



THE LEGAL GROUND FOR THE RIGHT TO WATER: BETWEEN A DERIVATIVE AND AN INDEPENDENT HUMAN RIGHT

Dovilė Stankevičiūtė¹

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SUMMARY

The aim of this article is to discern and compare the different positions on whether the right to water is recognized as a derivative or an independent human right and how each ground affects the nature of State's obligations. In order to achieve this aim, in the first two parts of this article two main views on the ground of the right to water are presented – firstly, that the right to water is derived from other existing human rights, and secondly, that it is a self-standing right.

Examining the State practice and relying upon the previous analysis of judicial decisions, the legal grounds for establishing right to water are compared. The views that human right to water is a self-standing right or established in customary law are analyzed and subsequently rejected, since only opinio juris of States is moving towards greater recognition of this right and the uniform practice, under traditional notion of customary law, is missing. While the position that right to water derives from ICESCR is criticized as potentially creating a new right through creative interpretation of the Covenant by CESCR, majority of States and judicial bodies agree with this derivation of the right to water from the right to adequate standard of living and right to health.

In the third part of the article, comparative analysis of judicial decisions from different jurisdictions is performed, which has shown that while the courts do not regard the right to water as a self-standing human right, they adjudicate water related issues as part of other fundamental human rights, such as right to life, dignity, and freedom from torture, right to health. Therefore, even in the absence of an explicit recognition of the right to water, the courts creatively adjudicate this essential element for human survival.

¹ Author is a PhD candidate at Faculty of Law, at Vytautas Magnus University.

KEY WORDS

International law, human rights, right to water, derivative rights, independent rights.

INTRODUCTION

Access to sufficient amount of clean and safe water is one of the most fundamental and vital human needs. Taking into account the importance of water, it would seem that it should have a place among the fundamental human rights, granted to all people. However, when one looks at the International Bill of Human Rights, it does not explicitly mention the human right to water. In contrast, such rights as right to food, health, adequate standard of living are explicitly mentioned in the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Given this lack of explicit reference of the right to water, the debate exists on what legal ground the right to water is recognized in international law and what practical implications arise if one regards the right to water to be a derivative or an independent right. In 2003, the UN Committee on Economic, Social and Cultural Rights in its General Comment No. 15 derived the right to water from the right to adequate standard of living under the ICESCR. However, even though the General Comment carries great weight and authority, it is still not binding upon the States. Additionally, in 2010 the UN General Assembly (UN GA) passed Resolution 64/292 recognizing the right to water,² however, this as well is not binding upon the States.

Considering the lack of direct recognition of the human right to water in the International Bill of Human Rights, Erick Bluemel has noted that the human right to water can be established in any of the following ways: “(1) as a subordinate and necessary to achieve the primary human rights recognized directly by international human rights agreements ..., (2) subordinate and necessary to achieve primary economic and socio-cultural rights recognized directly by an agreement such as the International Covenant on Economic, Social and Cultural Rights; or (3) as an independent human right.”³ However, the opinions of legal scholars differ regarding the issue on which of these grounds the right to water can be considered to exist in international law – part of them argues that there is a lack of evidence and State practice to claim that currently, the human right to water is internationally recognized as an independent human right. At the same time, there are some, who argue that the right to water has emerged or is emerging as customary international law and currently is derived from other recognized human rights. However, the authors do not elaborate on the implications that a particular ground would have on the State’s obligations concerning the right to water and subsequently to this right’s justiciability. If the right to water is considered to be derived from other related “parental” human rights, does it mean that the violation of the right to water can be established only if it amounts to the violation of these “parental” rights? Or has the State practice evolved in such manner as to consider the right to water as an independent right under the customary international law?

² The Human Right to Water and Sanitation, UN General Assembly, Resolution, A/RES/64/292, 03 08 2010, Para. 1.

³ Erick B. Bluemel, “The Implications of Formulating a Human Right to Water”, *Ecology Law Quarterly*, Vol. 31 (2004), 967-968.

In light of these diverging views, the aim of this article is to discern and compare the different positions on whether the right to water is recognized as a derivative or an independent human right and how each ground affects the nature of State's obligations. In order to achieve this aim, firstly, the views of legal scholars and evidence of State practice is analyzed, regarding the right to water as a derivative and an independent human right. Following this, an analysis of selected judicial decisions from several different jurisdictions is performed, reviewing how and on what grounds the courts adjudicate the right to water.

HUMAN RIGHT TO WATER AS A DERIVATIVE RIGHT

Regarding the articulation of the existence of the human right to water, most notable results have been achieved through the UN. In 2003, the UN Committee on Economic, Social and Cultural Rights adopted its General Comment No.15 titled “The Right to Water”. At the beginning of this document the Committee restates the existing situation in regard to the unequal distribution, insufficient quality of water, proclaiming that the “human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights”.⁴

The Committee then further goes on to establish what in its opinion constitutes a legal basis for this right's existence in international law. It derives the right to water from the first part of the Article 11 of the ICESCR, considering that the word “including” which is used in the formulation, indicates that the catalogue of rights stated in the article is not exhaustive and therefore includes water as one of the fundamental conditions for survival and securing an adequate standard of living.⁵ In this regard P. Gleick, by analyzing the drafting process of the Universal Declaration of Human Rights, states that the drafters in the UN did not regard the listing of the rights connected with the adequate standard of living to be all inclusive, but as a representative of what can be regarded as elements of adequate standard of living.⁶ T.S.Bulto observes that in the preparation of the Covenant, there were no discussions to include or to exclude the right to water in the text and this therefore represents the neutrality of the drafters regarding this right.⁷

