Equity in Global Health Law - Policy Brief (July 2023)

Scottish Council for Global Affairs and the ESRC IAA Policy Impact Fund

The COVID-19 pandemic has shone a light on the many flaws in the global system to protect people from pandemics: the most vulnerable people going without vaccines; health workers without needed equipment to perform their life-saving work; and 'me-first' approaches that stymie the global solidarity needed to deal with a global threat[1]

Key Messages

Context

Equity has been sorely lacking in pandemic preparedness and response, and COVID-19 is but the latest example (O'Cuinn and Switzer, 2019; Rourke, 2019). The response to COVID-19 was characterised by nationalism, inequity in access to diagnostics, vaccines,

[1] Dr Tedros Adhanom Ghebreyesus, Director-General of the WHO, cited at https://www.who.int/news/item/01-12-2021-world-health-assembly-agrees-to-launch-process-to-develop-historic-global-accord-on-pandemic-prevention-preparedness-and-response

therapeutics and personal protective equipment (PPE) between the Global North and the Global South, as well as discriminatory, and in some instances racist, border closures chiefly impacting low- and middle-income countries.

In response to the widespread inequity witnessed during the COVID-19 pandemic, Member States of the World Health Organisation (WHO) are currently negotiating a new international legal instrument - the Pandemic Treaty - intended to prevent pandemics and mitigate associated inequalities such as vaccine access, and improve compliance with international law during pandemic events.

From the initial proposal for the Treaty, through the many rounds of discussions that have occurred to date, it is clear that the new instrument is intended to be grounded in equity, with equity positioned as both an objective and as an operational output (Wenham, Eccleston- Turner & Voss, 2022). However, while equity is recognised as a general principle of international law, it does not have a precise and defined meaning. From the start of negotiations, it was unclear what an instrument 'grounded' in equity should look like, what the principle of equity actually means in this context, and how this principle can translate into meaningful obligations within international law more generally, as well as pandemic preparedness and global health governance specifically.

In an attempt to answer these questions, we convened - with the assistance of funding from the Scottish Council for Global Affairs and the ESRC IAA Policy Impact Fund - a workshop at King's College, London at which we gathered together experts on equity from different disciplinary backgrounds in an attempt to understand and conceptualize equity as a legal concept, charting its history, development and application within both domestic and international law.

In the following short discussion, **we distill some of the lessons at this workshop from both national law as well as other international arenas, before offering suggestions on how this somewhat opaque concept might be effectively operationalised within the Pandemic Treaty.** The aim of this discussion is therefore not to engage in a lengthy, academic literature review of the different conceptions of equity found in academic texts - of which there is an abundance of relevant literature - but rather to offer practical insights to the operationalisation of equity to the Pandemic Treaty. What we find is that there is no 'one' way to **do** equity or for an international agreement to **be** equitable. ***Our discussions found that equity* must be more than an abstract buzzword** - simply inserting the word equity into a legal text does not ***achieve*** equity. However, international law offers a number of lessons for responding to instances of inequity arising in the absence of a perfect, overarching functional definition of equity.

History of equity: domestic and international

The historical roots of equity as a concept can be traced back to the works of Aristotle and to Roman law. What became clear from our workshop discussions, however, was that ***despite the long established roots of equity, different versions and definitions of it exist in a multitude of legal systems around the world***. To truly encapsulate all that equity is in one definition appears to be near impossible. Instead, it is more feasible to describe rather than to define it, to **reframe the question and to consider the *purpose* of equity.**

Within the UK domestic context, equity developed as a separate but related concept within the legal systems of England and Scotland in the medieval eras. Equity continues to play a prominent role in English private law disputes. A notable use of equity in the present **English legal system is as a remedy,** including its use as **relief** against "unconscionable dealing" whereby the courts may preclude enforcement of a bargain in which (1) one of the parties suffered from a significant weakness or impediment, (2) that weakness was exploited by the other party, and (3) the resulting transaction was oppressive or overreaching.[2] This illustrates some of the key features of equity - at least in English law - such as protection for the weak or vulnerable litigants and legal disapproval of unconscionable conduct. **Unconscionable dealing** has been expanded further in some Commonwealth jurisdictions, which have removed the requirement of exploitation and therefore only require **'substantive unfairness',** that is to say, an oppressive or overreaching transaction arising from a difference in bargaining power between the parties.

