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978-1-107-08017-1 - Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law

Thomas Cottier

Excerpt

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## Equity revisited: an introduction

The way is equity, the end is justice

*Aroa Mines Case*, Frank Plumley, Umpire, Venezuelan Arbitration  
of 1903, Ralston's Report p. 385–7

### I. The renaissance of equity

#### A. *New frontiers*

The enclosure of the seas in the twentieth century silently, but fundamentally, reshaped the geographical allocation of marine resources between coastal states. The partial return to a philosophy of *mare clausum* amounts to the most profound revolution of quasi-territorial jurisdiction of nations over natural resources embedded at sea. The new territorial allocation was prompted by the emergence of the continental shelf doctrine in the 1950s and of the exclusive economic zone (EEZ) in the 1970s, both today codified by the 1982 United Nations Convention on the Law of the Sea. The movement brought about new and fundamental challenges within the Westphalian system of nation states. Claims and responses to maritime resources called for an assessment of the newly emerging customary law and, subsequently, of treaty law. This resulted in the allocation and fine-tuning of jurisdiction and control over mineral resources, including oil and gas, and living resources, in particular fisheries. Allocation resulted in horizontally shared rights over resources, derived from the extension of land masses of coastal states. The doctrine of the continental shelf was based upon the extension of the land mass. Today, the concept of the continental shelf combines the criteria of natural prolongation with that of distance, extending to a minimum of 200 nautical miles (nm). At least within those 200 nm, both the continental shelf and the coincident EEZ rely upon the configuration of the coast. The enclosure movement resolved problems of competing claims under the doctrine of the freedom of the seas. It brought about new rights and responsibilities for coastal states. But

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it also brought about new and fundamental questions of distributive justice on two principal accounts. Both triggered a renaissance of equity in international law.

Firstly, the foundations of the enclosure movement are, in hindsight, essentially based upon the philosophy of permanent sovereignty over natural resources of coastal states. This assignment of jurisdiction to states over portions of the ocean may allow those to regulate the use of marine resources in an efficient manner and by those who are mostly interested in the matter.<sup>1</sup> At the same time, the allocation of jurisdiction and powers on the basis of geographical features and political boundaries led to a widely uneven distribution of marine resources, which raises fundamental problems of distributive justice and of global equity in contemporary international law. Both, the continental shelf and the EEZ limited the problem of distribution to coastal states, at the exclusion of land-locked and other geographically disadvantaged states. Large coastal states, but also small island states, largely benefited from the movement and acquired jurisdiction over vast expanses of the sea. Isolated islands, even uninhabited ones, enjoyed a renaissance and became of paramount importance as base points delineating maritime jurisdictions of coastal states. As a result, the enclosure movement amounted to a paradigm of unequal allocation of natural resources, often amplifying the jurisdiction of already large nations with extensive coastal margins. The new allocation of resources was meant to overcome the tragedy of the commons<sup>2</sup> and the lack of responsibility for resource management under the previous regime of the high seas and its largely unrestricted freedom of exploitation. The enclosure movement succeeded partly, but also brought about new and unsettled problems. Exploitation of oil and gas resources increased – given enhanced legal security – thus accelerating the depletion of scarce and non-renewable resources. Over-fishing and depletion of livestock was partly reduced and partly enhanced under the new EEZ, depending on the resource management policies of coastal states. While conditions for coastal fisheries in particular improved in some of zones, the granting of licences also became more lucrative and many nations failed to develop adequate

<sup>1</sup> Eric Posner and Alan O. Sykes, 'Economic Foundations of the Law of the Sea' (16 December 2009) *University of Chicago Law & Economics*, Olin Working Paper No. 504' (available at SSRN: <http://ssrn.com/abstract=1524274>); see however, Bernard H. Oxman, 'The Territorial Temptation: A Siren Song at Sea, Centennial Essay' (2006) 100 *American Journal of International Law*, 830, 849.

<sup>2</sup> Garret Hardin, 'The Tragedy of the Commons' (1968) 162 (3859) *Science*, 1243.

