EQUITABLE PRINCIPLES OF MARITIME BOUNDARY DELIMITATION

The Quest for Distributive Justice in International Law

THOMAS COTTIER

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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

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.[1] 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[2] 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

[1] 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.

[2] Garret Hardin, 'The Tragedy of the Commons' (1968) 162 (3859) *Science*, 1243.

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.[3] 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.[4] 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

[3] 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'.

[4] 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.

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

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

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.[5] 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.[6] 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.[7] 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'.[8] 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

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

[6] *Frontier Dispute (Burkina Faso* v. *Republic of Mali)*, Judgment, ICJ Reports 1986, p. 554, para. 149.

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

[8] Oxman, n. 1, 832.

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.[9] 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

[9] 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.

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*:

> [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.[10]

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.[11] 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 rightousness (*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

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

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

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.[12] 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.'[13] 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',[14] 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.'[15] 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

[12] Sir Henry Maine, 'Ancient Law' in Ernest Rhys (ed.), *Everyman's Library: History: [no. 734]* (London et al.: Dent, 1917 (reprinted 1977)), p. 15.
[13] Ibid. p. 20. [14] Ibid. p. 34. [15] Ibid. p. 34.

equally be observed in English equity centuries later. 'A time always comes at which the moral principles originally adopted have been carried out to all their legitimate consequences, and then the system founded on them becomes as rigid, as unexpansive, and as liable to fall behind moral progress as the sternest code of rules avowedly legal.'[16] Legislation, finally, amounts to the third form of law-making, stemming from an autocratic prince or a parliamentary assembly, owing their force to the binding authority of the legislator which allows adjustment to new realities independent of its principles. 'The legislator, whatever be the actual restraints imposed on it by public opinion, is in theory empowered to impose what obligations it pleases on the members of a community.'[17]

It would seem that this triad of fiction, equity and legislation is inherent to all legal cultures, albeit, of course, in varying combinations. The role of equity was dependent upon, and complementary to, these other law-making functions and instruments of legal progress and adaptation. It therefore did not evolve in a uniform and static manner in different legal constituencies. The functions of equity varied as the underlying legal concept and traditions of fiction and legislation varied. Yet, they shared a common trait of being closely wedded to individual cases and circumstances.[18]

The more rigid the underlying law, the more active the role of equity became. Different concepts emerged. English equity emerged under the rigidity of the common law and constellations of power, leading to the independent and centralized judiciary of the Lord Chancellor. English law witnessed the emergence of an entirely separate legal system under equity, applied in parallel and by different judicial authorities, the task of which also was to secure legal uniformity and centralization (equity courts).[19] Based on a case-by-case approach, new legal institutions such as the trust emerged under this title, responding to new economic and societal needs. In addition, a set of principles, maxims of equity, emerged, constituting essential due process requirements and standards of justice.[20] The two traditions were merged only in the

[16] Ibid. p. 40. [17] Ibid. p. 17. [18] See ibid. p. 11.
[19] Harold G. Hanbury in Jill E. Martin (ed.), *Hanbury & Martin: Modern Equity* (London: Thomson, Sweet and Maxwell, 15th edn., 1997).
[20] These maxims comprise: (i) equity will not suffer a wrong to be without a remedy; (ii) equity follows the law; (iii) he who seeks equity must do equity; (iv) he who comes to equity must come with clean hands; (v) where the equities are equal, the law prevails; (vi) where the equities are equal, the first in time prevails; (vii) equity imputes an intention to fulfil an obligation; (viii) equity regards as done that which ought to be done; (ix) equity is equality; (x) equity looks to the intent rather than the

nineteenth century and became part of one and the same Anglo-Saxon and Anglo-American common law. In other systems, the law was able to absorb most of the change itself. The codification of civil law on the European continent was a response to excessive recourse to equity, which had often been perceived as arbitrary by pre-revolutionary continental European aristocracy.[21] The very idea of codification and democratic legislation emerged as a prime tool of adaptation of positive law and apparently left much less room for broadly defined equitable doctrines. It was generally agreed that equity henceforth be confined to equity *infra legem*, *praeter legem* and, exceptionally *contra legem*. Civil law was seen to develop in a way that was much less in need of recourse to equity outside the law, due to codification and, subsequently, to the evolution of constitutional law and the process of judicial review of legislation. While English equity thus produced a host of principles and maxims, its counterparts emerged under different titles elsewhere within the law. The role of equity is much more limited in civil law. The classical description of equity *infra, praeter and contra legem* reflects the idea of a complete and codified system, and found its way into international law on the basis of the continental law tradition. Similar conclusions may be drawn from the analysis of other systems of law, albeit that they have been less influential in international law. Under most codes, equity's function remains vague and largely unexplored. Equity, in continental law, was marginalized.

An exception to this is the Swiss Civil Code of 1907. This entails explicit powers to discharge cases by recourse to equity in the absence of existing rules on the subject matter. It laid the foundations for an objective recourse to equity within the law and recognized the powers of courts to legislate in the absence of positive rules. The Swiss Civil Code avoids the fiction of the completeness of codification, often found abroad at the time. In Article 1 para. 2, the judge is called upon to legislate in the absence of existing rules. In a remarkable manner, the legislative function of courts is recognized. The Swiss Civil Code would thus please modern realist schools, emphasizing the law-making functions of the judicial branch in the legal process. While this related to functions *praeter legem*, Article 4 calls upon the judge's exercise of his

form; (xi) delay defeats equities; (xii) equity acts in personam, see *Hanbury and Martin*, n. 19, pp. 25–32.

[21] See Georges Boyer, 'La Notion d'équité et son rôle dans la jurisprudence des Parlements' in *Mélanges offerts à Jacques Maury, tome II droit comparé, théorie générale du droit et droit privé* (Paris: Librairie Dalloz et Sirey, 1960), pp. 257–82.

or her discretion in accordance with law and equity (*règles du droit et de l'equité*). Swiss doctrine and the Swiss Supreme Court consider rules and equity to be fully part of the law. It is a matter of rendering an objective, and not a subjective decision. The perception is one of equitable law (*billiges Recht*) which incorporated the concern for individualized justice into rulings based upon the law. Law and equity are perceived as inseparable and not as different spheres of justice. Even in individualized circumstances, the Swiss Civil Code calls upon courts to apply and design criteria which are suitable for generalization and wider application.[22] '*Billigkeit muss das Recht meistern*' (equity masters the law) is an adage to be found on a painted window frame at my Alma Mater in Bern; allegorical figures call upon a non-pendantic, merciful interpretation of the law, taking into account, and in line with, reasonable and widely shared perceptions. In the 1920s Max Rümelin took this allegory as a starting point for his seminal work on equity in Swiss and continental law.[23] Equity, in other words, is part of the legal process, informing the law's interpretation by taking recourse to objective factors and criteria, yet short of formalism and dogmatism, in deciding individual cases. While strict rule-making is alien to equity, it does not exclude the formation of principles comparable to the maxims of equity in English law.[24] Much of what we shall find in the international adjudication of the twentieth century on equity can find a conceptual parallel in the philosophy of equity enshrined in Swiss law. The classical functions of equity, therefore, are essentially defined in relationship to the adaptation and adjustment of the law itself: they change over time and place. Equity has been part of the legal process and needs to be

[22] See Arthur Meier-Hayoz (ed.), *Berner Kommentar zum schweizerischen Privatrecht* (Bern: Stämpfli, 1966), Art. 4, pp. 421–42; Henri Deschenaux, 'Richterliches Ermessen' in Max Gutzwiller (ed.), *Einleitung und Personenrecht* (Basel: Helbling Lichtenhahn, 1967), pp. 130–42; Henri Deschenaux, 'Le Traitement de l'équité en droit Suisse' in M. Bridel (ed.), *Recueil des travaux suisses présentés au VIIIe Congrès international de droit comparé* (Basel: Verlag Helbing & Lichtenhahn, 1970), pp. 27–39.

[23] Max Rümelin, *Die Billigkeit im Recht* (Tübingen: Mohr Paul Siebeck, 1921).

[24] 'Jede Art von Regelbildung ist ausgeschlossen. Es lassen sich nur die Umstände anführen, die nach der einen oder andern Seite ins Gewicht fallen ... Soweit die Aufstellung bestimmter Grundsätze und fester Regeln möglich ist, wird man sich immer bemühen, zu solchen zu gelangen. Dahin drängt sowohl das Bedürfnis nach Rechtssicherheit als der Ordnungstrieb des Menschen, sein Streben nach Vernunft-, d.h. planmässigem Handeln. So lehrt uns denn auch die Geschichte, dass innerhalb der Billigkeitsrechtssprechung stets wieder feste Rechtssätze sich gebildet haben. Am deutlichsten zeigt sich dies Bild im englischen Equity-Recht, im Lauf der Zeit ein vollständiges System von *Equity* Sätzen entstanden ist.' Rümelin, n. 23, pp. 60–1.

distinguished from decision-making outside the law, on the basis of powers exceptionally granted to dispose *ex aequo et bono*. It plays a particularly important role in static and rigid concepts of law, particularly in legal systems defined by custom and religion. Equity's effect is different in systems dominated by legislation which are more amendable to reflect social change and needs. As legislation emerged as the prime and frequent response to changing and novel needs, recourse to equity became less pressing. Moreover, principles of law emanating from equity became of an independent and self-standing nature. Constitutional and international law, moreover, assumed corrective functions, mainly by recourse to fundamental rights and human rights.