The currently articulated doctrine of human rights holds that all human rights are universal, indivisible, interdependent and interrelated.⁸ This means that they are rarely realized in an isolated manner.⁹ Even though the right to water is most strongly inferred from the right to

⁴ General Comment No. 15: The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Committee on Economic, Social and Cultural Rights, E/C.12/2002/11, 20 01 2003, Para. 1; <<http://www.unhcr.org/afr/publications/operations/49d095742/committee-economic-social-cultural-rights-general-comment-15-2002-right.html>> [accessed 09 07 2019].

⁵ Id., Para. 3.

⁶ P. H. Gleick, “The human right to water”, *Water Policy* (1998, Vol. 1(5)), 490.

⁷ T.S. Bulto, “The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery”, *Melbourne Journal of International Law* (2011, 12(2)).

⁸ Vienna Declaration and Programme of Action (25 06 1993, Vienna), published by UN General Assembly A/CONF.157/23, 1993, Principle 5.

⁹ S. M.A. Salman, S. McInerney-Lankford, *The Human Right to Water: Legal and Policy Dimensions, Law, justice, and development series* (Washington, DC: World Bank, 2004), 60;

an adequate standard of living, several other rights, explicitly mentioned in the ICESCR, in some level involve access to water as one of the prerequisites for achieving those rights. In this context the right to adequate housing can be mentioned, which is also established in article 11 of the ICESCR as a part of an adequate standard of living. The Committee in its General Comment No. 4 has stated that the States obligations in relation to the right to adequate housing include an obligation to ensure availability of services, materials, facilities and infrastructure, which also entails sustainable access to safe drinking water.¹⁰

Another possible right, for the achievement of which, access to water is crucial is the right to life, established in the article 6 of the International Covenant on Civil and Political Rights (ICCPR).¹¹ However it has been noted that inference of a separate right to water from this right can be complicated due to existing narrow interpretation of the right to life, as primarily involving negative obligations by the State – to refrain from interfering with this right, as opposed to positive obligations, which would be necessary for achieving right to water.¹² However, the emerging interpretation is that State's also have positive obligations to ensure the right to life. For example, the Human Rights Committee in its General Comment No.16 has stated that these positive measures by the States should entail adopting measures to eliminate malnutrition and epidemics.¹³

Another inference could also be made from the right to health, under article 12 of the ICESCR.¹⁴ This was also mentioned by the Committee in its General Comment No. 15.¹⁵ According to the Committee, the right to health is seen as being dependent upon the realization of other rights and socio-economic factors such as food, housing, access to safe and potable water and adequate sanitation, etc.¹⁶

The right to water ultimately can relate to the protection of human dignity.¹⁷ For example, a Belgium Court has considered that human dignity cannot be understood without access to water. In this case, the Court considered the issue whether it was possible to disconnect water supply to a person, when he failed to make timely payments for the service. The court held that “even a

<<http://documents.worldbank.org/curated/en/219811468157522364/The-human-right-to-water-legal-and-policy-dimensions>> [accessed 10 02 2017].

¹⁰ General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant), UN Committee on Economic, Social and Cultural Rights, E/1992/23, 13 12 1991, Para. 8(b); <<http://www.refworld.org/pdfid/47a7079a1.pdf>> [accessed 10 07 2019].

¹¹ International Covenant on Civil and Political Rights, State News (2002, No. 77-3288), Art. 6.

¹² S. C. McCaffrey, “A Human Right to Water: Domestic and International Implications”, *Georgetown International Environmental Law Review* (1992, 5), 98, cited by M. Fitzmaurice, “The Human Right to Water”, *Fordham Environmental Law Review* (2006-2007, 18), 544.

¹³ General Comment No. 6: Article 6 (Right to Life), UN Human Right Committee (HRC), 30 04 1982, Para. 5; <<http://www.refworld.org/docid/45388400a.html>> [accessed 10 07 2019].

¹⁴ International Covenant on Economic, Social and Cultural Rights, State News (2002, No. 77-3290), Art. 12.

¹⁵ *Supra* note 3, General Comment No. 15, UN Committee on Economic, Social and Cultural Rights, Para. 3;

¹⁶ General Comment No.14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), UN Committee on Economic, Social and Cultural Rights (CESCR), (E/C.12/2000/4, 11 08 2000), Para. 3-4; <<http://www.refworld.org/pdfid/4538838d0.pdf>> [accessed 10 07 2019].

¹⁷ *Supra* note 3, General Comment No. 15, UN Committee on Economic, Social and Cultural Rights, Para. 3;

chronic failure of the user to his obligation to pay could not deprive him from his basic right to respect his dignity” and noted that the water service company, instead of disconnecting the water supply completely, had to reduce the amount of water that was being supplied, still ensuring that minimum supply of water is available.¹⁸

Salman M.A. Salman argues that the right to water could also be inferred through environmental law and based on the right to environment.¹⁹ He refers to the statement in the Stockholm Declaration that man has a fundamental right to adequate conditions of life in an environment of quality and he bears a responsibility to protect and improve environment.²⁰ However, as this particular principle is only emerging in international law, neither the Committee, nor other authors have relied on this basis for deriving the right to water.

