Taking the longer view:

UK governance options for a finite planet

Appendices

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Appendix 1

Voluntary initiatives

This Appendix provides information on some of the initiatives that take the longer view, both in the UK and internationally, which are not based on legislation.

Scotland's Futures Forum is highlighted in *Box A*, and other initiatives in *Box B*.

Box A – Scotland's Futures Forum

Scotland's Futures Forum was created by the Scottish Parliament (but not, it seems by law) to help its Members, along with policy makers, businesses, academics, and the wider community of Scotland, look beyond immediate horizons, to some of the challenges and opportunities we will face in the future.

Looking beyond the 4 year electoral cycle and away from party politics, the forum seeks to stimulate public debate in Scotland, bringing fresh perspectives, ideas and creativity on how we might prepare for the future now.

For example, it runs a public policy seminar series with the Scottish Government, has organised a phone-in on the future of Scottish football, has run a conference on poverty and inequalities, and has published three scenarios for what sustainable communities might look like in 2030.

http://www.scotlandfutureforum.org/

Box B – examples of other voluntary initiatives

The Transition Network
Transition Network's role is to inspire, encourage, connect, support and train communities as they self-organise around the transition model, creating initiatives that rebuild resilience and reduce CO2 emissions. More information is available here:
http://www.transitionnetwork.org/about

Low Carbon Communities
Low Carbon Communities has a mission to create a network of sustainable communities that offers mutual support, materials and infrastructure to make them more effective and efficient in collective action and lobbying for a low carbon future. More information is available here: http://lowcarboncommunities.net/

Future Justice Policy Principles
The World Future Council has developed seven future justice policy principles, based on The International Law Association's Principles of International Law Relating to Sustainable Development, adopted in Delhi in 2002. More information is available here:
http://www.worldfuturecouncil.org/future_justice_principles.html

Cochabamba Declaration for Rights of Mother Earth
At the World Peoples Conference on Climate Change and the Rights of Mother Earth, in Bolivia on 22 April 2010, a Declaration of the Rights of Mother Earth was adopted which recognises Mother Earth as a living being with rights. The Declaration is available here:
http://pwccc.wordpress.com/programa/

Community Ecological Governance is an approach pioneered by the African Biodiversity Network, CEG Global Alliance and Gaia Foundation to restore degraded ecosystems, strengthen community cohesion, and revive traditional forms of governance which comply with Natures' laws. Methodologies include intergenerational learning between elders and youth, eco-cultural mapping of the past order, present challenges and future visions, and development of community governance plans. More information available here : http://www.gaiafoundation.org/content/community-ecological-governance and http://africanbiodiversity.org/abn_old/index.html and films at http://vimeo.com/channels/gaia.

Crime of Ecocide
A proposal has been made to the United Nations to adopt a law recognizing mass destruction of ecosystems as a fifth international crime against peace – a crime of 'Ecocide' - actionable before the International Criminal Court (ICC). More information is available here: http://www.thisisecocide.com/

Earth Jurisprudence (EJ) or Earth Law is a philosophy of law and governance that recognises Earth - our non-negotiable life system - as the primary giver of law. More information is available here: http://www.gaiafoundation.org/content/earth-jurisprudence-earth-law , and here: http://www.earthjurisprudence.org/

Appendix 2

Other countries' institutions

This Appendix contains summaries of legislation in Canada, Hungary, Israel and New Zealand providing for Commissioners who are independent of the executive and who have varying powers relevant to protecting the environment and future generations; and an impressionistic summary of the Committee for the Future established by and within the Finnish Parliament. Very brief indications of some of their experience, and an evaluation, are outlined at the end of each summary, but these are not intended to be comprehensive or exhaustive.

1. Canada

Summary: A Commissioner, appointed by and reporting to the Auditor General (AG) since 1995, for the purpose of reporting, monitoring, examining and inquiring into progress by federal government bodies towards sustainable development; to help process petitions "about an environmental matter in the context of sustainable development" from Canadian citizens to which Ministers must respond within an extendable period of 120 days; to examine and monitor those responses; and, since 2007, to report at least biannually on Canada's progress in meeting its Kyoto reduction obligations. The "needs of future generations", as a component of sustainable development, are expressly included within the Commissioner's remit. 301 petitions have been filed since 1995, and an independent report in 2008 found that the Commissioner and AG had had "a positive impact on the federal government's management of environmental and sustainable development issues"; had "served an important educational role"; and had "developed a strong domestic and international reputation as a centre of excellence in environmental auditing." There is no substantive right to a healthy environment contained in the Canadian Charter of Rights and Freedoms.

Legal basis and appointment

The Canadian Parliament legislated in 1995 "to help strengthen parliamentary oversight of the federal government's efforts to protect the environment and to foster sustainable development"[1]. It did so by amending the Auditor General Act[2], to create the office of the ***Commissioner of the Environment and Sustainable Development***, in the office of, and appointed by, the Auditor General (who herself is a Parliamentary appointee[3]).

Under section 15.1 of the Act, the Commissioner is to be "a senior officer" who "shall assist the Auditor General in performing the duties of the Auditor General set out in this Act that relate to the environment and sustainable development." The appointment of the Commissioner is to be made in accordance with the Public Service Employment Act, and no term is provided for. (The Auditor General is appointed for ten years, and cannot be re-appointed.)

Constitutional rights
The Canadian Charter of Rights and Freedoms contains the usual kind of civil and political rights, and does not contain a substantive right to live in a clean or healthy environment (or similar formulation)[4].

Powers
The Commissioner has statutory powers to:

- report, monitor, examine and inquire into progress by federal government bodies towards sustainable development;
- help process petitions "about an environmental matter in the context of sustainable development" from Canadian citizens to which Ministers must respond within an extendable period of 120 days;
- examine and monitor those responses; and,
- since 2007, report at least biannually on Canada's progress in meeting its Kyoto reduction obligations.

The "needs of future generations", as a component of sustainable development, are expressly included within the Commissioner's remit (section.21.1(h)).

Experience and evaluation
301 petitions are listed on the Commissioner's website as having been filed between October 1996 and June 2010[5]. 28 petitions were filed between 1st July 2008 – 30th June 2009, about half the number in the previous year, relating mainly to health, biodiversity, fish habitat, and environmental assessment. 77% of responses were provided within the required 120 days (compared with 86% the previous year, and 95% the year before).[6]

In 2008, an independent review of the Commissioner's practice reported as follows:

> *"Despite a diversity of perspectives on future directions, on one issue there was almost total unanimity: Over the past 12 years, the Office of the Auditor General and the Commissioner have had a positive impact on the federal government's management of environmental and sustainable development issues. They have also served an important educational role. No one said otherwise. We agree. Within the mandate established by Parliament, we believe the Commissioner and the Office of the Auditor General have done a good job. They have developed a strong domestic and international reputation as a centre of excellence in environmental auditing."*[7]

2. Hungary

Summary: Since 2008, the Parliamentary Commissioner for Future Generations has been one of four ombudsmen elected by the unicameral Hungarian Parliament. He is charged with protecting the constitutionally-guaranteed fundamental right to a healthy environment, and receives petitions from those concerned that that right has been, or is in danger of being, violated. He must investigate proper petitions and make recommendations to the relevant public body, and he can investigate violations on his own initiative. He has duties aimed at improving law enforcement, legislation, and implementation of international treaties, and can ask the Constitutional Court to intervene, as well the duty to participate in formulating Hungary's position at the EU level. He has powers aimed at controlling the activities of

individuals and companies that actually and potentially harm the environment; at moving the competent regulatory authorities to use their own powers to restrain environmentally-damaging activities; and at suspending the decisions of administrative bodies which permit activities that harm the environment. In performing his functions, he has significant powers to obtain information, to enter property and to publicise his proceedings. The Commissioner has said that he also carries out strategic development and research, covering the duty of representing the interests of future generations. By the end of last year, he had completed 97 investigations as a result of over 400 petitions received, which mostly relate to local spatial plans, noise and air pollution; and had participated in scores of legislative consultations and proposals.

