A Right to Energy

A Multilevel Constitutional Perspective

Edited by

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Preface

The present volume explores the constitutional protection of the right to energy, an increasingly critical issue in contemporary legal and policy debates. Access to energy is fundamental to human dignity, social welfare, and economic development, yet its recognition as a constitutional right remains contested in many jurisdictions. The contributions in this volume seek to analyze the evolving legal frameworks, judicial interpretations, and policy mechanisms that shape the recognition and enforcement of energy rights at national and international levels.

This collection brings together a diverse range of perspectives from legal scholars, policymakers, and practitioners who examine the intersection of constitutional law, energy policy, and human rights. The chapters provide in-depth discussions on the normative foundations of the right to energy, comparative constitutional approaches, and the role of courts in adjudicating energy-related claims. Additionally, the volume explores how climate change, energy transitions, and socio-economic inequalities influence the legal discourse on energy access and affordability.

A key focus of this work is the balance between state obligations and market dynamics in ensuring universal and equitable access to energy. Contributors examine regulatory challenges, the role of public and private actors, and the implications of energy crises on fundamental rights. By addressing these issues, the volume aims to provide a comprehensive understanding of how constitutional law can safeguard energy access while promoting sustainability and social justice.

By combining legal analysis with interdisciplinary insights, this volume seeks to contribute to the growing academic and policy-oriented discourse on the constitutionalization of energy rights. It is our hope that this work will serve as a valuable resource for scholars, legislators, judges, and civil society actors engaged in the pursuit of equitable and sustainable energy governance.

Stella Christoforidou

Chapter 1

Mapping the Path to Constitutional Protection of a Right to Energy

Stella Christoforidou

Abstract

In the present paper, it is argued that a right to energy should have a broader meaning encompassing social, political, and procedural aspects. Thus, a mere social right for access to energy undermines the element of energy production. Energy societies and their members should be able to participate actively in the production of energy, which could be a matter of democracy, mainly regarding energy resources.

Introduction

This work attempts to outline a right to energy from the perspective of constitutional law, taking into account both international and supranational legal orders. The task is not an easy one, as this field is now being strongly highlighted on the occasion of the transition to green energy. Consequently, the questions that remain to be answered are many: what could be the legal nature of a right to energy, what its content should be, how it could be protected in court (see and Huhta, 2023). The analyses that follow in this volume attempt to address some of these fundamental questions and thus contribute to the scholarly debate, but their primary purpose is to highlight the scope that a right to energy could occupy, depending on the approach adopted in each case. For example, a right to green energy for right holders living in urban centers may conflict with the right to natural resource management of indigenous people in Latin America.

Also, it should not be overlooked that energy is as much about production as it is about consumption. Consequently, an energy right that would only relate to consumption would not adequately cover the content that this right should have. On the contrary, a right to energy should have both dimensions in its content.

Furthermore, there are other issues even more profound and perhaps marginal to the subject matter of constitutional law which can by no means be overlooked in conceptualising a right to energy. For example, what is the relationship between electrification and energy. The recognition of a right to energy cannot entail an obligation of electrification for societies or social groups with different cultures or religious or political beliefs.

These are the issues that this edited volume seeks to highlight and thus lay the groundwork for the development of a dialogue that takes into account as many components as possible.

Presentation of the chapters

In light of the above, in her study (Chapter 2), *Ifigeneia Tsakalogiani* analyzes the tension between the promotion of green energy and the constitutional and case law protections of Indigenous peoples' rights in Latin America. The increasing demand for renewable energy sources, as part of global commitments to address the climate crisis, has led to the exploitation of natural resources within Indigenous territories, with profound legal and ethical implications. This represents another aspect of the protection of the right to energy, one that is related to the protection and management of energy resources. The text examines relevant international legal provisions, regional and national case law, and the practical implementation of the principles of energy and climate justice, advocating for the establishment of an Indigenous right to energy.

The author primarily grounds this right in the legal and institutional framework for the protection of Indigenous peoples. Indigenous populations in Latin America are recognized as distinct political and cultural entities through international conventions and national constitutions.

Some countries, such as Bolivia (2009) and Ecuador (2008), have constitutionally incorporated the principle of plurinationality, recognizing specific rights for Indigenous communities.

Furthermore, international treaties also recognize Indigenous rights, such as the International Labour Organization Convention 169 (ILO 169, 1989), which imposes an obligation to consult Indigenous populations on projects affecting their natural resources; the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007), which introduces the principle of Free, Prior, and Informed Consent (FPIC) as a fundamental right of self-determination; and the American Declaration on the Rights of Indigenous Peoples (OAS, 2016), which explicitly recognizes the right of Indigenous peoples to manage their natural resources. The Convention on Biological Diversity (CBD, 1992) ensures the traditional rights of Indigenous peoples to manage environmental resources.

Moreover, the jurisprudence of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (IACtHR) has strengthened the legal protection of Indigenous populations, particularly concerning their right to manage natural resources. As analyzed extensively in the first chapter, in the case of Saramaka People v. Suriname (2007, IACtHR), FPIC was recognized as an essential element of Indigenous peoples' right to self-determination. In Lhaka Honhat v. Argentina (2020, IACtHR), environmental degradation was linked to the violation of Indigenous rights, requiring consultation on energy projects.

