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‘Burned by the Sun, Drowned by the Rain’: Enhancing Children’s Legal Protection against Climate Change



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EXECUTIVE SUMMARY

The objective of this policy brief is to make a case for addressing the pressing issue of child environmental rights in international law. There are 2.2 billion children on this planet, 90 per cent of whom are living in low and lower-middle income countries. While they constitute the human group with the biggest expecting growth over the next 30 years, they yet remain the most underrepresented one. Children also struggle making their voices heard, being taken seriously and simply catching the attention of the adult generation. Their fears, hopes, dreams, expectations but also innovative ideas for potential solutions and mitigation strategies regarding climate change are constantly underestimated. Up to this date, despite their will to be part of decision-making processes and legal initiatives, no right to environment applied to children is explicitly codified, recognised as such and endorsed *per se* as a legal international instrument.

The policy brief highlights five reasons justifying concrete change in policy making in order to safeguard children’s future. The environmental issue should be apprehended as an ethical duty for the adult generation: the risks faced by poor children and children in poor environments threatens their quality of life as well as their health and their chances to survive, the threats faced by indigenous communities involve serious risks altering their culture and their lifestyle, and the positive role of child activism should be valorised.

In order to address children’s concerns regarding climate change, the policy brief suggests a set of measures and initiatives which could lead to social and environmental change regarding local and national policy making, child participation, social group actions and international organisations’ capability.

INTRODUCTION

In 2019, over 1.2 billion young people were between 15 and 24 years in the world, 90 per cent of whom were living in low and lower-middle income countries. In the 47 poorest countries, an increase of the youth by 62 per cent is expected over the next 30 years, especially in Sub-Saharan Africa (89 per cent), Oceania (38 per cent) and Northern Africa/Western Asia (28 per cent).

Moreover, climate change and the social injustice it induces particularly affects lower income countries. This can be explained by a combination of socio-economic factors including important rural populations, natural resources exploitation as a source of national income, less access to education and health structures, gender inequalities but also natural disasters, less risk management/coping mechanisms from the states and structural fragilities (United Nations (UN) World Youth Report 2020). However, while possessing the fewest resources and being more vulnerable due to the early stage physiological and cognitive development, the youngsters from the 'majority's world' will be key stakeholders in both tackling this unprecedented crisis and coping with its impact on their daily life.

Children living in higher income countries are however not spared by the different consequences of our changing world and will also have to face the consequences of climate change. Their health is particularly affected by pollution and exposure to chemicals and asthma is the leading chronic disease (Gibbons 2014). Children also experience mental health effects due to the lack of exposure to nature and outdoor activities, as well as anxiety towards climate change and post traumatic syndromes due to natural catastrophes (Kar, Mohapatra, Kailash, Pratiti, Sarada & Harish 2007).

Despite such a context of multiple threats towards children's rights, the disbalance of strength opposing them, the most vulnerable existing social group, to states, decision-making bodies and legal frameworks has led to shocking global inaction and an absence of ambitious legal perspectives. Only 42 per cent of national climate plans mention children or youth, and only 22 per cent mention children explicitly, including the Paris Agreement and other actions

implemented by the United Nations Framework Convention on Climate Change (UNFCCC) and the highly publicised UN Sustainable Development Goals (Escudero 2019).

This juncture between ongoing action plans and children's rights is however critical. The best interest of the child as a primary consideration, the right to be heard, the right to appropriate legislative, administrative and other measures and the right to environmental education as mentioned in the UN Convention on the Rights of the Child (1989) (CRC) need to be part of a global strategy prompting awareness and bringing intergenerational equity, social inclusivity, justice and safety to the new generation all across the world.

PROBLEM DEFINITION

An Inexistent Right

To this day, no right to environment applied to children is explicitly codified, recognised as such and endorsed *per se* as a legal international instrument (Collins 2007). The very definition of a potential right to environment concerning all human beings poses problems in terms of nature and formulation as it does not fit in any category of 'first generation' rights. For the purposes of this paper, we will elaborate on McDonald's definition of environmental rights as 'the right to protect human health and private or common property from damage or potential damage sourced through the environment', as well as Shelton's vision of environmental rights as a 'reformulation and expansion of existing human rights and duties in the context of environmental protection' (MacDonald 2006; Shelton 2012).

Approaches Elaborating on the Environmental Rights Gap

Not all jurists agree on the best strategy to tackle environmental rights as four tendencies can be highlighted regarding the use of existing laws and the potential design of new legal tools. The first one considers that existing human rights can simply be used to reach environmen-

tal goals. The deprivation of existing rights is a central concept to such an approach. For example, the right to life or the right to a standard of living adequate for health and well-being as defined in the Universal Declaration of Human Rights (1948) might be violated by environmental degradations. The second one offers to reinterpret existing rights while taking into consideration environmental issues. The third one advocates for the creation of a new 'third generation' free-standing right to environment (Collins 2007). This last approach is so far quite contested as it could devalue and bring shade on the existing human rights approach as defined in 1948, the nearest manifestation to internationally accepted global standards related to humanity (MacDonald 2006).

