Intergenerational justice and climate litigation. Some considerations about law and the deal with contemporary economic, social, and political issues

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Abstract: *Giustizia intergenerazionale e contenzioso climatico. Alcune considerazioni sul rapporto tra il diritto e le questioni economiche, sociali e politiche contemporanee* – The recent debate on the climate crisis, environmental protection, and sustainable development is closely linked to thinking about future generations. In particular, there is a renewed interest in intergenerational justice and a revival of the older theories formulated by John Rawls and Edith Brown Weiss. Recently, again, the pages of the European Journal of International Law show two polarised positions: one against and one in defense of future generations. There are many challenges that the law faces in responding to the climate issues. Economic theories on the one hand and legal doctrines on the other ones recall the fundamental opposition between the ethnocentrism and individualism designed by Western law and the holism and diffusionism typical of systems outside the Western legal tradition. Thus, it becomes crucial to design a new balance between contemporary issues of environmental law, thanks to the help of comparative law.

Keywords: Climate justice; Intergenerational justice; Global North and South; Future generations

1. Introductory remarks

The most recent debate about the climate crisis, environmental protection, and sustainable development is closely linked to the reflection on future generations.

Discourses are really intricate because of the era the world is living. It's the so called Anthropocene era and represents the theorization of the complex relationship between fossil fuels, environmental degradation, and inequality, arguing that ecological vulnerability has to become a political theory, due to the unprecedented scale and pace of human impact[1]. So the question of justice unfurls on spatial and temporal scales at a global and microscopic level and legal and political concepts of causation and responsibility are complicated by the growing awareness of the intergenerational consequences of past and contemporary choices. In that way, it can be explained (i) the renewed interest in intergenerational justice

[1] A.P. Harris, *Vulnerability and Power in the Age of Anthropocene* in 6 *Washington and Lee Journal of Energy, Climate and Environment* 98 (2015).

and the revival of the older theories formulated by John Rawls and, more recently, by Edith Brown Weiss and (ii) the spread-out of climate litigation, vehicle of lots of social instances.

The mentioned theories and their developments show how difficult is to design a theoretical framework useful for making intertemporal protection demands effective, considering the urgency of the issues involved in the climate matter. All approaches seem to be inadequate.

In that scenario, climate litigation has emerged as an alternative governance mechanism to address climate change[2] and has many different contents. The phenomenon was defined as any piece of federal, state, tribal or local administrative or judicial litigation in which party filings or tribunal decisions directly and expressly raise an issue of fact or law regarding the issue or policy of climate change, its causes or impacts[3]. Additionally, it was defined as cases that have the issue of climate change at their core and that generally raise climate-specific arguments or judicial analysis referring to climate change[4]. Surely, it's a precious instrument to observe how living law works in constitutional interpretation, statutory interpretation, and under all areas of law.

This essay tries to recall the main definitions of intergenerational justice and how the future generation come into legal discourse in order to underline future challenge for the law.

2. Intergenerational justice

2.1 From John Rawls to Derek Parfit

John Rawls was the first to analyze the problem of intergenerational justice[5]. In his view, starting from the perspective of social contract theory, all generations are posed in a hypothetical original position, which corresponds to the "state of nature" in Enlightenment political theory. In this original contracting position, no one knows their place in time, social status, wealth, or intelligence: all parties are behind a "veil of ignorance". When parties choose the basic distribution of benefits and burdens that will apply across time, they each try to secure the agreement on the best possible terms for themselves due to humans are rational self-interested beings. But the veil of ignorance makes the choice of unequal distribution unacceptable: no one wants to find himself in a poor generation. So the parties choose a distribution that leaves no single generation in a position less favorable than that of any other generation.

Rawls, concerned with the subject of intergenerational justice, tried to organize an improved Kantian theory of justice and an alternative way to

[2] J. Setzer, L. Benjamin, *Climate Litigation in the Global South: Constraints and Innovations*, in 9 *Transnational Environmental Law* 83 (2020).
[3] D. Markell, J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?*, in 64 *Florida Law Review* 15–86 (2012).
[4] J. Peel, H.M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, Cambridge, 9–25.
[5] J. Rawls, *A Theory of Justice*, Cambridge (MA), 1971.

classical utilitarianism[6]. With his conception, he asserts the priority of individual rights over an encompassing theory of the commons[7]. So, in that perspective, people are forced to choose the governing principles of their future society based on a conception of individual moral rights that exists independently of, and before, any conception of a good society[8]. Only in that way, a society begin to take on the characteristics of an intergenerational community. In particular, as Rawls makes clear, the values of association and community can only be accounted for «by a conception of justice that in its theoretical basis is individualistic»[9], and the intergenerationally fair distribution that results from the original contract occurs only because each party acts «to achieve his own greatest good, to advance his rational ends as far as possible»[10].

This vision of the individualized self anyway fails to account for the rich diversity of our social and moral experience, and, ultimately, is «less liberated than disempowered»[11].

Rawls's view is shared by those who look at intergenerational justice as a matter of rights[12]. Because a right is limited by the individual rightsholder's capacity to possess it, the problem is that members of future generations cannot be identifiable rightsholders in the usual sense. This strikes at the core of the rights model of intergenerational justice.

The absence of identifiable persons in future generations is taken to extreme consequences by the British philosopher Derek Parfit[13]. In strongly summary, the non-identity problem shows that an act may still be wrong even if it is not wrong for anyone. More precisely, the nonidentity problem is the inability to simultaneously hold the following beliefs: (i) a person-affecting view; (ii) bringing someone into existence whose life is worth living, albeit flawed, is not "bad for" that person; (iii) some acts of bringing someone into existence are wrong even if they are not bad for someone[14].

In particular, with the regard to environment and sustainability, Parfit imagines how a future society might react to a choice made by the present generation to follow a dangerous energy policy which ultimately leads to catastrophe[15], and exemplifies the logical traps of thinking about rights and

[6] B.C. Bobertz, *Toward a Better Understanding of Intergenerational Justice*, in 36 *Buffalo Law Review* 167 (1987).
[7] For a discussion about deontological issues in Rawls, see M.J. Sandel, *Liberalism and the Limits of Justice*, Cambridge, 1982, 18–24.
[8] *Ivi*, 24–28.
[9] J. Rawls, *A Theory of Justice*, cit., at 264.
[10] *Ivi*, at 23.
[11] M.J. Sandel, *Liberalism and the Limits of Justice*, cit., at 178.
[12] For an interesting overview about the origins of the analysis of the intergenerational justice in terms of rights theory, see B.C. Bobertz, *Toward a Better Understanding of Intergenerational Justice*, cit., at 168; at last, for a recent systematic study of all theory, see L.H. Meyer, *Intergenerational justice*, in *The Stanford Encyclopedia of Philosophy*, 2021.
[13] D. Parfit, *Reasons and Persons*, Oxford, 1984; D. Parfit, *Future Generations: Further Problems*, in 11 *Philosophy & Public Affairs* 113–172 (1982).
[14] M.A. Roberts, *The Nonidentity Problem*, in *The Stanford Encyclopedia of Philosophy*, 2021.
[15] D. Parfit, *Energy policy and the further future: the identity problem*, in D. MacLean, P.G. Brown (eds.), *Energy and the Future*, Totowa (N.J.), 1983, 166–179.

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injuries solely in individualized terms[16]. A dangerous energy policy can cause the deaths of thousands. However, as Parfit points out, the particular persons killed would never have been born if society had chosen to follow a different energy policy. Since the dangerous policy leads to a higher standard of living over the short run, it indirectly causes different marriages, different conception decisions, and hence different children being born. From this viewpoint, the present generation can never take actions that are unjust to future generations, because every action determines the identity of the individuals conceived and born[17].