Energy and climate justice themselves also provide the basis for the right to energy. Climate justice aims to ensure a fair distribution of the benefits and burdens of the energy transition. Energy justice, as a more specific aspect of climate justice, is analyzed in terms of distributive justice, which concerns the allocation of benefits and impacts of green energy; procedural justice, which ensures the equal participation of Indigenous peoples in decision-making processes; and restorative justice, which involves the obligation to compensate and remedy damages caused by energy projects.

Furthermore, the concept of "Just Transition" links the shift to renewable energy sources with the protection of social rights. However, the lack of access to energy remains a serious issue, as in many cases, Indigenous populations do not benefit from the green energy projects developed on their lands.

In conclusion, it is argued that the recognition of an Indigenous "Right to Energy" can be legally established through the concept of the right to natural resources, which is already recognized in international and national law. In the case of Masacres de Río Negro v. Guatemala (2012, IACtHR), the Court emphasized the importance of access to energy as a factor in protecting fundamental rights.

The right to energy, as conceptualized in the first chapter, requires: a) the obligation of consultation (FPIC), ensuring that Indigenous populations have the right to refuse participation in projects that harm them; b) the fair distribution of benefits, particularly through the development of local renewable energy cooperatives and guaranteed access of Indigenous peoples to energy resources; c) institutional safeguards for protection, and consequently, stricter environmental regulations and compensation mechanisms for damages to Indigenous communities.

The transition to green energy cannot justify the violation of Indigenous peoples' rights. The establishment of an Indigenous right to energy can contribute to balancing energy development with respect for human rights. Achieving this requires the recognition of FPIC, the institutionalization of fair benefit-sharing mechanisms, and ensuring the genuine participation of Indigenous peoples in decision-making processes regarding energy projects that affect their communities.

This analysis also highlights the complex legal nature and scope that a right to energy may acquire. Depending on the rights-holder, this right may take on different typological characteristics, at times conflicting with other rights that are also based on serving the energy needs of another group of people. Regarding its scope, it appears to intersect multiple rights—individual, social, procedural, and others.

In the third chapter, *Magdalini-Christina Vlachou-Vlachopoulou* adds another perspective by exploring the possible establishment of a right to energy according to the separation of powers principle rather than seeking the constitutional grounds for its recognition through interpretation. She poses the research question of how a right to energy could be enshrined in the U.S. legal order. By adopting the tools of general constitutional theory and constitutional interpretation and taking into account the sources of law and the recognition of rights, as analyzed in-depth, she concludes that the right to energy could be recognized either through a constitutional amendment, legal provision, or jurisprudential construction in the absence of an explicit provision at a legal or constitutional level. Subsequently, guided by the organization and functioning of state institutions and the principle of the separation of powers, she assesses the likelihood of recognizing such a right in the U.S. legal system, considering the contemporary operation of the federal system and the system of Checks and Balances.

More specifically, the third chapter examines the potential existence and establishment of a constitutional right to energy in the United States through the lens of the federal system and the system of Checks and Balances. This right pertains to access to energy products and services and is analyzed through two axes: Federalism (vertical axis) and the separation of powers (horizontal axis).

The American federal system is based on the distribution of powers between the federal government and the states. The states maintain significant independence, with the federal government legislating in specific areas, mainly when multiple states are affected through the Interstate Commerce Clause. Federal energy regulation is primarily limited to the wholesale market, while states regulate the retail market. Despite the Supremacy Clause of federal law, state laws often coexist with federal laws unless Congress explicitly preempts a particular area.

The U.S. Constitution does not explicitly recognize a right to energy, and the interpretative approach of originalism complicates the judicial recognition of new rights. However, other theories, such as legal real-

ism and living constitutionalism, could allow for a more dynamic interpretation in favor of a right to energy. In case law, decisions such as Juliana v. United States have established a foundation for the protection of environmental rights through the substantive due process clause, which could potentially be applied to the right to energy.

Nevertheless, significant procedural obstacles such as standing and the political question doctrine limit the success of such claims. The Spokeo and TransUnion rulings require historical precedent in common law for a violation to be considered legally actionable, making the recognition of a right to energy more challenging. Furthermore, the political question doctrine suggests that specific issues fall within the purview of Congress or the President, potentially leading to the dismissal of energy-related claims.

Regarding state constitutions, while none explicitly enshrines a right to energy, several states have adopted "green amendments" protecting the right to a healthy environment. Although legal developments in this area may pave the way for an energy right, there remains the question of potential conflict between energy access and environmental protection.

Furthermore, the federal government distributes power among the Executive, Judiciary, and Legislature. The President, through judicial appointments and oversight of federal agencies, can influence policies related to the right to energy. However, the dominance of a conservative majority in the Supreme Court makes judicial recognition of such a right unlikely. Additionally, administrative agencies, influenced by presidential authority, shape energy regulation based on prevailing governmental policies.

