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ENVIRONMENTAL DEGRADATION AS AGE DISCRIMINATION

DEGRADAÇÃO AMBIENTAL COMO FORMA DE DISCRIMINAÇÃO EM RAZÃO DA IDADE

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Abstract: This paper argues that anti-age-discrimination law can be used in environmental litigation to combat environmental degradation, including climate inaction. This claim is premised on the possibility of a cohortal reading of anti-age-discrimination law, allowing to challenge discriminatory environmental degradation between generations. Such a cohortal reading received implicit legal support e.g. in the 2012 *Commission v. Hungary* ECJ case. We specify the personal and material scope conditions under which this strategy could be legally successful.

Keywords: anti-discrimination law, environmental law, intergenerational equity, age discrimination, climate litigation, atmospheric trust, Urgenda case

Palavras-chave: legislação anti-discriminação, direito do ambiente, equidade intergeracional, discriminação em razão da idade, litígios climáticos, trust atmosférico, caso Urgenda

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Introduction

1. As members of generations currently sharing a common and unique planet, many of us are wondering whether we are acting fairly towards members of other generations, towards those with whom we co-exist as well as those who will follow us in the future. Very serious worries arise at both social and environmental levels: pension sustainability in an ageing population context, foreign debt sustainability, job market evolution in an increasingly technological world, climate change, soil pollution, biodiversity erosion, etc. Even without looking very far ahead, there are also quite problematic inequalities between adjacent generations. For instance, Chauvel and Schröder (2014) recently compared how various birth cohorts fare in different countries. In the case of France, they concluded: “would the generation born in 1975 have had the chance to follow the exceptional growth trend that the cohorts born between 1920 and 1950 benefited from, it would now benefit from a standard of living 30 % higher”. A comparison with inequalities between immigrants and non-immigrants in France makes this equally vivid: “the comparison, for a given age, sex, level of education... shows that the fact of being an immigrant in France entails an income loss in the range of 15%; such is the magnitude of French discrimination towards foreigners. It is lower in intensity than the generational discrimination that the cohorts born after 1970 are suffering from in comparison to those born in the 40s. In other words, the young French generations are like foreigners in their own country”.²

2. The challenge we face is threefold. *First*, we need an idea of what we owe other generations, which requires feeding the debate with explicit and structured theories of (intergenerational) justice, or at the very least with sets of principles/rights the respective content and weight of which can be democratically discussed. The assumption here is that the democratic debate will best be able to deliver fair outcomes if it is fed not only with sound and state-of-the-art scientific data, but also with clear theories of justice, including of intergenerational justice, that allow for a proper exchange of arguments.³ *Second*, we need measurement methods, to be able to roughly assess whether our generation is actually acting fairly towards other ones. While we keep hearing about GDP or GINI, too little has been done on intergenerational indexes.⁴ There is no point in claiming that we should do more and/or better for other generations if we have no idea as to how well we are faring overall under a business-as-usual scenario. A proper democratic debate cannot get off the ground on those matters without specifically intergenerational measurement methods and data. Such intergenerational comparisons are tricky because comparing successive birth cohorts over their complete lives requires both collecting data about the past and elaborating plau-

2. L. Chauvel & M. Schröder, “Une France qui sacrifie sa jeunesse”, *Le Monde*, June 10, 2014 (our translation). See as well, L. Chauvel & M. Schröder, “Generational Inequalities and Welfare Regimes”, *Social Forces* 92(4): 1259-1283 (2014).

3. See A. Gosseries, “Theories of Intergenerational Justice. A synopsis”, *SAPIENS* 1(1): 61-71 (2008); A. Gosseries & L. Meyer (eds.), *Intergenerational Justice*, Oxford: Oxford University Press, 419 p. (2009)

4. For a recent proposal: P. Vanhuysse, “Measuring Intergenerational Justice. Toward a Synthetic Index for OECD Countries” in *Intergenerational Justice in Aging Societies. A Cross-national Comparison of 29 OECD Countries*, Gütersloh: Bertelsmann Stiftung, pp. 10-61 (2013).

sible scenarios about the future. However, this should not serve as an excuse for flying blind. *Third*, we need policy tools to make sure that, once we know what to do, individuals and institutions actually comply with the requirements of justice. This requires working on people's ethos and worldviews, through framing issues in alternative ways, coining new labels to renew their understanding, interest and concern for such issues. And it also requires institutional design, establishing new specialist institutions devoted to intergenerational issues, modifying existing non-specialist ones to render them more long-termists, opening new litigations avenues,...

