The Environmental Rule of Law, Intergenerational Equity and Climate Litigation in Latin America

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I. Introduction

Climate change has a dual characteristic, that is, as soon as it has become a challenge, it becomes the main problem facing the world since the 1990s.[1] As a result, the international system has had to develop joint efforts between scientists, NGOs, UN agencies, diplomats, lawyers, academics, citizens and others, trying to put climate change on the political agenda in an interdisciplinary way. However, an interesting dimension that intertwines the behaviour of the international system is the normative role in it, so throughout this research the key aspects of a "new environmental rule of law"[2] and its interaction with the new dynamics in environmental litigation from the global north to the global south, where the main focus will fall on the role of the principle of intergenerational justice and its interactions.

International law, including international courts, is undergoing significant changes in its cultural legal response to the challenges of climate change. The problems of climate change transcend national borders, so the idea of a transnational rule of law is more powerful when seen through the lens of the ecological crisis, but even more so when seen through the lens of climate litigation. For example, emissions or actions by one State are explicitly intended to have adverse consequences on other States and, in many cases, in areas over which States have no traditional jurisdiction or sovereignty, consequently indicating that climate change gives rise to reasons to strengthen the legal protection of biodiversity but also the protection of the ozone layer, the protection of the oceans and other objects of protection, all of them understood as issues that require global action and global governance.[3] Notwithstanding this governance, it must start by redefining a new notion of the rule of law but even more so it must redefine the value of intergenerational justice in the discussions between the Global North, the Global South and climate.

To understand the major transformations of the transnational demand for environmental governance, we will refer to the conceptualization of Patterson and others, who say that fundamental changes in the structural, functional, relational and cognitive aspects of systems lead to new patterns of interactions and outcomes.[4] It places an explicit focus on the processes of change in human society involved in moving towards more sustainable and equitable futures, which can be addressed both normatively (as a good/desirable thing to do) and analytically

1 Hajer & Versteeg (2011).

2 This debate had already been introduced in the text by Tarlok (2001). However, it didn't have an extension to climate litigation.

3 Sands (2017) p. 22.

4 See discussion in text, Patterson *et al.* (2017) .

(what actually happens and how and why). The normative and analytical level of this analysis will allow us to jump to the relevance of intergenerational climate litigation from its bases in the global north to the phenomenon of transformation under the eaves of the global south.

Without a doubt, climate change intensifies the risks to the values of the democratic rule of law, so the relentless spread of fires, floods, storms and droughts that entwine especially the global south, will lead to direct and indirect devastation that threatens our most precious institutions, as well as our homes and livelihoods. Furthermore, it is worth asking whether this issue is an adaptive problem or, to what extent, is the urgency rating for mitigation. But without hesitation, climate change can alienate some values from the rule of law, so the question immediately arises whether the climate factor should trump the law and guide a transnational democracy that governs climate change. The understanding of the rule of law has raised the development of cooperation, the international community and rights[5] establishing recognition of democratic political systems, accompanied by the expansive ideals of justice and democratic governance, however it is still not possible to affirm that this system resists the pressure of the climate crisis. Therefore, are there options to reinterpret the rule of law? In my opinion, yes, only if it is understood in transnational terms, that is, an international system that operates through the redefinition of justice in deeper terms (temporal, spatial and intergenerational) and that deals with legal, political configurations. and emerging social.[6]

When talking about redefining justice, it is necessary to link the elements between the environmental rule of law as a legal paradigm of transformation and the international principles of these rules, then the leap between the rule of law and the principles will be based on what Brown Weiss said, who has proposed normative principles of intergenerational equity that provide a practical basis on which the rights of future generations can be observed.[7] Undoubtedly, this practical base will be oriented in climate litigation. Many of these cases follow a broader trend of climate concerns, embedded in disputes over human rights, constitutional rights, environmental protection, land use, disaster management and natural resource conservation, even though this is often a local issue, develop an extension as an instrument of transnational climate governance, new

5 Carlarne (2020) p. 17.

6 Skillington (2019) p.14.

7 See Brown Weiss (1992).

State practices[8] and as a way to reinforce 'bottom-up' State commitments to climate action carried out through NDCs under the Paris Agreement.[9]

This text will begin with the genesis of the environmental rule of law, referring to Decision 27/9 of the Governing Council of the United Nations Environment Program ("UNEP"), and the many developments that have since contributed to the acceptance of the rule of environmental law. Subsequently, we will see how it is being consolidated as a transnational phenomenon through environmental principles and then, we will analyse how it can become a necessary tool in intergenerational climate litigation in the Global South, giving a geographical role to this area based on the Sabin Center study from Columbia University, which records that there are 86 active cases as of March 2023, which involve different environmental conflicts for LATAM.[10]

II. The "Environmental Rule of law" in the international system

First of all, we would say that the concept of environmental rule of law was articulated for the first time in "Decision 27/9 on the promotion of justice, governance and law for environmental sustainability," particularly in 2013 by the UNEP Governing Council. This decision is a recent development in a decades-long evolution of international environmental law and related institutions. However, upon the emergence of this definition, it should be noted that at the international level various environmental concepts have been placed in a very rigid and conservative international environmental system, which is probably due to the structures of universal economic models, which is why some authors such as Kreilhuber and Kariuki point out that "international legal regimes governing the environment continue to face an uphill battle to effectively counteract environmental degradation and the major environmental challenges of our time."[11]

In February 2013, the UNEP Governing Council adopted the first internationally negotiated document that succeeded in stipulating the concept "environmental rule of law," and this constitutes a major milestone. The Decision underlined the fact that environmental laws must go hand in hand with strong enforcement institutions, as this is the only way to respond to growing environmental pressures in a way that respects fundamental rights and principles of equity, including for future generations (principle of intergenerational justice).

