Intergenerational Rights: Rights of the Child and Environment

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HUMAN RIGHTS AND THE ENVIRONMENT IN THE EU // TOWARDS AN INCLUSIVE DEBATE

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Introduction

Development is an inherently complex process entangled with the tension of temporal dimensions- past, present, and future, which poses substantial challenges to the trajectory of development. While the past, with its legacies, established norms, and paradigms, influences the trajectory of development by instilling the need for continuity and reverence for established systems, institutions, structures, and paradigms, the present requires a careful assessment of the current circumstances and conditions in order to meet the needs and address present challenges. In contrast, the future, with its endless possibilities, potentials, and anticipations, invites the consideration of the short and long-term ramifications of decisions and struggles with the complexities of foresight and prudence. Thus, the development faces with the daunting task of striking a harmonious equilibrium between the established systems and structures and the urgency for innovative adaptation to the contemporary, new, and emerging challenges. In other words, the temporal dimension of development manifests themselves in the constant negotiation and delicate balancing act between the needs of the present and the needs and imperatives of the future.

The law has devised numerous strategies to navigate the ever-shifting terrain of development, aiming at ensuring the coalescence of the needs of the present with the needs of the future. Sustainable development, as a paradigm of development, is a strategy that guides the trajectory of development towards meeting "*the needs of the present without compromising the ability of future generations to meet their own needs.*"[1] In this context, the concept of future generations has emerged, conceptualised, inter alia, as intergenerational rights. Due to the intertwined forces of the past, present and future, intergenerational rights are closely related to the rights of the child, as children, due to their young age, are often referred to as both the present and the future.

This paper explores intergenerational rights with a focus on the impact of environmental degradation on the realisation, protection, and promotion of the rights of the child. It delves into the concept of

[1] Brundtland, G.H. *Our Common Future: Report of the World Commission on Environment and Development* (UN-Document A/42/427, 1987).

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intergenerational rights and the rights of the child, their importance in ensuring a sustainable future, and some of the legal strategies that have been developed to ensure environmental protection, survival, development, and intergenerational equality, in particular in the context of the EU. As such, it aims to contribute to the ongoing EU efforts to fulfil, protect and promote the rights of the child, including the environmental rights of the child, by providing an additional focus on the interrelationship between environmental degradation and the rights of the child.

Problems of the Human Environment- Intergenerational Perspective

The environment and environmental factors have a profound impact on human existence and social dynamics, and vice versa. On the one hand, the environment shapes human behaviour, and systems and structures; on the other hand, these behaviours and structures influence the environment. This fundamental premise of mutual influence underpins the development of law and policy in all aspects of the human enterprise. What seems to be often overlooked, however, is that while humans are dependent on the environment and environmental factors, the environment is not dependent on humans.

The development of human society, and in particular scientific and technological advancements, while providing the solutions to the most pressing problems, has also created a new set of challenges that outstrip the severity of the problems they were originally intended to solve. Thus, environmental degradation and climate change have become a global emergency, and society urgently needs to address these challenges effectively and efficiently.

There are three groups of problems in relation to the human environment. Within the first group are "*changes in the natural surroundings brought about, without adequate control, by the use of modern technological advances in industry and agriculture*"[2], including but not limited to "*air and water pollution, erosion and/or depletion of the soil, excessive and uncontrolled use of biocides, problems of waste, and disturbance of the ecological balance caused thereby.*"[3] Within the second group are the problems of the impact of the first set of issues on people themselves, particularly the perilous effects of changes in the natural environment on health, working and living conditions, while in the third group are the problems of urbanisation and uncontrolled urban development. For example, "*mushrooming shantytowns and other types of slum areas, as well as rapid urban growth, cause not only air pollution, traffic congestion, a damaging level of noise and sharply increased accident rates but also problems connected with family disorganisation, mental tensions, and increased crime rates.*"[4]

[2] UNECOSOC 'Consideration of the provisional agenda for the Forty-fifth session, Addendum, the question of convening an international conference on the problems of human environment, Letter dated 20 May 1968 from the Permanent Representative of Sweden addressed to the Secretary-General of the United Nations' para 2 (UN. Doc. E/4466/Add.1, 1968).
[3] *Ibid.*
[4] *Ibid.*

Today's most pressing problems of the human environment have far-reaching consequences for the present and future generations (either children or those yet to be born), placing environmental issues at the crossroads of different temporal dimensions of development. Children are among the most vulnerable to the adverse impacts of environmental degradation and climate change. The environmental and climate vulnerability of children builds on their overall vulnerability, which consists of children's physical, developmental, and cognitive vulnerability, dependency and care, and limited agency. Addressing the negative impacts of environmental degradation on children is therefore not a matter of establishing a forced hierarchy and competition between the rights of different groups in society but a matter of individual and collective responsibility towards children. Moreover, given the interrelationship between the environment, human agency, and development, environmental issues are human rights and rights of the child issues, which requires that environmental problems also be addressed in the context of human rights, particularly children's rights.

