Reframing Differentiation: Equitable outcomes for transformational change

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Introduction

The COP 21 meeting in Paris this December agreed a global framework on combating climate change that will replace the Kyoto Protocol. The agreement is based on the bottom up approach of the voluntary contributions of member states through their Intended Nationally Determined Contributions (INDCs). The Paris Agreement and NDC* process therefore heralded a paradigm shift from attempts to enforce a top down agreement of mitigation commitments to a more bottoms up approach. Further, COP 21 marked the end of nearly 20 year journey to agree on a global deal to combat climate change, ushering in a wave of optimism and new beginnings.

Differentiation has always been at the heart of the climate debate. Differentiation in actions and capabilities in fact lies at the heart of the United Nations Framework Convention on Climate Change (UNFCCC) agreed upon in 1992. Article 3.1 of the Convention affirms the need for Parties to protect the climate system "on the basis of equity and in accordance with their common but differentiate responsibilities (CBDR) and respective capabilities (RC)[1]." Furthermore, the UNFCCC divided countries into Annex I and Non Annex I Parties. Annex 1 Parties are developed countries with greater historical responsibility of carbon emissions and accordingly under the Kyoto Protocol, were tasked with specific emission reduction targets, which did not apply to Non Annex 1 Parties.

The NDC process which forms the bedrock of the Paris Agreement introduced the concept of self-differentiation in climate governance, as countries looked to their own calculations of interests, responsibilities, capabilities and political expediency in designing their plans for climate action. But is self-differentiation going to be enough to deliver equitable outcomes in the new climate regime? Is it possible under this new framework of combining top down imperatives with bottom up commitments, to ensure equitable outcomes from the Paris Agreement?

This paper does not seek to introduce a new model for distributing the mitigation burden, plenty of such models and proposals exist already and are discussed briefly in the paper. Instead, the idea is to re-frame the equity question in the context of national self-differentiation and the bottom up framework of the Paris Agreement, and with due cognizance of the failures of past approaches to enforce top down ambition. This is done through the introduction of two frameworks in this paper that could be used to drive equity in practice: the right to sustainable development and the principle of ''climate reparations''.

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* INDCs became NDCs after the signing of the Paris Agreement

[1] United Nations Framework Convention on Climate Change, 1992, https://unfccc.int/resource/docs/convkp/conveng.pdf

UNFCCC and the Kyoto Protocol: equity considerations

At the heart of the problem of climate change is a twisted irony - the countries that have been least responsible for the problem are the ones likely to suffer the most. Anthropogenic greenhouse gas emissions arose from the economic activity of developed countries but the impacts of climate change is distributed unequally to poorer nations. Therefore, distributing the mitigation burden is not the only focal point in the equity debate. Concerns over equity must also take into account the need for poorer countries to adapt to climate impacts, as well as the compensation that is due to poorer countries for loss and damage that has already occurred and cannot be adapted to.

This is the rationale behind differentiation in climate governance. The UNFCCC principles of CBDR and RC sought to confirm the idea that while all countries must take action on climate change, some must do more, based on their responsibility and capacity. The normative principles of CBDR and RC continue to be relevant, nearly 25 years after the Rio Earth Summit in 1992. Differentiation cannot be wished away in climate governance and ensuring equity in processes and outcomes is key to the effectiveness of a climate regime. But while climate politics has had little problem in recognizing principles of differentiation, operationalizing it to deliver equitable outcomes has proven to be much more difficult.

The principle that guided the Kyoto Protocol sought to confirm the notion of historical responsibility of developed countries in contributing to global warming and accordingly, their mandate to mitigate emissions. Attempts to subsume developing countries in ambitious mitigation commitments early on in the climate discourse were understandably met with fierce resistance. This was best captured in the landmark paper 'Global Warming in an Unequal World', which accused western countries of attempting environmental colonialism[2]. At the same time however, the blanket firewall constructed by the Kyoto Agreement architecture that in some eyes separated responsibilities for action on climate change, did not work. Countries defected from the Protocol or failed to ratify it altogether. Perceptions of 'free riding' by developing countries and emerging economies led to some developed countries arguing that lack of a clear framework of participation for developing countries will make the treaty ineffective[3].

