Judicial Review of Human Rights Impacts of Hydroelectric Projects

By: Benoît Mayer

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The mission of the **Centre for International Sustainable Development Law** (CISDL) is to promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law.

**Editors:** Sébastien Jodoin, CISDL Lead Counsel, Climate Change and Sumudu Atapattu, CISDL Lead Counsel, Human Rights and Poverty Eradication

**Assistant Editor:** Sean Stephenson, Associate Fellow, CISDL

**Contact Information:**

Centre for International Sustainable Development Law  
Faculty of Law, McGill University  
3644 Peel St., Montreal, Quebec, H3A 1W9 Canada  
Tel: (+1) 514 398 8918  
Fax: (+1) 514 398 4659  
Email: secretariat@cisdl.org  
[www.cisdl.org](http://www.cisdl.org)

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1. Introduction

While the direct effects of climate change on human rights have recently received attention of the international community, the indirect effects of climate change mitigation on human rights have generally received little attention.

Climate change mitigation calls for norms and actions that may have a great impact on fundamental rights through, for instance, the closing of plants or mines, the interruption of agricultural models, or the prevention of the use of certain types of vehicles. Such decisions can go against strong individual interests, often protected as rights: employees can be fired, industries can be closed, and property can be lost. Climate change mitigation may also push states to engage in certain specific policies such agro-fuel programs, reforestation or reduced emissions from deforestation and degradation (REDD), or the protection or development of certain areas.

One of the greatest consequences of mitigation efforts has arisen from vast hydroelectric projects. Such projects can result in sudden and dramatic changes in town and country planning. For example, the reservoir of the Three Gorges Dam in China covers a surface of more than one thousand square kilometers. Between Zambia and Zimbabwe, the reservoir of the Kariba dam covers 5.5 thousand square kilometers—roughly equivalent to the surface area of the Palestinian territories. In most cases, the human costs of such projects on human beings have been huge.

Dams existed long before the beginning of climate change mitigation efforts. Around 2600 BC, the Egyptians built a 14-meter high and 113-meter long dam in the Garawi ravine close to Memphis, in order to prevent floods. Throughout history, dams were developed not only to prevent or control floods, but also to improve water management and irrigation, to expand river transport, to create fishponds, to develop recreation, and to generate energy. Increasingly, however, dams are being perceived as a source of sustainable energy that could replace greenhouse gas emitting sources such as coal and oil. Recent scientific studies have demonstrated that dam reservoirs release large quantities of greenhouse gases, particularly methane produced “by the anaerobic decomposition of organic matter in lands flooded by the Reservoir.”

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2 For instance, Nepal’s decision to prevent the use of three-wheeler diesel engines in Kathmandu valley was unsuccessfully challenged before the Nepali Supreme Court, on the ground that it contravened the right to carry out trade or business. See Advocate Kedar Bhakta Shrestha and others v. HMG, Department of Transportation, Management and others, writ No. 3109 of 1999, Supreme Court of Nepal, Laxman Prasad Aryal and Top Bahadur Singh, JJ, in Compendium of Summaries of Judicial Decisions in Environment-Related Cases, UNEP, 2005, at 138.

3 See e.g.: Supreme Court of India, Rural Litigation and Entitlement Kendara v. Union of India (Doon Valley Limestone Quarrying Case II) AIR (1985) SC 652; Rural Litigation and Entitlement Kendara v. State of U.P. AIR (1988) SC 2187; Ambica Quarry Works v. State of Gujarat and others AIR (1987) SC 1073. What is the outcome of these cases?


6 The surface of the Palestinian territories is estimated at 6020 square kilometers by the UN data service information, available at http://data.un.org/CountryProfile.aspx?crName= Occupied%20Palestinian%20Territory.


nonetheless generally accepted, and this paper will take for granted, that hydroelectric projects, as compared to fossil oil, do play a role in mitigating climate change.

This article explores how national judiciaries have assessed the human rights impact of hydroelectric projects. In particular, it describes how judges have played a crucial role in identifying the permissible restrictions on rights affected. Thus, this article seeks to articulate the common features emerging from a range of very different cases decided in very different jurisdictions worldwide, yet facing similar challenges of how to reconcile political decisions to carry out hydroelectric projects with individual (or collective) fundamental rights.

The second section of the article discusses resistance to the application of a human rights normative framework to political decisions on hydroelectric projects. The third section addresses possible justifications for limiting individual with fundamental freedoms by such projects. Finally, this article argues that judicial review of hydroelectric projects’ interferences in human rights should better take into account the fact that such projects aim, at least in part, at mitigating climate change, thus playing a role in fulfilling the rights of other people, in other places and potentially at other times in the future. However, current international human rights law may not fully be able to take this indirect justification into account, given the law’s reliance on a territorially competent state to protect a given population at a given time.

2. Imposing a Human Rights Normative Framework on Hydroelectric Projects

Even though the complexity of large hydroelectric projects has encouraged the courts to allow decision makers a large margin of appreciation judges have extended a certain degree of judicial control over these sensitive political decisions and, have applied a human rights normative framework

A. An Exclusively Political Debate?

Decisions relating to large hydroelectric projects often involve strong and diverging interests. On the one hand, legitimate interests affecting the common good, such as climate change mitigation, energy independence, flood control, and water management (eg. potable water, agricultural use or a variety of other activities) are often at stake. For instance, the Itaipu Dam, located on the border between Brazil and Paraguay, meets about one fifth of Brazil’s energy demand and three fourths that of Paraguay. Economically significant procurements also further large private interests backed by influential lobbies. Furthermore, public interests can be understood differently by different public authorities. This is particularly the case when a hydroelectric project has different effects on different local communities or different federated states, or as between two different sovereign states.


10 Judicial review differs from environmental impact assessments carried out by governmental authorities; judicial review often occurs at a later stage and plays a strictly subsidiary function of controlling the government’s decision.

11 For a case regarding a dam built with the purpose to irrigate a golf field, see: Kenya, High Court at Nairobi, Nairobi Golf Hotels Ltd. v. Pelican Engineering and Construction Co. Ltd.


On the other hand, local populations generally oppose such projects, which at best wreak havoc on their landscape and often lead to the resettlement of entire communities. In some cases, the population affected by a hydroelectric project is clearly distinct from those who need this additional source of energy: rural communities or indigenous peoples are affected by urban industrial development, the fruits of which have not yet reached them. For instance, in *The Shadow of the Dam*, David Howarth recalls the encounter between the Tonga, an isolated African tribe, and the Kariba dam that flooded their valley and forced them to resettle a hundred of miles away. Experience shows a strong tendency to put local interests altogether aside in the furtherance of what is considered a general interest. In reaction, “Not In My Back-Yard” (NIMBYs) associations are often established to try and tip the balance in favor of locals’ interests.

