

Pierre Thielbörger

# The Right(s) to Water

The Multi-Level Governance of a Unique  
Human Right

 Springer

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The Multi-Level Governance  
of a Unique Human Right

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# Abstract

As indicated in the title “The Right(s) to Water”, this book argues that one single self-standing, comprehensive, and legally binding human right to water is not easily found in international law. However, it is important to note that this is not at all the same thing as stating that “there is no human right to water”. It is simply to say that this human right does not easily meet some of the characteristics of other human rights all at once. It is rather a right of its very own kind that must be seen in connection with national guarantees with regard to water and with other recognized human rights, such as the right to life, the right to the highest attainable standard of health, and the right to an adequate standard of living.

The book has three main chapters. A first analytical part examines the present status of the right to water in international, European, and domestic laws. A second, theoretical part scrutinizes whether and in which form it is conceptually best possible to consider water as the object of a distinct human right. Finally, a third, applied part considers how concrete reforms and developments can improve the effective implementation of the right in practical terms. Only by considering the right to water in its legal, philosophical, and practical context can the present status and future potential of the right to water be fully captured.



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# Abbreviations

AA	Auswärtiges Amt (Federal Foreign Office of Germany)
AdA	Compania de Aguas del Aconquija
AfCRC	African Charter on the Rights and Welfare of the Child
AIDS	Acquired immunodeficiency syndrome
AIR	All India Reporter
BCLR	Butterworths Constitutional Law Reports
BerlBG	Berliner Betriebe-Gesetz
BGH	Bundesgerichtshof (Federal Court of Justice of Germany)
BGHZ	Entscheidungssammlung des Bundesgerichtshof in Zivilsachen (Collected decisions of the Federal Court of Justice of Germany)
BIT	Bilateral Investment Treaty
BMU	Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit (Federal Ministry of the Environment, Nature Conservation and Nuclear Safety)
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court of Germany)
BVerfGE	Bundesverfassungsgericht Entscheidungen (Collected decisions of the Federal Constitutional Court of Germany)
BVerwG	Bundesverwaltungsgericht (Federal Administrative Court of Germany)
CCPR	Committee Human Rights Committee
CFDD	Conseil Fédéral du Développement Durable
CFI	Court of First Instance
CFREU	Charter of Fundamental Rights of the European Union
CGCT	Code général des collectivités territoriales
CGE	Compagnie Générale des Eaux
COHRE	Centre on Housing Rights and Evictions
CRC	Convention on the Rights of the Child
DFID	Department for International Development
EC	European Community

ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECOSOC	United Nations Economic and Social Council
ECSR	European Committee of Social Rights
ESC	European Social Charter
ESCR-Committee	Committee on Economic, Social and Cultural Rights
EU	European Union
GemO BW	Gemeindeordnung für Baden-Württemberg
HIV	Human immunodeficiency virus
HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID-Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
IDEA	International Institute for Democracy and Electoral Assistance
IFI	International Financial Institution
Ker	Kerala
LEMA	Loi sur l'eau et les milieux aquatiques (French Law on Water and Aquatic Environments)
MDG	Millennium Development Goal
NGO	Non-governmental organization
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OJ	Official Journal of the European Communities
PCIJ	Permanent Court of International Justice
SA	South African Law Reports
SCR	Supreme Court Reporter
SEMAPA	Sociedade de Investimento e Gestão
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TGI	Tribunal de Grande Instance
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly

UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children’s Fund
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
UPLBEC	Uttar Pradesh Local Bodies & Educational Cases
UPR	Universal Periodic Review
US or USA	United States of America
VCLT	Vienna Convention on the Law of Treaties
WHG	Wasserhaushaltsgesetz
WHO	World Health Organization
WTO	World Trade Organization



