



Equity as a Component of Climate's Contemporary Empire: A Response to the Montesquieu Lecture by Ralf Michaels

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ABSTRACT

This response considers equity as a normative dimension to Montesquieu's climate theory, as framed in the lecture by Ralf Michaels. In particular, this response explores the relation of climate theory to the manifestation of equity and the equity principle of common but differentiated responsibility located within the international legal climate change regime. This exploration will cover two facets, namely the current application (if at all) of climate theory to international climate change law, and the positioning of equity and common but differentiated responsibility as a component to climate theory within the context of the international legal climate change regime.

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It remains widely accepted today that the “theory of the influence of climate on men and societies is so closely associated with the name of Montesquieu that no apology is necessary for examining it”.¹ Montesquieu builds his climate theory on the contributions and work of many before him,² but it is ultimately Montesquieu who is recognized “to apply the theory of the empire of climate over the character, laws, and manners of nations in a systematic manner” and in a manner distinguishable from his predecessors.³

The lecture by Michaels builds on the continuing examination of Montesquieu’s work and offers a contemporary perspective on the application of Montesquieu’s climate theory and the construction of Montesquieu as a comparative lawyer, thereby situating Montesquieu’s climate theory not only within a geographical or sociological context, but also within a comparative law context.⁴

This response to Michaels’ lecture considers equity as a normative dimension to Montesquieu’s climate theory. Climate theory “finds new inspiration in the climate crisis”,⁵ and as such this response will explore the relation of climate theory to equity, also in its form as the principle of common but differentiated responsibility, within the international legal climate change regime.⁶ This exploration will cover two facets in the relationship between climate theory and equity – firstly, the current application (if at all) of climate theory to international climate change law, and secondly, the positioning of equity and common but differentiated responsibility in relation to climate theory within the context of the international legal climate change regime.

2 ARGUMENT FOR THE DEMISE OF CLIMATE THEORY: LIFE INDEPENDENT OF CLIMATE

In his lecture, Michaels explains three reasons for the decline in climate theory: ideological, disciplinary and factual.⁷ Firstly, Michaels submits that climate theory declined because it stood in contradiction with globalization.⁸ Secondly, Michaels suggests that climate theory declined with the development of disciplines of sociology and anthropology.⁹ Thirdly, and most importantly within the context of this response, Michaels submits that climate, in fact, plays less of a role since many people now live “factually independent from climate” albeit mostly in the Global North, meaning that it is possible to “deny a determining role to climate because climate no longer clearly [has] such a determining role”.¹⁰

The above submission leads to the following question: does humanity truly exist independent of the climate today? In a practical sense, it might be argued that humanity today depends less on the climate, especially in a gross comparison to life in the age of Montesquieu. Today, humankind uses various resources and technological advancements to keep us warm in cold climates, and cold in warm climates, and to protect ourselves from impending climate risks or disasters through technological responses warning us against events such as hurricanes and tsunamis or rising sea-levels. We employ technology to assist us in managing our daily response to unfavourable weather conditions such as increased rainfall and drought. Today, we rely less on our immediate environment for survival and we transport forms of sustenance all over the globe. However, to refer

1 Robert Shackleton, ‘The Evolution of Montesquieu’s Theory of Climate’ (1955) 9(33–34) *Revue Internationale de Philosophie* 317, 317.

2 Frank TH Fletcher, ‘Climate and Law. Influence of Montesquieu on British Writers’ (1934) 19(1) *Geography* 29, 29–36.

3 *ibid.*, 29. While this response can still identify application of a small component of climate theory today (as will be argued in a later section of the response), it should be stated that the application of climate theory in relation to its racist facets is absolutely rejected by this response.

4 Ralf Michaels, ‘On the Laws in their Relation to the Nature of the Climate – Climate Determinism and Comparative Law’ (Montesquieu Lecture, Tilburg University, 11 October 2023).