As interests on both sides are strong, decision-making in these cases is difficult. In an effort to guide decision-making and to favor a certain weighing of diverging interests, most legal systems provide for specific procedures such as environmental impact assessments and participatory rights for different stakeholders. Yet, consensual decisions are rare. After a decision harming its interests, a party often takes a chance and lodges a claim, either to annul the adverse decision or sometimes merely to claim damages. It must be recognized that dilatory procedures (which are based on purely political instead of legal grounds) may frequently cause substantial delays to even the most laudable projects.

The approach of judges in different jurisdictions has generally been to give deference to political decision-makers. This can be understood as a reflection of the inherent difficulty in arbitrating between strong yet irreconcilable interests in very complex cases where contradicting technical assessments are often presented. Illustrating this argument, the Supreme Court of India explicitly recalled that it was “well settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision.” According to this judgment, “[w]hether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy making process and the courts are ill equipped to adjudicate on a policy decision so undertaken.” Rather, the Court considered itself, with a certain degree of modesty, to be a “sentinel” whose role was “to defend the values of the Constitution and rights of Indians.” Accordingly, its role was to “act within [its] judicially permissible limitations to uphold the rule of law and harness [its] power in public interest.”

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15 David Howarth, *The Shadow of the Dam* (London: Collins, 1961), in part. at 40 (the District Commissioner “wondered how he could ever explain it to them. The Tonga had never even made a cart on wheels, and he would have to explain about turbines and electricity. They had never seen a lake, and he would have to describe what it would look like, and make them believe in it. They had very little idea of any community larger than their own, and he would have to persuade them that it was right that they should suffer for the sake of the progress of the country as a whole.”)
17 Supreme Court of India, Narmada Bachao Andolan v. Union of India, *supra* note 13, at para. 255.
But even beyond the technical difficulty of weighing complex and technical elements and taking sides amongst irreconcilable arguments, judges have also chosen to abstain from interfering in highly controversial and political issues, lest the contrary undermine their judicial authority (or “neutrality”). For instance, courts have generally rejected claims that the financial participation by public authorities in a hydroelectric project carried out in a third country should be halted. In one case, a Japanese court was seized by nearly 10,000 Sumatran indigenous people who had been resettled as part of a hydroelectric project built in Sumatra with Japanese development aid funding. The judges rejected the claim for damages, arguing that they would not interfere in a political decision, especially one taken by another state’s authorities. According to the presiding judges, these were “internal matters for the Indonesian government to deal with,” and it was not appropriate for them to be adjudicated in a Japanese court.

Similarly, questioning the justiciability of “political” issues, the High Court of Australia in the Tasmanian Dam case went as far as issuing a preliminary statement to recall that it was “in no way concerned with the question whether it is desirable or undesirable, either on the whole or from any particular point of view, that the construction of the dam should proceed.” The matter at issue in this case was a dam project on the Gordon river, which had been authorized by the Hydro-Electric Commission of Tasmania but outlawed by the World Heritage (Western Tasmania Wilderness) Regulations of the Governor-General and by the World Heritage Properties Conservation Act. The project would have inundated “significant Aboriginal archaeological sites.” According to Gibbs C.J., “[i]t is not for the Court to weigh the economic needs of Tasmania against the possible damage that will be caused to the archaeological sites and the wilderness area if the construction of the dam proceeds,” as these are “matters of policy for the Governments to consider.”

This may be an extreme position. The rule of law demands that judges exercise at least some degree of review over decisions taken by political authorities. Political responsibility before the people should certainly not replace judicial scrutiny over acts that may, as in the case of hydroelectric projects, harm the interests of a minority to better promote those of the majority.

B. From a Procedural to a Substantive Judicial Review

While granting deference to decision makers, judges have nonetheless exercised control over certain legal aspects of decisions regarding hydroelectric projects. At the very least, judges of most countries have reviewed the conformity of hydroelectric projects with legal procedures. As noted above, most legal systems demand that specific procedures be followed before the adoption of a project that is likely to have a significant impact on the environment. These procedural rules not only impose an assessment of the social, economic, cultural and environmental impacts of a given project, but also demand that the public concerned be informed, invited to participate, and granted access to justice.

An example of judicial review of procedural rules can be found in the Kajing Tubek vs. Ekran Bhd judgment of the High Court of Malaya, in which Malaysia was reprimanded for

23 Ibid. para. 1.
24 Ibid.
26 See for example the UNECE Aarhus convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 2161 UNTS 447 (1998).
derogating from national legislation requiring the preparation of a report on the environmental impact of hydroelectric projects. Insisting that the legislation at stake was enacted “to be applied to the entire nation,” the Malaysian High Court underscored that public participation in large projects was “essential, for interaction between people and their environment is fundamental to the concept of environmental impact.”

Yet, not all violations of procedural rules necessarily invalidate decisions on large-scale projects, as is illustrated by a 2002 judgment of the Supreme Court of Belize. A group of environmental organizations filed action objecting to the decision to carry out the Chalillo dam project. The Belizean judges recalled that “[t]he role of the Courts […] is not to make […] an informed choice between environmental and other objectives, […] that is for policy-makers to do,” but to “insist and ensure that the applicable rules are observed, including consulting the public where the case clearly warrants this.” Despite allegations of minor procedural flaws, the Court concluded that the national legislation was not “disregarded or flouted in such a fashion, if at all, as to render these decisions so flawed, tainted or unreasonable, as to warrant this Court to step in and quash the decision.” Following this reasoning, only violations of fundamental rights or substantive guarantees would be reviewed by courts, while the general interest in having public decisions taken efficiently in spite of the complexity of procedural rules should allow a degree of tolerance.

These procedural rules, mainly of a statutory nature, ensure that all questions have been asked, but they do not necessarily prevent decision-makers from taking a bad decision, such as one that would greatly affect the interests of one stakeholder without any proportionate advantage for the other stakeholder. Therefore, in some cases, courts have been tempted to review not only the procedure that led to a decision over a hydroelectric project, but also the project itself.

Yet, if the role of the judiciary as a guardian of procedure is easy to recognize, the case may be more delicate when substantive issues of compliance with the law are involved, as a risk exists for judicial review to meddle with purely political matters. For example, it may be difficult for a claimant to successfully emphasize that a project does not effectively pursue the general interest and constitutes a waste of public money, or that its environmental costs are higher than its advantages. Firstly, such a claim would require that individual or civil society claimants grapple with a mass of technical documents, while the government, backed by industrial lobbies, would be much better equipped to make a technical point. But more fundamentally, a substantive argument against a hydroelectric project will have to overcome the strong presumption that balancing between diverging general interests is a matter best left to political institutions. In other words, judges have usually afforded decision-makers a large margin of appreciation and limited judicial scrutiny to qualified (e.g. “manifest,” “grave”) violations of substantive rules.