The burning of fossil fuels has, to a large extent, driven the creation of wealth and prosperity in developed countries. It is understood that increasing energy use leads to development and poverty alleviation[4]. Nearly 700 million people live in extreme poverty globally[5]. Developing countries such as India and China now want to burn cheap fuels to alleviate poverty and industrialize their economies. Given the current state of technology, increasing use of energy leads to a rise in global carbon emissions. This is increasingly complicated because the carbon space available before we tip over into dangerous levels of climate change is shrinking rapidly. It is estimated that annual emissions must fall by more than

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[2] Agarwal, A. & Narain, S., (1991), *Global Warming in an Unequal World,* Centre for Science and Environment, New Delhi

[3] Heyward, Madeleine, (2007), *Equity and international climate change negotiations: a matter of perspective,* Climate Policy 7

[4] "Chapter 13: Energy and Poverty," IEA World Energy Outlook 2002, http://www.worldenergyoutlook.org/media/weowebsite/energydevelopment/WEO2002Chapter13.pdf

[5] The Guardian, 2015, *World Bank: 'extreme poverty' to fall below 10% of world population for first time,* http://www.theguardian.com/society/2015/oct/05/world-bank-extreme-poverty-to-fall-below-10-of-world-population-for-first-time

50 per cent to third of a ton per person or less if greenhouse gas (GHG) emissions are to be stabilized in this century[6]. Therefore, mitigation by just developed countries will not be enough. It is evident that all countries must contribute to mitigation efforts - distributing that fairly is the challenge and is key to equitable outcomes. Several approaches and frameworks have been developed to operationalize equity in a global climate agreement.

Approaches to Equity

The Kyoto Protocol's distinction of action by Annex and Non Annex Parties is just one example of an attempt to distribute the mitigation burden fairly. Another proposal put forward by the Global Commons Institute is based on egalitarianism. It proposes that over time, countries should move towards equal per capita emissions, i.e. equal emissions per person. Per capita emissions of nations would thus converge, while total global emissions would contract[7]. While many developing countries embraced 'contraction and convergence', developed countries, which would have to undertake significant emission cuts, have been against it[8].

Responsibility based proposals on the 'polluter pays' principle also include the 'Brazilian Proposal' made during the Kyoto negotiations, which called for assessing responsibility for climate change and reduction of emissions in accordance with relative historic contributions to greenhouse gas emissions. This also calls for drastic emissions cuts by developed countries that have proven unacceptable. Responsibility is also tricky to assess, both morally and technically[9].

Other proposals include a framework to have no-lose targets, which may be more politically acceptable to developing countries and therefore secure their participation. Combined with binding targets for developed countries, non-binding targets could move forward the agenda of climate action. On the other hand, this approach would give limited certainty of environmental ambition and could face the same problems of the Kyoto Protocol if developing countries fail to match their targets[10]. Other approaches to operationalizing equity include using multiple criteria to calculate responsibility and divide targets among countries; an example of this is the Triptych approach[11] which allows for countries to calculate sectoral emissions in the sectors of heavy industry, electricity production and a broadly defined domestic sector and affix targets based on each sector separately based on different rules of

[6] Baer, Paul. (2002). *Equity, greenhouse gas emissions, and global common resources*. Climate change policy: A survey, pp.393-408.
[7] Contraction and convergence, Global Commons Institute, http://www.gci.org.uk/contconv/cc.html
[8] Madeleine Heyward, (2007), *Equity and international climate change negotiations: a matter of perspective*, Op. Cit.
[9] Ibid.
[10] Ibid.
[11] Hohne, N, Gakeguillos C, Blok, K, Harnisch, J., Phylipsen, D. (2003), *Evolution of commitments under the UNFCCC: Involving newly industrialised economies and developing countries*, European Business Council for a Sustainable Economic Future, Germany.

calculation[12]. However, comparability of effort is harder to assess given differing national circumstances and economic systems. Some countries will be at a real disadvantage, making such a framework unviable[13].

Last but not least, the Equity Reference Framework proposed by Climate Action Network calls for an effort sharing framework where national allocation of global action on mitigation and adaptation is based on indicators of equity such as capability, responsibility, need, adequacy and the right to sustainable development. This too failed to materialize as a result of a lukewarm reception by some developing countries over challenges relating to the practicality of using indicators[14].

