

SYMPOSIUM: THE POPE'S ENCYCLICAL AND CLIMATE CHANGE POLICY
THE PAPAL ENCYCLICAL & THE ROLE OF COMMON BUT DIFFERENTIATED
RESPONSIBILITIES IN THE INTERNATIONAL CLIMATE CHANGE NEGOTIATIONS

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A fundamental theme running through the remarkable 192-page Papal Encyclical on Climate Change is the notion of solidarity—between nations and peoples, and between and within generations. In the words of the Encyclical, “[w]e require a new and universal solidarity.”¹ This translates, in the Encyclical’s vision, into principled cooperation between states and peoples, because “[a]ll of us can cooperate as instruments of God for the care of creation, each according to his or her own culture, experience, involvements and talents.”² In the international climate change regime³ this vision takes the form of the principle of common but differentiated responsibilities and respective capabilities (CBDRRC),⁴ a principle that the Encyclical explicitly endorses.⁵ The CBDRRC principle, however, lends itself to varying interpretations and has thus proven deeply contentious as the basis for climate cooperation. This is in particular in relation to the 2015 climate agreement that is due to be finalized in Paris in December 2015. This short essay explores the extent to which the Encyclical supports one or the other interpretation of this principle, and how closely aligned (or not) the Encyclical’s vision is to the emerging 2015 climate change agreement.

The CBDRRC Principle in the Climate Regime

The principle of CBDRRC has underpinned global efforts to address climate change from the very start. The principle finds expression in the Framework Convention on Climate Change (FCCC), and is the basis of the burden-sharing arrangements crafted under the FCCC and its Kyoto Protocol. It is also highlighted in numerous decisions of the FCCC Conference of the Parties (COP), the Copenhagen Accord, 2009,⁶ the Cancun

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¹ POPE FRANCIS, ENCYCLICAL LETTER LAUDATO SI’ OF THE HOLY FATHER FRANCIS ON CARE FOR OUR COMMON HOME, para. 14 (2015).

² *Id.*

³ United Nations Framework Convention on Climate Change, May 29, 1992, 1771 U.N.T.S. 107 [hereinafter FCCC], and Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162 [hereinafter Kyoto Protocol].

⁴ FCCC, *supra* note 3, at art. 3.

⁵ POPE FRANCIS, *supra* note 1, at paras. 52 and 170.

⁶ Decision 2/CP.15, Copenhagen Accord, para. 1, FCCC/CP/2009/11/Add.1, (Mar. 30, 2010).

Agreements, 2010,⁷ and Lima Call to Climate Action, 2014.⁸ While Parties agree on the crucial relevance of the principle, there is little agreement on its core content, application and legal status.⁹ There are differences between Parties on the:

- source, nature, extent and relative weight of the “common” responsibility Parties share
- source, nature, basis for, extent and relative weight of the differentiated responsibility individual or groups of Parties have¹⁰
- significance and legal import of the term “responsibilities”¹¹
- significance, legal import, and relative weight of the term “respective capabilities,” and,
- relationship between “responsibilities” and “respective capabilities.”

Flowing from these many contestations, there are differing views on the applications this principle lends itself to, the nature of any obligations it entails, as well as the legal status and operational significance of the principle.¹² Nevertheless, the CBDRRRC principle is accepted by Parties as a fundamental part of the conceptual apparatus of the climate regime. This principle offers authoritative guidance in certain respects—it requires efforts from all states in service of the common environmental goal, and it countenances differentiation between states.

The Papal Encyclical endorses both these intuitions at the heart of the CBDRRRC principle. It characterizes the climate as a “common good,”¹³ and urges all states and peoples to “regain the conviction” that “we have a shared responsibility for others and the world.”¹⁴ It also cites approvingly the view of the bishops of Bolivia that, “the countries which have benefited from a high degree of industrialization, at the cost of enormous emissions of greenhouse gases, have a greater responsibility for providing a solution to the problems they have caused.”¹⁵ In so doing, it favors one particular interpretation of the principle of CBDRRRC, namely that differentiated responsibility for climate change can be sourced to differing contributions to global environmental harm, rather than solely to differing capacities of states. This is a contested issue, and many developed countries, in particular the United States, do not support this interpretation.¹⁶

⁷ See Decision 1/CP.16, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention, para. 1, FCCC/CP/2010/7/Add.1 (Mar. 15, 2011).

⁸ Decision 1/CP.20, Lima Call for Climate Action, FCCC/CP/2014/10/Add.1, para. 3 (Feb. 2, 2015) [hereinafter Lima Call for Climate Action].

⁹ See Lavanya Rajamani, *The Reach and Limits of the Principle of Common but Differentiated Responsibilities and Respective Capabilities in the Climate Change Regime*, in HANDBOOK OF CLIMATE CHANGE AND INDIA: DEVELOPMENT, POLITICS AND GOVERNANCE 118 (Navroz K. Dubash ed., 2011).