The identity paradox leads to the troubling conclusion that society owes no moral obligations to future generations. Many authors, including Parfit himself, resist the moral implications of the identity paradox[18]. Nevertheless the theory strongly struggles with the reality where it's urgent and pressing an intuitive sense of concern for the future.

2.2 From the concern for climate change to Edith Brown Weiss's theories

The concern for the future has become quite urgent with the focus on climate change, a phenomenon with a polycentric nature, caused by the accumulation of direct and indirect impacts of all human activities, on various scales and in different countries, with equally differentiated and multi-scalar consequences[19].

Furthermore, climate change is intrinsically linked to social conflict which originates from the desire for development of each community and concerns the distribution of wealth on the microscopic and the global scale[20]. This highlights the socio-political character of climate controversies, even before the legal one. In this sense, climate change has reawakened the ethical sentiment of communities, linking the debate on environmental protection to that of future generations[21].

Indeed, the irreconcilability of human needs – with those of nature – seems to have reached a point of no return and calls for a rethinking of the traditional categories of philosophy and law. Precisely the need to take into account a future rights and interests distinguishes the protection of the ecosystem, from the other areas in which the reference to the intergenerational question can be find[22]. The irreversibility of choices having an impact on nature, therefore, poses significant problems in terms of balancing in the present instances that can only be intercepted in the

[16] B.C. Bobertz, *Toward a Better Understanding of Intergenerational Justice*, cit., at 169.
[17] D. Parfit, *Energy policy and the further future*, cit., 167 e ss.
[18] *Ivi*, at 170.
[19] E. Fisher, E. Scotford, E. Barrit, *The legally Disruptive Nature of Climate Change*, in 80 *The Modern Law Review* 178 (2017).
[20] S. Rayner, *Foreword*, in *H. Hulme* (eds.), *Why We Disagree about Climate Change: Understanding Controversy, Inaction and Opportunity*, Cambridge, 2019, at xxii.
[21] T. Guarnier, *La solidarietà intergenerazionale nella prospettiva costituzionale. Prime riflessioni su alcuni nodi da sciogliere*, in *Gruppo di Pisa. Dibattito aperto sul Diritto e la Giustizia Costituzionale*, 3, 2022, 9 ss.
[22] T. Andina, *Prolegomeni per una giustizia intergenerazionale: appunti di metafisica*, in *Lezioni di Etica Pubblica*, 2, 2019, 32 ss.

future[23].

By now, there's no debate about the ethical considerations that lead us to think about future generations: people share intuitive feelings of concern and responsibility for future generations, despite paradoxical theories about the existence of future people[24].

Sustainability requires a reversal of trends in the way natural resources are used and its development planned, concerning environmental externalities. The costs and benefits have to be assessed not only from the perspective of the present generation[25].

In that viewpoint, Brown Weiss pointed out that sustainability requires that we look at the earth as a «trust passed to us by our ancestors for our benefit, but also to be passed on to our descendants for their use»[26]. In her view, a theory of intergenerational equity comprehends both rights and responsibility: as members of the present generation, we are both trustees, responsible for the robustness and integrity of our planet, and beneficiaries, with the right to use and benefit from it for ourselves. So, intergenerational equity states that all generations have an equal place concerning the natural system and that there is no basis for preferring past, present, or future generations in relation to the system. This notion has deep roots in international law[27]. Finally, two relationships must shape any theory of intergenerational equity in the environmental context: our relationship with the natural system of which we are a part, and our relationship with other generations[28].

An intergenerational obligation arises to care for the natural system: costs of the improvement of the human condition should be distributed across generations. The corollary to the premise of equality is a partnership among generations[29]. The purpose of this partnership is to realize and protect the well-being of every generation in relation to the planet.

Brown Weiss uses Jonh Rawls's theory to determine the nature of responsibilities and obligations towards future generations, concluding that each generation has to «leave the planet in no worse condition than it received it, and to provide succeeding generations equitable access to its

[23] W. Thiery, *Intergenerational inequities in exposure to climate extremes*, in 374 *Science* 158–160 (2021).

[24] For a recent study, see M. Ojala, *Hope and climate-change engagement from a psychological perspective*, in 49 *Current Opinion in Psychology* 101514 (2023).

[25] Report of the World Commission on Environment and Development, *Our Common Future* (Brundtland Report), 1987.

[26] E. Brown Weiss, *In Fairness To Future Generations and Sustainable Development*, in 8 *American University International Law Review* 20 (1992).

[27] The preamble to the universal declaration of human rights recognizes dignity and equal and inalienable rights to all members of the human family. See *Universal Declaration of Human Rights*, pmbl., G.A. Res. 217, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948). The reference to all members of the human family has a temporal dimension which brings all generations within its scope. The reference to equal and inalienable rights affirms the basic equality of such generations in the human family. Also the United Nations Report, *Our Common Future*, known as Brundtland Report, published in 1987, followed Brown Weiss view.

[28] E. Brown Weiss, *In Fairness To Future Generations and Sustainable Development*, cit., 20–21.

[29] E. Burke, *Reflections on the Revolution in France*, New York, 1790, 139–140.

resources and benefits»[30], according to traditional liberal political theory.

From that, three normative principles of intergenerational equity are designed[31]. First, each generation must conserve options. This means conserving the diversity of natural and cultural resources so that each generation does not unduly restrict the options available to future generations in solving their problems and satisfying their values. Second, each generation should be required to maintain the quality of the planet so that it is passed on in a condition no worse than that in which it was received. Third, each generation should provide its members with equitable rights of access to the legacy of past generations and conserve this access for future generations. International law and climate diplomacy have implemented the structure outlined above, identifying the idea of (i) intergenerational equity in the exploitation of resources and (ii) the environment as the common heritage of humanity[32].

Even though intergenerationality permeates the social structure, the diachronic management of resources poses following problems: (i) defining which heritage, material and immaterial, should be handed down from one generation to the next and (ii) framing this relationship between generations in legal terms[33].

In that way, the minimum content of a principle of transgenerational responsibility binds each generation towards the following ones in order to guarantee them the possibility of coming into existence and of realizing the needs linked to fundamental rights[34]. This is the perspective of the so-called eco-sufficientarianism[35], according to which the management of the planet's natural resources, in light of the principle of intergenerational equity[36], has to allow us to ensure the satisfaction of basic needs for the next generation[37].

The ability of intergenerational responsibility to establish itself as a general principle, starting from the developments of international law, does not solve the problem of having to face a legal category that is imperfect in content and binding capacity.

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[30] E. Brown Weiss, *In Fairness To Future Generations and Sustainable Development*, cit., at 21.

[31] E. Brown Weiss, *In Fairness To Future Generations and Sustainable Development*, cit., 22–25.

[32] E. Frumento, *Lo Stato ambientale e le generazioni future per una tutela del diritto fondamentale all'ambiente*, in *AmbienteDiritto.it*, 2021. Furthermore, there are lots of Constitutions that use the idea of the trust in order to protect the environment, like Swaziland, New Guinea and Japan (see, A. D'Aloia, *Generazioni future (diritto costituzionale)*, in *Enciclopedia del diritto. Annali*, Milano, 2016, 377 ss.).

[33] T. Andina, *Prolegomeni per una giustizia intergenerazionale*, cit., *passim*.

