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Intergenerational Justice from Theory to Practice The Rights of Future (and Present) Generations in Climate Litigation**

ABSTRACT (EN): This paper compares various philosophical approaches to the rights of future generations with the solutions adopted by national courts in climate litigation. It argues that two opposing visions emerge from this comparison: one that recognizes the rights of future generations as those of indeterminate groups of people, and another that views these rights as future projections of the rights of present individuals.

ABSTRACT (IT): Questo articolo mette a confronto diversi approcci filosofici al tema dei diritti delle generazioni future con le soluzioni adottate da alcuni tribunali nazionali nei contenziosi climatici. Da questo confronto emergono due visioni opposte: una che riconosce i diritti delle generazioni future in quanto gruppi indeterminati di persone, e un'altra che concepisce questi diritti come proiezioni future dei diritti degli individui presenti.

SUMMARY: 1. Ethics and Law in the Face of the Perfect Storm - 2. Theoretical Models of Intergenerational Justice Compared - 2.1. Who Are Future Generations? - 2.2. Intergenerational Rights or Duties? - 2.2.1. The Planetary Rights Theory - 2.2.2. The Chain of Obligations Theory - 3. From Intergenerational Theory to Climate Litigation - 3.1. The Amazon Case (Colombia) - 3.2. The Neubauer Case (Germany) - 4. Future Rights of Present Generations: A New Paradigm of Intergenerational Justice?

1. Ethics and Law in the Face of the Perfect Storm

Climate change is not just an environmental problem; it is, in all likelihood, the greatest justice issue of our time. Indeed, it involves so many interconnected ethical and legal issues as to be qualified as a “perfect moral storm”¹. On the one hand, climate change raises questions of intragenerational justice, insofar as its consequences affect most severely those who contributed least to causing it. On the other hand – and this is what this paper focuses on – it raises fundamental questions of intergenerational justice²: the greenhouse gas emissions that

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¹ S.M. GARDINER, *A Perfect Moral Storm: The Ethical Tragedy of Climate Change*, OUP, Oxford, 2011. The essential elements of this reflection were already anticipated by the same author in ID, *A Perfect Moral Storm: Climate Change, Intergenerational Ethics and the Problem of Moral Corruption*, in *Environmental Values*, n. 3, 2006, pp. 397 ff. In the following notes, particular reference will be made to the latter contribution.

² For an in-depth illustration of the intergenerational justice issues raised by climate change, see P. LAWRENCE, *Justice for Future Generations. Climate Change and International Law*, Edward Elgar, Cheltenham, 2014; H. SHUE, *Changing*

are responsible for it remain trapped in the atmosphere for decades or even centuries, thus projecting their effects onto subsequent generations. The latter thus suffer the consequences of global warming without having directly enjoyed the benefits generated by the emissions³.

The difficulties in addressing climate change from an ethical perspective are ultimately due to the temporal dispersion of the causes and effects of global warming⁴. Indeed, the consequences of climate actions (or inactions) occur over time: the global warming that is already taking place is a consequence of emissions released by past generations. Therefore, if humanity stopped emitting GHGs into the atmosphere, it would suffer immediate losses, in terms of higher energy costs and lifestyle changes, but it would not reap any immediate benefits, as the effects of climate change would continue. In contrast, if humanity remained inert, it would continue to enjoy its ordinary way of life, while the negative consequences of its inaction would be deferred over time. This dissociation between causes and effects generates a formidable incentive for inaction⁵.

Even more problematic, from a moral standpoint, is the ripple effect that any failure to act triggers, due to the incremental nature of climate change. As each new GHG particle released into the atmosphere is added to those released in the past, the inaction of one generation does not merely postpone the problem but contributes to exacerbating it. Thus, as a result of the previous generation's inaction, the next generation finds itself in an even more ethically difficult situation since as the problem worsens, the costs of action and, therefore, the incentive for inaction increase⁶.

To translate these considerations into human-rights terms, one needs to consider that the relationship between climate change and rights is two-sided⁷: on the one hand, global warming results in the violation of many fundamental rights, such as the rights to life, health, and water; on the other hand, climate action limits the enjoyment of those fundamental rights and freedoms that, in non-fully decarbonized societies, involve the release of GHGs⁸.

images of climate change: human rights and future generations, in *Journal of Human Rights and the Environment*, n. 5, 2014, pp. 50 ff.

³ Indeed, it should not be forgotten that present generations benefit from the greenhouse gases emitted in the past, as these have helped raise their living standards. Similarly, future generations will benefit in part from the effects of Co2 emissions produced by present generations. The fact that these benefits are disproportionately distributed among the peoples of the earth, as well as within national societies, raises issues of intragenerational justice, which are beyond the scope of this contribution.

⁴ This distinctive feature of the climate issue has been highlighted among others in Italian scholarship by M. CARDUCCI, *Cambiamento climatico (diritto costituzionale)*, in *Dig. disc. pubbl.*, 2021, p. 52 ff.; A. D'ALOIA, *Bioetica ambientale, sostenibilità, teoria intergenerazionale della Costituzione*, in *BioLaw Journal*, n. 2, 2019, p. 648.

