INTERNATIONAL ENVIRONMENTAL LAW AND NEW SOVEREIGNTY: SOME PENDING CHALLENGES

Derecho medioambiental internacional y la nueva soberanía: Algunos retos pendientes

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Abstract

This brief paper tries to underline my international general experience on Environmental law, in particular from the point of view of concerned individuals. There is a real need for international alternative settlement of environmental conflicts in despite of the international principle of sovereignty which is failing in order to protect natural resources during the last decades. However, States and their subdivisions are reluctant to submit themselves to the new principles of co-sovereignty, especially in the relationship with individuals. Although one may safely state that the

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international law of the environment is on the road to strengthening the role of non-state actors, there is still a long way to go before access of these actors to international adjudication will be fully recognised. Therefore, there is real need worldwide for an open debate and proposal on an international forum for making available the need for international resolution of environmental disputes. The pending international challenges on Climate Change, inter alia, would find here another reason to push forward in terms of international solidarity and new sovereignty on environmental matters.

Keywords

Enviromental Law; sovereignity; International Law; climate change.

Resumen

Este breve documento intenta subrayar mi experiencia general internacional en derecho ambiental, en particular desde el punto de vista de las personas interesadas. Existe una necesidad real de una solución alternativa internacional de conflictos ambientales a pesar del principio internacional de soberanía que está fallando para proteger los recursos naturales durante las últimas décadas. Sin embargo, los Estados y sus subdivisiones son reacios a someterse a los nuevos principios de co-soberanía, especialmente en la relación con los individuos. Aunque se puede afirmar con seguridad que el derecho internacional del medio ambiente está en camino de fortalecer el papel de los actores no estatales, todavía queda un largo camino por recorrer antes de que el acceso de estos actores a la adjudicación internacional sea completamente reconocido. Por lo tanto, existe una necesidad real en todo el mundo de un debate abierto y una propuesta en un foro internacional para poner a disposición la necesidad de una resolución internacional de disputas ambientales. Los desafíos internacionales pendientes sobre el cambio climático, entre otras cosas, encontrarían aquí otra razón para avanzar en términos de solidaridad internacional y nueva soberanía sobre asuntos ambientales.

Palabras clave

Derecho medioambiental; soberanía; Derecho internacional; cambio climático.

I. ENVIRONMENTAL RIGHTS WITHIN THE RULE OF LAW

During the second half of the 20th century we have seen the development, either under international or domestic laws, of certain ethical and political parameters and rules called Human Rights which are nowadays the core issue of any Rule of Law system. The role of the European Union system is as well remarkable in this sense either from the point of view of the EU Treaties or at the EU Charter of Fundamental Rights. The development of Human Rights law is demonstrated by the establishment, for instance, of the European Court of Human Rights[2] (ECHR) and the provision, in many constitutions, of systems for an effective judicial protection of these rights.

The purpose of environmental rights law is to reach certain common legal grounds to achieve a similar international framework of law for the protection of the environment and fostering sustainable development. Legal practice, however, demonstrates otherwise in most of the cases including the very risky process of Climate Change. Subject to a few exceptions, national courts do not assume the existence of the required customary or principles of international environmental law necessary for individuals, non-governmental organizations (NGOs) and municipalities to derive claims from eventual violation in various and very complex issues related to the environment[3].

[2] The European Court of Human Rights was established by the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, http://www.echr.coe.int

[3] According to the UN studies, natives and the indigenous peoples are the worst hit of globalization. As a result, according to the UN, today 20% Northern minority of humankind has: 82% of world gross national product, 81% of world trade, 94% of all commercial lending, 80% of all domestic investment, 80% of all domestic savings, 94% of all research and development. https://sustainabledevelopment.un.org/intergovernmental/csd

II. BRIEF NOTE ON THE GENERAL JURISDICTIONAL PROTECTION OF ENVIRONMENTAL RIGHTS[4]

The current failure of judicial protection of environmental rights by means of national courts is not compensated through the availability of international judicial review with the general exception of the so called first generation of Human Rights[5]. There are various international dispute settlement mechanisms which address environmental issues in specific contexts, such as the International Tribunal for the Law of the Sea, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights, even though the 1950 Rome Convention on Human Rights does not include any specific reference to environmental rights. Since the 1994 López Ostra v. Spain Judgment at the ECHR there is an open possibility to link environmental rights with certain other Human Rights included along the rights protected at the 1950 Rome Convention, once domestic remedies exhausted.

In addition, there is an environmental chamber of the International Court of Justice (ICJ), though it has not often been accessed by governments for a variety of reasons. Furthermore, decisions of the World Trade Organization's (WTO) dispute settlement bodies may also affect environmental matters. The Permanent Court of Arbitration (PCA) is also actively working in this field during the last years. So to say for the case of the International Court of Environmental Arbitration and Conciliation, founded by international authors like R. Martín Mateo, D. Loperena, R. Ojeda, E. Rehbinder and A. Kiss, inter alia, and particularly active dealing with different environmental cases within the period 1995-2011.

Meanwhile, one of the main tasks of institutionalised arbitration and conciliation of environmental disputes is to protect the rights of peoples to an adequate environment and, in particular, considering the deep crisis of the principle of sovereignty[6], by granting individuals and non-governmental organisations access to real and effective justice remedies. Arbitration could

[4] Romano, C. P. R. "The proliferation of international judicial bodies: the pieces of the puzzle", Journal of International Law and Politics Vol. 31, nº 4, New York University, 1999.

