] unique metabolism, physiology and developmental needs. The negative impacts of climate change, including the increasing frequency and intensity of natural disasters, changing precipitation patterns, food and water shortages, and the increased transmission of communicable diseases, threaten the enjoyment by children of their rights to health, life, food, water and sanitation, education, housing, culture, and development, among others. Climate change heightens existing social and economic inequalities, intensifies poverty and reverses progress towards improvement in children's well-being.

David R. Boyd (Special Rapporteur on Human Rights and the Environment), Francisco Cali Tzay (Special Rapporteur on the Rights of Indigenous Peoples), Gerard Quinn (Special Rapporteur on the Rights of Persons with Disabilities), under the auspices of Environmental Justice Australia, representing five children living in Australia Oct. 25, 2021 ¶ 14 (emphasis and footnotes omitted).

[51] *Id.*

[52] *See* BVerfG, Order of the First Senate of 24 March 2021, 1 BvR 2656/18 at ¶ 146, Climate Change (Neubauer et al v. FRG); Herrera Carrion et al. v. Ministry of the Environment et al. (Caso Mecheros), Provincial Court of Justice, Juicio No: 21201202000170 at 10, 56-57 (Jul. 29, 2021) [Ecuador]; Future Generations v. Ministry of the Environment and Others, STC4360-2018, No. 11001-22-03-000-2018-00319-0, Corte Suprema de Justicia at 37 (Apr. 5, 2018) (Colom.).

constitutions include provisions recognizing the interests of future generations or rights in perpetuity; for example, the Preamble of the U.S. Constitution aims to "secure the Blessings of Liberty to ourselves and our Posterity."[53] An growing number confer rights accordingly, with some encompassing these rights under environmental constitutionalism. Sometimes childrens' rights are invoked as integral to a right to a heritage of a healthy environment with corresponding governmental duties; sometimes temporal considerations are a guiding principle, often along with the public trust doctrine. The International Court of Justice, European Court of Human Rights, UN Human Rights Committee, and the Inter-American Court of Human Rights[54] are increasingly being resorted to in this area, often after domestic constitutional courts are tried. "Equity," although having some international dimension,[55] including in the Paris Agreement,[56] is, in my view, not a fully adequate legal term for what is needed here, being unmoored from most constitutional rubrics. So, too, is U.S.-style equal protection, which, as explained, is conceptually empty, rigid, and mired in sameness-difference abstractions.

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[53] U.S. CONST., pmbl.

[54] For examples, *see* ICJ: Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) & Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, ICJ Reports 2015, p. 665 (Dec. 16, 2015). *See also* ECtHR: Schweiz v. Switzerland, App. no. 53600/20, ECtHR (Apr. 9, 2022); UNHRC: Daniel Billy and Others v. Australia (Torres Strait Islanders Petition), CCPR/C/135/D/3624/2019 (Sept. 22, 2022); IACtHR: Republic of Colombia & Republic of Chile, Request to the Inter-American Court of Human Rights for an Advisory Opinion on the Climate Emergency and Human Rights (Jan. 9, 2023).

[55] In its decision on the *Torres Strait Islanders* Case, the UNHRC, in accordance with the International Covenant on Civil and Political Rights (ICCPR) addressed the rights of future generations, finding that:

> With respect to article 24 of the Covenant [Protection Required for Children], the principle of intergenerational equity places a duty on current generations to act as responsible stewards of the planet and ensure the rights of future generations to meet their developmental and environmental needs. The remedies requested by the authors are reasonable and proportionate.

Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication 3624/2019, ¶ 5.8.

[56] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104, stating:

> Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity. *Id.*

To the latter, the *Juliana* case from Oregon, in its complaint against the U.S. government for facilitating the extraction and consumption of fossil fuels, claims a violation of children's rights of equal protection. Children are shoehorned into existing equal protection concepts such as "immutable characteristics" and "insular minorities,"[57] when age mutates and numbers are not the point. It also called for strict scrutiny for the group as a suspect class, which would tend to mean, for example, that nothing affirmative could be done for them, because strict scrutiny prohibits legal use of the classification as a form of discrimination.[58] The Ninth Circuit found lack of Article III standing on the ground that, in its view, all citizens will experience the harms of climate change equally, as opposed to the "discrete" and "particularized" injuries standing requires.[59] Apart from ignoring very real differential vulnerabilities, this means that the more widespread an injury is, the less the Constitution can do about it. The overlooked inequality here, as often by judicial majorities in these cases, is between those inflicting the harm and those on whom it is inflicted. Although climate change affects everyone to an extent, those doing it, and who could stop it but so far do not, are not those to whom it is most differentially being done.