Congress plays a central role in constitutional amendments, but the high majority required for amending the Constitution makes recognizing a right to energy particularly difficult. At the legislative level, despite the potential for statutory enactments supporting energy rights, the legislative process is complex, and most bills fail in the early stages. In 2021, the House of Representatives introduced Resolution No. 457, calling for the recognition of the right to electricity as a fundamental

human right and advocating for a transition to a publicly controlled energy system. However, the resolution did not progress beyond the Energy and Commerce Committee, highlighting political resistance to advancing this issue.

Consequently, the establishment of a constitutional right to energy in the United States faces significant obstacles, both due to the prevailing interpretative approach in the Supreme Court and institutional and political constraints within the federal system. The inability to recognize such a right through interpretation or constitutional amendment renders legislative and regulatory avenues the most realistic options. However, political realities indicate that this path is also challenging. The future of the right to energy will, therefore, depend on the evolution of the legal and political landscape, potential shifts in constitutional interpretative methods, and the development of intense social and political pressures advocating for its promotion.

The study "Energy as a fundamental right" by *Eva Tsoukalidou* (fourth chapter) examines the right to energy as a fundamental human right, analyzing the constitutional and legal framework of Greece and the United States. This right is not explicitly recognized in most constitutions, but it is directly related to social justice, sustainable development, and the fight against energy inequalities. Its content, as conceptualized by this study, consists of the material dimension of energy (electricity, fuel, etc.) and access to these goods to serve human needs. It is therefore distinguished from the right to energy, as approached by the first chapter of this volume, which emphasises natural resources, i.e. the raw material for the production of energy intended to meet human needs.

The introduction to the study places energy at the heart of modern societies and economies, pointing out that access to affordable and reliable energy is essential for securing fundamental human rights such as housing, health, and education. The concept of 'energy justice' has emerged as a central framework for analysing the distribution of energy resources, environmental impacts and the protection of vulnerable social groups. In Greece, energy poverty is a critical issue, as a large

proportion of households find it difficult to meet the cost of energy. In the United States, the approach is more decentralised, based on state autonomy and market forces, which creates inequalities in energy access and costs. The study examines the constitutional, legal, and policy aspects of energy justice in the two countries to highlight differences and potential best practices.

The study first focuses on the right to energy in the context of constitutional law. Although this right is not explicitly recognised in most constitutions, it is becoming increasingly important in the context of climate change, energy poverty and social inequalities. The study defines the right to energy as the right of all people to have access to affordable, reliable, and sustainable energy services such as electricity, heating, and cooling. This right is linked to other fundamental rights, such as the right to housing, health, and education. In addition, the right to energy is influenced by international law and treaties, such as the UN Sustainable Development Goals and the Paris Agreement, which promote the transition to sustainable energy models. The commitments arising from these international agreements push states to incorporate energy justice principles into their national legislation and to take concrete measures to improve energy access for all.

The right to energy in the Greek constitutional framework is then examined. The Greek Constitution does not include an explicit reference to this right but protects social justice and environmental sustainability through Articles 21 and 24. Article 21 refers to social welfare and the state's obligation to ensure a decent standard of living, while Article 24 guarantees environmental protection and sustainable development. Greece's energy policies are shaped mainly by the European Union, which imposes binding targets for renewable energy sources and energy efficiency. Greek jurisprudence has also helped to promote energy justice, such as the decision of the Council of State that identified energy as a social good. In addition, the framework of European regulations has led to subsidy programmes for energy efficiency and the promotion of renewable energy sources to low-income households.

The comparative analysis between Greece and the United States shows that while in Greece, energy is treated as a social issue through government intervention, in the United States, energy management is left more to markets and state initiatives. Greece benefits from the EU regulatory framework, which sets clear targets and provides funding for sustainable energy policies. In the US, the absence of a uniform federal policy leads to disparities between states, with some investing in renewable energy and energy efficiency. In contrast, others remain dependent on fossil fuels. Therefore, strengthening the legal framework in Greece and establishing a national energy strategy in the US could lead to a more equitable distribution of energy resources and a sustainable energy future.

Michael Papageorgiou's study (chapter five) examines the European Union's constitutional guarantees for green energy and the intergovernmental role of regional and local authorities in the formulation and implementation of policy. It draws on a comparative approach of three Mediterranean EU member states, Greece, Italy, and Spain, to highlight the institutional challenges and prospects of the green energy transition at the European and national levels. Through this analysis, another dimension of an energy right, institutional and political, is highlighted, and the importance of political participation and democratic governance at the local government level is consolidated. If anything can be observed from the combination of this chapter, chapter three and chapter four, it is that a right to energy requires initiatives at all levels of government, not just at the level of central government.

As discussed in the study, the constitutional foundation for green energy in the EU derives primarily from Article 194 of the Treaty on the Functioning of the European Union (TFEU), which defines the Union's competencies in the energy sector while preserving the right of member states to shape their priorities. This dual approach allows for the development of a common framework, but also recognises the differentiated needs and capabilities of each Member State. European energy policy has evolved since the era of the European Coal and Steel Community and Euratom towards a more integrated and coherent system of regula-

tion and cooperation between Member States, taking into account environmental objectives and sustainable development requirements.

