“Theorizing a human rights-based approach to energy transition and its justiciability in international and domestic jurisprudence”

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The international community and energy transition

<u>At the global level</u>

Sustainable Development Goal 7:“Ensure access to affordable, reliable, sustainable and modern energy for all”.

The 2021 United Nations Climate Change Conference of the Parties (COP 26):

- The Glasgow Climate Pact
- The Statement on International Public Support for the Clean Energy Transition
- Mission Statement of the Energy Transition Council (ETC)

<u>At the regional level</u>

The European Union (EU):

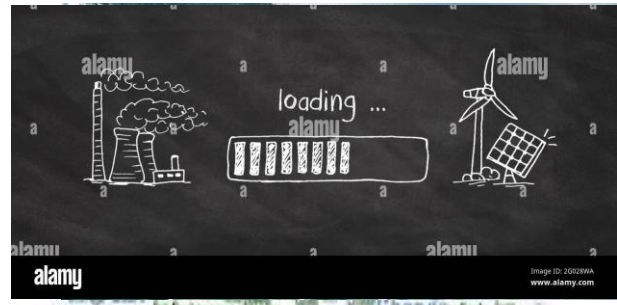
- The European Green Deal (aims to make Europe climate neutral by 2050)
- The European Climate Law
- REPowerEU: Joint European action for more affordable, secure and sustainable energy
- Regulation (EU) 2020/852 (the “Taxonomy Regulation”)

However…

The 2021 “Production Gap Report” has stressed that:

“Governments’ planned fossil fuel production remains dangerously out of sync with Paris Agreement limits”.

“The Production Gap Report — first launched in 2019 — tracks the discrepancy between governments’ planned fossil fuel production and global production levels consistent with limiting warming to 1.5°C or 2°C. The report represents a collaboration of several research and academic institutions, including input from more than 40 experts. UNEP staff provided guidance and insights from their experience leading other gap reports.”



Drawing inspiration from climate litigation

In the context of climate litigation, international judicial and quasi-judicial human rigths bodies and domestic courts are developing an important approach that can benefit the justiciability of energy transition.

Despite energy transition has not been expressly and directly addressed so far (except for *Climate Case Ireland,* from some viewpoints), protection can be granted.

This case law has been translating intergenerational equity and justice, sustainable development and the transboundary impact of climate change and emissions into a human rights framework, defining specific States' obligations (e.g.: positive obligations, due diligence obligations).

Importantly, human rights have been used as a standard for assessing States' compliance with their obligations under international human rights law and environmental law (as those enshrined in the Paris Agreement and in the UNFCCC).

These issues are inherenlty related to energy transition.

Shining a spotlight on climate change in Strasbourg

Duarte Agostinho and Others v. Portugal and 32 Other States (Portuguese Youth case)

Greebpeace Nordic and Others V. Norway (People v Arctic Oil)

Verein KlimaSeniorinnen Schweiz and others v. Switzerland

Mex M v. Austria

Articles 2 , 8, 13 and 14.

Significant steps taking by the ECtHR so far:

The Court has fast-tracked the *Portuguese Youth* case and…

When the Court communicated the case, it also invoked Article 3 of the ECHR

Issues that the ECtHR may deal with: victim status; standing; exhuastion of domestic remedies; due diligence; States‘ margin of appreciation; extraterritoriality.

The precautionary principle?

Presumptive responsibility and “indivisible injury”.

Portuguese Youth case

A “proactive” reference to the UNFCCC and the Paris Agreement

With more specific regard **to issues related to energy transition:**

The applicants addressed the issue of States’ export of fossil fuel and their contribution to emissions overseas.

In scholarship, it was stressed that the applicants were “inviting the ECtHR to forge new ground by developing new environmental standards” (O. W. PEDERSEN).

Article 3 of the ECHR

The ECtHR has stressed in its jurisprudence that “since [it] is master of the characterisation to be given in law to the facts of the case, it does not consider itself bound by the characterisation given by an applicant, a government or the Commission” (*jura novit curia principle*; ex multis: *Guerra v. Italy*, *Radomiljia and Oth. v. Croatia*, para. 114).