[34] B. Almassi, *Climate change and the Need for Intergenerational Reparative Justice*, in 30 *Journal of Agricultural and Environmental Ethics* 199 (2017).

[35] For a systematic presentation, see P. Kanschik, *Eco-Sufficiency and Distributive Sufficientarianism – Friends of Foes?*, in 25 *Environmental Values* 553 (2016).

[36] L.A. Nicotra, *L'ingresso dell'ambiente in Costituzione, un segnale importante dopo il Covid*, in *Federalismi.it*, n. 16/2021; F. Francioni, *Sviluppo sostenibile e principi di diritto internazionale dell'ambiente*, in P. Fois (ed.), *Il principio dello sviluppo sostenibile nel diritto internazionale ed europeo dell'ambiente. XI Convegno SIDI, Alghero 16-17 giugno 2006*, Napoli, 2007, at 42.

[37] L.H. Meyer, *Dimensioni temporali nel dibattito sulla giustizia climatica*, in *Lessico di etica pubblica*, 2, 2019, at 22.

3. Future generation and Law and Economics approach

In that scenario, there is an urgent need to examine how a 'future generations' rhetoric translates into the existing legal and institutional context within which climate policy is situated. Despite the intuitive bases and increasingly robust literature on the protection for future generations, modern legal systems today overwhelmingly fail to grant legal protection to future generations and tend to focus on the short term[38]. This is more difficult because solutions must be shared by different cultural traditions, and must be generally acceptable to different economic and political systems.

The leap from the ethical to the legal perspective presents strong critical elements[39]. Indeed, the fragility of the intertemporal effects of current choices and attitudes is even more complicated because the subjects – to whom protection is aimed – do not yet exist, nor are identifiable. Therefore, they cannot demand protection, nor negotiate behaviors and decisions[40].

The phenomenon seems to be at the crossroads between remedies and subjectivity. The concept of future generations appears as the consequence of the contemporary evolving social demands. With his stronger issue, the legal disruption of climate change has undermined the stability of society, the sovereignty of states, and the self-determination of individuals: it is, therefore, reasonable to expect that the rethinking of the balance between rights, principles, and interests will undermine the limits to freedom of private economic initiative[41].

Existing approaches to solve the problem seem to fall into two general categories: rights-based theory and cost-benefit analysis.

3.1 The individual rights-based approach

The first ones asserts the priority of individual rights over a comprehensive theory of commons[42]. Starting from Rawls's position[43], according to Parfit's nonidentity argument[44], the sense of intergenerational justice in rights-oriented language is acutely frustrated[45].

This frustration is evident, for example, in United States law, looking at the case-law development of the Natural Historic Preservation Act, where

[38] S. Caney, *Global Climate Governance, Short-Termism, and the Vulnerability of Future Generations*, in 36 *Ethics & International Affairs* 137–55 (2022); F. Stewart, *Overcoming Short-Termism: Incorporating Future Generations into Current Decision-making*, in 31 *Irish Studies in International Affairs* 171–187 (2020).

[39] D. Porena, *Il principio di sostenibilità. Contributo allo studio di un programma costituzionale di solidarietà intergenerazionale*, Torino, 2017, *passim*.

[40] A. D'Aloia, *Generazioni future*, cit., at 374.

[41] T. Guarnier, *La solidarietà intergenerazionale nella prospettiva costituzionale*, cit., at 13.

[42] B.C. Bobertz, *Toward a Better Understanding of Intergenerational Justice*, cit., *passim*.

[43] See *supra*.

[44] For the latest systematic presentation of the argument see D. Boonin, *Parfit and the Non-Identity Problem*, in S.M. Gardiner (ed.), *The Oxford Handbook of Intergenerational Ethics*, Oxford, 2021; for the latest publication of the Author, see D. Parfit, *Future People, the Non-Identity Problem, and Person-Affecting Principles*, in 45 *Philosophy & Public Affairs* 118–157 (2017).

[45] B.C. Bobertz, *Toward a Better Understanding of Intergenerational Justice*, cit., at 170.

it's explicit the concern for future generations[46]. Amended in 1980, with a new emphasis on its purpose to «fulfill the social, economic, and other requirements of present and future generations»[47], the legislative history of the Act indicates that its primary goals are intergenerational[48].

Similarly, under the National Environmental Policy Act of 1969[49], the federal government is directed to «use all practical means» to «fulfill the responsibilities of each generation as trustee of the environment for succeeding generations»[50].

In addition to these mentioned rules, several other federal and state statutes suggest intergenerational objectives[51] that get considerable frustration in practice, as a result of an individualistic conception of justice.

The *Sierra Club v. Morton* case[52] shows all the uselessness of the traditional legal language about individual rights concerning environmental defense suits.

The case originates from the development of Mineral King Valley for recreational purposes. In the late 1940s, Walt Disney Enterprises won a bid to start surveying the valley that would require the construction of a new highway and massive high-voltage power lines running through the Sequoia National Forest. The Sierra Club tried to stop this project to protect the land. So, the Club filed preliminary and permanent injunctions against federal officials to prevent them from granting permits for the development of the Mineral King Valley. The district court granted these injunctions. The U.S. Court of Appeals for the Ninth Circuit overturned the injunctions because the Sierra Club did not show that it would be directly affected by the actions of the defendants and therefore did not have standing to sue under the Administrative Procedure Act. Alternatively, the appellate court also held that the Sierra Club had not made an adequate showing of irreparable injury or likelihood of their success on the merits of the case. The United States Supreme Court granted the Sierra Club's petition for certiorari[53]. In the federal decision, Justice Potter Stewart wrote the majority opinion for the 4–3 majority, in which the Court held that, in order to have standing to sue under the Administrative Procedure Act, the plaintiffs must demonstrate they had directly suffered an injury as a result of the actions that led to the suit. Although building roads and high voltage power lines through the wilderness upsets the beauty of the area and the

[46] The National Historic Preservation Act of 1966 declared the policy of Congress «to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation» See 16 U.S.C. § 470(b)(5) (1982).
[47] *Id.* § 470-1(1), (3). This declaration of policy was added to the Act by Pub. L. 96-515, Title I, § 101(a), 94 Stat. 2988 (1980) (codified at 16 U.S.C. § 470-1 (1982)).
[48] B.C. Bobertz, *Toward a Better Understanding of Intergenerational Justice*, cit., at 171.
[49] 42 U.S.C. §§ 43214361 (1982).
[50] *Id.* § 4331(b)(1).
[51] The discourse concerns The Clean Air and Water Acts, the Wilderness Act and The Endangered Species Act.
[52] 405 U.S. 727 (1972). M.M. Mckeown, The *Trees Are Still Standing: The Backstory of* Sierra Club v. Morton, in 44 *Journal of Supreme Court History* 189–214 (2019); S.W. Scott, *Standing for Everyone: Sierra Club v. Morton, Supreme Court Deliberations, and a Solution to the Problem of Environmental Standing*, in 30 *Fordham Environmental Law Review* 21–103 (2018).
[53] Sierra Club v. Morton, 401 U.S. 907 (1971) (order granting certiorari).

enjoyment of some, such "general interest" in a potential problem is not sufficient to establish that a plaintiff has been injured in the manner that standing doctrine requires. Although it rejected the Sierra Club's assertion of standing, the Court nevertheless made it clear that an amended complaint would meet the standing requirement if it alleged harms suffered to an individualized interest[54].

