Electric Energy Access In European 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 had 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 to Dr. Sri Shamsuner, a visiting physician from the University of California.”

Unfortunately, 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 under-developed countries, including countries like Burma and Nigeria that are major providers of fossil fuels to developed countries. There, people still depend in wood, animal droppings and crop leftovers to provide for their energy needs, mainly for cooking food. I still remember stories from my grandmother in Puerto Rico who, in the 1930s had to walk 10 kilometers everyday round trip to gather wood and water for her family needs.

No one questions the role of access to energy to the development of human civilization. A renowned scientist puts it this way: “Energy plays a fundamental role in shaping the human condition. People's need for energy is essential for survival, so it is not surprising that energy production and consumption are some of the most


important activities of human life. Indeed, it has been argued that energy is the key "to the advance of civilization," that the evolution of human societies is dependent on the conversion of energy for human use. Few people have questioned the long-held assumption that standard of living and quality of civilization are proportional to the quantity of energy a society uses. However imprecise it may be, most people still accept the steadfast formula: energy=progress=civilization."³ The energy needs of individuals in developing countries is very small compared to the per capita energy consumption of individuals in developed countries: “...[T]he amount of energy required to lift people out of poverty is extremely small by the standards of developed countries. It has been estimated that each person needs the energy equivalent to only 100 watts of electricity capacity to meet their most basic energy needs.”⁴ 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 underdeveloped countries, but renewable energy technologies may provided some hope in the 21st century: “While there may be some scope to develop new and extend existing electricity grid systems in developing countries, it is anticipated that in most cases access to electricity services would be provided by standalone systems based on renewable energy resources.”⁵

Lack of access to energy in underdeveloped countries may lead to sub-human living conditions that may be considered in violation of Article 25 of the Universal Declaration of Human Rights,⁶ for instance. Article 25 of the Declaration provides that ‘[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services ...’ Without access to energy, the tenets of this Article 25 would not be achievable in today’s society.

In developed countries, such as the Member States of the European Union, most discussions on energy at the national level pivot around the concept of “energy security.” Few pages have been dedicated to end users of energy, particularly the

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⁴ Braddbrook, Supra, note 2.
⁵ Id.
⁶ G.A. Res. 217A (III) (10 December 1948)
poor individuals who exercise almost no control in how their governments decided to paternalistically fulfill their energy needs. The issue in Europe is not access to the electric grid and gas terminal. The issue in Europe is that increasingly, poor Europeans, particularly in the new Member States, will have an increasingly difficult access to affordable energy. Given the price volatility of energy natural resources, more and more people in Europe will face dark and cold living quarters during the long winter months for lack of resources to pay the high costs of these services.

As such, it is imperative to explore whether access to energy is or should be considered part of the human rights or fundamental rights intended to be protected in Europe after the enter into force of the Treaty of Lisbon. Before continuing, a distinction between a human right and a fundamental right is in order. Human rights are rights that should be recognized to all individuals for their condition as human beings and their legal basis lies in the international law, primarily in treaties. Fundamental rights are rights of a constitutional nature and represent all those rights a particular legal order at a particular historical moment considers essential and recognizes such rights via a constitution to the people under such legal order. Examples include the United States Bill of Rights and en European Charter of Fundamental Rights.

The Treaty on the Functioning of the European Union (TFEU) raised energy matters to the level of primary law, by in its Article 4(2)(i), making explicit the known fact that energy was a shared competence between the EU and the Member States and by introducing a new Title XXI Energy that added Article 194 to the Treaty.

Article 194 TFEU gives powers to the Parliament and Council in accordance with the ordinary legislative procedure to introduce legislation (Regulations or Directives) in order to: “(a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks.”

