

INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

Volume 2 | Issue 2

2020

© 2020 *International Journal of Legal Science and Innovation*

Follow this and additional works at: <https://www.ijlsi.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com>)

This Article is brought to you for “free” and “open access” by the International Journal of Legal Science and Innovation at VidhiAagaz. It has been accepted for inclusion in International Journal of Legal Science and Innovation after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at **International Journal of Legal Science and Innovation**, kindly email your Manuscript at editor.ijlsi@gmail.com.

Climate Change and Justice Unravelling the Enigma with a Jurisprudential Analysis

KETKI TUSHAR KULKARNI¹

ABSTRACT

Justice has always been a beacon of light amidst all adversities. It is a basic tenet for formulation of law governing vast discrepancies present in a society. With the advent of globalization and advancement in technology, the recent trend has witnessed debates revolving around global climate change and has raised pertaining questions regarding intergenerational justice in a world full of the vast discrepancy between the causes and effects of global warming and other factors leading to climate change. With the growing instances like forest fires, floods, uneven rainfall, high temperatures etc. has further added to several remarkable concerns regarding those responsible for climate change and those affected by the same. Therefore an urgent need is felt to mainstream the theories of justice in the light of climate change

Starting from the ancient Greek philosophers like Aristotle to contemporary thinkers like John Rawl, the idea of justice has evolved over time. Aristotle advocated his criteria for justice by treating equals equally and un-equals unequally by divided justice into distributive and correctional justice. John Rawl, on the other hand, linked the concept of distributive justice with fairness. Their concepts should be taken earnestly to ensure equitable distribution of funds and effective participation of those affected and those responsible for climate change. Further, the theories propounded by more contemporary thinkers like Martha Nussbaum and Amartya Sen should be deliberated to give a minimum amount of dignity of individuals to protect their capabilities.

This paper argues that India too should adopt such kind of refreshing approach towards climate change. It should harness the use of technology and other state and non-state actors by creating a strong climatic infrastructure by acting as a strong facilitator and enabler. This understanding is reached after analyzing several theories of justice.

“Climate change is happening now and to all of us. No country or community is immune, and, as is always the case, the poor and vulnerable are the first to suffer and the worst hit.”

-UN Secretary-General António Guterres.

¹ Author is a student at Hidayatullah National Law University, Raipur, India.

I. INTRODUCTION

We live in a world full of digitalization, big data, artificial intelligence, robotisation, financial crisis, and shift in global power. In such a constantly changing environment which is driven by changing customer needs and is enabled by digital technology, climate change has emerged as one of the biggest challenges of our times which add considerable stress to the environment and society in general. With the advent of COVID-19, the crisis has further added to the vulnerabilities possessed on human mankind. The only thing that can be said regarding the current situation is that we live in a world of “VUCA”² where the only constant thing is “change”.³

Climate change has been the burning issues of all times and has observable effects on the environment. Most climate scientists agree that the main cause of the current global warming trend is human expansion of the greenhouse effect.⁴ The range of published evidence indicates that the net damage costs of climate change are likely to be significant and to increase over time.⁵

Further, Sir Nicholas Stern, in the Economics of Climate Change raised concerns on climate change and its impact on human rights. He stated that;⁶

“Climate change threatens the basic elements of life for people around the world— access to water, food, health, and use of land and the environment.....consequences of climate change will become disproportionately more damaging with increased warming. Higher temperatures will increase the chance of triggering abrupt and large-scale changes that lead to regional disruption, migration, and conflict. There is still time to avoid the worst impacts of climate change if we take strong action now.”

With the recurring instances like forest fires of Amazon, cyclones hitting east and west coasts of India, extreme rainfall leading to devastating floods in Assam, and Maharashtra, proliferated swarms of locusts ravaging the farmlands in northern and western India has grabbed significant attention towards an urgent need to address the concerns regarding of climate change.

Justice though considered being rice and ether of law lays down the basic tenets for the

² Nathan Bennett and G. James, What VUCA really means for you, Harvard Business Review (2014).

³ The acronym “VUCA” was introduced in the late 1980’s by the US Army war college in the post-cold war time in order to understand what was happening in the world and to navigate the time post-cold war where the acronym stands for; Volatility, Uncertainty, Complexity, Ambiguity.

