Jus Corpus Law Journal
Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rishikesh Dave; Publisher – Ayush Pandey

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium provided the original work is properly cited.

Futility and Leviathan: Interrogating the Practices that Create Inefficacious Frontiers in International Environment Law

Chinmay Bhat[a]

[a]OP Jindal Global University, Sonipat, India

Received 08 December 2022; *Accepted* 13 December 2022; *Published* 20 December 2022

The climes of complexity in the face of unprecedented environmental risk augur ecological chaos. The ambition of the international community often finds itself in want of practical instruments to bring about the collective action required to cover the necessary ground to deal with climate change. Inefficacies abound in the legal processes that seek to spur cooperation between the systems of environmental protection. This article seeks to demonstrate that the legal instruments of the contemporary world are inherently inadequate in engendering collective climate action. It examines the extremities and fragmentation within the internal functioning of the International Law about Environmental Protection to present a critique of the contract theory jurisprudence and its capacity to explain the interactions within legal systems. It intends to resolve the logical constraints embedded in jurisprudence by proposing an optimal mode of enforcement for the alignment of actors towards ecological protection.

Keywords: *environmental law, ecological chaos, environmental protection, fragmentation, international law.*

INTRODUCTION

The legal milieu governing the network of interactions between vested actors in matters of international climate law is typified by scepticism, aversions, and enforcement constraints. These elements have led to inefficacies in building a universal legal language of climate action.

The same can be observed in jurisprudential and enforcement constraints that run amok about occurrences of deviant behaviour in collective climate efforts. This paper deals with emphasizing the limits of contemporary environmental law and proposing an optimal mode of enforcement to an already well-developed area of law. It seeks to do so by examining existing methods of contractual enforcement and highlighting their inefficacies.

THE ENVIRONMENTAL EMERGENCY AND PRUDENCY

For this paper, I assert that it is imperative to view the ongoing environmental issues through the juridical lens of an ongoing emergency, for a multitude of reasons. The features of this emergency emanate from the complexity of environmental systems, thus making it unfeasible to reasonably rule out any possibilities of an ecological catastrophe.[1] This view of the environmental emergency is well vindicated by Jocelyn Stacey, who states it is crucial for two reasons. For starters, it represents the internal direction of climate change legislation, as it aims to restrain our greatest environmental excesses and abuses, averting a catastrophic tragedy. Environmentalism, a driving factor behind environmental law development, is likewise focused on predicting the next environmental crisis. Second, focusing on the endgame scenario allows us to construct a rule of law that demonstrates how the law may both constitute and regulate the exercise of public authority at all times and for all concerns, including environmental disasters. This differs greatly from the assertion that all climate challenges must be regarded as a continuous emergency, revealing the basis for the previously stated rule of law.[2]

INEFFICACIES OF CONTRACT THEORY JURISPRUDENCE

I argue that existing practices of international environmental law are characterised by reliance on a mode of contractual enforcement at a time when peripheral areas of international law have moved well beyond the inefficacies of contract theory. Against the backdrop of the environmental emergency established earlier, I contend that contract theory is simply not well equipped to deal with the idea of an endgame, i.e., in this case, an environmental catastrophe.

---

[1] Jocelyn Stacy, *The Constitution of the Environmental Emergency* (Hart Publishing 2018) 2
[2] *Ibid*

Any foreseeability of an ultimate interaction will cause the network of synergy to dissipate as every faction assumes the possibility of the last interaction and the apostasy of the involved parties.[3]

Further, it is evident from judicial adjudication and compliance pulls in the realm of environmental law that matters like the precautionary principle are taken for granted, especially when it comes to transnational enforcement.[4] Amongst principal actors that contend with crucial ecological questions, the absence of capability characterises the encumbrance in bringing about collective climate action.[5]

FRAGMENTATION OF INTERNATIONAL ENVIRONMENTAL LAW

It is also imperative to note that in the existing modes of enforcement, there arises a very glaring jurisprudential problem best denominated as the fragmentation of international environmental law. It appears that this problem is two-fold. Firstly, international environmental law addresses existing predicaments by capriciously establishing new institutions. Secondly, Judicial adjudicators will tend to sabotage existing normative frameworks of climate law by espousing insular panoramas of environmental laws that support non-environment regimes. [6]