Also, the Treaty of Lisbon gives the EU certain responsibilities in several related areas of the energy sector. Article 122 TFEU gives the Council (by qualified majority voting) the power to take emergency action if there is a severe disruption in the supply of fuel necessary to fulfill the energy
In Europe, the people’s access to energy is provided by undertakings that provide “services of general economic interest,” mainly electric and gas utility providers. The Treaty on the European Union (TEU) and the TFEU do not define the term “services of general economic interest.” Although the Treaties do not define such types of undertakings, the European Commission (Commission) and the European Court of Justice (ECJ) have been left with the difficult task of providing legal meaning to such term. The Commission in its Green Paper on Services of General Interest referred 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.” With regards to the provision of electric energy service, the Commission in Ijsscentrale, took the position that vertically integrated electric public utilities provide “services of general economic interest” (in that case, the universal service). The European Court of Justice took the same position in the Almelo case.

Article 14 TFEU highlights the importance and special status of services of general economic interest in the EU. It reads:

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.
Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfill their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services. (Emphasis added.)

Such is the importance of undertakings providing services of general economic interest (SGEI), that they are not to be subjected to the EU rules of competition announced in Articles 101 and 102 TFEU if the application of such rules interferes with the public service obligations Member States delegate to such undertakings. Article 106 establishes that SGEI undertakings “shall be subject to the rules contained in the Treaties, in particular to the rules of competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.” (Emphasis added.)

The Commission in its Green Paper on Services of General Interest, stated that these services:

“…are a part of the values shared by all European societies and form an essential element of the European model of society. Their role is essential for increasing quality of life for all citizens and for overcoming social exclusion and isolation. Given their weight in the economy and their importance for the production of other goods and services, the efficiency and quality of these services is a factor for competitiveness and greater cohesion, in particular in terms of attracting investment in less-favoured regions. The efficient and
non-discriminatory provision of services of general interest is also a condition for the smooth functioning of the Single Market and for further economic integration in the European Union. Furthermore, these services are a pillar of European citizenship, forming some of the rights enjoyed by European citizens and providing an opportunity for dialogue with public authorities within the context of good governance.”\(^{14}\) (Emphasis added.)

Member States may impose undertakings providing SGEI a series of public service obligations with whom they must comply irrespective of the effect of market forces in the undertaking. The public service obligations include universal service obligations, continuity obligations, quality of service obligations, affordability obligations, user and consumer protection obligations, safety and security obligations, safety of supply obligations and network access and interconnectivity obligations, among others. For instance, “[t]he concept of universal service refers to a set of general interest requirements ensuring that certain services are made available at a specified quality to all consumers and users throughout the territory of a Member State, independently of geographical location, and, in the light of specific national conditions, at an affordable price\(^{15}\). It has been developed specifically for some of the network industries (e.g. telecommunications, electricity, and postal services). The concept establishes the right for every citizen to access certain services considered as essential and imposes obligations on industries to provide a defined service at specified conditions, including complete territorial coverage.”\(^{16}\)

We must next examine how the obligations imposed by the European order in its institutions, Member States and SGEI undertakings create rights, if any, in the recipients of such services. First and foremost, Article 2 TEU states that respect for human dignity, freedom, equality and human rights are the values on which the EU is founded. However, our detailed analysis must commence with Article 6 of the TEU which states, in relevant part, that:

\(^{14}\) Green Paper, *Supra* note 10, at par. 2


\(^{16}\) Green Paper, *Supra* note 10, at par. 50
1. The Union recognises 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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2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.

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 is incorporated by reference as primary law of the EU into the Treaties. Article 36 of the Charter, in turn, provides that:

The Union recognises 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 establish a right, but the phrase “recognizes and respects” imply that access to SGEI such electric energy and gas is a principle of law insofar that such access is provided for in the national laws and practices of Member States. If Member States legislate the right to access to SGEI, then the Treaties recognize that right to access as a general principle of EU law, such as the principles of non-discrimination, legal certainty and proportionality, for example. Thus, the principle of access to services of general economic interest being a general principle of EU law, must be accounted for by both EU and national courts in interpreting 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 general principle of EU in the
context of individuals’ access to electric energy and gas services. Again, advocates of the right to access to energy should not place their hope in the courts, since the second sentence of Article 6(1) TFEU clearly prohibits judicial activism by establishing that the Charter shall not extend in any way the competences of the Union as per the Treaties. The EU principle of access to SGEI only means 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.