5 *ibid.*

6 The international legal climate change regime can be defined as follows: “A global legal framework that aims at regulating the interaction of human activity with the global climate system to mitigate global climate change and adapt thereto.”. For further information, see Sanita van Wyk, *The Impact of Climate Change Law on the Principle of State Sovereignty over Natural Resources* (Nomos 2017).

7 Michaels (n 4).

8 *ibid.*

9 *ibid.*

10 *ibid.*

to only the aforementioned conquering of the climate, and not to admit to the vast inequality that still exists between various jurisdictions across the world in their response and defence to climate, would be an inaccurate representation of the status quo of the global response to climate.

The global objective risk to life on Earth posed by climate change (and illustrating the ultimate reliance of humankind on the climate) is perhaps most impactfully illustrated by the ‘Planetary Boundaries’ framework established by Johan Rockström and a team of scientists in 2009, which quantifies nine processes that regulate the stability and resilience of the Earth system and accordingly, life on Earth.¹¹ In addition to objective global risks, a great proportion of humanity also still lives, for the most part located in the Global South, in a manner by which their livelihood and lives are directly or closely connected to the climate. For example, in examining the threat to livelihood posed by climate change, the World Bank estimates that climate change will drive between 68 million to 135 million people into poverty by 2030 – this threat being largest for the regions of Sub-Saharan Africa and South Asia.¹² The connection between humankind and the Earth, and the impact of climate on this relationship, also remains relevant in other ways. For example, there remains a massive reliance on climate to provide food security in many regions of the world which still rely on subsistence farming.¹³ Another example can be located in the effects of climate change on indigenous peoples; from Africa’s Kalahari Basin, to the Arctic region, and deep within the Amazon, examples are plentiful across the globe of how reliant indigenous communities are on climate for survival.¹⁴

Accordingly, an argument for the demise of climate theory based on an acceptance of life today independent of the climate does not hold water. Instead, our combined subjugation to climate as a human race, requires a slightly more nuanced interpretation within the context of climate theory. Thus, can it be argued that a certain dimension of climate theory can find contemporary application based on the acceptance of life today as dependent on climate?

3 ARGUMENT FOR THE CONTEMPORARY APPLICATION OF A DIMENSION OF CLIMATE THEORY

3.1 LIFE DEPENDENT ON CLIMATE

It might be argued that, to some degree, climate theory can find partial application today, considering that climate change today makes us all, as Michaels phrases it, “subject to the folly of the climate.”¹⁵ More specifically, Michaels submits the following:

“If climate independence was one reason for the decline of climate determinism [...], then that independence is now over. If Montesquieu was right that ‘nature and climate almost alone dominate savages’, perhaps we are all savages now, subject to the folly of the climate.”¹⁶

From this point the question then becomes, within the context of this response, does the principle of equity, as a core foundational element of the international legal climate change regime, support the contention that climate theory can be applied to some degree today since “we are all... subject to the folly of the climate”? In order to answer this question, the sections below will briefly explore equity and the principle of common but differentiated responsibility both in terms of the initial stages of the development of the international climate change regime and in terms of the contemporary framing by the Paris Agreement.¹⁷

11 ‘Planetary Boundaries’ (Stockholm Research Institute, 2023) <www.stockholmresilience.org/research/planetary-boundaries.html> accessed 2 November 2023.

12 ‘Global Action Urgently Needed to Halt Historic Threats to Poverty Reduction’ (The World Bank, 7 October 2020) <www.worldbank.org/en/news/feature/2020/10/07/global-action-urgently-needed-to-halt-historic-threats-to-poverty-reduction> accessed 2 November 2023.

13 ‘Climate Change and Food Security: Risks and Responses’ (FAO, 2016) <www.fao.org/3/i5188e/i5188e.pdf> accessed 2 November 2023.

14 ‘Climate Change and Indigenous Peoples’ (United Nations) <www.un.org/esa/socdev/unpfii/documents/background%20climate%20change_FINAL.pdf> accessed 2 November 2023.

