

# Intergenerational Climate Justice in the Courtroom

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**I**T IS TODAY'S YOUTH, AND THEIR DESCENDANTS, WHO WILL CONTEND WITH THE devastating consequences of climate inaction. In recent years, young climate activists have articulated the frustration and resentment that comes with the knowledge that they, and the as-yet unborn, will carry the overwhelming burden of climate impacts; a burden that, in the words of climate scientist James Hansen and his colleagues, may prove to be 'too heavy to bear' (Hansen et al. 596).

Greta Thunberg is the most well-known of such activists. Thunberg has displayed extraordinary composure as she levels accusations and reproaches at world leaders and older generations, whom she has described, disparagingly, as acting like children (Carrington). Her speeches have galvanised young people worldwide to participate in school climate strikes and the Fridays for Future movement. In street protests, children have brandished placards stating: 'You'll die of old age, we'll die of climate change'. One placard, held aloft by Australian teenager Isolde Raj-Seppings during a climate protest outside the Prime Minister's residence at the height of Black Summer, read: 'Look at what you've left us. Watch us fight it. Watch us win' (Raj-Seppings). She would subsequently become a litigant in one of the youth climate lawsuits discussed below.

The intergenerational burden of climate impacts will be shouldered by *all* young people. Historian Dipesh Chakrabarty wrote in 2009 that 'there are no lifeboats

here for the rich and the privileged' (Chakrabarty 221). The intergenerational dimensions of climate injustice are, nevertheless, intertwined with its intragenerational dimensions. Ongoing legacies of racial injustice and colonialism contribute to hugely disparate levels of climate vulnerability. The impacts of historical emissions, which were overwhelmingly produced by Global North nations, are unevenly distributed, with Small Island Developing States and other developing nations already experiencing territorial incursions, property damage and loss of lives.

Temporal injustices should not overshadow or obfuscate geographical and racial injustices evident in the here and now: the largely ignored plight of the 'disappearing' States, the disparity in infrastructure and resources when it comes to addressing climate impacts. The issue of climate reparations remains contentious; developing nations are forced to accept a neutral framing of loss and damage in international discussions to achieve even a modicum of financial concessions. Young climate activists from the Global South struggle to obtain the same level of media attention as that bestowed upon their counterparts in the Global North. In one notorious example, Ugandan youth activist Vanessa Nakate was deliberately erased from a group photograph (Evelyn).

Global greenhouse gas emissions continue to mount exponentially and governments continue to prevaricate, making soft promises dismissed as 'blah blah blah' by Thunberg in 2021. In the absence of effective policies and climate leadership from above, young people are instigating lawsuits against their governments. I consider here how judges are responding to these demands for intergenerational climate justice. There have been critical moments of judicial acknowledgment of intergenerational climate *injustice*; there are, however, significant procedural and doctrinal obstacles to achieving intergenerational climate justice through the court system.

Finally, I turn to a term utilised by youth climate litigants in Italy: Giudizio Universale or the 'Last Judgment'. I am interested in what is meant by the Last Judgment, in the context of the climate crisis, and what a Last Judgment might represent. I am thinking here of judgement sought by a future generation living in the unpleasant reality of what climate scientist Will Steffen and colleagues have termed Hothouse Earth (Steffen et al. 8257), and how this provides us with a very different perspective on intergenerational climate justice. The Last Judgment would, surely, encompass retrospective condemnation of the deeds and omissions of today's adults in the Global North: our generational cohort that, with full awareness of the climate crisis, persists in the profligate consumption of fossil fuels. Yet, when a Last Judgment is handed down, there will be no belated opportunity for remedies or punishment.

Intergenerational climate justice is achievable and hence meaningful only in our current precarious moment, before the arrival of irreversible tipping points which will trigger ‘an irreparable rupture in time’ (Kim 412).

