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An International Environmental Court and the International Legalism: An Overview from Legal Context

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ABSTRACT

This article gives an overview and comes up with an assessment on the recent move led by the International Court for the Environment (ICE) Coalition to get support for the constitution of an international environmental court. This paper argues about Judith Shklar's idea of legalization and its recent up-gradation by Eric Posner Eric and provides a conceptual background for looking at the idea. It also suggests that the poor attention on legal remedies emphasizing legal accountability and liability seems inadequate. In spite of the limitations, it can be said that the contribution of the ICE Coalition to the debate, on how to best deal with collective action problems damaging the environment, can help develop long-term solutions.

Key words: *International Environmental Court, Legalism, Tribunals, ICJ, ICC, Climate Change.*

Introduction

Various academic discussions and debates have already initiated centering the formation of an international court for the environment. Through participating in the discussions, the community and public groups, and legal professionals are supporting the formation of such tribunal. A collective effort on the formation of an international environmental court was seen in the late 1980s when a group of experts headed by the former Italian Supreme Court Justice Amedeo Postiglione met in Rome (Pedersen, 1992). Later, the International Court of the Environment Foundation (ICEF) was established in 1992 to lobby for the constitution of such a court. The newly established ICE Coalition, which was founded by a limited company in the United Kingdom, aimed at drumming up support for the demand of formation of an international environmental court. The proposal of setting up an International Environmental Court around 20 years back raises the question of whether there is a viable basis for serious consideration (SoIntsev, 2019). This effort is trying to gain possible support for the formation of the court. From the recent discussions, it is clear that international courts and tribunals can contribute to developing international environmental law and this suggestion can hold support the proposal for the constitution of international environment court. This paper aims to find out the conceivable relevance of formation of an international environmental court and discusses the matter based on the recent criticisms and ICE Coalition's latest proposals. It also attempts to frame the debates from the legal aspect to reach a conclusion on the jurisdictions of an environmental court. This article argues that legalism suggests a philosophical framework to interpret a court protesting against. Nevertheless, the way other international efforts aimed at resolving environmental concerns (both broadly and specifically)

can be viewed as a legalistic approach. It also argues that the ICE Coalition's particular attempt to resolve issues of international collective action through judicial means is a powerful illustration of legalism.

International Court Debate and Overview

The fundamental discussion for the establishment of an international environmental court traces its roots back to the late 1980s and early 1990s. That time, this idea drew a huge critical response. An International Congress on a More Efficient International Environmental Law organized a conference in Rome in 1989 to establish an International Court for the Environment. In light of the decision of the conference, ICEF was founded in 1992 and the same year formulated a draft law for a tribunal. In the draft legislation, the need for an environmental court was integrated with a wider viewpoint on the alleged need for an international environmental organization (Carroll, 2013). A treaty was incorporated with the draft legislation promulgating the fundamental rights to the environment for all. The draft law also stated that an ICE will be formed as a permanent body responsible for 'protecting the environment as a fundamental human right in the name of the world community.' It also suggested that the proposed court will deal with any environmental issues affecting any state or community as well as it will rule on any environmental damage by any state party or individual that affect the human beings and the environment. But, the goal of settling conflicts relating to 'environmental harm' in 'international arena' seems to be very optimistic considering the absence of a general liability framework under international law for such damages (Andresen, 2007). As a result of the aspiring target and broad nature of the draft law, it was ultimately scaled-down and a new draft treaty was adopted at an ICEF-sponsored conference in Washington in 1999 dealing only with the perceived need for an international tribunal. However, the campaign for an international environmental court first initiated at the United Nations Framework Convention on Climate Change (UNFCCC) meeting of the Parties 15 (COP15) in Copenhagen in December 2009. Then, the newly formed ICE Coalition was established in 2008 as a part of the campaign. The ICE Coalition has arranged many conferences and programs to garner support and stressed the need for an international environmental court.

It successfully campaigned and advocated for the creation of the International Criminal Court (ICC). Immediate attention needs to be paid to an international environmental court to settle the huge number of environmental issues, currently, the world facing. The moves in favor of an environmental court can be categories into two sections: one relating to the (in) effectiveness of the governments and the other linked to international court procedural procedures.