The Lisbon Treaty introduced energy as an area of 'shared competence' between the EU and the Member States, incorporating the principle of energy solidarity. At the same time, the objectives of the European Green Deal and the 'Fit for 55' package reinforce the commitment to switch to renewable energy sources (RES), reduce emissions of pollutants, and enhance energy security. In this context, Member States are invited to develop national action plans, while regional and local authorities have a key role to play in the implementation of this policy.

The study underlines that participatory governance is a fundamental element of EU energy policy. Regional and local authorities are closer to the social and economic conditions of their regions, which allows them to adapt EU policies to local needs. The Committee of the Regions plays a crucial role in shaping legislation. It has the power to express opinions and refer cases of infringement of the subsidiarity principle to the EU Court of Justice. The role of local authorities is strengthened through initiatives such as the Covenant of Mayors, which promotes the reduction of CO2 emissions and the adoption of sustainable practices at the regional level.

The analysis of the national constitutional and administrative frameworks of Greece, Italy, and Spain highlights the different approaches to green energy governance. Greece is a centralised state where local government has limited powers in the energy sector. Although municipalities and regions have some responsibilities for the licensing and development of renewable energy projects, the central state retains the leading role in energy policy-making. The Greek Constitution, through Article 24, guarantees environmental protection, while energy policy is mainly determined by legislation. Greek local authorities are involved through the Energy Communities, but their participation is limited by bureaucratic obstacles and lack of institutional autonomy.

In contrast, Italy and Spain present a more decentralised system. Italy has adopted a system of decentralised governance, where regions have

critical competencies in energy policy, in particular with regard to the development of renewable energy and the promotion of energy efficiency. The Italian constitution, in particular after the 2001 constitutional reform, reinforces decentralisation, allowing regions to formulate policies tailored to local needs. Similarly, Spain, with its Autonomous Communities model, has transferred essential powers to the regions, which can define their energy mix and promote investment in renewable energy. Autonomous Communities, such as Catalonia and Andalusia, have developed their own energy transition plans, underlining the flexibility provided by the decentralised governance model.

The study concludes that EU energy policy is a fundamental pillar of European constitutional and administrative development. Multilevel governance, the strengthening of democratic participation, and the integration of local and regional authorities in the decision-making process are crucial to the success of the energy transition. Despite national differences, the need for greater decentralisation, transparency and accountability in energy policies is common. The study highlights the need for more effective cooperation between levels of governance to ensure that green energy becomes a driver of sustainable development and social cohesion in the EU.

The status of a right to energy

As far as the typology of an energy right is concerned, more emphasis seems to be placed on its social dimension. The discourse is of a social right to energy that would ensure access, especially to vulnerable groups and people with low incomes (Tully, 2006). This is justified by the fact that in the modern era access to energy is provided in economic exchange without requiring any kind of effort similar to that before the electrification era (gathering wood from the forest for a fireplace, or hay to feed the horse) (see and Khandker, 2012). A necessary emphasis is therefore placed on preventing the creation of energy inequalities created by the fact that members of society are cut off from direct access to raw materials to meet their energy needs. Indeed, emphasis is

placed on the fact that energy is a precondition for access to and effective enjoyment of other rights (Clemson, 2012).

The question that arises at this point is what a right to energy could be if it were not a social right. Attempting a mental experiment, one question that could be asked is whether an individual right to energy could be argued for. For example, a right to the free consumption of energy is a particular aspect of general freedom (on the consumption society, Goodwin, 2023. 316ff).

The problem with both the one approach and the other is that they perceive the citizen and the holder of the right in a one-dimensional way. A social right to energy makes the citizen a passive recipient of a service for the purpose of energy consumption. In order to secure this commodity, which is directly linked to their survival, individuals must have permanent financial resources. Otherwise, the state must provide a subsidiary measure to ensure that they are not deprived of it. On the other hand, recognising an individual freedom to consume energy not only has the potential to cause extreme inequality within society, but also raises serious environmental protection issues.

The important thing is to understand that a right to energy should be intended to be exercised by individuals who are also members of an energy society. Moreover, the recognition of energy communities already reinforces this character that society has taken on as an energy society (Koukoufikis, Schockaert, Paci, et al., 2023). For this reason, weight should be given to the active participation of each person in the energy society and, thus, in energy production. The Greek constitution, like the Italian constitution, combines the same constitutional provision, the freedom of personal development, with the right of everyone to participate in social, economic, and political life. Energy, directly interwoven with all three dimensions of political society, should be considered as a more specific manifestation of this right, and, therefore, the right we are talking about should be the right of everyone to participate in the energy society.

Such a right must, therefore, necessarily have an institutional-political dimension, as energy production is linked to the means of production and the management of natural resources (on the relations between energy and territorial sovereignty, Hailes, Viñuales, 2023). The recognition of such a right can serve as a guarantee for the democratic functioning of the energy society, or otherwise could lead to its democratisation (on the participation of local community in energy projects, Pesch, 2019).

This does not mean that a right to energy cannot establish the obligation of the state to ensure that everyone has access to energy by mitigating social inequalities. It does, however, establish as a primary goal the creation of the right conditions for everyone to have access to energy production as well. This is something that, thanks to renewable energy sources, especially the use of solar and other forms of energy able to decentralize the energy production, can be considered more feasible than ever before.