Definition Struggles

The different issues opposing legal experts highlight the complexity of the task. The first problem is the targeted audience as third generation rights tend to address groups rather than individuals, bringing difficulties in terms of codification. Children should also be considered as a distinct category in the spirit of the UN Declaration of the Rights of the Child (1959) and the CRC. The development of a law dedicated to children also questions the possibility to include future generations, as yet unborn. Moreover, experts are divided between adopting an anthropocentric approach, where protecting human life would constitute the most important goal as 'humans are not separable members of the universe' (Shelton 2012), as opposed to an 'ecocentric' one, where environmental rights should benefit the environment per se (MacDonald 2006).

Sustainable development constitutes a nexus between human rights law, environmental law and international economic law. However, further progress is still needed as sustainable development is not yet a widespread guiding principle of international environmental law and policy making (Collins 2007). However, some pragmatic results could be achieved by building on existing soft laws, such as the Declaration of the United Nations Conference on the Human Environment (1972), the non-binding

action plan Agenda 21 (1992), the Rio Declaration on Environment and Development (1992) and the Johannesburg Declaration on Sustainable Development (2002), where the connection between human rights and sustainable development was reaffirmed.

Children are not Considered as Stakeholders

Finally fourthly, child environmental rights are not progressing due to the lack of interest, consideration and trust towards children and teenagers' living conditions, but also the lack of capacity in bringing substantial change. Policymakers, leaders and our societies in general tend to dismiss children's perceptions and ideas as naive and unrealistic and do not consider them as stakeholders. Their political energy and innovative potential is underestimated and underexplored (Hayward 2012), despite the fact that they are aware of the impact of climate change on their future and 74 per cent of them are worried (Gibbons 2014).

RATIONALE FOR ACTION

An Ethical Duty Towards Future Generations

Developing a pragmatic approach to children's rights to a healthy environment is a necessity as well as an ethical imperative: adults must protect the best interests of the children of today as defined in the CRC by article 3, and protect the climate system to safeguard the future of present and future generations as defined by article 31. Improving our understanding of environmental rights will have a positive impact on countless aspects of children's daily lives by promoting a satisfactory standard of living, access to food, housing, culture, health and wellbeing, nature, education and recreational time, as well as guaranteeing non-discrimination, dignity, security, family stability and peace (Makuch, Zaman, Aczel & Miriam 2019). The concept of intergenerational justice must be central to succeed in this endeavour and can help achieve existing commitments regarding climate change

as defined in 2019 by the 25th Conference of the Parties to the UNFCCC (OHCHR 2019).

Children Face Increasing Risks

As highlighted by the Food Policy Research Institute, climate change is amplifying existing risks, especially for poor children and children located in low income countries, due to both geographic disparity in climate vulnerability, political instability and a lack of disaster relief structures (Nelson, Rosegrant & Koo 2019). In high income countries, polluting facilities, power plants, refineries, mines and sites of fossil extraction are very often located in the proximity of vulnerable groups (Ottinger 2013). Overall, children are estimated to bear 88 per cent of the burden of disease due to climate change and the poorest and the youngest are proportionally at risk. Diarrhoea was identified as the cause of one in ten preventable deaths, conducive to the scarcity of potable water and food (UNICEF 2013). Children also facing undernutrition and malnutrition, responsible for half of the deaths, exacerbated by the increase of natural disasters such as droughts, wildfires, heatwaves and storms. Finally, natural catastrophes cause high rates of child casualties and affect their cardiac and pulmonary health (Pass Philipsborn & Chan 2018). Climatic disasters deeply impact children's security and families and lead to displacements. More than 26 million people per year have migrated since 2008 in the aftermath of such episodes (IDMC 2015). It is also a factor exacerbating pre-existing political instability and conflicts (Pass Philipsborn & Chan 2018).

Protecting Indigenous Communities

New legal frameworks are necessary to counterbalance the lack of adequate protection which puts indigenous communities and culture at risk. The Office of the UN High Commissioner for Human Rights (OHCHR) highlighted the clear link between culture and environment among indigenous people, 'sharing a spiritual, cultural, social and economic relationship with their traditional lands' in Central America, the Amazon Basin, Asia, North America, Australia, Asia and North Africa. Lands dispossession,

forced removal, development projects, mining, foresting industries and agriculture damage the flora and fauna, their ecosystems and pollute their sources of water (UNHCHR 2008). Indigenous populations of the Arctic are extremely vulnerable to persistent organic pollutants which affect children and foetuses, a fact which fostered the implementation of the Stockholm Convention on Persistent Organic Pollutants (2001) (Koutouki 2017).