15 Michaels (n 4).

16 *ibid.* This response rejects the usage of the term ‘savage’, but chooses to use the original wording of Montesquieu.

17 Paris Agreement [2015] U.N. Doc. FCCC/CP/2015/L.9/Rev/1.

The Global North and Global South divide, also present in Montesquieu's climate theory, still stands firmly at the forefront of the international legal climate change regime and the collective international legal response to climate change. In navigating this divide, the principle of equity is employed as an underpinning and guiding element within the application of international climate change law.

In general, equity is understood as an issue of fairness or justice,¹⁸ and typically springs to the fore in the determination of fair state action in addressing climate change through mitigation or adaptation.¹⁹ The principle of equity can further be framed as generally functioning in three contexts: international, national and intergenerational. International equity operates as equity between states.²⁰ National or social equity operates as equity between different social groups within the national jurisdiction of a particular state.²¹ Finally, intergenerational equity is understood as the equity or justice between different generations.²² The form of equity most relevant to a possible current application of Montesquieu's climate theory, and accordingly to the context of this response, is international equity.

Ashton and Wang's deconstruction of equity uncovers different dimensions of the principle, which all relate to the framework of climate change law on an intergovernmental level today.²³ The dimensions of the principle of equity, further explained below, include: responsibility, equal entitlement, the capacity to act (or ability to pay), basic needs, and comparability of effort.²⁴ Firstly, the 'responsibility' dimension of equity ensures equity by asking who bears responsibility for the damage in the first place.²⁵ A common example in this context is the equity principle of the polluter-pays.²⁶ Secondly, the dimension of 'equal entitlement', within the context of international climate change law, refers to the equal entitlement of all states (including all people) to the atmosphere, as the atmosphere is considered a common good.²⁷ Thirdly, the 'capacity to act (or ability to pay)' refers to state capacity to act or to contribute in the mitigation of and adaptation to climate change, and places a heavier burden on the state with more capacity in this context.²⁸ This capacity is particularly relevant to financial- and technological assistance within the international legal climate change regime.²⁹ The fourth dimension of equity pertains to 'basic needs' and refers to a state's ability to meet the basic needs of its population.³⁰ The final component of equity pertains to 'comparability of effort' between states, wherein state effort must be fair and in accordance with each state's unique national circumstance and ability.³¹

18 Bert Metz, 'International Equity in Climate Change Policy' (2000) 1 Integrated Assessment 111, 111; John Ashton and Xueman Wang, 'Equity and Climate, In Principle and Practice' in Joseph E Aldy and others (eds), *Beyond Kyoto, Advancing the International Effort Against Climate Change* (Pew Center on Global Climate Change 2003) 61, 62; van Wyk (n 6) 143–222.

19 Matthew Paterson, 'Principles of Justice in the Context of Global Climate Change' in Urs Luterbacher and Detlef F Sprinz (eds), *International Relations and Global Climate Change* (MIT Press 2001) 121; Andrew Hurrell and Sandeep Sengupta, 'Emerging Powers, North-South Relations and Global Climate Politics' (2012) 88(3) *International Affairs* 463, 472; Lasse Ringius, Asbjørn Torvanger and Arild Underdal, 'Burden Sharing and Fairness Principles in International Climate Policy' (2002) 2 *International Environmental Agreements: Politics, Law and Economics* 1, 1–22; van Wyk (n 6) 143–222.

20 Metz (n 18); van Wyk (n 6) 143–222.

21 Metz (n 18); van Wyk (n 6) 143–222.

22 Paterson, (n 19) 121; Metz (n 18). For a further explanation on intragenerational equity versus intergenerational equity, see Edith Weiss, 'In Fairness to Future Generations and Sustainable Development' (1992) 8(1) *American University International Law Review* 19, 21.