However, part of production should also consider the exploitation of natural resources for energy production, thus allowing citizens to participate in decision-making or even in the management of energy resources (Olawuyi, 2018; Le Moli, 2023). In view of the fact that energy is a vital factor in the life of every human being, a right to energy can only be oriented towards independence and self-determination at the individual and collective level (see also Timmermann, Noboa, 2022).

Limits and content of a right to energy

Looking at the historical evolution of energy, two things can be noticed. One is that electrification led to the centralisation of energy production means (Smil, 2017). Individuals no longer had to take care of themselves individually in order to gather the energy means they needed to meet their energy needs (e.g., gathering wood for the fireplace) (Novikau, 2020) and became passive consumers of electricity. The green transition

and renewables, as already mentioned, for the first time enable everyone to claim access to energy production again.

The second thing that can be observed by looking at the history of energy is that, to a large extent, in human societies, the evolution of energy is intertwined with technological achievements, which sometimes lead to significant energy transitions, as happened with electrification (Rhodes, 2018). A right to energy, however, should be distinct from the right to participate in technological development and progress, although technology, in many cases, can be seen as a necessary condition for the enjoyment of a right to energy (for the strong connection between technology and energy Hailes, Viñuales, 2023).

This distinction is necessary as participation in energy and participation in technological progress start from two different conditions. Energy has been an indispensable condition for survival since the earliest times in the history of human societies (Novikau, 2020). Technological progress has improved living conditions (the horse has replaced the car, and wood for the fireplace has replaced the electric heater). Still, it lacks this inseparable link with the very existence of human beings and biological life. A fact that differentiates the various weightings or even the extent to which multiple claims could be made.

In this context, electrification is taking place at the crossroads. Electrification, a technological achievement that marked a significant energy transition, has the potential to change the structure of a society and the relationships between its members (Turnbull, 2021). A right to energy is likely to be significantly determined in its content by the context, setting, place, and time it is applied, with respect to the part of energy technology and know-how (see Wahlund, Palm, 2022 on energy participation during energy transitions). It is crucial to be safeguarded that a right to energy shall not serve as a vehicle for obliging or coercing the adoption of technologies, or even for electrification itself, in societies or social groups that want to preserve their culture, cultural identity, or other religious or political beliefs. In any case, progress does not always guarantee well-being (on degrowth Ferrari, Chartier, 2018; Latouche,

2010; van Griethuysen, 2010). In the context of pluralism, in fact, technology should be the means to ensure that these societies have the right to enjoy a right to energy in ways that are compatible with their traditions or beliefs or generally will serve the goals they have set for themselves (on the role of technology, Kerschner et al., 2018).

A right to energy because of its horizontal nature, which can extend to every aspect of a person's life, from dietary habits to the use of technology itself (e.g., energy needs of data centers) (Shin, 2018) is a right that is intended to make many compromises without reaching to undo at its core nor depriving the enjoyment of other rights. So far, to the extent that this right has begun to form, we have seen it seek to balance with the right to the environment (Wewerinke-Singh, 2022), but without always managing to achieve a right and justified balance.

Conclusion

Therefore, a right to energy is a right that should take into account that it is intended to apply to the energy society and, thus, should transcend the producer-consumer distinction. It is, therefore, a right that should have the potential to influence the energy economy, energy technology, energy structures, and their functioning, going beyond what is already known from constitutional rights theory. Moreover, it should not be overlooked that energy is another world on which the world we live in is built.

References

Clemson, M. (2012). Human rights and the environment: Access to energy. New Zealand Journal of Environmental Law, 16, 39–81.

Ferrari, A. C., Chartier, C. (2018). Degrowth, energy democracy, technology and social-ecological relations: Discussing a localised energy system in Vaxjö, Sweden. Journal of Cleaner Production, 197, 1754–1765.

Goodwin, N., Harris, J. M., Nelson, J. A., Rajkarnikar, P. J., Roach, B., & Torras, M. (2023). Macroeconomics in context. Routledge.

Hailes, O., Viñuales, J. E. (2023). The energy transition is at a critical juncture. Journal of International Economic Law, 26(4), 627–648.

Huhta, K. (2023). Conceptualising energy justice in the context of human rights law. Nordic Journal of Human Rights, 41(4), 378–392.

Jiglau, G., Hesselman, M., Dobbins, A., Grossmann, K., Guyet, R., Tirado Herrero, S., Varo, A. (2024). Energy and the social contract: From 'energy consumers' to 'people with a right to energy'. Sustainable Development, 32(1), 1321–1336.

Kerschner, C., Wächter, P., Nierling, L., Ehlers, M.-H. (2018). Degrowth and technology: Towards feasible, viable, appropriate and convivial imaginaries. Journal of Cleaner Production, 197, 1619–1636.

Khandker, S. R., Barnes, D. F., & Samad, H. A. (2012). Are the energy poor also income poor? Evidence from India. Energy Policy, 40, 1–12.