Failure in operationalizing equity

The failure of these frameworks has been at two levels: normative and practical. The framing of climate change and climate action as a problem of limited space, constraints, emission cuts and subsequently the backlash that was captured in the 'right to pollute' argument led to divisive, backward looking politics characterizing negotiations over equity and differentiation, and creating a deadlock that would last nearly 20 years. The idea of a limited carbon space within which humanity must adjust and allocate resources while technically correct, imposed a negative paradigm on the principle of equity, leading to countries scrambling for space and growing concerns over free-riding by others and ending in the eventual failure of the Kyoto Protocol, which attempted to capture this approach through clear separation of responsibilities. But why is the reframing of issues, in this case replacing the right to pollute actually important?

Frames are the way we see things and define them. They provide "cognitive shortcuts" that helps us better understand complex information[15]. Frames are also a filter; they use perceptions to simplify selectively, enabling people to see the spectrum of a problem[16]. This is precisely why framing is so important to conflict resolution and facilitating agreement. Frames can create incompatible versions of events that then strengthen impasses in negotiations between parties[17]. The framing of a conflict can thus influence the direction it takes as well as the chances for its resolution. One argument may be persuasive or chosen over others because of representations or characterization of certain situations, essentially frames. Frames also tend to influence the assessment of fairness and legitimacy in international regimes and their effectiveness[18]. Last but not least, a choice of a particular frame

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[12] Metz, Bert, et al. (2002) *Towards an equitable global climate change regime: compatibility with Article 2 of the Climate Change Convention and the link with sustainable development*, *Climate Policy* 2.2-3: 211-230.

[13] Madeleine Heyward, (2007), *Equity and international climate change negotiations: a matter of perspective*, Op. Cit.

[14] Xolisa Ngwadla, Discussion Note prepared for workshop on '*Building the Hinge: Reinforcing National and Global Climate Governance Mechanisms'*, December 2013, CPR India

[15] Kaufman, S, Michael E. and Deborah S. (2003) "Frames, Framing and Reframing." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder

[16] Ibid.

[17] Ibid.

[18] Young, O. R. (2011). *Effectiveness of international environmental regimes: Existing knowledge, cutting-edge themes, and research strategies*. Proceedings of the National Academy of Sciences, 108(50), 19853-19860.

determines the indicators we then use to measure risk, costs, progress, effects and consequences. Framing is thus critical to equity considerations and for designing an effective environmental agreement.

The second failure of these frameworks to operationalize equity was to do with their practicalities. The challenge of affixing precise allocations of carbon space to countries and/or citizens is obvious. Further, asking developed countries to undertake a drastic reduction in emissions in order to conform to the space allocated to them would be unworkable politically. Calculations of carbon budgets by country are also usually done on the basis of their population. It would be unfair after all to ask China to emit the same as the US given it has roughly four times the population. However, creating a system where per capita emissions are fixed and which then add up to country level budgets is also nearly impossible. Per capita emissions are never equal in reality within countries as economic and social position, peculiarity of needs and lifestyles, all render that meaningless. An overemphasis on science and technocratic principles thus compromises the effort to agree on an effective system for equity and differentiation in practice.

Paris Agreement, NDCs and Equity

In fact, it was the challenge of affixing quantified emissions limitation and reduction targets that led to calls for a change from the top down approach that had characterized the climate agenda post Kyoto. Bottom up approaches would certainly have greater appeal as equitable, in so far and at least by the countries that undertake them. It was argued by scholars that the top down approach was doomed to fail as it borrowed analogies from agreements such as the Ozone regime and the Strategic Arms Reduction Treaty (START) that posed fundamentally different challenges than the problem of climate change[19].

Proponents for a "clumsy" approach to climate governance which highlighted the importance of an ambitious 'direction of travel' over timetable based targets and a proliferation of policy tools to initiate bottom up action in nations began to gain prominence, particularly after the failure of Copenhagen in 2009[20]. A bottom up approach would also give weightage to adaptation, long ignored in the race to the bottom that characterized mitigation commitments. The bottom up approach does carry the risk of diminishing the ambition required to avoid dangerous levels of climate change as well as a requirement for mutual assurance on action being taken[21]. However, the struggles of the top down approach as well as the growing understanding that climate change challenges need to be broken down as well as tagged on to other cross cutting issues such as poverty, development and energy access has meant that the bottom up approach became the favored option for policymakers.