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# Chapter 1

## Introduction

Water is life. Lack of it leads to illness, misery and death. It is a grave fact that according to reports of the United Nations (UN)<sup>1</sup> in 2012 more than 780 million people rely on unsafe potable water and another 2.5 billion people have no access to sanitation.<sup>2</sup> Almost two million children die each year for want of clean water and clean toilets.<sup>3</sup> A recent example of this water crisis is the outbreak of cholera in 2008 in Zimbabwe, spread by water contaminated with human excrement, leaving the population of the whole country without clean and safe water for several weeks.<sup>4</sup> Another dramatic example is that of Haiti. The initial disaster, the earthquake of 12 January 2010, was followed by a devastating water crisis. Tremors from the initial earthquake demolished the water pipes, allowing seawater to seep into the drinking water supplies and rats to multiply in the sewer systems, making Haiti's freshwater undrinkable for weeks.<sup>5</sup> With no other water sources available, many Haitians nevertheless consumed the contaminated drinking water for weeks, causing a dramatic cholera epidemic.<sup>6</sup> As a third example, South Pacific Island States were confronted with severe water shortages as a consequence of low rainfall

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\*All cited webpages were last accessed on 1 August 2013.

<sup>1</sup> UNICEF and WHO (2012); WHO (2012).

<sup>2</sup> See similar figures in UN (2009), p. 46, which states that 884 million people worldwide still rely on unimproved water sources for drinking. Following DFID (2001), p. 13, even more than one billion people lack access to safe water. See also UNDP (2006).

<sup>3</sup> See UNDP (2006), pp. 5–6; “Lack of Toilets Among Leading Causes of Childs Death, Says UNICEF on World Toilet Day”, in: *UNICEF-USA*, 19 November 2012, <http://www.unicefusa.org/news/releases/lack-of-toilets-causes-child-deaths.html>.

<sup>4</sup> See for instance Dugger (2008).

<sup>5</sup> See for a good overview of the earthquake and its implications for the water supply in Haiti the reports at the *New York Times*, <http://www.nytimes.com/interactive/world/americas/2010-haiti-shattered-year.html#intro>.

<sup>6</sup> See for a good overview on the outbreak of cholera on Haiti McNeil Jr (2010) or “More than 100 dead in suspected cholera outbreak in Haiti”, in: *The Guardian*, 22 October 2010, <http://www.guardian.co.uk/world/2010/oct/22/haiti-cholera-outbreak>. See, more recently, Sontag (2012).

in 2011. Rising sea levels exacerbated the crisis by contaminating the groundwater. As a consequence, the inhabitants of Tuvalu and Tokelau heavily depended on foreign aid in terms of bottled water supply.<sup>7</sup> These examples show that, despite remarkable advances in some areas of the world in order to meet the UN Millennium Development Goals,<sup>8</sup> the global water crisis<sup>9</sup> is evident, in particular amongst the poor rural population.<sup>10</sup> The imperative for the international community to act in order to protect the planet's "blue gold"<sup>11</sup> could not be more urgent.

One way of confronting this global water crisis by reliable legal means is a subjective right to potable water for all humans. In this sense, on 28 July 2010, the UN General Assembly (UNGA) passed a resolution called "The human right to water and sanitation", in which it "recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights".<sup>12</sup> A few weeks later, the Human Rights Council (HRC) passed a corresponding resolution affirming that the right "is derived from the right to an adequate standard of living".<sup>13</sup> Despite these affirmations, the question remains: does a human right to water currently exist, to what extent and in what form should it exist at all, and can it make a difference to the global water challenges? These research questions lie at the heart of this book.

As indicated in the title "The Right(s) to Water", I deem it better to look at the right not only as one international human right, but as a complex network of different international and domestic rights. A single international human right does not easily meet some of the characteristics often associated with human rights. Firstly, the common Human Rights Instruments do not recognize a human right to water explicitly; one can only "derive" it from broader human rights recognized therein. Secondly, those legal documents that do recognize the right explicitly do so only for certain groups (such as women, children, etc.), but not comprehensively for

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<sup>7</sup> See for a good overview the articles "South Pacific islands face water crisis after 6 months of low rainfall", in: *The Guardian*, 4 October 2011, <http://www.guardian.co.uk/environment/2011/oct/04/south-pacific-water-crisis-rainfall>; "The South Pacific's water crisis: And not a drop to drink", in: *The Economist*, 6 October 2011, <http://www.economist.com/blogs/banyan/2011/10/south-pacifics-water-crisis>; "Australia, New Zealand in airlift to drought-hit Tuvalu", in: *BBC NEWS*, 7 October 2011, <http://www.bbc.co.uk/news/world-asia-pacific-15210568>.

