REVISTA Jurídica

ARTÍCULO

Introduction to environmental rights

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ACCESO ABIERTO

Para citaciones: Bin, M., & Perona, R. (2022). Introduction to environmental rights. Revista Jurídica, 19. 25-31.

Editor: Riccardo Perona. Universidad de Cartagena-Colombia.

Universidad Editorial Universitaria de Cartagena

1. Foreword

This article presents a revised version of a part of the researches carried out by Massimiliano Bin for his graduation tesis, under the supervision of Riccardo Perona, that included an academic stay at the University of Cartagena in May 2022.

The thesis focused on the Andean constitutional approach to environmental protection and legal subjectivity and required a preliminary study regarding the very notion of environmental rights, going through its history and development in the Western legal thinking. This article focuses on this specific issue.

When it comes to designing and enacting legal tools, whether hard or soft ones, in order to keep the environment safe, it must be said that human enjoyment of the environment has always played a huge role in the Western doctrine, despite the possibility for a dialogue on the fairly recent idea of protecting the environment for its own sake to taking place. As a matter of fact, these two conceptual approaches somehow diverge as well as they complement each other. However, in order to properly address this issue, the emergence of environmental law itself has to be considered.

In this sense, firstly, some insights into the history of environmental rights within the context of Western legal tradition will be presented (§ 2), henceforth their position in the general taxonomy of rights and within the human rights discourse will be addressed (§ 3).

2. History of Environmental Rights and the Advent of Environmental law in the Western World

Environmental law did not come into being as a distinct legal category, neither at a domestic nor at an international level, earlier than in the late 1960s. Despite this providing an idea of the modernity of the matter in question, it should be noted that modern environmental protection actually has some roots in resources conservation and public health laws, as well as in some private legal actions for pollution damage protecting the use and

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enjoyment of land, nuisance and abuse of rights, dating back to the nineteenth century[3]. However, common appreciation of the idea that natural environments and ecosystems, including water and air masses, were geographic entities that ought to be the subject of special legal protection did not come sooner than in the late nineteenth and early twentieth centuries[4].

Nonetheless, nowadays more than ever, given the extremely fast-changing scenario in which we live and the many life-threatening environmental issues we are called to face (e.g., water pollution, global warming, etc.), concrete legal responses are needed in order to preserve the environment. Fortunately, although the science-based idea that the environment is a fragile system vulnerable to human-induced impairment did not gain wide acceptance earlier than after the Second World War, when it finally did environmental legal protection quickly followed, especially in the USA, Europe and the Pacific Ocean region. Environmental protection has thenceforth become a significant component of the domestic legal systems in all developed countries and in many developing ones as well[5].
As a matter of fact, environmental awareness has providentially been growing furtherly in the last decades, also from a legal standpoint. This is reflected by the fact that environmental matters are now somehow addressed in roughly three-quarters of all current national constitutions worldwide[6], although in point of fact substantial issues of effectiveness and actual enforcement of law still exist and significant ongoing legal challenges are still to be addressed. Moreover, not only has environmental law become a significant and evolving component of international law, but also the urge to acknowledge environmental-related rights as human rights has become one of the most impellent legal challenges of these times, according to a widespread current of thought. Before considering this stance, though, it is necessary to take a step back and consider where the nature of the right to environment as a human right comes from, along with its characteristics.

3. Environmental Rights in the Human Rights Discourse: the Three Generations of Rights…

Truly, many academics have proposed different categorizations over time. Still, one of the classifications of human rights considered among the most practical by scholars is the one proposed by the Czech jurist Karel Vašák back in 1977[7]. Hence, let us take this taxonomy under consideration, to

[3] Hughes, David. 1986. *Environmental Law.* London. Butterworths.
[4] Tarlock, A. Dan. 2009. *Environmental Laws and Their Enforcement*, in *History of Environmental Law*. Vol. I. EUA.
[5] Ibid.
[6] May, James R., and Erin Daly. 2017. *Judicial Handbook on Environmental Constitutionalism.* United Nations Environment Programme, Cambridge University Press.
[7] Domaradzki, Spasimir, Margaryta Kvostova, and David Pupovac. 2019. *Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse.*

begin with. According to Vašák's categorization, human rights can be divided into three generations: i) civil and political rights, ii) social and cultural rights and iii) so-called "rights of solidarity". The first two groups of rights have their corresponding covenants signed in 1966: the ICCPR for the first generation[8] and ICESCR for the second generation[9], both coming into force ten years later, in 1976. Despite the first rights being labeled as negative, while the second ones being instead considered positive, the two groups of rights share the same place in the other two dichotomies of the classical taxonomy of rights. As a matter of fact, both generations regard individual rights that impose the related duties onto the nation-state.

Quite different, instead, is the nature of the last category. As a matter of fact, the third generation of rights, according to Vašák, refers to positive collective rights whose corresponding responsibility goes beyond the nation-state dimension. The third generation thus introduces for the first time two innovative features of human rights: collectivity and international liability. Though, this category of rights is the most recent one and, consequently, the least defined one. A universally accepted and precise list of the rights belonging to the third generation is still absent today and there is an unfortunate tendency to just squeeze in there all the rights that do not fit the criteria for the first two generations. It is precisely within this modern and challenging yet ambiguous category that we find, among others, the right to a healthy environment.

