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HUMAN RIGHTS AND CLIMATE CHANGE:  
SHIFTING THE BURDEN TO THE STATE?

by Anne Parsons*

In March 2008, the United Nations Human Rights Council passed Resolution 7/23 requesting intergovernmental and international organizations to conduct "a detailed analytical study on the relationship between climate change and human rights." Resolution 7/23 is indicative of the recent global trend that incorporates a human rights framework in climate change mitigation and adaptation policies.

Underlying the human rights approach to climate change is the notion that vulnerable populations that contributed little to the stocks of carbon emissions that cause global warming, should not have to bear the brunt of the burden in addressing global climate change. Correspondingly, protecting human rights will better enable individuals and communities to take steps to adapt on their own. Under a human rights framework, the state is traditionally the duty-bearer, and advocates of a rights-based approach to climate change urge governments to integrate climate change concerns into existing development policies and set minimum human rights thresholds around which new mitigation and adaptation policies can be developed.

While the rights-based approach to climate change raises many useful methodological insights, it also raises a fundamental question: how will states that currently lack the resources or political will to fulfill basic human rights tackle the problem of climate change?

The essential hope of orienting climate policy around human rights is that this orientation will generate moral and legal force within the global climate change regime. To start, it distinguishes between "perpetrators" of climate change and "victims" of climate change. This framing of the relationship has two key advantages from a human rights perspective. First, it highlights litigation as a viable mechanism for holding reluctant-to-change developed nations accountable to their climate change commitments. Second, it also helps provide new impetus for wealthier nations to assist vulnerable states to adapt by providing resources and technology. For example, to date, few wealthy countries have met the agreed international aid target for adaptation funding, which currently stands at 0.7% of Gross Domestic Product. In contrast, one study estimated the financing needed for "immediate 'climate proofing’” at between US$1.1 billion and US$2.2 billion for least developed countries.

At the national level, the logistics of implementing a rights-based climate change policy are tricky. A rights-based approach to climate change takes universally accepted human rights norms as minimum thresholds by which to gauge the effects of climate change and direct adaptation funding to where it is most needed. At the same time, these thresholds ensure that the policies implemented by governments to address the effect of climate change do not themselves infringe upon human rights. A recent total ban on charcoal in the West African country of Chad exemplifies the latter point: the government’s response to the pressing problem of deforestation has been widely criticized as overly harsh by the public and human rights activists alike. Paradoxically, then, a human rights approach to climate change may be hardest to implement in the countries that need it most. If a government of a resource-poor state faces a pressing environmental concern, the state’s only viable option within the human rights framework may be to appeal to the international community for aid.

Ultimately then, whether the human rights framework for climate change offers anything new to the states most vulnerable to climate change depends on those states’ ability to leverage this discourse in negotiations vis-à-vis the international community. This will require these states to invoke human rights discourses in new ways, since human rights have traditionally been concerned with the state-individual relationship. In the past, climate change negotiations have marginalized resource-poor countries in need of adaptation funding. Resource-poor states may be able to invoke procedural rights (right to participation, right to information) as a means of gaining access to these negotiations. Similarly, asserting the right to development may help developing nations articulate their concerns about the impacts of climate change on their ability to protect their citizens’ human rights. Integral to the human rights framework on climate change is the notion that powerful nations should recognize developing states’ right to actively participate in the development of a global strategy on climate change as both an ethical obligation and the only means of attaining a sustainable solution.

Endnotes:

3 See id.

Endnotes: Human Rights and Climate Change continued on page 68

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ries on an abnormally dangerous activity is subject to strict liability for harm caused by that activity).

63 Cassinos v. Union Oil Co. of Cal., 18 Cal. Rptr. 2d 574, 584.

64 Id. In reaching this conclusion, the Cassinos court considered two similar Oklahoma cases. In those cases, waste water migrated into space devoid of oil or gas, causing the courts to find no damages. See W. Edmond Salt Water Disposal Ass’n v. Rosecrans, 226 P.2d 965, 969 (Okla. 1950) (stating that “if . . . disposal of salt water is forbidden unless oil producers first obtain the consent of all persons under whose lands it may migrate . . ., underground disposal would be practically prohibited”); Sunray Oil Co. v. Cortez Oil Co., 112 P.2d 792, 794-96 (Okla. 1941).

65 In Chance, defendant BP injected waste water containing dissolved salts and other organics, into saline pore space 2,500 feet below the surface using deep well technology. 670 N.E.2d 985, 986-87 (Ohio 1996). Plaintiffs brought a class action for subsurface trespass, nuisance, negligence, ultra-hazardous activity, fraud, and negligent infliction of emotional distress, alleging extensive migration. See id. at 987-89. In affirming the trial court’s finding that no damages existed for trespass, the Ohio Supreme Court held that plaintiffs failed to “prove some physical damages or interference with use proximately caused by the deepwells . . . [such] that the injectate interfered with the reasonable and foreseeable use of their properties.” Id. at 993. In addition, because of the number of variables in determining the existence and extent of migration, including the permeability, porosity, and thickness of the injection strata, the diffusion of the waste into the saline, and the degradation of the substances over time, plaintiffs could not prove a property invasion as a factual matter. Id. at 994.


69 Id. The proposed measures include mapping nearby underground drinking water and ensuring injection, confinement, and containment zones; periodic review, modification and corrective action; deep-well construction procedures accounting for nature of CO₂ testing and monitoring of groundwater quality and CO₂ plume; 50-year post-injection site care and closure plans; and demonstrated financial assurances.

70 Statutes such as the CWA, the Resource Conservation and Recovery Act, and the Clean Air Act contain permit shield language, which protect permitees from certain types of liability. For example, CWA Section 402(k) states that “[c]ompliance with a permit issued pursuant to this section shall be deemed [to be] compliance.” 33 U.S.C.A. § 1342(k) (West 2008). If a permit holder discharges pollutants in compliance with its permit, it will be shielded from CWA civil or criminal liability. Several courts have addressed the scope of the permit shield. See generally, e.g., Piney Run Pres. Ass’n v. County Comm’n of Carroll County, Md., 268 F.3d 255 (4th Cir. 2001); see also Atl. States Legal Found., Inc. v. Eastman Kodak Co., 12 F.3d 353, 357 (2nd Cir. 1993).

71 See generally, e.g., Piney Run Pres. Ass’n, 268 F.3d 255; see also Chance v. BP Chemns., Inc., 670 N.E.2d 985, 986-87 (Ohio 1996).


73 The possibility of classification of CO₂ as a pollutant under the Clean Air Act or any other statute should be irrelevant to the permitting process itself, as compliance with a SDWA permit is a distinct issue.


75 See generally Cal. Const. art. XI.

76 Vitaly A. Adushkin et al., Seismicity in the Oil Field, OILFIELD REV. (Summer 2000), available at http://www.slb.com/media/services/resources/oilfieldrev/ons00/sum00/p2_17.pdf.


79 Three levels of coverage exist: First, nuclear plant operators must maintain individual insurance at mandated levels; second, each operator contributes up to the industry statutory cap; and third, the federal treasury provides coverage beyond the sum of the individual and industry combined levels. 42 U.S.C.A. § 2210 (West 2006).


81 See, e.g., Task Force, supra note 28.


ENDNOTES: HUMAN RIGHTS AND CLIMATE CHANGE continued from page 22