Beyond State Sovereignty: The Human Right to Water

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Abstract. International legal regulation of water resources traditionally operates from the perspective of the state and, in line with general legal doctrine regarding natural resources, hinges on the parameters of territoriality and state sovereignty. However, in recent times the problem of freshwater management is approached increasingly through the prism of human rights law. The shift from the state to the individual as a starting point in international law-formation is undoubtedly a powerful trend in legal doctrine and in legal discourse. A separate question is whether a human right to water at this point in time can be said to exist as lex lata in the positivist sense. The purpose of this article is to examine whether indeed a universal human right to water can be construed, notably on the basis of international treaty law. The analysis focuses on Article 6(1) of the International Covenant on Civil and Political Rights and on articles 11(1) and 12(1) of the International Covenant on Economic, Social and Cultural Rights. The authors conclude that a substantive human right to water is implied under articles 11(1) and 12(1) ICESCR, and subsequently address the normative implications of such a right, the nature and scope of corresponding state obligations, and general aspects of its implementation at the international and the domestic level.

1. Introduction

Over the past 50 years, environmental strain coupled with an enormous rise in human consumption has turned freshwater into an increasingly scarce resource. As conditions of water stress and scarcity spread around the world, a growing number of individual countries is facing a situation in which water supplies are insufficient to satisfy demand for industrial, agricultural and domestic uses. Where intra-state competition between different kinds of uses and groups of users intensifies, even the satisfaction of minimum essential water needs is anything but guaranteed to all people. Regarding water quality, more than one billion people around the world still have no access to any form of improved water supply and thus are forced to rely on freshwater resources that are qualitatively inadequate for basic human uses.

International legal regulation of water resources traditionally operates from the perspective of the state and, in line with general legal doctrine regarding natural resources, hinges on the parameters of territoriality and state sovereignty.1 The question then is,
both from a philosophical and a legal policy perspective, whether this is warranted when dealing with an aspect of human life as direct and as vital as water. Is it a matter of domestic jurisdiction when states fail adequately to address freshwater conditions in which parts of the population get seriously sick or even die because of lack of access to sufficient safe supplies? Can governments stay idle while private companies seriously pollute essential water resources without violating international obligations and hence incurring international responsibility? Or do all people have certain internationally guaranteed rights in respect of freshwater, obliging states in effect to ensure that everyone has access to essential quantities of safe water, even when available supplies are insufficient to satisfy all existing demands and intra-state competition for increasingly scarce resources intensifies?

The idea of a universal human right to water under international law, the realisation of which states are obliged to respect, to protect and – ultimately – to ensure through active provision of resources, appears increasingly to settle in among policy-makers and civil society groups alike. In a juristic sense this means introducing the human rights paradigm to the field of intra-state allocation and management of freshwater resources – traditionally matters of uncontested domestic jurisdiction.

The shift from the state to the individual is undoubtedly a powerful trend in legal doctrine and in legal discourse. A separate question is whether a human right to water at this point in time can be said to exist as lex lata. This article aims to examine whether a universal human right to water can indeed be construed, and to explore several fundamental questions regarding its legal basis, normative content and implementation. Notably, it examines possible legal bases of a universal right to water under international treaty law. The discussion focuses on Article 6(1) of the 1966 International Covenant on Civil and Political Rights and articles 11(1) and 12(1) of the 1966 International Covenant on Economic, Social and Cultural Rights, as these provisions appear as the most likely candidates for providing such a legal basis.

Law Association Berlin Conference on Water Resources Law (2004), in which the traditional rules regarding transboundary waters are (more) integrated with rules derived from the customary international environmental law and international human rights law that apply to all waters, national as well as international. By this – innovatory – approach the Committee mitigated to some degree the role of state sovereignty in water management; in a general sense this was reason for some Committee members to adopt a Dissenting Opinion (9 August 2004) to the Water Resources Committee Report during the same Conference (both at: http://www.internationalwaterlaw.org/); in contrast, the UN International Decade for Action, “Water for Life” (2005–2015), being geared to immediate action and implementation, seems to proceed from a classic state-based approach (see e.g. Actions taken in organizing the activities of the International Decade for Action, “Water for Life”, 2005–2015, Report of the Secretary-General, UN Doc. UN Doc A/60/158).

The terms “human right to water” or “right to water” are henceforth meant to refer to a substantive and universal right to water, the term “universal” meaning unlimited applicability, both ratione loci and ratione personae.

Access to basic supplies of safe water is a fundamental precondition for human sustenance. In that sense, the human right to water constitutes a “survival right” comparable to, e.g., the right to food. Therefore, from a conceptual point of view, a substantive “human right to water” would have to include as an essential component a positive entitlement to access to basic water supplies.