International environmental law developed in response to an imperative need to prevent immediate environmental deterioration. The prevalent use of ad hoc agreements can be observed through the existence of more than 1100 multilateral, 1500 bilateral, and 250 'other' environment treaties. Unfortunately, when it comes to climate crises, states only act in response to public demand, and issues only get public attention when they reach a critical stage. States seek short-term rewards by reaching agreements on pressing public issues to appease the public. Because MEA parties often do not address whole concerns at once, the agreement process forces the proliferation of MEAs, which leads inevitably to fragmentation. International environmental

---

[3] Robert E. Scott & Paul B. Stephen, *The Limits of Leviathan: Contract Theory and the Enforcement of International Law* (Cambridge University Press 2006) 69

[4] Malgosia Fitzmaurice, *Contemporary Issues in International Environmental Law* (Edward Elgar Publishing Limited 2009) 40-66

[5] Benoit Mayer, *The International Law on Climate Change* (Cambridge University Press 2018) 195

[6] Tim Stephens, *International Courts and Environmental Protection* (Cambridge University Press 2009) 304

law's fragmentation renders it impossible for future generations to adequately address global environmental issues since it necessitates the constant creation of new agencies.[7] The fragmentation problem has been extensively recognised not only by contemporary scholars but by the international law commission as well.[8] This is problematic for several reasons. Firstly, the absence of consensus on an umbrella agenda means that there will be a need to establish new institutions as and when problems come up. This is simply put, inefficient and tedious. Now, since each body will have a specific set of aims, methodology, and jurisdiction, bodies are bound to conflict. And since there is no overarching apex body, this leads to inconsistent jurisprudence.

Secondly, there exists the possibility that judicial adjudicators of peripheral areas of law may demolish existing environmental frameworks since the agenda of these bodies might be inherently dissonant with the environmental ethos. And while scholars have anecdotally examined this and come to the conclusion that this phenomenon cannot currently be witnessed in international law,[9] I assert that the existence of such fragmentation is not entirely necessary, one only has to consider if it is even remotely a possibility in a state of environmental complexity. Moreover, the state of complexity created by this phenomenon is also thought to have implications for the status of law since, if a rule's complexity results in the incorrect application of juridical principles or inadequate compliance, this can undermine the law's legitimacy and, by creating legal uncertainty, it may even be detrimental to the rule of law.[10]

FORMAL ENFORCEMENT AND THE CREATION OF CONTRACTS

Formal enforcement is best accomplished through the creation of comprehensive, sophisticated contracts that connect relevant contingencies with contractual performance. Such contracts have a good chance of being enforced effectively. However, when it comes to environmental issues, I assert that because the future is uncertain and contracting costs are high, parties resort to

---

[7] John Carter Morgan III., 'Fragmentation of International Environmental Law and the Synergy: A Problem and a 21st Century Model Solution' (2016) 18(1) Vermont Journal of Environmental Law

[8] International Law Commission, Report of the International Law Commission on the Work of its 58th Session (2006)

[9] Tim Stephens, *International Courts and Environmental Protection* (Cambridge University Press 2009) 342-344

[10] Neville Harris, 'Complexity: Knowing It, measuring it, assessing it' in Jamie Murray, Thomas E. Webb and Steven Wheatley (eds), *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (Routledge 2019)

constructing contracts in which they combine many potential future states of the world and provide for the same responsibilities across these states. Such contracts necessitate renegotiation, undermining investment incentives. These contracts' verification expenses also significantly outweigh any advantages they provide.[11] Due to the aforementioned reasons, there is a creation of an atmosphere of scepticism and aversion. Thus, the jurisprudential state of these kinds of contracts simply does not allow for efficacy in enforcement.

So, it appears that the problem we have encountered in this realm is two-fold. While existing normative frameworks of contract theory are already inefficient, to begin with, the jurisprudence of environment law simply does not allow for a state where there can be any sort of favourable outcome. Based on these analyses, one can now reasonably assert that the legal milieu governing diplomatic interactions is inherently adequate to bring about collective climate action.