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means to police and patrol their seas. While the outcome probably would not have been any better absent the advent of the EEZ, it should be noted that it was wrong to assume that territorialization in itself would solve conservation problems in all places.<sup>3</sup> The fate of the remaining high seas and its resources was left to the commons, devoid of sufficient management and governance. It was essentially left on its own under the doctrine of freedom of the seas. That this general economic problem justifies some kind of international regulation of the oceans has been widely recognized.<sup>4</sup> Yet overall, the law of the sea, some thirty years after the adoption of the United Nations Convention on the Law of the Sea, remains a field with ticking time bombs and unresolved issues. It still faces a host of issues relating to distribution other than that of territorial jurisdiction over natural resources. They range from deep seabed mining in the area and related transfers of technology to the co-ordination of communication and extraction of resources; from the compensatory rights of land-locked and geographically disadvantaged states to finding a proper balance in preventing and combating marine pollution, chronic over-fishing and the preservation of biodiversity.

Exploring the foundations of the continental shelf doctrine and of the EEZ thus amounts to a fascinating legal history inquiry into the process of international law, the emergence of new concepts in customary and treaty law, and into the effect they produce. The inquiry takes place within the parameters of the classic international law of co-existence. While co-operation between coastal states can be occasionally found, it is determined by classical precepts, far from current ideas of the law of integration, which tends to remove the importance and relevance of territorial allocations and of political boundaries. It examines the extent to which future problems of the law of the sea can still be managed under traditional precepts, and to what extent new forms and structures of global governance and enhanced integration are called upon.

Secondly, the enclosure movement triggered the need to settle new boundaries in an overall context which does not respond to the ideals of distributive justice for the reasons set out above. Demarcation causes political tensions; the difficulties that arise have still not been resolved

<sup>3</sup> See Oxman 2006, n. 1, 849, stating that the environmentalists should have at least exacted a higher price for accommodating the territorial temptation 'before it consolidated its grasp on the living resources of the EEZ'.

<sup>4</sup> See e.g. Robert L. Friedheim, 'A Proper Order for the Oceans: An Agenda for the New Century' in Davor Vidas and Willy Østreng (eds.), *Order for the Oceans at the Turn of the Century* (The Hague: Kluwer, 1999), pp. 537, 539.

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after more than half a century. New international tensions, even conflict, may arise. Even when oil and gas extraction has been completed, new uses, such as wind, tidal and biomass energy as well as the potential of carbon storage, will maintain interest in the jurisdiction over the shelf. New claims, partly induced by the melting of the ice cap in the Arctic Circle, have been introduced. The issue of proper allocation of rights and obligations is far from settled. Among all the challenges of distributive justice, the problem of maritime boundary delimitation between adjacent and opposite coastal states perhaps amounts to the most prominent issue. From the legal and methodological point of view, it clearly is the most interesting aspect of distributive justice in the field. This is not only true for the law of the sea, but perhaps for all of international law within the classical body of the law of co-existence of states. True, particular issues of distributive justice, delimitation and sharing of resources have not been alien to international law prior to the enclosure of the seas, in particular relating to the law of water and waterways, or the determination of land boundaries. Yet, compared to the challenges posed by the enclosure movement, they have remained of lesser scope and impact in, and on, international law.

Maritime boundary delimitation became of importance in a manner unprecedented in history. It became the subject of a multitude of bilateral agreements and the foremost occupation of the International Court of Justice (ICJ) and courts of arbitration throughout the second part of the twentieth century. No other field of law, except for trade regulation and investment protection, has been exposed such a significant stream of case law. It is in this field that the quest for distributive justice materialized in its most sophisticated manner. It is here that equity experienced its renaissance and became one of the leading principles in allocating natural resources among nations. Maritime boundary delimitation became the main legal battle field of trial and error in discharging distributive justice among nations before courts of law in a context which overall does not respond to distributive justice but to the vagaries and accidents of geography and political boundaries. It amounts to the main legal test as to whether and to what extent public international law is, in a given and difficult context, able to discharge distributive justice, both among and between generations, given the divergence of states in terms of size, prosperity, power and development operating under the laws of co-existence and of co-operation under the United Nations. It largely tells us to what extent international law has been able to bring about the fair distribution of

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resources under the inequitable foundations of maritime zones and among unequal nations, and to contribute to sustainable use of resources in the long run. The topic could not be more classical, essentially for three reasons:

Firstly, we deal with a prime field of classical international law. The law of the sea has been at the outset of the law of nations. Many of its concepts were shaped by the need to regulate navigation, commerce and marine spaces. It has nurtured the evolution of international law. Many concepts born in this context have found applications in other areas of international life and law. Findings in the law of the sea continue to have the potential to spill over into other areas of public international law and become of generic importance. They are of general interest to the discipline. This is particularly true for the judicial function, the application of general principles and the role of precedents of courts.