Educating children to protect biodiversity and build resilient communities

Moreover, ecocentric benefits arising from new legislation can also be expected regarding ecosystem services, as including children into environmental strategies improves its protection. The resilience of communities will also be increased as children can learn how to manage environmental resources and protect biodiversity. They can also be taught to identify disaster relief solutions in time of crisis, increase positive environmental awareness in their family and become 'responsible future stewards of the environment' (Makuch, Zaman, Aczel & Miriam 2019). When children are part of policy and decision-making processes, their voices can prevent environmental damages. For example, in 2008, during the decisive *Oposa v. Factoran* case (G.R. No. 101083 (224 SCRA 792)), the Supreme Court of the Philippines recognised the concept of intergenerational responsibility when 43 children rose against deforestation. Such cases contribute to the development of international environmental law frameworks (Houck 2006).

Child Activism

Finally, child activism must be taken seriously and lead to implementing change as it can bring positive influence on new legal developments. Following massive 2018 and 2019 school strikes across Europe, the UN Headquarters hosted its first Youth Climate Summit on 21 September 2019. The same year, a group of governments joined youth activists in Madrid and signed an intergovernmental declaration on children, youth and climate change (Escudero 2019).

Youth activists launched campaigns and lodged complaints to pressure policymakers, including the European Citizen Initiative, enabling citizens to ask the European Commission to tackle concrete demands or to reach a legal act (Han & Sang Wuk 2020).

POLICY SCENARIO

Switch our Political Focus to Best Interests of Children

Links can be developed between existing first and second generation rights in international human rights law in order to fulfil the best interests of the child as defined in article 3 of the UNFCCC which are being violated. Sustainable development can also be used as a framework to develop international agreements at international, national and regional levels as the Paris Climate Agreement (2015) already merged climate change and sustainable development and showed their deep interrelation. Governments must step out of their immobility to achieve the objectives defined by the UNFCCC and the Conference of Parties by taking urgent steps and tackling the many issues that are currently preventing them from courageous decisions: specifically political ambition and adequate finance. Indeed, high income countries refuse to be held responsible for past industrialisation while low and middle income countries refuse to give up on growth and industrial development (Gibbons 2014). The focus set by the current generation of policymakers on the benefits of economic growth and industrialisation must be fairly put in balance with their consequences on future generations.

Climate Change Finance

High income countries' commitment to fund climate change mitigation and adaptation actions in low and middle income countries as defined by article 4.3 of the UNFCCC must be respected. The Cancun Agreement (2010) set the goal to USD 100 billion per year mobilised by developed countries towards more vulnerable ones. Different strategies can be imagined

to project financial flows to protect the environment. Funds can be transferred directly to governments or private companies which could later on implement initiatives such as projects funding, loan contracts, public budget support etc. For example, the Green Climate Fund can support implementation. The Kyoto Protocol also showed potential for market-based instruments implementation. However, sizable financial flows must not foster corruption or promote rent-seeking and economic volatility. It is also possible to use market-based tools, such as international emission trading at governmental or company levels as defined in article 17 of the Tokyo Protocol (Jakob 2015). Through this method, countries that have emission units to spare, which they did not use, can sell the surplus to countries exceeding their needs, using carbon as any other good (UNFCCC Decision 11/CMP.1 2005).

Imposing Standards to Private Corporations

Jurists, political representatives and civil society groups must continue their efforts to bring action on polluting structures including fuel and power, oil and gas, transportations, fashion, food and agricultural products industries by combining national, transnational and international strategies. According to Izkhak, Kleimeier and Viehs' analysis of 1,800 international firms and reports, their CO₂ emissions and countries of locations, it is necessary to set an international framework and implement concerted actions as companies show lower emission levels in countries implementing strict environmental regulations but emit more abroad while benefiting from laxer rules. As strict rules are costly, companies mitigate their loss by exporting pollution to foreign countries (Izkhak, Kleimeier & Viehs 2019).

Favouriting Different Levels of Strategy

Supporting children's rights through political and legal action can happen at different levels, leveraging the current attention given to child environmental rights thanks to child activism.

Due to their predominance in environmental policymaking, ministries must be encouraged to develop children-centred approaches. Good practices from Germany can be highlighted: in 2016, Germany took the initiative to share inputs on the impacts of climate change on the rights of the child with the OHCHR analytical study (OHCHR 2016). The German government also committed to protect the best interests of children and to make it a priority in all steps of its development policy, such as planning, implementation, evaluation, funding, but also resilience building and risk reduction. The Filipino Children's Emergency Relief and Protection Act 2016 is centred around the idea of children's survival, development and political participation, and names the State of the Philippines as responsible for the design and implementation of a 'comprehensive Emergency Program for Children taking into consideration humanitarian standards' and improving the fate of children, pregnant and lactating mothers in situations of emergency (Republic Act No. 10821 of the Congress of the Philippines 2016).

