ELECTRIC ENERGY ACCESS IN EUROPEAN UNION LAW: A HUMAN RIGHT?

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“Just imagine taking your sick son or daughter to the hospital after dark and having the doctor examine the child by candlelight. Or walking 10 miles to the hospital for treatment after being bitten by a rabid dog and discovering that the vaccination you need is located an additional 100 miles away in a facility that can stock it because it has refrigerators.

That was the situation at the Village Health Works clinic in Burundi, where the sick often lay suffering in the dark and frustrated doctors [have] to consider the cost of running the diesel generator before turning it on in order to supply oxygen to a dying patient. “All of those discussions that you never want to have as a doctor,” said […] Dr. Sri Shamsuner, a visiting physician from the University of California.”

This story seems remote to a reader in living in developed countries such as France or the United States. However, this is the daily plight of people in developing countries, including countries like Burma and Nigeria that are major providers of fossil fuels to developed countries. There, people still depend on wood, animal droppings, and crop leftovers to provide for their energy needs, mainly for cooking food.

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Very few people question the role that access to electric energy played in the development of human civilization during the 20th century. Even though the energy needs of individuals in developing countries are very small compared to the per capita energy consumption of individuals in developed countries, the extremely high costs of developing electric grids in the latter part of the 20th century may have contributed to the underdevelopment of energy infrastructures in developing countries. Given that access to the electric grid seems to be the yardstick most used to measure access to electric energy, one may think that electric energy access is not a problem in developed countries.

However, in developed countries, such as the Member States of the European Union, very little attention has been afforded to end users of energy and the concerns of poor individuals that exercise negligible control over their state government’s blueprint for energy needs. The issue in Europe is not necessarily access to the electric grid and gas terminal. The issue in Europe is that poor Europeans, particularly in the new Member States, will find access to energy increasingly difficult. Given the price volatility of natural energy resources, more and more people in Europe will face dark and cold living quarters during the long winter months due to a lack of resources to pay the high costs of these services.

As such, it is imperative to explore the legal status of access to energy in the European Union. Is access to energy part of the fundamental rights protected in Europe after the Treaty of Lisbon?

In Europe, the people’s access to energy is provided by undertakings that provide

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5 Braddock, supra note 2.
6 Id.
“services of general economic interest,” mainly electric and gas utility providers. The Commission refers to services of general economic interest (“SGEI”) as “services of an economic nature which the Member States or the Community subject to specific public service obligations by virtue of a general interest criterion. The concept of services of general economic interest thus covers in particular certain services provided by the big network industries such as transport, postal services, energy and communications. However, the term also extends to any other economic activity subject to public service obligations.”

Regarding electric energy service, the Commission took the position in IJsselcentrale that vertically integrated electric public utilities provide “services of general economic interest” (in that case, the universal service obligations). The Court of Justice of the European Union (“ECJ”) took the same position in the Almelo case.

We must next examine whether the public service obligations imposed by Member States on SGEI undertakings create rights for the recipients of such services. If these rights exist, we must probe what is the nature of these rights in the EU legal order. First and foremost, any discussion about rights in the EU legal order must start with a reading of Article 2 of the Treaty of the European Union (“TEU”), which states that respect for human dignity, freedom, equality, and human rights are the values on which the EU is founded. Article 2 TEU must be read in conjunction with Article 6 TEU which states, in relevant part, that:

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8 I will concentrate in the energy needs of individuals to sustain a modicum of family life at their homes, namely access to electricity and gas for cooking, heating and certain minimum home leisure purposes such as reading and listening to the news on a radio. For purposes of this work, I am assuming that access to energy for individual transportation (i.e., car fuel) is not necessary to maintain living conditions that comply with the minimum standards of human dignity.


12 The Treaty of the European Union, 2008 O.J. (C 115) 16, art. 2 [hereinafter TEU].

13 TEU, supra note 11, art. 6(1).
1. The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

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3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law. (Emphasis added.)

Thus, the Charter of Fundamental Rights of the European Union (the “Charter”) is incorporated by reference into the Treaties as primary law of the EU. Article 36 of the Charter, in turn, provides that:

The Union recognizes and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union. (Emphasis added.)

Unfortunately, for advocates of access to energy as a human right, Article 36 of the Charter does not guarantee the right to access SGEI. The phrase “recognizes and respects” implies that access rights to SGEI created by the national laws and practices of Member States must not be trumped by the acts of the EU institutions.

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14 Charter of Fundamental Rights of the European Union, proclaimed by the Commission, 7 December 2000. Proclamation and text, 2000 O.J. (C 364) 1, art. 36.

15 See, supra note 2.

16 For instance, Article 38 of the Charter states: “Union policies shall ensure a high level of consumer protection.” This means that the policies developed by the EU must guarantee that the principle of “high level of consumer protection” is integrated into these policies and that the ECJ must safeguard the use of that principle in the judicial review of acts of the EU.
One may argue that, if a Member State legislates the right to access to electric energy, then the Treaties must recognize that right to access as a general principle of EU law. Article 36 of the Charter does not mention the word “principle.” However, it mandates EU institutions to “recognize and respect” access rights to SGEI. Furthermore, Article 52(5) of the Charter states “[t]he provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality.” As such, what is the legal status of the mandate to “recognize and respect” access rights to SGEI? It is difficult to see how the ECJ could interpret this mandate as none other than the general principle of recognition and respect for access rights to SGEI.