The concept was further solidified with the idea of Nationally Determined Contributions, an idea that first arose in the form of Nationally Determined *Commitments* at COP 19 in Warsaw (2013). The idea underwent several transformations to make it more acceptable to all member states before the final

[19] Rayner, Steve. (2010), *How To Eat An Elephant: A Bottom-Up Approach To Climate* Policy, Climate Policy 10.6
[20] Ibid.
[21] Madeleine Heyward, (2007), *Equity and international climate change negotiations: a matter of perspective*, Op. Cit.

version of Intended Nationally Determined Contributions (INDCs) was agreed upon in Lima the following year at COP 20. In the lead up to Paris, all countries were asked to submit INDCs as agreed upon in Lima, detailing their commitments and plans for climate action in the years to 2030. The bottom up, INDCs approach therefore introduced the concept of self – differentiation in the climate change agreement, where instead of top down goals for climate action, countries will act in line with their national capabilities and responsibilities. The voluntary pledges and review system was encouraged in the hope that it would lead to a global consensus on climate action, something which had been unachievable in nearly 20 years of negotiations. Self-differentiation therefore became the tool of choice to implement the principle of equity after past failures.

Is self-differentiation enough?

The NDCs grant the Paris Agreement a degree of self-differentiation missing from the Kyoto Protocol. On the one hand, countries' voluntary commitments make it more likely that they will follow through and implement the global agreement. On the other hand however, self-differentiation by itself will be no guarantor of equity. While the Kyoto Protocol failed in the end, how the principle of equity was conceptualized was clear in its design. Differentiation between Annex I and Non Annex I Parties in mitigation commitments embedded equity in the Protocol.

In the Paris Agreement, top down differentiation has been blurred. Self-differentiation is not enough. This is because the INDC process can only confirm *interest* and not *equity*. Countries will aim to do their fair share on climate action, and concerns over equity may be one factor in the calculation of interest, but it is hardly likely to be the defining factor[22]. Interest here represents what is best for the country and its people, while equity is based on what we consider morally right or just[23]. Interest and equity are therefore different concepts and equity should not become a cloak for pushing agendas of national self-interest. The UNFCCC process has unfortunately seen much of this in the previous 24 years, understandably so, as interest is likely to override concerns of equity[24]. The risk of the Paris Agreement is that certain countries may not have signed up to do enough, thereby increasing the threat of climate change, which is then unfair on countries that are particularly vulnerable to climatic impacts.

There are examples in history of equity concerns overriding interest too, for example in the abolishment of slavery or the extending of voting rights. To overcome the dominance of interest which has plagued climate negotiations since Kyoto 1997, equity will have to escape from the clutches of legality and scientific modelling, an approach that has failed thus far, and instead be defined by a positive, moral, forward looking agenda. Achieving progress on debates over equity will not just ensure the viability of the Paris Agreement, it may also contribute to increased rather than diluted ambition in the climate agenda. For this to happen, reframing the arguments that drive equity considerations may be critical.

[22] Ashton, J., & Wang, X. (2003). *Equity and climate: in principle and practice*. Beyond Kyoto: Advancing the international effort against climate change.
[23] Ibid.
[24] Ibid.

Ensuring equitable outcomes going forward

The Paris Agreement is the first multilateral environmental agreement to make an explicit reference to the question of human rights. Although negotiations over the final text ended up in the removal of human rights from the main agreement, the preamble of the agreement contains a reference to human rights. While the references do not create new legal obligations for Parties to the Paris Agreement, they do highlight the importance of the obligations countries have to existing human rights treaties and laws to which they may be party[25]. The Paris Agreement also contains a reference to a new term called "climate justice" in the preamble. The term has connotations for both distributive justice and corrective justice considerations. The former is to do with the division of emission rights and distribution of resources, i.e. quantified financial support for developing countries for mitigation and adaptation[26]. The latter term is linked with the issue of 'loss and damage'[27]. Both have been contentious issues in the context of equity in climate change. With the reference to human rights and climate justice in its preamble, the Paris Agreement provides a window of opportunity for reframing questions over differentiation and equity and overcome past failures in operationalizing the same. As discussed in the previous section, the Paris Agreement built on the practice of self-differentiation has not yet resolved these issues. I introduce two frameworks in this paper which may help lead to equitable outcomes in the new climate regime.