The claim at the heart of this paper, according to which environmental degradation could be challenged as a form of age discrimination, is a response to this third part of the challenge. It is potentially relevant to both the ethos and the institutional sides. Framing environmental degradation as a problem of age discrimination may sound unexpected. It could modify the way in which individuals look at environmental issues. More importantly for us here, it may open a new litigation avenue, enabling us not only to use anti-discrimination law for environmental purposes, but also to invoke a specific discrimination ground (age) for such a purpose.

3. To properly understand the significance and the exact location of this potential litigation avenue, we can look at it from at least three angles. *First*, age discrimination serves here as a substitute to a more straightforward "discrimination between *birth cohorts*" type of claim, unavailable in most legal systems. We will come back to this (*infra*, n° 5 and 6), our claim being that age discrimination can serve as a significant substitute in this respect.

Second, environmental litigation has relied on young plaintiffs in the seminal 1993 *Minors Oposa* case (Philippines), in "atmospheric trust" litigation (US), in the recent Dutch *Urgenda* Case (June 14, 2015) as well as in the Belgian *Klimaatzaak* proceedings.⁵ The age of plaintiffs is key to extend the scope for litigation to long-term issues. Formulating concerns in age discrimination terms can serve here as a complement or substitute, to try and converge towards the same intergenerational goals as those sought through public trust litigation. This is unsurprising if we accept that age discrimination claims can act as substitute for discrimination between birth cohorts concerns (*infra*, n° 6), and if unfairness between birth cohorts is at what actually triggers to a significant degree the reliance on the public trust doctrine by environmental activists.

Third, age discrimination is not the only ground through which anti-discrimination law can be used for environmental purposes. Besides questioning the constitutionality of specific laws on general equality and non-discrimination grounds

5. M.C. Wood, "Atmospheric Trust Litigation Across the World", in K. Coghill, Ch. Sampford and T. Smith (eds.), *Fiduciary Duty and the Atmospheric Trust*, Farnham: Ashgate, pp. 99-164 (2012). Note especially the *Alec L. et al. v. Lisa Jackson et al.* (C11-02203 EMC) US District Court – District of Columbia (May 31st, 2012) *dismissal* decision, as well as the Court of Appeals decision of June 5, 2014 *affirming* district court dismissals. For further details: <http://ourchildrenstrust.org/US/Federal-Lawsuit>. See as well on climate change litigation: <http://web.law.columbia.edu/climate-change/resources/litigation-charts>. A translation of the *Urgenda Foundation vs. Kingdom of the Netherlands* case is available here: <http://www.urgenda.nl/documents/FINAL-DRAFT-Translation-Summons-in-case-Urgenda-v-Dutch-State-v.25.06.10.pdf> (retrieved on July 7, 2015).

in front of constitutional courts, there is another specific suspect ground that has been relied upon by the so-called “environmental justice” movement: race. In the US, environmental litigation on racial discrimination grounds is typically aimed at denouncing pollution that disproportionately affects neighbourhoods that are predominantly African-American populated. If one relies on the 14th amendment Equal Protection Clause and invokes disparate treatment to challenge an allegedly racist environmental decision, one needs to show “discriminatory intent or motive”. This requirement - absent from EU anti-age discrimination law - has proven to be the main obstacle to successful litigation in cases such as *Bean v. Southwestern Waste Management Corp.* (1979), *East Bibb Twiggs v. Mason-Bibb County Planning & Zoning Commission* (1989) or *R.I.S.E. v. Kay* (1992).⁶ Our age-discrimination-focused proposal thus operates against a background of “atmospheric (public) trust” and “environmental justice” attempts that have not been very successful so far in the US so far. An important issue is whether we have reasons to believe that environmental litigation relying on age discrimination claims is likely to be more successful. Among these reasons, let me mention the absence of “discriminatory intent” requirement and the special connection between long-term issues, the passage of time and age. Also, whenever substantive environmental rights obtain, be they specific or general, it will be interesting to ask what the added value of framing the issue in age discrimination terms amounts to from a litigation point of view.