Equity in international law

Just as with domestic law, references to equity abound in international law. In this regard, equity can be, and often is, considered to fall within the "general principles of law." The Permanent Court of International Justice, albeit, via a dissenting opinion, has opined that certain maxims of equity constitute "general principles of law" under the International Court of Justice (ICJ) Statute, with this being the first, but not only, means by which equity may be recognised as a source of international law.[3]

Accordingly, we see equity used across numerous areas of international law. As Catharine Titi notes, equity can be found in fields "(f)rom international cultural heritage

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[2] Alec Lobb criteria - *Alec Lobb (Garages) Ltd. v. Total Oil (GB) Ltd.* [1984] EWCA Civ 2

[3] *Diversion of Water from the Meuse (The Netherlands v Belgium)* (Dissenting Opinion of M.Anzilotti) [1937], P.C.I.J. (Ser. A/B) No. 70; *Diversion of Water from the Meuse (The Netherlands v Belgium)* (Individual Opinion of Hudson) [1937], P.C.I.J. (Ser. A/B) No. 70

law to environmental law, from judgments on transboundary disputes to procedural decisions on security for costs in investment arbitration" (Titi, 2021). We see references to equity in the United Nations Convention on the Law of the Sea (UNCLOS); the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Treaty); the non-binding Pandemic Influenza Preparedness (PIP) Framework under the auspices of the World Health Organisation (WHO); and the United Nations General Assembly Declaration on the Establishment of a New International Economic Order, to name but a few. The incorporation of equity or equitable considerations into treaty law and other international legal texts and instruments indicates the importance of equity for international law but also the **importance of international law as a potential vehicle for the pursuit of equity.**

To give some examples of the operation of equity within international law, 'fair and equitable treatment' of foreign investors is provided for in the majority of investment treaties. The standard seeks, among other things, to protect ***legitimate expectations*****,** connecting to the notion that investors are entitled to a stable investment environment. Fair and equitable treatment will be deemed to have been violated if there has been denial of *justice*, there is a lack of ***good faith*** in the way investors are treated, and/or *manifest unfairness* in treatment of investors. Again, we can see links, as with the domestic law discussions above, to equity as connected in some way to the prevention or remediation of ***substantive unfairness*****.** However, our discussions noted the abundant concern regarding the application of this standard by investment arbitration tribunals; that it may serve to limit the right of the state hosting an investment to regulate for public interest, including with regard to concerns such as human rights, public health, environmental protection and food security. Accordingly, many states are in the process of renegotiating their bilateral investment treaties to provide them with greater policy space to regulate in the public interest. In our discussions, it was therefore evident how this equitable standard can at times result in inequity, depending upon how the standard is interpreted by relevant courts and tribunals. Indeed, certain investment standards have been used to protect the stronger party - the investor - at the expense of more vulnerable parties such as local communities.

Outside investment law, the principle of equity is also manifest in the international climate change regime. While climate change is recognised as a 'global commons' problem, the causality - that is, the historical responsibility - of countries in respect of climate change, as well as the capability of countries to mitigate and adapt to climate change is not equal. The climate change regime has recognised this, with Article 3 of the 1992 United Nations Framework Convention of Climate Change (UNFCCC) outlining that, 'The Parties should 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' (see also Article 2 of the UNFCCC Paris

Agreement). While there is no additional definitional content provided for the principle of equity in the climate change regime, it is clear that not only is equity a fundamental principle of the regime, but it is intrinsically connected to the notion of ***differentiated obligations****,* for which it is necessary to take into account countries' different capacities and historical responsibilities.