Different dissenting opinions were written. Justice William O. Douglas wrote a dissenting opinion in which he argued that the standing doctrine should allow environmental organizations such as the Sierra Club to sue on behalf of inanimate objects such as land. In his separate dissenting opinion, Justice Harry A. Blackmun argued that, when faced with new issues of potentially enormous and permanent consequences, such as environmental issues, the Court should not be quite so rigid about its legal requirements. Justice Blackmun proposed two alternatives for how to proceed in this case: either the Sierra Club's request for preliminary injunction should be granted while it is given time to amend its complaint to comport with the requirements of the standing doctrine, or the Court should expand the traditional standing doctrine to allow this type of litigation. Justice William J. Brennan, Jr. also wrote a separate dissent in which he agreed with Justice Blackmun regarding the Sierra Club's standing and argued that the Court should have considered the case on its merits.

Dissenting justices agreed with Christopher Stone who, while the case was pending before the Supreme Court, published his article[55], which argued that natural objects themselves should be conceived as jural entities capable of suffering legally compensable wrongs. Under this view, the Sierra Club would be seen as Mineral King's guardian *ad litem* suing on behalf of the valley itself[56].

The brief discussion above shows that the language of individual rights stresses the scope of suits like that of the Sierra Club Case which wants to protect diffuse interests in ecological integrity. Indeed, the complaints are geared toward emphasizing individualized injuries, such injuries are secondary because the litigants have the goal of maintaining an undegraded environment[57]. «By stressing the need for individualized impacts, the legal fiction reinforces an individualized conception of rights and injuries»: in this way, Bobertz concluded more than thirty years ago[58]. Even now, the individual conception of rights has been a primary cause of much of the confusion in the theoretical discussion of intergenerational justice.

Intergenerational rights theories and the experience of the environmental standing cases show that an individualistic conception of injury and responsibility is deeply embedded in current rights analysis. Because of the individualistic focus on rights, it becomes impossible to

[54] 405 U.S. at 736 n.8.
[55] C. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, in 45 *Southern California Law Review* 450–501 (1972).
[56] C. Stone, *Should Trees Have Standing? Revisited How Far Will Law and Morals Reach? A Pluralist Perspective*, in 59 *Southern California Law Review* 2 (1985).
[57] L.H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*,in 83 *Yale Law Journal* 1330–1331 (1974).
[58] B.C. Bobertz, *Toward a Better Understanding of Intergenerational Justice*, cit., at 176.

understand presently nonexistent persons as being the holders of individualistic rights. Thus, the rights approach to intergenerational justice begins to collapse when it attempts to confer currently enforceable rights to individuals not yet born. Although the language of rights may serve to partially articulate concern for future generations, the limitations of this language prevent the actual protection of their interests[59].

3.2 The Cost-Benefit Alternative

A nonindividualistic approach to intergenerational justice apparently can be that of cost-benefit analysis[60] as a method of assessing and choosing among policies that affect future generations[61]. It seeks to measure the future effects of present action by reducing all values to a common metric, the economic one, therefore the costs of an action can be compared with the expected benefits[62].

Starting from these premises and according to the philosophy of utilitarianism – which asserts the primacy of overall good over individual rights[63] –, the present generation has obligations to maximize utility in front of future generations[64]. Utility refers to the general happiness of humans now living and yet to be born. Independently of what could be the result, it's necessary to avoid a policy of extreme sacrifice on the present generations. For this, a discount rate is calculated to limit the number of future generations that will count in the calculus, even due to human incapacity to empathize with remote generations[65]. So society is assumed to prefer policies that favor present generations. It is argued that society, like an individual, should express a time preference that weighs future effects less heavily over time[66].

Furthermore, cost-benefit analysis can be manipulable in practice about the choosing of the discount rate, because it can serve to mask the economic interest of decision-makers[67], like in the Reagan administration when the cost-benefit analysis has instituted mandatory for executive

[59] C. Motupalli, *Notes and Comments, Intergenerational Justice, Environmental Law, and Restorative Justice*, in 8 *Washington Journal of Environmental Law & Policy* 333–361 (2018).
[60] B.C. Bobertz, *Toward a Better Understanding of Intergenerational Justice*, cit., 178 ss.
[61] R.F. Blomquist, *Roots, Trunk, and Branches Of Modern Environmental Law: A Book Review Comparison of An Environmental Law Anthology and Foundations of Environmental Law and Policy*, in 5 *Buffalo Environmental Law Journal* 503 (1998); S. Chrimes, D. Swartzman, R. Liroff and K. Croke, *Cost-Benefit Analysis and Environmental Regulations: Politics, Ethics and Method*, in 1 *Pace Environmental Law Review* 229 (1983).
[62] I.G. Barbour, *Technology, Environment, and Human Values*, Westport (CT), 1980, especially 173 ss.
[63] For a systematic review, see R.A. Posner, *Utilitarianism, Economics, and Legal Theory*, in 8 *The Journal of Legal Studies* 103– 140 (1979).
[64] B.C. Bobertz, *Toward a Better Understanding of Intergenerational Justice*, cit., at 178.
[65] L. Steg, G. Perlaviciute, E. van der Werff, *Understanding the human dimensions of a sustainable energy transition*, in 6 *Front Psychol* 805 (2015).
[66] H.S. Burness, R.G. Cummings, W.D. Gorman, R.R. Lansford, *Practicably Irrigable Acreage and Economic Feasibility: The Role of Time, Ethics, and Discounting*, in 23 *Natural Resources Journal* 294 (1983).
[67] B.C. Bobertz, *Toward a Better Understanding of Intergenerational Justice*, cit., at 182.

agencies to foster a more favorable business climate for regulated industries[68].

Moreover, the analysis doesn't take into account the ethical issues[69], often leading to disastrous decisions like the case of the production of Pinto car made by Ford Motor Company[70]. Compony production of a highly dangerous automobile in the1970s, despite it became aware that a design flaw in the gas tank assembly of the Pinto made the car explosive in rear-end collisions. After dealing a business plan, the cost-effective solution was to continue producing defective cars, not warn the public of danger, and absorb the tort claim awards as they occurred[71]. Although the cost-benefit analysis was respected, this decision was clearly intolerable from an ethical perspective[72].

So the cost-benefit analysis can be seen as a way to overrun the individualistic approach to the intergenerational justice of the right-based theory because of its utilitarianism approach that serves to choose the action or policy which leads to the greatest good for the greatest number of people, among several options. In theory, cost-benefit analysis sacrifices the right of the individual for the good of all. It doesn't work in practice because (a) the discount rate minimizes the future consequences of an action; (b); policy-makers can use cost-benefit analysis for a conception of utility that can be different by the community fitness; (c) values such as human life cannot be measured by monetary prices[73]. In addition, this kind of analysis expresses the individual preference, because the weight accorded to any given factor, taking into account, is determined by asking how much a person wants to pay for it[74].

Both rights-based theory and cost-benefit analysis create obstacles to our understanding of intergenerational justice. Since 1987, however, Bobertz has spotted a deeper sense in which both approaches reinforce the individualistic focus[75].

In attempting to escape this self-defeating circle, it's essential to consider alternative theories and legal structures. Development in climate litigation provides numerous concepts to envision a suitable degree of legal safeguard for future generations[76].

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[68] Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in 5* U.S.C. § 601, at 431 (1982); Exec. Order No. 12,498, 3 C.F.R. 323 (1986), *reprinted in 5* U.S.C. § 601, at 40 (SuII 1984).

[69] R.P. Malloy, *Equating Human Rights and Property Rights - The Need for Moral Judgment in an Economic Analysis of Law and Social Policy*, in 47 *Ohio State Law Journal* 164–177 (1986).