⁴ Ulrich Cusbach et al., Climate Change 2013: The Physical Science Basis, Intergovernmental Panel on Climate Change, 121 (2013), http://www.ipcc.ch/pdf/assessmentreport/ar5/wg1/WG1AR5_Chapter01_FINAL.pdf.

⁵ *Id.*

⁶ Nicholas Herbert Stern, The Economics of Climate Change, Stern Review, 65, 68 (2007).

existence of law. Climate change affects everyone, but it disproportionately strikes those who have contributed least to it and those with the largest carbon footprints, living and working in the world's wealthier regions.⁷ The recent Global Climate Risk Index, 2020⁸ released by Germanwatch, lays down several challenges faced especially by the poor and vulnerable countries along with high-income countries due to extreme weather events and sudden climate change. As per the same report, India has fallen from the fifteenth position in 2017 to the fifth position in 2018 amounting to be amongst the top ten worst-affected countries facing from climate change. Hence, there is an urgent need to study the concept of climate change in the light of intergenerational justice.

Several scholars of climate change often advocate for the two most common strategies for combating the impact of climate change namely mitigation and adaptation. However, it is because of these strategies justice is often jeopardized. Climate justice links the concept of human rights with climate change by sharing the burdens and benefits of climate change and its resolution equitably and fairly. It captures rights and obligations spanning generations, across political entities, and implicates state, corporate and individual responsibilities.⁹

Therefore, the study of jurisprudence in light of climate change helps in finding solutions to the threats possessed regarding "justice". It even helps one to put the law in proper context by considering the needs as well as requirements of the current as well as the future generation.

II. HISTORY AND DEVELOPMENT

If we trace the timeline associated with human rights and climate change, it was first in the year 1972 when Stockholm Declaration provided the basis for an elaboration of a human right to environmental quality. However, it was recently in the year 2005, a petition was filed to the Inter-American Commission on Human Rights seeking relief from human rights violations resulting from the impacts of global warming and climate change caused by acts and omissions of the United States. As a result in the year 2007, it was for the first time stated in the international agreement of Malé Declaration on the Human Dimension of Global Climate Change that the climate change has clear and immediate implications for the full

⁷ Presidential Task Force on Climate Change Justice and Human Rights, International Bar Association (2014), <https://www.ibanet.org/PresidentialTaskForceCCJHR2014.aspx>.

⁸ David Eckstein, Vera Künzel, Laura Schäfer and Maik Wings, Global Climate Risk Index (2020), https://germanwatch.org/sites/germanwatch.org/files/20-20_10.pdf.

⁹ Presidential Task Force on Climate Change Justice and Human Rights, International Bar Association (2014), <https://www.ibanet.org/PresidentialTaskForceCCJHR2014.aspx>.

enjoyment of human rights’ and called on the United Nations human rights system to address the issue as a matter of urgency.¹⁰

In January 2009, the Office of Human High Commissioner for Human Rights (“OHCHR”) became the first international human rights body to examine the link between climate change and human rights.¹¹ In 2010, the Conference of Parties to the UNFCCC reproduced the HRC’s language identifying the relationship between human rights and climate change in its report on the 2010 United Nations Climate Change Conference in Mexico. The report emphasized that parties should, in all climate change related actions, fully respect human rights.¹²

In 2012, the HRC established a mandate on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. In 2014, a joint statement on Human Rights Day was issued calling for states to incorporate their existing obligations under the human rights framework into climate change negotiations.

Finally, it was on 12th December 2015, the Paris Agreement on Climate Change was adopted at UNFCCC to address the issues regarding climate change and their obligations on human rights including the right to health, rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.¹³

With these legislative frameworks protecting human rights against the distressing effects of climate change, several jurists have come up with different theories protecting the rights of individuals and ensuring justice in the society.

