

Parenthood in the light of climate change challenges—a perspective from international law

Professor Susana Sanz Caballero



1. Introduction

Are the variables “climate change” and “parenthood” related at all? A first and superficial look at the two concepts will probably tell us nothing on whether there is a link among them. We may even conclude that there is no relation whatsoever. However, this is not the case at all.

Climate change affects children much more than it affects any other group of human beings¹. Children belong to a very special category of vulnerable group. They are unable to look for their own means of sustenance and are completely dependant on adults for care. Therefore, climate change, as well as any other hazards impacts more on them than on other categories of human beings.

Children are normally raised by their parents. They usually are members of a family. Within the marriage is where they find love, care and the supply of their basic needs. This is one of the reasons why the family is one of the fundamental institutions of society. A structured and caring family is the best environment for a child’s upbringing. As twin articles 16.3 of the Universal Declaration of Human Rights (UDHR) and article 23.1 of the International Covenant on Civil and Political Rights (ICCPR) affirm: “The family is the

natural and fundamental group unit of society and is entitled to protection by society and the State”. In the same vein, article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes: “The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children...”

2. Rights related to parenthood in the International Law of Human Rights

According to the UDHR, ICCPR, ICESCR and the Convention on the Rights of the Child (CRC), parents enjoy some important rights concerning their children. Most of these rights are not expressly contained or categorized in these international instruments as parents’ rights or family rights but their link with parenthood and/or with the family can easily be inferred from them. Among them, the most crystal-clear rights are:

- The right to family life.
- The right to found a family.
- The right to a standard of living adequate for the health and well-being of the family including food, clothing, housing and medical care and necessary social services.
- The right to the highest attainable standard of physical and mental health.
- Motherhood and childhood are entitled to special care and assistance.
- All children shall enjoy the same social protection without any discrimination for reasons of parentage or other conditions.
- The right of the child to be registered immediately after birth, to have a name and to acquire a nationality.
- States have to respect the liberty of parents to choose the kind of education they want for their children.

Climate change affects the previous rights with regards to parenting by jeopardizing parents’ rights to organize their family life and to offer their children what they need to cover their basic needs.

¹ See, BARLETT, S.: “Children in the context of climate change: a large and vulnerable population”, in *Population Dynamics and Climate Change*, 2009, vol. 80, pp. 133 ff.; SANZ CABALLERO, S.: “Climate change and its impact on children”, in ZERMATTEN, J. (ed.): *Acts of Proceedings of the International Congress on the rights of the child and climate change*, 2012, Geneva, in press.

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The Convention on the Rights of the Child of 1989 makes abundant references to the role parents are supposed to play for their child's well-being. Among the rights that touch parents' role and authority, we can cite:

- The right of the child to enjoy his/her rights irrespective of the parents' race, language, political status, opinion, national, ethnic origin, birth or status (art. 2).
- The best interest of the child as the primary consideration in all actions concerning children (art. 3).
- The respect of parents' rights and duties in the assurance of protection for the well-being of the child (art. 3.2).
- The rights and duties of parents, members of the extended family or legal guardians to provide appropriate direction and guidance to the child (art. 5).
- The right of the child to be cared for by his/her parents (art. 7).
- The right of the child not to be separated from his/her parents against their will, except when such separation is necessary for the best interests of the child (art. 9).
- The right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests (art. 9.3).
- Humane and expeditious treatment of family reunification cases without any adverse consequences for the applicants and for the members of the family (art. 10.1).
- The right of parents and child to leave any country, including their own, and to enter their country for the purpose of maintaining direct contacts (art. 10.2).
- The right to be free from unlawful interference with family life and to protection against such attacks (art. 16).
- Common responsibilities of both parents for the upbringing and development of the child. Parents have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern (art. 18.1).
- States Parties shall render appropriate assistance to parents in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children (art. 18.2).
- States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities (art. 18.3).
- Protection of the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s) or legal guardian(s) or any other person who has the care of the child (art. 19.1).
- A child temporarily or permanently deprived of his or her family environment shall be entitled to special protection and assistance provided by the State (art. 20.1).
- States Parties shall in accordance with their national laws ensure alternative care for such a child (20.2) including the necessary placement of children in suitable institutions for the care of children (20.3).
- Adoption as a system of alternative care, if the law so permits, in view of the child's status concerning parents, relatives and legal guardians and, if required, with the informed consent of the persons concerned (art. 21).
- Appropriate protection for refugee children or children seeking refugee, whether unaccompanied or accompanied by their parents as well as international cooperation in case of need to trace the parents or other members of the family (art. 22).
- The right to enjoy the highest attainable standard of health and to facilities for the treatment of illness, including the fight against malnutrition and infant mortality, pre-natal and post-natal care for mothers, as well as guidance for parents concerning preventive health (art. 24).
- The primary responsibility of parents to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development (art. 27).
- Need of States to take appropriate measures to assist parents to implement the child's right to an adequate standard of living (art. 27.4).
- The right to education (art. 28). One of the aims of education is the respect for the child's parents, his or her own cultural identity, language and values (art. 29).