The Concept of Intergenerational Rights

The concept of intergenerational rights emerged within the context of development, and it is based on the ethical imperative that "we have not inherited the Earth from our parents, we have borrowed it from our children." This ethical imperative articulates the notion of harmonious equilibrium between different dimensions of development and the temporal dimensions of development, striking a delicate balance between meeting short and long-term needs, and present and future needs. In this regard, equality and fairness between generations are at the core of the concept of intergenerational rights, which in turn highlights the need for sustainable practices, in particular for environmental protection and for addressing the problems of the human environment.

The concept of intergenerational rights is relatively self-explanatory- intergenerational rights are rights between generations. Suppose rights are understood as a tool for problem-solving. In this case, intergenerational rights are the rights that aim to solve the problems arising from the overlap of new and old generations, which are two-fold. Firstly, there are challenges related to the coexistence of new and old generations, and second, there are challenges related to succession, and these two types of problems become even more relevant in the context of environmental protection.

More specifically, intergenerational rights bring forth two challenges in the context of development and the environment. The first challenge relates to issues of differing needs, priorities, and interests of the different age cohorts within the current generations. In a society with established hierarchies and power structures, there is a need to rethink the public discourse on responsibility, and this is particularly true in the context of children's rights. In other words, intergenerational rights require shifting the focus from adult-centered development to child-

centred development, which transforms children from objects to subjects of development. The Convention on the Rights of the Child[5] sets out the framework for this. However, integrating the provisions of the Convention into the development and environmental agendas is critical, for example, changing the standards from an average adult person to an average child, especially in relation to setting acceptable levels of environmental pollution. Thus, the challenge then is to transform the frameworks, systems, and structures that reflect this reconceptualised notion of responsibility and holistic development in order to create "The Future We Want[6]".

With regard to the second set of challenges, in order to address environmental problems efficiently and effectively, it is imperative to ensure that the solutions to problems, on the one hand, reflect the responsibility for the stewardship of the planet and life-supporting systems for present and future generations, and, on the other hand, ensure that solutions to the development and environmental challenges do not inadvertently create more complex and far-reaching human rights, development, and environmental problems. In other words, the second set of challenges relates to the issues of the transition from old to new generations and the transmission of heritage. This last set of challenges reflects the tension between the present and the future, and the misconceptions related to the purpose of decision-making, responsibility, and the ability to meet immediate and long-term needs. In other words, the tension between the present and the future is exacerbated by perceived competing priorities, interests, and needs, which in turn result in trade-offs between immediate needs and desires versus the long-term well-being of future and present generations. These perceived conflicting priorities and needs are attributable to the misconceptions about the nature of reality and distorted thinking that result in an inability to balance short-term and long-term benefits, flawed self-regulatory mechanisms, and decision-making drivers that impair the balance between immediate gratification and deferred rewards. Furthermore, the limited resources and capacity pose an additional burden, especially in the face of uncertainty and discounting of the future.

Legal Framework for the Environmental Rights of the Child and Intergenerational Rights- the EU perspective

The legal framework for the children's environmental rights and intergenerational rights has functions: to command, to prohibit, and to empower. These three functions translate into different types of obligations on the development and environmental protection actors, or, in other words, these obligations articulate different types of expectations for actors in relation to children and the environment. Positive obligations command or order certain behaviours, and negative obligations

[5] UN General Assembly, *Convention on the Rights of the Child*. (United Nations, Treaty Series, vol. 1577, p. 3, 1989)
[6] UN General Assembly. *Transforming our world: the 2030 Agenda for Sustainable Development* (UN Doc. A/RES/70/1, 2015).

prohibit certain behaviours. Obligations of conduct are obligations implemented through conduct, while obligations of results are obligations to achieve a specific result. However, the legal framework also has the function to empower that is based on the premise of human rights and on the premise that "*only in a community can law have a basis other than power*."[7] Hence, the concept of intergenerational justice sets the tone for the empowerment of children, the protection of the environment, and a more equitable society.