As legal development progresses, concerns originally voiced under equity are being absorbed and integrated into the law. They no longer belong, strictly speaking, to the realm of equity *infra, praeter* or *contra legem*. They develop into principles and institutions of their own, much as English equity formalized over time and developed into a parallel body of law, complementing common law.[25] The principle of proportionality, of good faith and the protection of legitimate expectations and more particularly of estoppel and acquiescence, the doctrine of abuse of rights, are prime examples of equitable doctrines turned into legal concepts and principles of their own. Once established, there is no longer a need to resort to equity, and, indeed, principles are no longer directly based upon, or related to, equity in terms of legal foundations.

Thus, the process of the constitutionalization of law and states during the eighteenth and nineteenth centuries and the establishment of democratic representation and ongoing legislation was bound to reduce the role and functions of equity. Constitutionalism and the advent of fundamental rights fundamentally altered the equation. During the twentieth century, standards of justice in equity were increasingly replaced by recourse to human rights. Particularly after World War II, human rights emerged as the primary sources and standards of justice. They not only reduced the role of natural justice, but also of equity. In essence, constitutional judicial review under the Bill of Rights no longer made recourse to equity a necessary tool for remedying injustice and to assume the role of distributive justice and levelling in the way perceived by Maine. Law and legislation became subject to specific standards of justice and fairness embodied in the Constitution. The relationship between

[25] Hanbury, see n. 19.

constitutional law and equity is hardly discussed in the literature.[26] Yet, it is evident that the former has increasingly absorbed what in previous periods of pre-constitutional times equity was expected and assigned to bring about. Today, the adage of *summum ius summa iniuria* is no longer able to play to its full effect as it is tempered and controlled by human rights and constitutional law. Equity is no longer required to dampen the rigour of the law.

International law increasingly exerts corrective functions in adapting domestic law to international commitments. Human rights provide important yardsticks, albeit they still largely lack effective judicial protection at the international level, except for regional law, such as the European Convention on Human Rights. Principles of non-discrimination can be enforced by the WTO and help to remedy inequitable domestic legislation. In Europe, European Community law emerged as a new and additional corrective layer based upon a new legal system *sui generis*. Checks and balances increasingly extend to multilevels of governance, assuming traditional functions of equity.

It is therefore unsurprising that the incorporation of equitable doctrines into the law, either in legislation or in case law, made the requirement of equity as such almost redundant in recent decades in Western legal systems, as the desired aim could be achieved by other means. There are only a few cases where courts took explicit recourse to equity in domestic jurisdictions, and it is no longer a main concern of legal doctrine. This is true in civil law countries.[27] In a sense it is equally

[26] Rare and passing references to the relationship between constitutional law and equity can be found in Mario Rotoni, 'Considerations sur la fonction de l'équité dans un système de droit positif écrit' in *Aspects Nouveaux de la Pensée Juridique : Recueil d'études en hommage à Marc Ancel, vol. I, Etudes de droit privé, de droit public et de droit comparé* (Paris: Editions A. Pedone, 1975), pp. 43, 46; Paul Kirchhof, 'Gesetz und Billigkeit im Abgaberecht' in Norbert Achterberg et al. (eds.), *Recht und Staat im sozialen Wandel, Festschrift für Hans Ulrich Scupin zum 80. Geburtstag* (Berlin: Dunker & Humblot, 1983), pp. 775, 784; Rümelin, n. 23, p. 69 (calling upon the prohibition of arbitrary decisions in the French declaration on human rights as a more suitable foundation than equity in addressing certain problems in administrative law); Oscar Schachter discusses the relationship in the context of natural justice: 'The fact that equity and human rights have come to the forefront in contemporary international law has tended to minimize reference to "natural justice" as an operative concept, but much of its substantive content continues to influence international decisions under those other headings', *International Law in Theory and Practice* (Dordrecht, Boston MA, London: Martinus Nijhoff, 1991), p. 55.

[27] See Joseph Esser, 'Wandlungen von Billigkeit und Billigkeitsrechtssprechung im modernen Privatrecht' and Joachim Gernhuber, 'Die Billigkeit und ihr Preis' in University of Tübingen, Law Faculty, *Summum Ius Summa Iniuria: Individualgerechtigkeit und der Schutz allgemeiner Werte im Rechtsleben* (Tübingen: Mohr, 1963), pp. 22, 224;

true in common law jurisdictions to the extent that we consider the established institutions of English equity as part of modern common law.[28] The area no longer attracts much attention. History has moved on.

C. *The rebirth of equity in the law of natural resources*

Whilst the trend in domestic legal systems has been a decline in the use of equity, for it is no longer used to its fullest extent, it is interesting to observe that the situation is entirely opposite in public international law. International arbitration was frequently asked to decide on the basis of law and equity, and the nineteenth and early twentieth centuries saw a stream of decisions referring to equity which often formed a basis of law in treaties, ever since the 1794 Jay Treaty referred to justice, equity and international law.[29] Perhaps the most important precedent was the *Cayuga Indians* arbitration, granting legal status in equity to a tribe who otherwise would have remained without rights and entitlement.

> When a situation legally so anomalous is presented, recourse must be had to generally recognized principles of justice and fair dealing in order to determine the rights of the individuals involved. The same considerations of equity that have repeatedly been invoked by the courts where strict regard to the legal personality of a corporation would lead to inequitable results or to results contrary to legal policy, may be invoked here. In such cases courts have not hesitated to look behind the legal person and consider the human individuals who were the real beneficiaries.[30]

The arbitrator was Professor Roscoe Pound, who observed a decline in equity as it was increasingly consumed in law, and called for a fight for equity as an ever new port of entry to justice in a positivist legal order: 'Ihering has told us that we must fight

Joachim Gernhuber, 'Die Integrierte Billigkeit' in Joachim Gernhuber (ed.), *Tradition und Fortschritt im Recht, Festschrift zum 500-jährigen Bestehen der Tübinger Juristenfakultät* (Tübingen: J. C. B. Mohr (Paul Siebeck), 1977), p. 193.

[28] See Roscoe Pound, 'The Decadence of Equity' (1905) 5 *Columbia Law Review*, 20–35.

[29] See Karl Strupp, 'Das Recht des internationalen Richters, nach Billigkeit zu entscheiden' in F. Giese and K. Strupp (eds.) *Frankfurter Abhandlungen zum Völkerrecht* (1930), vol. 20, at p. 17; ibid. 'Le Droit du juge international de statuer selon l'équité' (1930) 33 *Recueil des cours de l'Académie de Droit International*. Vladimir-Duro Degan, *L'Equité et le Droit International* (The Hague: Martinus Nijhoff, 1970).

[30] *Cayuga Indians (Great Britain)* v. *United States*, reprinted in Reports of International Arbitral Awards, Vol. VI, pp. 173–90, 179.

for equity.'[31] The 1909 *Grisbadarna* case,[32] a maritime boundary delimitation case between Norway and Sweden, was decided upon historical patterns of conduct and *uti possidetis*, but was, according to Friedmann, in reality based on balancing the equities of that particular case.[33]

Recourse to equity also was implicit, rather than explicit, in the judgments of the ICJ, perhaps owing to the newly introduced clause of decision-making *ex aequo et bono* which separated law and equity, but was never formally invoked under Article 38 of the Statute of the ICJ. Traces of equity and equitable doctrines can be found in different cases. It was implicit in particular in the reasoning of the 1937 *Water from the Meuse* case.[34] Judge Manley Hudson in his concurring opinion, expounding the doctrine of equity, described the ruling as an application of maxims of equity in international law.[35] It is submitted that the founding precedent of international environmental law, the *Trail Smelter* arbitration,[36] was strongly influenced by considerations of equity.

The interwar period witnesses an increased and explicit interest in equity in legal writings. In the United States, L. B. Orfield published a seminal article on equity in international law in 1930.[37] In Europe, Karl Strupp published his work on equity in international arbitration in 1930,[38] reflecting the weaknesses of the positivist tradition.[39] In 1935,

[31] Pound, n. 28, 35.

[32] Arbitral award rendered on 23 October 1909 in the matter of the delimitation of a certain part of the maritime boundary between Norway and Sweden, decided 23 October 1909, reprinted in Hague Court Reports (Scott) 487 (Permanent Court of Arbitration, 1909), for English translations, see ibid, p. 121.