III. THEORIES OF JUSTICE IN TERMS OF CLIMATE CHANGE

The concept of Justice has changed from time to time, era to era and people to people, due to which there is no single definition of law. Starting from the ancient Greek philosophers like Aristotle to contemporary thinkers like John Rawl and Amartya Sen, the idea of justice has evolved. The recent trend has witnessed debates revolving around global climate change and has raised pertaining questions regarding intergenerational justice in a world full of the vast discrepancy between the causes and effects of global warming and other factors leading to

¹⁰ Malé Declaration on the Human Dimension of Global Climate Change (2007).

¹¹ John H. Knox, Linking Human Rights and Climate Change at the United Nations, 33 *Harv. Envtl. L. Rev.* 477, 498 (2009).

¹² The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action, Framework Convention on Climate Change (2011).

¹³ Adoption of Paris Agreement, UNFCCC (2012).

climate change. Under such an environment, there is a high need to study the theories of justice with its practical application to protect the rights of human mankind.

A. Aristotle's Theory of Justice

Aristotle an ancient Greek philosopher believed in the notion of justice and regarded it as the basic essence of the state. In his political philosophy, he advocated the basic criteria for treating justice is by treating equals equally and un-equals unequally subject to relevant differences¹⁴. In general, he stated that in order to be just, citizens should obey laws which are propounded in accordance with the state which is conducive for common good.

He explained his notion of justice by dividing it into two parts: distributive justice and corrective justice. Distributive justice involves dividing benefits and burdens fairly among members of a community. According to him, in a particular society, a central authority should control the distribution of resources so that there shall be a kind of just relationship amongst the people. While corrective justice, on the other hand, requires restoring a fair balance if a member of a community has been unfairly benefited or burdened with more or less than is deserved in the way of social distributions¹⁵. Aristotle in his theory of justice rather advocated for proportional equality or 'equity' involving the intermediate position between someone's unfairly getting "less" than is deserved and unfairly getting "more" at another's expense.¹⁶

Similarly, Aristotle's concept of justice can be understood by referring to Article 3 of the UN Framework Convention on Climate Change (UNFCCC) which explicitly identifies one of the key conceptions of justice to protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.¹⁷ UNFCCC and the Kyoto Protocol incorporate the principle of 'Common But Differentiated Responsibilities' (CBDR) by which is meant that the Convention's principal obligations, while common to all parties, are also subject, according to Article 4(1), to 'specific national and regional development priorities, objectives and circumstances.'¹⁸ Further, UNFCCC makes specific concessions to the needs of developing and least developed countries under Article 4(7), taking 'fully into account that

¹⁴ Wayne P. Pomerleau, *Western Theories of Justice*, <https://iep.utm.edu/justwest>.

¹⁵ Anton- Hermann Chroust and David. L. Osborn, *Aristotle's conception of Justice*, vol 17 issue 2, *Notredam Law Review* (1942).

¹⁶ Wayne P. Pomerleau, *Western Theories of Justice*, <https://iep.utm.edu/justwest>.

¹⁷ Steve Vanderheiden, *What Justice Theory and Climate Change Politics can learn from each other*, University of Colorado at Boulder (2013).

¹⁸ Presidential Task Force on Climate Change Justice and Human Rights, *International Bar Association* (2014), <https://www.ibanet.org/PresidentialTaskForceCCJHR2014.aspx>.

economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties'.¹⁹

In other words, the UNFCCC refers to the notion of distributive justice as well as corrective justice by highlighting the resource sharing problem or burden sharing problem along with remedial liability assessment following different capabilities of different states.

A.1 Criticisms to Aristotle's Theory of Justice

However, one of the major loopholes in applying theories of justice in terms of climate change is that these theories are only applied in abstraction and has very less relevance in the contemporary times of policy conflicts and international relations. The concern which is essentially raised is fairness in the quantity and quality of resources distributed, and in the access that one generation provides to the next. The basic reason contributing to the same is due to the vast discrepancy between those responsible for climate change and those affected by it.²⁰ Further, the uneven distribution of resources and industrialisation across the globe has added considerable stress in the application of this theory.

B. John Rawl's Theory of Justice

John Rawl was also one of the contemporary jurists who developed the concept of distributive justice and then linked it to the concept of "fairness". He wrote a paper on 'Justice as Fairness' in the year 1958 which gained wide popularity in the concepts of justice.