1. The Claim

4. While it dates back to the 60s in the US, admittedly in a limited form (discrimination between 40-plussers only), anti-age-discrimination legislation is both more recent and broader in personal scope in Europe. It has blossomed as a result of the conjunction of directive 2000/78/EC and of the broadening of national anti-discrimination legislations. Before this directive, the European Court of Justice touched upon age-related issues through other prisms (e.g. gender differences in minimum age for retirement). There is now a fast growing body of case law in front of the European Court of Justice that examines age issues in a direct manner.⁷ In this paper, I explore a very specific point, the importance of which

6. T. Ulezalka, “Race and Waste: The Quest for Environmental Justice”, *Temple J. of Sci. Tech. & Envtl. Law* 26(1): 51-73 (at 59-61)(2007)

7. A list of the first cases can be found in A.-F. Colla & A. Gosseries, “Discrimination par l’âge et droit transitoire. Réflexion à partir de Commission c. Hongrie (C-286/12)”, *Journal des tribunaux du travail* 43: 69-81, at note 6 (2013). Insofar as the post “Commission v. Hungary” cases are concerned, they include: *Odar*, C-152/11, Dec. 6, 2012 ; *Caves Krier Freres*, C-379/11, Dec. 13, 2012 ; *Soukupova*, C-401/11, April 11, 2013 ; *HK Danmark*, C-476/11, Sept. 26, 2013 ; *Dansk Jurist*, C-546/11, Sept. 26, 2013 ; *Pohl*, C-429/12, Jan. 16, 2014 ; *Specht and others*, C-501/12 to C-506/12, June 19, 2014 ; *Schmitzer*, C-530/13, Nov. 11, 2014 ; *Vital Pérez*, C-416-13, Nov. 13, 2014 ; *Larcher*, C-523/13, Dec. 18, 2014 ; *Felber*, C-529/13, Jan. 21, 2015 ; *Starjakob*, C-417/13, Jan. 28, 2015 ; *Ingeniorforeningen i Danmark*, C-515/13, Feb. 26, 2015 ; *SCMD*, C-262/14, May 21, 2015. See as well, for an example of recent scholarship on the matter: A. Numhauser-Henning & M. Rönmar (eds.), *Age Discrimination and Labour Law. Comparative and Conceptual Perspectives in the EU and Beyond*, Alphen aan den Rijn: Kluwer, 520 p. (especially Chap. 5 by Chr. Tobler).

has been underestimated so far. I will look at the extent to which anti-age-discrimination law could be used to address not only issues of discrimination between age groups, but also issues of discrimination between *birth cohorts*. I will also try and identify the (legal) conditions under which this strategy's substantive scope could be significant enough to be extended to issues such as environmental degradation, to which most of us do not tend to associate the label "age discrimination". This strategy may not succeed. However, the only way of finding out consists in identifying the precise conditions under which it could.

In short, the full claim that I will explore is the following:

The claim

P1: Anti-age-discrimination law can be used to combat discrimination between birth cohorts

P2: Environmental degradation can be discriminatory towards the next birth cohort(s)

C: Environmental degradation can be challenged on grounds of anti-age-discrimination law

5. This claim is specific in at least two ways. *First*, we are often worried about the lack of precise and substantive legal obligations towards future generations. In case of too vague legal requirements, when rights are phrased in a general manner (which is the case of the right to a healthy environment), one way of trying to give them more flesh consists in negatively, reactively invoking the existence of a discrimination, pointing at the fact that group A fares much better from the point of view of this right than group B. We can then refer to the level enjoyed by group A to try and give content to such a right and expect the same level to be reached for group B. This is one of the reasons why a defence of C can be significant in practice.

Second, the paper rests on an analysis of the connections between age and birth cohorts, two distinct categories. P2 does not claim that environmental degradation is always unjust. For instance, insofar as some degree of substitution is allowed or if the next generation is expected to be better off for exogenous reasons or if one remains within the ambit of what intergenerational sufficientarianism allows, there might be some room for fair environmental degradation. It is beyond the scope of this paper to identify precisely when environmental degradation is actually unfair from an intergenerational point of view.⁸ What matters here is that whenever it can be judged intergenerationally unfair, Environmental degradation can primarily be characterized as raising an issue of justice *between birth cohorts* rather than *between age groups*, one generation inheriting a worse environmental quality than its predecessor.

