Concretising the Human Rights Approach in relation to Ecological and Climate Debt

The universality of human rights has been clear from the outset, but governments have tended to limit recognition of their obligations to their own territory. This reductionism has led to a vacuum of regulation, and a paucity of protection of extraterritorial victims of national policies, in particular in the field of economic, social, cultural and collective rights. Bottom-up concepts, like Ecological - and Climate Debt are means to illustrate and operationalize these so far grossly ignored obligations, and emphasise the importance of collective rights.

In the European Union (EU), the Charter of Fundamental Rights has been legally binding since 2009 and an Action Plan on Human Rights and Democracy was adopted in 2012. However, political projects tending to stabilise access to raw materials in third countries, such as the Raw Materials Initiative, raise concerns on the consequences from an ecological debt perspective.

Why is there an Ecological and Climate Debt?

Ecological debt is constituted by economic and trade relations based on the indiscriminate exploitation of resources and its ecological impacts, including local and global environmental deterioration, most of which is the responsibility of the North. Climate debt is a branch of ecological debt that refers specifically to greenhouse gases output.

Both concepts stress the fact that unequal ecological exchange impoverishes people and countries and destroys territories and livelihoods in the Global South by plundering their resources and affecting territories and livelihoods—while at the same time enriching its beneficiaries—which reflects that external costs of consumption and production in affluent countries are mostly being born by people far from their jurisdiction. This includes not only the social and environmental damage of natural resource exploitation but also the often negative social and environmental impacts of huge private and public investments realised without local consultation.

‘Polluter Liability and Accountability’ requests holding the culprits accountable for paying restoration, compensation and clean-up costs (the ‘Polluter Pays Principle’), and m criminal responsibility. This can also be considered as a paying back the ecological debt, albeit in a different currency, accumulated by the unjust occupation of ‘environmental space’. Upholding human rights means ending this pattern of unequal exchange.

Furthermore, the key challenge is to avoid further accumulation of ecological and climate debt – a guarantee of non-repetition: by changing production and consumption patterns (a demand since the 1992 Rio UNCED conference).

The political perspective

Under the paradigm of sustainable development, and in contrast to multiple non-binding declarations since Rio 1992, contemporary international law has not been able to shape an effective, nor an equitable, answer to the global ecological and social crises.
Policy recommendations

End the accumulation of ecological debt through coherent public policymaking.

- Ensure transparency, accountability and liability for, environmental implications of economic and sectorial policies with European monitoring, including:
  - yearly policy coherence checks of EU policies affecting global sustainability;
  - a revision of the EU trade policy (multilateral and bilateral trade agreements) and investment strategies in order to more insistently restrict unjust exchanges, the undercutting of social and environmental standards and the erosion of democratic decision-making by investment protection agreements, including binding investor-to-state dispute settlements outside the legislative system;
  - a review of the European Sustainable Development Strategy (EUSDS) to emphasise Europe’s global responsibility;
  - a revision of the Common Agricultural Policy to strengthen food sovereignty, promote shorter production chains, support fair trade and small scale farmers, as well as to increase organic and permaculture practices;

End the accumulation of ecological debt.

- Establish procedures to control operations of European companies abroad by:
  - holding them liable and accountable for violations of economic, social, cultural and collective rights, and obliging them to respect national laws and international norms, regarding environmental protection and biodiversity conservation and human rights protection.
  - improving liability and accountability regarding the predatory actions of European companies in relation to host countries’ environment by establishing universally applicable mechanisms, facilitating access to justice in Europe to affected individuals and communities, and promoting action on the ground through procedures such as enforcement and mediation, and
  - making damage to global commons an offense under European and international law.

Rio Principle 2 says:

“States have […] the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”, which has been almost completely ignored.

Operationalizing the extraterritorial obligations particular to economic, social, cultural and collective rights, formal or informal, by introducing the ecological debt into international law would be a major step forward. Such initiatives could be considered methods of reparation or payment of the ecological debt. They are essentially an operationalization of Rio Principle 13:

“States shall develop national law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.”