While the need for differentiation may at first sight appear rather obvious, it must be underlined that relations within international law are premised upon the notion of sovereign equality. In the words of Cullet, '[t]he principle of sovereign equality has been translated into the sovereign legal equality of all states, which constitutes a cornerstone of international law… One consequence is that treaties were traditionally deemed to be "just" if they *provided for reciprocity of obligations among contracting states*' (emphasis added, Cullet, 1999). However, the 'worth' of formal equality was perhaps best summed up by Anatole France who stated that '[t]he majestic equality of the laws … forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread' (cited in Stone, 2004). Differentiated obligations may hence form an integral component of the concept of equity, and we can see this expressed within the international climate change regime which incorporates the principle of "common but differentiated responsibility" (CBDR) as a form of equity. CBDR recognizes the "shared" moral responsibility that all states have to address climate change, but nevertheless recognizes that the proportions of such responsibility, and how that responsibility manifests itself under international law, are differentiated. Accordingly, CBDR operates as an acknowledgment of **past behaviour** as well as **current capabilities** to deal with a complex global commons problem (Caney, 2012).

CBDR is operationalised within the climate change regime's Paris Agreement via a method of country-based self-differentiation through Nationally Determined Contributions (NDC), creating a bottom-up nationally determined series of commitments, through CBDR, and the additional consideration of such commitments ***'in light of different national circumstances'****.* This new approach allows for consideration of a wide array of criteria, including past and current, as well as projected future emissions, financial and technical capabilities, human capacity, population size as well as other demographic criteria, abatement costs, opportunity costs, skills, etc., with the expectation that developed countries will lead the way on implementation (Rajamani, 2016).

More generally, the implementation of equity via differentiated obligations through NDCs is not the only way to recognise both the historical responsibility and capability aspects of responding to a global commons problem such as climate change. Equity has been recognised within the climate change regime as relevant to issues such as **technology transfer**, but less detailed obligations exist in this domain, raising concerns as to whether

the climate change regime is capable of achieving 'true' equity. Issues such as technology transfer, however, raise important questions regarding the link between equity and justice, highlighting the role of intellectual property rights in that regard, particularly since technology transfer may be conceptualized as a form of **distributive justice**. Indeed, equity within international law has been recognised as related to ***the concept of justice.*** For example, within the climate change regime, the Paris Agreement mentions **climate justice** in its preamble and emphasises fairness and justice in response to what equity could mean.

The idea of equity is also arguably embedded in international intellectual property law. For instance, the World Trade Organisation's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) does recognise the importance of providing some policy space for WTO Members to calibrate their national IP laws to suit their socio-economic context and needs including facilitating access to medicines and vaccines, albeit its effectiveness in achieving these goals has been questioned. In addition, similar to the notion of differentiated obligations, WTO law has a series of measures called 'special and differential treatment' pursuant to which, *inter alia*, least-developed countries are currently exempt from implementing the TRIPS Agreement until 2034 and are also specifically exempt from providing patent protection for pharmaceutical products until 2033. Moreover, the World Intellectual Property Organisation (WIPO's) Marrakesh VIP Treaty is aimed at facilitating access to published works for those who are blind, visually impaired, or otherwise print disabled. At the same time, it must be admitted that the limited policy space available under international IP law can be further constrained by TRIPS-plus standards in regional and bilateral trade agreements (and potentially via the investor-state dispute settlement system). Furthermore, although Article 66.2 of the TRIPS Agreement imposes an obligation on developed countries with regard to technology transfer, this obligation is not clearly defined and is generally considered to be ineffective in practice.