8 Alogna & Clifford (2021), p. 13.

9 Peel & Lin (2019), p. 679-680.

10 See the page about the Global Climate Change Litigation Database includes all cases except those in the U.S. Available at https://climatecasechart.com/non-us-climate-change-litigation/

11 Kreilhuber & Kariuki (2019), p. 593.

Therefore, the rule of environmental law was the starting point for the achievement of the Sustainable Development Goals and environmental targets.[12]

However, the environmental rule of law has been debated at an academic level for a long time, in recent times there has been a certain conceptual consensus on the matter, in fact the vast majority of authors maintain that "the rule of law in the field of environment, develops when laws are widely understood, respected and applied and people and the planet enjoy the benefits of environmental protection.[13] In other words, the environmental rule of law is positioned in the promotion of three pillars of sustainable development: economic, social and environmental."[14] It should be noted that many of these ideas are raised from the Halliday and Carruthers approach on the relationship between national legislation and international legislation, in which both authors point out that standards must not only be considered at a global level but that their local influence is conditioned by the channels of transmission to national scenarios.[15] With this, in principle a national implementation will be needed anchored to recursive processes, through which global and national legislation interact dynamically.

Faced with the growing environmental complexities, many authors highlight that environmental law regulations should be oriented towards considering human rights, environmental law, jurisprudence, climate litigation and environmental governance as a whole, since it is increasingly necessary to solve problems of environmental justice issues in a systematic way. However, these issues must be understood by describing the elements of the environmental rule of law, and following this line we will say that its primary components[16] are:

"1. Fair, clear, and enforceable environmental laws;

2. Public participation in decision-making and access to justice and information in environmental matters, in accordance with Principle 10 of the Rio Declaration;

3. Accountability and integrity of institutions and decision-makers, including through the active engagements of environmental auditing and enforcement of environmental laws and regulations.

through the active engagements of environmental auditing and enforcement;

12 *Ibidem*.

13 Tarlock (2001), pp. 611-616.

14 Kreilhuber & Kariuki (2019), p. 592.

15 Halliday & Carruthers (2009).

16 These elements can be further explored in the declaration of the World Congress on Justice, Governance and Law for Environmental Sustainability, 2020, Rio + 20 Declaration on Justice, Governance and Law for Environmental Sustainability.

4. Accessible, fair, impartial, timely, and responsive dispute resolution mechanisms, including developing specialized expertise in environmental adjudication, and innovative environmental procedures and remedies;

5. Recognition of the mutually reinforcing relationship between human rights and the environment;

6. Specific criteria for the interpretation of environmental law."

Both points 5 and 6, will be the subject of this investigation, agree that they are unified for the recognition of the relationship between human rights and the environment, as well as intertwined with the specific criteria for the interpretation of environmental law as forms of reinterpretation. of global dynamics. Now, when are these criteria unified and to what extent do they constitute a transformation for international law? Regarding the question, we would say that the answer lies in the role of environmental law principles, transnational environmental rule of law, and climate litigation.

III. The Principle of intergenerational equity such as transformation of the Environmental Rule of Law and the International Community

The environmental rule of law can be extrapolated to transformations in the international community, as long as it manages to overcome the categories of classical environmental governance. To do so, attention must be paid to the role of intergenerationality in this debate, as the environmental rule of law often depends on decision-making in the face of great uncertainty. In other words, the rule of environmental law is applied on long time scales, acting on time scales of many centuries and much longer, which naturally implies developing the principle of intergenerational equity as a legal design inspired by the protection of individual interests. and groups of citizens and future generations in the long term.

This idea will reinforce the thesis that when the rule of environmental law is adopted, the principle of intergenerational equity is naturally extended to different conflicts. This type of justification has been seen in the so-called "peripheral legal arguments"[17] in climate litigation in countries of the Global South, which allude to the peripheral concept "not as the result of a lack of climate laws, deficient implementation of climate laws or a prioritization of other environmental or

17 See the concept and the cases in Grantham Research Institute on Climate Change and the Environment, Climate Change Laws of the World, supra note 12. The litigation database was searched for all years and countries, excluding the United States, and included data from the countries of the Global South.

sustainable development issues, but rather, quite the opposite since it is alluded to to an adaptation of jurisprudence to the applicable climate legal frameworks and the climate policy priorities of these jurisdictions."[18]

Now, in order to outline this research, we will come to assert that the principle of intergenerational equity is the main way to contribute to our understanding of the promotion of the rule of law at the international level, since from this principle it is possible to address the dynamics of the rule of law in an era of international and transnational governance as well as in a cycle of environmental litigation. It should be noted that by using the term 'dynamics' we refer not only to the growing international and transnational dimensions of rule of law promotion, but also to the interaction between the international and national levels of law.[19] It will therefore be relevant to understand the heart of the principle of intergenerational equity, in order to engage in the debate on transnational environmental litigation.

The principle of intergenerational equity was initially subsumed by other principles and instruments, which dispersed its content and application; in fact, authors such as Catherine Redgwell call this process the "denaturing of progressive intergenerationalization". At the same time, international courts and States have not been able to specify the content of intergenerational equity after the Rio"[20]. Indeed, one explicit effect of this conceptual absorption is the emergence of the principle of sustainable development, which ended much of the political and legal favour of the 1990s and 2000s as a paradigm for mediating between economic and environmental interests.[21] Due to this, for example, emerging climate disputes are in a process of interpretation as to how the principle enters into legal terms.