Even though the adoption of this General Comment is one of the most significant developments in addressing the existence of the human right to water, it is not without critique. Stephen Tully notes that for one, the sources, which the Committee lists in order to support the proposition that the human right to water is internationally recognized, are listed without differentiating between their nature and context.²¹ Another point that he raises includes the issue of the competence of the Committee – “... it does not possess authority to create human rights since its principal function is to monitor implementation”²² and it may only make suggestions and recommendations of a general nature in order to facilitate the implementation of the ICESCR.²³ However, the Committee’s weight in clarifying the norms of the ICESCR has been supported by a number of authors,²⁴ regarding its statements as authoritative in regards to interpreting ICESCR.

Regarding this right as a derivative right has several implications on its practical implementation. “The parent and derivative rights share the same legal character”.²⁵ If the right is to be considered as derivative, its violation can be established only when the parent rights are violated also.²⁶ Likewise, Amanda Cahill argues that consideration of the right to water as a derivative right causes confusion concerning the justiciability of this right as “... it could be difficult to establish whether violations are of the right to water itself or ... violations of other

¹⁸ Belgium case: *Juge de Paix Fontaine-l'Évêque*, Justice de Paix (Fontaine-l'Évêque, JJP [2012] 306, 2009), court quotations translated by WaterLex and WASH United, *The Human Rights to Water and Sanitation in Courts Worldwide. A Selection of National, Regional and International Case Law* (Switzerland: WaterLex, 2014), 191; <<http://www.waterlex.org/new/wp-content/uploads/2015/01/Case-Law-Compilation.pdf>> [accessed 07 07 2019].

¹⁹ Supra note 8, S. M.A. Salman, S. McInerney-Lankford, *The Human Right to Water: Legal and Policy Dimensions*, 57-58;

²⁰ Id.

²¹ S. Tully, “A Human Right to Access Water - A Critique of General Comment No. 15”, *Netherlands Quarterly of Human Rights* (2005, 23(1)), 58.

²² Id., 43.

²³ Id.

²⁴ O. De Shutter, *Economic, Social and Cultural Rights as Human Rights: An Introduction*, CRIDHO Working Paper 2013/2, 6; Supra note 3: E. B. Bluemel, “The Implications of Formulating a Human Right to Water”, 972.

²⁵ P. Thielbörger, *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* (Berlin Heidelberg: Springer-Verlag, 2014) 110.

²⁶ Supra note 6, T.S. Bulto, “The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery”, 304.

related rights”.²⁷ This issue could arise, for example, if the State does not ensure sufficient amount of water for hygiene, could a person claim a violation of the right to water, right to dignity, right to health or right to an adequate standard of living? What is the threshold for establishing the violation of the right to water or of the related rights? Furthermore, since shift in the international community towards the justiciability of economic, social and cultural rights is relatively recent, the ambiguity on the exact scope of these rights still exists. This also negatively impacts the attempts to define the normative content of the right to water.

A. Cahill regards the right to water as currently being right of “unique status”, between derivative right and independent right.²⁸ For his part, P. Thielbörger suggests that the most suitable way to derive the right to water is through the synthesis of the “parental” rights – right to life, highest attainable standard of health and right to adequate standard of living – which creates a new derivative right of multiple layers (aspects).²⁹ By responding to the critique, made by S. Tully, he presents an interesting argument - that the right to water, if inferred from several “parental” rights simultaneously, can exceed the scope of each of these “parental” rights put together.³⁰

Before turning to the analysis of selected judicial decisions regarding the scope and content of the State’s obligations towards the right to water, it is necessary to analyze another possible view of the right to water as an independent human right.

RECOGNITION OF THE HUMAN RIGHT TO WATER AS A SELF-STANDING RIGHT

When analyzing the legal ground for establishing the right to water, several authors have expressed the view that the recognition of the human right to water as an independent right is emerging. For example, Erick Bluemel argues that there has been a shift from recognizing the right to water as a subordinate to other primary human rights towards treating it as an independent human right.³¹ Similar view is also expressed by T.S. Bulto, who regards the right to water to be an independent, autonomous human right and therefore it is “...not dependent upon the finding of violations of other related rights...”.³² He supports this claim by relying on the interpretation of the ICESCR and stating that excluding such basic guarantees as right to water would go against the purpose and object of the Covenant.³³ In the view of Malcolm Langford, “...water should be carved out as a separate human right for both conceptual and instrumental reasons...”.³⁴ However,

²⁷ A. Cahill, “The Human Right to Water – A Right of Unique Status: The Legal Status and Normative Content of the Right to Water”, *The International Journal of Human Rights*, (2005, Vol. 9(3)), 391.

²⁸ *Id.*, 395.

²⁹ *Supra* note 24: P. Thielbörger, *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right*, 115.

³⁰ *Id.*, 69.

³¹ *Supra* note 3: E. B. Bluemel, “The Implications of Formulating a Human Right to Water”, 968.

³² *Supra* note 6, T.S. Bulto, “The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery”, 303.

³³ *Id.*, 302-303.