First, the right to pollute, for so long the basis of equity justifications in the context of distributive justice, is a negative approach to a problem requiring positive, morally based, transformational change. The right to pollute approach also faces logistical and practical challenges, which were highlighted previously. As the world hurtles towards dangerous levels of global warming, attempting to distribute the mitigation burden with a definite level of finality risks wasting precious time and political capital from potentially more productive ground.

The extreme threat of climate change necessitates that effective climate action going forward will need commitments by all states to constrain emissions, irrespective of their developmental or social challenges. In fact, failure to act on climate change on the part of certain developing nations despite knowledge of the dangerous consequences may itself be unfair on the countries who are doing their bit. At the same time, all countries cannot and should not act equally. Some countries have greater needs for development and energy access.

I propose that the right to pollute be replaced by the *right to sustainable development* as a driver of equity. The Sustainable Development Goals (SDGs) are already a key target for the world over the years 2015-2030[28]. The right to sustainable development encompasses concerns over development and energy access, while ensuring that energy systems correspond to the needs of constraining carbon emissions and moving towards cleaner, more sustainable technologies. Last but not least, the right to

[25] Savaresi, Annalisa (2016), *The Paris Agreement: a new beginning*? Journal of Energy & Natural Resources Law, 34:1, 16-26
[26] Ibid.
[27] Ibid.
[28] *Sustainable Development Goals*, United Nations, https://sustainabledevelopment.un.org/?menu=1300

sustainable development is actually one of the core principles of the UNFCCC, enshrined in Article 3.4 of the Convention in 1992.

Secondly, to facilitate effective action on climate change and the protection of the right to sustainable development, we need a system based on the principle of ''climate reparations''[29], which recognises the loss and damage suffered by states who could not adapt to climatic events and may not be able to do so in the future, and secondly a system to increase financing of adaptation, which protects the *right* to sustainable development for people living in countries particularly vulnerable to the impact of climate change.

Indeed, the framework of rights logically implies that if there are those whose rights have been violated, compensation is due to them. Adaptation therefore is about protecting the right to sustainable development, while, reparations are compensations for when those rights were violated. Therefore, the two frameworks introduced in this paper are intrinsically linked and mutually reinforcing.

Right to Sustainable Development

Discussing climate change in the context of ''human rights'' is an approach distinct from the preferred narratives of a cost benefit analysis approach, the security implications of climate change, or the ecological approach, which condemns humanity's exploitation and destruction of the planet[30]. Climate change does however impact on people's fundamental rights, especially the right to life, the right to subsistence and the right to health[31]. These three rights taken together constitute the essence of the right to sustainable development. The rights and more specifically right to development approach enables climate change to be tied to other challenges facing humanity, thereby increasing the agency of actors and bringing in a wider set of stakeholders in the climate agenda.

The framing of climate change as a 'right to development' problem is an alternative to it being framed as an environmental issue, which is considered to be both the responsibility and privilege of rich nations, as poor countries must pursue their developmental imperatives and cannot be held responsible for the transgressions of others[32]. The benefits of linking climate change to sustainable development is that it could alleviate concerns of developing nations of their capacity vis. a vis. economic growth and mitigation commitments[33]. Shifting the locus of climate action away from the right to pollute and instead to the right to sustainable development not only addresses developed country worries over sharing the mitigation burden and that developing countries might develop irresponsibly, but also does not ignore developing country needs and aspirations for economic prosperity and poverty alleviation.

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[29] Burkett, Maxine. (2009), *Climate reparations*, Melbourne Journal of International Law 10

[30] Caney, Simon. (2010), *Climate change, human rights, and moral thresholds*, Climate ethics: Essential readings: 163-177.

[31] Ibid.

[32] Metz, Bert, et al. (2002) *Towards an equitable global climate change regime: compatibility with Article 2 of the Climate Change Convention and the link with sustainable development*, Op. Cit.

[33] Madeleine Heyward, (2007), *Equity and international climate change negotiations: a matter of perspective*, Op. Cit.

This is the heart of the equity question – how to address historical responsibility and differentiated capabilities.