Not only has the principle of sustainable development subsumed the principle of intergenerational justice, but "intergenerational equity was soon replaced by the precautionary principle."[22] Many of these interpretations were held on the basis that this principle was more linked to the idea of risk, however, later we will see that this is not so, since there are cases of interpretation of the principle of intergenerational responsibility that show an effective model of legal protection. In a simple way, the thesis of this research maintains the idea of authors such as Bertram, who points out that "the fragmentation of the beginning further diluted the idea of intergenerational balance at its core. Weighing intergenerational versus intragenerational concerns, such as economic growth, tipped the balance

18 Peel & Lin (2019), p. 692.

19 Zürn, Nollkaemper & Peerenboom (2011), p. 4.

20 Bertram (2023), p. 127.

21 Barral (2012).

22 Redgwell (1999), pp. 138-140.

in favour of present interests and allowed States to retain the symbolic value of intergenerational equity without having to fully commit to its content."[23]

However, at the level of law, it is worth mentioning that "although international law has largely resisted the expansion and deepening of intergenerational equity, the national level has been much more receptive in terms of legislative and litigious activity," and even Jacqueline Peel said that: "the diversity of legal developments with respect to climate change [...] amply makes the case that the last few years have witnessed the emergence of a new legal discipline, that of climate change law. [...] The innovativeness of the case law in particular – decided as it was in the absence of a national regulatory system for climate change – provides an encouraging indication of the law's capacity to evolve and adapt to deal with this new environmental problem."[24]

In a 2021 quantitative study, Renan Araújo and Leonie Kössler find that as many as 81 of 196 national constitutions include some reference to future generations, and most of these provisions arose in the last 30 years.[25] This is where the first deliberative approaches to the beginning of the principle arise, from local political systems to the international arena. This leads the various investigations of the aforementioned authors to conclude that "future generations seem to be an important part of the nucleus of a modern and universalist constitutional language."[26] Indeed, the same authors explain that the path of expansion of the principle of intergenerational justice must enshrine an "embodied set of [intergenerational] interests as a strategic tool to justify strict environmental protection without having to do so because it adopted a politically more controversial ecocentric perspective."[27] In line with this theme, the principle of intergenerationality will be considered a rather offensive "anticipated effect" of fundamental rights and this will be the element that will be oriented, not only to the possibility to protect fundamental rights against extreme threat, but will also think about them in the long term and in their entirety.[28] As a result of this, the idea arises that the union of the principle of intergenerationality through climate change litigation provokes an "imperative to care for the natural foundations of life in such a way that they allow them to be bequeathed to future generations in a state that leaves them no choice but radical austerity."[29]

23 Bertram (2023), p. 127.

24 Peel (2008), pp. 977-978.

25 Araújo & Koessler (2021), p. 10.

26 *Ibidem*.

27 *Ibidem*. pp. 15-16.

28 Rochfeld (2022), p. 165.

29 *Ibidem*, pp. 165-166.

IV. The Principle of intergenerational equity extrapolated to Global Litigation

During the last years, international reports, academic articles and international institutions have identified an exponential increase in climate litigation and judicial responses to the global discourse on climate jurisprudence.[30] Authors such as Elizabeth Fisher said that the International System has maintained the consensus opinion in cases of climate litigation, understanding these not only as a series of strange cases before the courts of justice, but as phenomena with a "regulatory role that cuts across multiple levels of governance."[31]

Illustrative global climate change thematic litigation focuses on rights-based litigation issues, including standing issues, right to a healthy life and environment, intra- and intergenerational equity, public trust doctrine, or even the rights of nature . Also included within these are compliance with legal and executive regulations, commitments related to climate change, corporate responsibility and accountability, climate vulnerability, including indigenous communities, women and children. However, before all these issues, there is a common legal argument underlying the principle of intergenerational responsibility. We are currently witnessing a repeated wave of intergenerational lawsuits, which are closely related to the idea of climate crisis, but also about how the transnational rule of law could act as a disruptive tool to address the environmental crisis and litigation, in fact, theorists as Liz Fisher and her co-authors say we are facing the moment when legislators, litigants, and judges meet as equals to chart new legal territory.[32] As such, climate change shakes the foundations of doctrinal wisdom, "making intergenerational equity an attractive legal framework to address the long-term challenges of the climate crisis."[33]

The jump from the principle of intergenerational responsibility to transformative litigation consists, in principle, in the change of two paradigms, which are manifested in:

1. Climate Consciousness: which means adopting a climate conscious approach involves identifying the problems of climate change and the consequences of different courses of action and incorporating them into the preferred solution to the problem or legal dispute. Judicial responses provide forward-looking, systemic and long-term guidance that identifies causes and impact, but also develops a holistic approach to achieving sustainability and the SDGs within

30 See both texts, both Preston (2021) and Peel & Osofsky (2018).

31 Osofsky (2008), pp. 587-588.

32 Fisher, Scotford & Barritt (2017), pp. 173-175.

33 This idea of an attractive and ideal legal framework under the guise of intergenerationality is deepened in Davies (2020).

climate change. For example, these include redefining the human relationship with nature.[34] This point sets the foundations for international climate justice.