### **The *Future Generations* Case**

In 2018, in a groundbreaking decision handed down by the Colombian Supreme Court of Justice, 25 youth climate activists achieved a significant victory. The litigants challenged the failure on the part of the Colombian government to combat deforestation in the Colombian Amazon: a key contributing factor to climate change. The Court acknowledged that the present generation has rights with respect to ‘the unborn’, who ‘deserve to enjoy the same environmental conditions that we have’ (*Demanda Generaciones Futuras* [5.2]), and ordered the government to create an ‘intergenerational pact for the life of the Colombian Amazon’ (*Future Generations* [14]). The judges held that ‘[i]n terms of intergenerational equity, the transgression is obvious’ and that ‘future generations, including children who brought this action, will be directly affected, unless we presently reduce the deforestation rate to zero’ (*Demanda Generaciones Futuras* [11.2]). In the words of Gabriela Eslava, a plaintiff and lawyer in the case, ‘[w]e wanted to demonstrate that climate change is a human rights problem, and that it has a face: the face of those who are young today’ (Pelizzon 40).

At the same time as this pivotal judicial statement of the imperative for intergenerational climate justice occurred, a youth climate lawsuit was winding its tortuous path through the federal court system of the United States. The government’s lawyers drew upon every deflecting strategy in their armoury to postpone or derail the trial in this matter. They succeeded in this goal in 2020, when two majority judges of the Ninth Circuit Court of Appeals ruled that the matter was nonjusticiable (*Juliana* 1174).

### ***Juliana v. United States***

*Juliana* is the most prominent of an ever-expanding assemblage of atmospheric public trust lawsuits, which are based upon the premise that governments have a sovereign fiduciary obligation to protect the atmosphere for the benefit of current and future generations. In the *Juliana* case, the 21 young plaintiffs, in conjunction with environmental organisation Earth Guardians and James Hansen acting as a ‘representative of future generations’, argued also that the federal government was in violation of an alleged constitutional right: a right to a ‘climate system capable of sustaining human life’ (*Juliana* 1164). The case has foundered in the wake of the Ninth Circuit Court of Appeals majority ruling. Judge Josephine Staton’s dissenting judgment in that court, however, provides a powerful judicial indictment on the generational failure to act on climate change, and a scathing

condemnation of judicial hesitancy in this context. Asking '[w]here is the hope in today's decision', she continued:

If plaintiffs' fears, backed by the government's own studies, prove true, history will not judge us kindly. When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little? (*Juliana* 1191)

The majority decision, on the other hand, exemplifies the ways in which procedural considerations can override questions of justice and merit: what I have called 'the awfulness of lawfulness' (Rogers 2013). Although 'compelling evidence' provided by the plaintiffs indicated that an 'environmental apocalypse' loomed (*Juliana* 1164), the doctrine of separation of powers dictated the outcome for these judges: the court would be exceeding its remit were it to 'step into [the] shoes' of the executive branch of government (*Juliana* 1175). Four commentators, looking at rights-based youth climate litigation, have observed that most cases have been dismissed on procedural grounds before any arguments on the merits were presented (Parker et al. 80).

Judicial reservations over doctrinal limitations proved to be a stumbling block in another important case, in which considerations of intergenerational justice were a paramount concern for the primary judge but failed to sway the appellate court. This was the case of *Sharma v. Minister for the Environment*, brought by eight teenage plaintiffs and their octogenarian guardian against the Australian Minister for the Environment in 2020 and decided at first instance by Justice Mordecai Bromberg in 2021 (*Sharma*). His decision was overturned on appeal in 2022 (*Minister for the Environment*).

### **The *Sharma* Case**

After hearing evidence from expert witnesses who included climate scientist Will Steffen, Justice Bromberg was fully cognisant of the future dangers for today's youth created by a warming planet and extreme weather events. Legally speaking, his decision represents a daring departure from traditional understandings of the tortious duty of care, with the judge finding that the Minister for the Environment has such a duty to avoid causing Australian children personal injury and death as a consequence of climate impacts. This duty extends to her statutory decision making powers in relation to the approval of a coalmine extension. More generally, however, the judge provided in his judgment a searing summation of the magnitude and implications of intergenerational climate injustice. He stated therein that:

It is difficult to characterise in a single phrase the devastation that the plausible evidence presented in this proceeding forecasts for the Children. As Australian adults know their country, Australia will be lost and the World as we know it gone as well. The physical environment will be harsher, far more extreme and devastatingly brutal when angry. As for the human experience—quality of life, opportunities to partake in nature’s treasures, the capacity to grow and prosper—all will be greatly diminished. Lives will be cut short. Trauma will be far more common and good health harder to hold and maintain. None of this will be the fault of nature itself. It will largely be inflicted by the inaction of this generation of adults, in what might fairly be described as the greatest inter-generational injustice ever inflicted by one generation of humans upon the next. (*Sharma* 411)

