

Commentary by the Hon. Justice Brian J Preston SC to the IBA Showcase:

Climate change justice and human rights – concepts for legal and institutional reforms

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1. The central objective of the IBA's Task Force on Climate Change Justice and Human Rights is to evaluate the adequacy of climate laws, both at the international level (such as the conventions) and the national level (statutes) to achieve climate justice. This task necessitates unpacking what we mean by climate justice. In my brief comments, I wish to sketch some of the inquiries we need to undertake to understand what is meant by climate justice and hence provide points of reference to evaluate the adequacy of international and national laws.
2. The response to climate change involves both mitigation of greenhouse gas emissions and adaptation to the impacts of climate change caused by prior greenhouse gas emissions.
3. Striking the right balance between mitigation and adaption is itself a justice issue. To take strong mitigation action now is to limit the need for adaptation in the future. To be weaker on mitigation now is to increase the need for future adaption. At each end of this mitigation-adaption spectrum, and at the many positions in between, there are issues and implications of justice in terms of distribution, procedure and recognition.
4. Distributive justice is concerned with the distribution of environmental goods (or benefits) and environmental bads (or burdens). The law, both international and national, is critical in establishing the framework within which distribution of environmental benefits and burdens occur. A central task of the IBA Task Force is to evaluate the adequacy of international conventional and customary law, and to a lesser extent, national law in achieving distributive justice of climate change.

5. Evaluating the extent to which laws enable the achievement of distributive justice requires addressing three questions:
 - (a) who are the members of the community of justice to whom distributive justice is to be given?
 - (b) what are the environmental benefits and burdens to be distributed? and
 - (c) what are the principles or criteria to be applied in the distribution to and between members of the community of justice?

6. In relation to the criteria, they can generally be seen to be goal-based, rights-based or duty-based. Goal-based criteria use some goal, such as improving general welfare. Utilitarianism is a goal-based criterion. Rights-based criteria take some right, such as right to life or other human right, as fundamental. Duty-based criteria use some duty, such as ecological integrity.

7. However, the justice of the arrangements is to be assessed not only in simple distributive terms, but also in how these distributions of environmental benefits and burdens affect the capabilities of members of the community of justice to achieve valuable functionings (in terms of both activities and states of existence or being). This is the capabilities approach of Sen and Nussbaum.

8. Achievement of distributive justice is, however, not only a product of the laws' content and terms, but also how the laws are applied in practice. Distributive injustice is caused not only by laws that provide for inequitable distribution of environmental benefits and burdens, but also by inequitable application or non-application of laws that provide for equitable distribution.

9. Procedural justice is concerned with the ways in which decisions, including regarding the distribution of environmental benefits and burdens, are made and who is involved and who has influence in those decisions.

10. Claims about procedural justice require the addressing of two questions:
 - (a) who are the members of the community of justice to whom procedural justice is to be given? and
 - (b) what procedural rights are to be given to members of the community of justice?
11. The answers to these questions may be different for international law compared to national law. The entities entitled to participate and the degree and form of participation will be different at the international level compared to the national level.
12. For example, procedural justice is promoted at the national level by giving procedural rights to a nation's citizens to have access to environmental information, be entitled to participate in environmental decision-making, and have access to review procedures to challenge governmental decision-making or impairment of substantive or procedural rights. However, such procedural rights may not be afforded to citizens in relation to the negotiation, agreement and implementation of international conventions. This has justice ramifications.
13. The third concept of justice involves recognition. Justice as recognition is concerned with who is given respect and who is and is not valued. Issues of recognition are distinct from but closely connected to issues of distribution and procedure. Lack of recognition, in the social and political realms, demonstrated by various forms of denigration, degradation and devaluation, inflicts damage and constrains individuals and communities and leads to inhibited or ineffective participation in the polity (procedural injustice) and to inequalities in the distribution of environmental goods and bads (distributional injustice).
14. At the core of misrecognition are institutional and cultural processes of disrespect which devalue some individuals, groups or communities in

comparison to others, meaning that there are unequal patterns of recognition across social groups.

15. Misrecognition occurs at both the international and national levels. In international deliberations on climate change less developed and more vulnerable nations may be disrespected and devalued. In national decision-making, indigenous peoples, cultural minorities and other disadvantaged groups and communities may be disrespected and devalued.
16. Achieving justice as recognition involves respecting and valuing these entities and making consideration of their interests an integral part of policy-making and decision-making processes.
17. The two central concerns of climate change – mitigation and adaptation – can be viewed through the lens of these three justice concepts of distribution, procedure and recognition. Let me illustrate by examining mitigation and adaptation through the lens of distributive justice.
18. Starting with mitigation, the nature and extent of the distributive justice to be achieved depends on the answers to be given to the three questions concerning the community of justice, the environmental benefits and burdens distributed by the laws, and the criteria of distribution.
19. The members of the community of justice are the claimants for and the recipients of distributions of environmental benefits and burdens. Members could be countries, social groups and communities within countries, individual humans and non-human nature, as well as future generations of humans and non-human nature. Settling the membership of the community of justice is central to determining claims about distributive justice.
20. The second question to be addressed in determining claims about distributive justice is, what is to be distributed? Particular environmental features, materials or activities can be viewed as both benefits or burdens depending on the claimant or the context of the claim. For example, the global

atmosphere can be seen to be an environmental good. Allocation of the right to use clean air can be seen to involve the distribution of that environmental good. The nature, extent and other features of the use of the atmosphere by some can either foreclose or diminish, or not, the use by others. For example, breathing the air by some does not foreclose breathing by others. But emission of pollutants, including greenhouse gases, by some can diminish the environmental good of clean air and hence adversely affect use by others. Allocation of permits to pollute, therefore, involve the distribution to the polluter of the environmental good of the atmosphere but also the distribution of the concomitant environmental bad of polluted air.