For instance, a high level of judicial deference to political decision-makers in such actions has been cited by the Supreme Court of India in Narmada Bachao Andolan v. Union of India. Highlighting that “the courts should not become an approval authority,” this jurisdiction ruled that “[i]f a considered policy decision has been taken, which is not in conflict with any law or is not mala fide, it will not be in the public interest to require the Court to go into and investigate

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28 Ibid. at para. 56.
30 Ibid. at para. 81.
31 Ibid.
those areas which are the function of the executive.” Thus, “[w]hen two or more options or views are possible and after considering them the Government takes a policy decision, it is then not the function of the Court to go into the matter afresh and, in a way sit, in appeal over such a policy decision.”

Similarly, the Quebec Court of Appeals considered that “tribunals do not control the opportunity of the decision […] but verify the conformity of the impugned decision with the spirit of the law and make sure that this decision […] was not made of bad faith or in a discriminatory, unfair or unreasonable manner, or for goals that are incorrect, not provided by law or not taking relevant elements into consideration.” This is, a fortiori, the case of an interlocutory relief against a hydroelectric project, which a Quebec court called an “exceptional remedy.”

Lastly, the US Court of Appeals of the District of Columbia Circuit considered that “once an agency has made a decision subject to [the] procedural requirements [of the National Environmental Policy Act], the only role for a court is to insure that the agency has considered the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.”

Yet, under extreme circumstances, this minimal substantive control may nonetheless allow courts to overturn public decisions. One of the very few successful claims against a hydroelectric project on a substantial issue was decided in 1994 by the High Court of Justice of England and Wales in Regina v Secretary of State for Foreign and Commonwealth Affairs, which overturned a decision of the Secretary of State offering financial assistance to build a hydroelectric power station in Malaysia. Even though recognizing several times that “[t]he Secretary of State is […] generally speaking, fully entitled, when making decisions, to take into account political and economic considerations such as the promotion of regional stability, good government, human rights and British commercial interests,” the Court considered that “the contemplated development is, on the evidence, so economically unsound that there is no economic argument in favour of the case.”

On the other hand, an individual or a civil society organization may want to highlight that a large hydroelectric project unduly harms an individual interest, in particular by adopting a rights approach. Here again, such claim will succeed only if a certain judicial deference vis-à-vis political decision-makers can be overcome. However, the rights discourse that is likely to be developed may be viewed as less “political” and, therefore, more open to judicial control. Protecting the individual against the pursuance of (what are identified as) general interests by public authorities has long been the very credo of the human rights movement; therefore, judges may be inclined to allow a lesser deference to public decisions affecting individual rights.

C. The Human Rights Impacts of Hydroelectric Projects

Hydroelectric projects have a long history of interfering with a wide range of human rights. In particular, the right to property is necessarily affected as soon as the reservoir floods privately owned lands. Many other rights can also be affected. For instance, in a case before the

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32 Supreme Court of India, Narmada Bachao Andolan v. Union of India, supra note 13, para 260.
37 Ibid. at 402.
38 Ibid. at 402.
Quebec Court of Appeals, the Apostles of Infinite Love claimed that an administrative decision to expropriate one of their properties interfered with their freedom of religion.\(^{39}\)

In several cases, \((Canada,^{40} \text{Chile},^{41} \text{Mexico}, \text{Norway and the United States},^{42})\) hydroelectric projects have come into conflict with indigenous rights. For instance, in 1973, a decision of the Superior Court of Montreal\(^{43}\) granted interlocutory relief to indigenous and Inuit communities, and halted the James Bay hydroelectric project on the grounds that it would impede their traditional activities. This decision was reversed two years later by the Quebec Court of Appeal,\(^{44}\) mainly due to a diverging view on the recognition of indigenous rights – the Court of Appeal did not recognize that such rights existed, at least in the case at issue.\(^{45}\) The discriminatory nature of the negative impacts of hydroelectric projects, be it against indigenous communities or other minorities, has very often been denounced.\(^{46}\) For instance, the government of India once estimated that 40% of all persons displaced by hydroelectric projects in India were \textit{adivasis} (Indian aboriginal groups).\(^{47}\)

Yet, perhaps the most significant interference of hydroelectric projects with human rights is the massive resettlement of people living on expropriated lands. While acknowledging that figures remain imprecise, Patrick McCully estimates that, during the second half of the 20th century, “the builders of dams have evicted from their homes and lands many tens of millions of people, almost all of them poor and politically powerless, a large proportion of them from indigenous and other ethnic minorities.”\(^{48}\) Forcibly displaced persons lose not only their property, but also their livelihoods, their traditions, their way of life and their cultural identity. Resettlement is not simply about moving to another place; it is also about adapting to a new social environment. The latter is particularly difficult for socially vulnerable individuals or communities, which tend to be those most frequently negatively affected by hydroelectric projects. To this extent, it is worrisome that, “[m]ost of the time, minorities never achieve adequate resettlement after they are uprooted from their homelands.”\(^{49}\)

Examples of vast populations being resettled as part of large hydroelectric projects abound. Most famously, the Three Gorges Dam and its 600km long reservoir area have involved

\(^{39}\) \(\)Canada, Quebec Court of Appeals, Apôtres de l'amour infini c. Municipalité de Brébeuf 2008 QCCA 554 para. 24-25.


\(^{44}\) \(\)Canada, Quebec Court of Appeals, Société de développement de la Baie James c. Chef Robert Kanatewat, \textit{supra} note 34.

\(^{45}\) \(\)Ibid. at 172-76. See also \textit{ibid.} at 181 (“there is serious doubt about the existence of any right or title which might give rise to the relief claimed”).

\(^{46}\) \(\)McCully, \textit{supra} note 8, at 70.

\(^{47}\) \(\)Cited in \textit{ibid.} at 70.

\(^{48}\) \(\)\textit{Ibid.} at 66.

the resettlement of more than a million individuals. According to civil society reports, the Chinese standards for resettlement relating to large water projects "generally remain severely inadequate." Human Rights Watch reported on classified Chinese documents relating to police strategies to deal with "the widespread social turmoil ranging from large-scale peaceful protest actions to mass pitched battles with the authorities that is expected to ensue from the Three Gorges project as a whole and from the population transfer program in particular." One of these classified documents revealed that "one armed fight involving over 300 persons occurred in the vicinity of the dam."