[70] L. Strebel, *Reckless Homicide?: Ford's Pinto Trial*, South Bend (IN), 1980.

[71] *Ivi*, at 79-92, 286.

[72] S. Deva, *Human Rights and Humanizing Business*, in *Humanizing Business*, Berlin, 2022, 123–143.

[73] B.C. Bobertz, *Toward a Better Understanding of Intergenerational Justice*, cit., 184–185.

[74] M. Sagoff, *The economy of the earth: philosophy, law, and the environment*, 2ª, Cambridge, 2008.

[75] B.C. Bobertz, *Toward a Better Understanding of Intergenerational Justice*, cit., 186 ss.

[76] For an overview C.V. Giabarbo, *Climate Change Litigation and Tort Law: Regulation Through Litigation?*, in *Diritto e Processo*, 2020, 361 ss.; J. Setzer, L. Vanhala, *Climate change litigation: A review of research on courts and litigants in climate governance*, in *WIREs*

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Recently, the pages of the European Journal of International Law show two polarised positions: one against[77] and one in defense[78] of future generations.

4. The rhetoric of Future Generations and Global North Case law

Against Future Generations is a provocative title that the author uses primarily to reveal the rhetoric hidden behind it. The concern for future generations risks hiding development policies that do not pursue instances of substantial equality, but logic of powers and the market.

The essay argues against the use of future generations as a locus for establishing responsibility for present generations, pointing out that an over-emphasis on the future can come in a paradoxical discourse. It underlines the ambiguity of the syntagm because of many reasons. Primarily, it creates a disconnection between local and global[79], designing a multi-speed world since many contradictory policies are compatible with prioritizing future generations. So the sum of future generations locally doesn't amount to their aggregate globally, because each country – in the name of future generations – decides independently what kind of mitigation policy follows and which is the most convenient choice.

Secondly, the syntagm doesn't consider that future persons transit into the present in a constant flood[80], so it's better to use the term intragenerational because it captures a temporal radius buffering the present beyond the forever, vanishing urgency of now[81].

Thirdly, concerning climate policy, future generations' discourse focuses on mitigation actions and only marginally deals with adaptation. On the current trend, global mitigation will be achieved at the cost of local poverty and immiseration, because of the West-centrism prefigured in the 1972 Stockholm Conference on the Human Environment[82]. Important as rapid mitigation is, it is unlikely in itself to be sufficient to meet today's climate-driven needs: absent significant international transfers, steep global

Climate Change, 2019; G. Ganguly, J. Setzer, V. Heyvaert, *If at First You Don't Succeed: Suing Corporations for Climate Change*, in 38 *Oxford Journal of Legal Studies* 841 (2018).

[77] S. Humphreys, *Against Future Generations*, in 33 *The European Journal of International Law* 1061–1092 (2022).

[78] M. Wewerinke-Singh, A. Garg, S. Agarwalla, *In Defence of Future Generations: A Reply to Stephen Humphreys*, in 20 *The European Journal of International Law* 1–17 (2023).

[79] The Author refers to global Costitutionalism, which has largely foundered in many domains. See S. Gardiner, *On the Scope of Institutions for Future Generations: Defending an Expansive Global Constitutional Convention That Protects against Squandering Generations*, in 36 *Ethics and International Affairs* 157 (2022); S. Caney, *Global Climate Governance, Short-Termism, and the Vulnerability of Future Generations*, in 36 *Ethics and International Affairs* 137 (2022).

[80] S. Caney, *Justice and Posterity* in R. Kanbur and H. Shue (eds), *Climate Justice: Integrating Economics and Philosophy*, Oxford, 2018, at 157, 160–161.

[81] The Author recalls D. Heyd, *A Value or an Obligation? Rawls on Justice to Future Generations*, in A. Gosseries and L.H. Meyer (eds), *Intergenerational Justice*, Oxford, 2009, at 187.

[82] Stockholm Declaration on the Human Environment, 16 June 1972, 11 ILM 1416 (1972).

mitigation is a formula for entrenched inequity[83].

The appeal of future generations risks to pursuing a parochial interest, because it prioritizes the *status quo* for developed countries, who don't contribute materially to the transition of poorer countries to low-carbon and climate-adaptive economies, forgetting their historical responsibility[84].

Fourthly, future generations' discourse invokes sacrifice and the about it becomes only a choice of values on which the society is built. The choice is rarely between responsibility and none, between sacrifice or no sacrifice[85], and often it remains at some level unexplained and unjustified, and its logic undisclosed[86]. Meanwhile, the choice of sacrifice now orients the future. From this perspective, the possibility of sacrifice runs throughout the climate problem[87].

Enlightened by these principles, all 'waves' of climate change litigation[88], also the ones between private parties, in the Global North show that a climate assessment involves (i) balancing the costs of (local) mitigation today against (local) adaptation in the future and (ii) balancing the costs of (local) climate impacts in future against the (local) costs of mitigation today[89].

So the intergenerational instance has identified itself in a declination of the principle of reasonableness or solidarity, in a parameter of constitutionality[90] or, in contemporary times, a function of cultural and political orientation[91]. However, despite attempts to legalize relations between generations, the difficulty remains in providing binding effectiveness to political and economic activity within the horizon of sustainability. From this perspective, the legal system must find suitable guarantees to satisfy the purposes pursued, transferring ethical reasoning to the level of law. The unsuitability of the conventional conceptual tools of contemporary legal systems appears[92]: indeed, legal discourse oscillates between the notions of principle, value, subjective right, and interest[93].

In that scenario, climate change litigation remains the most powerful instrument in order to put intergenerational issues at the center of debate

[83] S. Humphreys, *Against Future Generations*, cit., at 1086.
[84] S. Humphreys, *Climate, Technology, Justice*, in A. Proelss (ed.), *Protecting the Environment for Future Generations: Principles and Actors in International Environmental Law*, Berlin, 2017, at 171.
[85] The Author recalls J. Derrida, *Donner la mort*, Paris, 1999,
[86] H. Shue, *The Pivotal Generation. Why We Have a Moral Responsibility to Slow Climate Change Right Now*, Princeton (N.J.), 2021, 44–45.
[87] S. Humphreys, *Against Future Generation, cit.*, at 1083.
[88] For an overview J. Setzer, L. Vanhala, *Climate change litigation: A review of research on courts and litigants in climate governance*, in *WIREs Climate Change*, 2019.
[89] S. Humphreys, *Against Future Generations*, cit., at 1089.
[90] O. Bonardi, *Il principio di solidarietà intergenerazionale tra diritto dell'ambiente e diritto alla sicurezza sociale*, in *Rivista del Diritto della Sicurezza Sociale*, 3, 2022, 447.
[91] R. Bin, *Che cos'è la Costituzione?*, in *Quaderni Costituzionali*, 2007, at 17.
[92] For an analysis in practice see J. Eisen, R. Mykitiuk, D. Scott, *Constituting Bodies into the Future: Toward a Relational Theory of Intergenerational Justice*, in 51 *UBC Law Review* 1 (2018).
[93] S. Pedrabassi, *Sviluppo sostenibile: l'evoluzione giuridica di un concetto mai definito*, in *Revìsta Ibérica do Dereito*, 1, 2020, 157 ss.

and the legal language uses the tort law categories[94].

The remedy of Aquilian liability is the language of the climate change litigation, but it cannot respond to all the requests brought by the Environmental Rights[95]. The difficulties of combining climatic damage with civil law emerge: the typical mechanism of restorative justice however cannot respond to a problem of distribution justice, also in temporal perspective.