The Federal Court of Appeals in Canada might have been expected to have a more substantive equality understanding of children's rights in the climate context. But in *La Rose,*[60] while claiming to apply a substantive equality analysis, under "adverse effect discrimination" it missed the substantive harms unequally imposed on children and native communities.[61] The equality claims were considered too "expansive and diffuse" to be compatible with constitutional adjudication and its remedial capacities, as well as "unprecedented," "not gradual," presenting "no present harm" to equality interests as

[57] *Juliana v. U.S.*, First Amended Complaint, ¶ 295 (stating "[f]uture generations … have immutable characteristics, and are also an insular minority").

[58] The case has gone up and down several times between the district court in Oregon, which repeatedly sided with the plaintiffs. *See Juliana v. U.S.*, No. 6:15-cv-01517, 2023 WL 9023339, (D. Or. Dec. 29, 2023) (permitting trial on due process and public trust claims). *See also* Order, U.S. v. U.S. Dist. Ct. D. Or., No. 24-684 (9th Cir. May 1, 2024) (granting, in the 9th Circuit Court of Appeals, the federal government's mandate to dismiss). Plaintiffs sought *en banc* review of the dismissal. Petition for rehearing, No. 24-684 (9th Cir. June 17, 2024), which was denied. Order, No. 24-684 (9th Cir. July 12, 2024). The Plaintiffs' website states they are considering next steps. *See* Youth v. Gov, OUR CHILDREN'S TRUST (last visited Feb. 3, 2025), https://www.ourchildrenstrust.org/juliana-v-us.

[59] Juliana v. U.S., 947 F3d 1159, 1174 (9th Cir. 2020).

[60] La Rose v. His Majesty the King, 2023 FCA 241 (F.C.A. Dec. 13, 2023) [Canada].

[61] *Id*. at ¶¶ 77, 82.

understood, and overstepping structural systemic boundaries.[62] A Section 7 security interest—not unequal security—was allowed to proceed to trial.[63]

As this illustrates, one constitutional problem in this area appears to be to claim an injury and remedy big enough to fit the problem and its solution—a cause of action and the redressability of its diagnosis—while not being too big to overstep existing concepts that include competences such as justiciability and separation of powers. A number of U.S. cases, with final decisions pending in state and federal courts, have been mired in similar tensions, as are some international decisions. Identifying the right inequality and its content could help.

Prior, more inspired, conceptually sophisticated, and realistic constitutional steps have successfully been taken by the apex constitutional courts in, for two examples only, Germany in the *Climate Change Case* in 2021,[64] and in Colombia, in the *tutela* of *Demanda Generaciones Futuras* in 2020.[65] The Supreme Court of Colombia's visionary decision faced that "there is a growing threat to the possibility of existence of human beings"[66] for which "[h]umanity is the main actor responsible."[67] That case connected the environment with fundamental rights in recognizing the principle of intergenerational equity—stressing that "solidarity" with future generations "transcends anthropocentrism"[68]—and recognized the river as a "subject of rights" itself in guaranteeing an "intergenerational pact for the life of the Colombian Amazon."[69]

A better way was also paved by the remarkable 2021 decision by the First Senate of the German Constitutional Court in the *Climate Change Case*, or *Neubauer*, on which Susanne Baer sat.[70] It recognizes an objective duty to protect future generations under Article 2(2) of

[62] *Id.,* at ¶¶ 22 ("expansive and diffuse"), 84 ("unprecedented" and "not . . . gradual"), and 124 ("no present harm").

[63] *Id.* at ¶ 109 (allowing § 7 security interest to proceed to trial). Following the plaintiffs amended statement of claim on May 31, 2024, as of July 22, 2024, the parties await a ruling.

[64] BVerfG, Order of the First Senate of 24 March 2021, 1 BvR 2656/18, Climate Change (Neubauer et al v. Ger.).

[65] Tutela, Demanda Generaciones Futuras v Minambiente [2018] Supreme Court 11001-22-03-000-2018-00319-01.

[66] *Id*. at 15, ¶ 4.

[67] *Id*. at 16, ¶ 1.

[68] *Id*. at 20.

[69] *Id*. at 48.