In another context, the Supreme Court of India recognized that "[d]isplacement of people living on the […] project site and the areas to be submerged is an important issue," in particular since “[m]ost of the hydrology projects are located in remote and inaccessible areas, where local population is […] either illiterate or having marginal means of employment and the per capita income of the families is low." Accordingly and as a consequence, “[d]isplacement of these people would undoubtedly disconnect them from their past, culture, custom and traditions.”

Obviously, the fact that a hydroelectric project interferes with certain fundamental rights should not automatically lead to its rejection. Human rights law does provide for some limitations to certain rights, including, for instance, the right to property and cultural rights. While some rights cannot be limited – such as the right not to be arbitrarily deprived of one’s life, the freedom from torture and the freedom from slavery, –, one can hardly think of circumstances whereby a hydroelectric project would result in a direct violation of those “absolute” rights.

It is generally considered that interference with human rights can be justified if three conditions are satisfied. First, the limitation of a right should be “in accordance with the law,” which can be understood as a procedural obligation not to interfere with rights in an arbitrary manner. This condition resembles the procedural obligations pertaining to large public works, which require that a large project be decided only after an extensive study of its impact, including its social impact.

Secondly, the limitation must be justified by a goal “necessary in a democratic society,” and finally, it must be proportionate to this goal. The latter two requirements call for all measures to be taken to reduce interference to that which is strictly inevitable, and to ensure that the general interests pursued are “worth” such interference. This calls to a host of mitigating measures adopted to reduce the harm caused by the project.

53 Ibid.
54 Supreme Court of India, Narmada Bachao Andolan v. Union of India, supra note 13, para. 267.
55 See in particular: International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171, art. 6(1).
57 See in particular: International Covenant on Civil and Political Rights, ibid., art. 8(1) (compare with ibid., art. 8(2), on the freedom from servitude, and 8(3), providing for certain exceptions to the freedom from forced or compulsory labour).
To this extent, compensation plays an essential role in justifying the interference. In *James v. the United Kingdom*, the European Court of Human Rights for instance noted that “compensation terms are material to the assessment whether the contested legislation respects a fair balance between various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicant.”

**D. The Human Rights Litigation**

Human rights, as a set of constitutional obligations that bind political decision-makers to protect fundamental interests of individuals and minorities, are primarily the responsibility of political authorities, and only subsidiarily the responsibility of the court. Therefore, courts must first ensure that political authorities implement the social clauses that most hydroelectric projects contain. Indeed, in many cases, the procedural obligations related to hydroelectric projects require an impact assessment that demands at least some recognition of individuals’ or minorities’ fundamental interests that are particularly affected by the project, possibly resulting in the adoption of measures to mitigate the social or “human rights” impacts of the project. During the implementation of the project, civil society groups may also resort to litigation as a means to ensure that their rights are protected. The rule of law allows the judges to extend their control over mitigating conditions, which were included as a condition in the project: nobody is above the rule of law. In this type of litigation, human rights serve more as a general framework of decision than as substantive norms to which courts would systematically refer: judges may for instance decide to interpret certain specific conditions of the hydroelectric project in the light of human rights law.

A relatively simple case of non-compliance with the duty to mitigate the effects of a hydroelectric project was addressed by the Supreme Court of Belize in *Belize Institute for Environmental Law and Policy v. Chief Environmental Officer,* recognizing that the government had not complied with its obligations arising from the “Environmental Compliance Plan” of the Chalillo dam, in particular with respect to emergency preparedness, risk management, water testing and public awareness measures, this court issued a writ of mandamus against the government.

Issues relating to the valuation of expropriated lands have also given rise to frequent litigation, including two cases before the Supreme Court of the Philippines. In *Aka v. Turkey* before the European Court on Human Rights, two plots of land had been expropriated from the applicant in order to allow for the construction of a dam. Mainly due to administrative slowness, the applicant received indemnification only five years after this expropriation. Considering that the Turkish currency devalued considerably during this period, the Court ordered the Turkish government to indemnify the applicant for the loss due to the absence of a significant interest rate on the indemnities.

In these instances, the judge need not take a position on the substance of the project, only on the adherence of a project to certain obligations. Nonetheless, the important interests at stake may considerably challenge the independence of the judiciary. In the case of the Belo Monte dam, a Brazilian judge decided to suspend authorization to carry out the project until

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60 Ibid., para. 78.
social mitigation measures were implemented. Most of the mitigating measures that had to be carried out beforehand had not been implemented, or only very partially. However, within one week, another judge overturned this decision without any justification, in a context where particularly strong political pressures encouraged very questionable legal practices.

Fortunately, however, judges did not limit their control to compliance with the mitigating clauses of the projects. In many cases, they have recognized that the judicial review of human rights interferences may require that they meddle into the substance of a project and compare its advantages with its human rights cost. In other words, a judge may be called to verify whether a project constitutes too great an interference with the human rights of too many people, without a sufficiently legitimate goal to justify such interference.

Thus, substantive claims based on alleged non-compliance with human rights law roll back the degree of deference that the judiciary generally grants political decision-makers with respect to hydroelectric projects. Whereas judges recognize that they are ill equipped to deal with the technicalities and the trickiness of decisions on hydroelectric projects, a project’s interference with fundamental freedoms may be enough to justify a genuine judicial review, possibly leading to the invalidation of the whole project.

The substantial judicial review of human rights interferences asks two basic questions: firstly, whether the interests sought to be advanced by the project are necessary in a democratic society, and secondly, whether these interests are sufficient to justify the level of interference with fundamental rights. Section III shows how specific factors have been used to justify hydroelectric projects.

3. Justifications for Human Rights Interferences Caused by Hydroelectric Projects

Generally speaking, any interference with a fundamental right may be justified either by an overriding general interest (e.g. national security) or by the need to guarantee the rights of other individuals. Less conventionally, the objective of mitigating climate change could be invoked as an alternative justification.

A. General Interest v. Rights Justifications

It is a well-established principle in human rights law that individual fundamental right may be restricted because of an overriding general or public interest. For instance, regarding the right to property, the first protocol to the European Convention on Human Rights provides that “[n]o one shall be deprived of his possessions except in the public interest and subject to the

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64 Ibid.

65 Ibid.

66 See for instance: International Rivers and Amazon Watch, “Regional Judge Overturns Ban on Construction of Controversial Belo Monte Dam,” Press release, 5 March 2011, available at http://www.internationalrivers.org/en/node/6303, reporting the use of a “legal artifice” called “suspensão de segurança,” that “dates to the military dictatorship” and allows “for previous decisions to be overturned without considering the merits of the case, based on arguments of supposed threats to national security.”