⁵ It is what Stephen Gardiner calls "The Problem of Intergenerational Buck Passing": S.M. GARDINER, *Protecting future generations: intergenerational buck-passing, theoretical ineptitude and a brief for a global core precautionary principle*, in J.C. TREMMEL (ed), *Handbook of Intergenerational Justice*, Edward Elgar, Cheltenham, 2006, p. 148 ff.

⁶ *Ibid.*, 405.

⁷ Cf. O.W. PEDERSEN, *The Janus-Head of Human Rights and Climate Change: Adaptation and Mitigation*, in *Nordic Journal of International Law*, 2011, p. 403 ff.

⁸ The rights and freedoms that depend on greenhouse gas emissions are not only economic freedoms, but also those very rights that are directly affected by climate change: consider, for example, the devastating consequences that an absolute and immediate ban on the use of fossil fuels would produce in terms of the availability of basic necessities such as food and medicine.

At present, global warming causes the violation of the fundamental rights of millions of people, and, according to the scenarios described by the IPCC, the situation is set to worsen in the coming years, regardless of the countermeasures taken by the current generation⁹. In this context, adopting ambitious climate policies would mean restricting citizens' freedoms in the present without the prospect of reaping any benefits in the near future. On the other hand, inaction by today's decision-makers exposes those of tomorrow to the alternative of adopting even more radical restrictions on fundamental freedoms or passing the problem on to the next generation¹⁰.

How can we break this perverse mechanism before it leads humanity to a climate catastrophe?

Moral philosophy has long sought to provide answers to problems of intergenerational justice in general¹¹ and those related to climate justice in particular¹². These philosophical debates have also influenced legal scholarship, finding an echo in international law studies since the late 1980s¹³. More recently, constitutional law scholarship has also taken an interest in these issues¹⁴, prompted by the introduction of intergenerational concepts such as 'sustainability' or 'future generations' into numerous constitutions¹⁵. However, the theories advanced in this field, no matter how refined and rigorous, necessarily resolved into theoretical speculation, given the lack of positive data with which to test the findings of such elaborations.

Today it is possible to take this discourse a step further. Indeed, recent years have witnessed a widespread increase in climate litigations around the world, many of which feature intergenerational arguments. Of particular interest from this perspective are the so-called

⁹ See IPCC, *AR6 Synthesis Report: Climate Change 2023*, published in March 2023 and freely available at www.ipcc.ch.

¹⁰ S.M. GARDINER, *A Perfect Moral Storm*, cit., p. 405 ff.

¹¹ An early treatment of the intergenerational question from an ethical perspective can be found in J. RAWLS, *A Theory of Justice*, Belknap Press, Cambridge, 1971, p. 284 ff. But the first accomplished formulation of an intergenerational ethics is by H. JONAS, *Das Prinzip Verantwortung: Versuch einer Ethik für die technologische Zivilisation*, Suhrkamp, Frankfurt, 1979.

¹² See the writings collected in S.M. GARDINER, S. CANEY, D. JAMIESON, H. SHUE (eds), *Climate Ethics: Essential Readings*, OUP, Oxford, 2010; as well as the essays by E.A. PAGE, *Climate Change, Justice and Future Generations*, Edward Elgar, Cheltenham, 2006; E.A. POSNER, D. WEISBACH, *Climate Change Justice*, Princeton University Press, Princeton, 2010; H. SHUE, *Climate Justice: Vulnerability and Protection*, OUP, Oxford, 2016.

¹³ Numerous authors have examined ethical issues related to intergenerational responsibility from the perspective of international environmental law. In addition to the work of Edith Brown Weiss, to which we will return at length *infra*, see P. LAWRENCE, *Justice for Future Generations*, cit.; R.P. HISKES, *The human right to a green future: environmental rights and intergenerational justice*, CUP, Cambridge, 2009.

¹⁴ In Italian constitutional scholarship an essential reference are the works of R. BIFULCO, *Diritto e generazioni future. Problemi giuridici della responsabilità intergenerazionale*, FrancoAngeli, Milan, 2008; and D'ALOIA A., *Generazioni future (diritto costituzionale)*, in *Enc. diritto*, Annali IX, 2016, p. 337 ff.; as well as the collection of writings edited by the two authors: BIFULCO R., D'ALOIA A. (eds), *Un diritto per il futuro. Teorie e modelli dello sviluppo sostenibile e della responsabilità intergenerazionale*, Jovene, Naples, 2008. More recently, see the monographic books by PORENA D., *Il principio di sostenibilità. Contributo allo studio di un programma costituzionale di solidarietà intergenerazionale*, Giappichelli, Turin, 2017; L. BARTOLUCCI, *La sostenibilità del debito pubblico in Costituzione. Procedure euro-nazionali di bilancio e responsabilità verso le generazioni future*, CEDAM, Padua, 2020; G. PALOMBINO, *Il principio di equità generazionale. La tutela costituzionale del futuro*, Le Monnier, Florence, 2022.

¹⁵ T. GROPPi, *Sostenibilità e costituzioni: lo Stato costituzionale alla prova del futuro*, in *Dir. Pubbl. comp. eur.*, n. 1, 2016, p. 43 ff.

“youth-led” climate litigations, i.e., those brought by young people or children, either in their own name or via organizations representing their interests, for the purpose of denouncing violations of their rights due to climate change¹⁶.