[70] BVerfG, Order of the First Senate of 24 March 2021, 1 BvR 2656/18, Climate Change (Neubauer et al v. FRG). This case is helpfully discussed by Andreas Paulus, *in* Conference Paper, INTERNAL CITE (on file with author).

the Grundgesetz (life and physical integrity) together with Article 20(a), a clause added in 1994 that speaks of "responsibility toward future generations" to "protect the natural foundations of life and animals" within constitutional limits.[71] Ultimately, the decision was based on the "intertemporal" right to liberty: The state burdens people in the future diproportonately if it does not plan adequately.[72] In recognizing that the principle of Article 20a informs fundamental freedoms and equality rights, in the context of holding that the legislative and executive powers can be under judicial orders (helpful on separation of powers concepts that can exaggerate judicial restraint), that court observed that "climate change exacerbates social inequalities,"[73] and its decision also promoted intergenerational justice.[74]

In another development, young people in *Duarte v. Agostinho v. Portugal* asserted among other claims the right to nondiscrimination on the basis of age under Article 14 of the European Convention on Human Rights, its main equality clause,[75] against 32 countries, for shifting the growing burdens of climate change onto future generations.[76] The European Court of Human Rights disappointingly dismissed the claim in 2024 for lack of extraterritorial jurisdiction and non-exhaustion of domestic remedies.[77] Perhaps as importantly though, on the same day the Strasbourg court accepted the claim of an activist association of Swiss senior women who claimed their rights were violated by the failure to take the unequal

[71] GRUNDGESETZ [GG] [Constitution] arts. 2 (2), 20 (a) (Ger.).

[72] BVerfG, headnote 4 and ¶¶ 122, 183.

[73] *Id*. at ¶ 28.

[74] The Court's recognition of inequalities exacerbated by climate change occurs in the factual findings with no causal connection to intergenerational justice. The risk of intensified vulnerabilities to climate change is, however, connected to migration, as potentially pushing affected populations to Europe. BVerfG, Order of the First Senate of 24 March 2021, 1 BvR 2656/18, ¶ 28, Climate Change (Neubauer et al v. FRG) (stating:

> [...C]limate change exacerbates social inequalities and carries the potential risk of violent conflict as competition for water, food and grazing land intensifies. Increased warming exposes low-lying coastal areas, deltas and small islands to particular risks associated with sea level rise, including increased saltwater intrusion, flooding and damage to infrastructure. As sea levels rise, the local population will abandon islands and coastal zones due to periodic or permanent flooding. Increasingly pronounced changes in the climate thus amplify worldwide refugee movements and could intensify international displacement and migration towards Europe. *Id.*

[75] The Council of Europe recognized equality as an independent right in Protocol No. 12 to the Convention.

[76] European Court of Human Rights Judge Ivana Jelic refers to this in [Conference Paper], INTERNAL CITE (on file with author).

[77] Duarte Agostinho et al v. Portugal et al., ECtHR (GC), Appl. No. 39371/20 (Apr. 9, 2024).

effects of climate change into account.[78] In a human rights system that is focused fairly relentlessly on the individual, the Grand Chamber there accepted that the association had victim status.[79] Another crucial development to follow is the advisory decision by the InterAmerican Court of Human Rights in the more substantively conceived request by Colombia and Chile, awaiting decision.[80]

Substantive equality could strengthen these intergenerational arguments. It infuses the equity concerns into the equality canon by taking account of the substance of childrens' inequality: They are smaller, weaker, developing, violated sexually and otherwise by dominant adults typically with impunity, dependent for survival on those same adults, not allowed to work to earn an independent living, not allowed to express themselves freely and fully, can't vote, and are not able fully to assert their rights (which are barely recognized) independently. This is true of children right now, intragenerationally, as well as in a forward-looking perspective, intergenerationally,[81] poisoning their present as well as their future, when it will be too late. This is the problem the German court addressed in its notion of "intergenerational" liberty rights.[82]

Some of the specific substantive harms to which children are being and will be differentially subjected are devastatingly documented in the petition brought by Environmental Justice Australia to the OHCHR Special Rapporteurs on the cases of Environment, First Nations, and

[78] Verein KlimaSeniorinnen Schweiz et al v. Switzerland, ECtHR (GC), Appl. No. 53600/20 (Apr. 9, 2024). For commentary, see P. Sußner, Intersectionality in Climate Litigation: The Case of KlimaSeniorinnen v. Switzerland at the ECtHR, VerfBlog, 2023/4/20, https://verfassungsblog.de/intersectionality-in-climate-litigation/, DOI: 10.17176/20230420-204539-0.