67 See, by analogy: Nepal, Supreme Court, Advocate Kedar Bhakta Shrestha v. HMG, writ No 3109 of 1999, available in UNEP, Compendium of Summaries of Judicial Decisions in Environment-Related Cases (2005), http://www.elaw.org/node/5452, at 138. In this case, the Supreme Court of Nepal upheld a decision of the government to prohibit the use of three-wheeler diesel engine tempo in the Kathmandu Valley. The court recognized that this decision interfered with the freedom to carry on a trade or business, but it considered that such interference was justified given the legitimate aim to guarantee the right to live in a healthy environment and to protect public health.
conditions provided for by law and by the general principles of international law.”67 Public interests include national security, public safety, economic prosperity and the protection of public order.68

Regarding hydroelectric projects more particularly, several general interests may be invoked to justify interferences with human rights protection. National security through the achievement of energy independence could be a particularly strong argument, but it requires very specific factual circumstances. For instance, this argument would be considerably weakened if the country in question is an important exporter of oil, or if part of the hydroelectricity planned to be produced would be exported. Indeed, the national security argument has rarely been put before the courts by governments.69

By contrast, national economic development is an easier argument to justify restricting human rights. This argument is frequently invoked and has often been accepted by judges. For instance, the Supreme Court of India in Narmada Bachao Andolan v. Union of India accepted the argument that extending the Sardar Sarovar Dam would ensure the year-round production of electricity, thus justifying certain interferences with human rights.70 The Court underscored the fact that India experienced a “perennial shortage of power” and, therefore, that it was “necessary that the generation increases,” adding in passing that “[o]ne of the indicators of the living standard of people is the per capita consumption of electricity.”71 In other words, an additional, reliable and cheap72 source of electricity would help economic development and benefit a sufficient number of people to balance the human rights cost of displacing those living in the planned reservoir.

Under similar circumstances, in the Belize Alliance of Conservation Non-Governmental Organisations case, the Court of Appeal of Belize73 recognized that the Chalillo dam project pursued a “public interest in increasing the country’s hydroelectric generating capacity.”74 Although this judgment dealt with a request for interim measures and not with the principal action, the Court adopted a similar approach, balancing the rights and interests of both parties that could be affected if the project were completed. On the one hand, the judges acknowledged that “Belize ha[d] an energy problem,” as “[d]omestic consumers pa[id] exceptionally high rates for electricity,”75 some of which was imported from Mexico. On the other hand, the tribunal also recognized that, through tourism and eco-tourism, “Belize ha[d] an economic (as well as cultural) interest in the preservation of [its] precious and fragile natural resources.”76 Therefore, even though the case involved “competition between two very important public interests,”77 the Belizian judges rejected the application for an injunction restraining further work on the dam.

69 The Supreme Court of India alluded to the control of the border as one justification of a hydroelectric project amongst others. It put forward that, thanks to water management permitted by the reservoir, human habitation would be settled further in a desert, closer to the “so far porous border with Pakistan,” thus helping to secure this border. Supreme Court of India, Narmada Bachao Andolan v. Union of India, supra note 13, para. 262.
70 Ibid. para. 277.
71 Ibid. para. 278.
72 Ibid. (comparing the cost of hydroelectricity with the cost of fossil fuel electricity).
74 Ibid. at para. 2.
75 Ibid.
76 Ibid.
77 Ibid. at para. 44.
considering in particular that the opposite decision would cause “significant financial loss”\(^\text{78}\) to the project.

Also dealing with a request for interim measures, the Quebec Court of Appeal in *Société de Développement de la Baie James v. Chef Robert Kanatewat* compared the cost of granting interlocutory relief against the James Bay hydroelectric project with the benefit to indigenous claimants.\(^\text{79}\) All judges agreed that “the inconvenience to Appellants resulting from a stoppage of the work on the project would be far greater than the inconvenience to Respondents in the event that work on the project is allowed to continue”\(^\text{80}\) and that “the inconvenience suffered or apprehended by the respondents was of the same order of magnitude as the growing energy needs of Quebec as a whole.”\(^\text{81}\) To reach these conclusions, the Court took into account the great public interest in carrying out the project. Noting that “hydroelectricity is the only source of primary energy possessed by the province of Quebec,” the Court stated that this source had become “of a paramount importance to ensure the economic future and the well-being of the citizens,” and concluded that it was in “the interest of the Quebec population”\(^\text{82}\) to carry out the project without any further delay. Accordingly, “stopping the construction works would have disastrous consequences as a program of thermal or nuclear electricity plants should be set up in replacement.”\(^\text{83}\) On the other hand, the court underscored the fact that no more than 972 families lived on the affected territory, that most of them no longer depended on traditional activities, and that less than one fourth of them indeed lived off local natural resources.\(^\text{84}\) It also noted that the project would not involve the displacement of any population.\(^\text{85}\) Thus, the claim for interlocutory relief was unanimously rejected.

A broader approach to the justification of restricting human rights in amongst others hydroelectric projects, was adopted in 1997 by the Supreme Court of Canada in *Delgamuukw v. British Columbia.*\(^\text{86}\) This very complex case considered the claim of the Gitksan and Wet’suwet’en native peoples to sovereignty over 58,000 square kilometers in British Columbia, including lands inhabited by non-native persons\(^\text{87}\) and lands used for hydroelectric projects.\(^\text{88}\) Though acknowledging the existence of aboriginal rights,\(^\text{89}\) the judgment nonetheless recalled that:

“because […] distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable.”\(^\text{90}\)

\(^{78}\) Ibid. at para. 40.

\(^{79}\) Canada, Quebec Court of Appeals, Société de développement de la Baie James c. Chef Robert Kanatewat, *supra* note 34, para. 177-78.

\(^{80}\) Ibid. at 185.

\(^{81}\) Ibid. at 182.

\(^{82}\) Ibid. at 177.

\(^{83}\) Ibid.

\(^{84}\) Ibid. at 178.

\(^{85}\) Ibid.


\(^{87}\) Ibid. paras 8-9, according to which the territories at issue were inhabited by less than 7,000 Native people and by over 30,000 non-Native people.

\(^{88}\) Ibid. para. 165.

\(^{89}\) Ibid. para. 89-159.

\(^{90}\) Ibid. para. 161, citing Gladstone at para. 73.
The court further noted that the “range of legislative objectives that can justify the infringement of aboriginal title is fairly broad” and may include “the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims.”\(^{91}\) It is interesting to note that hydroelectric power is not only considered as part of more general objectives (such as the general economic development and the building of infrastructure), but also as an objective of its own.