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Other rights included in the CRC but not necessarily related to parents' role concerning the child are the following: the right to acquire a nationality (art. 7), States measures to combat illicit transfer of children abroad and children non-return (art. 11), the right of the child to freedom of thought, conscience and religion and parents rights and duties to provide direction to the child in this field (art. 14), the right of indigenous communities to enjoy their culture (art. 30), the right of children to leisure and play and to participate in the cultural life (art. 31), the right of the child to be protected against economic exploitation (art. 32), the protection of children against drugs abuse (art. 33), the protection of the child against any form of sexual abuse (art. 34), the prevention of children from abduction, sale or trafficking (art. 35), the right of the child to be free from torture or any form of inhumane or degrading treatment (art. 37) as well as the promotion of child recovery in case of armed conflict, abuse, neglect or exploitation (art. 39).

As we will soon show, all these children rights and the related parents rights are equally affected by climate change consequences.

3. Special impact of climate change on parenthood

A preliminary hypothesis is that there is not a single parents' right which is not affected by heavy climate change consequences.

After cataclysmic disasters, epidemics and disease rapidly spread. Parents' capacity to prevent their children from falling ill is inversely proportionate to their ability to mitigate climate change consequences and to adapt to the new environment.

During disasters and in their aftermath, parents may lose sight of their children. The latter may die, get lost, be abducted, sold or given away in illegal adoption. Personal documentation of both parents and children may be destroyed and, as a result, they may encounter problems of identification before the authorities.

Parents' jobs or means of providing sustenance may vanish due to deforestation, floods, rising level of the waters, hurricanes or any other climate change-related cause. Parents will face the horrific situation of being unable to feed their children and to offer them a decent life. Their authority and their self-esteem may be eroded and they may lose control of their children. The inability of parents to provide food, shelter and health to their children may force them to flee from their countries. When parents migrate, they leave their children behind in the hope of sending money home once established abroad.

The children left behind may develop feelings of abandonment, anger, anxiety or threat when their parents leave. Fleeing parents will lose their children's control and will miss their chance to educate them. They will also face heavy bureaucratic problems in case they wish for a family reunification in the recipient country.

De-structured families are one of the common results of climate change consequences. Even in cases when parents manage to flee with their families from their devastated lands to a new settlement, their children normally experience alienation, xenophobia and isolation in the new country or territory. Sometimes they experience the impotence of being unable to communicate in the new land when the language spoken is different from theirs. All these added burdens severely affect the ability of parents to educate their children.

Housing is also heavily affected by climate change consequences, undermining the chances of parents to provide an adequate standard of living for their children. Sometimes families' homes collapse during climate catastrophes. Sometimes families have to abandon their homes because living there becomes impossible due to rising temperatures, land erosion, rising sea-water levels, etc. Families forced to leave their homes normally occupy or build new ones in slum areas of megacities or impoverished rural areas where they cannot provide their children with sanitation, basic services or education. When they settle down in overcrowded, ghettoized and unplanned areas, delinquency is normally what they find. As a result, parents experience authority problems to maintain their children away from gangs, drugs abuse and crime.

The right of parents to educate their children according to their own convictions and in schools of their choice also suffers from climate change impacts. When families are forced to flee due to the inhabitable conditions of land, education in their new settlement may be interrupted. Authorities in the new settlement may raise bureaucratic schooling obstacles for the children of newcomers. For those who stay in their homeland, education may also become impossible for different reasons. Among them, the need to employ children in the task of water-fetching for the family, cattle herding and firewood collecting, the departure of teachers due to global warming, the collapse of schools, the unaffordable reconstruction and relocation costs for new school buildings, the lack of sanitation facilities at school, etc.

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Climatic hazards provoke mass migration. Parents forced to flee abroad may also suffer the distressing experience of not being able to pass their nationality to their children born abroad, or the refusal of the new country to register the newborns. Parents may find themselves in the situation giving birth to stateless children with no political rights not because of political reasons but because their State of origin does not exist anymore. Needless to say, extreme situations always lead, with or without the parents' consent, to child exploitation or slavery, children forced to work, children being sexually abused and the increase of street children.