³⁴ M. Langford, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008), 511.

he does not further expand on this position. The particular consequences, which would occur if a self-standing right to water is recognized, are not clearly expressed neither by the proponents nor critics of this particular view. For instance, Pierre Thielbörger suggests that identifying a self-standing right to water for one, would highlight its importance, as well as easier identification of violations of this right.³⁵ It is argued, that the recognition of the independent human right to water would ensure broader and clearer scope of this right's protection.³⁶

G. Cavallo is of the opinion that "... a worldwide process towards an explicit recognition and a definition of the human right to water and sanitation" is underway.³⁷ He also further argues that the recent practice of States makes the inference of the human right to water less necessary.³⁸ For example, several States have included the right to water in their constitutions and national legislation.³⁹

In 2010 the UN General Assembly adopted Resolution 64/292 titled "the human right to water and sanitation", recognizing the right to safe and clean drinking water as a human right that is essential for the full enjoyment of all human rights.⁴⁰ This resolution has been adopted with 122 votes in favor, no States voted against, however 41 abstained, including such States as Australia, Canada, Denmark, Israel, New Zealand, United Kingdom and United States of America.⁴¹ The majority of States that have abstained indicated as a reason for their decision the short time frame during which the resolution has been introduced, so that the States had no adequate opportunity to assess the impact that the recognition of the human right to water would have on their international and domestic obligations.⁴² They did not make any official statements against the establishment of this right in itself.

Even though the adoption of this resolution has again reinforced the shared view of the importance of the human right to water, it does not by itself create any binding legal obligations upon the States. It is considered that the GA resolutions generally do not have a binding character, however can be an indication of evolution of the State's *opinion juris* regarding certain issues.⁴³ This view has been also expressed by the representative of Guatemala, during the adoption of this resolution stating that the adoption of the resolution "... will create no international or inter-State

³⁵ Supra note 24: P. Thielbörger, *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right*, 110-111.

³⁶ A. Hardberger, "Whose Job Is It Anyway?: Governmental Obligations Created by the Human Right to Water", *Texas International Law Journal*, (2006, Vol.41:533), 545.

³⁷ G. A. Cavallo, "The Human Right to Water and Sanitation: From Political Commitments to Customary Rule?", *Pace International Law Review Online Companion*, (2012, Vol. 3(5)), 152.

³⁸ Id.

³⁹ South Africa, Mauritania, Ethiopia, Zambia, Angola, Uganda, Uruguay, Bolivia, The Democratic Republic of Congo, Ecuador, Kenya, the Maldives, Nicaragua, the Niger, Mexico, Slovakia.

⁴⁰ Supra note 2, *The Human Right to Water and Sanitation*, UN General Assembly, Para. 1.

⁴¹ General Assembly Official Records, 64th session: 108th plenary meeting, UN General Assembly, A/64/PV.108, 28 07 2010, 9; <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/64/PV.108> [accessed 09 07 2019].

⁴² Id., See in particular the statements made by the representatives of New Zealand – 11, Botswana – 12, Australia – 17, U.S. – 8;

⁴³ M. D. Öberg, "The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ", *European Journal of International Law*, (2005, Vol. 16), 883, 904.

right or obligation”.⁴⁴ Similar position has been also taken by Chile. Australia has expressed its uncertainty over declaring new human rights through the General Assembly.⁴⁵ Analysis of these statements of States’ officials, made during the voting on the resolution, shows that some of the States, that voted in favor of the resolution considered it to be a moral statement as opposed to any recognition of a binding legal obligation.

The U.S. representatives have stated during the adoption process of the UN General Assembly resolution 64/292 that the right to water and sanitation, as it has been formulated in the Resolution, does not reflect existing international law as there is no right to water and sanitation in an international legal sense.⁴⁶ The United Kingdom, for its part expressed the opinion that there does not exist sufficient legal basis under international law to declare the human right to water as a free standing human right.⁴⁷ Similarly as the Committee, it regarded this right as deriving from the right to an adequate standard of living. The connection of this right to other related rights has been also expressed by Argentina, which linked the right to water with the right to life and adequate standard of living.⁴⁸ Similar position is also held by Norway. Therefore, there is no consensus between the States on the exact ground of this right. Although most of them regard it as inextricably connected or derived from related rights, however the self-standing view is not widely supported.

In the next part of this article the content of the State’s obligations will be assessed in respect to the human right to water, identifying the issues that arise or may arise in respecting, protecting and fulfilling the right to water. In order to clearer determine the exact scope of the right, reliance will be made upon selected decisions, made by various judicial bodies in different national and regional jurisdictions.

STATE OBLIGATIONS IN RELATION TO THE RIGHT TO WATER

Due to the diverging capabilities of States to effectively and immediately implement the necessary requirements related to the enjoyment of social and economic rights, the ICESCR in article 2 establishes the State’s obligation to take steps to the maximum of its available resources to progressively achieve the full realization of the rights, enshrined in the Covenant.⁴⁹

⁴⁴ Supra note 39, General Assembly Official Records, 64th session: 108th plenary meeting, UN General Assembly, 10.

⁴⁵ Id., Para. 11.

⁴⁶ John F. Sammis, *Explanation of Vote by John F. Sammis, U.S. Deputy Representative to the Economic and Social Council, on Resolution A/64/L.63/Rev.1, the Human Right to Water*, Press Release of United States Deputy Representative to ECOSOC (New York, 28 07 2010); <<https://2009-2017-usun.state.gov/remarks/4749>> [accessed 09 07 2019].