[33] Wolfgang Friedmann, 'The Contribution of English Equity to the Idea of an International Equity Tribunal' in *The New Commonwealth Institute Monographs*, Series B, No. 5 (London: Constable, 1935) at 35; the case is discussed below in Chapter 8(II)(A)(1).

[34] *The Diversion of Water from the Meuse (Netherlands* v. *Belgium)*, Judgment from 28 June 1937, PCIJ, Series A/B, No. 70, 1925, 4–89.

[35] Ibid., pp. 76–9. Wilfred Jenks considers the case the *locus classicus* of equity of that period, *The Prospects of International Adjudication* (London: Stevens, 1964), pp. 316–427, at p. 322.

[36] *Trail Smelter Case (United States, Canada)*, 16 April 1938 and 11 March 1941, UNIRIAA Vol. 3, pp. 1905–82.

[37] Lester B. Orfield, 'Equity as a Concept of International Law' (1930) 18 *Kentucky Law Journal*, 31.

[38] Karl Strupp, 'Das Recht des internationalen Richters, nach Billigkeit zu entscheiden' in F. Giese and K. Strupp, n. 29; Karl Strupp, 'Le Droit du juge international de statuer selon l'équité' (1930) 33 *Recueil des cours de l'Académie de Droit International*. For a discussion see Christopher R. Rossi, *Equity and International Law: A Legal Realist Approach to International Decisionmaking* (Irvington NY: Transnational Publishers, 1993) pp. 145–8. For further references to authors of this period see also Degan, n. 29, pp. 15–40.

[39] The intellectual effort criticizing positivism in international law was led, at the time, by the Commonwealth Institute; see Norman Bentwisch et al., 'Justice and Equity in the

Max Habicht drew renewed attention to the power to adjudicate *ex aequo et bono*.[40] These efforts culminated in the joint proposal to establish an International Equity Tribunal, based upon principles of co-operation by which decisions reached under distinct and separate positive public international law could be reviewed.[41] The idea was supported at the time by eminent international lawyers within the Commonwealth Institute, A. S. de Bustamante, Karl Strupp, Wolfgang Friedmann and Georg Schwarzenberger. The proposal never saw the light of the day, but equity was able to make a comeback after World War II in legal doctrine.

After the war, Wilfried Jenks offered an extensive review of the case law relating to equity in 1964.[42] Vladimir Degan submitted his analysis of arbitration in 1970,[43] and Charles de Visscher published a book on the subject in 1972.[44] The review of these works shows a wide and diverging view on the topic and the relationship of law and equity in a wide array of topics of international law, ranging from treaty interpretation, unilateral acts, state responsibility, diplomatic protection, procedural law, territorial disputes and natural resources – in particular access to water. While at this point in time – prior to the 1969 *North Sea Continental Shelf* cases – it is fair to say that no consolidated doctrine and approach existed; authors and cases show a clear interest in equity and a common concern for individualized justice (*Einzelfallgerechtigkeit*) being the main feature and function of equity within the body of public international law.

Given the developments in constitutional law, human rights protection and the emergence of general principles of law essentially detached from

International Sphere' in *The New Commonwealth Institute Monographs*, Series B, No. 1 (London: Constable, 1936); for a discussion see Rossi n. 38, p. 145.

[40] Max Habicht, 'The Power of the Judge to Give A Decision *Ex Aequo et Bono*' in *The New Commonwealth Institute Monographs*, Series B, No. 2 (London: Constable, 1935).

[41] A. S. de Bustamante and Karl Strupp, 'Proposals for an International Equity Tribunal' in *The New Commonwealth Institute Monographs*, Series B, No. 4 (London: Constable, 1935); Wolfgang Friedmann, 'The Contribution of English Equity to the Idea of an International Equity Tribunal' in *The New Commonwealth Institute Monographs*, Series B, No. 5 (London: Constable, 1935); Georg Schwarzenberger and William Ladd, 'An Examination of an American Proposal for an International Equity Tribunal' in *The New Commonwealth Institute Monographs*, Series B, No. 3 (London: Constable, 1936); see also Rossi, n. 38, p. 146.

[42] Wilfred Jenks, *The Prospects of International Adjudication* (London: Stevens, 1964), pp. 316–427; see also Wilfred Jenks, 'Equity as a Part of the Law Applied by the Permanent Court of International Justice' (1937) 53 *Law Quarterly Review*, 519.

[43] Vladimir-Duro Degan, *L'Equité et le Droit International* (The Hague: Martinus Nijhoff, 1970).

[44] Charles de Visscher, *De L'Equité dans le règlement arbitral ou judiciaire des litiges de droit international public* (Paris: Editions A. Pedone, 1972).

equity, we can understand that the main role of equity in twentieth- and twenty-first-century international law relates to issues such as the allocation of natural resources – a field neither governed by established legal institutions nor human rights. Indeed, it is striking to observe that recourse to equity implicitly or explicitly emerged in the context of allocation of natural resources among nations. It became its prime field of application while most other areas remained untouched by it. The 1951 *Fisheries Jurisdiction* case took into account a number of factors in deciding the case and in many ways anticipated methodologies subsequently developed under the doctrine of equitable principles in the 1969 *North Sea Continental Shelf* cases and subsequent case law by the court and in international arbitration discussed throughout this book.[45] The Helsinki Rules on equitable principles relating to the allocation of non-navigable waters, adopted in 1966 by the International Law Association,[46] introduced the concept of equitable principles relating to resource allocation in Articles IV and V of the instrument. It was subsequently taken up in treaty making by the International Law Commission of the United Nations.[47]

The renaissance of equity in the law of natural resources in the second part of the twentieth century can be partly explained by the fact that the international law of co-existence has remained a primitive system of law, devoid of effective legislative means capable of adjusting to new requirements, values and economic or scientific developments. The lack of a swift and timely legislative response remains one of the main traits of international law. The principles of international law established in the post World War II order, such as the prohibition of the use of force, the principle of non-intervention, the obligations to peaceful settlement of disputes and permanent sovereignty over natural resources, provide the constitutional pillars of world order and contemporary justice, but are often not in a position to settle complex issues on a case-by-case basis. Human rights only emerged in international law after World War II. Even today, they are still far from providing constitutional functions, in the sense that they may alter international and domestic law, assuming the role of equity. The general principles, stemming from equity and maxims of equity, which have found their way into international law and

[45] See below, Chapters 4, 6, 8, 11.

[46] See International Law Association (ed.), *Report of the Fifty-second Conference, held at Helsinki, 1966* (London: 1967), pp. 484–532.

[47] The effort resulted in the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, adopted by the United Nations General Assembly Resolution 51/229 of 21 May 1997.

practice (good faith, *pacta sunt servanda*, estoppel, acquiescence and others), are not able to address all of the contentious issues that have not been adequately dealt with through customary law or treaty law. Again, as occurred in domestic law centuries before, recourse to equity was needed in order to address new and pressing issues that arose in response to changes in the international community. An answer was found in turning to what will amount to equitable principles as key tools addressing pressing issues of distributive justice.

Recourse to equity in jurisprudence and resource allocation in return triggered renewed interest in the functions of equity in contemporary international law. The reception of civil law concepts of equity *infra, praeter* and *contra legem* was basically recognized in international law, as well as by lawyers rooted in the common law tradition, albeit relunctantly.[48] Equity was increasingly applied to the allocation of natural resources. While many scholars deal with equity in the context of maritime boundary delimitation, which will be discussed subsequently, general works on equity comprise the book by Christopher Rossi, stressing the law-making role of courts and tribunals applying equity – very much reminiscent of the fictions of the judicial role expounded by Sir Henry Maine more than a hundred years earlier.[49] Critical legal studies turned to equity in order to demonstrate the generic lack of objectivity of international law and the problem of subjectivity. Koskenniemi's work, first published in 1989, was strongly inspired by the alleged imprecision and vagaries of equity and equitable principles in the jurisprudence of the world's courts.[50] The case law on maritime boundary delimitation – much the subject of this book – gave rise to comprehensive legal opinions on equity in modern international law. Judge Weeramantry developed an extensive treatise on equity in the context of his separate opinion in the 1993 *Jan Mayen* case, essentially expounding the classical functions of equity, *infra, praeter* and *contra legem* and its different functions and methodologies in the administration of international justice.[51]

[48] See Michael Akehurst, 'Equity and General Principles of Law' (1976) 25 *International and Comparative Law Quarterly*, 801.

[49] Christopher R. Rossi, *Equity and International Law: A Legal Realist Approach to International Decisionmaking* (Irvington, NY: Transnational Publishers, 1993).

[50] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument: Reissue with a New Epilogue* (Cambridge University Press, 2005) (originally published by the Finnish Lawyer's Association in 1989).