Yet, an interference with rights must not only be justified by a legitimate interest, but also be proportionate to the interference with human rights. Though the goal may be laudable, the “cost”, in terms of human rights, may be just too high. The principle of proportionality allows for a notably high degree of judicial intervention, as the proportionality between an interference with rights and certain political goals is extremely difficult to assess in an objective way.\(^{92}\) How many people can be displaced per MW/h produced per year? What other elements should be taken into account, such as alternative sources of energy for the country or the level of development? While using a general interest-based justification for interference with rights is a difficult task, the requirement of proportionality is an even greater grey zone that precludes legal norms and risks arbitrariness.

In the Delgamuukw case, for instance, the Supreme Court of Canada considered that the “test of justification requires an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples.”\(^{93}\) Recalling previous jurisprudence, the court lists three separate questions: firstly, “whether there has been as little infringement as possible in order to effect the desired result”; secondly, “whether, in a situation of expropriation, fair compensation is available”; and thirdly, “whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.”\(^{94}\) The spirit of the human rights proportionality approach is followed when the court considers that “[t]he nature and scope of the duty of consultation will vary with the circumstances,” spanning from a “mere duty to discuss” to “full consent,”\(^{95}\) depending on the scope of interference.

**B. Rights v. Rights Justifications**

Human rights interferences of a hydroelectric project may also be justified by the necessity of protecting the rights of other individuals. Following the latter approach, the legally protected interests of those negatively affected by the project are weighted and compared to the legally protected interests of those positively affected by the same project. Arguably, the rights v. rights justification is a form of the general interest v. rights justification: while taking the rights of other persons into account, the courts are in fact protecting a general interest in the sense that everyone’s rights are respected. Nevertheless, the rights v. rights approach allows for a more thorough judicial review. While the pursuance of general interests or public goals is clearly the role of a political decision-maker, the protection of rights comes at least concurrently within the competence of the judiciary.\(^{96}\) A judge may be ill-equipped and lack legitimacy to decide of the

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\(^{91}\) Ibid. para. 165.


\(^{93}\) Supreme Court of Canada, Delgamuukw v. British Columbia, supra note 86, para. 162.

\(^{94}\) Ibid. para. 162, citing Sparrow at para. 1119.

\(^{95}\) Ibid. para. 168.

\(^{96}\) A similar argument was adopted by the European Court on Human Rights in Sunday Times v. UK, A 30 (1979), EHRR 245 para. 59. Harris, O’Boyle & Warbrick interpreted this judgment as signifying that “the greater the prospect of obtaining an objective understanding of the content of the interest sought to be protected, the narrower
appropriateness of a political decision to build hydroelectric dams rather than resorting to other sources of energy, importing electricity, or sparing electricity, but the same judge would probably not refrain from considering the human rights costs and benefits of a given project on the touchstone of state human rights obligations. In other words, the rights v. rights justification of human rights interferences caused by a hydroelectric project allows for a more extended judicial review than a general interest v. rights justification.

Certainly, similar arguments can sometimes be framed using either as a general interest versus rights or a rights versus rights approach. In these circumstances, a jurisdiction can decide to resort to either approach, as fulfilling of the rights pertaining to a large number of individuals is in itself a general interest. Such is particularly the case with arguments based on economic development, which play an important role in the rights v. rights approach through the notion of social and economic rights. In the Narmada Bachao Andolan case, for instance, the Supreme Court of India highlighted the fact that “[a] natural river is not only meant for the people close by but it should be for the benefit of those who can make use of it, being away from it or nearby.”97 Thus, this court not only considered the developmental dimension of the Sardar Sarovar Dam as a form of general interest that could justify the impact of this project on displaced persons, but also emphasized that the project was instrumental in fulfilling of the right to water. Developing this argument, the Court argued that “[w]ater is the basic need for the survival of the human beings.”98 It also put forward the fact that the right to access water was protected, not only “as part of right of life and human rights as enshrined in Article 21 of the Constitution of India,”99 but also by specific international instruments, such as the 1977 Mar del Plata action plan declaring access to safe drinking water a human right.100 Accordingly, “availability of drinking water will benefit about 1.91 lakh [i.e. 191,000] people residing in 124 villages in arid and drought-prone border areas of Jalore and Barmer districts of Rajasthan who have no other source of water and are suffering grave hardship.”101

When discussing the rights v. rights type of justification, judges tend to take at least two elements into account: the nature of the rights (affected or fulfilled) and the number of persons (positively or adversely affected). In the Narmada Bachao Andolan case, it is likely that the comparison between the huge number of people benefiting from the project and the relatively few displaced persons has played an important role in the decision of the court to uphold the project. But the numbers affected do not provide the whole picture: despite the great resistance of the human rights community to recognize a hierarchy amongst fundamental rights,102 the nature of the rights affected is implicitly taken into account as human rights costs and benefits are weighted.

In most cases, the rights v. rights approach results in opposing first the generation rights – in particular the right to property103 and the right to equality before the law104 – of those persons resettled or otherwise affected as a consequence of the hydroelectric project, to the second or third generation rights – such as the right to water,105 to food106 and to development – of other
persons who may take advantage of the project. But even generations of rights have no clear hierarchy. Regional specificities may play a role: developing Asian countries are arguably more likely to authorize restrictions in first generation rights in order to further achieve second and third generation rights, while Western liberal democracies may be more reluctant in conceding any limitation of traditionally recognized rights.  

In the *Narmada Bachao Andolan* case, the Indian Supreme Court explicitly recognized that “[c]onflicting rights had to be considered.” However, the Court considered that those displaced by the project could start a new life in dignity, while “for the people of Gujarat [who lack access to drinking water], there was no other solution but to provide them with water from” the dam. Therefore, the Court concluded that “the hardships of oustees from Madhya Pradesh could be mitigated by providing them with alternative lands, sites and compensation.”

Of course, such considerations are eminently subjective. Strictly speaking, there were obviously other solutions for the people of Gujarat, including displacing them closer to the river. In fact, what the Supreme Court presents as an absolute assessment that there were “no other solution” is in fact a comparative statement that there were no *better* solution and that the hydroelectric project was, in these circumstances, the most suitable way to reconcile diverging interests. This shows that the *rights v. rights* approach allows jurisdiction to review not only the legality, but also the decision to build a hydroelectric project.