The EU has been at the forefront of promoting children's rights and recognising the interrelationship between environmental degradation and the full enjoyment of these rights. The EU and its Member States have demonstrated their commitment to protecting and promoting children's rights and the environment both within the EU and internationally through development cooperation that promotes intergenerational justice, and promotes and protects children's environmental rights. Over the decades, the EU has contributed to the development of very sophisticated legal instruments and mechanisms, and to the promotion of international cooperation and collaboration for the protection of children's rights and the environment, and the promotion of intergenerational justice.

Although there have been significant achievements regarding the promotion of children's environmental rights and, consequently, intergenerational justice, the new and emerging development and environmental challenges have created additional opportunities for the advancement of the relevant system and its structures. The current intergenerational legal framework consists of the rights of the child, and the environment and development legal frameworks. Thus, the law on intergenerational rights in the EU derives from international human rights law, such as the Convention on the Rights of the Child, environmental treaties, such as the Paris Agreement and the Aarhus Convention, and development agreements, such as the Agenda 2030 to name a few. Furthermore, the Treaty on the European Union, Treaty on the Functioning of the European Union, Charter on the Fundamental Rights of the European Union, EU environmental directives, EU regulations and decisions, the jurisprudence of the European Court of Justice, and EU strategies and action plans address the issues related to children's rights, intergenerational rights, environmental protection, and sustainable development.

Despite the significant progress and a robust legal framework, children face significant challenges arising from pollution, climate change, and energy poverty, which negatively impact their health, well-being, and their rights. For example, environmental degradation affects their right to life, survival, and development, the right to health, the right to an adequate standard of living, the child's best interest, and right to education. Given the recognition of these links and the potential long-term impacts on children's rights, there is a growing consensus among scholars, policymakers, and advocates that addressing environmental degradation is not only an environmental imperative but also a human rights imperative. This understanding has led to

[7] Barnet, R.J. Coexistence and Cooperation in International Law. *World Politics* 18(1), 82-91 (1965).

increased efforts to integrate environmental considerations into the discourse and implementation of children's rights, both at the international and national levels, under the notion of the environmental rights of the child.

There are two types of environmental rights. The first one is environmental procedural rights, which are the rights encompassing legal protection, guarantees and safeguards for broad public participation in environmental decision-making. They include the right to access to information, public participation, and access to justice.[8] The second are substantive environmental rights, which are the rights and freedoms related to the environment. Some of these rights are the right to an adequate environment, water, food, and access to modern energy and energy services. While there is no explicit recognition of substantive environmental rights as such at the EU and international levels, these rights are derived from other rights, such as the right to life, health, and an adequate standard of living. However, many EU Member States do have a constitutional right to an environment of a certain quality. Furthermore, the jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights has a significant role in shaping and interpreting the development and environmental frameworks in relation to environmental protection and the protection of environmental rights, including the environmental rights of the child.

Issues of intergenerational rights and justice, as well as the environmental rights of the child, bring forth the need to balance tensions between the present and the future as well as tensions between conservation and innovation. In the face of ever-increasing environmental degradation and climate change, some of the most important tools for balancing the present and future needs, and needs for conservation and innovation are the Environmental Impact Assessment (EIA), the Rights of the Child Impact Assessment and the Precautionary Principle.

The EIA procedure[9] guarantees environmental protection, transparency, and public participation in the decision-making process for public and private projects, such as major building and development projects. The EIA is required for the development of nuclear power stations, hazardous waste disposal facilities, and motorways, to name but a few. In contrast, when it comes to urban and development projects, each member state either sets specific criteria for the EIA or decides about it on a case-by-case basis. In addition to anticipating and mitigating environmental impacts, the EIA assesses the direct and indirect impact of the project on people, health, and rights. The project's environmental impact is assessed before the project starts, which ensures that the major environmental risks are mitigated, reduced, neutralised, or eliminated and that public consent is obtained. In addition, those affected by project decisions can challenge the

[8] See UNECE. Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). (UNECE, 1998).
[9] Established under the EU’s Environmental Impact Assessment (EIA) Directive (2011/92/EU as amended by 2014/52/EU).

decision in court, which ensures not only environmental protection but also the protection of rights.