23 Ashton and Wang (n 18) 64–66; van Wyk (n 6) 143–222.

24 Ashton and Wang (n 18) 64–66; van Wyk (n 6) 143–222.

25 Ashton and Wang (n 18) 64; Eric Neumayer, 'In Defence of Historical Accountability for Greenhouse Gas Emissions' (2000) 33(2) *Ecological Economics* 185, 185–192.

26 van Wyk (n 6) 143–222.

27 Ashton and Wang (n 18) 65.

28 Marina Cazorla and Michael Toman 'International Equity and Climate Change Policy' (2000) 27 *Climate Issue Brief* 1, 7; Ashton and Wang (n 18) 65.

29 van Wyk (n 6) 143–222.

30 Ashton and Wang (n 18) 66.

31 *ibid.*

The different dimensions of equity make it possible for the principle of equity to function as an umbrella term, and in so doing to designate the principle of common but differentiated responsibility as a so-called equity principle.³²

3.3 PRINCIPLE OF COMMON BUT DIFFERENTIATED RESPONSIBILITY AS AN EQUITY PRINCIPLE

The principle of common but differentiated responsibility is a cornerstone of the contemporary international legal climate change regime, underpinning state action in regard to mitigation of- and adaptation to climate change. The foundational legal instruments of the international legal climate change regime relied heavily on the principle of common but differentiated responsibility and originally designated developed countries as the responsible parties to mitigate climate change. Therefore, it can be submitted that the international legal climate change regime focused more strongly on the equity component of ‘responsibility’ in the past, asking who the most responsible parties were historically for climate change. This approach, where emphasis is placed on historical ‘responsibility’, is illustrated by the Report of the United Nations Conference on Environment and Development (Rio Declaration),³³ the United Nations Framework Convention on Climate Change (UNFCCC)³⁴ and the Kyoto Protocol to the UNFCCC (Kyoto Protocol).³⁵

Illustrating the initial focus of the international legal climate change regime on the equity component of ‘responsibility’, the Rio Declaration reads as follows:

“In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”³⁶

Further illustrating the initial focus of the international legal climate change regime on the equity component of ‘responsibility’, is the UNFCCC and the Kyoto Protocol.³⁷ Per illustration, Article 3(1) of the UNFCCC specifically states that “*the developed country Parties should take the lead in combating climate change and the adverse effects thereof*” and Article 4 sets out the commitments of developed and developing countries in the context of common but differentiated responsibility. In these older international legal instruments, in particular the Kyoto Protocol, countries and their associated required mitigation effort, are differentiated according to whether they are categorised as a developed (or Annex I) country,³⁸ a developing (or Annex II) country,³⁹ a least developed country (LDC), a small island country, or a country with a particularly

³² van Wyk (n 6) 143–222.

³³ Report of the United Nations Conference on Environment and Development [1992] A/CONF.151/26 (Vol. I).

³⁴ United Nations Framework Convention on Climate Change [1992] U.N. Doc. A/AC.237/18 (Part II)/Add.1. Article 4(1) of the UNFCCC specifically sets out obligations by taking into account the principle of common but differentiated responsibility and “national and regional development priorities, objectives and circumstances”; Article 4(2) sets out the commitments of the developed country parties and other parties included in Annex I; Article 4(6) considers the state’s historic level of anthropogenic greenhouse gas emissions; Article 4(7) considers the specific priorities of developing countries, such as economic and social development as well as poverty eradication. For further information, see van Wyk (n 6) 143–222.

³⁵ Kyoto Protocol to the United Nations Framework Convention on Climate Change [1997] U.N. Doc FCCC/CP/1997/7/Add.1.

³⁶ Principle 7 of the Rio Declaration.