[51] *Case Concerning the Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway)*, Judgment of 14 June 1993, Separate Opinion of Judge Weeramantry, ICJ Reports 1993, pp. 1, 177–245.

Equity as applied by courts and tribunals, in conclusion, has found its particular place in the context of the allocation of natural resources. It is here that the renaissance took place while other fields of traditional equity, in particular procedural equity, were absorbed into constitutional and international public law by the renaissance of human rights, or developed into self-standing legal principles in customary international law.

II. The quest for global equity

The renaissance of the use of equity in the international law of natural resources inspired a broader movement of taking recourse to equity in the process of decolonization throughout the period of the 1960s to the 1980s and the effort to reshape international law and remedy the flaws of the colonial period. The period and process of decolonization did not merely cause the number of actors and sovereign states on the stage of international law and relations to proliferate. What were formerly largely domestic matters under colonial rule became issues and problems of international law, particularly under the umbrella of the Charter of the United Nations. This created the North–South debate. Colonial experience caused authors from the newly independent states to call for a new international economic order and a new concept of international law built upon a law of co-operation, enshrined in the United Nations Charter, and on broad precepts of equity.[52] The international law of co-existence, largely structured on colonial lines, experienced considerable difficulties in adjusting to the new map and values, and a largely positivist application by and in the ICJ reinforced suspicions at the time.[53] The term and notion of equity, similarly used in economic theory as a counterpart to economic efficiency, became a symbol and code word for new aspirations of justice in international law in order to remedy

[52] Prakash Narain Agarwala, *The New International Economic Order: An Overview* (New York: Pergamon Press, 1983); Ram P. Anand, *New States and International Law* (Delhi: Vikas Publishing House, 1972); Mohammed Bedjaoui, *Towards a New International Economic Order* (New York: Holmes and Meier, 1979); Francisco V. Garcia-Amador, 'The Proposed New International Economic Order: An New Approach to the Law Governing Nationalizations and Compensations' (1980) 12 *Lawyer of the Americas*, 1; Kamal Hussein (ed.), *Legal Aspects of the New International Economic Order* (London: Frances Pinter, 1980); see generally Patricia Buirette-Maurau, *La Participation du tiers-monde à l'élaboration du droit international* (Paris: Pichond et Durand-Auzias, 1983).

[53] The controversial ruling of the ICJ in the *South West Africa* cases essentially triggered the debate, *South West Africa Cases (Ethiopia* v. *South Africa; Liberia* v. *South Africa)*, Second Phase, Judgment, ICJ Reports 1966, p. 6.

existing inequities in the allocation of wealth, income and opportunities between industrialized and developing countries. It became a basis for the quest of enhanced co-operation and development aid. It firmly established and depicted the issue of distributive justice. True, this age-old theme existed before in international law, as it exists in any legal order. It was, for example, already part of territorial boundary delimitation and the allocation of fishing rights or irrigable water or market shares. Yet, it only now emerged as a global theme considered as affecting the very basics of international law. The symbol of equity helped to establish what Stone called 'in terms at any rate of paper declarations and programs the establishment of standards of human welfare as an area of central guidance'.[54]

A. *The programmatic function of equity*

Equity assumed an important programmatic and symbolic role beyond and outside the province of law properly speaking. It became synonymous with justice at large. It essentially turned to diplomacy and the process of law-making, seeking to remedy the wrongs of the past. It sought, in other words, to enter the realm of international legislation, beyond its traditional province of the judiciary discussed above. Developing countries sought progress on the basis of national sovereignty and pursued the quest for resource allocation and market access on the basis of equity. Oscar Schachter observed that in 1974, 'the idea of equitable sharing of resources among nations had moved, almost suddenly, to the center of the world's stage'.[55] Important documents such as successive Development Decades, the 1974 Declaration on the Establishment of a New International Economic Order[56] and, in the same year, the Charter of Economic Rights and Duties of States[57] rely upon equity and sovereignty as their prime foundation and the justification for bringing about distributive justice and welfare

[54] Julius Stone, 'A Sociological Perspective on International Law' in Roland St. J. Macdonald and Douglas M. Johnston (eds.), *The Structure and Process of International Law* (The Hague et al.: Martinus Nijhoff, 1983), pp. 263, 301, note 66.

[55] Oscar Schachter, *Sharing the World's Resources* (New York: Columbia University Press, 1977), p. vii.

[56] UN General Assembly Resolution 3201 (S-VI) of 1 May 1974 (UN Document A/RES/S-6/3201).

[57] UN General Assembly Resolution 3281 (XXIX) of 12 December 1974 (UN Document A/RES/29/3281).

among nations.[58] The New International Economic Order, combining enhanced market access for developing countries and stronger interventionism at domestic and international levels, aspired to an order 'which shall correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between the developed and the developing countries and ensure steadily accelerating economic and social development in peace and justice for present and future generations'.[59] A debate on a right to development was launched.[60]

Subsequently, the movement for sustainable development and ecology embraced equity. Edith Brown Weiss developed the concept of intergenerational equity.[61] She laid the doctrinal groundwork of what eventually emerged as sustainable development as a prime foundation of international environmental law. In 2002, the International Law Association adopted the ILA *New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, placing the principle of equity at the heart of sustainable development. Principle 2.1 states:

> The principle of equity is central to the attainment of sustainable development. It refers to both *inter-generational equity* (the right of future generations to enjoy a fair level of the common patrimony) and *intra-generational equity* (the right of all peoples within the current generation of fair access to the current generation's entitlement to the Earth's natural resources).[62]

With intergenerational equity, a new and powerful symbol was created. However, equity's role was not confined to the allocation of resources among nations. Excessive and careless exploitation of resources due to technological advances increasingly threatens the balance of nature and has brought about the danger of both the exhaustion of resources and also of substantial damage to natural and human environments. Increasingly, equity has become a symbol, synonymous with sharing the world's resources, not merely amongst existing, but also amongst

[58] See P. van Dijk, 'Nature and Function of Equity in International Economic Law' (1986) *7 Grotiana New Series*, 5.

[59] The Preamble of UNGA Res. 3201 (S-VI).

[60] See e.g. Paul de Vaart, Paul Peters and Erik Denters (eds.), *International Law and Development* (Dordrecht, Boston MA, London: Martinus Nijhoff, 1988).

[61] Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Tokyo: The United Nations University, 1989); Edith Brown Weiss, 'Our Rights and Obligations to Future Generations for the Environment' (1990) 84 *American Journal of International Law*, 198.

[62] Annex to Resolution 3/2002, Sustainable Development, ILA, *Report of the 70th Conference, New Delhi* (London: ILA, 2002) pp. 22, 26.

future generations within and outside national boundaries. The 1992 United Nations Agenda 21 refers to it as an agenda for change, both in the traditional sense of allocating resources between rich and poor, and also between present and future generations.[63] The term of intergenerational equity was firmly adopted. Similarly, the Convention on Biological Diversity[64] calls for an equitable sharing of genetic resources in this sense.[65] Scientific advances in genetic engineering create new issues of resource allocation between North and South, present and future. Issues of property and expropriation emerge in a new context. Again, equity finds itself at the centre of claims for a better world. There is little doubt that it will serve equally well as a challenger of law and relations in the light of future problems.

Scientific and technological advances since the end of World War II account for a greater importance for the role and function of equity in international law than decolonization. They raised new issues of resource allocation amongst all nations, including resource allocation amongst industrialized countries. Worldwide interaction, ranging from air travel to telecommunications, created the basis for increased globalization and enhanced interdependence of markets. Space travel, for example, required the creation of international space law. Technology allowed for resources to be exploited that previously could not have been. In 'the commons' (areas traditionally viewed as being of common ownership), technological progress resulted in offshore drilling, high seas industrial fishing activities and the potential for deep seabed mining. All of these activities triggered the silent revolution of the law of the sea and fundamentally changed the global map of sovereign rights exercised by nations over such resources. Once again, equity emerged as one of the foundations invoked to settle such allocations. The 1982 Convention on the Law of the Sea (LOS Convention), perhaps the single most important emanation of the aspirational 1974 New International Economic Order, contains no less than thrity-two references to equity, all seeking to provide guidance in resource allocation: twice in the preamble and in Articles 69, 70, 155 and 162; three times in Article 160; once in Articles 59, 74, 76, 82, 83, 140, 161, 163, 266, 269, 274; eight times in the Annexes.

[63] See *Report of the United Nations Conference on Environment and Development*, Rio de Janeiro, 3–14 June 1992 (UN Document A/CONF.151/26/Rev.l (Vol. I), Annex II).

[64] Convention on Biological Diversity opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

[65] Ibid.Art. 1.