Secondly, boundaries, in general, and both on land and sea, are a paradigm of the law of co-existence. They separate, distinguish, segregate and allocate jurisdictions and control. They are the opposite of integration, which removes such boundaries, and play a reduced role in the law of co-operation. In this era of globalization, it is perhaps worth recalling that political boundaries amount to the most basic and profound expression of the traditional system of nation states and the quest and claim of sovereignty over land, people and natural resources. They are a paradigm of co-existence for humans and states. They are at the core of classical international law and relations. The history of mankind is a history of boundaries. Many wars have been fought over them and many lives lost. From ancient times to the end of World War II and beyond, the struggle for land and resources has largely determined human conduct in the pursuit of power and influence, with law playing just a minor role. It is only since the end of World War II and the completion of decolonization in the 1970s, the end of the Cold War in the 1990s and the decline of ideological battles among industrialized and emerging countries, advances in co-operation, enhanced market access and regional integration in parts of the globe, that the importance of territorial control has somewhat declined and is no longer the primary factor used to determine power and influence. Some boundaries have even been surrendered, leading to unification. The law and policy of co-operation and integration has shifted interests to other forms of securing access and political and economic influence. An open trading system under the auspices of the World Trade Organization (WTO), supported by other organizations and programmes, and by

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high levels of economic interdependence, has gradually reduced the paramount importance of boundaries. The principle of non-aggression, limiting legitimate war to individual and collective self-defence and perhaps humanitarian intervention, has profoundly reduced the potential for territorial expansion. Governments have found other methods of securing their interests abroad. Yet wars have persisted, not only at a local level, and minorities continue to struggle in pain for self-determination. Land boundary disputes will continue to persist in the struggle by minorities for self-determination, yet overall, the map of nations has largely stabilized and attempts to further change it risk forceful intervention by the international community. In many instances, land boundary disputes will be a matter of completing existing boundary regimes.<sup>5</sup> Despite the obvious deficiencies of many frontiers inherited from colonization, the ICJ held that their modification can hardly be justified, for reasons of stability, on the ground of considerations of equity.<sup>6</sup> Compared to other periods of history, it is safe to say that the nuclear age and the system of multilateral security following World War II has, by and large, stabilized territorial allocations, at least for the time being.

The situation is completely different in the field of marine expanses. Whilst the appropriation of land has stalled, the large-scale taking of marine spaces has emerged instead. Boundary making in the twentieth and twenty-first centuries mainly relates to the seas, an area covering more than 70 per cent of the globe's surface. Once again, appropriation is a matter of securing national sovereignty over resources, and securing power.<sup>7</sup> In fact, as Bernhard Oxman puts it '[t]he territorial temptation thrust seaward with a speed and geographic scope that would be the envy of the most ambitious conquerors in human history'.<sup>8</sup> Again, we are dealing with the core of the classical law of co-existence. Yet, humankind was faced with an entirely new problem, which – fortunately – could not and cannot lawfully be approached using traditional methods of securing sovereignty. The principles of non-aggression and non-intervention preclude the lawful use of occupation by military means or other forms

<sup>5</sup> See e.g. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria) (Equatorial Guinea Intervening)*, ICJ Reports 2002, p. 303.

<sup>6</sup> *Frontier Dispute (Burkina Faso v. Republic of Mali)*, Judgment, ICJ Reports 1986, p. 554, para. 149.

<sup>7</sup> See generally John R. V. Prescott, *The Maritime Political Boundaries of the World* (London, New York: Methuen, 1985).

<sup>8</sup> Oxman, n. 1, 832.