What can we expect?

Meeting the **severity test** (it is relative and context-dependent):

- The ill-treatment causes ‘actual bodily injury or intense physical or mental suffering’ OR ‘humiliates or debases an individual showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance’ (*Bouyid v. Belgium*) (See: P. Clark, G. Liston, I. Kalpouzos; N. Mavronicola)
- A breach of Article 3 can be found also due to a “permanent state of anxiety and uncertainty” about one’s future (case of *E-Masri*), and “a sense or feeling of vulnerability” (case of *Doğanay*) (See: C. Heri)

Articles 2 and 8 of the ECHR

It seems interesting to recall what the ECtHR has said in its environmental case law.

The *Cordella v. Italy* case is an interesting example, since the Court affirmed that individuals “are ‘personally affected’ by the measure specifically under consideration if they find themselves in a situation ‘of high environmental risk’, in which the environmental threat ‘becomes potentially dangerous for the health and well-being of those who are exposed to it’. “

The Committe on the Rights of the Child (CRC)

Sacchi and Others v. Argentina and Others

Article 6 (right to life), Article 24 (the highest attainable standard of health), and Article 30 (the right to enjoy culture) of the Convention on the Rights of the Child.

Article 7(e) of the OPIC was at stake, namely, the admissibility criteria concerning the exhaustion of domestic remedies rule under its ‘unlikely to bring effective relief’ limb.

The CRC clarified the importance of “effective control” and “foreseeability” for the purpose of establishing jurisdiction:

“The Committee further considers that while the required elements to establish the responsibility of the State are rather a matter of merits, the alleged harm suffered by the victims needs to have been reasonably foreseeable to the State party at the time of its acts or omissions even for the purpose of establishing Jurisdiction” [Para. 9.7]

Extraterritoriality

With regard to the test for jurisdiction, the CRC recalled Advisory Opinion n. 23 of the Inter-American Court of Human Rights on the Environment and Human Rights, to stress that:

“when transboundary harm occurs, children are under the jurisdiction of the State on whose territory the emissions originated for the purposes of article 5 (1) [jurisdiction] of the Optional Protocol if there is a causal link between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory, when the State of origin exercises effective control over the sources of the emissions in question” [Para. 9.7].

The victim status and the intertemporal dimension

“The Committee considers that, as children, the authors are particularly impacted by the effects of climate change, both in terms of the manner in which they experience such effects as well as the potential of climate change to affect them throughout their lifetime, in particular if immediate action is not taken. Due to the particular impact on children, and the recognition by States parties to the Convention that children are entitled to special safeguards, including appropriate legal protection states have heightened obligations to protect children from foreseeable harm” [Para. 9.13].

The Inter-American Human Rights System

In 2017, the Inter-American Court of Human Rights' Advisory Opinion n. 23 "The environment and Human Rights" has paved the way for "diagonal cases".

Importantly, it has:

- Incorporated the concept of intergenerational equity and justice
- Provided an interesting interpretation of the concept of "effective control"
- Dealt with "extraterritoriality" (the IACtHR has affirmed States' obligations to prevent transboundary environmental damage) – although extraterritorial obligations under the ACHR are exceptional and should not be interpreted extensively
- Defined the right to a healthy environment as an autonomous right under the American Convention of Human Rights

Testo a piè di pagina di esempio

Photos: Sebastião Salgado
From the Exhibitions: «Kwait» and «Amazonia».