2. Climate future: It is an adaptation of the institutions to a legal language of the climate crisis and to the language of posterity for future generations.[35] Given this, the challenge in regulatory matters is to go from reactive to proactive, shaping a sustainable future by visualizing a "mutually reinforcing environmental rule of law and SDGs."[36] There have been cases all over the world, which have been referential in this logic for the international system, such as the Oposa case,[37] where the Supreme Court of the Philippines declared that the plaintiffs had the locus standi to sue on behalf of future generations based on an 'intergenerationality' responsibility to the extent that the right to a healthy and balanced life is guaranteed. This example is pedagogical to understand environmental damage from its long-term effect and also, the legal argument regarding the way in which future generations are more threatened by irreversible and irremediable damage than the current one, even due to the actions that are being taken.

V. Intergenerational Climate Litigation from the Global North to the Global South

Institutions like as the Sabin Center have produced a international study on the use of terms like "future generations" and "intergenerational" in legal arguments[38]. In the following, we will point out the most emblematic cases (in general terms) that help to understand this new intergenerational cycle in international litigation from the global north to the Global south.

In October 2021, the case of *Sacchi v. Argentina*[39] appears, which is framed under a complaint filed by 16 children and young people against five States Parties under the Optional Protocol to the Convention on the Rights of the Child (CRC) on a Communications Procedure.[40] The plaintiffs in the case alleged that the negligent climate policies adopted by the States were in clear conflict with

34 Preston (2016) pp. 14-17.

35 Terminology worked by Groves (2019).

36 UNEP (2019) p. 226.

37 *Oposa v. Factoran*, 1993, 224 S.C.R.A.792. Available at https://lawphil.net/judjuris/juri1993/jul1993/gr_101083_1993.html

38 See study by Sabin Center. Available at http://climatecasechart.com/non-us-climate-change-litigation/

39 See the case in http://climatecasechart.com/non-us-case/sacchi-et-al-v-argentina-et-al/

40 Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (2011), New York, in force 14 Apr. 2014. Available at: https://www.ohchr.org/sites/default/files/CTC_4-11d.pdf.

articles 6 (the right to life), 24 (harm at the highest possible level of health) and 30 (damage to culture), in conjunction with article 3 (the "best interest of the child" principle) of the CRC.[41] Although the UN Committee on the Rights of the Child finally declared the complaints inadmissible for not having exhausted domestic remedies[42]. It confirmed that, in principle, a State Party can be held responsible for the detrimental effects of its climate record, inside and outside its territories. Therefore, this argument goes along the lines of what was stated by authors such as Lewis, who points out that "the recognition of the obligations of the State towards future generations is compatible with the theory of human rights, and that these obligations must be balanced with the duties owed to current generations."[43]

An experience similar to the argumentation of the aforementioned case was lived in *Billy et al. v. Australia*,[44] where there was a complaint decided by the UN Human Rights Committee in September 2022, in which a group of indigenous islanders of the Torres Strait challenged the Australian government's insufficient climate change mitigation and adaptation efforts. Well, from this case and others, it can be deduced that in international judicial practice the definition of the right to culture has been extended, understanding this as a right implied by the right to conserve, transmit cultural practices and artifacts from generation to generation, which makes this a suitable resource for intergenerational litigation.

The regional courts have made an effort and are dealing with intergenerational petitions. For the first time in its history, for example, the European Court of Human Rights (ECtHR) is currently facing a series of climate-related lawsuits, spearheaded by *Duarte Agostinho et al. v. Portugal*.[45] This case is very special, since it was presented by a group of six young Portuguese people against 33 member States of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) alluding to faulty climate policies and, in turn, alleging that the impacts of climate change disproportionately affect young

41 Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure concerning Communication No. 107/2019, 22 September, 2021, UN Doc. CRC/C/88/D/107/2019 (*Sacchi*). In this Decision, the principle of intergenerational equity was invoked to support the claims: "By supporting climate policies that delay decarbonization, the State party is shifting the enormous burden and costs of climate change onto children and future generations. In doing so, it has breached its duty to ensure the enjoyment of children's rights for posterity and has failed to act in accordance with the principle of intergenerational equity." Available at http://climatecasechart.com/non-us-case/sacchi-et-al-v-argentina-et-al/

42 See recent discussions on this topic in Gul & Rahman (2022).

43 Lewis (2018) pp. 69-70.

44 See the Decision CCPR/C/135/D/3624/2019. Available at http://climatecasechart.com/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations-human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change/

45 Case Nos. 39371/20, 13 November, 2020. Available at: https://hudoc.echr.coe.int/eng?i=001-206535.

people. Additionally, the complaint argues that these impacts will continue more acutely in the future and will also affect the future children of the plaintiffs. Now, the final merit of these other and intergenerational arguments under the ECHR must still be evaluated by the Court, but there is already a consistency that according to authors such as Helen Keller and Corina Heri conclude that the justiciability of future harm has a long history in the jurisprudence of the European Court.[46]

At the local level, the principle has been used in controversial cases such as that of the Supreme Court of Justice of Colombia, which faced a lawsuit related to the violation of a wide variety of fundamental rights through the acceleration of deforestation of the jungle. Amazon (Lozano Barragán Case[47]). The young plaintiffs demanded, among other things, an "intergenerational agreement" to reduce said deforestation and counteract one of the main drivers of global climate change.