⁴⁷ Supra note 39, General Assembly Official Records, 64th session: 108th plenary meeting, UN General Assembly, 12.

⁴⁸ Id., 9.

⁴⁹ Supra note 13, International Covenant on Economic, Social and Cultural Rights, Art. 2(1).

Notwithstanding this, it is considered that the States have an obligation to immediately ensure the satisfaction of at least a minimum essential level of each right under this Covenant.⁵⁰

In regards to the right to water, the Committee has identified a number of core obligations that have to be granted immediately – ensuring nondiscriminatory access to minimum essential amount of water that is sufficient to prevent disease and its equitable allocation. To ensure physical access to water facilities, including ensuring personal security is not threatened when accessing these facilities. Finally, to implement a national water strategy plan, monitor the realization of the right to water and take measures to prevent, treat and control diseases related to water.⁵¹

Since the Committee regards this right to be derived from the right to the adequate standard of living, the adequacy of the supply of water has to encompass the following main principles: 1) availability, 2) quality, 3) accessibility.⁵²

Availability

The first element of the core obligation in respect to water entails the availability of sufficient amount of water. This aspect is closely related to the right to life, from which, as has been seen, the right to water can be derived. P. Thielbörger regards this aspect to be crucial to establishing any legal ground to this right to water as the life of a person cannot be possible at all without it.⁵³ However, in the opinion of the Committee, the right to water has to be ensured for personal and domestic uses, which includes water for drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene.⁵⁴ Thus, the water quantity that the States would have to ensure is bigger than only the quantity needed for securing the right to life. Therefore, the violation of this aspect of the right to water would entail not only complete denial of water resources to the people but also its insufficient amount.

This particular issue of the necessary amount of water has been addressed by the Inter-American Court of Human Rights in the case of *Xákmok Kásek Indigenous Community v. Paraguay* in 2010. From 2003 to 2009 the Xákmok Kásek Indigenous Community was not provided with access to water, however since 2009 the State has supplied limited amount of water to the inhabitants – the amounts were no more than 2.17 liters per person per day. This amount, in the Court's view, did not reach the minimum required under international standards to ensure that basic needs, such as food, hygiene are met – which would be at least 7.5 liters per day per person. Subsequently, it recognized that measures, employed by Paraguay have not been sufficient to ensure that minimum amounts of water are supplied and available to the population

⁵⁰ General Comment No.3: The Nature of State's Parties' Obligations (Art. 2, Para. 1, of the Covenant), UN Committee on Economic, Social and Cultural Rights (CESCR), E/1991/23, 14 12 1990, Para. 10; <<http://www.refworld.org/pdfid/4538838e10.pdf>> [accessed 09 07 2019].

⁵¹ Supra note 3, General Comment No. 15, UN Committee on Economic, Social and Cultural Rights, Para. 37.

⁵² Id., Para. 12.

⁵³ Supra note 24, Pierre Thielbörger, *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right*, 113.

⁵⁴ Supra note 3, General Comment No. 15, UN Committee on Economic, Social and Cultural Rights, Para. 12(a).

in question.⁵⁵ The Court regarded these actions to violate the right to life. This particular amount of necessary water was established based on the Committee's General Comment No. 15.

Interestingly, the local Administrative and Fiscal Court of Argentina, in the case of *Asociación Civil por la Igualdad y la Justicia c/Gobierno de la Ciudad de Buenos Aires* has held that the State has to provide the most basic level of the enjoyment of the right to water even in circumstances of crisis or emergency.⁵⁶ In its decision, the court referred to the ICESCR, determining that the right to water constitutes an essential component of the right to life, autonomy and human dignity.

Another important issue that arises in respect to the State's obligation to ensure the availability of water supply to the population is the compatibility of this obligation with other legitimate interest of the State, in particular with the supply of water to illegally constructed premises or informal settlements. For example, the High Court of Bombay, in line with the previous practice, developed by Indian courts,⁵⁷ has recently recognized that “[r]ight to get water is an integral part of the right to life conferred by Article 21”⁵⁸ of the Constitution of India. The Court therefore ordered the Municipality to develop a policy for supplying water to the dwellers of illegal structures in Mumbai. The Court further noted that the dwellers of such structures cannot claim to water access on par with the citizens who lives in lawfully constructed premises and therefore the Municipality could provide the water to former dwellers at higher costs.⁵⁹ In a similar case, the Supreme Court of Israel determined that „[a]ccessibility to water sources for basic human use falls within the realm of the right to minimal existence with dignity“.⁶⁰ Although the Supreme Court derived the right to water from Israel's Constitution, it referred to the international law instruments and in particular to the Committee's General Comment No. 15 in this regard, recognizing that much of the regulation of essence of the right to water is in international law.⁶¹ However, the Court examined the policy of water supply to the illegal Bedouin settlements in the Negev in relation to the test of proportionality, stating that this principle is met if the “...basic right to accessibility to water sources is maintained, even if this involves inconvenience and the bearing of certain monetary costs.”⁶²

Such judicial practice shows that the States have an obligation to ensure at least basic availability of water services even to the part of the population that does not live in legal premises or official settlements. However, as it can be seen, the courts differently interpret the rights which are affected if such minimum amounts are not met – they consider it to be a violation of the right to life, or right to dignity.

⁵⁵ Case of Inter-American Court of Human Rights: *Xákmok Kásek Indigenous Community v. Paraguay*, IACtHR Ser. C No. 214 (24 08 2010), Para. 194-196.