That said, however, a court examining a claim of a citizen who resides in a remote wilderness area, who requests the service and is denied the same by an electric utility subject to universal service obligations given the lack of economic feasibility to extend the electric service to that area, would have no choice but to resort to the principle of access to SGEI given that it is a general principle of EU law. Thus, the breach by the SGEI provider of the public service obligations imposed by the Member States may generate derivative rights to the users of such services and such users may vindicate these rights before the appropriate court.

Even though the Member States are the ones called to impose public service obligations to SGEI providers, the EU is attempting to provide some uniformity to these. Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity (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 a European-wide right to energy access. Article 3 of 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, verifiable and shall guarantee equality of access for electricity undertakings of the Community to national
Second, paragraph 3 mandates Member States to ensure that that two types of
titleholders of the energy access rights, namely “household customers” and “small enterprises” enjoy universal service. “Household customers” is defined as a
“customer purchasing electricity for his own household consumption, excluding commercial or professional activities.” “Small enterprises” must have less than 50 occupied persons and an annual turnover of less than EUR 10 million. Universal service is defined in the Directive 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.” In order to ensure universal service, Member States may appoint a supplier of last resort, that is, a supplier that must always be willing to provide the services in order to ensure continuity of service. Also, Member State must impose on “electricity distribution companies the obligation to connect customers to their network under the terms, conditions and tariffs set in accordance with the procedure laid down” in Article 37(6) of the Directive. Here, the term “customer” means a wholesale or final customer of electricity. Every type of customer has the legal right to be connected to the network, provided it contracts with the distribution company. Member States cannot prohibit that household, small and medium-sized (not defined in the Directive) customers to strengthen their market position “by promoting the possibilities of voluntary aggregation of representation for that class of customers.” Presumably this means that such customers may pool their resources to forms associations with representative capacity in order to collectively ascertain their rights vis a vis the SGEI providers. Paragraph 4 establishes “all customers” right to purchase the electric service from suppliers registered in other Member States with the sole requisite that those providers comply with the engineering rules needed when injecting power into the network of the Member State. Paragraph 5 gives all customers the right to change suppliers within 3 weeks of notification and to receive all relevant consumption data from the supplier.

Many other consumer rights are contained in the Electricity Directive, but I will only mention a series of rights that most approximate the access to energy rights to the consumers.”
domain of human rights. Paragraph 7 of the Electricity Directive reads:

Member States shall take appropriate measures to protect final customers, 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 into their national laws, the provisions of this paragraph of the Electricity Directive. 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 the electric services. It appears to me that once you define who are 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 (children, 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 does not mention a right to energy, one could argue that a Member State that allows its citizens to live without a

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17 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.
modicum of electric energy in her home violates her human dignity and possibly her
ing 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\(^\text{18}\), held that the enjoyment of electricity and gas
services are 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 the social welfare services.\(^\text{19}\)

Once Member States transpose the Electricity Directive, there will be a core right to
access to energy in Europe. If history proves right, Europe will live through many
more energy crisis such as the one suffered in 2008 due to many factors: volatility of
fossil fuel prices, world demand and other geopolitical issues. The fact remains that
as energy prices keep soaring, more people will be unable to pay for such energy
prices and subsist. Europe is close to recognize 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: “equity of access to basic energy services for cooking, space heating
and lighting, like access to water, could be considered a human right.”\(^\text{20}\) Also,
French electricity legislation “contributes to social cohesion by satisfying everyone’s
right to electricity.”\(^\text{21}\) The European Union lead in bringing the right to access energy
into the real of fundamental and human rights would certainly enhance its role as an
international actor and promoter of human rights.

\(^{18}\) “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”
\(^{19}\) Decision of 25 February 1988, J.L.M.B., 1989, p. 1132
\(^{21}\) Article 1 of the Electricity Act (2000) (Fr.).