The primary role assumed by Tort Law in climatic litigation remains unclear[96], also in consideration of the high degree of failure of the disputes brought to the attention of the courts.

Conceptually civil liability is very far from the instances of climate change because it concerns humanity in general, and not the relationships between private individuals. The anti-tort structure of climatic justice, on the other hand, had already been highlighted because the instruments of civil liability are unable to face the complexity of climate change[97]. The legal category remains marked by the legacy of individualism and the mechanistic vision of causality, that doesn't belong to climate change[98].

The principle of *neminem laedere* provides, moreover, that everyone behaves reasonably to avoid the negative and predictable consequences of their actions. A sort of climate duty of care has to be designed due to putting responsibility for everyone not to act to compromise nature[99]. In this sense, in *Juliana v. United States*[100], the recognition of a right to a «climate system capable of sustaining human life» has been requested. But judges don't configure it for the impossibility of conceptualizing climate negligence, since it has the absurd consequence of making everyone damaged and damaging[101]. Also the possibility of design a different causality fails.

Tort law tries to apply the market share tests in reference to the issue of CO_2 shares for the distribution of responsibilities[102], since the publication of the first Carbon Majors Report[103], which describes in detail the tracking

[94] M. Hinteregger, *Civil Liability and the Challenges of Climate Change: A Functional Analysis*, in 8 *Journal of European Tort Law* 238 (2017).
[95] R.P. Hiskes, *The Human Rights to a Green Future*, Cambridge, 2009, at 60.
[96] W. Bonython, *Tort Law and Climate Change*, in 40 *University of Queensland Law Journal* 423 (2021).
[97] D.A. Kysar, *What Climate Change Can Do for Tort Law?*, in 42 *Environmental Law Reporter* 10739 (2012).
[98] H. Winkelmann, S. Glazebrook, E. France, *Climate Change and the Law, working paper Asia Pacific Judicial Colloquium*, Singapore, 2019, § 109.
[99] D. Hunter, J. Salzam, *Negligence in the Air: The Duty of Care in Climate Change Litigation*, in *University of Pennsylvania Law Review* 1741 (2007).
[100] *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020). For a comment see E.A. Lloyd, T.G. Shepherd, *Climate change attribution and legal contexts: evidence and the role of storylines*, in 167 *Climatic Change* 28 (2021).
[101] B.C. Mank, *Standing and Global Warming is Injury to All Injury to None?*, in 35 *Environmental Law* 1 (2005).
[102] D.J. Grimm, *Global Warming and Market Share Liability: A Proposed Model for Allocating Climate Change Litigation: Drawing Lines to Avoid Strict Joint, and Several Liability*, in 98 *Georgetown Law Journal* 185 (2009).
[103] The Carbon Majors Database, *CDP Carbon Majors Report*, 2017, available at https://climateaccountability.org/pdf/CarbonMajorsRpt2017%20Jul17.pdf. For an overview of its implications, see M. Grasso, K. Vladimirova, *A moral analysis of carbon majors' role in climate change*, in 29 *Environmental Values* 175–195 (2020).

of carbon emissions of anthropic origin. Thanks to it, the Courts can be able to quantify the contribution to climate change to be attributed to the defendant in court, based on carbon emissions it causes anchoring to scientific data[104]. A new application in Aquilian liability seems born and contributes to the birth of the second wave of climatic litigation, in which private individuals face each other in court to see the responsibility for these on climate change recognized, based on the shares of CO_2 produced that contribute to pollution[105]. This new wave of climate litigation[106] asses the responsibility of the polluting not on traditional tort law but on the CO_2 market shares, according to the Paris Agreement, with the further objective to affect the production process of the agreed companies beyond cash compensation.

After the failure of the economic considerations, Global North has placed science at the center of legal reasoning in order to try to provide some effective protection to environment and future generations.

Also the latest decision in the case *Neubauer* ruled by the German Constitutional Court in March 2021[107] represents the product of the ambiguity of the concern about future generations in the view of Global North, even if it was widely hailed as a historic victory[108]. *Bundesverfassungsgericht* found lawmakers have a human rights obligation to protect people from the effects of climate change and ruled that the German climate change law, issued in 2019, does not adequately regulate greenhouse gas emission reduction goals from 2030 onwards. In that way, law violates the government's obligation to protect the human rights of the young people who brought the case. The applicants, nine young people between the ages of fifteen and thirty-two, are concerned about the impacts the climate crisis is having on their rights, now and in the future, so they call out government inaction on climate change. The court found that Germany is required to set emission reduction targets post 2030 for the country to meet commitments under the Paris Agreement, because failing to do so would irreversibly

[104] S. Hsu, *A Realistic Evaluation of Climate Change Litigation Through the Lens of Hypotetical Lawsuit*, in *University of Colorado Law Review* 13 (2008).
[105] G. Ganguly, J. Setzer, V. Heyvaert, *If at First You Don't Succeed: Suing Corporations for Climate Change*, in 38 *Oxford Journal of Legal Studies* 841 (2018).
[106] This is what is observed in the recent cases *Lliuya V RWE AG* (Case No. 2 O 285/19), *Milieudefensie V Royal Dutch Shell* (ECLI:NL:RBDHA:2021:5337), *Notre affaire à tous and others v. Total* (N° RG 21/01661 - DBV3-V-B7F-UL6E).
[107] *BVerfG, Beschluss des Ersten Senats vom 24. März 2021 - BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20 -, Rn. 1-270.* For a discussion L. J. Kotzé, *Neubauer et al. versus Germany: Planetary Climate Litigation for the Anthropocene?*, in 22 *German Law Journal* 1423–1444 (2021). A full analysis can be founded in A. Di Martino, *Intertemporalità dei diritti e dintorni: le scelte argomentative del Bundesverfassungsgericht nella sentenza sul clima e le interazioni con i processi democratici*, in *Rivista di Diritti Comparati*, fasc. 2, 2023, 65 ss.
[108] K. Connelly, *"Historic" German Ruling Says Climate Goals Not Tough Enough*, *The Guardian*, 29th April 2021; K. Rall, *Germany's Top Court Finds Country's Climate Law Violates Rights*, in *Human Rights Watch*, 29th April 2021; R. Bifulco, *Perché la storica sentenza tedesca impone una riflessione sulla responsabilità intergenerazionale*, in *Luiss Open*, 28th May 2021; R. Bin, *La Corte tedesca e il diritto al clima. Una rivoluzione?*, in *lacostituzione.info*, 30th April 2021; M. Pignataro, *Il dovere di protezione del clima e i diritti delle generazioni future in una storica decisione tedesca*, in *EuBlog.eu*, 17th May 2021.

offload major emission reduction burdens onto future generations. In particular, a violation of the State's obligation based on the art. 20a of *Grundgesetz für die Bundesrepublik Deutschland* is recognized. The State has to refrain from interfering with fundamental freedoms, the art. 20a mentioned requires that carbon emission must be distributed over time in a future-oriented perspective since a generation should not be allowed to exceed its emission budget threshold, in order to not cause a large loss of freedom for subsequent generations[109]. The intertemporal safeguarding of freedom is enshrined[110]. The Constitution, therefore, in this case, links the political process in favor of ecological issues[111]. Following this direction, the explicit inclusion of environmental protection in the interest of future generations among the fundamental principles should lead to considering environmental protection preparatory to the realization of other principles.