Rethinking effective control

The IACtHR has clarified that:

“For the purposes of Article 1(1) of the American Convention, it is understood that individuals whose rights under the Convention have been violated owing to **transboundary harm** are subject to the jurisdiction of the State of origin of the harm, **because that State exercises effective control over the activities carried out in its territory or under its jurisdiction,** in accordance with paragraphs 95 to 103 of this Opinion.” [Para. 4 of Advisory Opinion n. 23]

In the *Conclusion*, the Court further clarifies that:

“g. States are obliged to take all necessary measures to avoid activities implemented in their territory or under their control affecting the rights of persons within or outside their territory.

h. When transboundary harm or damage occurs, a person is under the jurisdiction of the State of origin if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory. The exercise of jurisdiction arises when the State of origin exercises effective control over the activities that caused the damage and the consequent human rights violation.” [Para. 104]

Testo a piè di pagina di esempio

Photos: Sebastião Salgado
From the Exhibitions: «Kwait» and «Amazonia».

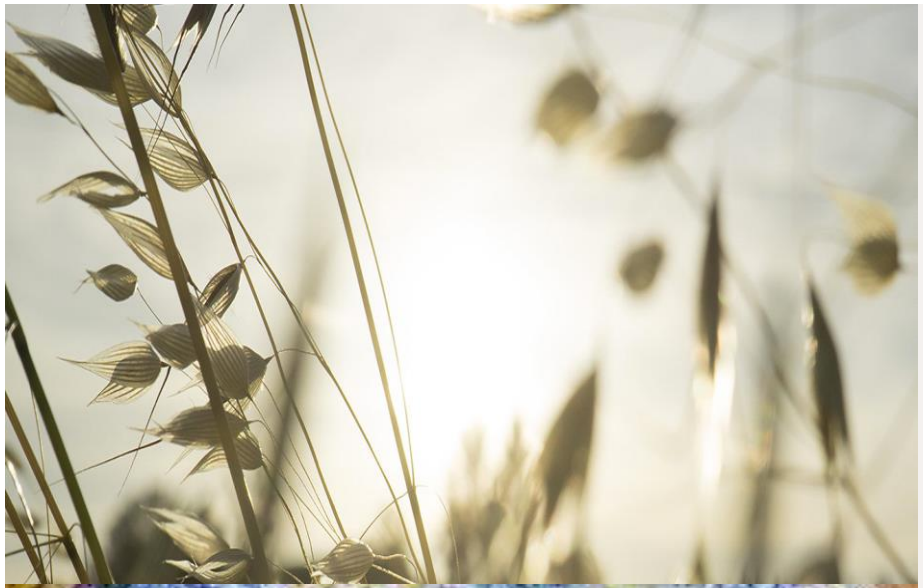
Resolution No. 3/2021

«Climate Emergency: Scope of Inter-American Human Rights Obligations»

The Resolution expressly addresses energy transition and frames it in human rigths terms in several paragraphs, besides recognizing, in the Preamble, that «climate change is one of the greatest threats to the full enjoyment and exercise of human rights of present and future generations".

In particular, Resolution 3/2021 recommends:

- The "**incorporat[ion of] a human rights approach into** the[…] construction and implementation" of "**legislation on** climate change and **energy transition** […]" (Para. 2);
- "States have **an obligation to cooperate in good faith in order to prevent pollution of the planet**, **which entails** reducing their emissions to ensure a safe climate that enables the exercise of rights. This involves […] **to build societies that** operate in a low-emission environment, **move towards a clean and just energy transition**, and protect people's rights. […]" (Para. 11);
- "States must comply with all their **human rights and environmental obligations in the context of mining activities for energy transition purposes**, given that the transition to a low-carbon future requires the extraction of minerals necessary for the construction of products and infrastructure that allow the operation of the renewable energy matrix" [Para. 55].



The International Covenant on Civil and Political Rights and the Human Rights Committee

The Case of *Sergio Euben Lopez Burgos v. Uruguay*

“it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory”.

Shining a spotlight on national Courts

The «pioneering» Urgenda judgment: from the concept of «imminence» to the use of the ECHR

“The ECtHR has on multiple occasions found that Article 2 ECHR was violated with regard to a state’s acts or omissions in relation to a natural or environmental disaster. It is obliged to take appropriate steps if there is a real and immediate risk to persons and the state in question is aware of that risk. In this context, the term ‘real and immediate risk’ must be understood to refer to a risk that is both genuine and imminent. The term ‘immediate’ does not refer to imminence in the sense that the risk must materialise within a short period of time, but rather that the risk in question is directly threatening the persons involved. The protection of Article 2 ECHR also regards risks that may only materialise in the longer term.”