Legal basis and election

The Hungarian Ombudsman Act[8] provides for the election of a Parliamentary Commissioner for Civil Rights in order to ensure the protection of fundamental rights. It also provides for additional "special ombudsmen" to be elected by a two-thirds majority of its unicameral parliament for the protection of certain fundamental rights.[9] The right to a healthy environment is contained in the Hungarian Constitution (see below).

In May 2008, the Hungarian Parliament elected Dr. Sándor Fülöp as the Parliamentary Commissioner for Future Generations as a special ombudsman "[i]n order to ensure the protection of the fundamental right to healthy environment [*sic*]".[10]

He has been elected for a term of six years, which can be renewed once.[11]

Constitutional rights

Article 18 of the Hungarian Constitution provides (translated into English[12]) as follows:

> *"The Republic of Hungary recognizes and shall implement the individual's right to a healthy environment."*

In the English translation of Section 27/A. § (1) of the Ombudsman Act on the website of the Commissioner for Future Generations, this right is described as a 'fundamental right':

> *"In order to ensure the protection of the fundamental right to healthy environment [sic] Parliament shall elect the Parliamentary Commissioner for Future Generations as special ombudsman."*

The Hungarian Constitutional Court has also stated that:

> *"the State does not enjoy the liberty of letting the condition of the environment deteriorate or allowing the risk of deterioration"*[13]

Petitions

Any person may petition any of the ombudsmen, including the Commissioner, if that person considers that a public authority or body performing a public service has caused a violation of a fundamental right or the direct danger thereof, subject to the exhaustion of available administrative legal remedies (excluding judicial review)[14]. The Commissioner may also act *ex officio* in order to terminate the violation (i.e., of his own motion, without waiting to receive a petition).

The Commissioner is obliged to "examine" petitions, and to "select himself the measure deemed to be purposeful within the framework of this Act" unless the matter is before, or has been heard by, a court, or if he deems it to be "of small importance" (section 17. § (1)).

The Commissioner must "reject evidently unfounded petitions, as well as petitions submitted repeatedly and containing no new fact or data on the merits, and he may reject petitions not submitted by the party entitled to do so, or anonymously submitted ones" (section 19. § (2)).

If he investigates and finds a violation of the fundamental right to a healthy environment, the Commissioner may make a draft "recommendation for remedy" to the relevant authority, who must respond within 30 days with its "standpoint on the merits". Thereafter, the Commissioner has 15 days within which to confirm, amend or withdraw his recommendation (section 20. § (1)). His recommendations can, in certain circumstances, extend to proposing the amendment, repeal or passing of legislation (section 25).

If the authority fails to form its "standpoint on the merits and to take the measures corresponding to it", or if the Commissioner disagrees with the standpoint or the measures taken, he must inform Parliament in his annual report, and may request that the case be investigated by Parliament. Where he considers the violation to be "extraordinar[il]y grave or if it affects a larger group of natural persons, he may initiate that Parliament put the debate of the given issue on its agenda already before the annual report" (s.26. § (1)).

Other duties and powers

As well as his duties in relation to petitions, the Commissioner for Future Generations has the widest functions of comparable institutions considered in this report, at the national, EU and international law levels, and in respect of both public and private actors. [15]

Under section 27/B he has duties relating to law enforcement, legislation, international treaties and the EU, in particular to:

- monitor, evaluate and control the enforcement of laws ensuring sustainability and environmental improvement;[16]
- investigate "improprieties" relating to such developments, and "initiate" measures for redress;[17]
- express an opinion on draft legislation and propose legislation;[18]
- express an opinion on motions about the mandatory effect of international environmental treaties, contribute to reports under international agreements and track the development of these agreements;[19] and
- participate in formulating Hungary's position at the EU level on relevant issues;[20]

If he has concerns about whether a law conflicts with the constitution or with an international agreement, or wishes an unconstitutional omission to be brought to an end, he may take the matter to the Constitutional Court.[21]

The Commissioner also has *discretions* (powers) aimed at controlling the activities of individuals and companies that actually and potentially harm the environment; at moving the competent regulatory authorities to use their own powers to restrain environmentally-

damaging activities; and at suspending the authorizations of administrative bodies which permit activities that harm the environment. More specifically, the Commissioner may[22]:

- request a person or organization (not a public authority) to terminate an illegally endangering, polluting or damaging activity;[23]

  If the activity, be it an act or omission, is damaging the environment (as opposed, presumably, to simply endangering or polluting it), the person or organization damaging it can be requested to restore the environment as well. If the addressee does not respond, adequately or at all, the Commissioner can ask a court to issue injunctions to restrain the damaging conduct, to effect damage-prevention measures and to restore the environment.[24]

- request competent regulatory authorities to take environmental improvement measures;[25]

  This seemingly unrestricted power is supplemented by a power in section 27/D under which the Commissioner "may initiate the competent authority to take measures to impede and forbid the activity damaging the environment, to prevent damages and to restore the environmental status preceding the environmental damaging conduct", and the authority "shall immediately notify [him] on the measures taken". The Commissioner's request initiates a compulsory procedure, and the authority must respond.

- request administrative bodies to suspend decisions they have made permitting environmentally harmful activities. The Commissioner's request initiates a compulsory procedure, the bodies must respond and, depending on the nature of the administrative body, the Commissioner can seek a judicial review of the decision;[26]
- make general and case-specific recommendations, to which addressees must respond within 30 days;[27]
- track and express his opinion on long-term local development plans and concepts, resettlement (cf. compulsory purchase?) and other plans directly affecting the quality of life of future generations;[28] and
- participate in public hearings[29].

In performing his functions, the Commissioner also has important *further powers*, to:

- request information "from anyone" in cases which may affect the condition and use of the environment, and he may inspect documents, including personal and other data (such as commercial data), subject to him being bound by secrecy laws and excluding specified information listed in an Annex to the Act which relates to the army, national security, customs and the public prosecutor's office;[30]

- enter land and property where activities threatening irreversible environmental damage are going on, or if access to data, circumstances or facts necessary for conducting his proceedings cannot not be otherwise ensured;[31]

- publicise the launch of his proceedings, and his recommendations, even if this involves disclosing commercial secrets or personal data[32] – i.e., the wider public

interest to be informed of environmentally damaging activities is given precedence over private or personal interests.

Experience and evaluation

According to the 2010 Summary Report, up the end of 2009 the Commissioner:

- had received 119 "government initiatives";
- participated in 81 consultation procedures concerning legislative proposals;
- initiated one constitutional review;
- initiated the adoption or amendment of 17 legislative proposals;
- dealt with 422 complaints, mostly related to local spatial plans, noise and air pollution. Investigations were launched into 271 cases, 97 of which were completed. In 37 cases the "bureau issued a statement and encountered improprieties on 26 occasions".

The Commissioner has said that he performs three duties: "complaints investigation; parliamentary advocacy; and strategic development and research… The function of strategic development and research covers the duty of representing future generations' interests. Within this field, the Commissioner has launched comprehensive six year strategic research projects on the issues of the availability of environmental information, the climate and energy policy, and the study and support of sustainable local communities."[33]

It is too early to find any evaluation of the Commissioner's work, and the 2010 Summary Report does not contain a systematic analysis of its outcome.