Though the court's treatment of a conjoined complaint from Bangladeshi petitioners also matters. While the possible positive knock-on effect for Bangladeshis of future German mitigation policy was flagged, the court did not recognize any German responsibility for current impacts in Bangladesh nor any concrete obligation to assist present (much less future) generations there through adaptation, technology or otherwise[112]. None of this is surprising: courts generally present as territorially bounded creatures, unprepared to prioritize foreign persons even in the present, much less in the future[113]. Bus it's a signal that also the formant of the law most contiguous to civil society could strike an appropriate balance between the interests of property owners exposed to risks from climate change and the interests opposing more stringent climate action[114].

Not even creative jurisprudence is able to recognize the legal relevance of the moral duty to preserve and transfer environmental heritage to posterity. It seems that a recent decision ruled in New Zealand shows all the insufficient of this Nordic view, where the judges wrote: «What should be the response of tort law to climate change? (…). Climate change is commonly described as the biggest challenge facing humanity in modern times. Its causes and its effects are now widely recognised, with scientists predicting that if greenhouse gas emissions keep increasing, the planet will eventually reach a point of no return[115]. (...) In our view, the magnitude of the crisis which is climate change simply cannot be appropriately or adequately addressed by common law tort claims pursued through the courts[116]».

5. The Global South Case law and the distributive justice

Conversely, the Global South highlights a discussion relating to distributive

[109] *Neubauer* decision in note 107, §§ 192-193.
[110] *Ivi* § 122.
[111] *Ivi §§* 193; 205 e 206.
[112] *Ivi* § 178.
[113] S. Humphreys, *Against Future Generations*, cit., 1087.
[114] *Neubauer* decision § 172.
[115] *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552; [2022]2 NZLR 284 *(21 October 2021)*, §§ 1–2.
[116] *Ivi* § 16.

justice, benefiting from generally looser rules of standing, constitutionally empowered judiciaries, and a tendency to be more rights-based[117].

First of all, it's necessary to remember that the first case on future generations was ruled in front of Philippines' Supreme Court. *Minors Oposa v. Factoran*[118] case serves as testament to the potential of intergenerational climate justice. The claimant group of children in *Oposa* sought to interrupt ongoing large-scale deforestation through the cancellation of timber license agreements. The Supreme Court of the Philippines granted standing to the claimant group on the basis of future generations' rights, holding that intergenerational equity was inherent to the provisions of the Philippines' Constitution, which spoke of a «rhythm and harmony with nature».

Recently, a decision ruled in Pakistan shows as the case law developed from the mentioned judgment inspired courts and other actors across the world to explore the potential of the law to advance climate justice over time, like the essay on the defense of future generations underlines[119]. In *D.G. Khan Cement Company v. Government of Punjab*, the Supreme Court of Pakistan upheld a bar on the construction of new cement plants in environmentally fragile zones, consolidated this jurisprudence by powerfully stating: «Through our pen and jurisprudential fiat, we need to decolonize our future generations from the wrath of climate change, by upholding climate justice at all times»[120].

As we said before, in response to who doesn't sustain future generations' language, the most recent essay, appeared on the pages of European Journal of International Law, intervenes on defense of future generations. The Authors pointed out that adopting the language of future generations' rights has put future generations a tangible and vital part of the struggle for environmental and climate justice[121].

Enlightened by these premises, some domestic climate litigation can be read as a result of redistributive justice legal reasoning which concerns the fair and equitable distribution of resources throughout society, and provides moral guidance for the political processes and structures that affect the distribution of benefits and burdens in societies[122]. For example, in *Goa Foundation v. Union of India & Ors*[123], the Supreme Court created a trust fund for future generations by limiting the amount of mineable minerals. India's National Green Tribunal has held that intergenerational equity is inherent in the right to the environment and has enforced this understanding by ordering the regulation of vehicle traffic, reforestation and the saving of

[117] J. Setzer, L. Benjamin, *Climate Litigation in the Global South: Constraints and Innovations*, cit., 77–101
[118] Supreme Court of Philippines, *Oposa v. Factoran*, G.R. no. 101083, 30 July 1993, 224 SCRA 792.
[119] M. Wewerinke-Singh, A. Garg, S. Agarwalla, *In Defence of Future Generations*, cit., *passim.*
[120] Supreme Court of Pakistan, *D.G. Khan Cement Company v. Government of Punjab*, 2021 SCMR 834.
[121] M. Wewerinke-Singh, A. Garg, S. Agarwalla, *In Defence of Future Generations*, cit., at 12.
[122] J. Lamont, *Distributive justice* in *The Stanford Encyclopedia of Philosophy*, 2017.
[123] Supreme Court of India, *Goa Foundation v. Union of India & Ors.*, Writ Petition (Civil) no. 435 of 2012, Judgment (21 April 2014).

disappearing glaciers. The tribunal has also set aside orders approving the clearing of forestland, invoking future generations' rights. In the absence of competent government action, litigants are able to seek urgent and pressing climate justice through judicial protection by using the powerful device of future generations' rights[124].

In South Africa, the High Court has noted that intergenerational justice in the context of climate change necessitates the rejection of short-termism and requires consideration of the long-term impact of pollution on future generations[125]. Judges observe that the constitutionally protected right to a healthy environment could be invoked solely for the benefit of future generations and a potential violation is sufficient to establish a violation of the rights[126].

The High Court of Kenya, applying the principle of intergenerational equity, stressed that the present generation is legally obliged to maintain and enhance the diversity and productivity of natural resources for the benefit of future generations[127]

The essay that defends future generations[128] highlights the different point of view in which the interconnectedness of past, present, and future may be approached[129]. In particular, it refers to indigenous law and its conception of temporality that rejects the construction of the past, present, and future as separate or linear temporal categories[130]. For example, in Māori cultures, the intergenerationality necessitates that decisions have to be made with reference to the likely impact on the four generations hence, but encompassing all future descendants[131].

Indigenous perspective on future generations can be enucleated by the case law on ancestral land rights ruled by the Inter-American Court of Human Rights. In the first case, *Mayagna (Sumo) Awas Tingui Community v. Nicaragua* in 2001[132], it can be read: «For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve

[124] For an overview, see R. Basu, *Intergenerational Equity Case Study: Iron-ore Mining in Goa*, in 52 *Economic and Political Weekly* 18 (2017).
[125] High Court of South Africa, *GroundWork Trust & Vukani Environmental Justice Alliance Movement in Action v. Minister of Environmental Affairs & Others*, Case no. 39724/2019, [2022] ZAGPPHC 208 (2022), para. 41; see also Constitutional Court of South Africa, *Fuel Retailers Association of Southern Africa v. Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* [2007] ZACC 13.
[126] High Court of South Africa, *GroundWork Trust & Vukani Environmental Justice Alliance Movement in Action v. Minister of Environmental Affairs & Others*, § 82.4
[127] High Court of Kenya, *Waweru v. Republic of Kenya*, (2006) 1 KLR (E&L) §§ 677–696.
[128] M. Wewerinke-Singh, A. Garg, S. Agarwalla, *In Defence of Future Generations*, cit., *passim*.
[129] M. Liboiron, *Pollution Is Colonialism*, Durham, 2021.
[130] K.P. Whyte, *Indigenous Science (Fiction) for the Anthropocene: Ancestral Dystopias and Fantasies of Climate Change Crises*, in 1 *Environment and Planning E: Nature and Space*, 2018, 224 ss.
[131] M. Wewerinke-Singh, A. Garg, S. Agarwalla, *In Defence of Future Generations*, cit., at 4.
[132] IACtHR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment (Merits, Reparations, Costs), 31 August 2001.

their cultural legacy and transmit it to future generations»[133]. Afterward, the Court emphasized the importance of effective safeguards of indigenous land ownership, in order to transmit their culture to future generations[134]. The principle of intergenerational equity furthermore served as a basis for the right of restitution of land[135], as well as for the tribal community[136]. Rights and reparations are also recognised as a part of solidarity that involves past, present, and future generations[137].

