The Legal Relationship between Present and Future Generations

An Intertemporal Perspective on Intergenerational Equity

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Abstract

The legal relationship between present and future generations is shaped by the concept of intergenerational equity. This concept, in its most common wording, requires the present generation to abstain from "compromising the ability of future generations to meet their own needs" (World Commission on Environment and Development, Brundtland Report, UN Doc. A/42/427). While a variety of international legal and policy documents, case law and academia have addressed intergenerational equity from various angles, the exact substance of the concept and its structures of implementation are still controversial today. The present thesis thus examines two connected research questions. First, it analyses the legal contents and structures of the concept of intergenerational equity as of today (Part 1). Second, it examines which legal understanding the present generation would and should base its answer on from an intertemporal law perspective on the legal relationship between the present and the future (Part 2).

With respect to the first research question, the thesis answers the following sub-questions:

1) How does intergenerational equity differ between its historical roots and its scholarly conceptualisation? What is the relationship of intergenerational equity within the contextual framework of international environmental law in general?
   Chapter 1 addresses these aspects in the form of a *lex lata* analysis by giving a historical overview of intergenerational equity in international law and illustrating its scholarly conceptualisation. In light of the systemic role of intergenerational equity within international environmental law, particularly its relationship with sustainable development, a first important finding of the thesis is the differentiation between two manifestations of intergenerational equity. It distinguishes between a general conception that requires the present generation to take into consideration the interests of future generations and a more specific doctrine of intergenerational equity, as established, *inter alia*, by *Edith Brown Weiss* in her works (see, e.g., 'In Fairness to Future Generations', 1989). This specific doctrine goes beyond the typical formulations in international documents and it builds on intergenerational duties and rights of future generations, a planetary trust as well as institutionalised frameworks of representation.

2) Which philosophical objections exist against a concept of intergenerational justice or equity? Which influences did the philosophical approaches have on the legal discourse of intergenerational equity?

   Chapter 2 of the thesis addresses the complex and intertwined relationship between the legal concept of intergenerational equity and the pre-legal ideas of "intergenerational justice". Often, objections against intergenerational equity have been mixed with more conceptual, philosophical objections against *any* theory of intergenerational justice. These objections concern, *inter alia*, the question of whether future generations could at all be capable of holding rights in the sense of the aforementioned doctrine of intergenerational equity. After giving an overview of the most common conceptual objections, particularly the non-identity problem and the non-existence argument, the thesis demonstrates that these obstacles have been overcome by other convincing philosophical considerations. Beyond this, the philosophical realm has shaped the legal discourse of intergenerational equity in many ways. Particularly, *John Rawls'* social contract theory, based on just and fair principles of (intergenerational) justice (e.g., 'A Theory of Justice', 1999), has inspired some aspects of *Brown Weiss'* theory. Further, communitarian ideas of a transgenerational community of humanity are reflected in intergenerational notions, such as the idea of a planetary trust or the notions of common heritage and common concern of humankind.

3) What is the legal nature of intergenerational equity in its two manifestations? Do these manifestations have the normative capacity to steer the behaviour of States? Beyond this, are they legally binding parts of contemporaneous international law in the form of the legal sources within the meaning of Article 38 of the ICJ Statute?

   Building on the distinction between the two manifestations of intergenerational equity, Chapter 3 adresses, first, the normative capacity of both manifestations and, second, their legal status as treaty and/or customary international law. Based on *Ronald Dworkin's* typology of policies, principles and rules ('Taking Rights Seriously', 1978), both manifestations have normative capacity. The general conception of intergenerational equity constitutes a legal principle, whereas the specific doctrine constitutes a legal rule. Despite this normative capacity, the manifestations differ with regard to their legally binding character under international law. The general conception is included in many environmental treaty regimes, so that it became part of binding treaty law. It is further part of customary international law as abundant State practice and *opinio iuris* reflect a binding customary obligation to take into account the needs of

future generations in international environmental law. In contrast, the specific doctrine does not form part of any binding treaty regime as of today. Despite its emerging occurrence in several policy documents and civil society initiatives, there is not enough evidence to establish the doctrine as part of binding customary international law. Yet, there are tendencies of an emergence of said doctrine in the future.

4) Finally, the first part of the thesis turns to several sub-questions of operationalisation: Who are the duty-bearers of the concept of intergenerational equity? Are future generations actual right-holders of intergenerational rights? Which frameworks of implementation and representation of future generations do exist?

   Chapter 4 addresses these complex structural issues of intergenerational equity. With regard to the duty-bearers, States clearly remain the primary actors that are obliged to take into account future generations. Beyond States, there are some developments with a view to conferring international duties also to private corporations, but there are no such international duties as of today. The question whether future generations are right-holders under international law is strongly intertwined with the aforementioned conceptual objections of the non-existence argument. However, having overcome this and other objections, future generations *can* become right-holders of intergenerational rights; yet, the current legal regime does not consider them right-holders so far.