Critics of such an approach may note that it is unstructured and allows for too much leeway. However, the positive forward looking of sustainable development, which is in the interest of all, is an agenda that has already been agreed to by all countries and contains co-benefits and opportunities associated with mitigation action, which may prove to be a successful way of moving the equity debate forward. This is because creating an approach that prioritizes opportunities and benefits makes it more likely that perceptions of equitable outcomes are likely to be favorable. As Najam et al point out, sustainable development must not only be seen as in the interests of the global south[34]. Sustainable development is an agenda both influenced by and shaped by our climate imperatives and the agenda of sustainable development certainly requires mutually reinforcing mitigation and adaptation action, the former a key focus of the developed world. To put it simply, the world in which climate policies will be most effective is a world in which the sustainable development agenda is at the forefront of what we do both nationally and internationally[35].

For this to happen, a normative reframing, from the right to pollute to the right to sustainable development must be followed by an attempt to identify and maximize the synergies between climate action and sustainable development. Improvements in the area of energy efficiency, renewable energy, sustainable land-use and clean air policies through greater focus on technology transfer and innovation will contribute to maximizing our efforts on climate change and development, instead of the focus on contracting and dividing limited resources. The success of the sustainable development agenda may not be contingent on equitable outcomes in the climate regime, but, equitable outcomes in the climate regime are certainly contingent on the importance and *right* of all people to sustainable development[36].

"Climate reparations": the case for Loss and Damage

The implications of considering climate change in the context of human rights are that one must also consider situations where human rights are endangered by climate change, or cases where those rights were violated. As Caney notes, if climate change violates human rights, it is only natural that compensation must flow to those whose rights have been violated[37]. Loss and Damage is one such scenario.

Loss and Damage pertains to impacts of climate change which cannot be adapted to and where there is irreversible loss. The Warsaw Mechanism on Loss and Damage was introduced at COP 19 in 2013 and outlines a framework of action on the subject including enhancing of knowledge, action and support

[34] Najam, A., Huq, S., & Sokona, Y. (2003). *Climate negotiations beyond Kyoto: developing countries concerns and interests*, Climate Policy, *3*(3), 221-231.
[35] Beg, Noreen, et al. (2002), "*Linkages between climate change and sustainable development*." Climate policy 2.2-3: 129-144.
[36] Najam, A., Huq, S., & Sokona, Y. (2003). *Climate negotiations beyond Kyoto: developing countries concerns and interests*, Op. Cit.
[37] Simon Caney, (2010), *Climate change, human rights, and moral thresholds,* Op. Cit.

associated with the issue of loss and damage. The Paris Agreement contains a central clause on Loss and Damage. The clause points to the importance of the Warsaw Mechanism for taking forward action on Loss and Damage as well as identifies areas of cooperation such as early warning systems, risk insurance and risk assessment and management[38]. The Agreement makes no mention of compensation for such losses and in fact, the text of the COP decision accompanying the Paris Agreement specifies that the provision on loss and damage 'does not involve or provide a basis for any liability or compensation'[39].

However, while legal recourse and compensation on the basis of liability is never likely to be politically viable or logistically enforceable in the context of climate change, a system of compensation for permanent loss and damage which takes away the right to sustainable development is key to equitable outcomes from a new climate regime. Numerous scholars have noted that solving the problem of climate change is impossible without addressing questions of justice and more particularly, questions over transfer of technology, finance and support to address the impacts of climate change[40].

A system of climate reparations has been discussed by Maxine Burkett who contends that reparations must take the form of commitment to do no further harm i.e. mitigation action and support for adaptation initiatives[41]. Reparations are broadly defined as activities that are justified by past harms and correct the harm and improve the lives of victims in the future[42]. International law recognises three components of the reparations process – first, re-establishing the situation that existed prior to the wrongful act being committed, secondly, compensation for harm done and third, satisfaction i.e. the acknowledgement of harm done, apology, truth telling and non-repetition[43]. The first part i.e. returning of the status-quo is clearly not possible in the climate change context. Adaptation and loss and damage comprise the second and third part of the reparations framework respectively.