¹⁰ That is, is differentiation to account for different capabilities alone or different responsibilities as well?

¹¹ That is, does “responsibilities” signal a “responsibility for” or a “responsibility to” and is it a moral or legal responsibility?

¹² For a detailed examination of these issues see Rajamani, *supra note 9*.

¹³ POPE FRANCIS, *supra note 1*, at para. 23.

¹⁴ *Id.* at para. 229.

¹⁵ *Id.* at para. 170.

¹⁶ See differing terms of United Nations Environment Program, 1992 Rio Declaration on Environment and Development, principle 7, UN Doc. A/CONF.151/26 (vol. I) (June 14, 1992) and FCCC, *supra note 3*, at art. 3. Also note that many developed countries opposed language pertaining to contribution to environmental degradation in FCCC Article 3. And, the United States introduced various amendments to circumscribe the legal potential of Article 3 and ensure that the principles, unofficially so titled, applied only to the parties and only in relation to the FCCC, not as general law. See, Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT’L L. 451(1993).

The CDRRC Principle and Differentiation in the 2015 Climate Negotiations

A fundamental shift appears to be underway in the 2015 climate negotiations—in relation both to the articulation as well as operationalization of the CDRRC principle. The Durban Platform that launched the negotiating process towards the 2015 agreement, unusually so for the time, contained no reference to common but differentiated responsibilities.¹⁷ Developed countries had argued that references to “common but differentiated responsibilities” must be qualified with a statement that this principle must be interpreted in the light of contemporary economic realities. In their view, economic and political realities have evolved since the FCCC was negotiated in 1992, and common but differentiated responsibilities must be interpreted as a dynamic concept that evolves in tandem with changing economic and other realities. Many developing countries, argued in response that this would be tantamount to amending the FCCC. The text was thus drafted such that this new agreement was to be “under the Convention”¹⁸—thereby implicitly engaging its principles, including the principle of common but differentiated responsibilities. This, it was believed, would hold efforts to reinterpret and qualify this principle at bay. The Doha and Warsaw decisions in 2012 and 2013 contained a general reference to “principles” of the Convention,¹⁹ but no specific reference to the principle of common but differentiated responsibilities. The Lima Call for Climate Action of 2014 does contain an explicit reference to the CDRRC principle, but it is qualified by the clause “in light of different national circumstances.”²⁰ This qualification arguably represents a shift in the interpretation of the CDRRC principle in its application to the 2015 agreement. The qualification of the principle by a reference to “national circumstances” introduces a dynamic element to the interpretation of the principle. As national circumstances evolve, so too will the common but differentiated responsibilities of States. This particular framing of the CDRRC principle, with the qualification “in light of different national circumstances,” and possibly with additional qualifiers such as a recognition of different “development stages,” is likely to represent the compromise articulation of the CDRRC principle in the 2015 agreement.

More significant than this subtle shift in the articulation of the principle, however, is the shift that is underway in its operationalization. The FCCC and the Kyoto Protocol operationalize the CDRRC principle by requiring developed countries (alone) to assume ambitious greenhouse gas (GHG) mitigation targets.²¹ These instruments categorize Parties and tailor their commitments based on lists defined in their Annexes broadly differentiating between developed and developing countries. This form of differentiation has proven deeply controversial over the years, and the troubled waters the Kyoto Protocol has navigated in the last decade stand testimony to this. Although some Parties remain in favor of retaining this form of prescriptive differentiation for the 2015 agreement,²² a more facilitative model of differentiation, rooted in sovereign autonomy, has gained ground.

¹⁷ See Decision 1/CP.17, Establishment of an Ad Hoc Working Group on a Durban Platform for Enhanced Action, 2011, FCCC/CP/2011/9/Add.1 (Mar. 15, 2012).

¹⁸ *Id.* at para 1.

¹⁹ See Decision 1/CP.18, Agreed outcome pursuant to the Bali Action Plan, recital to Part I, FCCC/CP/2012/8/Add.1 (Feb. 28, 2013); and Decision 1/CP.19, Further Advancing the Durban Platform, recital para. 9, FCCC/CP/2013/10/Add.1 (Jan. 31, 2014) [hereinafter Warsaw Decision].

²⁰ Lima Call for Climate Action, *supra* note 8, at para. 3. This language is identical to the language that appears in WHITE HOUSE, Press Release, U.S.-China Joint Announcement on Climate Change, para. 2 (Nov. 12, 2014).

²¹ Kyoto Protocol, *supra* note 3, at art. 3.

²² The Like Minded Developing countries (LMDC) hold such a view. The LMDC consist of Algeria, Argentina, Bolivia, China, Cuba, Democratic Republic of the Congo, Dominica, Ecuador, Egypt, El Salvador, India, Iran, Iraq, Kuwait, Libya, Malaysia, Mali, Nicaragua, Pakistan, Philippines, Qatar, Saudi Arabia, Sri Lanka, Sudan, Syria and Venezuela.