The appellate judges, although dismissive of the Commonwealth’s ‘belated’ attempt to have Professor Steffen’s expert evidence set aside on appeal (*Minister for the Environment* [407]), were less concerned about the wellbeing of future generations or redressing intergenerational injustice. They focused instead upon doctrinal limitations which, as they all decided for a variety of different reasons, the trial judge had disregarded. It may well be, one of the judges concluded, that the tortious duty of care should have a broader application, temporally and geographically, than is currently the case (*Minister for the Environment* [754]). This, however, was a matter for the High Court rather than for their own.

Here, again, the ‘awfulness of lawfulness’ prevailed in the courtroom.

### ***Neubauer v. Germany***

In 2021, however, a German court articulated and accepted the need to provide intergenerational justice for the climate generation, in accordance with Article 20a of Germany’s Basic Law which ‘is aimed first and foremost at preserving the natural foundations of life for future generations’ (*Neubauer* [193]). In a case brought by young people, including complainants from Bangladesh and Nepal, and several environmental organisations, the Federal Constitutional Court was asked to determine the constitutionality of Germany’s *Climate Change Act*. The plaintiffs argued that its climate mitigation targets were inadequate to safeguard their future, and that they had a constitutional right to a ‘future consistent with human dignity’ (*Neubauer* [60]). The Court, although only in relation to the German complainants, held 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’ (*Neubauer*

[192]). Louis Kotzé has described this decision as ‘an example of how legal imagination can become legal reality through judicial creativity’ (Kotzé 1442).

Will there be sufficient judicial creativity, and judicial acceptance of the urgent need for intergenerational climate justice, for contemporary courts to hold States to account and reverse our current trajectory towards a hostile future for our children and their children? In youth climate lawsuits, of which I have considered only a small subset, successful outcomes are rare and their political impact is uncertain. The German government has announced that it will act on the *Neubauer* decision but the response to the *Future Generations* case has been less promising (Parker et al. 80-1). Intergenerational climate justice remains, legally and politically speaking, an elusive target.

### ***The Last Judgment***

I conclude by ruminating on the impermanence of the concept of intergenerational climate justice. This is a concept which carried no weight or meaning in even the recent past. It has a powerful resonance for us in our present moment in planetary history, but it may not transcend that moment. Consider what a Last Judgment represents. The phrase has Biblical overtones and a terrible finality to it. A Last Judgment is a form of meta-judgment. It stands outside and above the common law: that vast tapestry of decisions in which judges, mostly deceased, have complied deferentially with precedent, or bravely and sometimes ill-advisedly departed from it. It is the final wrapping up, a damning verdict on all which precedes it.

In various works of fiction, there appear accounts of informal acts of retribution by aggrieved youth against their climate culpable elders; for instance, in a short story written by Margaret Atwood, young people rally under the slogan ‘Torch the Dusties’ in launching attacks on aged care facilities (Atwood 262). There are even futuristic climate courts in which the adults of today are held to account (Muntisov and Finlayson). However, the closest fictional exemplar of a Last Judgment which I have found is the trial described in Doris Lessing’s visionary work *Shikasta*. Although this trial ends inconclusively and without a formal verdict, the arguments presented by the multi-racial young complainants are rife with intergenerational and interracial condemnation and judgement. They shared ‘a sullen and despairing loathing of their elders, whom they could see only as totally culpable’ (Lessing 295-6). The trial opens with an indictment: the ‘white races of this world’ must ‘accept the burden of culpability, as murderers, thieves and destroyers, for the dreadful situation we now all find ourselves in’ (Lessing 388). The scapegoat defendant is summarily executed at the trial’s conclusion, by accidental error rather than design (Lessing 416), but vengeance is nonetheless

extracted. The trial is a matter of young people airing profound, intergenerational grievances, in a setting in which there is seemingly no future and no hope.

A warning of what might come to be, Lessing's Last Trial signals the death throes of law and order on a denuded Earth. At this final moment, intergenerational climate justice is no longer achievable.

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