Deforestation provokes forest degradation and impacts the indigenous peoples' rights to enjoy their culture, their traditional lands and access to food. Simply put, deforestation damages the indigenous people's way of life. This all has an impact on the right to a decent standard of living, the right to housing and the right to collective property. Parents of indigenous communities find themselves in a desperate situation because they can no longer teach their children about their values, their environmental friendly know-how or their ancestral knowledge about survival, contact with earth, animals and plants.

In short: sometimes parents die from climatic events, or they migrate with the intention of working abroad and sending money to the family. Sometimes they just abandon or sell their children when they feel hopeless about the future. The children left behind risk falling into the hands of gangs and organizations that traffic with human beings. All these hazards multiply the number of street children, abandoned or exploited children, children who have to work, gang children and trafficked children.

Parents have a lot to lose concerning the care and raising of their children and concerning the control of their family structure because of climate change consequences on the environment, household and on their local communities.

4. Case law concerning family and parenthood rights in the context of environmental degradation

Despite the fact that environmental degradation and climate change provoke serious human rights breaches the reality is that there is almost no international case-law on the subject. One of the trickiest problems of climate change is how to allocate responsibility for human-induced climate change and its harmful consequences. There are several reasons for this:

- The nature of global warming makes it impossible to establish a direct causal link between a specific past emission and a specific harm on a specific person.
- Responsibility of impacts cannot always be attributed to the nearest government, but also to far away countries.

- States are not the only ones to blame but also public and private entities. However, corporations are not subjects of international law.
- The rights at issue sometimes are difficult to enforce (migrant rights, rights in time of war) and most of the harms are yet to come.
- Courts are not likely to accept cases where harms are not very concrete, as human rights litigation does not usually work with events that create massive numbers of victims who may, in addition, be dispersed all over the world.
- Human rights prioritise harms to actual persons, not to future generations. The rights of future generations are at stake due to climate change but there are strong arguments against entitlements and litigation in the name of people not yet born².
- Emergency conditions –as in the case of famine, floods, mass migration...- limit the application of human rights law. Governments take measures derogating from their human rights obligations in the aftermath of climate change hazards³ (curfew, etc.).

The previous reasons make it difficult for any victim of climate change harms -including mothers and fathers whose rights as parents are jeopardized due to global warming consequences- to have access to justice. To sum up: climate change gives clear evidence of the inadequacies of the international justice system in face of new threats and changing patterns of responsibility.

For the time being, no applications have been brought before international courts by parents claiming that the effects of global warming have undermined the exercise of their parenting rights. However, it is not inconceivable that this kind of application and this kind of legal argumentation will reach international organs in the next future. The few cases brought so far before international regional organs on the consequences of global warming or environmental degradation have been focused on their impact on community rights or individual rights instead of on parents' rights concerning their children.

² One may maintain that generations to come do not have rights because they are not yet human beings. But this is a very narrowed-minded approach that only takes into account legal rights and forgets about moral rights.

³ Some of these handicaps for environmental litigation are explained in International Council on Human Rights Policy, *cit.*, p. 4 and 45 and in UNICEF: *A brighter tomorrow: climate change, child rights and intergenerational justice*, London, 2011, p. 3.

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However, there is an exception to this rule in the case-law of the European Court of Human Rights (ECHR), which has developed a very creative and far-reaching jurisprudence on the right to a healthy environment by stating that pollution can interfere with the right to family life. The ECHR is the executive body of the European Convention of Human Rights of 1950. Despite the fact that the Convention does not include the right to a healthy environment as such, the ECHR has been able to infer this right from the right to family life because pollution and environmental degradation can easily affect the right to enjoy a peaceful and joyful family life. In what is probably the first case ever of international litigation on environmental degradation where a court has condemned a State⁴ -case *López Ostra/Spain* (1994)-, the ECHR understood that the right to family life of the López Ostra's family had been violated because the Spanish authorities had permitted the location of a noisy and pestilential waste treatment plant beside a family home without any previous study of ecological impact. Severe and continuous environmental pollution caused serious health problems for all the family members: the mother suffered from depression, the daughter turned sick and all the members of the family had frequent quarrels. The family well-being and quality of life was so affected that they had to move. Although the judgment does not talk specifically about how environmental pollution affected the López Ostra's parenthood rights and authority, we can easily deduce it from all the facts surrounding the case. The ECHR found a violation of article 8 of the Convention, which deals with the right to private and family life as well as a violation of article 3 on degrading treatment.