[5] See Loperena, D. "Desarrollo sostenible y globalización", Thomson-Aranzadi, 2003, and also his work on "El derecho al medio ambiente adecuado", Civitas, 1998.

[6] In particular, if we consider that natural resources need to be assumed as public domain goods of every human being: "Res commune omnium". At the same time, there are still many data bounding into the other direction linking natural resources with national sovereignty. See "Mining in Mexico: the sovereign take", The Economist, 2-11-2013, page. 44. Regarding marine energy, see, inter alia, Leary, D., and Esteban, M. Climate change and renewable energy from the ocean and tides: Calming the sea of regulatory uncertainty. The International Journal of Marine and Coastal Law 24, 2009, 617–651.

also develop a substantive right to a healthy environment based on existing international Human Rights, principles previously mentioned, as well as statutory law applicable under the relevant conflicts rules.

This would comprise prevention, restitution and compensation of environmental harm. The current situation clearly shows that individuals and NGOs are not adequately protected in international environmental disputes nowadays. Their role must be strengthened in order to achieve effective environmental protection and sustainable development[7].

This brief paper argues that there is a need for international enforcement of environmental law, arbitration and conciliation on environmental international matters regardless of the classic principle of sovereignty which seems to be useless in order to protect natural resourses. In fact, the action of international courts dealing with environmental issues does not mean that every single petition reaches the final procedural phase misleading, in many cases, the real protection of environmental rights.

Therefore, new concepts of sovereignty within a general proposal of international environmental justice should be fostered at the international arena[8] and, in particular, from the powerful economies, companies and banks which may need to analyse the direct linkages between economy and ecology[9].

[7] That is a particular concern, for instance, on sustainable fisheries. In the 1990s fishing reached the point of diminishing returns. Many fish stocks have fallen to levels from which they can no longer recover without reductions in the catches or a moratorium on fishing. There are simply too many boats catching too many fish. The first surge in number of fishing vessels occurred during the industrial revolution. This situation tapered off during the two World Wars, but boomed again in the 1950s through the 1970s. The world's fishing fleet doubled between 1970 and 1990. More than 100 million people in developing countries are dependent on fisheries. For them fishing is a way of life, not just a source of income.

Traditionally, small-scale or artisanal fishers have provided fish for local consumption; but as fish becomes scarce and its value increases, it enters the global market and becomes unaffordable for common people. Developed nations, which have overfished their closer waters, have headed into the waters close to developing countries. The EU has around 40% more vessels than necessary to catch fish on a sustainable basis. I still have in my recent memories the trouble of driftnets along Biscay bay during the last decades. See Ezeizabarrena, X. "Problems and legal rules regarding fishing with driftnets, with particular reference to EC Law", en Ocean Yearbook 15, Chicago University Press-Dalhousie Law School, 2001.

[8] Ezeizabarrena, X. "Rio+20 (1992-2012): el reto del desarrollo sostenible", Universidad de Deusto, Cuadernos Deusto de derechos humanos, 70, Bilbao, 2013.

[9] In fact, both words share the common relevant root "eco".

III. SOME PENDING CHALLENGES FOR THE PATH FORWARD

The experience of the enforcement International Environmental Law in general shows that, from the point of view of individuals, there is a growing need for an international alternative dispute settlement mechanism to deal with environmental conflicts. However, given their relationship with individuals and NGOs, States and their subdivisions are reluctant to submit themselves to such adjudication. Although one may safely state that the International Law of the environment is on the road to strengthening the role of non-state actors, there is still a long way to go before the access of these actors to international adjudication is properly granted. There is a clear space to offer an open study and debate on the necessity of an international forum for the international resolution of environmental disputes. In my view, this tool should be constituted and funded by the EU, some powerful but concerned governments worldwide, international companies and finantial institutions.

In terms of real protection of Human Rights the aforementioned proposal would become a clear example of an open field within the enforcement of Law for sustainable development. Once again in this context, International Law needs to start assuming a shifting process within the concept of sovereignty. Thereby, the system could take advantage of this sort of thoughts and common grounds whenever the involved parties may assume the voluntary jurisdiction of a real international universal jurisdiction on environmental issues, in particular towards the fight against climate change[10].

This challenge is nowadays a key element for the development and real enforcement of the whole principles and rules of sustainable development, for the direct protection of individuals or collective rights. Therefore, we have a pending challenge within Rio+20 context and the future to come. From the old Europe we must offer to the future generations something more than GDP and fresh money to buy things. I do sincerely hope that this historical anniversary of Elkano´s world circumnavigation (1419-2019) could become an inspiring part of this step forward. Why not a tiny piece of European environmental international solidarity?[11]

We are facing a very slow process that requires a deep shift in International Law and the concept of sovereignty. We have to tackle both the Global economic, ecology crisis and Climate Change through new concepts and the

[10] Vid. "The Climate Issue", National Geographic Magazine, November 2015; "How to fix it? A blueprint for a Carbon-free America", in National Geographic Magazine, The Climate Issue, November 2015.

[V]id. also "Planet or Plastic?", National Geographic Magazine, June 2018.

[11] See Rifkin, J. "El sueño europeo: cómo la visión europea del futuro está eclipsando al sueño americano", Paidós, Barcelona, 2004.

real development of a common and shared sovereignty towards environmental protection. It is an all inclusive approach from an ethical viewpoint. The life of the planet, the dependent health of the whole humanity should not be sacrificed by the greed of a few. In fact, it is a worldwide open challenge for domestic and international lawyers worldwide.

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