At the Intersection of Climate Change, AI, and Human Rights Law: Towards a Solidarity-Based Approach (Part 2)

By:

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In my previous post, I identified a range of ways in which climate change and artificial intelligence (AI) technologies intersect – revealing, in particular, how AI technologies may be understood as climate consumers, climate mitigators and adaptors, climate securitizers, and climate discourse-shapers. I also advanced a solidarity-based conception of human rights law (HRL) as one limited avenue for potentially confronting some of the challenges that have arisen at these intersections. In this post, I turn to critically examine three registers – argumentative, aesthetic, and affective – in which HRL has been or may be harnessed in ways that help reveal the emancipatory promise and perils of a solidarity-based conception of HRL for addressing challenges at the intersection of climate and AI governance.

The Argumentative Register of Human Rights Law

The argumentative register of HRL refers to the ways in which HRL may be mobilised as an argumentative practice, encompassing a contestable set of criteria and standards that actors must adhere to. While the promise and limits of HRL in its argumentative register may be examined from a diversity of standpoints, here I limit myself to a discussion of so-called 'red lines'. In recent work in the field of business and human rights in general, and climate due diligence in particular, scholars have emphasised the importance of drawing 'red lines' to prohibit certain activities and products that are fundamentally incompatible with the realization of human rights. As Surya Deva has emphasised, 'In the absence of such red lines, corporations manufacturing and selling inherently harmful products may continue to trample [...] human rights by creating an impression of mitigating risks, e.g., promoting the use of e-cigarettes as less harmful than normal cigarettes'.

Applied to challenges at the intersection of climate change and AI technologies, the advancement of 'red line' arguments can already be seen in the mobilisation of HRL within efforts to prohibit certain AI-based surveillance technologies that negatively impact climate activists and climate-induced migrants. David Kaye, for example, has questioned whether spyware, including the NSO Group's now-infamous zero-click Pegasus product, can ever meet the test of proportionality under HRL given the ways in which they enable access to the entirety of a person's digital life. In a similar vein, Francesca Palmiotto and Natalia Menéndez González recently suggested that live facial recognition technology may be inherently incompatible with HRL given how such technologies are unavoidably linked to and underpinned by mass surveillance practices – requiring constant video surveillance of specific areas to function such that 'it is impossible to delimit the bull's eye of a technology that, by its nature, indiscriminately targets everyone'. This latter position offers a clear example of how a human rights argument can be rooted in the wider structures within which a particular technology operates in an effort to ensure that a concern for the human rights compliance of particular uses of facial recognition technology does not crowd out a concern for the broader surveillance practices that enable the technology to function.

In practice, the potential for such arguments to prevail is likely to be highly contingent on the context in which they are advanced. The European Court of Human Rights (ECtHR), for example, has recently revealed itself to be quite resistant to drawing red-lines in the surveillance context. In *Big Brother Watch and Others v. the UK*, for example, the Grand Chamber rejected arguments that bulk interception practices are categorically disproportionate with the right to privacy, concluding that the decision to operate bulk interception regimes remains within States' margin of appreciation, premised on the belief that such practices remain 'of vital importance' for identifying threats to national security. The result is an approach that Zalnieriute has characterised as 'procedural fetishism', one which focuses on establishing procedural safeguards rather than evaluating the substantive legality of such regimes. More recently, in *Glukhin v. Russia*, the Third Section of the ECtHR avoided confronting red-line thinking by making clear that the question before it was 'not whether the processing of biometric personal data by facial recognition technology may, *in general*, be regarded as justified under the Convention', but rather 'whether the processing of the applicant's personal data was justified [...] *in the present case*'.

While the caselaw of the ECtHR reveals the limits of red-line argumentation in certain judicial contexts, it is important to remember that the sites for advancing such arguments are not confined to courts but also encompass a wider array of political and legislative arenas. For example, 180 rights groups and other experts recently called on governments and companies to ban facial recognition from public spaces and borders. There is, of course, no guarantee that such arguments will succeed, but to stand a chance, as Amy Kapczynski emphasises, those mobilising the vocabulary of HRL 'must also be attentive to the need to build a broader politics and structures of political accountability, that are needed to achieve a more ambitious vision of justice at a global scale'.

The Aesthetic Register of Human Rights Law

Amidst what has been described as an 'ethnographic turn in international law', anthropological scholarship concerning international legal institutions and practices has emerged as 'a robust and vibrant field'. One area of focus for anthropological studies of international law has been an interest in the legal form, including explorations of how power operates in international legal

landscapes by examining 'the aesthetic conditions through which "law" acquires meaning and force'.

While such analyses have taken a variety of forms, an approach of particular interest to the present inquiry is Matthew Canfield's recent examination of how actors 'draw on the aesthetic features of legal form to politicize conflicts and disputes suppressed through neoliberal governance'. Based on ethnographic fieldwork in the UN Committee on World Food Security (CFS), Canfield reveals how food sovereignty activists have sought to oppose their designation as 'stakeholders' as part of the model of multistakeholderism embraced within the CFS – a political aesthetic that activists fear 'diminishes their voices by putting them on equal footing with the private sector' and 'fails to recognise the differential responsibilities, needs, and obligations of different actors'. By asserting 'we […] are the rights-holders while governments and intergovernmental institutions are duty-bearers', activists have mobilised the form of HRL – and the right to food in particular – to disrupt the horizontal aesthetic of multistakeholderism and import the hierarchical aesthetic of international law in an effort to 'clearly distinguish the role of States as the primary duty bearers to uphold human rights and create a clear line of accountability to rights holders'. By mobilising HRL in this way, food sovereignty activists have sought 'to politicize what would otherwise be framed as technocratic processes' and 'to disrupt the neoliberal aesthetic [of multistakeholderism] that seeks to suppress political conflict'.