Similar facts and similar court argumentation can be found in the ECHR case *Guerra and others against Italy* (1998), where a chemical factory located close to the applicant's home was classified as high-risk. Italian authorities failed to fulfill their obligation to protect the Guerra's family right to family life as they never informed them about the risk for health and for the family members' well-being of living beside such a plant. Another relevant judgment is *Tatar/Rumania* (2009), where the ECHR ruled that pollution could affect the quality of family life of a father and son.

The recent judgment *Dubetska/Ukraine* (2011) – about an extended family living close to a mine and to a polluting factory- could be, in our opinion, a leading case on parenthood rights, because the ECHR accepted the applicants' submission that sometimes environmental hazards impair the right to family life. The ECHR ruled that, although there was no provision in the Convention guaranteeing the right to preservation of the natural environment as such, Ukraine had failed in its obligations because severe pollution and lack of clean water reportedly provoked diseases and caused difficulties in relations between spouses, increased family frustration and affected the communication of family members, forcing younger members of the family to break away from the older ones in search of better conditions for the growing children.

These cases tell us a lot about the existing link between environmental degradation and the right to enjoy family life. However, none of them deals with the effects of climate change. In the rest of cases that have been brought before the ECHR on environmental degradation's charges the argument of the respect for the right to family life has not been raised or employed by the Court. These are the cases *Balner-Schafroth/Switzerland* (1997), *Kyrtatos/Greece* (2003), *Hatton and others/UK* (2003), *Pilar Moreno/Spain* (2004), *Oneryildiz/Turkey* (2004), *Gorraiz-Lizarraga and other/Spain* (2004), *Ledyayeva/Russia* (2006), *Budayeva/ Russia* (2008) and *Bacila/Rumania* (2010). In all of them the ECHR solved the disputes by using other legal arguments such as the right to life (art. 2), the right to private life (art. 8), access to justice (art. 13), the right to property (art. 1 Prot. 1) and the right to information on environmental matters (art. 10)⁵.

The Inter-American Commission of Human Rights has followed the ECHR's path by recognizing environmental rights in the Americas. However, it has never used the argument of the breach of the right to family life as a legal reasoning. The Inter-American Commission has had at least three opportunities to develop on environmental harms in the cases *Yanomami/ Brazil* (1985), *Mayagna (Sumo) Awas Tingni Community/Nicaragua* (2001) and *Inuit/USA* (2005).

⁴ Before that ruling the European Commission of Human Rights had rejected environmental claims on the grounds that no right to nature preservation is as such included in the European Convention (Powell and Rayner against UK of 1990, on the excessive levels of aircraft noise in Heathrow Airport).

⁵ BLAZOGIANNAKI, M.: "Human rights and climate change", 4th meeting of the Group of Experts on Biodiversity and Climate Change, Strasbourg, 8 April 2009, Doc. T-PVS/Inf (2009) 4; SANDS, P.: "Human rights and the environment", in Human Rights and the Environment. Proceedings of a Geneva Environment Network Roundtable, 2004, pp. 22 ff.; HREOC (AUSTRALIA): Background paper: Human Rights and Climate Change, 2008, p. 10.

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In the first one, the Inter-American Commission found that the environmental destruction of ancestral lands violated the right to life, the right to health and the right to food. In the second case, the Commission found that a logging concession violated property rights of an indigenous community protected in article 21 of the Inter-American Convention of Human Rights. The third case is much more relevant because the plaintiff (Sheila Watt-Cloutier) alleged that different rights of the indigenous group to which she belonged had been infringed due in large part to the failure of the USA to curb its green-house emissions. The application provided a large list of supposed violated rights such as the right of Inuit people to enjoy from the benefits of their culture, the right to enjoy their ancestral lands, the right to health, physical integrity, security, residence, to preserve their own means of subsistence as well as their right to the inviolability of the home. Unfortunately, the Inter-American Commission found the application inadmissible. Thus, the chance was lost to read about this organ's opinion on the eventual link between human-induced ice-melting, on the one hand, and the breach of some rights which have a lot to do with the respect of family life and with the respect of the life-style parents choose for their children, on the other. The non-admission of the application was due to the fact the Commission could not find a direct link between the negative effects the Inuit community was suffering in their way of life and USA emissions. The Inter-American Commission was of the opinion that the harms caused to this indigenous community were probably the result of several polluters' action, many of them of a private origin⁶.