However, despite being unquestionably practical and useful, the categorization made by the Czech jurist about half a century ago may not completely adapt and apply to all the legal challenges of these times, leaving some questions unanswered and some matters without an appropriate classification. Indeed, because of their vagueness and ambiguity, some topics actually do not seem to fit into any of the groups of rights proposed by Vašák[10]. Precisely, it is difficult to differentiate those topics – among which lies the right to environment too – based on some of the above-mentioned dichotomies, namely: "individual" versus "collective" and "national" versus "international".

4. … and Beyond

Surely, while the concept of collective rights, introduced by what Vašák identifies as the third generation, has certainly reshaped the conventional perception of rights, somehow moving the holder of those rights from the

[8] UN General Assembly. 1966. *International Covenant on Civil and Political Rights.* Available at: https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf (last accessed on May 12, 2022).
[9] UN General Assembly. 1966. *International Covenant on Economic, Social, and Cultural Rights.* Available at: https://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf (last accessed on May 12, 2022).
[10] Domaradzki, Kvostova, and Pupovac, supra note 6.

individual to the community, the recognition of environmental rights may actually introduce a whole new category of rights which do not exactly fall into the definition of collective rights, but rather of "shared rights"[11]. In fact, it is the way the right is enjoyed by the holder that differs from the previous categories, not the holder *per se*, which instead remains the individual. To be sure, the holder of civil, political or social rights can enjoy those rights even if those rights are not being concurrently enjoyed by anybody else. Conversely, a healthy environment can be enjoyed by someone if and only if everybody else who is sharing the same environment enjoys the same right at the same time as well.

The concept of international liability, then, constitutes an even bigger issue to address. When we talk about international responsibility concerning environmental rights, in fact, what we mean goes beyond the meaning of "international" as conventionally understood in the legal tradition. Not by chance, the human rights of Vašák's third generation are also referred to as "rights of solidarity", and according to the Czech jurist they require collective action of individuals as well as states and other political units[12]. Therefore, though, it may be somewhat inaccurate to refer to the obligation in question, which is a common but differentiated responsibility, as "international". It would rather be more appropriate, perhaps, to take into account Immanuel Kant's ground-breaking division of public law into three categories. Indeed, leaving aside the *jus civitatis*, the German philosopher identified what we now normally call international law in the *just gentium*, but then recognized a whole new level in his theoretical distinction: the *jus cosmopoliticum*, "insofar as individuals and states, standing in an external and mutual relation, may be regarded as citizens of a universal state of humankind"[13]. It might be useful to refer, in this respect, to the proposal of Jürgen Habermas, who (within the general context of the constitutionalization of international law, though it can be applied in a broader sense to other legal questions) suggests we can distinguish two different legal and institutional frames: one is referred to as "transnational law", while the other is what he calls "supranational law"[14].

When speaking of transnational law, it is reasonably typical to start from a well-known quote taken from Philip Jessup's seminal Storr Lectures 1956[15]: "Nevertheless, I shall use, [...] the term transnational law to include all law which regulates actions or events that transcend national frontiers. Both

[11] Dellavalle, Sergio. 2022. Granting rights to nature? *Considerations of three different approaches to the question.* Max Planck Institute for comparative public law and international law. MPIL research paper series. No. 2022-09.
[12] Domaradzki, Kvostova and Pupovac, supra note 6.
[13] Kant, Immanuel. 1795. *Perpetual peace: a philosophical sketch.*
[14] Habermas, Jürgen. 2012. *The Crisis of the European Union in the Light of a Constitutionalization of International Law*. The European Journal of International Law. Vol. 23 no. 2.
[15] Pappalardo, Maria Manuela. 2020. *What is Transnational Law? A Trip through a Still Unknown Land.* FLADI – Fogli di Lavoro per il diritto internazionale.

public and private international law are included, as are other rules which do not wholly fit into such standard categories"[16]. Yet, without any doubt, transnational law still remains an elusive and imprecise notion[17], and there is still no overall consensus among scholars concerning its definition[18]. Accordingly, different solutions can be adopted in order to explain the concept of transnational law.

Many scholars have resorted to a tripartition in order to describe the different conceptions of transnational law. As pointed out by Craig Scott, for example, transnational law shall be considered as a mere proto-concept which has then been further developed in different ways by three distinctive schools of thought, that he labels as "transnationalized legal traditionalism" (understood as the "law as we know it that must deal with various phenomena consisting of actions or events that transcend national frontiers, to which one might perhaps usefully add to actions and events something like relationships amongst actors"), "transnationalized legal decisionism" (understood as the institutionally-generated "resulting interpretations or applications of domestic and international law to transnational situations"), and "transnational socio-legal pluralism" (understood as "being in some meaningful sense autonomous from either international or domestic law, including private international law as a cross-stitching legal discipline")[19]. According to this last view, rather than focusing on Jessup's very broad definition of transnational law which perceives it as some kind of umbrella term comprising a blend of non-standard rules alongside both public and private international law, these other rules are instead deemed as the true transnational law[20]. Along the lines of this tripartition is the scheme offered by Jaakko Husa as well, according to which three different notions of transnational law can be distinguished[21], more or less as highlighted by Scott. This shows that besides being no consensus among scholars on the definition of transnational law, there is fair consensus among scholars at least on the different conceptions of it.