Koukoufikis, G., Schockaert, H., Paci, D., Filippidou, F., Caramizaru, A., Della Valle, N., Candelise, C., Murauskaite-Bull, I., Uihlein, A. (2023). Energy Communities and Energy Poverty. Publications Office of the European Union, Luxembourg.

Latouche, S. (2010). Degrowth. Journal of Cleaner Production, 18(6), 519–522.

Le Moli, G. (2023). Beyond externalities: Human rights as a foundation of entitlements over energy resources. Journal of International Economic Law, 26(4), 649–662.

Needham, A., & Gross, S. (2023). New Energies: A History of Energy Transitions in Europe and North America. University of Pittsburgh Press, Pittsburgh.

Novikau, A. (2020). Energy security: Evolution of a concept. In Romaniuk, S., Thapa, M., & Marton, P. (Eds.), The Palgrave Encyclopedia of Global Security Studies. Palgrave Macmillan.

Olawuyi, D. S. (2018). Energy (and human rights) for all: Addressing human rights risks in energy access projects. In Energy justice: US and international perspectives (pp. 73–104). Edward Elgar Publishing Ltd.

Pesch, U. (2019). Elusive publics in energy projects: The politics of localness and energy democracy. Energy Research & Social Science, 56, 101225.

Rhodes, R. (2018). Energy: A Human History. Simon & Schuster.

Shin, H. (2018). Energy/Culture: A reading guide for historical literature. Spring 2018, Special Issue: The Material Culture of Energy, 25 April 2018.

Smil, V. (2017). Energy and Civilization: A History. Massachusetts Institute of Technology.

Timmermann, C., Noboa, E. (2022). Energy Sovereignty: A Values-Based Conceptual Analysis. Sci Eng Ethics 28, 54.

Tully, S. (2006) Access to Electricity as a Human Right, Netherlands Quarterly of Human Rights, 24(4), 557–587.

Turnbull, T. (2021). Energy, history, and the humanities: Against a new determinism. History and Technology, 37(2), 247–292.

van Griethuysen, P. (2010). Why are we growth-addicted? The hard way towards degrowth in the involutionary western development path. Journal of Cleaner Production, 18(6), 590–595.

Wahlund, M., & Palm, J. (2022). The role of energy democracy and energy citizenship for participatory energy transitions: A comprehensive review. Energy Research & Social Science, 87, Article 102482.

Wewerinke-Singh, M. (2022). A human rights approach to energy: Realizing the rights of billions within ecological limits. RECIEL, 31(1), 16–26.

Chapter 2

Balancing Green Energy Development and Indigenous Rights in Latin America: An Examination of Constitutional and Jurisprudential Tensions

Ifigeneia Tsakalogianni

Abstract

This chapter critically examines the interplay between green energy initiatives and the constitutional and jurisprudential recognition of Indigenous rights in Latin America. The burgeoning demand for renewable energy, driven by global climate imperatives, has intensified the exploitation of natural resources within Indigenous territories, raising significant legal and ethical questions. Through an analysis of legal frameworks and landmark judicial decisions, this study explores how Latin American countries have attempted to reconcile the imperative of energy development with the protection of Indigenous cultures and territories. Additionally, I conduct an energy and climate justice analysis, evaluating the degree to which the principles of equity, recognition, and participation must be upheld in the execution of energy projects to substantiate the identification of a 'right to energy'. The findings identify three key principles that must be upheld to recognize an Indigenous 'right to energy': a) the free, prior, and informed consent (FPIC) of Indigenous peoples is a fundamental prerequisite before any energy projects can be initiated on their lands; b) equitable benefit-sharing is critical to ensure that Indigenous communities receive a fair allocation of the economic gains derived from energy projects; and c) adequate institutional safeguards are necessary to protect Indigenous resources from exploitation. By interrogating the legal mechanisms and judicial approaches that seek to balance these often-competing interests, this

research contributes to the broader discourse on sustainable development, human rights, and environmental justice in this part of the Global South.

Introduction

Since the First World Climate Conference in 1979, which issued a declaration calling on the world's nations "*to foresee and prevent potential man-made changes in climate that might be adverse to the well-being of humanity*" (WMO, 1979, p. 12) similar alarms have been made from the 1992 Rio Summit (UN, 1992) to the 2015 Paris Agreement (UN, 2015); and yet, greenhouse gas emissions have been steadily increasing, despite an impressive, albeit temporary, halt due to the COVID-19 pandemic (Climate Action Tracker, 2020, p. 13). Concurrently with the adoption of binding, hybrid and soft law legal instruments (Luterbacher and Sprinz, 1996; Bodansky, 2016), talk on climate change mitigation and adaptation has increased exponentially in recent years. Among the blossoming of climate initiatives, there is also a global shift towards "green" and "carbon-free" energy.

Energy, in general, is defined as the ability or power to produce an effect. Green energy is the one that does not lead to the release of greenhouse gases, i.e., carbon emissions, into the atmosphere, mostly stemming from Renewable Energy Sources that are natural and, therefore, cannot be reduced or are at no risk of being depleted.

It is now widely accepted that mitigating and combating the effects of climate change requires a radical change in the current polluting energy model through a rapid decarbonization of the global energy system by reducing the production and utilization of fossil fuels, which, in turn, requires a massive boost of green energy production to meet global energy needs.