B. *The impact of sovereignty and self-determination*

At the same time, throughout these periods of development of international law, defence of the newly gained independence and self-determination perpetuated the very classical concept of national sovereignty. It was reinforced by the principle of self-determination and non-interference in domestic affairs. In fact, the quest for a new international law soon resulted in a defence of overwhelmingly traditional concepts, and therefore the core of international law has not fundamentally changed for this reason.[66] As stated at the outset, reliance upon the doctrine of the continental shelf and national sovereignty resulted in a highly uneven distribution of natural resources among coastal states, let alone land-locked countries.[67] The adoption of the principles of permanent sovereignty over natural resources in 1962, rejecting ideas of the common heritage of mankind, was a landmark to this effect.[68] Today, the proponents of new and relaxed approaches to sovereignty, the movement of constitutionalization of international law and the doctrine of multilevel governance, are mainly found among authors of industrialized nations, in order to cope with environmental challenges and the enhanced interdependence of financial systems and markets, in particular within Western Europe with the creation and evolution of the European Community and today the European Union.[69] The evolution of the European Union shaped new attitudes to international law in general in Europe, rethinking some of the classical precepts of international law which still are fiercely defended by countries in the process of

[66] See generally Patricia Buirette-Maurau, *La Participation du tiers-monde à l'élaboration du droit international* (Paris: Pichond et Durand-Auzias, 1983).

[67] See Stephen C. Vasciannie, *Land-locked and Geographically Disadvantaged States in the International Law of the Sea* (Oxford: Clarendon Press, 1990), pp. 105–38 (saying that '[t]he failure of the [land-locked and geographically disadvantaged states] to influence the final position on the outer limit of the continental shelf in the [LOS Convention] was almost complete', p. 118).

[68] UN General Assembly Resolution 1803 (XVII) of 14 December 1962 (UN Document A/5217 (1962)).

[69] See Ronald St. John Macdonald and Douglas M. Johnston (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Leiden, Boston MA: Martinus Nijhoff Publishers, 2005); Anne Peters, *Elemente einer Theorie der Verfassung Europas* (Berlin: Duncker & Humblot, 2001); Jan Klabbers, Anne Peters and Geir Ulfstein (eds.), *The Constitutionalization of International Law* (Oxford University Press, 2009). John H. Jackson, *Sovereignty, WTO, and Changing Fundamentals of International Law* (Cambridge University Press, 2006); Thomas Cottier and Maya Hertig, 'The Prospects of 21st Century Constitutionalism' (2004) 7 *Max Planck Yearbook of United Nations Law*, 261.

nation-building and those defending their interests on their own and outside a larger and supranational union of states. The classical precepts of international law, based upon sovereignty, independence, non-intervention and international co-operation, are still predominant in shaping international relations at large. In this co-existence of programmatic claims to global equity and of classical precepts of international law based upon sovereignty and independence, the impact of equity, if any, remains indirect most of the time. The quest for global equity influenced the advent of reforms of the GATT[70] when Part IV was introduced in 1966. Special and differential treatment for developing countries emerged and may be considered an outflow of equity in terms of levelling uneven conditions of competition in terms of economic and social development. The General System of Preferences, allowing industrialized countries to unilaterally grant preferences to developing countries, amounts to the most important emanation of efforts purported by UNCTAD,[71] established in 1964. Efforts to co-ordinate official development assistance (ODA) was undertaken within the OECD[72] and led to increased efforts, jointly with the work of multilateral development institutions, in particular the World Bank and regional development banks.

But by and large, efforts at global equity failed to materialize. Efforts to stabilize commodity prizes failed to operate successfully. The set of equitable principles on restricted business practices remained a document of soft law and did not influence the anti-trust practices of industrialized countries. Even today, no ban on export cartels exists. Recourse to global equity resulted in substantial frustration, as expectations created did not materialize. The WTO, founded in 1995 on the basis of the GATT, was built upon the doctrine of progressive liberalization and on principles of non-discrimination and transparency. Differences in levels of development were taken into account in diverging levels of commitment and special and differential treatment. Yet overall, the WTO is built upon the philosophy of a single undertaking and the philosophy to fully integrate developing countries into the global trading system. Obligations, including those on protecting intellectual property rights, were essentially shaped in a uniform manner for all members alike, with some transitional arrangements for developing countries. Equity did not emerge as a leading idea. It indirectly produced distributional effects,

[70] General Agreement on Tariffs and Trade, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 29 July 1948).

[71] United Nations Conference on Trade and Development, established in 1964.

[72] Convention on the Organisation for Economic Co-operation and Development, entered into force 30 September 1961.

without taking explicit recourse to equity. Trade liberalization and equal opportunities dismantled colonial structures, brought about growth in industrialized countries and developing countries alike, in particular in newly emerging economies, while it failed to serve least developed countries in significant terms. Their growth rates were left behind and fuelled the powerful quest for the right to development and affirmative action, such as special and differential treatment, preferential market access and aid for trade. Differential treatment with a view to bringing about distributive justice remains an unresolved challenge in trade regulation and calls for new avenues of graduation in law. Today, it may indirectly inform efforts to bring about graduation and a legal regime which is more likely to take into account unequal levels of competitivness and social and economic developments.[73]

Achieving broad goals of global welfare and equity is not a matter of international charity, but of common and shared interests in the light of the 'ticking time bombs' of excessive population, mass migration, poverty and destitution facing many parts of the globe. These goals are essential for stability and world peace. And yet, whilst the goal of sharing resources receives overwhelming support, the methods used to achieve the goal of global equity have been the subject of persistent fundamental controversy. They were somewhat reduced by the collapse of communism and the end of the Cold War in the 1990s, but, even with a move towards market-oriented policies in many countries, fundamental differences over resource allocation still remain. There is no end to history and the struggle for power will continue, significantly defined by power over human and natural resources.

In conclusion, the impact of programmatic equity has remained modest and mainly rhetorical, albeit it has had some indirect influence in shaping international law. To some extent, distributive justice has entered international agreements, yet without profoundly transforming the system as a whole. Equity, in other words, has not played a crucial role, albeit the spirit of it may have influenced and motivated actors. Yet, it has been far from bringing about new general principles and rules of customary international law. It has not brought about new methods of discharging distributive justice in broad terms in public international law. The classic body of public international law is still predominantly shaped by the law of

[73] See Thomas Cottier, 'The Legitimacy of WTO Law' in Linda Yueh (ed.), *The Law and Economics of Globalisation. New Challenges for a World in Flux* (Cheltenham: Edward Elgar Publishing, 2009), pp. 11–48; Thomas Cottier, 'From Progressive Liberalization to Progressive Regulation in WTO Law' (2006) 9 *Journal of International Economic Law*, 779.

co-existence. True, the law of the United Nations transformed international law to a law of co-operation in promoting these concerns. Regionalism, in particular the emergence of the European Union, laid the foundations for an international law of integration which, today, is beginning to develop, based upon cosmopolitan values and doctrines of global constitutionalism.[74] Distributive justice, in all this, amounts to an important programme besides the removal of barriers to international trade. Aid for development has become a standard feature in bilateral and multilateral relations. Yet, it has been mainly pursued by means of programmes and finance, rather than through the establishment of new legal principles based upon equity. Human rights, in particular the canon of social and economic rights of the 1948 Universal Declaration of Human Rights and the 1966 United Nations Covenant, replaced equity and underwrote the call for distributive justice. They have largely remained of a programmatic and gradual impact. Subsequently, environmental concerns brought about the doctrine of sustainable development, balancing economic, social and ecological concerns within a magic triangle beyond the idea of intergenerational equity.

III. The legal nature of equity

A. *Different layers*

A comparison between the global aspirations of equity in reshaping the world order and its functions in dispute settlement, both discussed above, readily reveals that equity operates on different normative levels. Equity as a norm of political and moral aspiration of justice, often powerfully influencing political agendas and perceptions, is beyond the realm of law and the legal sphere, properly speaking.[75] Global justice, in these terms, needs to be distinguished from operational equity, as it finds itself, as an ideal and programme, on a different normative layer which is not accessible in the operation of international law in negotiations and dispute settlement. It lacks the basic qualities of being wedded to a particular context. It influences the law as it influences perceptions of justice, which in return may eventually redefine rights and obligations. To the extent

[74] See Gillian Brock and Harry Brighouse (eds.), *The Political Philosophy of Cosmopolitanism* (Cambridge University Press, 2005); Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford University Press, 2005).