In this paper I do not intend to conduct an analytical survey of these litigations, which have already been the subject of several studies¹⁷. Instead, I aim to ascertain whether and how the theoretical reconstructions developed in the ethical and legal literature have been implemented in the decisions adopted by the courts dealing with these disputes. The hypothesis I put forward is that in the comparative scenario, the courts have espoused different – in some ways opposing – understandings of the principles of intergenerational justice, reflecting the anthropocentric or ecocentric visions adopted by the respective legal systems with regard to the relationship between humans and the environment.

To advance this thesis, in the following paragraphs I will first outline some of the main models of response to intergenerational problems theorized in the ethical and legal literature, focusing in particular on the doctrine of *planetary rights* elaborated by Edith Brown Weiss¹⁸ and the doctrine of the *chain of obligations* formulated by Axel Gosseries¹⁹ (Section 2). Next, I will analyze in depth two emblematic cases of climate litigation, in which some aspects of the above theories have been transposed: the case of the Amazon in Colombia and the *Neubauer* case in Germany (Section 3). Finally, I will explain why I believe that the approach of the German Constitutional Court, based on the intertemporal protection of fundamental freedoms, represents an effective response to the transgenerational problems raised by climate change (Section 4).

2. Theoretical Models of Intergenerational Justice Compared

The scholarly literature on intergenerational responsibility and future generations is vast, making it impossible to provide a comprehensive overview here. Instead, I will outline a few essential issues that highlight the distinctive elements of the two theoretical models of response analyzed in this paper. These issues can be summarized by the following two questions: who are future generations? (Section 2.1); by what title are we obligated to them? (Section 2.2).

¹⁶ For a definition of youth-led climate litigation, see E. DONGER, *Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization*, in *Transnational Environmental Law*, n. 2, 2022, p. 269-270.

¹⁷ In addition to the already cited paper by E. DONGER, *Children and Youth*, cit., see also L. SLOBODIAN, *Defending the Future: Intergenerational Equity in Climate Litigation*, in *The Georgetown Environmental Law Review*, n. 32, 2020, p. 569 ff.; L. PARKER ET AL., *When the Kids Put Climate Change on Trial: Youth-Focused Rights-Based Climate Litigation around the World*, in *Journal of Human Rights and the Environment*, n. 13, 2022, p. 64 ff.; K. SULYOK, *A rule of law revolution in future generations' litigation - intergenerational equity and the rule of law in the Anthropocene in re:constitution Working Papers, Forum Transregionale Studien*, n. 14, 2023; D. SPENTZOUN, *Climate change litigation as a means to address intergenerational equity and climate change*, in *Queen Mary Law Journal*, n. 2, 2021, p. 153 ff.

¹⁸ E.B. WEISS, *In Fairness to Future Generations. International Law, Common Patrimony and Intergenerational Equity*, United Nations University, Tokyo, 1989.

¹⁹ A. GOSSERIES, *On future generations' future rights*, in *The Journal of Political Philosophy*, 2008, p. 446 ff. Some elements of this theory had already been enunciated by the same author in A. GOSSERIES, *Penser la justice entre générations, De l'affaire Perruche à la réforme des retraites*, Aubier, Paris, 2004.

2.1. Who Are Future Generations?

A primary challenge in addressing the issue of intergenerational responsibility from a legal perspective is defining the concepts of ‘present’ and ‘future’ generations. Generations do not succeed one another in a linear fashion but overlap, with at least two successive generations coexisting at each historical moment²⁰. Moreover, the very idea of clearly distinguishing one generation from the next is illusory, since what occurs in social reality is an uninterrupted flow (rather than an orderly succession) of generations²¹.

What, then, should be meant by ‘present’ and ‘future’ generations in the context of a theory of intergenerational responsibility?

Some authors, aware of the ambiguities inherent in these concepts, have proposed limiting the addressees of intergenerational obligations to those who are not yet born at the time they are referred to²². While this approach may have merits from a philosophical point of view, it does not seem acceptable from a legal perspective. It is hard to see why an intertemporal obligation (e.g., the obligation to achieve climate neutrality by 2050) should not apply to all persons who will be alive in the future, but only to those who have not yet been born at the time the obligation is recognized. This would amount to clear unequal treatment based on a purely accidental factor (whether or not one is born at the time the obligation is affirmed). Besides, climate litigations show that, in most cases, it is young people or children who have enforced the intertemporal obligations incumbent on policymakers, sometimes explicitly acting on behalf of (as part of) future generations²³. Therefore, for the purposes of this paper, it can be assumed that the addressees of intergenerational obligations are all those who will live in the future, regardless of whether or not they are born at the time these obligations are asserted.

Another issue associated with intergenerational justice is whether the obligations of the present generations are addressed only to the nearest generations or also to more distant ones. Some authors argue for limiting the subjective scope of intertemporal duties to the nearest generations, suggesting that only with these do present generations entertain an emotional and moral bond and can imagine their desires and needs with sufficient accuracy²⁴. However, from a legal perspective, these theses do not seem acceptable. The different gradations of affective intensity that bind subsequent generations, while relevant from a moral point of view, do not seem capable of delimiting the legal scope of intergenerational obligations. These obligations, from the moment they are legally affirmed, necessarily extend to all successive generations, regardless of when they come into existence. Indeed, all attempts to identify objective criteria to temporally delimit the scope of intergenerational duties, and thus to justify discrimination

²⁰ On this concept, see A. GOSSERIES, *On future generations' future rights*, cit., p. 455 ff.