<sup>8</sup> As UN Secretary General Ban-Ki Moon states, "we are well on our way to meeting the target for safe drinking water" (UN (2009), p. 3). However, a closer look reveals that the improved statistics are mainly thanks to regional efforts, in particular of China and India, through the increased use of improved water supplies and the expansion of access.

<sup>9</sup> Despite the recent progress, UN (2009) still uses this term, see for instance Sha Zukang, Under-Secretary-General for Economic and Social Affairs, p. 5.

<sup>10</sup> See UN (2012), p. 53, according to which the number of people without an improved water source in rural areas are five times greater than in urban areas.

<sup>11</sup> The term "Blue Gold" was prominently introduced by Barlow and Clarke (2002), and is becoming more and more common in the current debate, see for instance: Petrova (2006) or Kessler (2007).

<sup>12</sup> UNGA, *The human right to water and sanitation*, A/RES/64/292, 3 August 2010, op. par. 1.

<sup>13</sup> HRC, *Human rights and access to safe drinking water and sanitation*, A/HRC/RES/15/9, 6 October 2010, op. par. 3.

all humans. Thirdly, all explicit recognitions that aim at granting the right to all human beings (e.g. the two aforementioned resolutions of the UNGA and the HRC) are not *per se* legally binding. Thus, what is often called “the human right to water” exists only as a right of its very own kind; it is also not clear whether it exists rather as part of treaty law or customary law, or both. It is therefore better to understand the right to water as a complex of different rights. This includes recognitions in domestic constitutional and sub-constitutional law as well the right’s close connections to, if not origins in, other accepted human rights.

Although often perceived as a purely socio-economic right, the human right to water, more than other rights, combines components of different legal character. As water is one of the most essential human needs of all, the right also has an important nucleus relating to the human right to life and a mantle relating to the human rights of an adequate standard of living and the human right to the highest attainable standard of health. This triad of human rights also reflects the most suitable normative content of a right to water: without “availability” of water, the right to life is at stake; if water lacks sufficient “quality”, the right to health is challenged; and without physical and economic water “accessibility”, an adequate standard of living is not possible. In compounding these different legal mosaics, the components indeed form what can by now legitimately be called a “human right to water”. It might be of political significance to call these different individual claims relating to water “one human right”. However, one must keep in mind that it takes some legal efforts to come to this conclusion under the umbrella of only one right. By understanding it as a right of different layers, however, deeply rooted in both national rights as well as other international human rights, one can turn necessity into a virtue, thereby maximizing the right’s possible effects.

In this multi-layered character, the right inevitably raises questions of the relations of the different legal orders. While cherishing the supremacy of international law, I argue that a human right to water must be understood as upholding international minimum levels of protection, which can be outperformed, but not underperformed by national law.

Whether a human right to water can make a crucial contribution to solve the global water crisis will depend (at least) on three significant factors: its independent monitoring (to identify violations); its enforcement against the private sector (as an actor of increasing importance in the field of water delivery); and its ability to motivate international assistance (without which it will not be possible to realize the human right to water globally).

The book addresses its research question in three steps. A first analytical part examines the present status of the right to water in international, European and domestic law. A second, theoretical part, scrutinizes which conceptual and theoretical objections the right faces and in which form the right is conceptually best understood. Finally, a third, applied part considers which elements are necessary to ensure the right can be meaningful in practical terms. Only by considering the right to water in its legal, theoretical and practical context all at once can the present status and future potential of the right to water be fully addressed.