Still, Habermas' line of thinking seems to be more likely to fit into the first conception, if we take into consideration the above-mentioned tripartition. According to Habermas, transnational law may be explained as a post-classic international law dealing with matters of global concern and it is generated by national states in order to create and implement norms aimed

[16] Jessup, Philip C. 1956. *Transnational law* (Storrs lectures on jurisprudence). Yale University Press.
[17] Cotterell, Roger. 2012. *What is transnational law?* Law & Social Inquiry, Volume 37, Issue 2, 500–524.
[18] Husa, Jaakko. 2018. *Advanced Introduction to Law and Globalisation*. Elgar Advanced Introductions.
[19] Scott, Craig. 2009. *"Transnational Law" as Proto-Concept: Three Conceptions*. German Law Journal. Vol. 10. Issue 6-7. Following the Call of the Wild: The Promises and Perils of Transnationalizing Legal Education. Published online by Cambridge University Press on March 6, 2019 (last accessed on June 6, 2022).
[20] Ibid.
[21] Husa, supra note 17.

at governing fields of general interest, like the environment. "This global international law differs from the mere inter-state treaty praxis of the classic, i.e., non-constitutional, international law as its rules and practices do not just affect the interests of the political communities involved but shape common concerns on a worldwide scale."[22]

This furthers the concept behind the so-called "rights of solidarity" and most certainly gives an idea of why environmental rights seem to belong to this category. It is unlikely that decisions on environmental issues taken by national states will only affect their own community. It is clear, in fact, that those decisions would in all probability affect others too. Consequently, this leads to (or, at least, should lead to) a higher and shared sense of responsibility toward environmental issues. The Rio Declaration of 1992, which laid out the principles of sustainable development and of common but differentiated responsibility, and other similar declaratory tools are unmistakable examples of this ongoing process, showing how the universal awareness of certain issues is changing and growing and how this is bringing up-to-date legal approaches as well, unhinging some cornerstones of the classic Western legal tradition. Regardless of whether the concept of transnational law is conceived in one way or another, e.g., as comprising private actors or just the public sphere, it is definitely crucial to grasp the transnational dimension of environmental law.

On the lines of Habermas, supranational law instead can be said to be characterized by institutions endowed with normative authority as regards the protection of peace and essential human rights, and it may be considered "the cosmopolitan law in the proper sense of the word, which, unlike the still state-oriented global dimension of post-classic international law, is directly addressed to individuals as the citizens of the world"[23]. Environmental matters are not exempt from this particular legal and institutional framework either. On the contrary, supranational institutions, e.g., the United Nations[24] and the European Union[25], are vital for the current development of environmental awareness and protection from a legal standpoint. It suffices to note that the above-mentioned Rio Declaration of 1992, which is an important turning point on the subject of environmental law, has been produced at the UN Conference on Environment and Development. Not to mention the contribution that the EU has been giving in the last decades. As a matter of fact, since the adoption of the First Environmental Programme in 1973, the "EU environmental policy and

[22] Dellavalle, Sergio. 2015. *Opening the Forum to the Others: Is There an Obligation to Take Non-National-Interests into Account within National Political and Juridical Decision-Making-Processes?* Göttingen Journal of International Law. Vol. 6.
[23] Ibid.
[24] Henceforth referred to as the UN.
[25] Henceforth referred to as the EU.

legislation have expanded dramatically, and gradually become one of the main EU areas of intervention"[26]. Moreover, "EU environmental policy represents one of the most interesting areas from the point of view of innovative legal tools and inclusive governance approaches".[27] To be sure, despite undoubtedly having some supranational characteristics, there is still no general consensus over whether some particular institutions (e.g. the UN) can be really considered supranational rather than international. Then again, nonetheless, its significance for environmental law shall be appreciated regardless.

The fact that the responsibility related to what Vašák calls third-generation rights appears to be heavily linked to an international, or rather, global legal perception, though, does not rule out the significance of state-level measures. Nowadays, as mentioned before, the environment has been considered worthy of constitutional attention in most of the countries in the world. While the constitutions that were adopted at the end of the Second World War were heavily influenced by the Weimar Constitution, in particular with reference to the relevance given to social rights, the constitutions promulgated in the second half of the twentieth century were distinguished in their turn by the introduction, once again, of a new kind of rights – among which, environmental rights. Of course, it cannot be a coincidence that this goes hand in hand with a general development of environmental legal awareness. On the contrary, it constitutes vibrant evidence of the ongoing process we have been analyzing so far, besides being a successful result of it as much as a valuable starting point for further progress.

[26] Orlando, Emanuela. 2013. *The Evolution of EU Policy and Law in the Environmental Field: Achievements and Current Challenges* in TRANSWORLD - The Transatlantic Relationship and the future Global Governance.
[27] Ibid.