The Warsaw decision invited parties to submit “intended nationally determined contributions” in the context of the 2015 agreement.²³ Parties can determine the scope of these contributions (whether they will cover only mitigation or also adaptation and finance), their form (in relation to mitigation, for instance, whether absolute economy wide targets or intensity targets or other), their rigor, and the information that will accompany them. Despite some efforts at the Lima conference to circumscribe the extent of discretion Parties enjoy, Parties retain considerable discretion in relation to their contributions. In so far as Parties choose their own commitments and tailor these to their national circumstances, capacities and constraints, they differentiate themselves from every other nation. This form of differentiation has come to be characterized as self-differentiation, and is expected to form a fundamental building block of the 2015 agreement. Self-differentiation provides flexibility, privileges sovereign autonomy and encourages broader participation. However, it does not provide any assurance either that countries’ contributions will add up to what is adequate to address the problem or that countries will do their fair share based on their past and current responsibility for environmental harm. No nation will be expected to do more (than it chooses to do) based on any objective or subjective assessment of its responsibilities and capabilities. Self-differentiation is thus an eminently pragmatic approach that, not surprisingly, lacks an ethical mooring.

In sharp contrast, the Papal Encyclical, in word, tenor and tone, advocates ethical burden-sharing solutions rooted in solidarity, responsibility and developed country leadership. The Encyclical highlights the vulnerability of poor countries, and the “true ecological debt” that exists between the global north and south as a result of the “disproportionate use of natural resources by certain countries over long periods of time.”²⁴ It even notes the pressing need to “calculate the use of environmental space” given that the “warming caused by huge consumption on the part of some rich countries has repercussions on the poorest areas of the world.”²⁵ The notion of self-differentiation, in contrast, allows states to side step these vexing questions relating to historical and current responsibility, environmental space, and equity and fairness in burden sharing.

While the 2015 agreement is unlikely to directly address these difficult questions, it could nevertheless move closer to the Papal vision, if it contains a strong mechanism to review countries’ nationally determined contributions for adequacy and fairness, and persuade countries, where necessary, to take on more ambitious and equitable commitments. What is under discussion currently, however, is a global stock taking process that will assess the aggregate progress that countries make towards the temperature goal.²⁶ While this may offer some assurance in relation to the adequacy of the overall effort, it does not offer similar comfort in relation to the equity or adequacy of individual contributions.

Another respect in which the 2015 agreement could move closer to the Papal vision is in relation to the provision of support, whether financial or technological. The Papal Encyclical recognizes that for poor countries “the priorities must be to eliminate extreme poverty and to promote the social development of their people.”²⁷ It nevertheless expects developing countries to behave environmentally responsibly, but places a requirement on those who “have experienced great growth at the cost of the ongoing pollution of the planet”²⁸ to help. Indeed, the Encyclical places the issue of poverty on par with environmental harms and calls for a

²³ See Warsaw Decision, *supra* note 19, at para. 2(b).

²⁴ POPE FRANCIS, *supra* note 1, at para. 51.

²⁵ *Id.*

²⁶ Draft agreement and draft decision on workstreams 1 and 2 of the Ad Hoc Working Group on the Durban Platform for Enhanced Action, Work of the ADP contact group, art. 10 (Edited version of Nov. 6, 2015, Re-issued Nov. 10, 2015) [hereinafter Draft agreement and draft decision].

²⁷ POPE FRANCIS, *supra* note 1, at para. 172.

²⁸ *Id.*

“more responsible overall approach” to addressing both issues.²⁹ A strong support package could play a crucial role in demonstrating solidarity and bolstering mutual confidence. However, many difficult questions remain on the table in relation to finance, including the extent to which the obligation to finance the climate regime should be extended to “all Parties in a position to do so.”³⁰

Concluding Remarks

At the heart of the dissonance between Parties in the 2015 negotiations is the fundamental paradigm shift that has been underway in the climate regime for nearly a decade. A shift from a prescriptive to a facilitative approach, from Annex-based differentiation to self-differentiation, and from the provision of support to developing countries for climate action to sharing of the costs of climate action. This shift obfuscates the “responsibility” that states have, historical and current, for greenhouse gases. The issue of “responsibility” played a key role in shaping the FCCC, and is a central thread running through the Papal Encyclical. Given the interpretative shifts in the CBDRRC principle, and the gradual erosion in differentiation between developed and developing countries since Bali, it remains to be seen how, if at all, and to what extent differentiated responsibilities will be reflected in the 2015 agreement. It is clear, however, that it will be one of the last and most difficult issues that states will resolve in Paris. Difficult as it will be, we must resolve it, as the Encyclical urges, in the spirit of solidarity between and within nations³¹ as this alone will allow us to address the “immensity and urgency of the challenge we face”³² to our common home.

²⁹ *Id.* at para. 175.

³⁰ Draft agreement and draft decision, *supra* note 26, at art. 6.

³¹ POPE FRANCIS, *supra* note 1, at para 162.

³² *Id.* at para. 15.