The legal system of the United States (USA) fulfils a double role, since in my opinion it becomes a point of reference for several countries of the Global South, due to its geopolitical power. Therefore, it is pertinent to briefly review the history of climate litigation under the auspices of the atmospheric public trust doctrine. The last case in this category was the so-called "*Juliana v. United States.*"[48] This has attracted attention due to the fact that it was initiated by a group of children and young people together with a non-governmental organization (NGO) and a designated guardian for the future generations, Columbia University climatologist James Hansen.[49] The plaintiffs asked the Court to grant injunctive relief of various kinds to compel the government to take strict weather measures. With this, the District Court had ruled in favour of this lawsuit, but later, the US Court of Appeals for the 9th Circuit reversed that decision for the alleged lack of "reparability" of the case. Despite the fact that the lawsuit did not prosper, intergenerational concerns appeared in the public and judicial debate. In fact, the District Court expanded at length on the dangers of climate change to public trust resources and emphasized that a long line of case law prohibited the government from depriving future generations of environmental commons, as such deprivation would mean future diminish the promotion of the general or common welfare.

46 See the history of the jurisprudence of the European Court in Keller & Heri (2022).

47 Available at https://cortesuprema.gov.co/corte/wp-content/uploads/2018/04/STC4360-2018-2018-00319-011.pdf

48 Available at http://climatecasechart.com/case/juliana-v-united-states/. To understand more details of the case and more information about it, it's recommended to read the paper by Powers (2018) called "Juliana v United States: the next frontier in US climate mitigation?"

49 See Marris (2018) for context.

Finally, the most contemporary and most controversial intergenerational climate claim,[50] at least in Europe to date, was the one received by the German Constitutional Court on March 24, 2021. First, the constitutional claim was filed by minors and adults residing both in Germany and outside the country. What they were challenging was the German Climate Protection Act of 2019,[51] where they asserted that the basis of their emission reduction target for 2030 was supposedly insufficient, which produced a violation of the fundamental rights of complainants.

After the court has had time to deliver its decision, what was probably the most far-reaching decision ever made by a supreme court in the world on climate protection is manifested. With this, the Court centred its argument on article 20a of the German Basic Law, alluding to the fact that it sought to develop an intertemporal dimension of fundamental rights in relation to climate change. Along with this, the Court ordered the German State to update the law with more specific objectives for the period after 2030 and review the permitted emissions, seeking that the measures seek intergenerational justice. Almost immediately, the government and legislature implemented a decision titled an "intergenerational climate contract,"[52] with an updated carbon dioxide (CO_2) emissions target of 65% by 2030, a new target of 88% by 2040, and among other things.

A review of Climate Change Litigation from the global north to the Global South is necessary, and in my opinion an intellectual duty, but we should not doubt the role of climate litigation from LATAM, which is having an interesting trend through new narratives, arguments of litigants, among other things. Therefore, it will be necessary for the purposes of this research to review the Latin American case and the new demands for climate and intergenerational justice.

V.I Climate litigation and Intergenerational Justice in Latin America

The influence of the Global South goes beyond borders and possibilities, this is to see how the Colombian case of 2018 called "Future Generations against the Ministerio del Medio Ambiente and others" was configured as "the first (demand) on climate change and future generations in Latin America."[53] This has been

50 *Neubauer et al. v. Germany*, German Constitutional Court, 24 Mar. 2021. Available at http://climate-casechart.com/non-us-case/neubauer-et-al-v-germany

51 For more information, read Flachsland & Levi (2021) or Minnerop (2020).

52 "Climate Change Act: Climate Neutrality by 2045" by Bundesregierung (Federal Government). Available at: https://www.bundesregierung.de/breg-de/themen/klimaschutz/climate-change-act-2021-1936846. See more historical information about this program in Bodle & Sina (2022).

53 Setzer & Benjamin (2019), pp. 77-111.

considered the basis of innovation in climate litigation, as through it the bases have been laid for the filing of actions for environmental constitutional protection, and in Boyd's words this case has become a "revolution of environmental rights in constitutional seat"[54] or as Giuliana Viglione calls it, "the path to climate demands has new legal paths to protect the planet."[55] This constitutional tendency is situated, in other words, in not being able to exclude the demand from discussions on an autonomous ecological public order in the different countries of the region. Authors such as Cordini, have highlighted that Latin American debates on environmental matters have formulated strategies for "containment and opposition to both internal phenomena (not only degradation, but also corruption and environmental crime) and external ones (for example, exploitation, patents and biotechnology) that can increase the depletion of resources."[56]

In the Colombian case, it should be noted that the lawsuit was brought by 25 young people against the government and several corporations, where the plaintiffs claimed that the government's failure to fulfill its international commitment to ensure zero net deforestation in the Amazon with targets towards 2020 was a violation of their present and future human rights. This event caused a major uproar, but the Supreme Court ultimately recognized a "substantial link"[57] between the Colombian government's commitment to reduce deforestation, GHG emissions, fundamental rights and the constitutional rights enshrined in Colombia's Magna Carta, including the right to life, health, human dignity and a healthy environment.[58] Although this argument was of great relevance, the Court also invoked the "principle of solidarity" to conclude that all human beings of every generation have environmental rights[59] and, in turn, reaffirmed that human rights violations affect the "other", that is, all other people, animal or plant species on the planet, including future generations.[60] Authors like Donger, have highlighted that the "other" is a legal configuration of a focus based on rights to balance children's rights with climate damage,[61] which is why this type of decision is part

54 Boyd (2011), p. 133.

55 Viglione (2020), pp. 184-185.

56 Cordini (2013), pp. 563-564.

57 See Supreme Court of Colombia, *Demanda Generaciones Futuras v. Minambiente* (Colombia) 5 April 2018, (No. 49). Available at www.elaw.org/system/files/attachments/publicresource/Colombia%20 2018%20Sentencia%20Amazonas%20cambio%20climatico.pdf

58 *Ibidem*.