[75] The normative difference is clearly expressed in Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law*, vol. I (London, New York: Longman, 9th edn., 1996), pp. 43–4.

that aspirations of global equity are expressed in declarations and resolutions of international organizations, they form part of soft law. Non-binding in principle, they nevertheless create legitimate expectations as to promised conduct which may find legal protection under the principle of good faith. To the extent that aspirations of global equity enter treaty law, equity may form part of the preamble which should be taken into account in the process of interpreting operational provisions. To the extent that equity enters operational provisions, the legal nature changes. Equity becomes part of the law. It is here that the recourse to equity or to equitable principles or equitable solutions informs subsequent processes of negotiations or dispute settlement in the process of implementing such provisions. On this level, equity also may emerge in customary international law. It may, alternatively, find its way into the law as a general principle of law, forming the starting point, influencing and shaping the law. Yet, whatever the source, the legal operation of equity, it essentially remains wedded to individual circumstances, to negotiations and to judicial settlement and case law. Equity, on all accounts, is inherently wedded to the context and facts of a particular case. The Aristotelian doctrine has prevailed and proven appropriate. Equity cannot operate in a vacuum, but depends upon a particular problem which needs to be solved. Equity operating on high levels of abstraction is bound to remain without guidance and direct impact. The failure of global equity to influence international law profoundly contrasts with its paramount importance in the contained field of maritime boundary delimitation. In other words, while its programmatic functions remained limited, it developed prominently within a particular and precise context. The finding confirms that operational equity, as a legal principle, essentially requires an inductive approach. Ever since equity began to influence the course of law and international law by being applied and used in the context of specific issues within a particular framework, it has worked bottom-up, and thereby contributed to the evolution of individual fields of law.

B. *A source of new legal principles*

Over time, repeated recourse to equity in like or comparable circumstances led and will lead to new principles and rules; at some point, these rules and principles will become part of the law and so will leave the realm of equity properly speaking. As discussed, this holds true for principles of natural justice, specific maxims of equity, proportionality

and of protecting good faith and legitimate expectations. Estoppel and acquiescence are examples in point. Whether these principles continue to be part of equity, or whether they have a life of their own, is assessed differently. Principles derived from equity partly continue to be part of equity, partly they are discussed independently henceforth. Oscar Schachter thus distinguishes different manifestations of equity:

(i) equity as a basis of individualized justice tempering the rigours of strict law;
(ii) equity as consideration of fairness, reasonableness and good faith;
(iii) equity as a basis for certain specific principles of legal reasoning, in particular estoppel, unjust enrichement and abuse of rights;
(iv) equitable standards for sharing natural resources;
(v) equity as a broad synonym for distributive justice to justify demands for economic and social arrangements and redistribution of wealth.[76]

Similarly, Thomas Franck in 1995 surveyed the development of equity in the international system from the turn of that century, discussing: (i) equity as an instance of 'law as justice', encompassing such concepts as 'unjust enrichment', estoppel, good faith and acquiescence; and (ii) equity as a mode of introducing justice into resource allocation, distinguished as corrective equity, 'broadly conceived equity' and 'common heritage equity', all the while stressing the difference between equitable decisions and decisions *ex aequo et bono*.[77] Other authors, in particular Jörg Paul Müller, Elisabeth Zoller and Robert Kolb, address the protection of good faith and legitimate expectations independently of equity. These principles operate, according to those authors, in their own right and on their own terms.[78] As a practical matter, the difference is not of substantial importance. Invocation of more specific principles, such as estoppel, no longer depend upon recognition as equitable principles but are principles of law, and of international law, in their own right. At the same time, it is still reasonable to group them under equitable doctrines

[76] Oscar Schachter, *International Law in Theory and Practice* (Dordrecht, Boston MA, London: Martinus Nijhoff Publishers, 1991), pp. 50–65, in particular pp. 55–6.

[77] Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995).

[78] See Jörg Paul Müller, *Vertrauensschutz im Völkerrecht* (Köln, Berlin: Carly Heymanns Verlag, 1971); Elisabeth Zoller, *La Bonne foi en droit international public* (Paris: Editions A. Pedone, 1977); Robert Kolb, *La Bonne foi en droit international public: Contribution à l'étude des principes généraux de droit* (Paris: Presse Universitaire de France, 2000), p. 109.

as they often contract positive rights and obligations and continue to exert their corrective functions. It is more important to demarcate equity in terms of justiciable and non-justiciable layers and components. The most important function of equity remains being operative in new territories where rules are lacking or inappropriate for application in a particular context, and yet fair and just answers need to be found.

The study of equity in law, therefore, has to be as specific as possible in order to learn about its nature in contemporary and future international law. This is why an inquiry into the foundations, methods and the scope of allocating marine resources in the process of maritime boundary delimitation becomes of prime and contemporary interest for the future of equity in international law. The subject matter thus offers the possibility and precise context for a detailed inquiry into existing dimensions of distributive justice and equity within co-existence, and within the traditional system of nation states. Its findings will be useful to other areas of law where the renaissance of equity, so far, has not taken place but where enhanced recourse to its methodology may be useful in the future.

C. *Ambivalence and the need for context*

Yet, even within a narrowly defined field of application, we still are faced with the difficult situation that, on the one hand, equity is clearly established as a symbol and code word for distributive justice in international law. It has become part of many international instruments and provisions, both in force and to be applied. On the other hand, we lack agreement as to its scope and contents of distributive justice. We do not know what it means to a precise degree. In a pluralist, multicultural world of diverging stages of economic development, despite a high degree of interdependence, we cannot hope to achieve consensus by deducing conclusions from elusive and evasive precepts, even within an inductive and bottom-up approach. This is particularly true in international law. The risk of subjectivism and legal uncertainty in the recourse to equity is apparent and amounts to a main argument in favour of per se rules. Selden keeps coming back in different forms and arguments, with his famous quote:

> Equity is a roughish thing; for law we have a measure, know what to trust to Equity is according to the conscience of him that is chancellor, and as that it larger or narrower so is equity. Tis all one, as if they should make the standard for the measure we call a chancellor's foot, what an uncertain

> measure this would be! One chancellor has a long foot, another a short foot, a third an indifferent foot tis the same thing is the chancellors conscience.[79]

Every negotiator, judge and scholar dealing with equity at any time faces the problem of objectively defining its contents in specific terms. There are several reasons for this.

Firstly, equity, whilst constituting an established value of justice, is not in a position to readily clarify the approaches, goals, means and methods concerning how and to what point changes need to be brought about in more than general terms. Since its inception, the shape and content of equity have been vague and elusive, falling short of allowing for more specific conclusions that go beyond speculation. More than anything else, Justice Holmes' statement remains accurate with regard to equity: 'A word is not a crystal, transparent and unchanging, it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and time in which it is used.'[80] Little help may be expected from equity as a general principle of law beyond mere generalities. Extensive comparative studies reveal that it means different things in different contexts, legal systems and time periods. Reducing the principles discovered to their common denominator and foundation, Ralph A. Newman expounded upon the moral precepts of good faith, honesty and generosity, and combinations thereof, with the underlying concept of human brotherhood: 'Equity may be described as a way of adjusting the burdens of misfortune arising out of human encounters in accordance with standards of generous and honorable conduct that are commonplace facts of all systems of ethics, morals and religion.' And: 'Equity may be defined as the expression of standards of decent and honorable conduct which are the mark of a morally mature society.'[81]

These ethical precepts affirm the legitimacy of invoking equity in current international law. Yet, they still offer little help towards shaping operational legal principles and concepts of resource allocation. Similarly, the juxtaposition of equity and efficiency in economic theory, if correct at all, does not provide much normative guidance. Equity is perceived as a correcting factor to allocation according to efficiency, but

[79] Quoted from Karl Strupp, n. 38, p. 103 (orthography in original).

[80] Oliver Wendell Holmes Jr., as quoted at www.quotationspage.com/quote/29065.html (last accessed 24 October 2009).

[81] Ralph A Newman (ed.), *Equity in the World's Legal Systems: A Comparative Study* (Brussels: Bruylant 1972), pp. 27 and 599, respectively.

little is settled as to what extent such a correction should take place in the process of balancing the scales in international relations. Similarly, the theory of equity in social psychology has not yet reached international relations. This theory is concerned with the effects of different distributional schemes on the human psyche. The main (simplified) tenet of the theory holds that striving to maximize personal outcomes and rewards causes, if not unlimited, then serious threats to the social system. This is therefore counterbalanced by the norms of equity, compliance with which is honoured by society. It indicates the requirement for a counterbalance, but little about specific methods and degrees can yet be found to have been applied to international relations.[82] Finally, similar problems concerning limits to the scope of inquiry into distributive justice are common in moral philosophy. There may be good reasons for discussing such issues, primarily in the context of well-organized society and in a national context.[83] Yet the absence of a common and widely shared view regarding similar problems, as adjusted to international society, results in the search for equity being more troublesome and difficult in the quest for cosmopolitan justice.[84]

Secondly, and given its dependence upon particular circumstances, equity continues to mean different things in different contexts. Each circumstance has to be assessed on its own merits. We are faced with the question of to what extent equity offers predictability and legal security. Is it a matter of gradually developing new rules? Or is it rather the function of equity to remain a blanket norm which allows the addressing of new and novel circumstances which require adjustment?

Thirdly, equity in international law uses different legal systems as its sources of inspiration. Whilst it was seen above that the basic idea and function is shared, emanations of equity vary, as alternative legal systems vary and define the relationship of law and equity differently. Differences in legal traditions and culture, discussed above, loom large and need to be considered. They continue to influence international law.