3. Israel

Summary: A Parliamentary Commissioner for Future Generations, established by law in 2001 within the unicameral Knesset and appointed by the Speaker for a renewable five year term. No Commissioner has been in place since 2006, though the law remains in effect. The Commissioner's powers are focused on supporting the Knesset in its consideration of proposed laws of particular relevance for future generations. Working across education, health and environment from 2001-2006, the Commissioner appears to have gained real influence across a wide policy spectrum.

Legal basis and appointment

In 2001, the Israeli Parliament passed a law establishing the Knesset Commissioner for Future Generations "which will present it with data and assessments of issues which have particular relevance for future generations"[34]

The Commissioner is appointed by the Knesset Speaker, with the authorization of the Knesset House Committee, from at least two candidates recommended by a committee which is appointed by the Speaker and consists of three Knesset Committee chairpersons and three faculty members from institutions of higher education with relevant expertise.[35]

The Commissioner's term of office is for five years, and the Speaker has a right to appoint him or her for a further term. The former judge, Shlomo Shoham, was appointed as the first

Commissioner, and his appointment ended in 2006 without renewal. There has been no Commissioner since, although the law remains in effect.[36]

Constitutional rights

Israel does not have a written constitution, contained within a single document of particular sanctity or with specially protected legal status. According to the Knesset's English language website, the Knesset has passed fourteen "Basic Laws", as opposed to "ordinary laws", and these Basic Laws are a part of the Israeli constitution, though there are differences of opinion over whether they take precedence over ordinary laws[37]. It does not appear that the fourteen listed Basic Laws contain a right to a healthy environment, and there is no reference to any such right, or indirectly associated right, in the law establishing the Commissioner.

After the World Summit on Sustainable Development in Johannesburg in 2002, the Commissioner drew up a proposed government bill, as a basic law, to ensure that all economic, social and environmental development be conducted in a sustainable manner. This proposal was watered down for presentation to the Knesset, but even this weakened proposal did not become law. However, following this initiative Shoham reports that "the right to sustainability found its way into the map of rights contained in the proposed bill for the Israeli constitution".

Powers

The Commissioner operates within the Knesset and its law-making processes, with four functions, namely to:[38]

- assess proposed primary and secondary legislation of particular relevance for future generations;
- present reports to the Knesset from time to time, at his or her discretion, with recommendations on issues of particular relevance for future generations;
- advise Knesset Members on such issues; and
- present an annual report to the Knesset.

In performing his or her duties, the Commissioner "will be guided purely by professional considerations".[39]

All bills and proposed secondary legislation before the Knesset are to be sent to the Commissioner by the relevant Knesset authorities. The Commissioner will inform the Speaker periodically of those laws and bills that he or she considers have particular relevance for future generations, and the Speaker is to inform the chairpersons of the Knesset committees responsible for the areas covered by the laws or bills. The Commissioner is to be invited to debates on proposed primary and secondary legislation which he or she has declared are of particular relevance to future generations, and the timing of such debates are to be coordinated by the committee chairpersons and the Commissioner, allowing reasonable time for the Commissioner's collection of data and preparation of an evaluation. A summary of the evaluation is to be included in the explanatory notes to the bill (if given before first reading) or in the appendix of the committee's proposal to the full Knesset for the second and third readings (if given after the first reading). The Commissioner is permitted to participate in committee debates, at the

Commissioner's discretion (or with the committee chairperson's authorization if the debate is "secret by law").[40]

If an organization or body listed in relevant provisions of the State Comptroller Act is "being investigated", the Commissioner may request any information, document or report from that organization or body if required for the implementation of his or her tasks, and the request must be complied with (with certain exceptions for national security, foreign relations and public safety.[41]

Experience and evaluation

From 2001-2006, the Commissioner's work focused on education, involving sustainable education, future education, child welfare and promotion of youth involvement in the democratic process; health, involving raising awareness of the relationship between public health and the environment, and strengthening preventive services, including membership of the national task force on obesity; and environment, involving the introduction of a law on air quality to replace an ineffective voluntary agreement between polluters and government, and new coastal protection legislation.

There appears to be no independent evaluation of the Commissioner's work. Here, though, are some statements from the Commissioner himself in his book, preceded by a statement from the author of the book's preface:

> *"Like any experiment, the success of this venture was mixed. Over time, Shoham and his coterie of expert staffers developed real influence across a wide policy spectrum, though they in some cases saw their proposals rejected. They brought an unusual and often controversial perspective - the claims of intergenerational justice - to debates ordinarily shaped by rival ideologies, conflicting data sets or competing political interest groups."*
>
> *"As an interdisciplinary body, we were able to rise above immediate political pressures and the survival mentality of practical politics. In doing so we were able to be a significant catalyst in triggering interest in a subject with long-term impact, in creating public awareness and in bringing about a change in legislation"*(p162)
>
> *"by treating the obesity epidemic as an issue of sustainable health, we helped people understand the broader social significance of sustainability."*
>
> *"our experience in the Israeli Commission for Future Generations taught us that a large part of our influence in fact lay behind the scenes, in personal meetings and in laying the groundwork for change, work that was for the most part hid from the public eye." (p85)*
>
> *"Frequently, when the Commission turned to the public and explained the future consequences of decisions and legislation, it turned out that the public was not really asking for instant solutions. The public turned out to be willing to pay a present-day price in order to safeguard the future of its children. When decision-makers came to appreciate the public's deeper desires, they often accepted our opinion and changed their stands…..[The Commission] could help bridge this gap between policymakers' beliefs and the public's deeper, often unvoiced expectations" (p100)*

"parliamentarians started to appreciate the Commission as an institution with the power to cultivate public interest. p106 and the public started to show an interest in sustainable thinking." (p105)

"the terms sustainability, sustainable development, futures thinking and concern for future generations are now found in almost every public debate over decisions with long-term significance."

4. New Zealand

Summary: A Parliamentary Commissioner for the Environment with wide-ranging powers, established by statute in 1986, and appointed by and reporting to Parliament (not Ministers). She has wide powers of review, investigation and advice across public bodies, and also to obtain information and to be heard in legal proceedings, and can report on draft legislation if requested. In carrying out her functions, the list of matters to which she is to have regard does not include economic issues or the needs of future generations. Citizens do not have the right to petition her, but they can and do ask her to investigate matters, though these requests are declining. A high satisfaction rate amongst MPs is reported.

Legal basis and appointment

In 1986, the unicameral New Zealand Parliament enacted the Environment Act[42], to establish the Parliamentary Commissioner for the Environment[43] (and the Ministry for the Environment). Under section 4 of the Act, the Commissioner is appointed by the Governor-General on the recommendation of the House of Representatives. The Commissioner is one of three officers of Parliament, the others being the Office of the Ombudsmen and the Office of the Controller and the Auditor-General[44].

The Commissioner is appointed for 5 years, and may be re-appointed.

Constitutional rights

The New Zealand Bill of Rights Act 1990 contains the usual kind of civil and political rights, and does not contain a substantive right to live in a clean or healthy environment (or similar formulation)[45].

Powers

The Commissioner has wide-ranging functions, grouped into seven categories in section 16 of the Act:

- review the system of agencies and processes set up by the Government to manage the country's resources, and report to Parliament, with the objective of maintaining and improving the quality of the environment
- investigate the effectiveness of environmental planning and management by public authorities, and advise them on remedial action
- investigate any matter where, in the Commissioner's opinion, the environment may be or has been adversely affected, advise on preventative measures or remedial action, and report to Parliament

- if requested by Parliament or a select committee, report on any petition, Bill, or any other matter which may have a significant effect on the environment
- on the direction of Parliament, to inquire into any matter that has had or may have a substantial and damaging effect on the environment, and to report the results of the inquiry to Parliament
- undertake and encourage the collection and dissemination of information about the environment
- encourage preventive measures and remedial actions to protect the environment.