59 Pelizzon (2020) p. 33.

60 See Supreme Court of Colombia, *Demanda Generaciones Futuras v. Minambiente* (Colombia) 5 April 2018, No 19.Available at <www.elaw.org/system/files/attachments/publicresource/Colombia%20 2018%20Sentencia%20Amazonas%20cambio%20climatico.pdf

61 Donger (2022), pp. 263-289.

of the possible "legal imaginary"[62] emanating from LATAM. In my opinion, many of these decisions that consider others, base their analysis on the vulnerability of minors but also overlook the population in its entirety, and are ultimately prolonging the intergenerational factor as a whole.

In summary, the Court emphasized that all entities involved in the case have a right to natural resources and that failure to regulate consumption in a fair and equitable manner compromises the access of future generations to those resources.[63] In this same way, intergenerational environmental equity is, in the opinion of the Court, twofold, i.e., it extends (i) to an ethical duty of solidarity, and (ii) to an intrinsic value of nature. Element (ii) is based on the Amazon, since the jurisdictional body itself ratifies that this is a vital ecosystem of global importance and concluded that the State's failure to stop deforestation violated human rights and international climate commitments, such as the Paris Agreement. The Colombian case made evident the preponderance of future generations to be involved with litigation, opening the door to climate lawsuits through constitutional provisions oriented to future generations, moreover, the thesis of creating an "intergenerational pact" to reduce deforestation and GHG emissions was included in the argumentation of the litigants.[64] This decision results from the approach adopted in other latitudes, as in the case of *Taip v. East Gippsland Shire Council*,[65] on the so-called "cautious approach" towards the development and future planning of human life.

A similar lawsuit was filed in Peru in 2019, it was named *Álvarez et al. v. Peru*.[66] Through a constitutional injunction, the young plaintiffs reached the Superior Court of Justice of Lima pointing out in their argument that the constitutional right to an adequate and balanced environment is crucial to enjoy other fundamental rights such as the right to life, health and human dignity. As in the Colombian case, the plaintiffs argued that the government had not taken sufficient climate measures and had not maintained its internal deforestation plans in the Amazon, thus implying that there were violations of the National Government

62 This concept reflects a method emanating from Charles Taylor's notion of thinking from the notion of legal imagination, and in other words, pursuing a concept of social imaginary from our contemporary world where the focus is centred on the ways in which we are capable of thinking or imagine society as a whole. This idea will serve to bring together the project for the creation of intergenerational justice from the global South, and can be evidenced in Taylor (2004).

63 See Supreme Court of Colombia, *Demanda Generaciones Futuras v. Minambiente* (Colombia) 5 April 2018, No 20. Available at www.elaw.org/system/files/attachments/publicresource/Colombia%202018%20Sentencia%20Amazonas%20cambio%20climatico.pdf

64 *Ibidem* (No. 12) and (No. 11.3).

65 See the case of *Taip v. East Gippsland Shire Council* [2010] VCAT 1222 (Victorian Civil 7 Admin. Court) (Australia). Available at https://climatecasechart.com/non-us-case/taip-v-east-gippsland-shire-council/

66 See at https://climatecasechart.com/non-us-case/alvarez-et-al-v-peru/

plan, specifically the National Environmental Policy and the National Forest and Wildlife Policy. This action brought as a consequence the constitutional and regional obligations acquired by the State, that is, firstly, a violation of Art. 2.22 of the Peruvian Constitution and, secondly, Art. 11 of the Additional Protocol of the American Convention on Human Rights.

Without a doubt, the arguments of the plaintiffs sought to transcend through the climate dispute, and decided to achieve objectives and concrete actions intended by the State to achieve a net deforestation for the year 2025, including adaptation and mitigation measures designed for a good life of future generations. The central argument of this demand focuses on equity and intergenerational justice integrated into the principle of sustainable development,[67], where it is stated that each generation must provide sufficient natural resources so that future generations can enjoy it.[68] This generational duty found its critical knots in uncontrolled deforestation, since it was understood as the main cause of accelerating climate change, therefore young people designed a legal argumentation for the regulation and protection of the rights of present and future generations, where the issue of intergenerational justice is intertwined with the concept of climate justice and global justice.[69]

In the Chilean case, in 2016 from the lawsuit filed by the Community of Chañaral against Codelco (National Copper Corporation of Chile), the Supreme Court declared that the right to a clean environment is owed to individuals, communities and future generations.[70] This court decision, while keeping the geographical and adaptive differences in mind, had a similar analysis to Minors Oposa, where the Philippine Supreme Court recognized the intergenerational position, albeit on the basis of both pre-existing norms and constitutional rights. The court said that "even before the ratification of the Philippine Constitution, specific laws already paid special attention to the 'environmental right' of present and future generations."[71] In spite of this decision in the Chilean case, it should be pointed out that the constitutional role in the Chilean system is lesser due to a constitutional structure of environmental legal lack of protection due to the neoliberal model prolonged in the constitution,[72] therefore the disruptive interpretations reside in the prolongation of specific laws.

67 See the case of *Álvarez et al. v. Perú* (No. 186). Available at https://climatecasechart.com/non-us-case/alvarez-et-al-v-peru/

68 *Ibidem*.

69 On the interaction between climate justice and global justice, see Knappe & Renn (2022).

70 See the case of Comunidad de Chañaral against Codelco División el Saldor (1988) S/ Appeal for Protection, Supreme Court of Chile. To go deeper, see González (2018), pp. 1-12.