Moreover, Rawls' *The Law of Peoples* has an explicit international or cosmopolitan focus that seems readily applicable in the global context of climate change.²¹

According to him, a just society is a society which satisfies the principle of "fairness" and is close to the voluntary scheme so that nobody will be put at a loss. According to him, in a just society, there exist two general principles which are fair²²;

- a. Principle of Reciprocity and
- b. Just Savings Principle.

According to the Reciprocity Principle given by John Rawl, nobody will agree to bring benefit to others at the cost of harm to oneself. In his second principle of Just Savings, he

¹⁹ Id.

²⁰ P. Baer, S. Kartha, and T. Athanasiou et al., *The Greenhouse Development Rights Framework: Drawing Attention to Inequality within Nations in the Global Climate Policy Debate*, *Development and Change*, 1121–38 (2009).

²¹ Shannon Brincat, *Global Climate Change Justice from Rawl's Law of Peoples to Honneth's Condition of Freedom* (2015), <https://www.researchgate.net/publication/290502246>.

²² Id.

states that the level of conservation in savings is to be adopted which is sufficient to promote the best interest of the worst of members of the future generation to the greatest degree acceptable to the worst of the members of the existing generation.

In the context of climate change, it coheres with the commitments to intergenerational justice expressed in the 1992 UN Framework Convention on Climate Change (UNFCCC). Rawl's concept provides an ideal condition for distributing obligations and responsibilities for climate change. By following Rawls in his difference principle, one might assign carbon reduction targets to nations that converge on approximately equal per capita emissions shares, but allow some inequality in those shares when these benefit the least advantaged²³. Here, the focus would necessarily be on what, if anything, might justify departures from the default position of equal per capita shares, as, for example, the physical or geographical differences among nations or persons that affect their ability to convert a given emissions allowance into a comparable measure of welfare or functioning.²⁴

It can be also observed that self-interest does reside in conserving resources, safeguarding ecological diversity, or curbing climate change for one's own sake or the sake of one's family or descendants. Rawl's concept of reciprocity can serve the interests of future generations at the same time as that of the current generation and hence ensure intergenerational justice.

B.1 Criticism to John Rawl's Theory of Justice

John Rawl's theory of justice though has been the guiding light for ensuring climate justice is still subjected to several criticisms. Rawl for example rejected the idea of an international extension of distributive justice principles giving a little scope on settling ongoing disputes as to inequitable resource sharing that has led to the issue of climate change.²⁵ Robert Huseby and Lauren Hartzell suggested that it is only by amendments to *The Law of Peoples* that Rawls finds his proper place in climate justice debates and have deliberately moved away from *A Theory of Justice*²⁶. Honneth by propounding his theory of recognition has attempted to overcome certain limitations possessed by the Rawlsian approach. He propounded that justice is not only concerned with distribution or rights but it is rather for providing psychological, social, cultural, and material conditions necessary for the "functioning and

²³ Steve Vanderheiden, What Justice Theory and Climate Change Politics Can Learn From Each Other, University of Colorado at Boulder (2013), https://experts.colorado.edu/display/pubid_30248.

²⁴ Id.

²⁵ Id.

²⁶ Robert Huseby, John Rawls and Climate Justice: An Amendment to The Law of Peoples, Environmental Ethics 35 (2013); Lauren Hartzell, Climate change and global justice: Extending Rawls' Law of Peoples, ISEE/IAEP Environmental Philosophy Conference (2006).

flourishing” of collective and individual human freedom.²⁷ One of the major loopholes which can be said regarding John Rawl’s theory is that it is not clear as to what and how much should present generations save for the benefit of future generations as the exact measure of “fair share” is subject to wide interpretation.

C. Amartya Sen and Martha Nussbaum Theory of Social Justice

Social justice is considered to be one of the important facets of justice. Several jurists like Amartya Sen, Martha Nussbaum and others propounded the theories of social justice. They in their theories of social justice emphasized that human rights are similar to that of human capabilities. Every human being should be given a minimum amount of dignity to protect their capabilities. They correlated the human rights with the basic human rights of every individual which are universal. They gave an inclusive list of human capabilities and emphasized that if every individual is provided with these basic rights, it will ultimately lead to social justice in society.