The arguments of both the sections are intertwined while the first takes a powerful turn and suggests that the existing international dispute-settlement systems are ineffective when it comes to resolving significant environmental challenges. Meanwhile, the section for the procedural critique focuses on highlighting flaws such as the lack of representation before international tribunals for non-state actors and the lack of recognition among international judges over environmental issues. For example, despite the instrumental critique, current structures are somehow struggling to provide an adequate course of action for environmental issues. The rulings of the International Court of Justice (ICJ), the World Trade Organization (WTO), and the General Tariffs and Trade Agreement (GATT) indicate sufficient facts provided by the members of an international environmental tribunal (Bodansky, 2017). The ICJ has numerous decrees underlining the importance of protecting the environment; however, it has specifically found that such concern is not convincing enough to prohibit the use of nuclear weapons (Jefferies *et al.*, 2018). These considerations should not be used as a justification for failing to meet Treaty obligations. It is where the value of an offender and special environmental court comes in. Because of the insufficiency, environmental court proponents argue that a special court could be better able to hear environmental disputes and would go some way to give the environment the particular attention it needs. This approach is understandable because adjudicatory institutions give a legal system considerable credibility in many ways. According to Gardner, "If there are no institutions charged with resolving disputes arising from non-observance of the rules, there is no legal system." So, it can be said that an international environmental court could promote the international environmental law's credibility and integrity, and perhaps provide the impetus for its development as an individual legal discipline. Nevertheless, the main

drawback of this critique overlooks the fact that the 'environmental aspects' of conflict are frequently difficult to distinguish from 'non-environmental aspects.' Although the decision of the ICJ can be considered as an environmental case in the Gabc Jeden-Nagymaros Project (Hungary v Slovakia) for many reasons, the central argument in the dispute is related to the right to unilateral suspension of treaty obligations. Of that matter, the stimulation of an expressly 'environmental' disagreement is difficult to observe without having any connection to international public law, international trade law, or foreign investment law, either. Experts claim that in such cases a generalist court is better suited than a specialist court. Sir Robert Jennings said, "However esoteric one's professed specialty may be, it is the common experience that, faced with particular problems, one is often at a loss unless one has a mastery of the elements of the ordinary everyday law."

One of the crucial evidence in favor of an international environmental court is that proceedings before the ICJ are open to states only and thus, it excludes applications from individuals and environmental bodies. Although this is counter to existing trends in regional environmental treaties (for example, the Aarhus Convention, which acknowledges in itself the significant role played by non-government organizations while at the same time denying them a central role in the work of its Enforcement Committee), there are a variety of international efforts aimed at resolving the exclusion of non-state actors. The Permanent Court of Arbitration (PCA) adopted its special rules for arbitration of natural resources and/or environmental disputes in 2011, keeping the opportunity for the move by non-state actors (Voigt, 2016). Though, the regulations of PCA have been criticized as "essentially twisting uncritical rules", they still contain some potential arguments for future environmental arbitration. Of course, a big downside of the Rules is that confidentiality gets a heavy focus to be maintained. With the result that disputes can be kept away from the general public, the parties involved in the conflict may find it very helpful. However, the interests of non-state actors not been completely ignored after considering the argument. The International Court of Environmental Arbitration and Conciliation (ICEAC) was founded in 1994 in Mexico in a move by a group of international lawyers. The Court facilitate the settlement of environmental disputes between states by conciliation and arbitration as per the agreement of the parties to the dispute after natural or legal persons placed complaint before it. However, while the court often offers consultative opinions on request and following the court's website, it appears that most of the court's decisions related to consultative opinions (often on domestic issues) and that no state has yet approved a conciliation petition.

Based on the debate and discussion from this brief overview of the environmental court that has taken place over the past 20 years, it seems that it is debatable to establish an international environmental court. However, it originates huge debates in favor and against the establishment of such an international environment court. Considering the ICJ's now abandoned environmental chamber's backlog, it would appear that states are reluctant to identify a dispute as 'environmental' with a view to international judgement. In this view, ICE Coalition's latest proposal could be a potential success.

Legalism

The idea of legalism plays a crucial role in an international perspective to define the concept of the attempts to constitute an international environmental court. The international legalism is presented as the comprehensive version of the international discourse of legalism that is done for addressing the issues of global collective action. Legalism, however, also manifests itself in the tendency towards so-called 'judicialisation' from the domestic sense (*ibid*, 2012). And, 'judicialisation' may be defined as "the transfer of decision-making rights from the legislature, the cabinet, or the civil service to the courts' or, at least, the spread of judicial decision-making outside the judicial province proper." A brief overview of some criticism relating to the concept of legalism is needed before these concepts are contrasted with the context of an international environmental court. The vital argument of legalism is that the concept is too vast and ambiguous. Many criticized that Judith Shklar in her definition of legalism unnecessarily made the readers confused with the description of two distinct terminological phenomena. Mentioning the importance of legalism as a heavy focus on court cases, it defines the "court of law and the trial according to the law are the social paradigms, the perfection, the very epitome, of legalistic morality." Legalism is often taken as involving "the ethical attitude that holds moral conduct to