Equity is also intricately tied to the question of 'who gets what' in international law. Within the law of the sea regime, for example, the concept of an 'equitable solution' is prominent in terms of delimiting maritime boundaries between states. The relevant treaty, UNCLOS, is silent on what 'equity' means in this context (Article 74 (1) and Article 83 (1)). However, in its maritime delimitation jurisprudence, the International Court of Justice has acknowledged that "[w]hatever the legal reasoning of a court of justice, **its decisions must by definition be just, and therefore in that sense equitable**" but that it was "**not a question of applying equity simply as a matter of abstract justice**, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal régime…in this

field."[4] Accordingly, 'true' equity needs to do more than merely apply abstract notions of justice; simply inserting the word 'equity' or 'justice' into a legal text does not automatically operationalise its content.

Equity is also related to agency; and about "deep … and cosmopolitan international cooperation" (Morgera, 2018). The fair and equitable sharing of benefits from the utilisation of genetic resources is a key principle of the Convention on Biological Diversity (CBD) - often identified by the short hand of benefit-sharing. The international community has since accepted benefit-sharing as the main mechanism for injecting equity and justice in bio-based research and development, and has operationalised it in different ways in the CBD's Nagoya Protocol on access and benefit-sharing, the International Treaty on Plant Genetic Resources for Food and Agriculture and, recently, the international agreement on marine biodiversity beyond national jurisdiction (BBNJ Agreement (sometimes referred to as the High Seas Treaty). In addition, benefit-sharing has arisen under the CBD and international human rights treaties that contribute to the protection of Indigenous peoples' human rights as a reward and safeguard for biodiversity stewardship to enable their continued contribution to biodiversity conservation (Morgera, 2018b). Several problems remain with regard to its application among and within States, including due to asymmetries with intellectual property rights. In this context, it has been recognised that the agency of beneficiaries is a key but often absent aspect of the principle of benefit-sharing (Morgera, 2018). Achieving 'true' equity in this context requires that the **needs of the most vulnerable** must be met in a spirit of partnership (and solidarity) (Morgera, 2016), recognising that "progress does not [automatically] mean that benefits are shared fairly" (or indeed equitably) (Tsioumani, 2016). Simply put, equity is not just an 'outcome' - though fairness in terms of 'who gets what' is certainly an aspect of equity - but is also linked to the process by which decisions are taken. In essence, 'who calls the shots' is about equity and benefits). Again, borrowing from insights from the biodiversity regime, equity requires an "iterative process, rather than a one-off exercise, of **good-faith engagement** among different actors that lays the foundation for a **partnership** among them" (Morgera, 2016). Notably, references to the need for iterative approaches are also to be found under the High Seas Treaty.

Indeed, we can see the importance of process, partnership and good faith engagement within the climate change regime with respect to the self-differentiation NDC model. This model has been noted by some commentators as potentially allowing countries to downplay their own responsibility for addressing climate change, and deflecting that the root causes of climate change (and therefore the obligation to address it) are other countries' behaviors, more than their own. This has the potential to lead to a piecemeal

[4] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Reports p.3

system whereby parties are self-interested, leading to an overall incoherent system, which is not delivering equity within the climate change regime. However, the Global Stocktake is due to take place later this year - a "(p)arty-driven process conducted in a transparent manner and with the participation of non-Party stakeholders, that enables countries and other stakeholders to see where they're collectively making progress toward meeting the goals of the (UNFCCC) Paris Agreement" (UNFCCC, n.d.). In addition, civil society is increasingly holding their own national governments to account through various approaches to climate change-related litigation in the absence of international enforcement mechanisms under the Paris Agreement.

Our discussions also focused on how a transactional approach to international problems may struggle to achieve equitable outcomes, depending upon the context. The World Health Organisation's Pandemic Influenza Preparedness Framework (PIP Framework) is a transactional regime whereby access to pathogen samples - in this case, samples of influenza virus with human pandemic potential - are exchanged for the promise of receiving benefits such as flu vaccines and antivirals at a later date. However, connecting access to pathogens in a *quid pro quo* for the provision of 'benefits' is not the solution to the inequities surrounding access to pathogen samples and information or access to medical countermeasures. Tying these two issues together produces a situation where parties that would otherwise have similar interests (combating a pandemic) become adversaries in a buyer-seller paradigm, with each party trying to maximise their own gains. Providers of pathogen samples will want to maximise the benefits that they may be entitled to while users of pathogenic genetic resources (e.g., pharmaceutical companies) will want to minimise the benefits shared. In such an arrangement, the parties with the greatest power and resources will win out, often at the expense of shortening the public health emergency that the arrangement is supposed to address. The pursuit of equity - and moreover, the achievement of the right to health - is therefore threatened under such an arrangement.