Canfield's analysis reveals the potential for the form of HRL to be harnessed by social movements as part of efforts to challenge structural imbalances in power in institutional contexts. Applied to institutional settings concerned with challenges at the intersection of climate change and AI technologies, such solidarity-based mobilisations of human rights law may offer one tactical possibility for addressing some of the exclusionary dynamics of climate and AI governance processes, including the informal organizational cultures of such processes. As Marie-Therese Png explains, such cultures include 'financial opportunism tied to lobbying and regulatory capture, careerism and political opportunism, protocols of diplomacy which center agendas of powerful actors and exclude oppositional voices, co-option of Global South or civil society terminology and narratives […] and the use of overly broad policy language that allow for interpretations that protect interests of affluent governments and

industry actors'.

The Affective Register of Human Rights Law

Recent decades have also witnessed a burgeoning scholarship exploring the relationship between emotions and law in general, and international law in particular. One focal point within this space has been a concern for how recourse to particular emotional discourses (for example, rhetoric evoking fear or anger) within human rights activism can contribute to framing how societal challenges are understood and by which means they should be addressed.

Anne Saab, for example, suggests that recourse to the language of 'threat' within HRL to depict the impacts of climate change on human rights reflects a 'discourse of fear' that contributes to framing climate change as 'primarily a physical and scientific problem' at the expense of 'important questions of unequal responsibility for causing climate change and unequal shouldering of the burdens of climate change'. Beyond potentially leading to passive disengagement from or even active opposition to climate action, Saab suggests that, by obscuring the non-climatological dimensions of climate change, discourses of fear may inadvertently contribute to the promotion of quick technological fixes to the climate crisis.

The problems with a techno-fix mindset in this context are twofold. First, such a mindset suggests that recourse to technologies, including those underpinned by AI, will be able, in and of themselves, to solve the ecological crisis at the expense of reflecting on the social and economic conditions underpinning climate change. As Jason Hickel explains, technological change and efficiency improvements should only be embraced to the extent that these are 'empirically feasible, ecologically coherent, and socially just' and, most importantly, accompanied by economic and social transformations centred on 'sufficiency and equity'. Second, a techno-fix mindset also risks neglecting the particularities of the contexts in which technologies are deployed. As Emily Clough emphasises, '[d]ata-driven adaptation technologies that are developed in a particular context, with certain kinds of data infrastructures and participatory systems, may not translate well across to contexts where those mechanisms operate differently or are absent'.

Research on the relationship between emotions, climate activism and behaviour remains nascent and the impact of particular emotional discourses may vary between different groups and contexts. Some studies, for example, have begun to reveal the extent to which anger might nurture various forms of climate activism in particular societal contexts. Such concerns for exploring the productivity of emotions in framing our understanding of the climate crisis and our responses to it are understandable at a time of increasing urgency to act against ecological breakdown.

At the same time, even in situations where emotions may prove counterproductive, it is important to remember, as Amia Srinivasan argues, that there is more to emotions than their effects. Even if anger, for example, were proven to be counterproductive, it may nonetheless be apt where it is directed at, motivated by, and proportional to a moral violation (what Srinivasan terms ‘a violation of how things ought to be’). In such circumstances, survivors of injustice will be confronted with a conflict between getting aptly angry as a means of ‘affectively registering or appreciating’ the injustice of world as it is, and making progress towards the world as it should be. Srinivasan refers to this as a form of ‘affective injustice’, understood as ‘the injustice of having to negotiate between one’s apt emotional response to the injustice of one’s situation and one’s desire to better one’s situation’. As Srinivasan explains, in such contexts affective injustice should be understood as ‘a second-order injustice that is parasitic on first-order injustice, a sort of psychic tax’ that tends to be levied on survivors of oppression.

Going forward, a solidarity-based conception of HRL, one rooted in the experiences, concerns, and interests of those most affected by and vulnerable to societal challenges at the intersection of climate change and AI, will not only have to grapple with how different emotional discourses may impact mobilisations of HRL in particular societal contexts, but also how to address affective injustices to the extent that they arise in practice.

Conclusion

In this two-part post, I have sought to identify some of the challenges that have arisen at the intersection of climate change and AI, and to unravel some of the different registers through which a solidarity-based conception of HRL may contribute, in some limited form, towards addressing them. In her recent book,

Atlas of AI, Kate Crawford concludes that what is needed is ‘a renewed politics of refusal – opposing the narratives of technological inevitability that says, “If it can be done, it will be”’. We are already seeing indications of this politics of refusal in the field of HRL through red-line argumentation that seeks to resist certain forms of AI-based surveillance technologies, reliance on the aesthetic features of the form of HRL to confront structural imbalances of power in particular institutional contexts, and concerns raised about how fear-driven discourses within human rights activism may risk inadvertently contributing to technofix responses to the climate crisis. While HRL is not the only, or even the primary, means of pursuing justice in the world today, these mobilisations suggest that HRL retains some promise as social movements look to confront the urgent perils that surround them.

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