In the performance of her functions, under section 17 of the Act the Commissioner is to have regard to a wide range of environmental issues and effects on communities. Neither economic issues nor the needs of future generations appear in section 17.

The Commissioner also:

- has power under section 19 of the Act to require information, documents or things to be provided to her by any person in relation to any matter which she is investigating or inquiring into (subject to secrecy obligations imposed upon her). Failure to comply with the Commissioner's requirement, or otherwise to hinder her, is a criminal (summary) offence;
- is entitled to be heard under section 21 in any proceedings before courts, tribunals and other bodies in relation to any consent;
- must report annually to Parliament,

and her proceedings are privileged in a similar way to which the proceedings of Parliament are privileged.

Although the Environment Act does not provide for petitions from members of the public, the Commissioner's website includes a 'Suggest an Investigation' page, which can act as a spur to exercise her function to investigate any matter where in her opinion the environment may be or has been adversely affected[46].

Experience and evaluation

Three major investigations were conducted in 2008/9, into the clean-up of a contaminated land site, the impact of land use changes in the high country of the South Island, and smart electricity meters, as well as into mining, water quality and transport fuels, and advising on the Emissions Trading Scheme.[47]

According to her recent annual reports, the biannual survey of "all MPs indicated high satisfaction with the clarity, timeliness and usefulness of the Commissioner's advice";[48] and 65% of recommendations were adopted.[49]

In her latest annual report, the Commissioner states that her:

> *"'Environmental Ombudsman' role has decreased over the years, as other avenues for addressing environmental concerns have become available. However, it remains an important part of the office's work and can often alert the Commissioner to new or persistent environmental issues. In 2008/09, the office received a total of 118 concerns and inquiries (Table 1). The majority (90) of these related to a variety of environmental issues. The remaining 28 inquiries were in relation to topics such as office functions, expenses and reports.*"[50]

5. Finland

Summary: A standing Parliamentary Committee ("the TVK") set up in 1993 with a visionary, rather than a legislative or budgetary, role. Its main task is, apparently, to provide a report (during the second year of each government) to the Finnish Parliament in response to 'future statements' from the Prime Minister's office on its legislative programme. Once adopted, the report becomes the Parliament's basis for appraising forthcoming decision and legislation (perhaps in conjunction with reports from other committees). In addition, it reports on wide-ranging issues, and undertakes specific technology assessments. The Committee's work is carried out in the context of a relatively weak and seemingly unassociated constitutional State duty in relation to the right to a healthy environment.

Legal basis

In 1993 the Finnish Parliament (*Eduskunta*) established a Committee for the Future[51] (*Tulevaisuusvaliokunta* – TVK), as one of its standing committees under section 35 of the Finnish Constitution[52].

Constitutional rights

Although there appears to be no express linking between the establishment or operation of the Committee and constitutional rights, section 20 of the Finnish Constitution provides as follows:

> *"Section 20 - Responsibility for the environment*
> *Nature and its biodiversity, the environment and the national heritage are the responsibility of everyone. The public authorities shall endeavour to guarantee for everyone the right to a healthy environment and for everyone the possibility to influence the decisions that concern their own living environment."*

This formulation of the right to a healthy environment is clearly weaker than for other rights in the constitution[53].

From reading some of those of the Committee's reports that have been translated into English, its work is not in any way expressed as being linked to this, or to any other, constitutional right. The subject-matter of its reports is very diverse, and rarely environmental in a traditional sense.

Powers

Presumably, the Committee has the powers of a standing committee under the Finnish constitution (whatever those may be). It does not seem to have any powers which are comparable to the functions of the Parliamentary Commissioners in Hungary, Israel or New Zealand, or the Canadian Commissioner.

My understanding of the Committee's work is contained in the following two extracts.

First, the Counsel to the Committee, Paula Tiihonen, wrote the following in (about) 2008 (sent by the author to me):

> *"In Finland 15 years ago, some of our Representatives had the insight that establishing a committee to deal with the future would be one means of revitalising the Eduskunta from within. Like the other special committees, it has 17 members, all*

Representatives, and it deliberates parliamentary documents that are referred to it. The Committee studies development factors and development models relating to the future. It examines futures research, including its procedural questions. It assesses the societal impacts of technology and acts on the international level as a parliamentary body that evaluates the significance of technology. It is a kind of parliamentary 'think tank'.

"It has become established practice for the Government to make 1-2 reports on the future in the course of a four-year parliamentary term. The theme during the last term was demographic development. The new Government has announced that the next report on the future will deal with climate change. The Committee is free to choose other tasks and functions – beginning with definition of themes – itself. Working methods vary depending on the theme and project. Some themes demands a thorough, scientifically based study, others are best teased out on the political level by arranging a seminar. Sometimes the problem in question is so difficult, the theme so new that it demands the commissioning of a preliminary study from a university and only in the second stage the Committee's report and statements of position. The Committee has drawn on the assistance of two background groups, one of which has represented the 'experienced wise' and the other the 'challenging young'."

Second, (Emeritus Professor) Brian Groombridge described its main task in an interesting though undated (probably around 2006/7) article on the Scottish Futures Forum website:

"The Committee for the Future's main task is to conduct dialogues with the Prime Minister's office and government on all the foreseeable long term issues affecting the policies and work of whatever government is in power (always a coalition). The agreed procedure is that after a general election, in its second year of office, the government has to produce at least one policy statement on the future. These second-year papers are not manifestos; they do not reiterate election pledges; nor do they pre-empt decisions by subsequent governments. They provide a view of the future as seen by the new government, proposing a long-range framework in which to judge its four-year programme, so that its specific legislative decisions may be assessed and debated in the light of how they affect and could be affected by longer term, inter-related issues; issues such as climate change, energy policy, demography and technological development. This Future report is examined by the Future Committee and the other select committees; the Future Committee then drafts a response which it submits to the Eduskunta itself. When approved and confirmed, the revised response provides the basis for the Eduskunta's appraisal of forthcoming decisions and legislation."[54]

Groombridge also states that technology assessment is a major responsibility of the Committee, in which role it takes up specific topical themes as well as the most wide-ranging ones—plant gene technology in food production, for example, quite different in scale from, say, the relevance of 'the knowledge society' to 'a caring, encouraging and creative Finland'. He says that "to some extent" the Committee resembles the UK Parliamentary Office of Science and Technology, with whom it is in contact.

Experience and evaluation

It is very difficult to obtain an overview of the Committee's work that goes beyond, simply, an impression.

Fifteen publications from 2002-2010, and seven reports and statements from 2000-2004, are available in English on the Committee's website. Their subject-matter is very diverse, and appears both generic (e.g., future democracy, information technology, Asia, health care) and of particular interest to Finland (two publications on Russia).

More widely, in his article - in which he recommends a UK Select Committee for the Future – Groombridge writes:

> *"Those directly involved with the TVK are cautious about its work so far. Dr Tiihonen says 'it is too soon' to know how valuable it is. Likewise, Seppo Tiitinen, in that 2004 Inter-Parliamentary Union address, was equally cautious: 'The Committee has been working for only 10 years, so it is too early to say if it has been a success'.* He added, however:
>
> > *The Committee has taken its place in the Finnish parliamentary system as an innovative political body and . . . created a new forum that works at the core of the parliamentary system and—still more important—it has demonstrated that parliamentary measures can still be used to take the initiative within democracy."*

The Committee Counsel, Paula Tiihonen, has written that the Committee was created to strengthen the visionary, rather than the legislative or budgetary powers of the Parliament:

> *"Over the years [the Committee] has created a new forum that works at the core of the parliamentary system and - even more important - has demonstrated that parliamentary measures can still be used to take the initiative within democracy….Politics in this context is about values, attitudes, atmosphere and opinion building, and, most important, opinion leading."*[55]

Appendix 3

Constitutional law discussion

It is often said that the UK has an unwritten constitution. More accurately, the UK does not have a single written document, of particular sanctity or legally protected status, which governs the system of public administration and relationship between the individual and the State.