In this respect, anti-discrimination law faces two problems. *First*, while "age" is now more and more part of suspect grounds in anti-discrimination law, the label "age discrimination" invites at first sight a connection with issues of justice be-

8. See A. Gosseries, "Theories of...", *op.cit.*

tween “age groups” rather than between birth cohorts. The crucial move (P1) of this paper consists in claiming that anti-age-discrimination legislation can help us addressing issues of justice between birth cohorts. We will even show that there is one European Court of Justice (hereinafter “ECJ”) case that necessarily supports this approach, which will give *de judicio lato* relevance to our paper.

Second, suspect grounds lists from anti-discrimination acts do not tend to include “date of birth”. Admittedly, “birth” is listed among the suspect grounds in various anti-discrimination acts, such as in Sect. 21 of the 2000 Charter of fundamental rights of the European Union or Sect. 4, 4° of the 2007 Belgian Law against discrimination. However, I have not come across uses of the “birth” criterion interpreted as “date of birth” in actual anti-discrimination cases. While interpreting “birth” as “date of birth” could arguably provide us with a more direct path, converging with the age-based one that I am proposing, this is not the one that I will explore here. I am concerned with proposing a legal strategy that can build on actual case law. We do have a rich body of case law on anti-discrimination (supra, note 7). We do not have any equivalent for “date of birth” despite the fact that creative lawyers and judges could try and put this on tracks too. The anti-age-discrimination law thus seems to me legally more promising – at this stage of case law development at least - than a more direct strategy based on date of birth as a discriminatory ground.

2. A Cohort Reading Of Anti-Age-Discrimination Law

6. First, we need to understand what is at work in P1:

P1: Anti-age-discrimination law can be used to combat discrimination between *birth cohorts*

Demographers working with age-period-cohort models typically try to disentangle three types of effects from one another.⁹ This is so for instance when they observe the evolution of people’s values or of the incidence of a specific disease. What is the respective weight of period effects, age effects and cohort effects in people’s values or health? Leaving period effects aside, let us concentrate on the two latter effects. An *age group* is a group of people sharing the same age, such as those aged 40, regardless of whether they are 40 in 1655, 1965 or 2015. A *birth cohort* is a group of people defined by their date of birth. For instance, we can consider that all those born between 1970 and 1980 belong to the same birth cohort. Demographers, epidemiologists, sociologists, etc. then try and understand whether it is mostly age – i.e. the fact of belonging to a given age group - that determines the fact of being subject to a disease (age effect) or whether it primarily results from belonging to a different cohort (cohort effect). For instance, if there is an increase in diabetes or skin cancer, is it primarily due e.g. to the fact that more recent cohorts were more exposed respectively to sugar or

9. See Chr. Vandeschrick, *Analyse démographique. Population et développement*, Paris: L’Harmattan, 216 p.

sun when they were young, because of change of habits? Or is it e.g. because the increase in life expectancy increases the incidence of age-related pathologies?

Since “age discrimination” includes the word “age”, one may be tempted to associate anti-age-discrimination law with an exclusive concern for non-discrimination between *age-groups*. However, this does not need to be so. The main reason is the following. At any given point in time, a person’s age and her date of birth are perfectly correlated. Two people with the same age at time x also share the same date of birth. At a given point in time, if they belong to the same age group, they automatically belong to the same birth cohort. Consider then the following asymmetry, that has to do with this date-of-birth/age relationship:

The asymmetry

P4. An age-based differential treatment (be it explicit or not) necessarily leads to a differential treatment between age groups but *not necessarily between birth cohorts*.

P5. A date-of-birth-based differential treatment (be it explicit or not) necessarily leads to a differential treatment between birth cohorts and can *always be re-characterized as a (temporary) age-based differential treatment*.

7. I will not go into the details of claim P4 and will refer the readers to other writings in this respect.¹⁰ The key idea in P4 is one of “complete-life *neutrality*” of age criteria. If certain conditions are met, age limits may not lead to any differential treatment between different individuals *over their complete life*. Being prevented from working before the age of 14 or from voting before the age of 18 may affect us all to the same extent, despite the fact that at any given point in time, it entails that some enjoy a given right and others not. This is one of the features that render age “special” as a suspect ground of differential treatment. A further idea is that age limits can sometimes serve to *increase* equality between birth cohorts.¹¹

However, what matters more to us here is that sometimes, one may be tempted to list “age” and “date of birth” separately among the suspect grounds of anti-discrimination provisions. Claim P5 suggests that this is *not needed* as one can always re-characterize any date of birth limit as an age limit, at least during transition. This means that any differential treatment between birth cohorts can be re-characterized not necessarily as a differential treatment between *age groups*, but as an *age-based* differential treatment. If I claim that *any person born after date x will not be entitled to z* , this is equivalent to claiming that *any person not having reached the age of y at date $x+y$ will not be entitled to z* .¹² Date-of-birth-based differential treatment potentially falls, for this reason, within the

10. A. Gosseries, “What Makes Age Discrimination Special? A Philosophical Look at the ECJ Case Law”, *Neth. J. of Legal Philosophy* 43 (1): 59-80 (especially at 66 ff.)

