Short Article – Camila Akemi Perruso

Title: The role of comparative law in the "fundamentalization" of the right to environment: an analyses of the european and inter-americain human rights systems

The questions related to the environment are a major challenge for modern societies and for different domains of knowledge. They began to emerge from the 1960s, following the progress of the science that has generated an awareness of the incompatibility of the development disproportionate to the sustainability of the planet. From this period, the increase of human activities aimed at economic growth and the advancement of technology that have caused environmental damages such as pollution, destruction of forests, threats to biodiversity and climate change, which fostered a critical review of the exploitation of environment.

The need for an environmental protection in relation to the human life justified the creation of a new field in international law. Environmental degradation is a global phenomenon that is not limited by geographical boundaries. Beginning in 1972 with the Stockholm Declaration, environmental degration becomes an issue that affects everyone, at all levels. Then, international law attempts to provide answers to global challenges imposed by the degradation of the environment, generating a movement of "greening"[i] within branches of international law.

I. Right to environment in the european and inter-americain human rights systems

Nowadays there is an acceptance of a "human right to the environment," even if it is not possible to assert the existence of it as a positivated human right in international law. Critics focus on the context of human rights and its anthropocentric perspective, claiming the lack of legal definition and the philosophical foundations of the environment. Perhaps the "fundamentalization" of the right to environment has its basis in the "fair-between" proposed by François Ost[ii], and the international law should establish principles and rules intenting to protect the environment and take account of human needs.

In the absence of environmental´s jurisdictions in international law, victims ask international courts in order to recognize the violations of human rights in relationship with the environment. The practical reason to focus on the international human rights law regarding environmental matters is the lack of alternative international instances. In this way,

in the case of environmental degradation, the jurisdictions of this branch of international law can be invoked to seek compensation for damages resulting from an act or an omission of a State.[iii]

The European Convention of Human Rights, adopted in 1950, does not mention a "right to environment", although the Court recognize that environmental issues have an impact on the enjoyment of human rights. According to Canal-Forgues, the European Court "does not have a textual support ensuring the right to environment, so it relates the protection of environment to the rights of the European Convention"[iv]. Sudre also note that the environment does not have autonomy as a human right and its assessment by the Court is made by ricochet because the issues relating to the environment do not have a clear normative basis.[v]

The actors of inter-american human rights system have also experienced difficulty in defining the scope of this emerging "right to environment"[vi]. The majority of the cases related to environmental issues concerns the violation of the rights of vulnerable populations (specially indigenous peoples[vii]), due to the economic expansion in tension with natural resources. Both in the inter-american and the european systems, environmental-related issues are discussed by accessory ways. That is to say, in general, environmental questions arise in the discussion of the violations of other rights, such as the right to life or the right to property.

II. Comparative law and the "fundamentalization" of the right to environment

Comparative law has an essential role in the definition of the possible of contribution between the systems, particularly in the definition of the "fundamentalization" of the right to environment. The primary object of the comparative law is the knowledge and the aproximation of people in order to establish an international cooperation. Thus, applying the method of comparative law in public international law, specifically between the european and inter-american human rights system is a way of finding better responses to similar problems arising from environmental degradation in different jurisdictions.

The comparative process involves a set of transactions, , moving towards a precise aim, through distinct phases. This methodology allows the analysis of the elements, while establishing the rules to be observed at each stage. There are three procedural phases: know, understand and compare. The first one, related to analysis, focuses on the actions needed for the knowledge of all the terms to be compared. The second step concerns the methodological

operations necessary for understanding the compared terms, within the legal frameworks to which they belong. The third, analises all actions taken and make a comparison to establish the relationship between the comparative terms that belong to different legal orders.[viii]

The emergence of this complex problem involving human rights and the environment drives the development of an internationalization of law and reveals the importance of establishing parameters for understanding it. Furthermore, the comparison of regional legal systems in order to verify differences in their specificity and rationality helps the establishment of a global cooperation on the matter.[ix] Thus, both the European and the inter-american systems could help each other to develop the "fair-between" solution, through a comparative approach analyzing the common challenges posed to the humanity.

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[i] SANDS Philippe (org.). Greening International Law. New York, The new press, 1994.

[ii] OST François. La nature hors loi

[iii] SHELTON Dinah. Human rights, environmental rights and the right to environment. In 28 Stan. J. Int'l L. – Heinonline - 103 1991-1992, p. 130.

[iv] CANAL-FORGUES Eric. Le droit à l´environnement en droit français et devant la cour européenne des droits de l´homme, In Nomos, Fortaleza, Vol. 29.1, 2009, p. 216.

[v] The jurisprudence of the European Court demonstrates an evolution towards the establishment of the relation between the protection of human rights and the environment, so the cases analyzed by it is mainly related to: the right to life enshrined in art. 2 (leading case Öneryildiz vs. Turquie 2004), the right to respect for private life, family life and home enshrined in art. 8 (leading case Moreno Gomez vs. l'Espagne 2004), the right to freedom of expression formulated in art. 10 (leading case , the right to a fair trial guaranteed by art. 6 § 1, the right to an effective remedy under art. 13, the principle of non-discrimination enshrined in art. 14, the right to not be subjected to degrading treatment set forth in art. 3, and the right to freedom of association in art. 11 of the European Convention and the right to peaceful enjoyment of property affirmed by art. 1 of Protocol n.1. DEJEANT-PONS Maguelonne. Les droits de l'homme à l'environnement dans le cadre du Conseil de l'Europe, RTDH, 2004, p. 861-888 ; GARCIA SAN JOSE Daniel, La protection de l'environnement et la CEDH, Dossier Droits de l'Homme, n. 21, Conseil de l'Europe, 2005, ; MERINO Muriel, Protection de l'individu contre les nuisances environnementales dans al jurisprudence de la Cour EDH, RTDH, 2006, p. 55-86 ; SUDRE Frédéric, La protection de l'environnement par la CEDH, In La communauté européenne et l'environnement, Colloque CEDECE d'Angers, La Documentation française, 1997, p. 209-222.

[vi] Despite its consecration in the art. 11 of Additional Protocol on Economic, Social and Cultural Rights of the American Convention on Human Rights of 1988, this treaty does not allow victims of environmental damage to use it as a legal basis to claim in the inter-american commission and court of human rights. The instrument of this regional system is the American Convention on Human Rights, focusing on civil and political rights. Adopted in Costa Rica in 1969.

[vii] For indigenous peoples, the link between culture and environment is established by the spiritual, cultural, social and economic relations that they have with their traditional lands. The laws, customs and practices traditionals reflect both an attachment to the land and a sense of responsibility in terms of protecting traditional lands for future generations. This is why the right to property guaranteed by the American Convention is invoked in case of threats to the traditional lands of indigenous peoples.

[viii] CONSTANTINESCO, Léontin-Jean. Traité de droit comparé, Tome II, La méthode comparative, Paris, Librairie générale de droit et jurisprudence, 1974, p.127-133.

[ix] SCHWARZ-LIEBERMANN von WAHLENDORF, Hans Albrecht. Droit comparé. Théorie générale et principes. Paris, Librairie générale de droit et jurisprudence, 1978, p. 81-87.