Rather, the UK's constitution is found in a miscellany of statutes, law reports and parliamentary standing orders (all written documents) and in constitutional conventions (some (though not all?) unwritten).

What is the constitution? – a trick(y) question

The Constitution Committee of the House of Lords, in its first report in 2001, provided its own working definition of the UK constitution:

> *"18…..The constitution is uncodified and although it is in part written there is no single, accepted and agreed list of statutes which form that part of the constitution which is indeed written down…*
>
> *19. We accordingly asked all our witnesses what their definition was of the constitution. We are very grateful to those who responded and also to those who gave good reasons for not supplying a definition as such. We are very conscious that, given everything said in the preceding paragraphs, this was indeed something of a trick question….*
>
> *20. Against the background of these very helpful comments, which serve not least to illustrate the difficulties of any attempt to define a constitution we offer as our own working definition: "the set of laws, rules and practices that create the basic institutions of the state, and its component and related parts, and stipulate the powers of those institutions and the relationship between the different institutions and between those institutions and the individual."* (emphasis added)[56]

One aspect, however, that it might still be worth drawing out for the purposes of this report, is that the UK's constitution is sometimes described, in the words of Lord Birkenhead, as "an uncontrolled constitution", as opposed to a "controlled constitution" (such as the US). This is what he said in a case before the House of Lords, some 90 years ago, noting how the former emphasizes not shackling succeeding generations:

> *"The first point which requires consideration depends upon the distinction between constitutions the terms of which may be modified or repealed with no other formality than is necessary in the case of other legislation, and constitutions which can only be altered with some special formality, in some cases by a specially convened assembly.*
>
> *The difference of view, which has been subject of careful analysis by writers upon the subject of constitutional law, may be traced to the spirit and genius of the nation in which a particular constitution has its birth. Some communities, and notably Great Britain, have not in the framing of constitutions felt it necessary, or thought it useful, to shackle the complete independence of their successors. They have shrunk from the*

> *assumption that a degree of wisdom and foresight has been conceded to their generation which will be, or may be, wanting to their successors, in spite of the fact that those successors will possess more experience of the circumstances and necessities amid which their lives are lived. Those constitution framers who have adopted the other view must be supposed to have believed that certainty and stability were on such a matter the supreme desiderata. Giving effect to this belief, they have created obstacles of varying difficulty in the path of those who would lay rash hands upon the ark of the constitution…[I]t is important to realize with clearness the nature of the distinction…*
>
> *Many different terms have been employed in the text-books to distinguish these two contrasted forms of constitution. Their special qualities may perhaps be exhibited as clearly by calling the one a controlled and the other an uncontrolled constitution as by any other nomenclature…It is of the greatest importance to notice that where the constitution is uncontrolled the consequences of its freedom admit of no qualification whatsoever. The doctrine is carried to every proper consequence with logical and inexorable precision…If [the constitution] were uncontrolled, it would be an elementary commonplace that in the eye of the law the legislative document or documents which defined it occupied the same position as a Dog Act or any other Act, however humble its subject matter."*[57]

A lot has happened, however, since 1920[58]. Constitutionally-significant legislation has abounded – especially the European Communities Act 1972, the Human Rights Act 1998, the devolution settlements and the new Supreme Court. Parliament has given the power to the courts to review primary legislation in the HRA[59], and the courts are now seen increasingly as having a central role in protecting fundamental rights. For example, Lord Justice Laws said the following in 2002:

> *"In its present state of evolution, the British system may be said to stand at an intermediate stage between parliamentary supremacy and constitutional supremacy…Parliament remains the sovereign legislature; there is no superior text to which it must defer (I leave aside the refinements (sic) flowing from our membership of the European Union); there is no statute which by law it cannot make. But at the same time, the common law has come to recognize and endorse the notion of constitutional, or fundamental rights. These are broadly the rights given expression in the Convention for the protection of Human Rights"*[60]

This has been described by a leading constitutional academic lawyer as "*a marked shift in emphasis from a 'political' to a more 'legal' constitution (or 'legal liberalism')*", though he concluded as follows:

> *"In the United Kingdom, parliamentary supremacy is* ***the*** *(or, possibly, merely* ***a****) fundamental principle of the constitutional system under which UK courts recognize all provisions of Acts of the UK Parliament as valid law, even if they may be thought to violate some other important constitutional principle. Despite academic criticism of the principle, and the special and limited exception for the primacy of European Union law, for practical purposes parliamentary supremacy remains for the time being the ultimate 'political fact which can only be changed by revolution'".*[61] [Original emphases]

So, can Parliament legislate without restraint…..?

It would flow from this description of the nature of the UK constitution that legally the UK Parliament should be free to enact whatever law it wishes.

Indeed, this freedom is reflected, for example, in the Human Rights Act 1998, where Parliament did not give the judges the power to strike down primary legislation that violates human rights (cf. the US Supreme Court, which can strike down Acts of Congress) – non-binding declarations of incompatibility fall short of that, legally.[62]

Subject to the UK's membership of the European Union, this is probably the position: basically, Parliament remains supreme and can enact pretty much any law it wishes. Put another way, if a legal challenge was brought to an Act, the courts would not be able to strike it down (i.e., declare it null and void, to be of no effect), unless a basis in law for doing so could be found. I have tried to find one, and – assuming no EU law ramifications – I have failed, or at least I have failed to find one that would be likely to be effective in the situation with which we are concerned. I have considered two conceivable bases: possible present/future rights' conflicts, and new veto powers on legislation.

…..even if in so doing it violates a common law right…..?

One legal basis for striking down the provisions of an Act (as opposed to, but also, subordinate legislation) might be that they offended in some way against (conflicts with, violates, is incompatible with) a common law right[63].

For example, the right to life is a common law right. If the provisions of an Act of Parliament were to be construed as in some way impinging upon the right to life of individuals presently alive, favouring instead the right to life or the interests of individuals yet to be born[64], it is arguable that the courts would have a legal basis to strike that provision down.

This scenario, however, seems highly unlikely to arise in practice. Even if such a conflict was to occur – which from time to time it could be expected to - then it would be inconceivable that the Act containing the provisions that gave rise to the conflict would not also include a provision making it clear that Parliament was intending (in some way) to modify the common law right in this context.[65]

In other words, parliamentary supremacy would allow the UK Parliament to modify any common law rights[66].

….and even if it changes the way legislation is made?

Basically, yes.

It has been suggested, for example, that a reformed House of Lords, or even an entirely new chamber of Parliament, could be given a power to stand up for the interests of future generations, and be given a 'veto' over legislation that (in some way) threatened their interests. Could an Act setting out these powers be validly passed?

It would be reasonable to regard such a change in the law-making process as a constitutional change, though I have not found any legal implications flowing from that characterisation alone. The UK constitution does not have any special legal protection (such as the need for a particular majority voting in favour of a proposed change), so such a change would be effected by statute and amendment of standing orders in the usual way. I have not found any bar in principle to such an idea, or to the manner in which the relevant individuals might become members of such a chamber (e.g., whether by election, by appointment, by lot, or by some other way, or a combination of two or more methods).