11. *Ibid.*, p. 72 ff. (isogenic function of age criteria) and *infra*, n° 7.

12. We call this type of age-based differential treatment a (type 2) transitory age-based differential treatment. For further developments on the three types of age-based differential treatment in relation to the ECJ case law: A.-F. Colla & A. Gosseries, *op. cit.*, n° 7 – 12.

scope of anti-age-discrimination legislation. While not every age-based differential treatment amounts to a date-of-birth-based differential treatment (P4), every date-of-birth-based differential treatment, amounts to an age-based differential treatment, at least during a transitory period (P5).

As a way of illustrating this, imagine that we are in 2018 and that the electoral system still prevents those below 18 from voting. In line with P4, it does not necessarily mean that a differential treatment between birth cohorts follows, as every birth cohort may be subject to the same degree of disenfranchisement before the age of 18. Imagine now that we are still in 2018 and that instead of disenfranchising those below 18, the electoral system disenfranchises those born after 2000. It means that cohorts born after 2000 will be disenfranchised possibly over their whole life. It also entails, in line with P5, that those aged less than 18 in 2018 will be treated differently from those who are more than 18 in 2018.

What this amounts to is that anti-age-discrimination law opens the gate to scrutinizing legislation on grounds of concerns for impartiality between age groups but also for impartiality between birth cohorts. P5 thus allows for a twofold reading of anti-age-discrimination law, i.e. a reading that links it both to concerns for a fair treatment of various age groups (age-groups reading) and for a fair treatment of various birth cohorts (cohortal reading). The two concerns may be present with unequal respective intensity, depending on the practice under scrutiny.

8. Do we find support in the actual (case) law for such a twofold reading of anti-age-discrimination law, especially in the ECJ case law? The answer is “yes”. Consider first the rationale of existing legislation that relies on age limits. For the reasons we just provided, it should be re-read with the age-group/birth cohort distinction in mind. Admittedly, a whole set of measures are clearly grounded on age-group-related concerns. Prohibiting child labour aims at guaranteeing that children are not being exploited on the job market, at making sure that they have less reasons not to join schools, etc. Similarly, rules regarding sexual majority or criminal liability clearly assume some age-related competence. The age at which this competence is being reached may of course evolve with time, which suggests that cohort effects may play a role too. However, such examples primarily involve age effects. Other age-based practices are less unilaterally age-group-focused and are more plausibly read as involving justice between birth cohorts concerns to a more significant degree.

Let us look in this respect at the expressions used by the ECJ in age discrimination cases to characterize the possible justification for age distinctions in domestic law. Expressions include “shar[ing] out among the generations employment opportunities » (*Petersen*, C-341/08, § 65), « sharing employment between the generations » (*Rosenbladt*, C-45/09, § 43), “balance between the generations” (-*Georgiev*, C-250/09, § 42; *Fuchs & Köhler*, C-159/10, § 47), “free[ing] up posts for younger workers on the labour market” as a legitimate aim (*Hörnfeldt*, C-141/11, § 25). If we accept to read the word “generation” as birth cohort rather than age group, such expressions allow for both an age-group and a cohort-focused reading. For instance, a concern for *mixing academics of different ages*

(as in the *Georgiev* case) can be understood as a concern for mixing different approaches that result both from cohortal and from age differences. Similarly, *compulsory age-based retirement* is probably driven by both age-group focused concerns and by cohortal concerns. What matters to us here is that the expressions used by the ECJ above allow and sometimes privilege a cohortal reading of age-related issues. The concern for job sharing is arguably philosophically more robust if it is about sharing between birth cohorts rather than between age groups.