The first descriptive-analytical chapter examines the current legal status of the right to water in different legal orders. One needs to identify how the law currently stands, before looking for answers as to how it can be developed or re-conceptualized in the future. In order to address this question comprehensively, the book scrutinizes all legal levels—the spheres of domestic, European and international law. The study distinguishes between protection that derives from legislation and protection that is judge-made. Starting from the legal orders of European States such as Germany, France or Belgium, the analysis examines how the legal order of the European Union (EU) and that of the Council of Europe has dealt with water rights. Subsequently, important non-European examples, such as South Africa and India, shed light on alternative approaches to a right to water that are significantly different from the European experience. In a last step, the first chapter scrutinizes in detail the approach to a right to water in international law. How do international treaties make mention of water and how have international judges dealt with the issue of basic water needs? The study takes all sources of international law as mentioned in Art. 38 of the Statute of the International Court of Justice (ICJ)—international conventions, international custom, and the general principles of law as recognized by civilized nations—into account. The book gives special attention to General Comment No. 15<sup>14</sup> named “The right to water”, released by the Committee on Economic, Social and Cultural Rights (ESCR-Committee) in 2002, as it is widely considered as ground-breaking and highly influential for the recognition of the right in international law.<sup>15</sup> Altogether, the first chapter seeks to answer two questions: Firstly, to what extent do the different legal orders provide effective protection of a right to water, and secondly, to what extent do they provide protection that can be considered an archetype for the protection of the right to water in other legal orders?

The second chapter is theoretical and normative in nature. The chapter addresses general philosophical questions related to a right to water. It seeks to satisfy a number of theoretical objections that can be, and have been, raised against a human right to water (and might be part of the reason why the right took so long to develop). Starting from the very term “human-right to-water”, the study examines all three parts of the term. Firstly, is *water* a suitable content for a distinct right? Can we meaningfully hold a right to a limited or scarce resource? Secondly, should we accept as binding upon us a *right* which we are possibly not able to fulfill for all humans? And finally, if one accepts a distinct right to water, would such a right necessarily fulfill the conditions of that very special category of a *human right*?

With these theoretical clarifications in mind, the second chapter raises the question of how best to conceptualize such a right in order to adequately reflect

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<sup>14</sup> ESCR-Committee, *General Comment No. 15: The right to water (Art. 11 and 12)*, HRI/GEN/1/Rev.9 (Vol. I), 27 May 2008, at 97 (hereinafter “ESCR-Committee, *General Comment No. 15*”).

<sup>15</sup> Rudolf argues that the General Comment has decisively influenced (“maßgeblich beeinflusst”) the discussion on a right to water ever since its release, see Rudolf (2007), p. 22; see also Langford (2006), p. 479, who argues that the General Comment “has had perhaps more impact and influence than the drafters initially expected.”

the different existing approaches. How can the diverse approaches in different legal orders be reconciled? Is the right a self-standing human right or a derivative right? The study sheds light on the question of legal derivation and highlights advantages and disadvantages of this legal technique. For the case of a derivative right, one must identify a legal source: is the right more related to civil and political rights, to economic and social rights, or is a combined approach best reflective of the nature of the right? Should one summarize the spectrum of possible entitlements related to water, ranging from moderate price development in welfare States to access to a minimum of drinking water in developing countries, under the umbrella of one right? And if so, what is the best theoretical architectural framework for such a unified right?

In determining the content of such a right, the study also distinguishes it from another right that is increasingly advocated on the international agenda: the right to sanitation. Should water and sanitation be seen as one human right or are they different in nature and scope?

Finally, the chapter addresses the question of how the recognitions of the right to water on different legal levels relates to each other. The much debated judgments of the European Court of Justice (ECJ) in the case of *Kadi*<sup>16</sup> have shown that the relationship between different legal levels remains highly contentious. It is in cases like the right to water that these distinctions show great practical relevance. Would a human right to water in international law make national recognitions dispensable, or vice versa? And what legal recognition of a right to water prevails, if national or regional law clashes with the international legal order?

With this understanding of the current legal status of the right to water, developed in the first analytical chapter, and with a refined understanding of its normative structure, gained in the second theoretical chapter, one must raise a rather blunt question: what difference can a human right to water make at all? Is there an added value of a rights-based approach to water? The last chapter suggests a focus of the present discussion on the right to water to three specific elements. In order to be effective, the right must be effectively monitored, enforced and realized. The logic behind these elements is the following: Violations must be, in the first place, noticed and recorded (“monitoring”). Secondly, in order to address these violations, the right must be enforced or upheld where it is most crucially challenged, namely against the private sector. And finally, in order to prevent future violations, and address the global water crisis, the right must be progressively realized, not only nationally, but through the means of international water assistance. For these three elements, the study will assess the status quo, identify existing challenges, and, where appropriate, make suggestions for substantive improvement.