In the area of economic development, human rights impact assessment, including child rights impact assessment, is an important tool for assessing the long, medium, and short-term impacts of laws and policies on rights, including children's environmental rights. For instance, as part of the EU's Better Regulation agenda, impact assessment of trade policies is used to ensure transparency in decision-making and to identify potential problems and solutions, such as in the case of the trade in minerals from conflict-affected or high-risk areas.[10]

The precautionary principle is the third tool in balancing the present with the future and conservation with innovation.[11] The purpose of the precautionary principle is to ensure a high level of environmental protection through preventive decision-making. As such, the scope of the principle covers the environment, consumer policy, food, human, animal and plant health when the risks of a phenomenon, product, or process cannot be determined with sufficient certainty. However, to invoke the precautionary principle, three criteria must be met. The first one is the identification of the potential adverse effects, the second one is the availability of scientific data, and the third one is the degree of scientific uncertainty. In the context of intergenerational and environmental rights, the precautionary principle ensures environmental protection, children's rights, and sustainability in the face of uncertainty.

Opportunities for Advancement of Intergenerational Rights, Environmental Protection and Children's Rights

Despite significant progress in the legal and policy framework for development and environmental protection, there are several challenges to the realisation, promotion, and protection of intergenerational and environmental rights, both at the EU and international levels. One of the major challenges of environmental protection and children's rights policy is policy integration and coherence. While fragmentation in environmental protection and children's rights can offer many advantages, such as specialisation and expertise, flexibility, adaptability, policy experimentation and resilience, one of the main challenges of fragmentation is a lack of coherence and policy competition, which often results in conflicting objectives of protection, inadequate environmental protection measures, and violations of children' rights.

Conflicting policy objectives and priorities are often complex. Let's take as an example cases where policies to promote economic growth and competitiveness are in conflict with environmental objectives. There may be an increased concern that economic priorities will

[10] See EU. *Responsible trade in minerals from high-risk or conflict areas* https://eur-lex.europa.eu/EN/legal-content/summary/responsible-trade-in-minerals-from-high-risk-or-conflict-areas.html (2021).
[11] The precautionary principle is detailed in Article 191 of the Treaty on the Functioning of the European Union.

overshadow environmental protection due to a lack of negotiation, cooperation, coordination, and information sharing between different actors and stakeholders. Furthermore, while operating within specific sectors or departments may be seen, in some cases, as increasing the effectiveness and efficiency of the policy-making process, the downside of such a process is the creation of potential policy silos and institutional barriers, which have a significant negative impact on the promotion of cross-sectoral cooperation.

One of the ways to address these challenges would be to strengthen the legal framework by developing new standards and regulations that explicitly recognise, promote, and protect the environmental rights, including the environmental rights of the child. It is important to note that developing a new regulation in the case of environmental rights would not be seen as over-regulation, which is challenging in itself, but rather as codification, which on the one hand would systematise expectations and obligations in relation to environmental protection and children's rights, and on the other hand would articulate and clarify the duties and responsibilities of different actors, with the potential to significantly reduce fragmentation and conflicts of laws, norms and objectives. Furthermore, integrating and mainstreaming environmental and rights perspectives into various policy areas such as agriculture, energy, transport, and industry would have significant potential in and, in that way, it would promote and strengthen sustainability practices across different policy areas and ensure long-term planning that extends beyond 2100.

Once the legal and policy frameworks are developed, the implementation phase begins, which presents its own set of challenges. Inconsistent implementation and lack of enforcement are some of the main impediments. For instance, inconsistent implementation may result in different levels of protection of both the environment and environmental rights. It should be noted that while the EU sets environmental standards and directives, their implementation and enforcement depend on interpretation, transposition, and enforcement in the Member States, which often leads to inconsistent implementation. Moreover, implementation difficulties are closely linked to the political will but also to institutional capacity to enforce the regulatory framework for environmental protection and environmental rights. While political will is one of the determinants of implementation and enforcement, the implementation of environmental legislation and the realisation of children's environmental rights will also depend on the resources available and, more importantly, on the capacity of the state to implement the relevant frameworks effectively and efficiently. Funding for environmental protection and the protection of environmental rights have a significant impact, both positive and negative, on implementation and enforcement. Availability of funding, resources, and human and institutional capacity can accelerate the monitoring, inspection, and enforcement actions, while their absence can significantly hamper them.