A similar *rights v. rights* analysis was adopted by Vice-President Weeramantry of the International Court of Justice, in his separate opinion in the *Gabčíkovo-Nagymaros* case between Hungary and Slovakia – although this analysis opposed the rights of sovereign states, rather than individual rights. In his opinion, Judge Weeramantry suggested the need to balance Hungary’s right to environmental protection with Slovakia’s right to development; while the Gabčíkovo-Nagymaros hydroelectric project would mainly affect the Hungarian environment, it would be “important to the welfare of Slovakia and its people,” as “Slovakia has traditionally been short of electricity, and the power generated would be important to its economic development.” Here again, the *rights v. rights* analysis allows a judge closer scrutiny in taking into account not only the scope of rights interfered with, but also the scope of the alleged justification for this interference. The judge is thus allowed to carry out a much closer review than would be possible with a *general interest v. rights* approach.

Besides social and economic rights and the right to development, environmental rights might also be put forward in justifying hydroelectric projects if for instance one consider that a hydroelectric project may be an alternative to more polluting ways of producing energy. Here again, speaking about environmental rights allows a jurisdiction to deal with a general interest – the protection of the environment – in a language of rights. Environmental rights constitute a

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107 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, 6 I.L.M. 368, in particular art. 11(2)(a) (“The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed […] To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources”).

108 See for instance Bilahari Kausikan, “Asia’s Different Standard” (1993) 92 Foreign Policy 24 at 37 (“What may have struck a chord with the peasants was not ‘democracy,’ but complaints against inflation, corruption, and nepotism”). See also Simon Tay, “Human rights, culture, and the Singapore example” (1995) 41 McGill Law Journal 743 at 746, discussing the argument according to which “Asian approaches to human rights […] emphasize economic and social rights and are legitimized by the continued enjoyment of stability and good economic progress, which is what Asians value.”

109 *Supreme Court of India, Narmada Bachao Andolan v. Union of India*, supra note 13, para. 264.

nascent category of human rights that is not entirely accepted, nor even defined, in international law. Judges have nonetheless demonstrated a strong willingness to refer to them.\footnote{See for instance the joint dissenting opinion of judges Costa, Ress, Türmen, Zupancic and Steiner in European Court on Human Rights, Hatton v. United Kingdom (2003) 37 EHRR 28, in particular at para. 1.}

However, in the context of hydroelectric projects, environmental rights are two-edged arguments, as they may be put forward either for or against a hydroelectric project. The separate opinion of Vice-President Weeramantry illustrates the ambiguity of this argument. From the Hungarian side, Judge Weeramantry took note of the argument that the Gabčíkovo-Nagymaros hydroelectric project could “produce […] ecological damage of many varieties, including harm to river bank fauna and flora, damage to fish breeding, damage to surface water quality, eutrophication, damage to the groundwater régime, agriculture, forestry and soil, deterioration of the quality of drinking water reserves, and sedimentation.”\footnote{Separate Opinion of Vice-President Weeramantry in Gabcikovo-Nagymaros, supra note 109, para. 89.} Yet, on the other side, Slovakia also put forward environmental arguments. According to Slovakia, “the environment would be improved through the operation of the Project as it would help to stop erosion of the river bed.”\footnote{Ibid.} In addition, the alleged role of the hydroelectric project in preventing floods\footnote{Ibid.} may constitute a form of environmental adaptation.

C. Mitigating climate change

The two previous sections showed how interference with human rights in hydroelectric projects may be justified by reference to either overriding public interests, or to competing rights. Thus, both the public interest in protecting the environment and the environmental rights can justify human rights interferences, either alone or in combination with other arguments. Yet, neither of these two approaches has been understood as allowing judges to fully take into account the aim of mitigating global climate change through sustainable energy, as is shown in this section.

It is clear that climate change does have a tremendous impact on human rights worldwide; however, there is neither a temporal nor geographical connection between greenhouse gas emissions and the human rights consequences of climate change. Similarly, climate change mitigation does not immediately improve anyone’s human rights; rather, it has a diffuse and long-term impact.

Hydroelectric projects, as a source of sustainable energy that may replace other sources of energy, can be viewed as a tool to mitigate climate change. While the aim of mitigating climate change has been well recognized in international diplomatic forums and in international environmental law, its meaning relevance as a possible justification with human rights must also be discussed.

Firstly, the \textit{rights v. rights} approach is complicated by the fact that the potential “victims” of climate change – those who benefit from the hydroelectric project’s positive effects on mitigating climate change through providing cleaner energy – can neither be individually identified, nor even accurately counted. In other words, a judge could accept evidence that a hydroelectric project does contribute to climate change mitigation and that climate change has human rights consequences, but the connection between the hydroelectric project and the human rights consequences may be too tenuous to justify interferences, not to mention the requirement that these interferences be proportionate with the protection of human rights at issue.

More fundamentally, both the \textit{rights v. rights} and the \textit{public interest v. rights} approaches are limited by the reliance of states as human rights guarantors. On the one hand, a state has
classically recognized only the rights of those persons who are “within its jurisdiction,”¹¹⁴ and not the rights of all individuals in the world. In some circumstances, the protection of rights has extended to nationals abroad,¹¹⁵ or the word “jurisdiction” has been interpreted as “effective control” so as to include people directly affected by a state’s forces in, say, occupied territories.¹¹⁶ Nonetheless, it is generally understood that a state does not bear any human rights obligations vis-à-vis individuals who are potentially affected in other countries as a result of greenhouse gas emissions – those, precisely, who could remotely benefit from hydroelectric projects as a clean energy provider.

Moreover, human rights adjudication remains, most of the time, the task of domestic judges, not international ones. Although most states have ratified international instruments for the protection of human rights, domestic judges have retained the ordinary jurisdiction to decide of human rights claims, and international human rights bodies may be seized only after the exhaustion of domestic remedies.¹¹⁷ It seems that international human rights bodies have never been seized in any case relating to a hydroelectric project.

This reliance of international human rights law on national institutions weakens the argument that certain human rights interferences are justified because the hydroelectric project at issue would contribute to climate change mitigation. In particular, it bias gives a coup de grace to the rights v. rights approach to justification: for the “protection of the rights of others” to matter before a domestic court, “others” should certainly be understood as referring to the individuals falling within the state’s jurisdiction. Yet, since climate change is a global phenomenon whose victims are spread geographically across countries, most potential victims of climate change – the beneficiaries of a hydroelectric project – would fall outside the jurisdiction of a state carrying out a hydroelectric project. Therefore, it would be particularly difficult to justify a hydroelectric project before a domestic jurisdiction on the basis of its contribution to climate change mitigation, which benefits mostly to individuals outside of the state’s jurisdiction.