³⁷ See in particular Articles 2, 3, 10 and 12 of the Kyoto Protocol: Article 2(3) states that countries listed in Annex I of the Kyoto Protocol should ensure that their implementation of policies and measures under Article 2 have minimal adverse effect on developing countries, illustrating the differentiation between countries to achieve equity; Article 3(14) reiterates the aforementioned idea and states that Annex I countries must implement their commitments in terms of Article 3(1) so that the social, environmental and economic impacts on developing countries are minimal; Article 10 also takes into account the principle of common but differentiated responsibility in addition to “national and regional development priorities, objectives and circumstances”; Article 12 deals with the clean development mechanism and Article 12(8) stipulates that a share of the proceeds of the mechanism should be used to cover administrative expenses of developing countries and to assist developing countries that are particularly vulnerable in adapting to climate change. For further information, see van Wyk (n 6) 143–222.

³⁸ ‘Parties and Observers’ (UNFCCC Secretariat) <<https://unfccc.int/parties-observers>> accessed 4 November 2023.

³⁹ *ibid.*

high dependence on fossil fuels.⁴⁰ Through this construction of equity (where the focus is placed on historical responsibility) within the international legal climate change regime, the equity principle of common but differentiated responsibility could be utilised as an “obstacle”⁴¹ or legal shield⁴² by developing countries with significant greenhouse gas emissions to avoid reduction obligations. The international legal climate change regime solved this conundrum through the inclusion of the principle of equity (in all its dimensions) in the Paris Agreement.

Accordingly, in its current form, the international climate change regime, with the inclusion of the Paris Agreement, has shifted the focus of equity to also focus more on its other dimensions, besides ‘responsibility’, such as equal entitlement, the capacity to act (or ability to pay), basic needs and comparability of effort. Accordingly, in terms of the Paris Agreement, all parties (regardless of a state’s developmental status) are to bear the responsibility of mitigating climate change today.

The Paris Agreement sets out in its preamble that it remains guided by the principle of common but differentiated responsibility and Article 2(2) stipulates that the agreement will be implemented to reflect the principle of common but differentiated responsibility. However, equity is escalated through the Paris Agreement’s implementation of Nationally Determined Contributions (NDCs), which are defined as follows:

“national climate plans highlighting climate actions, including climate related targets, policies and measures governments aim to implement in response to climate change and as a contribution to global climate action.”⁴³

Each Party to the Paris Agreement is obligated to submit their NDC irrespective of their developmental status, although each country can take into consideration its development agenda.⁴⁴ The Paris Agreement states in Article 4 that NDCs will reflect “respective capabilities, in the light of different national circumstances” of each Party.⁴⁵

As a sidenote, and a possible further justification in the argument for the contemporary application of a dimension of climate theory, Michaels also makes the point that “*those in the North [now] have agency because they can protect themselves from climate whereas those in the South have none because they remain subject to it*”.⁴⁶ Michaels’ statement is accurate within the contemporary international climate change regime, particularly within contexts related to technology transfer and financial assistance between developed and developing countries in order to advance and finance mitigation and adaptation to climate change.⁴⁷

To argue that “we are all... subject to the folly of the climate” today seems to be attuned to the core underpinnings of the contemporary international legal climate change regime; more specifically,

⁴⁰ Daniel Bodansky, Sandra Day O’Connor and Elliot Diringer, ‘Issues for a 2015 Climate Agreement’ (*Center for Climate and Energy Solutions*, May 2014) <www.c2es.org/docUploads/issues-for-a-2015-climate-agreement.pdf> accessed 4 November 2023.

⁴¹ Werner Scholtz, ‘Equity as the Basis for a Future International Climate Change Agreement: Between Pragmatic Panacea and Idealistic Impediment. The Optimisation of the CBDR Principle via Realism’ (2009) 42(2) *The Comparative and International Law Journal of Southern Africa* 166, 167.

⁴² Deepa Badrinarayana, ‘Global Warming: A Second Coming for International Law?’ (2010) 85 (2) *Washington Law Review* 253, 253.

⁴³ ‘NDC Spotlight’ (*UNFCCC Secretariat*) <<https://unfccc.int/process/the-paris-agreement/nationally-determined-contributions/ndc-spotlight>> accessed 4 November 2023.