Here again we see the extent of the supremacy of Parliament, which goes to the vesting of legislative powers, not just their exercise. According to Halsbury:

> *"Unless otherwise provided by statute, legislative power is vested in the Sovereign, Lords and Commons jointly (see 15 Edw 2 (Revocatio Novarum Ordinationum) (1322)"*[67]

Statute has provided otherwise, thus far, in two circumstances: money bills, and public bills passed in two successive sessions by the House of Commons but rejected by the House of Lords.[68]

The current position is therefore that the vast majority of proposed primary legislation in the UK Parliament needs only the consent of the House of Commons (and royal assent) to become law, subject to the delaying power of the House of Lords. If a (reformed) upper house was to be empowered to veto proposed laws that it regarded as damaging to the future, then s.2 of the Parliament Act would need amendment. The same would apply if only certain members of the upper house (say) were so empowered.

What if an Act of Parliament gave a body, which is neither the House of Lords nor the House of Commons, a law-making power? The Parliament Act 1911[69] aside:

> *"there is no restriction preventing the three constituent bodies from vesting their legislative authority in one of them, or in a delegate, and the delegate may be authorised to make a further delegation of the authority delegated to him."*[70]

It is also therefore possible for a body, which is neither the House of Lords nor the House of Commons, to be given the power to make laws, if a statute passed in the ordinary way so provides. In the same spirit, there is no legal reason why a third House of Parliament could not be created by statute in the ordinary way (though I know of no other existing tri-cameral legislature).

And two final points…..

1. If the legislation in question touches on broad social policy – which it would, in our case – then quite apart from the strict legal position, the courts are especially reluctant to intervene[71].

2. This discussion only applies to primary legislation. Nothing I have said here applies to administrative decisions.

Endnotes

[1] Foreword to the Report of the Independent Green Ribbon Panel, January 2008, entitled "Fulfilling the Potential: A Review of the Environment and Sustainable Development Practice of the Office of the Auditor General of Canada" , available here (accessed on 4/11/10): http://www.oag-bvg.gc.ca/internet/English/acc_rpt_e_29778.html#p1

[2] The Act, as amended, can be read here (accessed 04/11/10): http://laws.justice.gc.ca/en/A-17/FullText.html

[3] Under s.3 of the Auditor General Act, the AG is appointed by the Governor in Council "by commission under the Great Seal…after consultation with the leader of every recognized party in the Senate and House of Commons and approval of the appointment by resolution of the Senate and House of Commons."

[4] The Charter is set out in Part 1 of the Constitution Act 1982 enacted by the Canadian Parliament (available here (accessed on 4/11/10): http://laws.justice.gc.ca/eng/Const/9.html#anchorsc:7); and in Schedule B of the Canada Act 1982, simultaneously enacted by the UK Parliament (available here (accessed on 29/11/10): http://www.legislation.gov.uk/ukpga/1982/11/pdfs/ukpga_19820011_en.pdf

[5] http://www.oag-bvg.gc.ca/internet/English/pet_lp_e_938.html

[6] See Chapter 4 of the 2009 Fall Report of the Commissioner of the Environment and Sustainable Development, available here (accessed on 4/11/10): http://www.oag-bvg.gc.ca/internet/English/parl_cesd_200911_04_e_33199.html

[7] See the Executive Summary (Key conclusions) of the report referred to above in end note 1, available here (accessed on 4/11/10): http://www.oag-bvg.gc.ca/internet/English/acc_rpt_e_29778.html#p1

[8] Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights. An English translation of the Act is available here (accessed on 4/10/10): http://jno.hu/en/?menu=legisl_t&doc=LIX_of_1993

[9] Act LIX of 1993, section 2. § (1) and (2).

[10] Act LIX of 1993, section 27/A. § (1).

[11] Act LIX of 1993, section 4. § (5).

[12] See here (accessed on 8/11/10): http://net.jogtar.hu/jr/gen/getdoc.cgi?docid=94900020.tv&dbnum=62.The translation on e-page 10 of the English language Comprehensive Summary of the Report of the Parliamentary Commissioner for Future Generations, published in July 2010 ("the 2010 Summary Report") is slightly different: "The Republic of Hungary acknowledges and enforces everyone's right to a healthy environment." The 2010 Summary Report is available here (accessed on 08/11/10): http://jno.hu/en/pdf/Comprehensive_Summary_2009.pdf

[13] Resolution 28/1994. (V.20.) of the Constitutional Court, quoted on e-page 5 of the 2010 Summary Report.

[14] Section 16. § (1) provides that "Anybody may apply to the ombudsman if in his judgement the proceedings of any authority (paragraph (1) of Section 29) or organ performing a public service (hereinafter together 'authority') caused impropriety relating to the fundamental rights of the petitioner, provided that he has exhausted the available possibilities of administrative legal remedies – except for the judicial review of administrative decisions – or that no legal remedy is ensured for him". Section 29. §(4) provides that: "For the purposes of this Act an impropriety relating to fundamental rights is: the violation of a fundamental right or the direct danger thereof, irrespective of the fact that it is the result of an action or an omission".

[15] Although this characterisation and division of his main functions into duties and powers might be inappropriate under Hungarian law, or might be an incorrect understanding of the Act, it is adopted here as it is a familiar characterisation for UK lawyers and fits with the English translation of the Act posted on the Commissioner's website. Unfortunately, that translation is not very elegant, sometimes not easy to understand and, in several instances, is different from other translations of the same provision by the Commissioner in the 2010 Summary Report. With one exception (in the case of the first bulleted duty, where the translations are significantly different and the latter translation seems to make more sense), the summaries of the duties are based on the translation on the website; the verbatim translated text from the website is referenced after each summary of (what the website text suggests would in our law be) a duty or power, and, where the 2010 Summary Report has provided a different translation, that version is also included in the corresponding end note.

[16] This summary (exceptionally) is based on the English translation of what appears to be the relevant provision (s.27/B. § (1), first sentence), set out on e-page 10 of the 2010 Summary Report: "Based on the Ombudsman Act, the Commissioner 'monitors, evaluates and controls the enforcement of legal provisions ensuring the sustainability and improvement of the state of the environment and nature…' ". Although this translation is expressed in descriptive rather than mandatory language (and so perhaps it might not be accurate to understand it as a duty), the translation of the provision posted on the Commissioner's website is clearly

expressed as a duty but seems to make less sense (especially when considered in the light of the associated duty in the next bullet): the Commissioner "shall follow with attention, estimate and control the emergence of the provisions of the law ensuring the sustainability and improvement of the situation of environment and nature". (It is not clear, however, whether this provision applies only to legal provisions which are intended to ensure sustainability and environmental and natural improvement, or to any legal provisions in order, thereby, to ensure sustainability and such improvement.)

[17] The Commissioner "shall investigate or to have investigated any improprieties he has become aware of relating to these, and to initiate general or particular measures for the redress thereof", s.27/B. § (1), second sentence. Cf. the Commissioner's translation on e-page 10 of the 2010 Summary Report: his "task is to investigate or have investigated the abuses brought to [his] attention related to all this, and to initiate general or individual measures in order to redress them". From the web translation, it seems that this duty is related to legislative developments ("relating to these"), though it might perhaps be a wider investigative duty in relation to any environmental or sustainability "impropriety". In any event, it appears to be cast more widely than the test for submitting a petition, as it does not seem to be restricted to an actual or potential violation of the right to a healthy environment.

[18] The Commissioner "shall express an opinion on the drafts of statutory instruments and other governmental motions connected with his tasks, and may make a proposal for legislation in his sphere of tasks", s.27/B. § (3)(e).