AN OPTIMAL MODE OF ENFORCEMENT

As previously stated, this paper undertakes the ambitious task of also proposing an optimal mode of enforcement, for it is simply not enough to say contemporary *international law just doesn't work*. The examination of inefficacies in environmental law previously explored points to the problem being enforcement constraints that arise out of contract theory jurisprudence. Therefore, the enforcement mechanisms of contract theory need rethinking. To propose alternative models of enforcement, one may look towards already existing enforcement mechanisms. Since we have established that formal enforcement mechanisms are ill-equipped to deal with the environmental emergency, we must consider exploring informal enforcement options.

I cite Stewart Macaulay's work in claiming that most agreements between entities are self-enforcing, and based on powerful informal norms rather than any formal enforcement

[11] Robert E. Scott & Paul B. Stephen, *The Limits of Leviathan: Contract Theory and the Enforcement of International Law* (Cambridge University Press 2006) 76

mechanisms.[12] It has also been identified that contract governance works on an idea of reciprocity. However, as one can observe in peripheral areas of international law, it is evident that any sort of simple reciprocity is bound to be limiting. Also, with informal enforcement, one will have to contend with the fact that repeated interactions have the possibility of endgame dissipation, as previously explored. However, to resolve this, I suggest the effectiveness of the *inequity aversion theory*:

Under the inequity aversion theory, a person is altruistic to others if her payoffs are above an equitable benchmark and is envious of others if their payoffs exceed that benchmark. In other words, people compare themselves with others in their group (and with the other party in a two-person relationship) by using a benchmark of equality of distribution. Thus, inequity aversion (which also can be termed a preference for reciprocal fairness) holds that many individuals will respond to inequity in a contractual relationship either by rewarding a generous action or by punishing a selfish action. This theory predicts that informal enforcement of many types of agreements, even those among perfect strangers, can be more efficient than the alternative of judicial enforcement.

Fehr and Schmidt's work complements a claim by evolutionary theorists that an evolutionary basis exists for what they label "moralistic reciprocity as distinguished from simple reciprocity." Moralistic reciprocity embodies a willingness to punish defectors in ways that include social ostracism, reduced status, and withdrawal from relationships. In the simple form of reciprocity punishment for defection takes the form of withdrawal of future cooperation (e.g., if you cheat, I will not deal with you anymore). Moralistic reciprocity refers to more elaborate forms of punishment, including social ostracization, reduced status, fewer friends, and fewer mating opportunities. Evolutionary theorists argue that simple reciprocity cannot support large-scale human cooperation. Withholding cooperation is too crude a mechanism to maintain cooperation in large groups. But moralistic reciprocity offers a more plausible basis for establishing large-

[12] Stewart Macaulay, 'Elegant Models, Empirical Pictures, and the Complexities of Contract' (1977) 11(3) Law & Society Review 507

scale patterns of cooperation because it provides many more ways that co-operators can punish defectors.[13]

The network of interactions in this state shall then operate on established normative principles of environmental law and said principles shall proliferate through modes of informal enforcement. It is to be noted that this does not cause any need for concern so as long as established normative frameworks of international environmental law are rigorously adhered to. While the inequity aversion theory and informal enforcement theories have only been applied to agreements in international trade law, I argue that there is a prospect of transposition to international environmental law. I argue even better applicability since the endgame is catastrophic in the environmental emergency and contracting costs are much higher as well. Therefore, the transposition of the inequity aversion principle and informal contract regulation is well-justified. Also, it must be noted that it is successfully able to negate any fragmentation problems discussed earlier since the enforcement will not occur through the creation of new international bodies, but by informal enforcement of normative epistemological frameworks of environmental action. So, the application of said enforcement mechanisms to climate change law provides a better alternative to contract theory. The complexities of the interwoven network of interactions in an environmental emergency are well accounted for. It also provides for a more robust legal justification culture and fills in lacunae that are not considered in contract theory.

CONCLUSION

Upon close examination of pertinent variables in the juridic-normative framework sustaining collective climate action, it becomes evident that there is a multitude of impediments that haunt the locale. These factors not only hinder any sort of efforts on collective climate action, they effectively subvert it. The milieu is best depicted as a body of systemic constraints that obstruct collective efforts by relevant international actors. Said constraints are inherently counterproductive and create an atmosphere of uncertainty, complexity, and inefficacy. Thus, it

[13] Robert E. Scott & Paul B. Stephen (n 11)

is evident that contemporary diplomatic instruments are inherently sabotaging in nature, and require rethinking.