[82] E.g. Leonard Berkowitz and Elaine Walster (eds.), *Equity Theory: Toward a General Theory of Social Interaction* (New York: Academic Press, 1976); David Miller, *Social Justice* (Oxford: Clarendon Press, 1976), emphasizing distributive allocations according to desert.

[83] John Rawls, *A Theory of Justice* (Cambridge MA: Harvard University Press, 1971); John Rawls, *The Law of Peoples* (Cambridge MA: Harvard University Press, 1999).

[84] See Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford University Press, 2005); Gillian Brock and Harry Brighouse (eds.), *The Political Philosophy of Cosmopolitanism* (Cambridge University Press, 2005).

Fourthly, the function and role of equity varies under different legal theories and doctrines.[85] This is an important point to note, as lawyers and jurists (as well as courts) do not always reveal the theoretical underpinnings of their arguments. Equity assumes different functions under the main schools of thought. It is at the crossroads of ethics, morals, natural law and positive law. Its role varies over time, as different theories and schools of law emerge, prevail, change and eventually disappear, superseded by newly emerging theories in a long-term cycle. In his work on law and morals, Roscoe Pound exposed these evolutions and differences at the time.[86] They continued to exist in subsequent periods[87] and persist today under contemporary legal theories. The problem of diverging perceptions even exists when the particular context of equity is well defined, as in maritime boundary delimitation. It will be seen throughout the book that disputations on the role of judges and of equity in relation to pre-defined rules, such as the principle of equidistance and its relationship to equity, equitable principles and equitable results, are essentially rooted in diverging schools of jurisprudence and legal thought.

D. The impact of different schools

Without attempting to assign different authors to different schools and to define and assign clearly distinguishable functions of equity, basic distinctions can be observed. Natural law schools and idealism, recognizing pre-statal rights and obligations, inherently or explicitly accord important functions to equity as a point of entry for the articulation of rights and obligations. Equity essentially serves as a port of entry for religious, ethical, moral and philosophical considerations when interpreting, completing and overruling the rigidity of the existing law. Of course, the fundamental problem remains that, in pluralistic societies, there is no common and generally agreed content of such

[85] For a discussion see Rossi, n. 49 p. 12–19.

[86] Roscoe Pound, *Law and Morals* (Littleton CO: Fried B. Rothmann, 1897).

[87] Different schools are discussed in Ronald St. J. Macdonald and Douglas M. Johnston, *The Structure and Process of International Law* (The Hague et al.: Martinus Nijhoff Publishers, 1983), pp. 1–178; e.g. W. L. Morison, 'The Schools Revisited' inibid. at p. 131, lists the natural law school, the historical school of jurisprudence, Austrian positivsm, modern English positivism; the positivism of Hans Kelsen, and sociological jurisprudence. Wolfgang Friedmann, *Legal Theory* (New York: Columbia University Press, 1967), pp. 95–364, distinguished in his seminal work the following classical schools at the time: natural law, philosophical ideals, sociological theories, positivism (including realism), and utilitarianism.

considerations. The advent of human rights in constitutional law and in post World War II international law partly imported such values into positive law and rendered recourse to equity somewhat less elusive. It still may serve as an entry point today, for example when applying pre-statal concepts of natural law to relations among private parties in civil law.

Positivism and neo-positivism inherently limit the functions of equity to operations within the law. This theory does not accept pre-statal concepts of law. All law flows from existing and positive rules and principles. In its formal approaches, there is no room for equity. The pure theory of law, which denies its inherent value, therefore denies any possibility of taking recourse to equity beyond the operation of interpretations within the law as it stands. There is no definitive school of positivism, and its different variants thus accord different roles to equity.

Legal realism, often combining idealism, utilitarianism and sociological schools, essentially stresses the role of decision-makers and decision-making processes and considers them to be of practically higher importance than substantive rules and principles and distinctions of law or non-legal norms. Sociological schools exist in different variations. The American New Haven School of Jurisprudence (McDougal and Lasswell) analyse political and legal processes along a continuum, denying strict boundaries of law and politics, and accept those decisions that are in a position to affect reality as authoritative. This school of thought may be employed in an apologetic manner, simply justifying the outcomes of power relations. At the same time, it is combined with high normative aspirations of human dignity and just world order, and contains high aspirations of justice.[88] In this normative context, equity may serve to import moral and ethical values and seek to bring about what have been described as utopian goals. New Haven has been influential and shaped the minds of many international lawyers who remained within traditional precepts, but accepted the importance of realist and sociological implications to the legal process. In particular, this involves recognition of the active role of judges and recourse to equity being analysed in terms of judicial law-making and legislation. The active role of equity in this process

[88] Myres McDougal, Harold Lasswell and James C. Miller, *The Interpretation of Agreements and World Public Order* (New Haven CT, London: Yale University Press 1967); Myres McDougal and Harold Lasswell, 'The Identification and Appraisal of Diverse Systems of Public Order' (1959) 53 *American Journal of International Law*, 1; Myres S. McDougal, Harold D. Lasswell and Lunch-Chu Chen, *Human Rights and World Public Order* (New Haven CT, London: Yale University Press, 1980).

is recognized and supported. Critical legal studies, inspired by linguistic and sociological de-constructivism, build upon the traditions of legal realism and takes issue with formalism and objectivism.[89] The main tenet of this school denies the existence of natural law and of the objectivity of law. The law is inherently indeterminate. It is not a matter of finding the law. The law has to be shaped in a discursive process, laying out the underlying political values in a transparent manner based upon a liberal and pluralist theory of politics and the state. In the present context, Martti Koskenniemi's seminal work provides a comprehensive framework for the analysis and deconstruction of different legal theories in international law.[90] The analysis of different schools and positions in legal and political science doctrine is of great help in clarifying and deepening insights into fundamental attitudes, angles and perceptions that underlie the use of and recourse to equity, as well as other principles and basic rules of international law. Koskenniemi operates within theories depicting the liberal doctrine of politics underlying international law. This doctrine essentially denies natural law and pre-statal rights. The initial liberal solution, used by Wolff and Vattel, relied upon the state's self-definition. The author argues that 'the international legal argument is constructed upon pluralistic and individualistic ideas ... associated with the liberal doctrine of politics'.[91] In order to solve conflicts that go beyond procedural approaches (negotiations), a viewpoint external to states was needed, and this was often taken from precepts of natural law. According to Koskenniemi, however, this undermines the original liberal assumption.[92] Mere procedural solutions alone cannot suffice as they equally require a normative framework. This framework can thus only be man-made. He therefore essentially relies upon positivism, and addresses problems of the law's

[89] See Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge MA, London: Harvard University Press, 1983); also in *Essays on Critical Legal Studies Selected from the Pages of the Harvard Law Review* (Cambridge MA: Harvard Law Review Association, 1986), p. 318; see generally Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge MA: Harvard University Press, 1987); Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (eds.), *Deconstruction and the Possibility of Justice* (New York, London: Routledge, 1992).

[90] Koskenniemi, n. 50. In this work, which was first published in 1989, apology stands for law justifying existing power constellations, bare of normativity. Utopia, on the other hand, expresses high normative aspirations independently of factual constellations, cf. Koskenniemi, n. 50, pp. 21, 45, 54, 536–7. While policy-oriented schools (McDougal and Lasswell) are deemed to be on the extreme side of the apologetic spectrum, the pure theory of law (Kelsen) stands for utopia on the other side of the spectrum, with other schools of thought fluctuating in between.

[91] Koskenniemi, n. 50, p. 156. [92] Ibid., p. 155.

objectivity on this basis. He expounds the relative indeterminacy of law (often using examples relating to equity) and the alleged inability to assess law objectively.[93] Problems can be approached from the perspective of the international community (descending arguments). They can also be addressed from the state's point of view (ascending argument), and the two points of view often produce conflicting results.[94] His main deconstructivist thesis argues that the law is incapable of providing convincing justifications and each solution remains exposed to criticism. Instead of seeking a more determinate system of legal argument, lawyers need to take a stand on political issues without assuming a privileged rationality.[95]

The analysis is based on an assessment of the main theories and schools of thought within the parameters of positivism and the realm of man-made law. They share a common trait in that they accept that the law can be found even in hard cases, but they do so in a different manner. Koskenniemi distinguished four approaches to this effect:[96] The formalistic view (Kelsen) assumes the completeness of the legal system on the basis of the Lotus doctrine. Secondly, the naturalist schools argue that certain material standards are inherent to the law and offer guidance. A third, purposive variant emphasizes that in the absence of positive rules, the decision must either give effect to some legislative purpose, or to some conception of utility or equity.[97] A fourth variant emphasizes the constructive aspects of legal decisions and the autonomous and systemic character of legal concepts, equally assuming material completeness of the law.