A good example of the implementation and enforcement challenges is the transition to a green economy, which is the transition to a sustainable and low-carbon economy. The transition

to a green economy presents an opportunity to strike a delicate balance between the needs of different generations, and current and future needs, by ensuring that sufficient resources are available in the future for the life, survival, development, and well-being of living organisms. In that regard, the Green Economy aims to integrate environmental protection and the protection of rights into economic policies. It promotes the use of clean technologies, renewable energy, and sustainable production and consumption patterns. However, the transition requires research and development of new technologies and practices to generate innovative solutions to environmental challenges and rights of child violations.

Effective solutions to environmental and child rights challenges require broad public participation and engagement of individuals, communities, and civil society organisations. One of the significant obstacles to ensuring broad public participation is limited knowledge and awareness of the seriousness and complexities of environmental issues, and human rights and rights of child violations. This is followed by the information gap, whereby there is limited access to accurate and reliable information and knowledge, which impedes informed decision-making and active engagement. Thus, environmental education is critical for environmental and rights protection. Nevertheless, even when there are established and effective mechanisms for participation, children often face significant barriers to meaningfully pa Effective solutions to environmental and child rights challenges require broad public participation and engagement of individuals, communities, and civil society organisations. One of the major obstacles to ensuring broad public participation is limited knowledge and awareness of the seriousness and complexity of environmental issues, and human rights and child rights violations. This is followed by the information gap, where there is limited access to accurate and reliable information and knowledge, which hinders informed decision-making and active engagement. Environmental education is crucial for the protection of the environment and human rights. However, even where there are established and effective mechanisms for participation, children often face significant barriers to meaningful participation in environmental and development decision-making, particularly as there is a need to balance the protection of children with exposure and participation. Thus, there are significant institutional barriers to children's participation in the sustainability discourse and decision making, at both EU and international levels.

Moreover, due to the proliferation of environmental and development processes and norms, but also due to the lack of fruitful and meaningful participation in decision-making, the general public, including children, experience what could be called "engagement fatigue", leading to disengagement from environmental decision-making, environmental protection, and rights protection. Because the general public is not a homogeneous group, there are tensions in balancing the needs and interests of different groups within society, similar to balancing the needs and interests of different generations. Due to different power structures, some groups have more influence on the decision-making process, such as the case with the industry groups, which deepens the existing inequalities in society, and worsens the environmental protection and the

state of human rights and children's rights. Strengthening participation in environmental decision-making is critical not only from the perspective of transparency and accountability but also to increase efficiency in finding solutions, as well as in implementation, enforcement, and access to justice. In doing so, it is imperative to address power imbalances in public participation is imperative, especially for children.

Access to justice is essential if rights and environmental protection are to be meaningful. Limited resources, procedural obstacles, and the complexity of environmental protection frameworks can have significant negative implications. Protecting the environment and the rights of the child is not only a right but also a duty. Hence, access to justice serves the purpose of protecting the rights and the environment and has an empowerment component reflected in responsible and accountable development actors. In addition, access to justice has a corrective and preventive function to ensure that the quality of the environment, now, in the present and in the future, is such as to enable the progress of individuals and communities, and to support their flourishing and the realisation of their full potential.

Finally, because of the EU’s advancements in sustainability and rights of the child protection, through international cooperation and assistance, the EU can leverage its influence on the global processes to inspire advancements for environmental protection, rights of the child, access to justice, and advance sustainability initiatives and planning beyond its borders. By sharing the best practices and lessons learned and cooperating with international partners, the EU is in a unique position to strengthen and promote the environmental rights of the child and contribute to global efforts for a just and sustainable world.

Conclusion

The realisation and protection of intergenerational rights and the environmental rights of the child are essential to ensure equality between the present generations, to ensure the transition from old to new generations and the succession of heritage, where the inherited natural and human environment is conducive to human well-being and prosperity. Both intergenerational rights and the environmental rights of the child besides not only ensure that the needs of current generations are met, also but also facilitate planning for the future in a way that does not compromise the ability of the current generations to meet their own needs. The task at hand is far from easy, but it is certainly not unattainable.

The EU has been at the forefront, both directly and indirectly, of promoting and implementing intergenerational, and environmental rights of the child. In doing so, it has developed a number of key mechanisms to ensure the harmonious development, integration, and mainstreaming of environmental and children's rights perspectives in different policy areas. Although there are a number of difficulties to be addressed, by capitalising on these opportunities, the EU is helping to strengthen the environmental rights of the child both within the EU and globally, improving

environmental protection, and contributing to a more sustainable future for its citizens and children and the planet as a whole.