[19] The Commissioner "shall express an opinion on motions relating to the recognition of obligatory effect of international agreements with environmental protection or nature conservation subjects or affecting the common heritage and concerns of the mankind, shall contribute to the preparation of national reports drafted on the basis of these international agreements, furthermore, he shall follow with attention and estimate the emergence of these agreements under Hungarian jurisdiction", s.27/B. § (3)(g). Cf. the translation on e-page 11 of the 2010 Summary Report: "the commissioner 'expresses its opinion on propositions about the subjects of the environment and nature conservation, as well as ones concerning the acknowledgement of the binding effect of international conventions affecting the common heritage and common concerns of mankind; it is involved in the preparation of national reports based on these international contracts; furthermore it monitors and evaluates the enforcement of these conventions within the Hungarian jurisdiction". The meaning of the first part of this provision is obscure on the basis of either translation.

[20] "shall participate in cases relating to his tasks in the elaboration of Hungarian standpoint represented in the institutions of the European Union operating with governmental participation", s.27/B. § (3)(h). Cf. the translation on e-page 11 of the 2010 Summary Report: "in the cases related to [his] sphere of tasks, [he] takes part in the formulation of the Hungarian position represented in the institutions of the European Union operating with governmental participation."

[21] "22. § The ombudsman may make a motion to the Constitutional Court for: (a) the ex post facts examination of the unconstitutionality of a statutory instrument or any other legal means of government control; (b) the examination of whether a statutory instrument or any other legal means of government control conflicts with an international agreement; (c) [text omitted from the translation on the Commissioner's website, presumably repealed?][;] d) the termination of unconstitutionality manifesting itself in an omission; (e) the interpretation of the provisions of the Constitution."

[22] Section 27/B. § (3)(d) provides that the Commissioner "may initiate the conduct of supervisory proceedings against administrative resolutions relating to the conditions of the environment, and the suspension of execution thereof, and may participate in the suit as intervening party during its judicial review". This power is not included in this bullet list, because I do not understand it, and because I do not know how it relates to the seemingly connected powers in sections 27/E and 27/F.

[23] The Commissioner "may call on the person or organization illegally endangering, polluting or damaging the environment…to terminate this activity" s. 27/B. § (3)(a). Of these three categories of activity, it is not clear whether only the first, where the threatened impact has not yet occurred, needs also to be illegal. It is also not clear to me whether the illegality can be on the basis of a violation of the right to a healthy environment, or whether another illegal basis has to be established, and, if so, whether that other basis would need to be additional, or alternative. The power in relation to the third category is elaborated on further in section 27/C, and is discussed further below.

[24] These provisions are contained in section 27/C. Within thirty days (or immediately if requested by the Commissioner, and in any event within five days), the addressee of the request to terminate or restore must notify the Commissioner of the measures taken. If the Commissioner considers the notification unsatisfactory, he may ask a court for injunctions to restrain the damaging conduct, to effect damage-prevention measures and to restore the environment.

[25] The Commissioner "may call on the competent authority to take measures relating to the protection of environment" s. 27/B. § (3)(b). This seems to be an unrestricted power.
[26] This would seem to be the best understanding, in summary, based on sections 27/B. § 3(d), 27/E and 27/F, correspondence with the Commissioner and, of course, no knowledge of Hungarian administrative law.
[27] The Commissioner "may issue general recommendations in his sphere of tasks or recommendations for certain organs, institutions, authorities or persons in individual cases" s. 27/B. § (3)(c). "The addressee of the recommendation described in point c) paragraph (3) shall be obliged to respond in the merits within thirty days the recommendation issued for him (*sic*)" s. 27/B. § (4). This seems to be an additional, catch-all power.
[28] The Commissioner "may familiarize himself with and express an opinion on the long-term plans and concepts of local governments for development, area settlement or those otherwise directly affecting the life quality of future generations" s. 27/B. § (3)(f).
[29] The Commissioner "may participate on obligatory public hearings held on the basis of the provisions of the law which are connected to his sphere of tasks" " s. 27/B. § (3)(i). It does not seem that the Commissioner has the power to hold a public hearing (?), but he may request specified public authorities and administrative organs to hold one under s.27/G. § (2).
[30] Section 27/H. § (1) and (2).
[31] Section 27/H. § (3). Section 27/H. § (4) provides that "Private secrets, business secrets, state secrets, service secrets or other secrets defined by a separate Act may not impede the Parliamentary Commissioner for Future Generations in exercising his powers regulated in paragraphs (1)-(3), but the provisions relating to secrecy shall be binding for him as well unless otherwise prescribed by a separate Act", and, where "state secrets or service secrets" are concerned, the Commissioner must exercise his powers personally or through colleagues who have undergone "national security control" (s. 27/H. § (5)).
[32] The Commissioner "may inform the public – by indicating the character and measure of the activity damaging the environment and the place of activity damaging the environment and its effect area, also including business secret – on the launching of his proceedings and the issue and contents of his recommendation also including personal data" s. 27/B. § (6).
[33] 2010 Summary Report, e-page 9.
[34] Knesset law (Amendment no.14), 5761-2001, Addition to Section 8 of Knesset Law 1994, clauses 30-48. The extract cited is from clause 31 (unofficial translation). Clause 30 defines the term "particular relevance for future generations" as referring "to an issue which may have significant consequences for future generations in the realms of the environment, natural resources, science, development, education, health, the economy, demography, planning and construction, quality of life, technology, justice and any matter that has been determined by the Knesset Constitution, Law and Justice Committee to have significant consequences for future generations".
[35] The Bill which led to the enacted law proposed that the Commissioner would be elected by the majority of MPs in a secret vote (see the table on page 207 of Shoham, Future Intelligence and Sustainability (Bertelsmann, 2010)). This book, written by Shlomo Shoham, provides the source of information for almost all the information contained in this summary.
[36] It appears that if the Speaker does not exercise his right to re-appoint the Commissioner, he or she is obliged to appoint the six-person committee to come forward with its recommendations for candidates. This has not been done.
[37] Accessed on 10/11/10: http://www.knesset.gov.il/description/eng/eng_mimshal_yesod.htm
[38] These functions are set out in Clause 32, which is entitled 'The role of the Knesset Commissioner for Future Generations'.
[39] Clause 33, entitled 'Independence'.
[40] This paragraph is a summary of the provisons contained in Clause 34, entitled 'The status of the Knesset Commissioner for Future Generations'.
[41] Clause 35, entitled 'Acquisition of information'.
[42] The Act is available here (accessed on 4/11/10):
http://www.legislation.govt.nz/act/public/1986/0127/latest/DLM98975.html?search=ts_act_environment_resel&sr=1
[43] In Maori, '*Te Kaitiaki Taiao a Te Whare Pāremata*'.
[44] According to the Commissioner's website, available here (accessed on 4/11/10):
http://www.pce.parliament.nz/about-us/
[45] The Act is available here (accessed on 4/11/10):
http://legislation.govt.nz/act/public/1990/0109/latest/whole.html

[46] The web page is here (accessed on 4/11/10): http://www.pce.parliament.nz/current-work/suggest-an-investigation/

[47] See the Commissioner's annual report to Parliament for 2009, available here (accessed on 5/11/10): http://www.pce.parliament.nz/publications/all-publications/annual-report-for-the-year-ended-30-june-2009

[48] This evaluation appears to be based on 15 MPs of the 25 MPs (of about 120 MPs) who returned survey forms stating 100% satisfaction on these three criteria (see the annual report for 2008, page 26, available here (accessed on 5/11/10): http://www.pce.parliament.nz/publications/all-publications/annual-report-for-the-year-ended-30-june-2008

[49] See the annual report for 2009, Table 5 on page 23, available here (accessed on 5/11/10): http://www.pce.parliament.nz/publications/all-publications/annual-report-for-the-year-ended-30-june-2009

[50] As above, page 12. Although declining, this compares (for example) with 169 requests for investigation, information or another service in 2003/4, 83% of which were from citizens, according to the annual report for 2004, page 28, available here (accessed on 5/11/10): http://www.pce.parliament.nz/publications/all-publications/annual-report-for-the-year-ended-30-june-2004

[51] The Committee's website is here (accessed 29/9/10): http://web.eduskunta.fi/Resource.phx/parliament/committees/future.htx

[52] An English translation of the Constitution is available from the Finnish Ministry of Justice's website, here (accessed 29/9/10): http://www.om.fi/21910.htm

[53] For example: "Everyone has the right to life, personal liberty, integrity and security" (section 7); "Everyone's private life, honour and the sanctity of the home are guaranteed" (section 10); "Everyone has the right to basic education free of charge" (section 16).