Energy is generally defined as the capacity to perform work or produce an effect. Green energy refers to energy sources that do not emit greenhouse gases, such as carbon dioxide, into the atmosphere. It primar-

ily derives from renewable energy sources, naturally replenished and therefore not at risk of depletion. Addressing climate change necessitates a profound shift away from fossil-fuel-based energy system, which involves the rapid decarbonization of the global energy sector and a significant increase in green energy production to meet worldwide energy demands sustainably.

As green energy is heralded as a cornerstone of efforts to combat climate change and achieve sustainable development, all Latin American countries have ratified the Paris Agreement and submitted their respective national commitment declarations (NDCs, according to Articles 3 and 4 of the Agreement), committing to lowering emissions and promoting green energy in their respective national energy mixes. However, this "green energy transition" is not without its complexities, particularly in regions where the pursuit of green energy intersects with the rights and livelihoods of Indigenous peoples. In Latin America, a region rich in cultural diversity, this intersection has sparked intense legal and ethical debates, as Indigenous communities, whose ancestral territories are often targeted for large-scale energy projects, find themselves at the forefront of these tensions and try to navigate the dual challenges of environmental preservation and cultural survival.

Especially in Latin America, Indigenous people who oppose the development of energy projects have suffered violence, including physical aggression, harassment, and even assassinations (Canales, 2024). According to the Mexican Center for Environmental Law, between July 2015 and July 2016, 35 attacks were reported against human rights defenders connected to large-scale projects and wind-energy investments at the Isthmus of Tehuantepec in Mexico. Incidents included intimidation, harassment, defamation, illegal detention, and physical aggression. Additionally, two assassinations and human rights violations occurred between 2013 and 2016 (Ramirez, 2021).

Sometimes, these violent acts towards Indigenous leaders have led to the cancellation of energy projects. This was the case of the 21.5-Megawatt *Agua Zarca* hydroelectric power project in an indigenous commu-

nity's sacred river in Honduras, where Berta Cáceres, an activist opposing the construction of the project, was murdered (Flores, 2018).

In an era where the urgency of the energy transition is matched by the imperative to uphold human rights, the experiences of the indigenous populations in Latin American countries provide valuable lessons. After the introduction, the second section focuses on recognizing the status and rights of Indigenous peoples in Latin America, exploring their legal frameworks, constitutional recognition, and the pivotal principle of Free, Prior, and Informed Consent (FPIC). The following section will examine the jurisprudential tensions arising from the expansion of green energy projects in Indigenous territories across Latin America, highlighting the conflict between renewable energy development and Indigenous sovereignty, focusing on specific cases. The fourth section will examine whether the right to resources includes the recognition of a 'right to energy' through the lenses of climate and energy justice in the context of Indigenous communities in Latin America, and some conclusions will follow.

Indigenous people in Latin America: recognition of status and rights

Conceptualizing the term

The term 'Indigenous Peoples' generally refers to "*communities living in ancient territories under a relationality ethos related to understanding and protecting their natural environments*" (Segovia-Tzompa et al., 2024, p. 2). The first comprehensive definition of Indigenous communities, peoples and nations came from the U.N. Special Rapporteur José Martinez Cobo, according to which they are those:

"*which, having a historical continuity with preinvasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present nondominant sectors of society and are determined to*

preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems" (Martinez Cobo, 1987, p. 29).

Even though there have been a plethora of different definitions concerning these ethnic groups, there is a consensus on their most important characteristics: a) a particular culture or lifestyle rooted deep in each group's history, b) the group being a minority within the greater society or country – but, for example, the indigenous population in Bolivia and Guatemala is close to half of the general population (Buchholz, 2021), and c) a past or continuously present threat towards their identity by states foreign to Indigenous economic and political structures (Gosart, 2012).

The term appears also in national Constitutions – in Bolivia, Indigenous people are recognized as a "nation" and rural native Indigenous people which consist of "*every human collective that shares a cultural identity, language, historic tradition, institutions, territory and world view, whose existence predates the Spanish colonial invasion*" [30(I)].

International Legal Frameworks on Indigenous Protections

International Labour Organization Convention no. 169 of 1989 and FPIC

A cornerstone of Indigenous legal protections, International Labour Organization Convention no. 169 of 1989 (ILO, 1989), hereinafter "ILO 169", focuses on the rights of Indigenous and tribal peoples. It is the successor to the less progressive ILO Convention No. 107 (ILO, 1957), trying to reflect a shift from assimilationist policies to the recognition of Indigenous peoples as distinct communities with the right to self-determination, that is, the founding principle of their rights (Ward, 2011).

ILO 169 addresses different elements of Indigenous Peoples' rights, recognizing, inter alia, their cultures and traditions (Article 5), their

right to protection against discrimination in employment, education, and health (Articles 20–31), an obligation for their consultation and participation in land resource development (Articles 13–19), and, most importantly, particular emphasis is put on the notions of a general obligation (beyond and including resource development) for the 'consultation' and 'consent' of Indigenous peoples under Articles 6 and 7. A duty is established for governments to engage with Indigenous peoples through genuine dialogue, ensuring their views are considered in decision-making processes. This consultation must be carried out in good faith, to achieve agreement or consent, and, importantly, the primary objective of such consultations is to strive for agreement or consent on the proposed measures towards a more inclusive governance. Hence, the provisions do not merely prescribe a procedural requirement, but recognize consultation as a substantive right that enables Indigenous communities to influence outcomes that affect their livelihoods and survival.