9. However, while it is of interest to indicate that cohortal concerns can drive *the use of age criteria*, and that the ECJ may acknowledge and endorse such concerns, it does not necessarily follow that cohortal concerns drive *anti-age-discrimination law*. One further step is thus needed. Interestingly enough, we have good reasons to take that extra step. In one case, i.e. *Commission v. Hungary* (C-286/12), the ECJ has clearly argued in a way such that her concerns underlying the rejection *on age-discrimination grounds* of a measure can only be read as concerns for differential treatment (and discrimination) *between birth cohorts* and not between age groups. There is no room for a detailed analysis of this case here but the case for this cohortal reading of the ECJ's judgment has been argued for on two grounds in detail elsewhere.¹³

10. To sum up, what matters is that the ECJ case law allows for two views. It allows for a twofold interpretation of the rationale underlying several age-based measures that were challenged in front of her, i.e. as measures driven both by age-group and by birth-cohort-focused concerns. However, and more importantly, in one case (*Commission v. Hungary*), it even interpreted – probably without fully realizing it – the *prohibition on age discrimination* as a prohibition on discrimination between *birth cohorts*.

This establishes the *legal plausibility* of a twofold reading of the rationale of both *age-based measures* (some aim at increasing justice between age-groups, other aim at increasing justice between birth cohorts, and several of them aim at achieving both) and, more importantly, of *anti-age-discrimination law* (one may end up rejecting age-based measures out of concern for justice between age-groups and/or between birth cohorts). I hope to have established at this stage that treating problematic environmental degradation as an issue of age discrimination can make sense philosophically (section 1). And I hope to have shown as well that there is room, legally speaking, for a cohortal reading of anti-age discrimination law (section 2). We now need to go one step further. We have to check whether there is legal room for applying anti-age-discrimination law – and its cohortal reading – to environmental issues.

3. Age Discrimination And The Environment

11. What are the implications of this twofold reading? One way of answering

13. A. Gosseries, “What...”, *op. cit.*, at 76-77

consists in finding out about the conditions under which anti-age-discrimination law can be used for broader purposes such as challenging debt policy, pension reform, or insufficient environmental protection, just to take a few examples. I will go through a set of requirements that should be met for the strategy to work in practice, i.e. to be able to use the prohibition on age discrimination to challenge such measures. And for the sake of this argument, I will limit myself to the case of environmental degradation. I will look into issues of personal and of material scope. Before proceeding, let me mention two points. Contrary to the US “environmental justice” cases referred to above (*supra* n° 3), age discrimination cases do not require the demonstration of a discriminatory *intent*. Moreover, while the environmental cases we have in mind here would tend to be cases of *indirect* discrimination, this does not seem to make much difference in the specific case of age as the room for admissible justifications tends to be already broader for age in direct discrimination cases than it is for other suspect grounds.

3.1. Personal scope

12. A first consideration has to do with the distinction between *legal and natural persons*. One way of reaching further into the future in litigation consists in trying to rely on the additional life expectancy of the plaintiff. This entails that relying on young plaintiffs may be a good strategy as the above-mentioned *Minors Oposa, Atmospheric Trust* and *Urgenda* cases illustrate. Alternatively, environmental litigation may also invoke harm, discrimination and right violation to the detriment of *legal* as opposed to natural persons. Given the indefinite life expectancy of legal persons, this is an interesting strategy too.¹⁴ However, for the present purposes, it seems that age discrimination claims may only apply to cases of discrimination against natural persons, contrary to claims of discrimination based on nationality for instance that can apply to legal persons too.

13. Another aspect of the *personal scope* of the age discrimination strategy against environmental degradation is that some legal systems may allow for claims across the whole lifespan whereas other legal systems are concerned about age discrimination above or below a certain age limit only. US anti-discrimination law illustrates the case of a limited scope in this respect as it is only concerned with discrimination between individuals located above the threshold age of 40. At first sight, one may insist on the fact that this still leaves open challenges that would have to do with environmental degradation between now and the number of years ahead corresponding with the additional life expectancy of plaintiffs who are in their early 40s.