⁵⁶ Argentina case: *Asociación Civil por la Igualdad y la Justicia c/ Gobierno de la Ciudad de Buenos Aires*, Cámara de Apelaciones en lo Contencioso Administrativo y Tributario, (Ciudad Autónoma de Buenos Aires, 18 07 2007), supra note 17, WaterLex and WASH United, 70-72;

⁵⁷ Ph. Cullet, “Right to Water in India – Plugging Conceptual and Practical Gaps“, *The International Journal of Human Rights*, (2013, Vol. 17(1)), 61.

⁵⁸ Case of the High Court of Bombay: *Pani Haq Samiti & Ors. v. Brihan Mumbai Municipal Corporation & Ors*, PIL-10-2012 (15 12 2014), 18.

⁵⁹ Id., 18, 21.

⁶⁰ Case of Israel Supreme Court: *Abdallah Abu Masad, et al. v. the Water Commissioner*, CA 9535/06 (05 06 2011), Para. 23.

⁶¹ Id., 25-29.

⁶² Id., 45.

Quality

The next element of the right to water includes its sufficient quality, which means that water has to be free from micro-organisms, chemical substances or radiological hazards, as well as to have appropriate taste, odour and colour.⁶³ This also relates to another right from which the right to water can be derived – the right to the highest attainable standard of health.

This aspect has been addressed in the case of *Marchisio Jose Bautista y Otros c/Superior Gobierno de la Provincia de Cordoba y Otros* in 2004 by a Civil and Commercial Court of first instance of Cordoba. Here the court referred to the General Comment No. 15 and stated that access to clean water is a right, which is implicit in the right to health.⁶⁴ Accordingly, the Court considered that given that the water resources in the Municipality of Cordoba have been contaminated by a malfunction of a wastewater plant and were no longer safe for human consumption, the Province was ordered to provide each household with 200 liters of drinking water until the situation is mitigated.

In the last three decades, a shift from surface water to ground water use occurred in Bangladesh, however no tests have been conducted for arsenic contamination of these ground waters. Later research showed that a large part of the tube-wells were poisoned with arsenic, which has detrimental impact on the health of the population.⁶⁵ In this case the Supreme Court of Bangladesh held that since provision of safe potable water under international law is part of the right to health, this right, as well as the right to life has been violated and ordered the State's agencies, responsible for water management, to "...fulfill their legal obligations to provide safe water to millions of persons across Bangladesh, and in particular to stop human consumption of arsenic contaminated water..."⁶⁶

The cases, analyzed above, show that the State's obligations to respect, protect and fulfill are interrelated in the case of ensuring the element of adequate water quality. States have an obligation to fulfil the right to water by taking legislative measures in implementing policies that prevent and mitigate water pollution. When human health has already been affected – the State has to remedy the situation by cleaning the polluted water resources, at least as an interim measure ensuring allocation of fresh and usable water to the population and raising population's awareness about the harmful effects of using this water (as it is seen in the case from Bangladesh).

⁶³ Supra note 3, General Comment No. 15, UN Committee on Economic, Social and Cultural Rights, Para. 12(b)

⁶⁴ Argentina case: *Marchisio José Bautista y Otros c/ Superior Gobierno de la Provincia de Córdoba y Otros*, Juzgado de Primera Instancia Civil y Comercial (Ciudad de Córdoba, 500003/36, 14 10 2004), supra note 17, WaterLex and WASH United, 73-76;

⁶⁵ Case of Supreme Court of Bangladesh: *Rabia Bhuyian, M.P. v. Ministry of Local Governments and Rural Development and others*, 2007 27 BLD (AD) 261 (27 08 2007), Para. 2-6.

⁶⁶ Id., Para. 29.

Accessibility

The third aspect of the core content of the right to water is its accessibility – physical and economic.⁶⁷ The economic accessibility entails that water and water facilities must be affordable to all, without discrimination.⁶⁸ This aspect shows the rights connection with the right to adequate standard of living.⁶⁹ As Inga T. Winkler has pointed out – “[g]enerally, the State is required to create an enabling environment and to foster conditions that are conducive to the realization of the human right to water”.⁷⁰

There are several cases which indicate that the State has not only positive obligations in providing access to water resources (fulfilling the right to water), however also a negative obligation to refrain from interfering (in certain circumstances) with the attempts of people to gain access to these resources themselves. Notable example in this context is a decision of Botswana’s Court of Appeals in 2011 in the case of *Mosetlhanyane and Others v. Attorney-General (Kalahari Bushmen case)*. This case concerned the group rights of the indigenous, nomadic Kalahari Bushmen people, who were evicted in 2002 from their settlement in the Reserve by the government of Botswana. In 2006, they have won a case against the government as their eviction was recognized to be unlawful. However, the return of these people to these lands has been prevented as they were not allowed to use their traditional water resources – a borehole, from which, during the eviction, a water engine and tank has been removed, due to which water from this borehole could not be drawn. Due to these circumstances the people, who decided to return to the land, used rain water, melons or had to travel outside of the Reserve in order to secure their water supplies, which most of the time were not sufficient. In this appeal judgment, the Court held that such actions by the government of Botswana amounted to degrading treatment of the Bushmen people.⁷¹ The Court ordered that the applicants have a right at their own expense to re-commission the borehole in question and to sink one or more further boreholes in order to use the water for domestic purposes only.⁷² In its decision, the Court made several references to international documents on the right to water – namely the General Comment No. 15 and the 2010 UN Human Rights Council Resolution on Human Rights and Access to Safe Drinking Water and Sanitation – as a way of showing international consensus on the importance of access to water. This case is also a good example on the State’s obligation to respect the right to water. The Committee in its General Comment No. 15 has identified that this

⁶⁷ Supra note 3, General Comment No. 15, UN Committee on Economic, Social and Cultural Rights, Para. 12(c);

⁶⁸ Id., Para. 12(c);

⁶⁹ Supra note 24: P. Thielbörger, *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right*, 114.