⁴⁴ Article 4 of the Paris Agreement. See also W Pieter and others, ‘Conditional Nationally Determined Contributions in the Paris Agreement: Foothold for Equity or Achilles Heel?’ (2019) 20(4) *Climate Policy* 468, 469.

⁴⁵ Article 4(3) of Paris Agreement.

⁴⁶ Michaels (n 4).

⁴⁷ Article 4(3) of the UNFCCC pertains to financial resources provided by developed country parties and other developed parties included in Annex II; Article 4(4) of the UNFCCC deals with assistance from developed countries and other developed countries included in Annex II to developing countries that are particularly vulnerable, in the context of adaptation; Article 4(5) of the UNFCCC covers the issue of financing and technology transfer between developed countries (including developed countries listed in Annex II) and developing countries; Article 4(8) recognises the principle of common but differentiated responsibility by stating that necessary actions, such as funding, insurance and technology transfer, must take into consideration the specific needs of developing countries or countries that are particularly vulnerable, while listing characteristics which may contribute to the vulnerability of a country; Article 4(9) reiterates that funding and technology transfer should take into consideration the specific needs and situations of the least developed countries; and Article 4(10), stipulates that developing countries must receive consideration during the implementation of measures to respond to climate change, especially in light of the fact that their economies might be vulnerable to the implementation of such measures. For further information, see van Wyk (n 6) 143–222.

the core underpinnings of the Paris Agreement. Today, the Paris Agreement solidifies a global response by all parties to the agreement, in a stark departure from the initial approach within the regime which placed developed countries at the helm in global efforts to mitigate climate change based on their historical responsibility for climate change. Today, developed countries are still urged to take the lead (this can be seen in the preamble of the Paris Agreement), in particular related to technology transfer and financial assistance, however, the principle of equity is being applied in all its dimensions and no longer mainly focused on its dimension of ‘responsibility’.

Thus, does the principle of equity, as a core foundational element of the international legal climate change regime, support the contention that climate theory can be applied to some degree today since “we are all... subject to the folly of the climate”? This can indeed be the case, since equity and the particular equity principle of common but differentiated responsibility, obliges all states, as parties to the Paris Agreement, to respond to the mitigation of and adaptation to climate change. Therefore, all states (and all people) are today “subject to the folly of the climate” in their legal obligation to mitigate and adapt to climate change in terms of the international legal climate change regime.

4 CONCLUSION

This response explored the relation of climate theory to equity (also in its form as the principle of common but differentiated responsibility) within the context of the international legal climate change regime and Michaels’ lecture. This exploration covered the following facets: the current application (if at all) of climate theory to international climate change law, and the positioning of equity (and common but differentiated responsibility as an equity principle) within the context of the international legal climate change regime.

The principle of common but differentiated responsibility is framed as a foundational component of the contemporary international legal climate change regime, underpinning state action in the past and today in regard to mitigation of and adaptation to climate change. However, the regime focused more strongly on the equity component of historical ‘responsibility’ in the past, asking who the most responsible parties were initially for greenhouse gas emissions and resulting climate change. As the regime developed, and in its current form, with the inclusion of the Paris Agreement, all parties are to bear the responsibility of mitigating climate change. Accordingly, the focus of the equity principle within the regime has shifted to also include its other dimensions, besides historical ‘responsibility’, such as equal entitlement, the capacity to act (or ability to pay), basic needs, and comparability of effort.

Consequently, does the principle of equity, as a core foundational element of the international legal climate change regime, support the contention that climate theory can be applied to some degree today since “we are all... subject to the folly of the climate”? Yes, because equity and the particular equity principle of common but differentiated responsibility, obliges all states as parties to the Paris Agreement to respond to the mitigation of and adaptation to climate change. Therefore, all states and all people are “subject to the folly of the climate” today in their legal obligation to mitigate and adapt to climate change in terms of the international legal climate change regime.

COMPETING INTERESTS

The author has no competing interests to declare.

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