be a matter of rules following, and moral relationships to consist of duties and rights determined by rules." However, such ambiguity makes the definition's credibility weaker, which does not mean that the term does not apply to the present debate, as the emphasis in this article is mainly on the first phenomenon of 'judicialisation.' Legalism would thus seem to recommend a theoretical basis in favor of an environmental court on the current appeals. These calls are especially crucial when as the intention behind these calls are related to the environmental issues. If the main purpose behind these appeals is to encourage international judicial intervention in an effort to provide a solution to environmental problems (on behalf of institutional funding for environmental concerns), then legalism would appear to be contributing to its operation. After all, it seems quite clear that these methods seem benevolent and respectable. In particular reference to the topic of anthropogenic climate change (a key point in favor of the court), the international community faces a 'super-wracked' problem and has sadly struggled to come up in possible solutions, although that is not inherently the case. Legalism, as Shklar says, is an ideology that competes with different political views. Legalism is a political philosophy that "express[es] itself in politics, in institutional structures and intellectual attitudes (Bruce, 2018) While legalists may take pleasure in adhesion to 'justice policy,' to Shklar, legalism is yet another political ideology that competes for attention in comparison to other political doctrines. While it holds no elevated position within a society in the discipline of law, it is however intertwined with politics and morality.

According to Shklar, "The tendency to think of law as ''there" as a discrete entity, discernibly different from morals and politics, has its deepest roots in the legal profession's views of its functions, and forms the basis of our judicial institutions and procedures." Accordingly, prima facie compassionate claims to 'justice reform' are reversed in part because justice is dependent in many respects. Richard Rorty says justice is a practical goal rather than a grand political objective. For him, justice is based on ideas and persuasions of truth. Justice, to him, is focused on real ideas and persuasions (Hey, 2000). "Legalism" can, however, be identified as 'a form of political action.' Applying this definition to the call for an environmental court by the ICE Coalition is promoting legal solutions, and is one of many options.

International legalism contains the idea that international law offers a ready-made answer wherever a problem of collective action is identified.

According to Tate, 'judicialization' is important where lobbyists influence debates while addressing the involvement of the judiciary as policy decisions go against their interests. The justification of the last one point gives an idea of the key arguments of the ICE Coalition that, if we relate the role of so-called epistemic communities (a network of professionals sharing a set of beliefs to facilitate a common policy) in establishing responses to the international issues. The focus on an international environmental court illustrates resolving major environmental concerns and especially man-made climate change (Faruque, 2017). Besides, there is no alternative to international institutions and laws when a global crisis arises. To some degree of its lax compliance, lack of credibility, and often low implementation levels, international legalism may be viewed as a response to the criticism of international law. So Posner observes legalism as "the world government approach except without the government. Legalists recognize that a world government is not likely soon, but they believe that law without government can nonetheless solve global problems". As a result, legalists should form a strong and independent international judiciary, as this follows smoothly from domestic legal structures. However, some significant limitations for such an approach are several environmental concerns, in particular, the multi-scalar and detailed aspects of climate change treatment. Those will probably require multiple-scale responses. As per Eleanor Ostrom: "An important lesson is that simply recommending a single governmental unit to solve global collective action problems because of global impacts needs to be seriously rethought and the important role of smaller-scale effects recognized." So it is likely to say that a focus on legal solutions that emphasize legal responsibility and blameworthiness will not prove enough.

Conclusion

Whether the international community will soon come together at any time to reach an agreement to facilitate the formation of the International Environmental Court may be a little higher than expected. However, the assumption taking the continuation of the commitment period of Kyoto Protocol into ac-

count with the ongoing stagnation seems completely unreasonable. So it can be said that if any country does not come forward even though they are trying to reduce greenhouse emissions and other environment problem to protect economic development and environmental recovery, then it is clear that the states are not supporting the formation of an international environmental court. Meanwhile, campaigners for an international environment court can find some particulars that most of the states are more interested to provide compelling authority to specialised courts or tribunals limited judicial powers. The jurisdiction of the ICC, for example, is limited to genocide crimes, crimes against humanity, war crimes and the crime of aggression. Arguably, all this discussion suggests a constructive answer to creating a special environmental court, as it has a greater chance of seeing light eventually.

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