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of coercion. For the first time in modern human history, allocation of resources was bound to take place within and on the basis of law. It is no coincidence that peaceful negotiations and courts of law have played a much more prominent role in shaping the law of marine boundaries than was the case in the field of land boundaries.<sup>9</sup> Successful delimitation reinforces the role of boundaries. Failure to settle them and to find appropriate models of resource management are indications that new approaches will be required, either based upon co-operation and joint exploitation of marine resources or full integration which entirely removes old needs for boundaries and thus the paradigm of mere co-existence. The same may be true for other jurisdictional aspects such as the regulation of navigation, where unilateralism leads to particularly protracted situations

Thirdly, and of main importance in the context of this study, the operation of maritime boundary delimitation in international law emerged on the basis of equity and equitable principles. It gave rise to a renaissance of equity. Initially, no general rules existed on how maritime boundaries should be drawn in disputed cases, and the issues were complicated, given a background of maritime zones which themselves do not respond to ideals of distributive justice. It is here that equity entered the stage and started to work. The quest for distributive justice within a given conceptual framework of the continental shelf doctrine and the EEZ and of the co-existence of coastal states has been answered by the ICJ, courts of arbitration and treaty making by recourse to equity, equitable principles and equitable solutions. The process, in other words, took recourse to the fundamental principles of justice in the life of the law. This has significance far beyond the technical subject of maritime boundary delimitation.

In an inductive process of trial and error, a doctrine and methodology of delimitation emerged, partly in competition with efforts at law-making, and by way of recourse to geographical and predictable principles of delimitation, in particular the principle of equidistance. Different and competing methodologies were developed. Extensive case law and scholarly work offers a fascinating and complex account of trial and error in finding and shaping the rules, factors and methodology of maritime boundary delimitation over the last fifty years. It is

<sup>9</sup> See e.g. the Arbitration for the Brcko Area which took recourse to equitable principles with reference to the case law on maritime boundary delimitation (Arbitral Tribunal for Dispute over Inter-Entity Boundary in Brcko Area (''), para. 88, reprinted in 36 ILM 369 (1997), pp. 427–8.



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the most prominent, if not exclusive, field where equity and equitable principles have been developed and applied in a unique series of case law in recent public international law. It will be seen and argued, throughout this book, that its principles and rules essentially rely, in a unique manner, on judge-made law based upon the broad precept of equity. Different schools of thought and jurisprudence are involved. They offer valuable insights into the relationship of equity and the application of strict rules subject to exceptions, and its relationship to decision-making *ex aequo et bono* in accordance with Article 38 of the Statute of the ICJ. Equity developed novel features in terms of legal methodology with a view to combining legal objectivity, fairness and the avoidance of unfettered subjectivity of decisions taken. It profoundly reshapes traditional perceptions of the role of judges and the persistently alleged absence of judge-made law in international relations. In addition, a wide body of international agreements allows the comparison of these judge-made principles with agreed diplomatic solutions and the establishment of a common ground in international law. Finally, it raises the issue of extent to which the international law of the Society of States of the Westphalian system reaches beyond co-existence and is able to venture into domains of distributive justice among nations.

In order to prepare for this, we turn to a brief history of the different functions of equity in legal systems and in international law and introduce a number of theoretical problems at the end of this introduction.

### *B. Traditional functions and the decline of equity*

Equity (*équité*, *Billigkeit*) has been a companion of the law ever since rule-based legal systems emerged. It offers a bridge to justice where the law itself is not able to adequately respond. Equity essentially remedies legal failings and shortcomings. Rules and principles of law are essentially and structurally of a general nature. Their prescriptions predictably apply to future circumstances. They seek to steer and influence future conduct of humans. They create expectations as to lawful conduct and stabilize human relations. Yet, the law is not complete. Sometimes answers are lacking, or the application of the law fails to bring about satisfactory results in line with the moral or ethical values underlying contemporary society. It is here that the companion of the law enters the stage. Aristotle authoritatively described completing and rectifying functions of equity within the law in the *Nicomachean Ethics*:



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[A]ll law is universal, but there are some things about which it is not possible to speak correctly in universal terms . . . So in a situation in which the law speaks universally, but the issue happens to fall outside the universal formula, it is correct to rectify the shortcomings, in other words, the omission and mistake of the lawgiver due to the generality of his statement. Such a rectification corresponds to what the lawgiver himself would have acted if he had known. That is why the equitable is both just and also better than the just in one sense. It is not better than the just in general, but better than the mistake due to the generality. And this is the very nature of the equitable, a rectification of its universality.<sup>10</sup>