²¹ See S. CANEY, *Justice and Posterity*, in R. KANBUR, H. SHUE (eds), *Climate Justice: Integrating Economics and Philosophy*, OUP, Oxford, 2018, p. 160-161.

²² J.C. TREMMEL, *A Theory of Intergenerational Justice*, Routledge, London, 2009, p. 19 ff.

²³ Emblematic in this regard is the *Generaciones Futuras* litigation settled by the Supreme Court of Colombia in 2018, to which we will return *infra*.

²⁴ Also on these positions is A. SPADARO, *L'amore dei lontani: universalità e intergenerazionalità dei diritti fondamentali fra ragionevolezza e globalizzazione*, R. BIFULCO, A. D'ALOIA (eds.), *Un diritto per il futuro*, cit., p. 72 ff.

among members of successive generations, rely on questionable parameters. For example, with reference to climate change, Simon Caney has proposed that the duration of each generation's duties should extend as long as the effects of its actions endure²⁵; which, given that some GHG remain in the atmosphere for hundreds of thousands of years, is de facto equivalent to saying "forever".

2.2. Intergenerational Rights or Duties?

What has been argued so far – namely, that intergenerational responsibility concerns all those who will live into the future, regardless of the time of their coming into being – is shared by both theories under examination here²⁶, which is why up to this point it has not been deemed useful to introduce a distinction.

The divergence begins when investigating the legal basis of intergenerational duties, specifically by what legal title present generations are obligated to future ones. The numerous doctrines advanced in legal scholarship can be divided into two categories: those that view future generations as holders of rights and those that affirm the existence of duties of present generations towards future ones without attributing correlative rights to the latter. The two theories considered below exemplify these distinct theoretical approaches: one recognizing future generations as planetary rights holders (Section 2.2.1), and the other depicting intergenerational responsibility as a chain of obligations between successive generations (Section 2.2.2).

2.2.1. The Theory of Planetary Rights

Theories involving the attribution of subjective rights in favor of future generations have attracted significant attention and garnered numerous adherents in the legal literature²⁷. Despite their popularity, these theories have faced theoretical challenges, mainly related to the objections of non-existence and non-identity.

The first objection is based on the assumption that persons belonging to future generations cannot hold rights in the present because they do not yet exist. They will hold rights when they are born, but since it is impossible to predict if and when this will happen, they cannot be considered rights-holders in the present²⁸. The second objection, based on a paradox formulated by Derek Parfit, posits that future people cannot resent the actions of present

²⁵ S. CANEY, *Justice and Posterity*, cit., p. 163.

²⁶ See especially E.B. Weiss, *In Fairness to Future Generations*, cit., p. 97.

²⁷ Among the earliest and best known voices in favor of recognizing rights in the head of future generations, see R. ELLIOT, *The Rights of Future People*, in *Journal of Applied Philosophy*, n. 6, 1989, p. 159 ff.; J. FEINBERG, *The Rights of Animals and Unborn Generations*, in E. PARTRIDGE (ed), *Responsibilities to Future Generations: Environmental Ethics*, Prometheus Books, Buffalo, 1981, p. 139 ff.; PARTRIDGE E., *On the Rights of Future Generations*, in D. SCHERER (ed), *Upstream/downstream: Issues in Environmental Ethics*, Temple University Press, Philadelphia, 1990.

²⁸ The best known formulation of this objection is due to W. BECKERMAN, J. PASEK, *Justice, Posterity and the Environment*, OUP, Oxford, 2001; W. BECKERMAN, *The Impossibility of a Theory of Intergenerational Justice*, in J.C. TREMMEL (ed), *Handbook of Intergenerational Justice*, cit., p. 53 ff.

generations because, without those actions, those same people would never be born. Parfit's argument hinges on the premise that present actions affect the identity of individuals who will live in the future, so even an irresponsible decision by a previous generation cannot be deemed to violate the rights of the members of subsequent generations, since, in its absence, those same individuals would not exist²⁹.

Proponents of the theories of the rights of future generations have responded to these objections with diverse and articulate arguments. Here, I will focus on the doctrine of planetary rights, formulated by American jurist Edith Brown Weiss in her 1989 essay *In Fairness to Future Generations*³⁰ and later elaborated upon in subsequent writings³¹.

Brown Weiss argues that any theory of intergenerational justice must be based on two types of relationships: our relationship with other generations of our species and our relationship with the natural system of which humans are a part³². Building on these premises, she qualifies the planet as the common heritage of all humankind and argues that each generation is simultaneously the custodian (trustee) and beneficiary of natural resources³³. More precisely, this theory claims that each generation holds a set of planetary rights and obligations, consisting on one hand of the right to receive the planet in no worse condition than the previous generation, and on the other hand, the obligation to preserve it so that subsequent generations can also benefit from the same opportunities as previous ones³⁴.

The distinguishing feature of this doctrine is that the rights affirmed therein are not individual rights but group rights³⁵, belonging collectively to each generation, regardless of the number and identity of the individuals composing it³⁶. These rights, therefore, do not concern relations between individuals of different generations, but between the various generations that constitute the human community³⁷.