Takeaways for the Pandemic Treaty

Equity is multidimensional and contextual. It is tied to notions of **fairness** when resources or property need to be shared and hence arises in respect of the 'who gets what' question in, for example, questions of maritime delimitation. It is linked to questions of **justice** as well as ***differentiated obligations***; the notion that it is necessary to take into account countries' different capacities/capabilities when transacting between countries. Equity is therefore closely tied to the idea that there are inequalities in power dynamics and the notion that strict equality - whereby every party owes the same obligations - is not the same as equity. Equity may demand that those with less capacity, or with less historical responsibility for a problem, should owe less by way of obligations. Equity is further linked

to obligations of repair, remedy and remediation; the so-called 'equitable remedy.' It is also tied to notions of taking account of **vulnerability and disadvantage**, with legal obligations tempered by such concerns. It is further linked to concerns of agency, process and procedure; the notion that equity requires partnership and good faith engagement between actors.

If equity is fact sensitive, ***then what lessons for the Pandemic Treaty can we take from the above brief discussion*** of how equity is conceptualised as both a general principle as well as in different international law instruments - and indeed domestic law - contexts? The first is that equity **must be more than an abstract buzzword** - simply inserting the word equity into a legal text does not ***achieve*** equity. The second is that equity is associated with questions of fairness and justice. While these are vague words in themselves, we can learn from other international processes in terms of how such fairness and justice may be achieved. This may require, for example, differentiated obligations, recognising different capacities and the need for technical assistance in recognition of this. It also requires a thorough examination of the root causes of the present inequalities that have been exacerbated by previous outbreaks, including (but not limited to) COVID-19. Until we recognise why there is inequity, there cannot be anything approaching equity. This requires issues of vulnerability and disadvantage as well as their causes to be considered and remedied accordingly. The achievement of equity also requires agency on all sides; equity cannot be achieved via *ad hoc* charitable donations or 'gifts', whereby the donor simply provides assistance on their terms, without consideration of the needs of the recipient.

Equity needs to be defined in a spirit of true partnership - underpinned by agency - as well as good faith engagement. This means that how we understand equity cannot be determined or defined by one or a small number of dominant parties. This obviously has relevance to the negotiating procedure applicable to the Treaty (and to the future institutions that will be created by the Treaty), as well as the power dynamics applicable to this. To this end, equity cannot be achieved in the presence of oppressive or overreaching transactional bargaining arising from a difference in power relations and resources between the parties. Indeed, equity cannot be bought nor can it be traded; to achieve equity, the process must also be equitable.

Within international law generally, there is an overt focus on enforcement and compliance, with many assuming that in the absence of enforcement mechanisms, international law is somehow redundant and ineffective. Indeed, as the clouds slowly started to clear during the COVID-19 pandemic, there was a call from several quarters for the introduction of a sanctions regime to be operated by the WHO, as if that would make us all safer (see Rourke, Eccleston-Turner and Switzer, 2022). During the workshop, there was agreement

that equity is important as a principle, even if there is no overt enforcement, because there is something powerful in having equity as a principle in itself, based on the participatory element. It was also agreed that there are different ways of thinking about this issue in any case, with an alternative being a focus on transparency and accountability, operationalised via global stocktakes, informational provisions and peer review mechanisms. More generally, we must take the opportunity to respond flexibly to real instances of inequity arising in the absence of a perfect functional definition of equity. ***We must therefore embrace equity as an experimental and iterative process, with an emphasis upon agency, participation and learning, so as to actualise equity in practice.***

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