[79] On the merits, it held that the state violated their liberty rights, eliding inequality once again. Verein KlimaSeniorinnen Schweiz et al v. Switzerland, ECtHR (GC), Appl. No. 53600/20, ¶ 526 (Apr. 9, 2024). In the aftermath, the Swiss parliament rejected the ruling. *See Swiss parliament rejects European climate ruling*, SWISS INFO (June 12, 2024, 13:29), https://www.swissinfo.ch/eng/climate-change/parliament-criticises-european-climate-ruling-against-switzerland/80447999.

[80] The deadline for further submissions was extended to December 18, 2023, after which amici curiae briefs were submitted and public hearings were held during the court's 166th and 167th sessions in late April and early May 2024. *See Public Hearing of the Advisory Opinion on Climate Emergency and Human Rights. Part 1*, CORTE INTERAMERICANA DE DERECHOS HUMANOS (Apr. 23, 2024), https://www.youtube.com/live/t6D9LyXKSOE?si=SsxAoegCyZwJvqOd (containing footage of hearings).

[81] This general point is made cogently by Nina Koistinen in Looking Forward: An Analysis of Global Climate Litigation Invoking Intergenerational Equity and the Interests of Future Generations (Oct. 31, 2023) (M.A. thesis, University of Eastern Finland) (on file with author), https://erepo.uef.fi/handle/123456789/31032.

[82] BVerfG, Order of the First Senate of 24 March 2021, 1 BvR 2656/18, ¶ 146, Climate Change (Neubauer et al v. FRG) ("[T]his duty to afford intergenerational protection has a solely objective dimension because future generations– either as a whole or as the sum of individuals not yet born– do not yet carry any fundamental rights in the present.").

Disability jointly,[83] citing a study finding "that a 6 year old in 2020 will experience twice as many bushfires and tropical cyclones, three times more river floods, four times more crop failures, five times more droughts, and 36 times more heatwaves compared to a person born in 1960."[84] The effects of each of these upon children will be disproportionately damaging,[85] making them sick, interfering with their access to health care, education, shelter, culture, and development and other rights guaranteed in the Convention on the Rights of the Child.[86] As the Office of the High Commissioner of Human Rights has stated, "Climate change heightens existing social and economic inequalities, intensifies poverty and reverses progress towards improvement in children's well-being."[87]

Judges, provided with a substantive record like this one, asserting their democratic independence, are capable of facing these realities. One Australian judge found the prognosis documented "the greatest intergenerational injustice ever inflicted by one

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[83] Environmental Justice Australia (EJA) v. Australia, OHCHR, Complaint, ¶ 24 (Oct. 25, 2021), https://envirojustice.org.au/wp-content/uploads/2023/11/UN_Climate_Change_Human_Rights_FINAL_complaint_2021.pd (stating:

> Human rights harm of the Australian government's Nationally Determined Contribution and Inaction on climate change: [s]tudies confirm catastrophic risk exposures to young people in Australia at 3°C level of warming. Heatwaves in parts of Australia are projected to become twice as likely (seven per year) and last twice as long (16 days on average) when compared to 1.5°C warming. Human mortality and morbidity is expected to increase. Water and food availability, quality and security will be significantly compromised, with the consequences including broad public health harms, undermining various industries reliant on water supplies (for example, agriculture) and contributing to regional instability and conflict. A recent study found that a 6 year old in 2020 will experience twice as many bushfires and tropical cyclones, three times more river floods, four times more crop failures, five times more droughts, and 36 times more heatwaves compared to a person born in 1960. Each of these harms severely compromise multiple rights of the Complainants, including the rights to life, to attain the highest attainable standard of health and to an adequate standard of living.

Id. (internal citations omitted).

[84] *See* Wim Thierry et al., Intergenerational inequities in exposure to climate extremes, 374 SCIENCE 158, 158 (2021) (documenting these facts in the study).

[85] *See* OHCHR*, supra* note 50.

[86] UN Commission on Human Rights (46th sess. : 1990 : Geneva), *Convention on the Rights of the Child.*, E/CN.4/RES/1990/74, UN Commission on Human Rights (Mar. 7, 1990), https://www.refworld.org/legal/resohulution/unchr/1990/en/47325.