The collective nature of planetary rights allows this theory to avoid the objections of non-existence and non-identity, as the recognition of these rights does not depend on identifying their holders³⁸. However, this same fact makes it challenging to apply this conception in liberal-based legal systems, such as those in Europe, where rights are traditionally conceived as individual claims that can be enforced by determined subjects. Conversely, this theory is

²⁹ D. PARFIT, *Reasons and Persons*, Oxford, 1987.

³⁰ E.B. WEISS, *In Fairness to Future Generations*, cit.

³¹ E.B. WEISS, *Our Rights and Obligations to Future Generations for the Environment*, in *American Journal of International Law*, n. 84, 1990, p. 198 ff.

³² E.B. WEISS, *Our Rights and Obligations*, cit., p. 199.

³³ E.B. WEISS, *In Fairness to Future Generations*, cit., p. 17.

³⁴ *Ibid*, p. 95.

³⁵ It should be noted, however, that, according to the author, these planetary rights, when held by living subjects, as part of the present generation, translate into individual rights, which can be enforced individually by their respective holders. Cf. E.B. WEISS, *In Fairness to Future Generations*, cit., p. 97.

³⁶ *Ibid*, p. 96.

³⁷ *Ibid*.

³⁸ Thus E.B. WEISS, *Our Rights and Obligations*, cit., p. 205.

compatible with a communitarian view of rights³⁹ or even with the attribution of rights to non-human subjects⁴⁰.

2.2.2. The Chain of Obligations Theory

A different approach to the issue of intergenerational responsibility is taken by theories that affirm the existence of obligations of present generations to future ones without attributing any rights to the latter. These theories are based on the assumption that not all obligations presuppose the existence of a right and that it is possible to assert the existence of an obligation without knowing the identity of the relevant beneficiary. While having the merit of avoiding the ethical-legal problems inherent in attributing rights to future subjects, these theories are subject to criticism due to the lesser moral and legal force generally associated with the category of duties. Indeed, it is often argued in legal literature that rights possess greater symbolic relevance and that their violation is usually followed by the activation of more effective remedies⁴¹. Hence, some authors have developed a theory that avoids the ethical-legal problems underlying the attribution of (individual or collective) rights to future subjects but does not abandon the symbolism and legal tools proper to fundamental rights.

One of the most persuasive theory of this kind is the “chain of obligations” theory, formulated by Richard Howarth in 1992⁴² and refined by Axel Gosseries in 2008⁴³. This theory is based on the assumption that generations do not succeed linearly but overlap, so that at any given time, at least two successive generations coexist. Given this premise, the theory suggests that each generation has an obligation toward the next generation with which it overlaps and, conversely, each generation has a right toward the previous one⁴⁴.

Schematically, assume generation A overlaps with generation B, and generation B overlaps with generation C, but generations A and C do not overlap⁴⁵. In this situation, the non-existence and non-identity objections prevent the attribution of rights to generation C vis-à-vis generation A, since, for the entire existence of the latter, the members of generation C will not be born⁴⁶. However, nothing precludes giving generation B an intergenerational right toward generation A, since the members of generation B are not future subjects but are flesh-and-blood persons⁴⁷.

³⁹ We refer to the current of thought aimed at configuring collective rights in the head of entire peoples or even the whole of humanity. To this category several authors, including in Italian scholarship, trace environmental rights. See S. RODOTÀ, *Il diritto di avere diritti*, Bari, 2015, p. 81.

⁴⁰ See in this sense also A. D'ALOIA, *Generazioni future*, cit., p. 365.

⁴¹ E.B. WEISS, *In Fairness to Future Generations*, cit., p. 101.

⁴² R.B. HOWARTH, *Intergenerational justice and the chain of obligation*, in *Environmental Values*, n. 1, 1992, p. 133 ff.

⁴³ A. GOSSERIES, *On future generations' future rights*, cit., p. 446 ff.

⁴⁴ *Ibid.*, p. 463.

⁴⁵ For similar schematizations, see G. BOS, *A chain of status. Long-term responsibility in the context of human rights*, in G. BOS, M. DÜWELL (eds), *Human Rights and Sustainability. Moral responsibilities for the future*, Routledge, Abingdon, 2016, p. 108.

⁴⁶ A. GOSSERIES, *On future generations' future rights*, cit., p. 462.

⁴⁷ Cf. R.B. HOWARTH, *Intergenerational justice*, cit., p. 135.

At first glance, the temporal extension of intergenerational obligations might seem limited to the life of the immediately succeeding generation, thus leaving unprotected those issues whose effects propagate beyond a human lifetime⁴⁸. However, the theory responds to this objection through what Gosseries calls the “transitive strategy”⁴⁹. This strategy consists in giving members of generation B the right to demand of A not only that it fulfills its duties to B, but also that it does not act in such a way as to make it impossible or excessively difficult for B to fulfill its duties to C. In this way, through a chain of transgenerational obligations, the members of the younger generation are given the power to ensure that present generations fulfill their obligations even to remote generations⁵⁰.

This theory differs substantially from the one set forth above for at least three reasons: first, it does not configure intergenerational rights as belonging to an indefinite collectivity but as individual rights attributed to the members of each generation. Secondly, it does not attribute rights to unborn individuals but to real persons, who acquire them at birth. Lastly, this theory does not require each generation to transmit the planet in at least the condition in which it received it but seeks to achieve an equitable distribution of the burdens arising from intergenerational obligations, so each generation can fulfill its duties without enduring excessive restrictions in the enjoyment of its own rights⁵¹.