On the other hand, the reliance of international human rights law on national institutions could also greatly impede the success of a justification framed in a general interest v. rights approach. The general interests at issue in this approach have tended to be national interests, such as national security and national economic development (discussed above). Even environmental protection has also been interpreted as a national (or even local) interest in protecting a specific place,¹¹⁸ as opposed to global climate change mitigation. On a more conceptual level, despite calls for international cooperation in certain conventions,¹¹⁹ human rights law usually demands

¹¹⁴ See e.g. International Covenant on Civil and Political Rights, supra note 55, art. 2.1; European Convention on Human Rights, supra note 68, art. 1.
¹¹⁵ See in particular Individual communications to the Human Rights Committee in Martins v. Uruguay, communication No. 57/1979, 23 March 1982, UN Doc. CCPR/C/15/D/57/1979, para. 7, and Lichtensztejn v. Uruguay, communication No. 77/1980, 31 March 1983, UN Doc. CCPR/C/OP/2, para. 6.2. See also the “Annotations on the text of the draft International Covenants on Human Rights” (1955), UN Doc. A/2929, at 17 (§4) (“States parties would have to recognize the right of their nationals to join associations within their territories even while they were abroad.”)
¹¹⁶ See in particular General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Human Rights Committee, UN Doc. CCPR/C/21/Rev.1/Add.13 (March 29, 2004), para 10 (“a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”).
¹¹⁷ See International Covenant on Civil and Political Rights, supra note 55, art. 41(1)(3); European Convention on Human Rights, supra note 68, art. 35(1).
¹¹⁸ See for instance European Court of Human Rights, Chassagnou v. France, 29 Apr. 1999, 29 E.H.R.R. 615, Applications nos. 25088/94, 28331/95 and 28443/95, para. 79 (“general interest to avoid unregulated hunting and encourage the rational management of game stocks”).
that a state protect its own population. Accordingly, the general interests that could justify diverting from this core duty would certainly be a national interest.

Facing this technical hurdle that seems to exclude climate change mitigation from the set of possible justifications for a hydroelectric project, judges may take two different approaches. On the one hand, the international objective of climate change mitigation may be transformed into a national objective: the participation in international efforts in order to realize national interests such as the protection of the domestic environment. In other words, a hydroelectric project may not be of much consequence on its own, but it may indicate a willingness to contribute to a wider, coordinated action that may ultimately aid national objectives.

On the other hand, domestic courts may also reconstruct human rights law so as to consider the international goal of mitigating climate change as a legitimate objective. This would require a progressive interpretation of human rights law. Perhaps not surprisingly, common law jurisdictions have shown a greater willingness to take this approach than their civil law counterparts. For instance, this approach was adopted by the Supreme Court of India in the *Narmada Bachao Andolan v. Union of India* case. The Supreme Court of India underscored the fact that fossil fuels “are not only depleting fast but also contribute towards environmental pollution.” Noting that “[g]lobal warming due to the greenhouse effect has become a major cause of concern,” the Court took into account the “international concern for reduction of greenhouse gases which is shared by the World Bank resulting in the restriction of sanction of funds for thermal power projects.” Therefore, the Court accepted that the goal of reducing the emission of greenhouse gases and mitigating climate change could justify a derogation from the fundamental rights of some persons, in particular through a hydroelectric project. The Court insisted that, “[p]erhaps the setting up of a thermal plant may not displace as many families as a hydel project may but at the same time the pollution caused by the thermal plant and the adverse effect on the neighbourhood could be far greater than the inconvenience caused in shifting and rehabilitating the oustees of a reservoir.”

4. Conclusion

Because they often implicate important interests for both public authorities and local inhabitants, hydroelectric projects have resulted in many difficult cases brought before courts. Despite a certain deference given to political deciders, judges have usually agreed to review the human rights implications of such projects. However, most judges have been cautious and respectful toward political institutions. If they agreed to verify that a hydroelectric project seeks a legitimate aim – either for the sake of public interest, the protection of rights of others, or possibly climate change mitigation – and that the human rights interferences are proportionate to the foreseeable benefits of such a project, they have generally refrained from replacing political institutions and judging the suitability of the project altogether. The decision whether or not to

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120 Human Rights law has often been interpreted as a field of law in constant evolution. For instance, the European Court of Human Rights has called the European Convention a “living” instrument. See e.g. European Court of Human Rights, *Airey v. Ireland*, judgment of 9 October 1979, 32 ECHR Ser A (1979), [1979] 2 EHRR 305, § 26.

121 Supreme Court of India, *Supreme Court of India, Narmada Bachao Andolan v. Union of India*, supra note 13. In different contexts, other domestic judges have recognized the legitimate goal of mitigating climate change as a possible justification for human rights interferences. See for instance Australia, *Court of the New South Wales, Greenpeace Australia v. Redbank Power*, 1 (1994) 86 LGERA 143.


develop a hydroelectric project and, to some extent, how to do it, remains a political question, as opposed to a legal issue. Reserving for politics that which belongs to it, the Supreme Court of India recognized in the Narmada Bachao Andolan case that:

There is, and has been in the recent past, protests and agitations not only against hydel projects but also against the setting up of nuclear or thermal power plants. In each case reasons are put forth against the execution of the proposed project either as being dangerous (in case of nuclear) or causing pollution and ecological degradation (in the case of thermal) or rendering people homeless and possess adverse environment impacts as has been argued in the present case. But then electricity has to be generated and one or more of these options exercised. What option to exercise, in our constitutional framework, is for the government to decide keeping various factors in mind.¹²⁵

Human rights institutions do have a role to play in hydroelectric projects, however, not only in ensuring that mitigating conditions are respected, but also in preventing projects that would have unjustifiable human consequences. Hydroelectric projects epitomize one of the key challenges that human rights law is meant to deal with: the opposition of the interests of a small minority with those of an abstract majority.¹²⁶ At the very core of the human rights paradigm lies the notion that no one should be “sacrificed” on the altar of the common good. To this extent, expanding the judiciary’s control over human rights interferences and making this control more subtle – in particular by taking all possible justifications into account and weighting them as “precisely” as possible – would perhaps prevent the worst hydroelectric projects from slipping through the net, while allowing those socially beneficial projects, and establishing a fair jurisprudence able to nourish a fruitful preliminary political debate on global governance for sustainable development.

¹²⁵ Supreme Court of India, Supreme Court of India, Narmada Bachao Andolan v. Union of India, supra note 13, para. 279.
¹²⁶ See per analogy: joint dissenting opinion of judges Costa, Ress, Türmen, Zupancic and Steiner in European Court on Human Rights, Hatton v. United Kingdom, supra note 110, para 14.