[Para. 5.2.2]

Defining State's obligations

"'5.3.2 The obligation to take appropriate steps pursuant to Articles 2 [right to life] and 8 [right to respect for private and family life and home] ECHR also encompasses the duty of the state to take ***preventive measures to counter the danger, even if the materialisation of that danger is uncertain****. […] The obligation pursuant to* ***Articles 2 and 8 ECHR*** *to take appropriate steps to counter an imminent threat may* ***encompass both mitigation measures*** *(measures to prevent the threat from materialising)* ***or adaptation measures*** *(measures to lessen or soften the impact of that materialisation)".*

The Neubauer case: the justiciability of sustainable development before the German Consitutional Court

The German Constitutional Court recognized, to some extent, the **extraterritoriality of the duty to protect** (in particular, see paras. 29, 30, 181).

With respect to **intergenerational equity**, the Court said that:

"[O]ne generation must not be allowed to consume large portions of the CO2 budget while bearing a relatively minor share of the reduction effort if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to comprehensive losses of freedom. At some point in the future, even serious losses of freedom may be deemed proportionate and justified under constitutional law in order to prevent climate change. This is precisely what gives rise to the risk of having to accept considerable losses of freedom."

ntergenerational justice and the constitutionality of nuclear power

“The aspect of intergenerational justice has played a not inconsiderable role above all in the debate on the constitutionality of the use of nuclear energy. The topic has been the subject of discussion in case law and literature, particularly with regard to the long-term consequences of the final disposal of nuclear waste. In the meantime, the legislator has recognized […] that, in finding a site for a final repository with the best possible safety, unreasonable burdens and obligations for future generations must be avoided. In the opinion of the complainants, the obligation to ***"intergenerational justice"*** *recognised in this regulation is to be applied here as well. “*
[Page 104]

Friends of the Irish Environment v Government of Ireland ("Climate Case Ireland")

The case is particularly interesting, as the Irish Supreme Court quashed the Irish Government's National Mitigation Plan.

The Court addressed the "national transition objective", which the 2015 Climate Act defines as a "transition to a low carbon, climate resilient, and environmentally sustainable economy" by 2050.

As the Court decided the case on the basis that the Plan was *ultra vires* the 2015 Climate Act, it did not delve into the human rights issues at stake.

Nevertheless, it provided some interesting guidance on the standing of corporate bodies and on the constitutional right to a healthy environment.

Shrestha v. Office of the Prime Minister et al.

"The **Nepalese Supreme Court** found that the **absence of a climate change law infringed** the constitutional right to a clean environment, and that **the right to a clean environment specifically requires the Nepal government to take climate mitigation and adaptation action**."

(See: Climate Law Blog – Sabin Center for Climate Change Law, Columbia Law School)

Shrestha case

The judgment of the Nepalese Supreme Court contains some powerful statements with respect to some fundamental questions.

Para. 2 addresses intergenerational equity:

“If only we embrace the principles of sustainable development and allied principles of inter-generational and inter-generational equity, and formulate a law to conserve biodiversity and ecosystem, we can establish an edifice of climate justice for present and future generations.” [Para. 2]

Shrestha case

Para. 3 contains an important statement and further addresses intergenerational equity:

“Climate change, exploitation of natural resources and environmental pollution have posed a threat to the existence of ecology and biodiversity. Such threats do not just affect the organisms living today but also cause irreversible damage to nature and pose an imminent threat to several generations ahead. The matter of climate change and threat posed by pollution is directly connected to the well being of citizens who are guaranteed with the right to clean environment and conservation under the Constitution. Such kind of threat to present and future generations posed by climate change affects every citizen hence, the matters raised in the current petition are of public concern. Considering the public nature of concerns raised in the present petition, there is a meaningful relation between the issues and the petitioners.” [Para. 3]