With respect to monitoring, the mandate of the new UN Special Rapporteur on the Human Right to Water and Sanitation, formerly called Independent Expert on the issue of human rights obligations related to access to safe drinking water and

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<sup>16</sup> ECJ, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Judgment of 3 September 2008, [2008] ECR I-6351.

sanitation,<sup>17</sup> currently held by the Portuguese lawyer Catarina de Albuquerque,<sup>18</sup> deserves special attention. To what extent is the mandate able to provide independent and comprehensive monitoring of violations of a human right to water?

In terms of enforcement towards the private sector, the interplay of a right to water and international investment law assumes a key role. Some see privatization as the silver bullet for the realization of access to water, others condemn it as part of the right's ultimate demise. Thus, how should the private sector best be involved? What are the reasons why privatization in the water sector can work, or why is it doomed to fail, and how does one shift the parameters in order to best realize a human right to water in times of water privatization? This will also include an economic analysis, shedding light on the question of to what extent the two concepts of water as a human right, and its service delivery through the private sector, can go together. Disputes between States and international investors, if such privatization fails, are examined through analyzing specific cases before the International Centre for the Settlement of Investment Disputes (ICSID)—the forum which typically decides over water investment disputes between States and investors. How could a human right to water contribute to upholding the rights of people and ensure the protection of basic needs, while at the same times respecting the legitimate interests of foreign investors?

The final element for the right to be effective is that of international realization. Is there a sound moral and legal case to be made for such water assistance, or is it ultimately an anchorless claim of the developing world? What are the problems that still hold back international water assistance, and how, if at all, can a right to water be helpful to overcome them?

Much research has, of course, been done on an important topic like that of a human right to water. Although this research is highly valuable and has advanced the discussion on a right to water, there are still significant gaps that this book strives to fill. Often the existing research has been carried out with a politically motivated background—one in favor of accepting a human right to water too easily. Although this study also concludes with a positive presumption in favor of a human right to water, it does so in a more nuanced way, attempting to keep political considerations out of the legal analysis. Often the existing research has also been too narrowly focused—either mainly concentrating on international rather than domestic law; or failing to tackle the issue from more than one discipline. Existing literature often focuses either on the legal status of a human right to water, assesses the economic prospects of water privatization or makes a philosophical claim in favor of or against global water solidarity. This book combines these different disciplines and techniques in order to find holistic answers: it deploys legal analysis, economic reasoning and philosophical argumentation in combination. Only

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<sup>17</sup> For the introduction of the mandate, see HRC, *Human rights and access to safe drinking water and sanitation*, A/HRC/RES/7/22, adopted on 28 March 2008. For an overview of the mandate's work, also see the webpage of the Office of the High Commissioner for Human Rights (OHCHR), <http://www2.ohchr.org/english/issues/water/iexpert/index.htm>.

<sup>18</sup> See the curriculum vitae of Mrs. de Albuquerque at the OHCHR webpage, <http://www.ohchr.org/en/Issues/WaterAndSanitation/SRWater/Pages/CatarinaDeAlbuquerque.aspx>.



holistic answers—answers drawing on insights across legal regimes and different disciplines—will suffice in tackling one of the biggest challenges faced by modern humankind.

Finally, the book takes into account the recent developments that the right has experienced during the calendar years of 2010 and 2011: the recent UNGA Resolution<sup>19</sup> and the Resolution of the HRC<sup>20</sup> as well as the renewal of the Independent Expert's mandate (now called: Special Rapporteur).<sup>21</sup> Have these developments given the right finally the status and meaning that many have claimed for it since a long time?

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<sup>19</sup> UNGA, *The human right to water and sanitation*, A/RES/64/292, 3 August 2010.

<sup>20</sup> HRC, *Human rights and access to safe drinking water and sanitation*, A/HRC/RES/15/9, 6 October 2010.

<sup>21</sup> HRC, *The human right to safe drinking water and sanitation*, A/HRC/RES/16/2, 8 April 2011.