Moreover, the impact of grass-roots initiatives and local organs of power such as local parliaments should not be underestimated in implementing sustainable change among individuals and collectivities. Children can be consulted through one-off events, regarding a particular issue or legislation, taking into consideration their views on the matter. They can also be involved in designing projects, choosing methodologies and collaborating on the long-term with local and regional instances (Inter-Parliamentary Union & UNICEF 2011). One can mention good practices in terms of children's parliaments, such as Slovenia, where over 100 teenagers are elected in schools and meet to discuss a chosen topic. In Zimbabwe, children from primary and secondary schools are selected to join the annual children's parliament and discuss topics chosen by the Organisation of African Unity. In France, youth councils articulate children's concerns with local communities' representatives and have achieved results including the creation of children friendly spaces and children friendly transport facilities, and better equipment for children with disabilities (Landsown 2001).

Support Legal Accountability

Environmental degradation and climate change effects must be considered as human rights violations. However, assessing the impact of climate change does not go without difficulties as it is not possible to measure rationally the effects of a country's history of political decisions in increasing greenhouse gas emissions. Another example is the increase of environmental catastrophes: if global warming plays an important role in such a phenomenon, it not possible to scientifically qualify it as the only factor.

Finally, there are concerns for the future when international human rights law is based on compensating a harm which already occurred (Gibbons 2014). However, filing lawsuits still constitutes an efficient strategy. Well-constructed and mediated cases shed light on potential harmful situations as well as identify a concrete perpetrator. They can lead to social change, empower communities and stimulate civil groups to advocate for policy and legal change (Newell 2008).

Support Civil Groups and Community Sovereignty

Civil society groups are vital to support the accountability process. They play a major role in raising awareness towards climate change as well as in advocating for the enforcement of existing frameworks. They can target both national and international bodies, which is decisive as international agencies facilitate interstate agreements, but the involved parties are responsible for implementing national agendas. Therefore, citizens should exert their right to accountability, which can be defined as the 'division of rights and responsibilities between state, market and civil society actors and the means for realising these' (Newell 2008). They can both hold governments responsible for their inaction and for their links with polluting private companies, but also prevent damage. Accountability should play an important role in addressing environmental policies as civil society has the power to develop their own mechanisms of civil redress. Civil groups can also bring light to the issue of democratic disparities and exclusion by chal-

lenging international environmental regimes which are not including the communities that are the most affected by climate change.

PROPOSED RECOMMENDATIONS

- Data collection and analysis regarding the impact of climate change on children must be increased. Data should provide clear insights on the impact of natural catastrophes, pollution, greenhouse gas emissions and persistent organic pollutants on children according to their age, gender and geographical location.
- Public access to information regarding climate change and existing legal frameworks must be enhanced to reach all citizens including children. Communication strategies must be made accessible and understandable by children of different age groups.
- Children should be able to participate in the UNFCCC Conference of Parties through the creation of a standing agenda item. The Conference of Parties should take into consideration gathered data and focus on inter-generational justice to protect the present and future generations.
- The possibility to create a UN Corporate Accountability Convention, raised at the World Summit on Sustainable Development in 2002, must be advocated for.
- Multi-actor initiatives must be developed by creating groups made of state, regions and cities representatives, legal experts, civil society actors, community members and children. Action can be taken through public audits and consultations, citizen activism and campaigns, and judicial action.
- Contact between civil groups and state representatives must be increased. Building good relations with the state is necessary to improve the effectiveness of legal environmental campaigns.
- Social and environmental regulations on corporations must be established at both the national level and, most importantly, at the international level.
- Legal activism should not limit itself to environmental cases, but also should search for other forms of action which might have a positive impact on climate change. Changes brought through other concerns might bring a wide range of benefits.
- Legal aid mechanisms for communities and groups at risk must be provided by states and regional actors.
- Public policy making related to child environmental rights and quality of life should include issues of generations, health, social inclusion, legal services, education and finance. It should be developed in collaboration with non-governmental organisations (NGOs), civil groups, concerned communities and social groups, different ministers including ministries of environmental protection and ecological transition, of agriculture, of health, of solidarity and inclusion, of the economy and finance, national assemblies or senates and departments or councils in charge of the constitutionality of legislation. Public consultations should be held with relevant stakeholders including legal communities, NGOs, communities and environmental agencies.
- The power of the UN Committee on the Rights of the Child (CRC Committee) should be used by children and their representatives in order to confront states on their obligations in the case of climate change. Periodic reports to the CRC Committee should include information on the impact of climate change on children.
- Quality trainings must be provided to national courts' judges who do not always understand international environmental law as well as national dispositions.

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