71 Daly & May (2014), p. 340.

72 On the Chilean context, see Bauer (2021).

It is necessary to mention that both the State of Chile and the State of Colombia, on January 9, 2023, signed a joint request for an advisory opinion to be submitted to the Inter-American Court of Human Rights (IACHR) with the objective of clarifying the scope of the State's obligations to respond to the climate emergency under international human rights law.[73] The application, in general terms, described the role and effects of the climate emergency on human rights, especially on the vulnerability of communities and ecosystems in Latin America. On the role of intergenerational justice, it requested to explain the nature and scope of a State Party's obligation to adopt timely and effective measures in the face of the climate emergency in order to ensure the protection of children's rights derived from its obligations under Articles 1, 4, 5, 11 and 19 of the American Convention. It also requested an explanation of the nature and scope of a State Party's obligation to provide children with meaningful and effective means to freely and fully express their views, including the opportunity to initiate, or otherwise participate in, any judicial or administrative proceeding concerning the prevention of climate change that constitutes a threat to their lives.

In the case of Brazil, during April 2021 six young Brazilians sued the national government, seeking to overturn Brazil's revised emissions commitments in the Paris Agreement that, by 2030, would allow for more GHG emissions than the country's original commitment.[74] Finally, the allegations of non-compliance with a fundamental precept of ADPF 747, 748 and 749, raised the violation of the rights of future generations.

As discussed in the preceding cases and paragraphs, the alleged rights of future generations are directly affected by the current environmental degradation and climate crisis. Thus, actions to curb global warming and other devastating consequences of climate change are part of the young people's argument in the lawsuit, who claim that such actions will help ensure that future generations will enjoy nature and natural resources in the same way that current generations enjoy them. Recognition of the rights of future generations by Latin American courts means taking action to combat climate change today, thus influencing climate policy and mitigation and adaptation actions today.

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73 See the Request for an advisory opinion on Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile. At the date of preparation of this investigation, the request is at the stage of submission of observations. Available at https://climatecasechart.com/non-us-case/request-for-an-advisory-opinion-on-the-scope-of-the-state-obligations-for-responding-to-the-climate-emergency/#:~:text=The%20request%20acknowledged%20the%20human,action%20to%20confront%20climate%20change.

74 Young people demand the government for climate 'pedalada' and demand annulment of the Brazilian goal in the Paris Agreement" (G1). Available at https://g1.globo.com/natureza/noticia/2021/04/14/jovens-processam-government-by-climatic-pedalada-and-asking-annulment-of-Brazilian-goal-in-the-Paris-agreement.ghtml

V.II Horizons of transformation of Climate Litigation from Latin America

The strategic litigation studies need to be thought in great detail, not least because they consistently confirm that positive social impacts of cases are also maximized through "integrated advocacy strategies," such as situations that combine "media engagement to shape and promote narrative, community organizing to mobilize affected communities and their allies, and interdisciplinary collaborations to [shape] policy and practice."[75] Given this, climate litigation may be producing a form of participatory revolution for the Global South, placing the area on the chessboard of international interactions and relations on this issue.

Likewise, various authors highlight the law-making processes on the continent and, above all, outline the contours of public interest litigation on climate change, which are drivers of social change by promoting the climate cause. So, beyond the legal technique, common strategies of the actors involved often emerge: recourse to law, mobilization of law and new pleadings before the courts.[76] Cournil mentions that the legal route, both in the lawsuit itself and in the threat of resorting to a lawsuit elsewhere, is a vector for challenging pre-established law. With all this, the law is both the weapon and the object of contestation in LATAM and on repeated occasions, the court then appears as a "platform" of expression in the public space where expectations of environmental change crystallize.[77]

The role of intergenerational equity and prolonged intergenerational justice designs a Latin America that seeks to strengthen environmental protection, where its various countries have assumed the duty to protect the environment for the benefit of "future generations,"[78] recognizing the long-term consequences of environmental damage and climate change.[79] Moreover, where this right has not been expressly recognized, some courts have interpreted existing environmental obligations broadly to include a duty owed to future generations.[80] It could be argued that the process of Latin American normative imagination in climate litigation has been largely based on the integration of the principle of intergenerational equity, influenced by the Rio Declaration on Environment and Development, especially Principle 3. However, it should be noted that the proliferation of climate litigation has only broadened and deepened as prosecutors,

75 Archer (2018), pp. 339-340.

76 Blankenburg (1994), pp. 691-703.

77 Cournil (2017), pp. 245-261.

78 Tigre, Urzola & Goodman (2023), pp. 67-93.

79 Gosseries & Meyer (2009).

80 See the case in "Vilcabamba River Case" in Clark, Emmanouil, Page & Pelizzon (2019), pp. 792-796.

public defenders, civil society groups and judges in the Global South have become more knowledgeable about climate change, its politics, its laws and the ways in which this type of litigation unfolds.

The new theoretical interpretations from LATAM are very relevant, in other words, we are facing an increase in national climate cases and recent jurisprudential and academic developments that address the links between environmental damage, climate change and human rights, materializing these reflections in tune with international judicial bodies that use this type of criteria to base their decisions. This trend may not only clarify issues related to state responsibility for environmental damage that constitute wrongful acts under international human rights law, but may also provide a new perspective on the role of the State in the protection of human rights,[81] or it may raise questions as to whether State liability should be calibrated when the defendant State has contributed less to a multi-causal source of harm, such as a developing nation in the context of climate change.