21. Similarly, energy consumption can be viewed as a benefit in providing essential energy services and a burden in contributing carbon emissions and causing climate change. The burning of fossil fuels to generate electricity, therefore, gives rise to the distribution of both benefits and burdens. Mitigation of climate change, involving elimination of energy production by fossil fuel combustion, affects not only the distribution of environmental burdens (greenhouse gas emissions and their adverse effects on climate change), but also the distribution of the environmental benefits associated with the energy produced.
22. The third question to be addressed in determining claims about distributive justice involves the criteria or principles of distribution to be used. Many different criteria have been suggested for achieving distributive justice. In terms of mitigation, different approaches have been suggested for the international and national levels and for transnational corporations.
23. At the international level, four approaches have been suggested to determine greenhouse gas emissions targets:
 - *Grandfathering*: start from the emission levels that countries already have and seek to achieve proportional reductions from this baseline. This is the approach effectively adopted in the Kyoto Protocol to the United Nations Framework Convention on Climate Change.

- *Carbon intensity*: focus targets on making economic growth less carbon intensive. This was the approach pushed by the United States government after it withdrew from the Kyoto Protocol.
- *Per capita*: focus on average emissions (calculated at a national level) and work towards making these more equal. This approach is pushed by various alignments of non OECD nations who argue it embodies a simple egalitarian notion of justice that everyone has an equal right to the global atmosphere.
- *Historical responsibility*: take account of the accumulated past emissions that have contributed to previous, current and future warming. This approach is advocated by Friends of the Earth International and negotiating blocks of poorer nations on the basis that there needs to be fair reparation or compensation for past or ongoing impact. It involves a full application of the polluter pays principle.

24. However, climate justice is not restricted to global negotiation of climate change targets. What really matters in the end are the changes that are actually achieved within nations to make emission reductions. Looking within national totals, beyond per capita averages and generalisations about the status of particular countries, reveals further sets of inequalities, and further questions about the distribution of responsibilities for, and the side effect consequences of, greenhouse gas mitigation.
25. Therefore, further criteria need to be developed for mitigation of greenhouse gas emissions within nations. Although some of the criteria for international targets could also be appropriate within nations, such as grandfathering, others may give rise to ethical objections, such as per capita.
26. There are also justice issues associated with regressive side effects of carbon mitigation policy. For example, a carbon tax on electricity reflecting the carbon content of the method of generation may increase energy prices, potentially exacerbating fuel poverty problems for vulnerable groups. The substitution of biofuels as a lower carbon form of fuel, usually for transport,

may cause replacement of crops grown for food, leading to food shortages and price rises, as well as increasing pressure on biological diversity as natural forests are cleared for production of biofuels.

27. There is a need to determine where the balance between mitigation and its side effects needs to be struck.
28. In relation to adaptation, the question of membership of the community of justice may have different answers than those given for mitigation. The particular entities who ought to be the recipients of environmental benefits and burdens regarding adaptation are different, although overlap, with the entities who are the recipients for mitigation. So too the question of what benefits and burdens are to be distributed may have different answers.
29. In relation to the question of the criteria to be used for distribution, different criteria need to be developed for distributing the responsibility for harm (who should pay and in what proportion?) and for the entitlement to receive funding or other assistance (who should be recipients and in what proportion?). For example, in relation to the first (responsibility), criteria could relate to past emissions or future emissions or both, or to the degree of culpability (fault, liability or moral blame).
30. In relation to the second (the recipients), there are different principles for justly distributing adaptation funding and assistance:
 - *Reward*: reward those communities that are reducing emissions the most.
 - *Deserving*: allocate majority of funds to those least able to adapt to climate change on their own (the vulnerable).
 - *Development*: target failing areas and use adaptation funding as a lever for development.
 - *Exposed*: allocate to those who face direct impacts of climate change (these may not necessarily correspond with the most vulnerable).
 - *Equality*: allocate adaptation funds equally to all areas in a country.

- *Utilitarian*: allocate in a way that promotes the greatest good for the greatest number.

31. Paavolo and Adger suggest that justice dilemmas involved in adaptation to climate change can be condensed to four main issues:

- what is the responsibility of developed countries for climate change impacts caused by their greenhouse gas emissions?
- how much assistance should developed countries make available for developing countries and how should developed countries share the burden of assistance?
- how should assistance be distributed between countries and adaptive measures? and
- how should planning and decisions about adaptation be made at different levels?

32. The analysis that I have undertaken in relation to distributive justice can be repeated for procedural justice and justice as recognition. These analyses provide a basis for evaluating climate laws, both international and national. The purpose of the enquiry is to evaluate whether the laws provide an adequate framework for achieving climate justice.