Some of the human capabilities can be listed as life, health, adequate nourishment, bodily integrity, freedom of expression, affection, self-respect, control over the environment, play, recreation etc.

However, in the present context, the phenomenon of climate change is affecting the basic human capabilities of individuals living in society. For example, the 21st COP of the United Nations Framework Convention on Climate Change (UNFCCC) has given a brief understanding the importance of human rights due to climate change. According to the Universal Declaration of Human Rights, everyone has the right to life, liberty and security of person which might get affected due to climate change.

Further, Article 1 of the ICCPR (International Covenant on Civil and Political Rights) states that all peoples have the right of self-determination. In other words by virtue of rights, they freely determine their political status and freely pursue their economic, social and cultural development.

Moreover, as per the United Nations Framework Convention on Climate Change (UNFCCC) Articles 1 and 3²⁸

“Adverse effects of climate change” means changes in the physical environment or biota resulting from climate change which have a significant deleterious effect on human health

²⁷ Shannon Brincat, Global Climate Change Justice from Rawl’s Law of Peoples to Honneth’s Condition of Freedom (2015), <https://www.researchgate.net/publication/290502246>.

²⁸ United Nations Framework Convention on Climate Change (1992), art 1, 3, <https://unfccc.int>.

and welfare. The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.”

As per Synthesis Report of the IPCC Fifth Assessment Report on Climate Change, 2014 stated that climate change is expected to lead to increases in ill-health in many regions and especially in developing countries with low income, as compared to a baseline without climate change.²⁹

A special report on Climate Change and Land³⁰ made observations for balancing land as a source of greenhouse gas omission versus land of carbon sink and a need to ensure climate justice. Therefore a need is felt to address the concerns regarding the protection of basic human capabilities so that they can live a healthy and peaceful life.

IV. CONCLUSION

As discussed before, justice is considered to be the rice and ether of law and ensures the very existence of law. Climate change possesses several threats to the rights of present as well as future generation. The recent instances like Amazon fires, floods in different parts of the world, extreme heat records etc. have clearly shown us that the law has reached its carrying capacity and hence is beyond any savings. Therefore an urgent need is felt to mainstream the theories of justice in the light of climate change.

Even though India is amongst the top ten performing countries on the Climate Change Performance Index Report,³¹ significant steps are required to make climate action more effective and achieve climate justice. Countries should adopt a strategy to shift from a reign of negotiation to a reign of implementation wherein the basic social rights and capabilities of individuals are upheld hence furthering the concept propounded by Amartya Sen and Martha Nussbaum. Moreover, the theory propounded by Aristotle regarding distributive and correctional justice and John Rawl's theory of justice should be taken earnestly to ensure equitable distribution of funds and effective participation of those affected and those responsible for climate change. Despite the criticism presented on these theories, a holistic approach is required in its application by taking into consideration the social, economic, human and environmental cost associated with the climate crisis as the social and cultural impacts of climate change are far-reaching.

²⁹ AR5 Synthesis Report: Climate Change, Intergovernmental Panel on Climate Change (2014), <https://www.ipcc.ch/report/ar5/syr>.

³⁰ Special report on Climate Change and Land, Intergovernmental Panel on Climate Change (2019), <https://www.ipcc.ch/srccl>.

³¹ David Eckstein, Vera Künzel, Laura Schäfer and Maik Winges, Global Climate Risk Index (2020), https://germanwatch.org/sites/germanwatch.org/files/20-20_10.pdf.

In the context of India, a bottom-up approach should be adopted wherein the focus should be on the domestic coordination of climate-related issues as the ministries should adopt an integrated approach for reinforcing policies for climate change. The government should further mobilize funds in its budget dedicated specifically to meet the domestic climate goals and should also explore the potential of other stakeholders like non-state actors, civil society and private players by strictly laying down their roles in ensuring climate justice.

The technology should be embraced in such a manner so that transparency in climate actions is ensured by educating both the state and non-state actors regarding the best practices for climate action. The government should act as a strong facilitator and enabler for building a strong climate infrastructure by keeping in mind several theories of justice.