3. From Intergenerational Theory to Climate Litigation

As noted above, climate litigation provides a good viewpoint for assessing the practical implications of different theoretical models of intergenerational justice. In this section, I will focus on two climate cases in which the theories just exposed seem to have found concretization: the Colombian case *Generaciones Futuras v Minambiente* (Section 3.1) and the German case *Neubauer* (Section 3.2).

3.1 The Amazon case (Colombia)

The first case⁵², settled by the Supreme Court of Colombia in 2018, was initiated by an *acción de tutela* (a form of *amparo*) brought by a group of young people aged between 7 and 25, who alleged that their constitutional rights had been violated as a result of the Colombian State’s failure to fulfill its national and international commitments to reduce deforestation in the Amazon.

⁴⁸ A typical example is that of nuclear waste, which can produce negative effects even a considerable time after it was generated.

⁴⁹ A. GOSSERIES, *On future generations' future rights*, cit., p. 461 ff.

⁵⁰ R.B. HOWARTH, *Intergenerational justice*, cit., p. 135.

⁵¹ A. GOSSERIES, *On future generations' future rights*, cit., p. 462-463.

⁵² Suprema Corte de Justicia, STC4360-2018, *Generaciones Futuras v Minambiente*.

The ruling gained significant attention in legal literature⁵³, particularly for recognizing the Colombian Amazon as a “subject of rights”⁵⁴. For the purposes of this paper, however, the focus is on the parts of the judgment addressing the rights of future generations.

Following a common pattern in youth-led climate litigations the plaintiffs had argued that, due to their young age, they would spend the central part of their lives between 2041 and 2070, when scientific evidence predicted an average temperature rise of more than 1.5°C in Colombia. They claimed therefore that the Colombian State, by failing to take adequate steps to counter Amazon deforestation, was contributing to the violation of fundamental rights they would face in the future due to climate change⁵⁵.

In its decision, the Court deviated from the plaintiffs' arguments to focus on the configurability of future generations' rights under the Colombian Constitution. This reasoning is framed as part of a radical critique of the “anthropocentric and selfish” model of liberal constitutionalism⁵⁶, to which the Court opposes the ecocentric “ideology”⁵⁷ underlying Colombia's “ecological constitution”⁵⁸. Within this framework, the rights of future generations are seen as part of a broader process extending the protection scope of fundamental rights. The Court asserted that rights should not only protect individuals but must also extend to all people living on the planet, including the “unborn”⁵⁹.

Especially noteworthy is the section of the judgment where the Court, using language similar to Edith Brown Weiss's⁶⁰, identifies the foundation of future generations' rights in the “ethical duty of solidarity of the species” and the “intrinsic value of nature”, of which future generations are part⁶¹. From this dual connection the Court derives a legal rights-duties relationship between generations, whereby present generations are charged with obligations to “care and custody of natural goods and the future human world”⁶², while future generations are entitled with the right “to benefit from the same environmental conditions enjoyed by us”⁶³.

Regarding the legal nature of these rights, the Court explicitly categorizes them as “collective rights”⁶⁴. In fact, in the case at hand, the Court recognizes the violation of the plaintiffs' rights, but not as individuals so much as part of a broader community that includes “all the inhabitants of the national territory, both for present and future generations”⁶⁵, and within a relationship

⁵³ Among many commentaries on this ruling, see P.A. ACOSTA ALVARADO, D. RIVAS-RAMIREZ, *A Milestone in Environmental and Future Generations' Rights Protection: Recent Legal Developments before the Colombian Supreme Court*, in *Journal of Environmental Law*, n. 3, 2018, p. 519 ff.; A. PELIZZON, *An Intergenerational Ecological Jurisprudence: The Supreme Court of Colombia and the Rights of the Amazon Rainforest*, in *Law, Technology and Humans*, 2020, p. 33 ff.

⁵⁴ Section 14.

⁵⁵ The plaintiffs' arguments are set out in paragraph 2 of the judgment.

⁵⁶ Section 4.

⁵⁷ Section 5.

⁵⁸ Section 7.

⁵⁹ Section 5.2.

⁶⁰ E.B. WEISS, *Our Rights and Obligations*, cit., 199.

⁶¹ Section 5.3.

⁶² *Ibid.*

⁶³ Section 5.2.

⁶⁴ Section 8.

⁶⁵ Section 11.

of solidarity that extends to "all the populations of the globe, including ecosystems and all living beings"⁶⁶.

In summary, the Colombian Supreme Court's view aligns closely with the planetary-rights theory discussed earlier. Both conceptions identify the foundation of intergenerational responsibility in a dual relationship of solidarity between human generations and between humans and nature. This results in an intergenerational legal relationship, whereby future generations have the collective right to benefit from the same environmental conditions as present generations, who, in turn, have the obligation to care for and preserve the planet for future generations.

Compared to Edith Brown Weiss's 1989 theory, the Colombian Supreme Court's arguments are more ecocentric, reflecting the cultural shift of recent Latin American constitutionalism. Elements of ecocentrism, however, were not absent in the thinking of the American jurist, who in some points of her theory referred to obligations that existed independently of a human counterpart⁶⁷. Therefore, it is reasonable to suggest that the theory of planetary rights contained the seeds for an ecocentric reading of intergenerational relations, which the Colombian judgment has realized.