The Leghari judgment and State's climate inaction

*In the case of **Leghari v. Federation of Pakistan**, "the **Lahore High Court** found that the citizen's fundamental rights, such as the right to life (which according to the court in this case includes the right to a healthy and clean environment and the right to human dignity), were **infringed by the government's climate inaction**."*

(See: Climate Law Blog – Sabin Center for Climate Change Law, Columbia Law School)

The Leghari judgment and State's climate inaction

In the case of ***Leghari v. Federation of Pakistan***, special emphasis was put on adaptation. Human rights permeated the decision of the Court.

Interestingly enough, in the decision, Chief Justice Syed Mansoor Ali Shah said:

"I, do not wish to dispose of the petition, but instead, consign it to the record, so that the Standing Committee [on Climate Change] can approach this Court for appropriate order for the enforcement of the fundamental rights of the people in the context of climate change, if and when required."

Future Generations and the stewardship of natural resources

*"In **Future Generations v. Ministry of the Environment and Others**, the **Colombian Supreme Court** found that the **deforestation of the Amazon rainforest and** its **contribution to climate change** infringed the constitutional right to a healthy environment of present and future generations, and that **the environmental rights of future generations demand environmental commitments from the state** in order **to take care of and promote stewardship of natural resources for the future**."*

(See: Climate Law Blog – Sabin Center for Climate Change Law, Columbia Law School)

Juliana v. United States

In the case of *Juliana v. United States*, 21 youth plaintiffs, represented by the non-profit organization Our Children's Trust, alleged that the Government had violated their due process rights of life, liberty, and property as well as the government's sovereign duty to protect public grounds by permitting the combustion of fossil fuels. This had caused catastrophic and destabilizing impacts to the global climate, that resulted in threatening the survival and welfare of present and future generations.

Currently, the plaintiffs “are awaiting a ruling on their Motion for Leave to File a Second Amended Complaint and the Motion to Intervene filed by 18 states, led by Alabama.“

Association Notre Affaire à Tous - l'«Affaire du siécle» (Tribunal Administratif de Paris, 2021)

«21. Il résulte de ces stipulations et dispositions que l'État français, qui a reconnu **l'existence d'une « urgence » à lutter contre le dérèglement climatique** en cours, a également reconnu sa capacité à agir effectivement sur ce phénomène pour en limiter les causes et en atténuer les conséquences néfastes. À cet effet, il a choisi de souscrire à des **engagements internationaux [including Art. 2 of the UNFCCC, expressly recalled by the Tribunal, which addresses future generations and States' common but differentiated responsibilites]** et, **à l'échelle nationale, d'exercer son pouvoir de réglementation, notamment en menant une politique publique de réduction des émissions de gaz à effet de serre émis depuis le territoire national**, par laquelle il s'est engagé à atteindre, à des échéances précises et successives, un certain nombre d'objectifs dans ce domaine».

Association Notre Affaire à Tous - l'«Affaire du siécle»

Some important issues:

The applicants had recalled Articles 2 and 8 of the ECHR, but the Tribunal did not use it in ist legal reasoning; it used the UNFCCC instead.

Some relevant issues related to the «improvement of energy efficiency, the increase in the percentage of energy produced by renewable energy sources, and the reduction of greenhouse gas emissions» were raised in the case.

However, the Tribunal considered that, despite the France was failing to comply with its international obligations, the improvement of energy efficiency and the increase in the percentage of energy produced by renewable energy sources were only «une des politiques sectorielles mobilisables» in the context of GHG reduction, therefore they could not be considered as directly contributing to aggravate the environmental harm complained of.

The Tribunal Administratif de Paris has ordered that…

All the necessary measures be adopted for ensuring France's compliance with its obligations related to emissions reduction.

In particular…

«Article 4 : Il est ordonné […], afin de faire cesser pour l'avenir l'aggravation du préjudice écologique constaté, de prendre toutes les mesures permettant d'atteindre les objectifs que la France s'est fixés en matière de réduction des émissions de gaz à effet de serre […].»