Despite the role that litigation has played as a tool for policy change, countries in the Global South are already reducing their heavy reliance on a fossil fuel-based economy and initiating decarbonization programs as a way to reduce their GHG emissions and acquire new forms of energy sovereignty. This suggests that these countries are questioning their carbon-intensive mode of production due to the likelihood of stranded assets and the environmental and human rights impacts historically suffered by local communities.[82] This situation, in the words of Rodriguez Garavito and Auz, "may lead to a rethinking of climate litigation as a way to accelerate this path to decarbonization, while ensuring that the deployment of renewable energy projects respects human rights."[83]

One of the great transformations of climate litigation from LATAM is the promotion of International Cooperation from local climate litigation, since it is from this area where a teleological or intentional method of interpretation is used, national and human rights courts seek to revitalize the international obligations of States to cooperate with each other as a way to ensure the non-repetition of damage.[84] In my opinion, the main rationale for this approach is the recognition that the structural obstacle to developing country compliance with a potential climate-related judgment is the lack of expertise and resources (both financial and technical). In other words, tribunals could anticipate a possible non-compliance scenario due to systemic barriers and thus resort to interpretative techniques to

81 Wewerinke-Singh (2019), p. 88.

82 See Inter-American Development Bank and Deep Decarbonization Pathways for Latin America and the Caribbean (2019) pp. 28-30.

83 Rodríguez-Garavito (2022), p. 149.

84 Shelton (2000), p. 397.

design context-specific solutions. Thus, we may be in the presence of an indirect remedy of international cooperation with climate justice, meaning that the effect of climate litigation is to establish obligations requiring States to make every effort to cooperate with other States or multilateral institutions to protect the rights of their citizens from climate-related harm.[85]

Finally, it should be noted that the Global North-South category is being widely used as a result of the asymmetry of effects and responsibilities in the crisis; despite this, there is a possibility to focus the debate on the role and nature of litigation, so that in accordance with Broberg's words, the potential for climate litigation to contribute to redress for the victims of climate change, this implies that by driving action on capacity building and development, litigation requires cases in which (corporations based in various locations) hold developed States accountable for the capacity building and development suffered in developing states.[86] Broberg explains that Article 8 of the Paris Agreement reflects this understanding and, therefore, may inspire claims by "those affected in developing countries" against historic polluters despite the exclusion of liability and compensation from its scope.[87]

VI. Conclusions

Climate change has a large-scale impact, which by the way can alienate various values of the rule of law, so this research concludes that the foundations of the classical rule of law have already been removed, and the reconfiguration of a state of environmental law is urgent and imperative. However, the discussion about its content, application and implementation will still remain open.

The first assertions we can make are that climate cannot totally triumph over law and democracy. Thus, this means recognizing that democratic political systems have some mechanism for adapting to and combating climate change. These transformations, which were already explained in the development of the essay, are supported by expansive ideals of the rule of law of justice and democratic governance in environmental crisis, that is, the pressure on democracy from climate change is recognized, but there are still options to reinterpret the rule of law in a transnational setting. Speaking in a transnational venue means redefining justice, and here it is necessary to link the elements between the

85 Mayer (2018), p. 140.

86 Broberg (2020), p. 527. Similarly, review the study of Broberg & Martinez Romera (2021).

87 *ibidem*.

environmental rule of law as a legal paradigm of transformation and the international principles of these norms, such as intergenerational value.

Illustrative global climate change thematic litigation focuses on rights-based litigation issues, including standing issues, the right to a healthy and clean life and environment, however intra- and intergenerational equity still It is in a field of conceptual development. With this, in principle a national implementation will be needed anchored to recursive processes, through which global and national legislation interact dynamically. The experience in the local legal system has been a great opportunity to reorganize and reorient the principles of law in the international system. This last situation was a relevant factor to explain the different cases, at a local, international and regional level, of environmental and intergenerational litigation.

However, much attention should be paid to the Global South, as it has had the constant presence of constitutional and human rights arguments in the interaction between litigants, the environment and judicial institutions, which has meant that all these disciplines have acted in an integrated manner. Likewise, the basis of Latin American lawsuits in climate litigation has focused much of its core on the transcendence of the value of intergenerational justice, in fact plaintiffs in Chile, Brazil, Colombia and Peru have raised the obligation to meet the objectives and concrete actions intended by the State to achieve adaptation and mitigation measures designed for the good living of future generations.

The intergenerational factor from LATAM has been considered as a whole, understanding the role of intergenerational equity and intergenerational justice as a complete design, which among other things seeks to strengthen the protection of the environment by assuming the duty to protect it for the benefit of "future generations". Nevertheless, the process of normative imagination from Latin America presupposes recognizing the positive social impacts of climate litigation cases with intergenerational justice, since it is there where a form of maximization of "integral defense" strategies can be evidenced, as well as an extension to the role of "public interest litigation on climate change," which directly and indirectly constitute social change and the promotion of the climate cause. Thus, what can be evidenced through this research is that climate litigation with intergenerational justice seeks to go beyond the legal technique, since from this, common strategies emerge from the actors involved that focus as an objective, the mobilization of the right in favour of future generations.

Climate litigation has been seen as a tool for political and social change, where countries in the Global South have set an agenda in international relations, reducing their heavy dependence on a fossil fuel economy and initiating decarbonization programs as a way to reduce their GHG emissions. International Cooperation has also entered into the debate on the objectives and transformation

horizons of local intergenerational climate disputes. Ultimately, the potential of Latin American climate litigation is and will be to contribute to the reparation of the victims of climate change, which implies a designed and integrated plan of action for the protection of future generations.

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