Chapter 4

The human rights-based approach to freshwater access within current international human rights law

4.1. Introduction

In contrast to international water law as analysed in Chapter 2, international human rights law a priori and by its nature is committed to the individual. The substantive and procedural rules of human rights law provide the single human being with individual legal entitlements vis-à-vis the state. International human rights are first of all laid down in the so called “International Bill of Rights.” This consists of the Universal Declaration of Human Rights (UDHR), the Covenant on Economic, Social and Cultural Rights (ICESCR) and the Covenant on Civil and Political Rights (ICCPR). Although the International Bill of Rights provides a rather dense system of rules there is no explicit reference to the issue of access to freshwater resources within it. According to the overwhelming importance of this concern and due to the fact that the international human rights instruments contain certainly some rights that are less important for human existence, this seems rather odd. Maybe the access to freshwater as a basic human need was taken for granted and therefore not worth mentioning or it was considered to be an implicit component of other human rights. Indeed, there are quite a few human rights that can be thought of when talking about people lacking even the most basic water needs, like, for example, the human rights to life, food or health. Nevertheless, none of them was made for the sole purpose of securing freshwater access of people. This fact raises doubts as to whether the existing human rights instruments provide a solid basis for a human rights-based approach to freshwater access as elaborated in the previous chapter. It is, for example, certainly not sufficient to regard freshwater access solely in its nutritional function. The social implications of freshwater access have to be taken into account, too. Thus, there is a strong link between freshwater access
and poverty because present water shortages above all affect poor people. The link can be extended from the individual to society. The human rights-based approach to freshwater access is charged with a particular societal interest because water is essential for biodiversity and a functioning ecosystem.\(^1\) Widespread poverty can destabilise water balance and sustainable water management systems by, for example, the slash and burn of forests due to poor people’s lack of productive resources.\(^2\) In view of the diversity of interests connected with a human rights-based approach to freshwater access, it cannot simply be derived as an immanent and self-evident component of other human rights. It necessitates instead a differentiated determination of the concrete interests protected by human rights law and the specific scope of obligations imposed on the state in this respect.

The following analysis seeks to work out the exact standard of a human rights-based approach to freshwater access in current human rights law and its deficits in this respect. In doing so, some aspects are of particular importance. Many people are unable to fulfil their need for water solely by way of defending their individual freedoms against the interfering state but need the state as guarantor. Chapter 3 has already shown that international law is open for positive obligations of states enabling the efficient exercise of human rights. This general recognition shall be scrutinised with regard to the specific human rights applicable to the issue of freshwater access. Thus, the chapter will turn, in particular, to the question to what extent international human rights law imposes positive obligations upon the state and to what extent they provide the individual water user with entitlements vis-à-vis the state.

Human rights are thought to cover the relations of the state and the people affected by its authority. However, watercourses cross international borders and some countries might be unable to provide their citizens with the sufficient amount of water because a riparian state reduces the natural flow of a watercourse in order to fulfil its own water needs. McCaffrey proved that there is a right of states to receive water from co-riparian countries if it serves the fulfilment of vital human needs.\(^3\) But, is there also an individual right

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2 Cf. D. Shelton, Environmental protection and the right to food, p. 95.