The functions of equity, however, are not limited to a static concept of law reflected in Aristotle's conception. It goes beyond completing and corrective functions. All legal systems face the problem that rules and principles that were shaped and developed in the past may no longer be suitable for achieving justice under changing conditions. Moral and ethical attitudes and perceptions change as society changes. Society changes as factual conditions change due to economic or technological developments, which create new regulatory needs. For centuries, equity has served the purpose of facilitating legal adjustment and bringing laws in line with contemporary perceptions of justice and regulatory needs. The function of equity therefore equally entails the advancement of the law in the light of new regulatory needs. It offers a prime response, laying foundations for new developments which eventually find their way into the body of legal institutions.

Historical and comparative studies demonstrate the point. A study published in 1972 and edited by Ralph A. Newman recalls that the functions of equity are inherent to all the world's legal systems.<sup>11</sup> They can be found in Greek law (*Epieidia*), in Roman law (*Aequitas*), but also in the Judaic tradition referred to as justice (*Elohim*) or mercy (*Jhyh*). They can be found in Hindu philosophy in the doctrine of righteousness (*Dharma*), and also in Islamic law (*Istihsan*). The companion is universal, and an inherent ingredient of all law based upon justice and its inherent shortcomings and deficiencies, with a view to responding to new challenges, bringing about change and adjusting to altered circumstances in society to which the law and justice properly have to respond. Albeit the functions exist in different forms, they share a common relationship

<sup>10</sup> Aristotle, *Nicomachean Ethics*, trans. Martin Oswald, Book 5 Chapter 10 (New York: Bobbs-Merrill, 1962), pp. 141–2.

<sup>11</sup> Ralph A. Newman (ed.), *Equity in the World's Legal Systems: A Comparative Study* (Brussels: Bruylant, 1972).

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to rules and principles, as equity acts and enters the stage under the facts of a particular case, seeking to do justice. Ever since, equity has therefore been an instrument of the judiciary, dealing with human conduct and the specific facts of a particular situation. It inherently entails an active judicial role, either completing or even altering law in the pursuit of ideals of justice and fairness. Equity, in other words, amounts to an important ingredient of the legitimacy of the overall legal system. Without the ability to have recourse to equity, justice may miscarry and the authority of law as the prime organizer of human co-existence and co-operation may be undermined.

From these traditions which reflect the shared and common needs of all legal systems, the Roman law concept of *Aequitas* was most influential as a foundation for equity in Western European law, which, in turn, provided the basis for the development of equity in international law under the Westphalian state system. In 1861, Sir Henry Maine identified legal fiction, equity and legislation to be, in this order, the main drivers of legal change and adaptation to societal developments and need.<sup>12</sup> Legal fiction in a broad sense entails the assumption that law remains unchanged, while in fact it evolves through case law and judicial law-making, the existence of which is carefully denied. Allegedly, judges merely find the law. They do not make the law: ‘We do not admit that our tribunals legislate; we imply that they have never legislated, and we maintain that the rules of English common law, with some assistance from the Court of Chancery or from Parliament, are coextensive with the complicated interests of modern society.’<sup>13</sup> The second engine of change, according to Maine, is equity which brought together *jus gentium* and the law of nature. ‘I think that they touch and blend through *Aequitas*, or Equity in its original sense; and here we seem to come to the first appearance in jurisprudence of this famous term, Equity’,<sup>14</sup> the essence of which has been proportionate distribution and, based upon that, a sense of levelling: ‘I imagine that the word was at first a mere description of that constant *levelling* or removal of irregularities which went on wherever the praetorian system was applied to the cases of foreign litigants.’<sup>15</sup> And it is from here that it developed its ethical content based upon natural law in Roman times and assisted in adapting law in praetorian law, and finally crystallized into rigidity, a process which could

<sup>12</sup> Sir Henry Maine, ‘Ancient Law’ in Ernest Rhys (ed.), *Everyman’s Library: History*: [no. 734] (London et al.: Dent, 1917 (reprinted 1977)), p. 15.

<sup>13</sup> *Ibid.* p. 20. <sup>14</sup> *Ibid.* p. 34. <sup>15</sup> *Ibid.* p. 34.