⁷⁰ I. T. Winkler, *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (Portland: Hart Publishing, 2012), 111.

⁷¹ Case of Botswana: *Matsipane Mosetlhanyane and Gakenyatsiwe Matsipane v. The Attorney General*, Court of Appeal of the Republic of Botswana, CACLB-074-10 (27 01 2011), Para. 22; <http://internationalwaterlaw.org/cases/Domestic-HR_to_Water/Bushmen-Water-Appeal-Judgement-Jan_2011.pdf> [accessed 2017 03 17].

⁷² Id., para. 25

obligation *inter alia* entails refraining from limiting access to or destroying water services and infrastructure as a punitive measure.⁷³

It has to be noted, that treating access to water as a human right, does not prevent the privatization of water. In this regard, the State's obligation to protect becomes important, as it has an obligation to ensure that third parties (private water access providers) respect the principles of equal, affordable access to safe water.⁷⁴ A number of cases deal with the issue of proportionality when water supply is cut off by private water suppliers due to failures of timely payments for water services. The outcome in those instances is that access to water should generally prevail over economic pressure to ensure contract compliance.⁷⁵ However, in this context a decision by the Appellate Court of the Netherlands should be noted, where the court, examining the General Comment No. 15 held that the right to affordable water does not include free access to water.⁷⁶ Subsequently no violation of the right to water or other rights was found for disconnecting water due to failed payments. Therefore, judicial practice on this issue differs.

The obligation to ensure that population under the State's jurisdiction is granted sufficient amounts of safe water may also relate to connected obligations, such as sustainable use of available water resources, adequate policy in environmental protection. However, more in depth analysis of these related obligations goes outside the scope of this article.

It can be seen from the analyzed judicial practice, that the courts adjudicate the right to water as part of other related basic human rights – most notably right to life, dignity, right to health, adequate housing and standard of living. Therefore, it is evident that considering the right to water to be a derivative human right does not prevent the justiciability of this right. The courts in the analyzed decisions do not require that the violation of water related rights should meet a threshold of other basic human rights violations, but rather the impairment on the availability, access or quality of water is enough to consider such related rights to be violated.

CONCLUSION

1. As it has been analyzed in this article, the drafting process of the ICESCR shows that no outright denial of the right to water has been present in its creation and the Committee interpreted the Covenant in light of its object and purpose, that is, the protection of social, economic and cultural rights. Furthermore, as the voting on the 2010 UN GA Resolution has shown, majority of States accept the Committee's opinion on the derivation of this right from the related right of adequate standard of living and right to health and other States reject the view that human right to

⁷³ Supra note 3, General Comment No. 15, UN Committee on Economic, Social and Cultural Rights, Para. 21.

⁷⁴ Id., Para. 27.

⁷⁵ Portugal case: *A x EPAL – Empresa Pública das Águas de Lisboa*, Tribunal Constitucional, Second Section (Ciudad de Córdoba, 685/2004, 2004), Argentina case: *Asociación Civil por la Igualdad y la Justicia c/ Gobierno de la Ciudad de Buenos Aires*, Cámara de Apelaciones en lo Contencioso Administrativo y Tributario, (Ciudad Autónoma de Buenos Aires, 18 07 2007), supra note 17, WaterLex and WASH United, 219-220.

⁷⁶ Case of the Netherlands: *NV Waterleiding Maatschappij Limburg v. Anonumous*, Den Bosch Court of Appeal, HD 200 018 358 (02 03 2010), Para. A7-A9.

water is established as an independent right. Therefore, even though the *opinio juris* of States is developing, the state practice (such as recognition of this right in a constitution or adopting international law standards) currently is not wide and consistent enough that the human right to water is part of customary international law. Different conclusion may be reached only if relying upon the modern view on the formation of customary international law, however this view is rightly criticized for its proneness to find recognition of customary international law based more on the inherent importance of human rights rather than actual state practice.⁷⁷

2. As has been seen from the analysis of the content of the obligations under the human right to water, the current view of this right in the practice of judicial bodies reflects that it is generally adjudicated as part of other rights, such as right to health, right to life, human dignity, adequate standard of living, finding that failure to ensure the State's obligations to respect, protect and fulfill the right to water, constitutes violation of related rights. In order to recognize the violations of these rights, the courts considered it to be sufficient that only certain aspects of water rights (accessibility, adequacy, quality) would be violated. It is notable that a number of courts rely on not only national legislation but also mention international documents (ICESCR, General Comment No. 15, etc.).