Domestic examples of judicial cases brought before USA courts have started to produce positive results. In *Massachusetts/EPA*, ruled by the Supreme Court (April 2007), the Court found that evidence of sea-level rise, together with credible predictions of worsening effects of climate change, were sufficient evidence of injuries suffered by nature and provoked by USA action. This is a landmark case. The Supreme Court ruled in favor of the State of Massachusetts and against the US because it found a link of causation, as the injury had been caused in some respect by the entity being sued. And in *Green Mountain Chrysler-Plymouth-Dodge et al./Cromble et al.* (September 2007, a Vermont court ruled in favor of 14 US States and against the plaintiffs (some automobile firms) because it found that the States' decision to limit by law the levels of admissible carbon dioxide emissions did not contravene the right to free enterprise.

5. Conclusions

Environmental degradation and violations of human rights are intrinsically linked. However, establishing standing to bring suit may be very difficult in case of harms caused by climate change. In order for an application before an international court to be admissible, a line of causation between a State action or inaction and the injury caused has to be established. Though it is evident that climate change's adverse effects on housing, life-style, means of subsistence, health, etc., damage family life as well as the institution of family as such, it can be extremely difficult to show before a domestic or an international court how and to what extent global warming directly affects the rights of parents to raise their children, to give them guidance, to educate them, to provide them with food, water and shelter, to offer them an adequate standard of living, to help them stay healthy, to help them develop all their potentialities and to transmit them their values, lifestyle and sense of cultural identity.

International litigation based on ecologic harms is and will continue to be tough. Needless to say that it will be even tougher if the plaintiff tries to demonstrate how their rights as a father or as a mother are affected by climate change consequences.

Susana Sanz Caballero is Chaired Professor of Public International Law at the University CEU-Cardenal Herrera. She is also a member of the Council of administration of the International Institute of Human Rights, whose she diploma holds. She has the Jean Monnet Chair of the European Commission. She has been visiting professor at the universities of Helsinki, Lyon and San Pablo CEU de Madrid. Her publications are focused on the international law of human rights, the international and European protection of the family and peacekeeping.

⁶ On the Inuit case, see: INTERNATIONAL COUNCIL ON HUMAN RIGHTS: Climate change and human rights. A Rough Guide, 2008, p. 41.

Personal care and co-parenting—current debate in Chile

Judge Gabriela Ureta



I. Introduction

The Convention on the Rights of the Child (CRC) was approved and ratified in Chile in 1990 and, consequently, forms part of the Chilean national legal system. In order to incorporate its principles into national legislation, Chile has passed and adopted a number of legislative and administrative measures with the aim of improving the situation of minors in the country. However, where the personal care of children whose parents are separated is concerned this has not been enough and this is one of the issues pending treatment in national legislation.

Context

In 2004 Chile was the last country in the world to pass a Divorce Law. In the first few years after the law became effective, legal separation of parents increased significantly, and this was in turn facilitated by the passing of the law that established Family Courts. It is estimated that in 2008 there was one divorce for every three marriages celebrated during the same period, and the trend has been growing. According to the statistics of the Administrative Corporation of the Judiciary, the Family Courts issued 29,889 divorce decrees in 2009; in 2010 this figure increased to 50,160, and in the six months to June 2011 it had reached 38,887.

According to the records of the Vital Statistics Registry, most separations take place among couples in their 30s and 40s and most particularly among recently married couples with quite young children. It is important to emphasise that statistics do not reflect the total scenario of separations, for they do not include unmarried couples with children who get separated after having lived together.

Divorce and its impact on children, the development of new family structures—mainly single parent families—the incorporation of women into the labour market, and the changing roles within couples reflect new kinds of interpersonal relationships. There has been a corresponding growth in the number of separated parents' associations advocating greater involvement of the father in the personal care of his children and a more active role in the decisions that are relevant to the child's development.

Against this background this article discusses a recent Parliamentary initiative and the resulting debate.

II. The issue

Section 7 of the CRC provides that:

The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

Article 18 provides:

States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities in the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

In Chile a distinction is made between the notions of *patria potestas* and *personal care*, both of which are treated as a single entity in these two articles of the Convention.

Patria potestas

Patria potestas, is defined by Section 243 of Chile's Civil Code as:

The set of rights and obligations pertaining to the father or the mother with regard to the property [ie estate] of minor children. Patria potestas may also be applied to the contingent rights of the unborn child.

The powers granted by *patria potestas* in our legislation¹ comprise the legal right of enjoyment and administration of children's property and legal representation of the children. The legal right of enjoyment consists in the power to use the property of the child and to receive its profits, with the obligation to preserve the form and substance of the property and—in the case of non-fungible property—either to restore it or to return the same

¹ Civil Code article 252, paragraph 1.