[87] Rep. of the U.N. Hum. Rts. Council, Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child ¶ 50, U.N. Doc. No. A/HRC/35/13 (May 4, 2017).

generation of humans upon the next."[88] Unless such an approach is taken now, recognizing that the harm is already present, if the harm to children is temporally cabined, as many courts are doing, the time will never come when it will be both legally allowed and empirically possible to address the disparity of their situation: When the right people to make the equality claim and the right time to make it converge. Conceived substantively, equality, compared with equity and formal equality—and in my opinion more justiciable and fittingly than liberty—is not just a valued principle or a diffuse aspirational notion or a "nebulous 'moral responsibility'"[89] but a currently assertable right before constitutional courts, improving the possibilities of standing and remedy. Because it is concrete, comparative, and evidence-based, rather than a principle in the air, it is justiciable. Application of substantive equality analysis could expand the judicial imagination toward the "novel and creative remedies" the *La Rose* Court suggested are required to meet this moment.[90]

Empowerment of indigenous peoples—learning from them, colonizer/settler governments working in tandem with them and following their lead—offers further possibilities for productively addressing climate change. One consequence of the genocidal European incursions into the ecosystems and societies of native peoples has been the destruction of the land and sea and of the cultural connection of First Nations peoples to them, being existential, along with the impoverishment of the knowledge base for a sustainable long-term habitable earth. The Australian complaint mentioned by the Torres Strait Islanders in their application to the 3 Special Rapporteurs strongly documents violation of the intersectional rights of children within the aboriginal and disabled community.[91] Equality of original nations within territories with the governments now superimposed upon them,

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[88] Sharma v. Minister for the Environment [2021] FCA 560 n.36 [292] (Bromberg, J.).

[89] *Juliana* dissent at 1177.

[90] 2023 FCA 241, at ¶ 56. *See also* Koistinen, *supra* note 81 at 62:

> As (intergenerational) climate litigation continues to proliferate, the crafting of novel forms of remedies that simultaneously respond to the needs of future generations and the specificities of climate-induced harms, while avoiding conflict with the doctrine of the separation of powers, may emerge at an ever-greater rate. This may require an expansion of the judicial imagination, though the effectiveness of such remedies will depend on their perceived legitimacy and the resources and political will available to implement them, as demonstrated in the aftermath of the Demanda Generaciones Futuras judgment. *Id.*

[91] UNHRC, Daniel Billy and Others v. Australia (Torres Strait Islanders Petition) at ¶¶ 6-7.8, U.N. Doc. No. CCPR/C/135/D/3624/2019 (Sept. 18, 2023).

which can be supported by constitutional judging, as well as in claims by First Nations in the international system, and strengthening the synergy between transnational and national courts and fora on this and other issues, moves toward promoting both human justice and mutual survival.

As the extraordinary dissent in *Juliana* puts it, the U.S. has reached "a tipping point crying out for a concerted response—yet presses ahead toward calamity."[92] And as the First Senate of the German Constitutional Court and the Human Rights Committee alike recognize, the fact that a problem is international does not absolve nations of their obligation to act.[93] This includes constitutional courts. If we don't solve the climate problem for life on earth, it won't matter what other problems are solved, because there will be no place to live out the solutions.

E. Constitutional law matters

Structurally unequal social power enforces inequality and precludes equality. When politically institutionalized, it undermines democracy and promotes the destruction of the natural as well as the social and political world. Substantive equality's recognition could make social and political equality real by embodying democracy in legal doctrine, implementing it as a right, and by empowering at least the mitigation of climate change through slowing or reversing its differential consequences on the young. If it is stopped for them, it is stopped. Through recognizing the reality of substantive inequality when presented to courts and other fora, power and privilege can be equalized across social, political, and national groups through constitutional means, equalizing representation and efficacy from corporate to political to transnational governance, giving voice to the silenced and excluded and protecting and restoring the natural environment, walking it back from the brink on which it is teetering.

Our three topics, seen intersectionally, present the most urgent interconnected crises of our time. We know what we are facing and, from history and science, we know what acting to stop it requires. With substantive equality in constitutional adjudication, we have a tool for a chance—now, not later—to save people and peoples, who are already disastrously and painfully unequal; to save rule by the people, which is under widespread attack; and to save our precious planet—for itself, for ourselves, and for our children.

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[92] *Juliana* dissent at 1175.

[93] 1 BvR 2656/18 at ¶¶ 199-201 (German Climate Change case); UNHRC, Daniel Billy and Others v. Australia (Torres Strait Islanders Petition), U.N. Doc. No. CCPR/C/135/D/3624/2019 (Sept. 18, 2023); at Annex IV ¶ 5 (Zyberi, concurring).

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