3.2. The Neubauer Case (Germany)

The second case being examined is the landmark decision of the German Federal Constitutional Court issued in March 2021, in the Neubauer case, which ruled that the Federal Climate Act (KSG) was partially unconstitutional⁶⁸. The ruling is well known and has been the subject of extensive commentary⁶⁹. Here, we will focus specifically on those aspects pertaining to intergenerational responsibility.

The reasoning of the *Bundesverfassungsgericht*, as regards the relationship between present and future generations, can be summarized in four basic propositions: 1) Future generations do not hold fundamental rights; 2) The state is charged with protective obligations also towards future generations; 3) The burdens associated with the fulfillment of intergenerational obligations must be distributed equally among generations; 4) An unequal distribution of these burdens results in an anticipated impairment of the future enjoyment of the rights of present generations.

1) The first assumption is reiterated in several points of the judgment: a first time in section 109, where the Court - after stating that the plaintiffs are entitled to bring the action because they are "presently" (*gegenwärtig*) affected in their fundamental rights⁷⁰ - specifies that "the plaintiffs are not asserting the rights of unborn persons or even entire generations, neither of

⁶⁶ Section 11.3.

⁶⁷ See E.B. WEISS, *In Fairness to Future Generations*, cit., p. 23.

⁶⁸ Bundesverfassungsgericht (BVerfG), Beschluss des Ersten Senats, March 24, 2021, 1 BvR 2656/18-1BvR78/20-1BvR96/20-1BvR288/20, published on April 29, 2021.

⁶⁹ For some early comments from German doctrine, see the discussion "Der Klimabeschluss des BVerfG," sponsored by verfassungsblog.de, available at <https://verfassungsblog.de/category/debates/der-klimabeschluss-des-bverfg/>.

⁷⁰ Section 108.

whom enjoy subjective fundamental rights" but rather "are invoking their own fundamental rights"⁷¹.

The Court then returns to the point in section 146, where it states that the duty to protect life and bodily integrity flowing from Article 2(2) GG "has a solely objective dimension because future generations – either as a whole or as the sum of individuals not yet born – do not yet carry any fundamental rights in the present"⁷².

2) While the Court denies the possibility of conferring fundamental rights on future generations, either as individuals or as "groups", it shows no reticence in affirming the existence of a state duty to protect future generations. Indeed, the Court acknowledges in several points of its judgment the existence of such a duty, the basis of which is found in the duties of protection inherent in the objective dimension of Article 2(2) GG⁷³ and in Article 20a GG⁷⁴.

3) While the two propositions examined so far are in line with the previous case-law of the German Constitutional Court, it is in the last two propositions that the landmark implications of this decision become apparent. With the third proposition, in particular, the Court delivers an innovative interpretation of the principle of proportionality, which it declines for the first time in intergenerational terms. Indeed, the Court asserts that the burdens associated with the fulfillment of intergenerational obligations must be distributed equitably between generations and cannot be unilaterally passed on to the future, lest the principle of proportionality be violated⁷⁵. This leads the Court to conclude that "one generation must not be allowed to consume large portions of the CO2 budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom"⁷⁶.

4) Most importantly, it is the fourth and final proposition that introduces an element of rupture with the Court's previous case-law, whose future implications may extend far beyond the environmental field. The Court, in fact, after rejecting the exceptions of unconstitutionality of the KSG for violation of the duties of protection set forth in Sections 2(2) and 14 GG, goes on to review the legitimacy of the same Act with respect to the defensive right to freedom protected by Section 2(1) GG. This shift allows the court to assess the legitimacy of the measure in light of the (far more restrictive) test for defensive rights. We are not here to examine the perplexities that this operation has aroused in German scholarship⁷⁷. For the purposes of this paper, however, it is worth noting that to achieve such result the Court introduced two concepts hitherto unknown to German dogmatics.

⁷¹ Section 109.

⁷² Section 146.

⁷³ *Ibid.*

⁷⁴ Section 193.

⁷⁵ Section 192

⁷⁶ Section 192.

⁷⁷ Several authors have raised concerns about the BVerfG's use of the *Elfes* doctrine to assert, through the direct constitutionality appeal, the violation of the protection mandate affirmed by Article 20a GG, thereby "subjectivizing" an obligation that, under German constitutional law, is objective in nature. In this sense, see C. MÖLLERS, N. WEINBERG, *Die Klimaschutzentscheidung des Bundesverfassungsgerichts*, in *Juristen Zeitung*, 76, 2021, p 1069 ff.

The first concept is that of the "advanced interference-like effect" (*eingriffsähnliche Vorwirkung*)⁷⁸, which consists in devising an infringement of a fundamental freedom when a given action (or inaction) in the present makes it inevitable that measures restrictive of that same freedom will be taken in the future in order to fulfill the constitutional obligations incumbent on the state⁷⁹.