Some missed opportunities…

At least, for now…

The People v. Arctic Oil case

The Supreme Court of Norway interpreted Article 112 of the Norwegian Constitution on the right to a clean and healthy environment.

In the case, such issues as conflicts between climate goals and energy policy, and whether oil can be exploited and exported, were at stake.

As stressed in scholarship, “Notably, the potential for the extraterritorial application of Article 112 was considered, and in a limited way the possibility for challenging legislative and administrative action for violating the constitutional duty of care was left open for direct and indirect governmental action that could affect Norwegian citizens.” (H. DUFFY, L. MAXWELL)

The Court’s approach focused on the separation of powers and, thus, a procedural approach to oil policy was adopted.

The Greenpeace Nordicand Others v. Norway case…

Is now pending before the ECtHR.

It will provide the Strasbourg Court the opportunity to address more specifically issues related to energy transition.

It is not a diagonal case and domestic remedies have been exhausted.

So, expectations are quite high.

Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment [2021] FCA 560

The Australian Federal Court had affirmed that

“[…] An emphasis upon children, including their interest in a healthy environment, is also provided by the principle of inter-generational equity specified by s 3A(c) “that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.” [Para. 273]

Minister for the Environment v Sharma (No 2) [2022] FCAFC 65

The Full Federal Court has overturned the judgment.

Nevertheless, the Court leaves some room for future proceedings…

Minister for the Environment v Sharma (No 2) [2022] FCAFC 65

"[…] The duty of care posited by the respondents (and ultimately rejected by the Full Court) concerns an issue of fundamental importance: the exercise of statutory power by a Minister and its connection with the catastrophic risks of climate change and potential of future harm to Australians. That we have concluded that the posited duty of care under the EPBC Act should not be imposed in relation to this particular decision at this particular time should not preclude the Represented Children, by issue estoppel or otherwise, many of whom remain under a legal incapacity, from pursuing proceedings in the future, and raising such questions of fact or law, that may be necessary to assert a duty of care against the Minister in relation to future harm or damage they may suffer as a result of global warming. […]". [Para. 11].

Conclusions

- Climate change litigation has been achieving some interesting results at both the international and the domestic level;

- Intergenerational equity and intergenerational justice as well as sustainable development have been incorporated into the approach that this case law adopts, and have been translated into a human rights framework and into States‘ obligations, including in relation to emissions reduction;

- The recognition of the right to a healthy environment by the Human Rigths Council and its Resolution 48/13 on the Right to a clean, healthy and sustainable environment may benefit this jurisprudential trend;

- A proactive idea of extraterritoriality has been emerging and, often, jurisdiction has been linked to a broader idea of “effective control“ (also emissions export has been addressed) ;

- This new conceptualization of transboundary obligations and extraterritoriality seems to be crucial for tackling some of the hurdles that have generally prevented climate litigation from been successful in the past (see the *Inuit* case, for example);

- This approach has become consistent in the field of climate litigation, despite some exceptions can be found;

Conclusions

- Judicial dialogue and cross-fertilization are recommendable, including from a multi-level perspective:

for example, it would be helpful for enhancing the conception of extraterritoriality and effective control - e.g., for enhancing the standards that the ECtHR has defined in the *Bankovic* case; the time seems ripe (see also: States‘ obligation to act joint and to cooperate).

Inspiration can be drawn both from the IACtHR and from national Courts;

- What is more, the tendency to improve the results achieved can be sought, again, in the Hague, namely, in the recent *Milieudefensie v. Shell* judgment, related to oil corporations and the duty to mitigate climate change;

- WHAT COULD THE FUTURE HOLD?

- The approach adopted in the climate litigation may be a fruitful paradigm for the justiciability of energy transition, especially in relation to States‘ obligations in the field of mitigation.

Recently, the environmental law firm ClientEarth has sued Shell‘s board of Directors for failing to prepare for energy transition.

Thank you for your kind attention!

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