The analyzed essay shows that these principles are jointed to climate change with the concurring opinion of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* decision written by judges Cançado Trindade, Pacheco Gómez and Abreu Burelli that says: «The concern with the element of conservation reflects a cultural manifestation of the integration of the human being with nature and the world wherein he lives. This integration, we believe, is projected into both space and time, as we relate ourselves, in space, with the natural system of which we are part and that we ought to treat with care, and, in time, with other generations (past and future), in respect of which we have obligations»[138]. The expressed integration is fundamental for climate justice.

In the *Leghari Case*, the High Court of Lahore underlines that «Climate Justice links human rights and development to achieve a human-centered approach, safeguarding the rights of the most vulnerable people and sharing the burdens and benefits of climate change and its impacts equitably and fairly. [...] Who is to be penalised and who is to be restrained?»[139]. For this reason, scientific and legal circles cannot neglect or dismiss these perspectives because climate justice recognizes that losses and damages resulting from climate change and pollution have a profound impact on indigenous communities and their territories, and the traditional knowledge and conservation practices of indigenous people have a crucial role to play in legal responses to the crises related to climate change[140].

For represent a full spectrum of climate litigation, defending future generations, Authors report the Colombian Supreme Court's landmark decision, in stark contrast to the German Federal Constitutional Court's decision in the case *Neubauer*. In *Lozano Barragán* case[141], judges take place from intergenerational equality and solidarity due to recognize future

[133] *Ivi* § 149.
[134] IACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment (Merits, Reparations, and Costs), 17 June 2005.
[135] IACtHR, *Sawhoyamaxa Indigenous Community of the Enxet-Lengua People v. Paraguay*, Merits, Reparations, and Costs, 29 March 2006, § 378.
[136] IACtHR, *Case of the Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, 28 November 2007, § 95.
[137] IACtHR, *Case of Bámaca-Velásquez v. Guatemala*, Merits, 25 November 2000, at 23.
[138] *Mayagna (Sumo) Awas Tingni Community*, *supra* note 109, Separate Opinions of Judges A.A. Cançado Trindade, M. Pacheco Gómez and A. Abreu Burelli, § 10.
[139] *Ashari Legari v. Federation of Pakistan* (W.P. No. 255501/2015), Lahore High Court Green Bench, § 21.
[140] M. Wewerinke-Singh, A. Garg, S. Agarwalla, *In Defence of Future Generations*, cit., at 6.
[141] *Andrea Lozano Barragán, et al. v. Presidencia de la República et al.*, Sentencia de la Corte Suprema de Justicia del 5 de abril del 2018, MP Luis Armando Tolosa Villabona, STC 4360-2018, Radicación no. 11001-22-03-000-2018-00319-01.

generations as rights holders and to declare the Amazon as a subject of rights. For these reasons, the judgement orders the government to formulate and implement an intergenerational pact for the life of the Colombian Amazon. The court's reasoning is presented as «heterodox legal reasoning grounded in decolonial thinking»[142] , with far-reaching implications for the protection of intergenerational rights.

Therefore, it is vital to surpass tort law categories and also to transcend national borders, and adopt a more comprehensive approach to tackle the complexities of climate change more effectively.

6. Some conclusive remarks

As the review shows, there are key distributive questions related to climate change, and the first step may be recognized the disparities between the Global North and South. Reconciling different approaches and understanding different arguments can significantly improve comprehension of the interdependence between the needs and rights of present and future generations. All these matters seem to pass by the renewal debate about intergenerational justice via climate litigation[143].

Unlike strategic climate litigation in the Global North, litigants in the Global South currently do not focus on eliciting new regulatory targets or instruments from governments on reducing emissions. Rather, they use existing legislative tools and human rights discourses to highlight the vulnerability of their populations to climate change and protect their valuable ecosystems[144]. Several landmark strategic climate litigation cases in the Global North are targeted at driving governmental ambition on climate change[145]. Differently, cases in the Global South tend to include efforts to protect important native ecosystems and focus on the destruction of emblematic ecosystems, giving continuity to ongoing efforts in the environmental movement.

The human rights-based approach kept by Global South Courts can provide procedural and substantive protection to citizens in the context of climate impacts, and can help to ensure that development-based projects do not result in adverse human rights consequences[146]. So strategic climate litigation in the Global South does not rely extensively on traditional tort-based approaches to climate damage against either state or non-state actors. In that scenario, it's important to underline the historical marginalization of communities in the Global South that have successfully vindicated collective

[142] P.A. Alvarado and D. Rivas-Ramírez, *A Milestone in Environmental and Future Generations' Rights Protection: Recent Legal Developments before the Colombian Supreme Court*, in 30 *Journal of Environmental Law* 524 (2018).

[143] For a systematic overview, H. Weston, *Climate change and intergenerational justice: foundational reflections*, in 9 *Vermont Journal of Environmental Law* 375–430 (2008).

[144] J. Setzer, L. Benjamin, *Climate Litigation in the Global South: Constraints and Innovations*, cit., at 85.

[145] Like the *Urgenda Case* Stichting Urgenda v. Government of the Netherlands (Ministry of Infrastructure and the Environment), ECLI:NL:RBDHA:2015:7145, Rechtbank Den Haag, C/09/456689/HA ZA 13-1396 (*Urgenda*).

[146] J. Setzer, L. Benjamin, *Climate Litigation in the Global South: Constraints and Innovations*, cit., at 88.

human rights in regional human rights bodies, so some national courts have a record of innovation in human rights and environmental rights[147].

The difference in approaches is related to the socio-economic and political contexts: actually colonial and post-colonial activities of Northern countries, combined with multinational corporate actors, have closed the human rights abuses and environmental destruction to issues of equity, survival, security, and human capital development[148].

It seems a return of a fundamental contraposition: the ethnocentrism and individualism designed by the Western Law versus the holism and diffusionism typical of systems beyond the Western legal tradition. Legal pluralism[149] – shaped by international environmental law, indigenous rights, human rights – can provide a valid basis for constructing frameworks for intergenerational justice. Recognizing the value of these diverse sources enables us to broaden our temporal perspectives and understand the link between past, present, and future.

Law has to face numerous challenges concerning intergenerational justice in the climate issues. Advocates of 'free market environmentalism' claim that the best way to solve our environmental and resource problems is to lower barriers to trade and to institute property rights in resources that are currently un-owned, or commonly owned[150]. But an analysis of the intertemporal distributional effects of the market represents a crucial step toward the development of an adequate theory of justice between generations. The market does not be the appropriate instrument to limit excess and conserve crucial natural resources. That because the economic system nowadays doesn't take in account that it would be wrong do what deprive the members of future generations of productive means to provide for their basic needs. On the other hand, Environmental legislation may often fail to protect natural resources from free market forces, but in the context of environmental protection and resource conservation, it has a better track record than the free market alternative[151].

It's necessary to go beyond the narrow interests of *homo economicus* and of known legal categories. Because it has made green capitalism to respond at Anthropocene's demands by placing science at the center of legal reasoning, like the Global North approach shows. The challenge is about Law to create a novel integration of contemporary economic, social, and political issues related to environmental protection, by looking beyond the economic theoretical framework and legal reasoning of Western Legal tradition.

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