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SANTRAUKA

TEISĖS Į VANDENĮ TEISINIS PAGRINDAS: TARP IŠVESTINĖS IR SAVARANKIŠKOS ŽMOGAUS TEISĖS

Tarptautinės teisės mokslinių darbų apžvalga patvirtina, kad ir šiai dienai teisės į vandenį pripažinimo žmogaus teise klausimu vieningos nuomonės nėra, todėl siekiant plėtoti šios teisės pripažinimo polemiką, straipsnio tikslas yra išanalizuoti kokių pagrindų žmogaus teisė į vandenį yra pripažįstama tarptautinėje teisėje ir kokią įtaką skirtingas teisinis pagrindas turi šios teisės teisminei gynybai.

Pirmojoje straipsnio dalyje analizuojamas plačiausiai paplitęs požiūris į teisės į vandenį teisinį pagrindą, kuris remiasi Ekonominių, socialinių ir kultūrinių teisių komiteto 2002 metais paskelbtu bendruoju komentaru Nr. 15, vadovaujantis kuriuo teisė į vandenį pripažįstama kaip išvestinė teisė, kylanti iš kitų Tarptautiniame ekonominių, socialinių ir kultūrinių teisių pakte įtvirtintų teisių, tokių kaip teisė į pakankamą gyvenimo lygį ir teisė į sveikatą. Nors įvertinama, kad pagal šį požiūrį teisė į vandenį išvedama atsižvelgiant į tai, jog teisės į pakankamą gyvenimo lygį formuluotė pakte pateikia nebaigtinį sąrašą teisių, įeinančių į pakankamo gyvenimo lygio užtikrinimą, ir net pats pakto priėmimo ir svarstymo procesas suponuoja, kad nei teisės į vandenį įtraukimas, nei jos atmetimas valstybių nebuvo svarstomas, vis tik nustatoma, kad dėl susietumo su kitomis teisėmis, toks išvedimas apsunkina teisės į vandenį turinio identifikavimą ir jos pažeidimų nustatymą.

Atsižvelgiant į šią pirmojo požiūrio problematiką, antroje straipsnio dalyje išskiriamas kitas požiūris, jog teisė į vandenį yra įtvirtinta kaip savarankiška teisė, esanti paprotinės teisės dalis. Tačiau darbe atlikta šaltinių analizė, kurią atliekant vertinta valstybių praktika pripažįstant šią teisę ir ginant ją teisinėmis priemonėmis, atskleidė, jog valstybių opinio juris pripažįstant šią teisę šiuo metu yra labiau išreikšta nei jų praktika, todėl laikantis tradicinio požiūrio į tarptautinės paprotinės teisės formavimąsi, šis antrasis požiūris buvo atmestas.

Tam, kad būtų galima identifikuoti, kaip šiuo metu teismai gina teisę į vandenį, trečiojoje straipsnio dalyje yra atliekama lyginamoji skirtingų jurisdikcijų teismų praktikos analizė. Identifikuojami trys esminiai elementai, sudarantys teisę į vandenį – vandens pasiekiamumas, kokybė ir prieinamumas. Nustatoma, kad įgyvendinant šiuos elementus, valstybės pareigos gerbti, saugoti ir įgyvendinti teisę į vandenį yra susiję – nesugebant gerbti ir apsaugoti teisės į vandenį, valstybė turi pareigą šią teisę įgyvendinti, bet jau tam tikrame pakankame lygyje, nors pats įsipareigojimas įgyvendinti teisę apima valstybės veiksmus ir siekiant pilnos teisės apimtį įgyvendinimo. Nors teisiniuose ir moksliniuose darbuose yra nesutariama, ar yra galima teisės į vandenį teisminė gynyba, išnagrinėti teismų sprendimai leidžia daryti išvadą, kad atskirose jurisdikcijose toks procesas vyksta.

Atliekant lyginamąją teismų sprendimų analizę atskleidžiami du teisės į vandenį įgyvendinimo lygiai. Pirmame lygmenyje valstybė privalo užtikrinti minimalų vandens pasiekiamumo lygį visais atvejais, net ir nepaprastosios padėties atveju, ar tuomet, kai gyvenvietės, į kurias turi būti tiekiamas vanduo, yra nelegalios. Ši pirmojo lygmens valstybės pareiga siejama su žmogaus teise į gyvybę ir orumą. Antrame lygmenyje pilnas teisės į vandenį įgyvendinimas siejamas su vandens prieinamumu (tiek fizine, tiek ir ekonomine prasme) bei teise į pakankamo gyvenimo lygio užtikrinimą. Nustatoma, kad pabrėždami teisės į vandenį svarbą, teismai kartais vadovaujasi tarptautinės teisės instrumentais, tačiau dažniausiai sprendimus grindžia šios teisės išvedimu iš kitų konstitucinių žmogaus teisių, tokių kaip teisė į gyvybę, orumą, teisę nebūti kankinamam, teisę į sveikatą. Trečioji dalis užbaigiama išvada, kad valstybėse, kurių konstitucijose teisė į vandenį nėra eksplicitiškai įtvirtinta, esamu momentu teismai nepripažįsta žmogaus teisės į vandenį kaip savarankiškos teisės, tačiau susijusių teisių pažeidimus teismai pripažįsta, net jei pažeidžiamas tik vienas iš vandens užtikrinimo aspektų.

REIKŠMINIAI ŽODŽIAI

Tarptautinė teisė, žmogaus teisės, teisė į vandenį, išvestinės teisės, savarankiška teisė.