However, the difficulty might be more significant than that in the US case. It may well be that a legislation with a restricted age scope such as the US one can only be plausibly read as expressing age-group-focused as opposed to cohortal concerns. If the concern were cohortal, why would one restrict it to discrimination between certain cohorts as opposed to all coexisting cohorts? This major difference between the US and the EU system may have remained unnoticed so

14. Thanks to Th. Amparo for pressing me on this.

far. If this claim is plausible, it entails that an anti-age-discrimination legislation with a restricted age scope cannot be applied to cases of environmental degradation. This is so because such an “extensive” strategy presupposes a cohortal reading of anti-age-discrimination law. The same consideration may also apply to legal systems that, while covering the whole age range, would *systematically* exhibit a stronger concern for differential treatment against the elderly than for differential treatment against the young. In such cases too, a cohortal reading of anti-age-discrimination would not be plausible. In Canada, the 1999 *Law v. Canada* Supreme Court decision (1 SCR 497) suggests a stronger concern for older than for younger people. However, it is related to the specific purpose of the type of pension regime at stake and does not need to entail a *general* asymmetry in concern across the age range. Be that as it may, in the EU, we have a full age spectrum anti-age-discrimination law. This means that a cohortal reading is perfectly possible in such a context.

3.2. Material scope

14. Insofar as the *material scope* of anti-discrimination law is concerned, interesting questions arise as well. For instance, considering the scope of directive 2000/78/EC as defined in its art. 3, while applicable to employment matters, vocational training and occupational pensions, it *does not* apply at all to environmental matters. There are basically two mutually compatible strategies to overcome this material scope limitation. One consists in looking for other grounds than Directive 2000/78/EC within the EU system to condemn age discrimination (call it the “EU Law Strategy”). The other consists in taking the domestic law avenue, taking advantage of the fact that in many domestic systems in the EU, the material scope of anti-age-discrimination law is broader than the one of Directive 2000/78/EC (call it the “Domestic Law Strategy”).

Let me first explore what the *EU Law Strategy* could consist in. A typical case would need to articulate three elements. *First*, we would need to identify a EU directive allowing for environmental degradation in a way deemed discriminatory between birth cohorts. *Second*, we would need to rely on a prohibition on age discrimination independent from Directive 2000/78/EC, given the latter’s too narrow scope. One interesting element in this respect is the claim, inaugurated by the ECJ in its 2005 *Mangold* (C-144/04) case, that “The principle of non-discrimination on grounds of age must (...) be regarded as a general principle of Community law” (§75).¹⁵ This position was confirmed in the 2010 *Kücükdeveci* (C-555/07) case. The Court stated that “it is the general principle of European Union law prohibiting all discrimination on grounds of age, as given expression in Directive 2000/78, which must be the basis of the examination of whether European Union law precludes national legislation such as that at issue in the main proceedings.” (§27).¹⁶ As a general principle, its material scope is definitely

15. Thanks to Ch. Tobler for pressing me on this.

16. See Ch. Tobler, “The Prohibition of Discrimination in the Union’s Layered System of Equality Law: From Early Staff Cases to the *Mangold* Approach”, in Rosas A., Levits E. & Bot Y. (eds.), *The Court of Justice and the Construction of Europe. Analyses and Perspec-*

broader than the material scope of Directive 2000/78/EC.

Third, we would need to be able to rely on a general right to a healthy environment at the EU level. There does not seem to be such a general right at the EU level. However, the possibility of invoking substantive environmental rights directly has been recognized by both the ECJ and the ECtHR. The ECJ confirmed in its 2008 *Janacek* judgment (C-237/07, § 37-38) that an affected citizen can invoke the air or water quality standard of a directive directly, especially when it relates to health concerns, whenever it has not been properly implemented by state legislation. Adding the age discrimination dimension to such a *Janecek* approach would be an option. Note as well that insofar as the ECtHR is concerned, environment-related health concerns are being approached through the lense of the right to privacy (art. 8, ECHR) rather than of the right to life (art. 2, ECHR).¹⁷ The *Domestic Law Strategy* seems much more promising. *First*, a plaintiff would need to identify an administrative decree or an Act that allows for environmental degradation such that it can be deemed discriminatory between birth cohorts. *Second*, it would need to invoke the domestic legislation against age discrimination. Provided that the latter's scope is broad enough, it could apply to the allegedly discriminatory act in question. The best strategy would probably consist in identifying a country in which the material scope of the anti-discrimination Act is especially broad and then to creatively explore connections with environmental issues. Countries in which a general principle of non-discrimination obtains on top of specific anti-discrimination legislation may be a good place to start too. This may not be straightforward of course. In Belgium for instance, the May 10, 2007 Anti-discrimination Act, as revised in 2013, is applicable to age and has a broader scope than the 2000/78/EC directive since it applies e.g. to goods and services too (art. 5). However, it explicitly excludes its applicability to subject matters that are within the jurisdiction of the Belgian federate entities, which is the case for many environmental issues.