The emphasis of ILO 169 on consultation aligns with emerging international norms, the most important of which for the present analysis is the Free, Prior, and Informed Consent (FPIC) (Doyle, 2014). Although ILO 169 stops short of mandating explicit consent in all circumstances, it lays the groundwork for this by emphasizing participatory mechanisms that respect Indigenous peoples' cultural practices and decision-making systems. The obligation extends to legislative measures, administrative actions, and development projects, particularly when these initiatives involve land or resources central to the community's cultural or economic survival.

First and foremost, the 'free' aspect of FPIC underscores that consultations must be conducted without coercion, manipulation, or undue influence, hence, autonomously; it requires that Indigenous peoples are free to provide or withhold consent without fear of reprisal or pressure from state actors or private entities. Second, the principle of 'prior' consultation also implies that dialogue must occur before decisions are finalized or actions are undertaken, preventing retroactive consultations that undermine Indigenous rights. This aspect ties into the 'informed'

component of FPIC, emphasizing that Indigenous communities must have the opportunity to evaluate proposals comprehensively before providing feedback. Third, the obligation of consultation includes ensuring that Indigenous peoples have access to all necessary information in a comprehensible and culturally relevant format.

These principles collectively align with broader international norms, such as those articulated in the Aarhus Convention (UN, 1998), which stresses both the proactive dissemination of critical information by authorities and the facilitation of public participation at an early stage in environmental matters. Indigenous communities, much like the general public under the Aarhus framework, must be equipped with all relevant information proactively and in appropriate formats to enable active and meaningful engagement. The Aarhus Convention's emphasis on early-stage participation, where all options remain open and stakeholders can effectively negotiate or propose amendments [6(4)], parallels FPIC's insistence on 'prior' consultation. However, the Aarhus Convention requires decision-makers to account for public input, as mentioned in 6(8): *"(…) ensure that in the decision due account is taken of the outcome of the public participation*", whereas ILO 169 does not explicitly mandate the incorporation of Indigenous perspectives into final decisions affecting them. Similarly, as stipulated by Article 6(2), the objective of consultations done in good faith with Indigenous populations must be obtaining agreement or consent, but pursuant to the ILO Handbook, ILO 169 does not *per se* provide Indigenous peoples with a veto right, as obtaining the agreement or consent is merely the purpose of engaging in the actual consultation process, and is not an independent requirement (ILO, 2013, p. 16). And, finally, while it outlines significant Indigenous rights, ILO 169 provides limited guidance on operationalizing them, as, for example, the specifics of consultation processes and land restitution mechanisms are left to national interpretation.

The Latin American version of the Aarhus Convention, the 2018 Escazú Agreement (UN, 2018), aims to enhance access to environmental justice in the region by emphasizing the three pillars of rights enshrined in the Aarhus Convention (right to information, public participation, and

justice in environmental matters), while building upon the principles of the Aarhus Convention, including additional safeguards for vulnerable groups and human rights defenders. Notably, it introduces principles like non-regression [Article 3(c)], which ensures progress in environmental governance and prevents backsliding. Its focus on transparency, accountability, and good governance serves as an essential framework for improving environmental rights across the region, and has been hailed as "*the last piece of the tripartite normative framework in the right to a healthy environment*" (Dávila, 2023).

U.N. Declaration on the Rights of Indigenous Peoples

While ILO 169 is a legally binding treaty for ratifying states, the "soft law" U.N. Declaration on the Rights of Indigenous Peoples" (UN, 2007a), hereinafter "UNDRIP", adopted in 2007, enjoys broader acceptance, with UNDRIP's influence having prompted states to align with its principles even without ratifying ILO 169, leading to a near-universal endorsement by UN member states (UN, 2007b). The two instruments are complementary; while the first provides enforceable obligations, UNDRIP sets aspirational standards and frames FPIC as a fundamental aspect of self-determination, rather than deriving it from the rights to culture or non-discrimination (Ward, p. 58), and, by the identification of a longstanding *sui generis* violation of it (Anaya, 2009, p. 190), self-determination is recognized in its Article 3. Many commentators have argued that albeit its non-binding nature, UNDRIP includes certain norms that can guide states in incorporating them into their *leges (non) scriptae* and that these norms will gradually solidify into customary international law (Anaya, 2004, p. 62); indeed, the Declaration is referred to as an international standard by the Inter-American Court of Human Rights in its judgement at the landmark *Saramaka People v. Suriname* case (IACtHR, 2007), which articulated not only the right of Indigenous peoples to FPIC, but also the substantive nature of that right within the Inter-American System (Ward, 2011, p. 63).

Within the context of this chapter's analysis, one of the central principles of UNDRIP is the recognition of Indigenous peoples' intrinsic