The intransigence of developed countries on issues relating to liability and compensation indicate that direct compensation or reparations may be unworkable. However, a system based on the principle of ''climate reparations'', that acknowledges situations where that right has been lost and provides financing for adaptation to protect the right to sustainable development is critical for long term effectiveness of the new climate regime. It is crucial here to note that this new framework does not suggest compensation for loss and damage per se, an option that as it currently stands, has been precluded by the Paris Agreement. Rather it invokes the principle of acknowledgement of harm done through the form of permanent loss and damage and shifts financing to a forward looking agenda of financing for adaptation rather than a backward looking compensation framework. It is also important to note that historical examples of reparations have included compensation in the form of financing and aid without liability of governments to lawsuits from citizens of other countries. A notable example is the case of Japan and Republic of Korea after World War II. The Agreement on Basic Relations signed between the two countries saw Japan provide Korea with a total of $800 million as "economic

[38] Article 8.4, Paris Agreement
[39] Paris Agreement COP Decision 52
[40] See for example the papers included in Stephen Humphreys, Human Rights and Climate Change (Cambridge University Press 2009).
[41] Burkett, Maxine. (2009), *Climate reparations,* Op. Cit.
[42] Brophy, Alfred, (2006), L. *Reparations: Pro and Con*. Oxford University Press.
[43] Burkett, Maxine. (2009), *Climate reparations,* Op. Cit.

cooperation'' in the form of grants and loans[44] and in turn waived Japanese liability in the face of possible individual lawsuits by Korean citizens.

Without an effective agreement on loss and damage, the notion of corrective justice will never be resolved under the new climate architecture post Paris. History tells us that failure to resolve even one of the two notions of justice in the context of climate change may be enough to create perceptions of inequitable outcomes and derail global consensus. The Warsaw Mechanism on Loss and Damage is up for review in 2016. It is crucial that a system of direct financing for adaptation and acknowledgement of harm done is integrated into the mechanism going forward. This system based on the principle of ''reparations'' will strengthen the engagement of developing countries with climate action; enable them to pursue an agenda of sustainable development and build trust among key actors, critical to effective and equitable outcomes in the battle against climate change.

Conclusion

Although currently essentially placeholders in the Paris Agreement, climate justice and human rights are only likely to gain importance in the years to come as the climatic impacts become more and more extreme. The real threat of climate change induced migration for instance has been referred to in the Decision text of the Paris Agreement as part of the section on Loss and Damage[45]. This is likely to be revisited in coming years.

The effects and impacts of climate change are creating and will continue to create burdens on countries and their populations. Two burdens in particular are of importance and always have been: that to reduce emission of GHGs to prevent further global warming (mitigation), and secondly, to devote resources to adapt to climate change and prevent the most insidious impacts (adaptation)[46]. An acceptance of the burdens of climate change then raises the question of who must bear these burdens. Distributing this equitably is key to the legitimacy and thereby durability of a climate regime.

The Paris Agreement has touched lightly on issues of differentiation and equity. Self-differentiation became the tool of choice, particularly for questions around distributive justice. However, by itself it will not be enough. Attempts to redistribute mitigation burdens are likely to rear their heads once again at the first global stocktake, when progress is reviewed in light of science. This paper argues that putting the right to sustainable development first may be the key to unlocking policy changes that deliver ambitious action on both emissions and poverty.

On corrective justice, the treaty addresses the question of Loss and Damage at length, but with ambiguity and little clarity on how this issue will be addressed with a level of finality. The review of the Warsaw Mechanism on Loss and Damage in 2016 nevertheless offers further opportunity for progress in this regard. It may prove necessary however that some form of acknowledgement and/or support for

[44] Ishikida, Miki Y (2005). *Toward Peace: War Responsibility, Postwar Compensation, and Peace Movements and Education in Japan*

[45] Paris Agreement COP Decision 50

[46] Caney, Simon (2010). *Climate change and the duties of the advantaged*, Critical Review of International Social and Political Philosophy, 13(1), 203-228.

adaptation and protection of the right to sustainable development will be needed to enhance the legitimacy of the Paris regime and build trust amongst actors. This paper has introduced a framework that could make that possible.

The pressures of diplomacy, negotiations and getting 196 countries to agree to a single document all meant that any outcome from Paris would be a consensus around the minimum. It would have been unreasonable to expect 2 weeks of negotiations at COP 21 to solve dilemmas over equity that have plagued climate debates for more than 20 years. The Paris Agreement has not sidestepped differentiation, but neither has it addressed it conclusively. In the years ahead, how we deal with climate justice and human rights in the context of climate change may shape our considerations of equitable outcomes from climate governance. Going forward, eschewing an obsession with technocratic, scientific and simple and elegant solutions in favor of 'clumsy', loosely defined principles that serve as a pole star reference to questions over equity may yield more successful outcomes.