Certainly, the right to access to electric energy must be “recognized and respected” by the EU institutions in formulating secondary legislation. Also, courts must weigh this principle interpreting EU secondary or national legislation that on its face or as applied violates this general principle. It remains to be seen how the European courts will apply this general principle in the context of individuals’ access to electric energy and gas services. It may not be pragmatic for proponents of access to energy to pin their hopes on the judiciary, since the second sentence of Article 6(1) TFEU\(^\text{17}\) clearly prohibits judicial activism by establishing that the Charter shall not extend in any way the competences of the Union as per the Treaties. In the end, the EU principle of access to SGEI may only mean that the EU cannot take any legislative steps to curtail EU citizens the access to SGEI providers entrusted by Member States with public service obligations.

Even though the Member States are the ones called to impose public service obligations, the Treaties must recognize that right to access as a general principle of EU law.

\(^{17}\) Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 47, art. 6(1) [hereinafter TFEU].
obligations on SGEI providers, the EU is attempting to provide some uniformity to these obligations. Directive 2009/72/EC concerning common rules for the internal market in electricity (the Electricity Directive) is a major step in that direction. If properly implemented by the Member States, it will provide a series of rights to European citizens that as a group may define the elements of an EU-wide right to energy access. Article 3 of the Electricity Directive entitled “Public service obligations and customer protection” directs Member States to enact a series of rights.

First, Article 3, paragraph 2 of the Electricity Directive clarifies that Member States may impose on undertakings operating in the electricity sector public service obligations “which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and climate protection. Such obligations shall be clearly defined, transparent, non-discriminatory, [and] verifiable[,] and shall guarantee equality of access for electricity undertakings of the Community to national consumers.”

Second, the Electricity Directive defines universal service as “the right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable, transparent and non-discriminatory prices.” The Electricity Directive contains many consumer rights, but relevant to this article is a series of rights that most approximate access to energy rights to the domain of human rights. Paragraph 7 of the Electricity Directive reads:

Member States shall take appropriate measures to protect final customers,

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19 Electricity Directive, supra note 17 at par. 3(2).
20 Electricity Directive, supra note 17 at par. 3(3).
21 The Directive implements many of the ideas put forward by the Commission in its MEMO/07/278 of 5 July 2007 entitled Towards a European Energy Consumers’ Charter: protecting the consumers’ right to choose.
and shall, in particular, ensure that there are adequate safeguards to protect vulnerable customers. In this context, each Member State shall define the concept of vulnerable customers which may refer to energy poverty and, inter alia, to the prohibition of disconnection of electricity to such customers in critical times. Member States shall ensure that rights and obligations linked to vulnerable customers are applied. In particular, they shall take measures to protect final customers in remote areas. They shall ensure high levels of consumer protection, particularly with respect to transparency regarding contractual terms and conditions, general information and dispute settlement mechanisms. Member States shall ensure that the eligible customer is in fact able easily to switch to a new supplier. As regards at least household customers, those measures shall include those set out in Annex I [Measures on consumer protection].

(Emphasis added.)

It remains to be seen how the Member States will implement the provisions of this paragraph of the Electricity Directive into their national laws. The EU has officially recognized the fact that even in its developed Member States, there are citizens who cannot afford to pay for their continued access to electric services. It is my belief that once one defines the identity of the “vulnerable customers,” Member States must put in place appropriate mechanisms in order to avoid the disconnection of these “vulnerable customers” from the electric service. The EU seems to recognize that living without a modicum of electricity is not a dignified way to live. If a Member State allows its most vulnerable citizens (e.g., children and elderly people) to be disconnected from the electric grid, these people will not enjoy decent nourishment, decent health, and a decent life.

Even though the European Convention of Human Rights\(^\text{23}\) (ECHR) does not mention a right to energy, one could argue that a Member State that allows its citizens to live

\(^{22}\)Electricity Directive, supra note 17 at par. 7.

without a modicum of electric energy in their homes violates their human dignity and possibly their rights under Article 8(1) ECHR: “Everyone has the right to respect for his private and family life, his home and his correspondence.” At least one national court has tackled this issue under the ECHR. In 1988, the Cour d’Appel de Bruxelles, in denying the application of Article 3 of the ECHR, held that the enjoyment of electricity and gas services is indispensable to human dignity. The Court went on to say that public authorities have the positive duty to provide gas and electric service within the framework of social welfare services.

Once Member States transpose the Electricity Directive, there will be a core right to access to energy in the EU Member States. History indicates that energy crises such as the one in 2008 are not a thing of the past, and fossil fuel price volatility, global demand, and other geopolitical issues will continue to play a significant role. As energy prices increase, it will become increasingly tough for a larger set of people to afford energy. The European Union is close to recognizing that access to affordable energy should be a fundamental right of EU citizens, and it should do so in the next revision of the Charter. Many Member States feel strongly about this issue. For instance, the United Kingdom’s Department for International Development has stated in no uncertain terms that “equity of access to basic energy services for cooking, space heating and lighting, like access to water, could be considered a human right.” Also, French electricity legislation “contributes to social cohesion by satisfying everyone’s right to electricity.”

The European Union’s lead in bringing the right to access energy into the realm of fundamental and human rights would certainly enhance its role as an international actor and promoter of human rights.

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24 ECHR, supra note 22, at par. 8(1).
25 Which states: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” ECHR, supra note 22, at par. 3.
28 Article 1 of the Electricity Act (2000) (Fr.)