As a side effect, the liability and compensation obligations of Rio Principle 13 would ex ante provide incentives for reducing pressure on resources and human beings, for administrative policies as well as for corporations. In any case, liability and compensation of ecological debt must not be confused with damage licensing, the rather perverse “Payer Pollutes Principle”.

The legal challenge

From a legal point of view, the main problematic element in building a useful legal framework for ecological debt is defining its subjects.

“Reparation of ecological debt must include restitution if possible (restore the victim to the original situation before the violation occurred, in terms of human rights and environment); and compensation in proportion to the damage done. This integral reparation (social and environmental) must be done through democratic and participatory mechanisms with the victims.”

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Policy recommendations

Integral reparations for the accumulated ecological debt:

- Establish programs of restoration of and compensation for environmental damage caused by the activities of EU and Member State jurisdiction, in democratic and participatory processes with local communities as the main beneficiaries.
- Increase the financial commitment of the EU in global sustainability policies, especially by supporting the Climate Adaptation Fund, and similar initiatives, based on a participatory process with the victims.
- Initiate innovative new funding mechanisms like the Financial Transaction Tax or a Footprint Tax, and ban tax havens.
- Set up a specific “Green Revolving Fund” that will use the money for implementation of outreach projects that eliminate ecological debt on local levels.

Stop ecological debt through recognising it in legal and political terms:

- Strong implementation of Principle 10 of Agenda 21 Agenda (Cfr: Aarhus Convention).
- Establish an International court on environmental crimes.
- Recognise, punish and end ecocide.
- Capping the use of resources, absolute decoupling and achieve fair distribution of wealth within the limits of the planets carrying capacity.

In particular, building on previous works about the concept of ecological debt, the following working legal definition follows: the ecological debt of country A consists of:

1. The ecological damage caused over time by country A in other countries or in areas under jurisdiction of other countries through its production and consumption patterns, and/or
2. The ecological damage caused over time by country A to ecosystems beyond national jurisdiction through its consumption and production patterns, and/or
3. The exploitation over time of ecosystems and the appropriation of the benefits they provide by country A at the expense of the equitable rights to these ecosystems and benefits by other countries, communities or individuals.

(1) A methodical calculation of the damage caused and
(2) the disproportionate enrichment gained by a few at the expense of dispossession of the big majority, in conjunction with
(3) a determination of exactly who is deemed a creditor and debtor are essential, though challenging, legal pieces.
(4) Create legal and jurisdictional mechanisms to avoid impunity. Recognising these challenges, the EJOLT 11 report ‘International law and ecological debt’ emphasises the potential of current international law to deal with the needs of intragenerational and intergenerational environmental justice and outlines some ideas that go beyond the elements already present in current regulations.
In many cases it is obvious who is the creditor or debtor, or in legal terms: who is the aggressor, who is the victim. Though sometimes difficult to define criminal vs. victim in ecological debt, it is possible to use this concept in court. When coalitions of local, national and international environmental and justice organisations confront corporations like Texaco, Shell, Dow Chemical and Eternit in court, these can be seen as examples of partial compensation for ecological debt.

Debt accumulates over time. A fair global burden-sharing agreement for the cost of the restoration and preservation of the planet’s ecosystems needs to take into account historical and present responsibilities of industrialised economies, to the extent that they have contributed to the current ecological crisis and the damage to the common good. In doing so, governments and international institutions must explore more inclusive global decision-making procedures.

Such procedures should also be employed to develop an agreed notion of the common good as a basis for its legal institutionalisation. With these premises, a profoundly revised global legal order with constitutional features could be established, based on a framework that fosters more equitable, sustainable societies. Of course, global patterns of ecologically unequal exchange and other injustices will not be corrected just by minor adaptations of the existing overall paradigm.

Rather, corrections will require a profound reconceptualisation of global governance, legal institutions and our economic system to achieve environmental and social justice – the measures suggested here are a first step in a long journey.

For more information
International law and ecological debt.
International claims, debates and struggles for environmental justice
EJOLT Report No. 11, available at:
www.ejolt.org/reports

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