Third, the plaintiff may invoke the violation of her fundamental, general right to a healthy environment. Such a right is recognized at the constitutional level in several EU countries as well as in numerous countries outside the EU.¹⁸ Note that there is no need here for rights specifically granted to future generations. A plain right to a healthy environment applicable to already existing people would do for the present purposes.¹⁹ Moreover, the plaintiff could even invoke more directly the fact that a given environmental legislation is discriminatory without having to refer to a general, constitutional right to a clean/healthy environment. The

tives on Sixty Years of Case-Law/La Cour de Justice et la construction de l'Europe: Analyses et perspectives de soixante ans de jurisprudence. The Hague: Asser Press/Springer, 443-467, especially at 457-458 and 466.

17. See N. de Sadeleer, "Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases", *Nordic Journal of International Law* 81: 39-74 (2012) (respectively at 54-55 & 64-70).

18. This right is recognized e.g. since 1976 in the Portuguese constitution, Sect. 66(1): "Everyone shall possess the right to a healthy and ecologically balanced human living environment and the duty to defend it".

19. On the challenges arising from the idea of rights of future generations: A. Gosseries, "On Future Generations' Future Rights", *J. of Political Philosophy* 16(4): 446-474.

plaintiff could stress the fact that e.g. a given industrial project would be incompatible with the non-discriminatory application over time of a specific domestic environmental water or air standard.

Whereas the EU status of a right to a healthy environment thus seems to be the main limiting factor for a EU Law Strategy, the key element for the Domestic Law Strategy seems to rest with the material scope of domestic anti-age-discrimination provisions. Note as well that one possible domestic strategy of limited scope would consist in relying on the Charter of Fundamental Rights of the EU.²⁰ The material scope of its non-discrimination principle, that includes age among the suspect grounds, is extremely broad (Sect. 21), which is relevant for our extension to environmental issues. However, it only applies to Member States when they are implementing Union law (art. 51). We could thus imagine a plaintiff opposing an environmental law or regulation that implements a EU environmental directive because of its incompatibility with art. 21 of the Charter on age discrimination grounds.²¹

Conclusion

15. This paper has sketched a possible strategy to challenge decisions that are unfair towards successive birth cohorts, more specifically in the environmental realm. It involves a reading of anti-age-discrimination law that is *extensive in two ways*. It is extensive in a first way insofar as it invites us to adopt a *cohortal reading* of anti-age-discrimination law, besides a more straightforward age-group focused one. We have seen that such a cohortal reading only makes sense if the anti-age-discrimination principle or law applies across the full age spectrum, which tends to be the case in European systems, but not in the US. We have also shown that such a cohortal reading of anti-age-discrimination law, besides making sense in general, is actually endorsed by the ECJ in the *Commission v. Hungary* case.

Our approach is also extensive in a second sense. It invites us to explore the implications of anti-discrimination law in areas to which we tend to apply it less, here *in the environmental area*. It is here that it will probably require more creativity, through relying on general non-discrimination principles, and through drawing analogies with other, non-environmental problems such as the non-sustainability of pension schemes or of health care systems.

This paper has explored one litigation avenue that could be experimented as part of a package aimed at challenging the shortcomings of our environmental regimes. We believe that it is a promising avenue for three reasons. *First*, our legal systems already contain rules and principles against age discrimination, as well as a growing body of case law. *Second*, there is a very straightforward con-

20. Thanks to D. Martin for an exchange on this.

21. See the ECJ cases: *Fransson*, C-617/10, Feb. 26, 2013; *Glatzel*, C-356-12, May 22, 2014.

nection between a concern for age discrimination and issues of fairness between birth cohorts, such that it allows for a cohortal reading of anti-age-discrimination law. *Third*, concerns for justice between birth cohorts are central to claims for environmental sustainability.

Whether this can be turned into real, successful cases will depend on the resources of the legal systems at stake. It will also depend on the ability of plaintiffs to transform a vision into conclusive legal argument, maximally exploiting the potential of existing anti-discrimination law while not forcing judges to go beyond what separation of powers allows, or, in the case of the ECJ, leaving enough margin of appreciation to member states.
