

Tutorial 2: The Development of International and Global Environmental Law in the Context of Sustainable Development

Research Handbook on International Environmental Law edited by Magliosa Fitzmaurice et al

Chapter 8: Common but Differentiated Responsibilities

Introduction

- Equity has been a central concern in IEL.
- There is a need to adopt legal frameworks that foster substantive equality between developed and developing countries.
- Debates over equity in the context of global environmental problems are reflected in the development of an array of measures designed to take into account the special position of developing countries.
- These can take the form of differential treatment where different groups of countries take different commitments or where the implementation of developing countries' commitments is conditioned upon the implementation by developed countries of their financial and technology transfer commitments.
- Differential treatment in international environmental law is a pragmatic response that states have adopted in the search for ways to effectively address environmental problems.
- It also contributes to the realisation of substantive equality and is thus an equity measure.
- In terms of principles of international environmental law, this is represented through the principle of common but differentiated responsibilities (Rio Declaration Principle 7).

Equity in International Environmental Law

- Environmental conservation is intrinsically connected with the use of environmental and natural resources, livelihoods and the realisation of human rights.
- Fairness, equity and justice are captured under the concept of environmental justice.
- Compassionate measure is based on the idea that some countries need to be helped because they suffer specific disadvantages, not rooted in any obligation but on benevolence **e.g** *financial aid*
- Environmental justice is based on the perception that justice is a compulsory part of IEL.
- The central role of justice derives from the basic fact that life is an impossibility without a clean environment; there is an intrinsic relationship between conservation and justice and conservation and sustainable use of resources such as water or agricultural biodiversity and human survival.
- Justice can be realised in a variety of ways **e.g** *At the international level, the fiction of equality of States as a basis for inter-state relations conditioned thinking about equity for a long time.*

Equity through Formal Equality

- Formal equality is based on the principle that all subjects of the law should be treated similarly.
- The aim is to foster a society where resources are distributed to maximise the total welfare of claimants.
- A strict application of the theory states that a right is justly acquired as long as it was acquired according to the rules in force at the time of acquisition.
- Under the above application, existing inequalities may be upheld.
- At the international level, the principle has been translated into a notion of sovereign equality of states.
- Formal equality seeks to give every member of the community equal opportunities.
- Internationally this means that states have the right to take any amount of shared common resources on a first come first served basis.

Equity through Substantive Equality

- A justice system based on formal equality can produce a high rate of overall economic growth but tends to overlook the welfare of disadvantaged individuals.
- The basis of focusing on formal equality is that the existence of rules apply similarly to all individuals which is best suited to ensure stability and foreseeability.
- An alternative basis is that like cases be treated alike and that dissimilarly situated people should be treated dissimilarly.

- Substantive equality implies that existing inequalities, such as inequalities in wealth or natural endowments, should be acknowledged and taken into account.
- Raul's veil of ignorance implies that members of the community do not know whether their society will be a developed or developing country.
- The measures necessary to realise substantive equality are not meant to be permanent exceptions to the principle of formal equality but specifically to offset problem areas that may have been identified **e.g gaps in economic development at the state level**

Differential Treatment

- The first solution found for judges to use equity in international law was to use equity considerations in taking decision based on formally equal rules.
- The process of decolonisation then brought about the introduction of considerations of equity in the norms of international law.
- Differential or preferential treatment reflects considerations of equity at the level of rules and constitutes a significant departure from the established framework of international law.
- Reciprocity implies that states accord each other similar benefits so that there can be, for instance, reciprocal use of legal arguments by states against which they are employed; there is no scope for hierarchies of entitlements.
- Differential treatment refers to instances where, because of pervasive differences or inequalities among states, formal legal equality and reciprocity are sidelined to accommodate extraneous factors.
- Differential treatment refers to non-reciprocal arrangements that seek to foster substantive equality in the international community.
- Economic development and environmental vulnerability are ways to categorise states for the purpose of differentiation.
- Differential treatment provides a new foundation for obligations in IL.
- In IEL it provides a broader context that ensures environmental issues are not addressed exclusively from a technical perspective.
- In the context of global warming, differentiation constitutes a basis for allocating responsibilities to address the problem based on actual contributions to its occurrence rather than the equal contribution of each sovereign state.

Aims of Differentiation

- Differential treatment seeks to foster the realisation of substantive equality.
- Differentiation is specifically geared towards making the legal system more effective.
- It is an instrument merely for adapting the international legal order in the face of new circumstances.
- It is intrinsically linked to the notion of equity.
- Equity seeks to influence results brought about by the application of a given rule of law which are deemed undesirable according to broader justice, moral or social concerns.
- Equity provides remedial measures to harsh consequences of the application of a rule of law applying to all in a similar way.
- Identical rules may be the fairest allocation among equal parties; this is not the case whether parties do not have the same economic capacity to acquire the resources.
- Differential treatment implies a necessity to identify groups.
- Aggregate fairness seeks to ensure overall availability of the necessary resources.
- Disaggregate fairness seeks to allocate existing resources in such a way that individuals, or states, who need them most to get a share.

Justifications for Differentiation

Notions of Justice

- Based on two notions of justice: corrective and distributive justice.
- Corrective justice points that wrong must be compensated by the wrongdoer.
- Distributive justice seeks to identify whether the existing distribution of entitlements and resources is appropriate to ensure substantive equality.
- It requires that relevant dissimilarities between subjects of the law warrant special attention or special treatment which may imply the redistribution of entitlements or resources.