[54] A report by Professor Brian Groombridge, entitled Parliament and the Future: Learning from Finland (undated), available here (accessed on 16/11/10): http://www.scotlandfutureforum.org/assets/library/files/application/1214405098.doc

[55] Ethical Prospects 2009, Part 3, 239-241, DOI: 10.1007/978-1-4020-9821-5_13
The Right of Future Generations, available here (accessed on 29/11/10): http://www.springerlink.com/content/wl472161365u0469/

[56] The Constitution Committee also said: "21. We offer the following as the five basic tenets of the United Kingdom Constitution: Sovereignty of the Crown in Parliament; The Rule of Law, encompassing the rights of the individual; Union State; Representative Government; Membership of the Commonwealth, the European Union, and other international organisations." [emphasis removed, and formatting and punctuation changed]. The report is available here: http://www.publications.parliament.uk/pa/ld200102/ldselect/ldconst/11/1101.htm. The "rule of law" has now been recognized as a "constitutional principle" in section 1 of the Constitutional Reform Act 2005.

[57] *McCawley v. R.* [1920] A.C. 691 at 703 et seq.

[58] Some might think that the closing sentence in this extract (from Halsbury's Laws in 1996) to be splitting hairs, but it illustrates just how difficult it is to shake the principle of parliamentary supremacy: "Subject to the legislative powers of institutions of the European Community, the legislative authority of the Sovereign in the United Kingdom Parliament is supreme. An Act of Parliament, whether public or private, can define or override the common law [fn omitted], abrogate local custom, and amend or repeal the provisions of earlier Acts. Since every Parliament is supreme, one Parliament cannot derogate from the powers of a subsequent Parliament. It follows that an Act can neither provide that it is incapable of repeal nor dictate the form of subsequent legislation…The power of the United Kingdom Parliament to legislate is not theoretically curtailed by the legislative powers of institutions of the European Community, but when Community law and English law are inconsistent, Community law will prevail." Halsbury's Laws of England, 4th ed, Vol. 8(2) Reissue, 1996, paras. 1201 and 1203.

[59] And they have already reviewed (and finally upheld) the validity of at least one piece of primary legislation, namely section 9 of the British Indian Ocean Territory (Constitution) Order 2004, made under prerogative powers and providing that no person had a right of abode on the coral atolls known as the Chagos Archipelago, including Diego Garcia, as a result of the territory being "set aside to be available for the defence purposes of the Government of the United Kingdom and the Government of the United States of America" – see *R (Bancoult) v Foreign Secretary (No. 2)* [2008] UKHL 61, [2008] 3 WLR 955. When reviewing secondary legislation, the courts have already determined that they can quash the whole instrument, or excise certain words (e.g., Middlebrook Mushrooms [2004] EWHC 1447 at [90]; *A v HM Treasury* [2008] EWCA Civ 1187, [2009] 3 WLR 25).

[60] *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728, [71]

[61] Professor Andrew Le Sueur in Oxford Principles of English Law, English Public Law, 2nd Edition (Feldman, ed., OUP 2009) Chapter 1, para 1.07 (footnotes omitted). The closing quotation is from H.W.R. Wade, The Basis of Legal Sovereignty, [1955] CLJ 172.

[62] "A declaration under this section ("a declaration of incompatibility") - (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made." (Human Rights Act 1008, s.4(6)). The political effect of such a declaration, and the political response to it, are of course different matters.

[63] Recent examples of judges recognizing common law rights include the following: "the citizens of this country do enjoy a fundamental or constitutional right not to be detained arbitrarily at common law. That conclusion is not capable of much elaboration." Wyn Williams J in *R. (on the application of Juncal) v. Secretary of State for the Home Department* [2007] EWHC 3024 (Admin) at [47]; "It is in my judgment axiomatic that the common law rights of personal security and personal liberty prevent any official search of an individual's clothing or person without explicit statutory authority. That these are rights customarily defined by correlative wrongs than by affirmative declarations is an artifact of our constitutional history; but it makes them no less real and the courts' vigilance in defence of them no less necessary." Sedley LJ in *Secretary of State for the Home Department v. GG* (proceedings under the Prevention of Terrorism Act 2005) [2009] EWCA 786 at [12].

[64] This presupposes that a statute in some way creating a right or rights for future generations can be passed, and again I see no reason why it cannot – though the precise detail of such rights, or whether they should be formulated as rights at all, is another matter. Neither do I see any reason why the current absence of such a right prevents some kind of 'future generations institution' being created. These are both separate issues that I will cover elsewhere in the report.

[65] Moreover, if the interests of future generations were to be embedded into the law-making process, the courts might construe this as a decision of a public interest nature, rather than as a clash of rights between individuals, and so judicial strike-down would be even less likely. See Lord Hoffman in *R v. Secretary of State for the Environment, Transport and the Regions, ex parte Holdings & Barnes Plc* (the Alconbury case) [2003] 2 AC 295 at [70]: "a decision as to the public interest…is quite different from a determination of right…it does not involve deciding between the rights or interests of particular persons. It is the exercise of a power delegated by the people as a whole to decide what the public interest requires."

[66] It is also of interest, and even possibly an indication of how a UK court might approach the question of inroads into the common law or human rights of individuals now alive, that the preamble to the EU's Charter of Fundamental Rights states that "Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations"– even though a Protocol to the Treaty on European Union contains provisions limiting the applicability of the Charter in the UK (and Poland).

[67] Halsbury's Statutes, 4th Edition, Vol. 32, 2004 Reissue, para. xxx. Cf. the Attorney-General's Parliamentary Answer in 2004 that "[t]he source of the legislative powers is the common law", available here: http://hansard.millbanksystems.com/written_answers/2004/mar/31/parliament-legislative-powers. See also Lester, Beyond the Powers of Parliament, [2004] Judicial Review 95.

[68] Sections 1 and 2 of the Parliament Act 1911, respectively, available here: http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&title=Parliament+Act&Year=1911&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&TYPE=QS&PageNumber=1&NavFrom=0&parentActiveTextDocId=1069329&ActiveTextDocId=1069329&filesize=16566

[69] And certain conventional limitations, relating to succession to the throne and royal styles and titles, which are not relevant to this report.

[70] Halsbury's Laws of England, 4th Edition, Vol. 32, 2004 Reissue, para. 838.

[71] "The more the legislation concerns matters of broad social policy the less ready will be a court to intervene" - Lord Nicholls in *Wilson v Secretary of State for Trade and Industry* [2004] 1 AC 816 at [70]; "A very considerable margin of discretion must be afforded to the Secretary of State. Difficult questions of economic and social policy were involved, the resolution of which fell within the province of the executive and the legislature rather than the courts" - Laws LJ in *Hooper v Secretary of State for Work and Pensions* [2003] EWCA Civ 813; "less intrusive JR should apply to decisions in the 'macro-political field'" (check for quote) - Laws LJ in *R v. Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 at 1131.