Having analysed the relationship of doctrine and practice and the relationship of law and political science further, Koskenniemi introduces another four viewpoints for the assessment of the role of law in international relations:[98]

[93] Ibid., pp. 23–24, 60–70. [94] Ibid., pp. 59–60.

[95] Ibid., p. 69. 'I shall argue, then, that law is incapable of providing convincing justifications to the solution of normative problems. Each proposed solution will remain vulnerable to criticisms which are justified by the system itself. Moreover, depending on which of the systems' two contradictory demands one is led to emphasize, different – indeed contradictory – solutions can be made to seem equally acceptable ... No coherent normative practice arises from the assumptions on which we identify international law ... My suggestion will not be to develop a "more determinate" system of legal argument. Quite the contrary, I believe that lawyers should admit that if they wish to achieve justifications, they have to take a stand on political issues without assuming that there exists a privileged rationality which solves such issues for them.'

[96] Koskenniemi, n. 50, pp. 44–58. [97] Ibid., p. 48. [98] Ibid., pp. 184–5.

(i) the rule approach position denies the fluidity of law and politics and stands for an independent and defined, albeit narrow, body of law;
(ii) the policy approach position, reflecting mainly sociological schools, considers law to be normatively weak and broad in scope;
(iii) the sceptical position considers law to be normatively weak and materially restricted; and
(iv) the idealistic position considers law to be normatively strong and materially wide.

These positions are useful for the provision of a framework for our analysis. None of them is immune from criticism from the perspective of the other three. Indeed, according to the author, the rule approach lawyer will be criticized by the policy approach lawyer because the rule approach does not take realities into account and results in the creation of a utopian model.[99] Similarly, sceptical political scientists and economists will be reminded by Henkin that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'.[100] And legal idealists will be reminded of the law's shortcomings, particularly in the context of political disputes. Doctrines and arguments therefore oscillate within and among these positions, leading to some middle ground. According to Koskenniemi:

> This explains the movement by modern lawyers constantly towards a middle-position – a position from which it would be possible to reject the utopias of those who think the world is or is in a process of becoming a law-regulated community and the apologies of those who engage themselves in law's infinite manipulation in favour of political ends.[101]

It would seem that the research undertaken by Koskenniemi was partially inspired by the renaissance of equity in international law and frequent recourse to it. He frequently refers to the case law of the ICJ. Problems of indeterminacy, conflicting solutions and the inability to assess the law objectively are often exemplified by taking recourse to cases based upon equity and equitable principles. It is premature at this stage to assess whether Koskenniemi's thesis stands the test of detailed analysis of the case law and underlying doctrines and principles. It is the task of this book to undertake such detailed analysis in one particular field of law – maritime boundary delimitation – with a view to assessing the de-constructivist

[99] Ibid., p. 185.
[100] Louis Henkin, *How Nations Behave: Law and Foreign Policy* (New York: Columbia University Press, 1979), p. 47.
[101] Koskenniemi, n. 50, p. 186.

thesis. Yet, such detailed examination will show that the scope for 'a more determinate system of legal argument' can be developed in this field, and that Koskenniemi's conclusions are partly based upon a lack of sufficiently detailed analysis of the case law and the underlying legal doctrines and equitable principles. Clearly, equity as a foundation and methodology of maritime boundary delimitation is more than splitting the difference, ex post justification or application of *ex aequo et bono* in disguise. However, his useful framework of classifying different schools of thought and positions makes it clear from the outset that equity is also bound to mean different things in the context of different theories. His work assists in assessing where different views come from and why one or another normative function of equity is preferred in a particular context. The discourse on equity, as with other principles of international law, is exposed to these different schools and positions and fluctuates equally among and between them. Koskonniemi makes a convincing case that it would be futile and incorrect to seek a final and exclusive theory of equity in international law. The underlying assumptions of international law based upon the liberal theory of state and sovereign equality are bound to project a pluralist view. Moreover, there are no intellectual limitations to theorizing about law, even positive law, and bringing about different schools of thought in assessing the normativity and impact of factual relations in between the ranges offered by utopia and apology.

Pluralism, however, does not prevent us from seeking the description and analysis of equity in a particular context and of identifying its foundations, functions and processes as they operate within the legal system of international law – the functions ascribed to equity in diplomacy, in treaty making and, foremost, in adjudication relating to maritime boundary delimitation.

IV. Conclusion

Our thesis is, to conclude this introduction, that much can be learned about the reality and processes of law and equity in a particular and detailed context. This is the goal of this book. And by doing so, it hopes to gain further insights into the real operation of equity and of distributive justice in the law of co-existence. Such analytical work, of course, cannot aspire to find the truth of the matter *per se*. This is not an exercise in natural sciences. Oscillating theories, underlying arguments and decisions continue to render the task complex and difficult. Yet, it is hoped that such a step-by-step analysis will assist in clearing the path, with the

aim of achieving a more complete picture and a rational view of the interrelationship of law and equity in this particular field. Much can be learned about the methodologies applied, and methodologies that should be applied, taking the details of the problem into account. It is through this approach that we hope to learn more about the very functions of equity and the judge in contemporary international law relating to maritime boundaries. It is on this basis that insights can be offered into the operation of equity within a specific field of law as well as into the evolution and development of equity in the legal process. Results in substantive law will remain within the bounds of this particular field. Equity means different things in different contexts. Generalizations will only be made with respect to fundamental functions and the methodology developed under the realms of equity. It will be argued that such common ground exists. While the substance of equity is bound to vary from field to field, a methodology of concretization and shaping of equitable standards, and applying such standards in their respective legal and political environments, can be found, which may be helpful in all issues related to resource allocation based on equity.

Modern equity in international law brings a new legal methodology to the table which is of importance far beyond the specific context of maritime boundary delimitation. It offers an approach to complex problems and conflicts, the settlement of which need to be left to assessment case by case, taking into account relevant factors to be determined on the basis of respective foundations of the regulatory field at stake. Such findings on modern equity and its new methodology thus are not only of importance with a view to unsettled boundaries. They may be equally crucial in the face of the new challenges that are emerging with climate change, such as the melting of the polar ice and, with it, the enhanced access to further navigational routes and submarine resources.[102] At the same time the possible rise of sea levels and the ensuing change of coastal configurations loom large and strongly depend upon past experience and findings in the law of distributive justice.[103] But the lessons do not end here. The methodological insights may be applied to other areas of

[102] See The Ilulissat Declaration, Adopted by the five States bordering the Arctic Ocean at the Arctic Ocean Conference, Illulisat, Greenland, 28 May 2008, available at http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf (last accessed 7 September 2014).

[103] On the problem of rising sea levels, see David D. Caron, 'Climate Change, Sea Level Rise and the Coming Uncertainty in Oceanic Boundaries: A Proposal to Avoid Conflict' in Seoung-Yong Hong and Jon M. Van Dyke (eds.), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Leiden, Boston: Martinus Nijhoff, 2009).

international economic law relating to the allocation of natural resources, as well as to other areas taking recourse to equity. The methodology expounded in judicial dispute settlement on maritime boundaries may serve as a model whenever treaties and customary law refer to equity. It stands for a particular methodology. Negotiators agreeing on treaty text invoking equity or equitable principles essentially delegate decision-making to further negotiations or dispute settlement in which precedents may play an important role. It implies that the matter is inherently justiciable. The approach is suitable for many areas entailing problems of distributive justice, such as allocation of territorial jurisdiction, the allocation of fresh water rights, navigable rivers and perhaps clean air, the allocation of compensation, the assessment of subsidies, countervailing duty determination in WTO law and anti-trust. Finally, the inquiry will teach and tell us to what extent justice is, and can be, done within the law of nations and to what extent new foundations will be required in global governance in order to address unresolved issues and challenges in bringing about distributive justice.

Accordingly, Part I of this book provides and assesses the particular context of this inquiry into equity: the law of the sea and the enclosure movements and its distributive effects. Part II focuses on the new boundaries which the enclosure of the seas produced. It deals extensively with the emerging role of equity and equitable principles in maritime boundary delimitation in what amounts to the most extensive area of litigation in international law besides trade and investment disputes. Part III conceptualizes the rule of equity and justiciable standards in the present context. It develops a proper methodology both for adjudication and negotiations which may eventually finds its way into other areas of international law.

In essence, this book argues that the rule of equity is able to gradually develop, in the particular field of a regulatory area and context, more specific equitable principles and define relevant circumstances the operation of which allows the bringing about of fair and equitable results beyond the technicalities of positive law or strict rules and exceptions. As a topical methodology, it contributes to the achievement of fair outcomes, given the constraints of the international society of sovereign states in the Westphalian system. It bears the potential to be applied to other and emerging regulatory areas of international law. They can learn from the experience over half a century of maritime boundary delimitation, the process of trial and error, the exceptional wealth of jurisprudence and doctrine, and from the gradual emergence of equitable principles offering guidance in what amounts to an utterly complex field.