   With respect to the third structural issue, there is no coherent and universal framework of representation of future generations, neither on the level of policy-making nor in judicial proceedings. In some States, national ombudspersons for future generations take a limited representative function, but initiatives to introduce an international obligation to create domestic institutions or to establish a global representative for future generations have been unsuccessful. Further, there is no generally accepted actor that could represent future generations before international courts or tribunals. As of today, States in *erga omnes (partes)* constellations, third parties as *amici curiae* or the courts themselves (e.g., in advisory proceedings) have been suggested to take up this role, yet, without coherent precedents. In individual complaints proceedings against States (and partly against private corporations), non-governmental organisations, Indigenous communities and members of the younger generation often act also on behalf of future generations. However, as most of these proceedings take place at the national level, the relevant courts took very different approaches to this kind of procedural representation.

These four chapters of the thesis illustrate that intergenerational equity from a contemporaneous perspective is continuously evolving between *lex lata* and *lex ferenda*. At this point, the second

research question comes into play: So far, the analysis was based on the legal regime of the year 2022, but it leaves out an intertemporal perspective on intergenerational equity that would preliminary answer which legal regime is actually applicable to the determination of the norm of intergenerational equity *de lege lata*. Therefore, Chapter 5 of the thesis elaborates on the doctrine of intertemporal law, which assists in determining the temporally applicable legal regime to an international norm. The first component of intertemporal law, contemporaneity, points to the legal regime contemporaneous to the time of the creation of a certain norm. This contemporaneous perspective is inherent in the foregoing *lex lata* analysis. The second component of intertemporal law contains the application of evolutionary approaches that require taking into account subsequent developments of the legal regime until the time of a dispute on the norm. These evolutionary approaches have so far been applied in the context of treaty interpretation, linking the past of a norm to its developments until the present.

The analysis in Chapter 6 of the thesis illustrates that this existing doctrine of intertemporal law cannot be applied *par for par* to the concept of intergenerational equity due to formal as well as substantial reasons. First, the evolutionary approaches of treaty interpretation must be modified to the customary nature of intergenerational equity, as assessed in this thesis. Second and third, the inherently intertemporal nature of intergenerational equity as well as the irreversible impacts of most intergenerational violations require a shift of perspective with regard to intergenerational equity. The thesis establishes a modified doctrine of intertemporal law that is adequately applicable to disputes on intergenerational equity. The main component of this modification is the necessary shift of perspective that results in a future-oriented perspective on intergenerational equity: Instead of awaiting future legal developments of the norm and then retrospectively applying them to a future dispute, the modified doctrine requires taking into account future developments of intergenerational equity in the resolution of intergenerational disputes, already today. Put differently, the members of the present generation must today consider not only the current (contemporaneous) legal regime of intergenerational equity, as illustrated in Chapters 1 to 4, in the context of intergenerational policy-making or judicial disputes. They must also take into consideration how the concept of intergenerational equity will evolve in the near future in order to apply the temporally correct legal regime.

Since predicting future developments of law is not easily possible – some might say impossible – the present thesis offers three alternative solutions to overcome this lack of knowledge on the future. At the very least, the lack of persuasiveness of the retrospective doctrine in respect of intergenerational equity could trigger a change of mindset vis-à-vis intergenerational problems today. If the members of the present generation became conscious about the intertemporal

perspective of future generations, this might also change the way they see their obligations towards future generations. Beyond this abstract change of mindset, it would, second, be possible to engage more substantially with the potential future developments of intergenerational equity. Based on the transitional character of intergenerational equity as a norm of customary international law, the two-fold manifestations of the concept offer an adequate starting point for such a cautious outlook on the future. Intergenerational equity is situated between its currently binding manifestation of the general conception and its emerging manifestation of a more specific doctrine. Although it is not certain that the concept will develop into the specific doctrine, the continuous evolution of intergenerational equity and the increasing amount of evidence of the specific doctrine in international legal discourse speak in favour of the future development of the concept. Consequently, this future-oriented perspective on intergenerational equity could be based on the contents of the specific doctrine of intergenerational equity, including planetary duties and rights and a more coherent institutional framework of representation. Decision-makers and judges would have to be less fixated on the accepted general conception and to become open to the prospective consideration of emerging developments of intergenerational equity. The specific doctrine would then already play a decisive role in today's decision-making and dispute resolution even ahead of its final crystallisation as legally binding norm.

Finally, and as a third solution, it could be possible to apply a methodologically convincing framework for the prediction of future change in international law in order to make even more reliable assumptions on the future development of intergenerational equity. Although the present thesis does not consider the application of such a method to be absolutely necessary, it introduces a framework of the international legal system by *Paul Diehl* and *Charlotte Ku* as appropriate analytical tool to engage in this assessment (e.g., 'The Dynamics of International Law', 2010). While the present thesis only briefly sketches out their main ideas, a more detailed analysis of the interactions and conditions for system change could make it possible to predict the future changes of intergenerational equity more specifically and with a higher probability. These predictions would then influence the present generation's legal obligations towards the future as they would have to be considered from an intertemporal perspective as part of the evolutionary approach.