INTERGENERATIONAL JUSTICE FROM FUTURE GENERATIONS TO EARTH SYSTEM GOVERNANCE. VIA CLIMATE LITIGATION, COULD LAW WRITE A NEW INTEGRATION BETWEEN CONTEMPORARY ECONOMIC, SOCIAL, AND POLITICAL ISSUES?

The most recent debate about the climate crisis, environmental protection, and sustainable development is closely linked to the reflection on 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, the pages of the European Journal of International Law show two polarised positions: one against and one in defense of future generations.

By now, there's no debate about challenging 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. But there's 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 appeal 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.

Existing approaches seem to fall into two general categories: rights theory and cost-benefit analysis. The first asserts the priority of individual rights over a comprehensive theory of the good. Based on social contract theory, there is no concept of the common good, and this view relies on an individualistic view of human nature. In this way, members of future generations – being only possible – cannot be identifiable rights holders in the usual sense, and in any case fall into Parfit's identity paradox. But a sense of intergenerational responsibility is intuitive and intergenerational justice in rights-oriented language is acutely frustrated. This frustration is evident, for example, in American law, when we look at the case-law development of the Natural Historic Preservation Act. 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 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.

The cost-benefit approach, on the other hand, takes a non-individualistic view of intergenerational justice. It's a competing approach that uses cost-benefit analysis as a method for evaluating and choosing among policies that affect future generations. According to the utilitarian view, the primacy of the common good over individual rights imposes obligations on present generations before future ones and these obligations tend to maximize utility, i.e. the overall happiness of present and future people. In this way, lines of responsibility and corresponding sacrifice run from deep in the past through our fraught present and continue indefinitely before us.

The question is not whether there will be sacrifice – there must be – but in what form: whom to sacrifice, and who will choose to sacrifice.

Since 1987, however, Bobertz has spotted a deeper sense in which the cost-benefit approach reinforces the individualistic focus it seems to escape. Utilitarian analysis weighs values in order to reach the best decision for all: the weight of values is instrumental to the satisfaction of individuals. So the need to translate broad environmental and intergenerational goals into the vocabulary of individualism tends to undermine the goals themselves.

It's essential to consider alternative theories and legal structures compatible with a non-individualistic view of human nature. Development in climate litigation provides numerous concepts to envision a suitable degree of legal safeguard for future generations.

The mentioned essays about protecting or opposing future generations enable us to analyze the different approaches of the Global North and the Global South environmental case law. In the first ones, it can be underlined Decision ruled by the German Constitutional Court on March 2021, with which judges affirm that the 'legislature has considerable leeway in deciding how to strike an appropriate balance between the interests of property owners exposed to risks from climate change and the interests opposing more stringent climate action'. Enlightened by this principle, we can observe how all 'waves' of climate change litigation, also the ones between private parties, 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. The legal language uses the tort law categories because everything about climate change consequences can be defined within restorative justice. Conversely, the Global South highlights a discussion relating to distributive justice. From *Oposa v. Factoran* decision, ruled by Philippine Supreme Court on July 1993, case law illustrates that intergenerational climate justice is not an abstract concept but a practical actionable component of the broader struggle for climate and environmental justice worldwide. In particular, future generations' discourse can provide marginalized or disadvantaged groups with a platform to assert their rights and demand climate justice. It is crucial that remedies ordered in climate litigation cases address the complex and multi-layered nature of the climate problem and the concomitant justice questions it raises. 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. There are key distributive questions related to climate change and recognizing the disparities between the Global North and South can significantly improve comprehension of the interdependence between the needs and rights of present and future generations.

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 - shaped by international environmental law, indigenous rights, human rights, and new interpretation of private law under a 'green principle' - 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 interconnectedness of the past, present, and future.

There are numerous challenges that the law encounters in responding to interrelated earth system governance. In order to become more aware and reflective of the functioning of the earth system, as well as the intricate governance implications of a coupled earth system, it must overcome these challenges. 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. Beyond the narrow interests of *homo economicus*, green capitalism seems to overrun the Anthropocene approach by placing science at the center of legal reasoning. Could Law facilitate a novel integration of contemporary economic, social, and political issues related to environmental protection?

CLARISSA GIANNACCARI
PH.D. IN PRIVATE COMPARATIVE LAW
SAPIENZA – UNIVERSITÀ DI ROMA
clarissa.giannaccari@uniroma1.it

SHORT BIBLIOGRAPHY

- M. WEWERINKE-SINGH, A. GARG, S. AGARWALLA, *In Defence of Future Generations: A Reply to Stephen Humphreys*, in *The European Journal of International Law*, 2023, pp. 1-17
- S. HUMPHREYS, *Against Future Generations*, in 33(4) *The European Journal of International Law*, 2022, pp. 1061–1092.
- SOMMA, *Il diritto del sistema terra. Democrazia, capitalismo e protezione della natura nell'antropocene*, in *DPCE Online*, 2, 2022, pp. 275-311.
- L. J. KOTZÉ ,*Neubauer et al. versus Germany: Planetary Climate Litigation for the Anthropocene?*, in 22 *German Law Journal*, 2021, 22, pp. 1423–1444
- S. A. ATAPATTU, C. G. GONZALES, S. L. SECK (eds.), *The Cambridge Handbook of Environmental Justice and Sustainable Development*, Cambridge, 2021.
- H. SHUE, *The Pivotal Generation. Why We Have a Moral Responsibility to Slow Climate Change Right Now*, Princeton, 2021.
- S. BOGOJEVIĆ, *Human rights of minors and future generations: Global trends and EU environmental law particularities*, in 29 *Review of European, Comparative & International Environmental Law*, 2020, pp. 191–200.
- SETZER, L. BENJAMIN, *Climate Litigation in the Global South: Constraints and Innovations*, in 9(1) *Transnational Environmental Law*, 2020, pp. 77–101
- E. GAILLARD, *L'entrée dans l'ère du droit des générations future*, in 3 *Les cahiers de la justice*, 2019, pp. 441-454.
- MOTUPALLI, *Notes and Comments, Intergenerational Justice, Environmental Law, and Restorative Justice*, in 8 Washinghton Journal of Environmental Law & POLicy, 2018, pp. 333-361.
- BUTTI, *The Tortuous Road to Liability: A Critical Survey on Climate Change Litigation in Europe and North America*, in 11(2) *Sustainable Development Law & Policy* 2011, pp. 32-26, 82-84.

- H. WESTON, *Climate change and intergenerational justice: foundational reflections*, in 9(3) *Vermont Journal of Environmental Law*, 2008, pp. 375-430.
- WOLF, *Markets, Justice, and the Interests of Future Generations*, in 1(2) *Ethics and the Environment*, 1996, pp. 153-175
- BROWN WEISS, *In Fairness To Future Generations and Sustainable Development*, in 8(1) *American University International Law Review* 1992, pp. 19-26.
- B. C. BOBERTZ, *Toward better understanding of intergenerational justice*, in 36(1) *Buffalo Law Review*, 1987, pp. 165-192.