The second innovation is to configure fundamental rights as an "intertemporal guarantees of freedoms" (*Intertemporale Freiheitssicherung*)⁸⁰: according to this new conception, fundamental rights require the state to safeguard freedoms "over time" (*über die Zeit*) and to proportionally distribute the opportunities associated with freedom among generations⁸¹. Hence, where the legislature shifts the burdens of reducing Co2 emissions to the future, this results in an anticipated violation of those fundamental freedoms whose exercise involves the emission of Co2, which will undergo severe restrictions in the future in order to fulfill the constitutional obligation to achieve climate neutrality⁸².

In conclusion, it is important to emphasize that the intergenerational obligation to safeguard freedom over time, derived from Article 2(1) GG, does not have an objective nature, unlike the protective duties arising from Articles 2(2) and 20a GG. Instead, it has a subjective nature, corresponding to the recognition of a subjective right for specific individuals⁸³. This means that the affirmation of such an obligation corresponds to the recognition of a subjective right upon specific persons. These individuals, for the reasons stated above, are not members of future generations, who under German Basic law do not have rights, but rather individuals belonging to the present generation, whose future enjoyment of fundamental rights is at risk⁸⁴.

4. The Future Rights of Present Generations: A New Paradigm of Intergenerational Justice?

The solution indicated by the German Federal Constitutional Court represents, in my opinion, an effective and "exportable" model of response to the problems of intergenerational justice. Structurally, it mirrors elements of the "chain of obligations" theory analyzed earlier. Specifically, it draws a clear distinction between the living members of present generations, to which the claimants belong, and the unborn: the latter are recipients of obligations but do not hold any rights in the present, either as individuals or as groups. In contrast, members of the

⁷⁸ Section 183.

⁷⁹ Section 187.

⁸⁰ Section 182 ff.

⁸¹ Section 183.

⁸² Section 243.

⁸³ See Leitsatz No. 4 of the ordinance: "In their subjective dimension, fundamental rights – as intertemporal guarantees of freedom – afford protection against the greenhouse gas reduction burdens imposed by Art. 20a of the Basic Law being unilaterally offloaded onto the future".

⁸⁴ As noted by German scholarship, ultimately, the issue of intergenerational justice is of secondary importance in the Court's argument, which instead bases its decision on the future impairment to the plaintiffs' rights. See R. SINDER, *Anthropozänisches Verfassungsrecht als Antwort auf den anthropogenen Klimawandel*, in *Juristen Zeitung*, n. 76, 2021, p. 1078 ff.; M. BECKMANN, *Das Bundesverfassungsgericht, der Klimawandel und der "intertemporale Freiheitsschutz"*, in *UPR Umwelt- und Planungsrecht*, n. 7, 2021, p. 241 ff.; S. LENZ, *Der Klimabeschluss des Bundesverfassungsgerichts - Eine Dekonstruktion*, in *Der Staat*, n. 61, 2022, p. 99 ff.

present generation currently hold fundamental rights whose scope of protection extends to their future enjoyment. This enables present generations, particularly the younger ones, to demand the fulfillment of intertemporal obligations by invoking fundamental rights protection remedies.

These remedies, for their part, while focused on the future rights of present generations, also provide indirect protection for future people⁸⁵. In fact, under the transitive principle mentioned earlier, the State is obligated not only to safeguard the rights of current generations to continue enjoying their freedoms over time but also to ensure that these individuals will not face disproportionate restrictions on their freedoms in the future to fulfill obligations to subsequent generations. Through this chain of obligations, therefore, the interests of even remote future generations can acquire legal representation in the present time as a future projection of the rights of younger generations⁸⁶.

In conclusion, this model appears capable of achieving many of the goals pursued by the theory of the rights of future generations without encountering the theoretical and practical criticisms that have traditionally accompanied this latter category.

From a theoretical perspective, this solution avoids objections related to "non-existence" and "non-identity", as it does not grant rights to unborn subjects or indeterminate collectivities, but to actual persons. Practically, it mitigates the problem of standing, as intertemporal claims can be asserted by living individuals, provided they can demonstrate an "advanced interference-like effect" on the future enjoyment of their fundamental rights. Additionally, it clarifies ambiguities surrounding the notions of "rights" of future generations, addressing which rights future generations are entitled to and what their interests may be. According to this theory, in fact, the 'rights of future generations' ultimately consist in the future projection of the rights of present generations.

It could be argued that this theory, instead of abandoning the individualistic approach characterizing the Western legal tradition and often blamed for environmental deterioration, projects the same anthropocentric view into the future. Without delving into the anthropocentrism versus ecocentrism debate, which is beyond the scope of this contribution, it should be noted that environmental problems such as climate change require immediate decisions with a much closer time horizon than previously thought. While ecocentric legal concepts like planetary rights may prove more effective in the long run, they would necessitate a radical shift in constitutional paradigms, a change that currently seems distant. The new conception emerging from the German Constitutional Court's decision, on the other hand, does not challenge the fundamental postulates of liberal constitutionalism. Instead, it seeks to reinterpret them in the light of intergenerational responsibility, making it a realistically reproducible model even in systems where human dignity is considered the axiological foundation of every fundamental right.

⁸⁵ P. MINNEROP, *The "Advance Interference-Like Effect" of Climate Targets: Fundamental Rights, Intergenerational Equity and the German Federal Constitutional Court*, in *Journal of Environmental Law*, n. 34, 2022, p. 158 ff.

⁸⁶ Cf. G. BOS, *A chain of status*, cit., p. 116.