

Entrenchment of the Right to Water and Sanitation through Legal Instruments: A Brief Analysis

Artigo de Pesquisa - Diplomacia Civil

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Summary:

It is impossible to deny the major importance of water as a resource in the world. Since water is mostly needed in agricultural and energy production, irreplaceable in health and welfare systems and crucial to sustain biodiversity in all ecosystems, it is the very foundation of all known life forms and currently plays a key role in contemporary human society. However, while the international community has been gradually acknowledging water's importance over the years and how it is directly inserted within other previously established rights, such as right to life and health, it was not until July 2010 that the United Nations explicitly recognised the right to water as a fundamental human right¹. Moreover, while the right to water is now embedded into the United Nation's International Covenant on Economic, Social and Cultural Rights (ICESCR), there is still the urgent need of member countries to endorse the ICESCR optional protocol in their legal systems in order to become legally bound to this human right obligation. This paper will articulate why legal frameworks and guidelines can, or rather should, be put forward in order to fulfil this right and improve sustainable practices.

Key Words: water, sanitation, human rights, water rights, water policies.

¹ Escritório das Nações Unidas de apoio à Década Internacional de Ação (UNO-IDFA) "Água para a Vida, 2005-2015/Programa da Década da Água da ONU-Água sobre Advocacia e Comunicação (UNW-DPAC), 2015.

Introduction:

During the past few decades, it is undeniable how several social, economic and environmental changes in our world lead to the overexploitation of natural resources. Rapid worldwide demographic growths, urbanization of developing countries and expansion of agricultural practices, combined with drastic climate changes have been exhausting our planet capacity to provide sufficient means to equally maintain contemporary societies. Amongst the various resources which suffer from a reduction in their availability and quality, water is perhaps the one that calls for urgent action. As one of the core elements of sustainable development², the protection of freshwater sources and enhancement of the quantity and quality of existing universal sanitation are of major relevance when improving economic practices, underpin energy security, guarantee environmental health and support poverty reduction.

Amid the many global changes which compromise hydric resources, the increase in overall population growth and per capita density can be portrayed as the foremost contributor of the current water crisis.

World population growth (1970–2030)				
Rural population	1970	1990	2010	2030
Africa	279 800	438 000	627 700	857 400
Americas	184 100	201 400	188 700	176 400
Asia	1 599 300	2 142 500	2 312 000	2 150 800
Europe	269 000	253 200	260 000	166 200
Oceania	5 600	7 900	10 700	13 300
Overall rural	2 337 900	3 033 000	3 341 200	3 364 100
Urban population	1970	1990	2010	2030
Africa	86 700	202 000	403 400	777 000
Americas	334 900	526 100	754 000	943 700
Asia	484 100	1 004 400	1 853 400	2 736 100
Europe	433 500	536 300	538 300	570 100
Oceania	14 000	19 100	25 900	34 000
Overall urban	1 353 300	2 287 800	3 575 000	5 060 800
World population	3 691 200	5 320 800	6 916 200	8 424 900

Note: Values are given in thousands.

Source: WMAP, with data from the FAOSTAT database Population domain. <http://faostat3.fao.org/download/Q/QA/E> (Accessed November 2014).

Note: Values are given in thousands.

Source: WWAP, with data from the FAOSTAT database Population domain.
Available at: <http://faostat3.fao.org/download/O/OA/E> Accessed in: 19 Sep 2015

² United Nations Educational, Scientific and Cultural Organization. Water for a sustainable world: The United Nations World Water Development Report 2015

As it can be noticed, the exponential demographic increase recorded in the past twenty years is one of unprecedented nature and ultimately intensifies the global water demand. It is largely estimated that by the end of this century, worldwide demand for water supplies will raise over 60% of existing figures, mainly due to manufacturing, domestic use and agriculture³. Irrigation systems grew over five times the values observed at the start of the century⁴ while annual hydric usage by global industry is expected to rise considerably as developing countries rapid industrialise⁵.

Moreover, as rapid demographic growth rates strain freshwater sources, the consequent urbanization process not only worsens the ecological damage done to various ecosystems, but ultimately compromise government's ability to properly provide basic sanitation services well. One of the main issues responsible for water crisis in major urban centres is the mismanagement of hydric resources⁶. Poor investment in water research institutions, fragmented facilities, extensive privatization of water supplies, unstable development around riverine areas and lack of proper sewerage systems are in a wide list of factors contributors to the over-utilization and high-scale pollution of hydric resources which compromise quality and affordability of freshwater⁷. Collectively, the increase in water usage ultimately culminates in water scarcity across the globe, mainly in Africa, Asia and America's arid and semi-arid regions, where countries are been gravely damaged by water shortages⁸.

These global changes, coupled with climate variations, pose a major threat to humanity and biodiversity in general. Considering the limited nature of

³ United Nations Educational, Scientific and Cultural Organization. Water for a sustainable world: The United Nations World Water Development Report 2015

⁴ From around 50 million hectares at 2000 to over 300 million hectares today. Cassar, A.; Nemes, N.; Scanlon, J. Water as a Human Right?. IUCN Environmental Policy and Law Paper, v. 51, 2015.

⁵ Ibid.

⁶ Peter H. Gçeick, The world's Water 1998-1999: The Biennial Report on Freshwater Resources. Island Press, Washington, DC (1998).

⁷ World Water Assessment Programme, UNESCO,. Water for People, Water for Life: UN World Water Development Report (WWDR), 2003

⁸ Ibid.

water, its deteriorating quality and human growing demand for it, the need to protect and properly manage freshwater resources is now, more than ever, of vital importance.

Historical Background of Water as a Human Right:

The water crisis and how growing demands for hydric resources have been increasingly outstripping the world's capacity to supply it is not a recent phenomenon. Water shortages, urgent need to improve sanitation and unequal distribution of hydric resources across countries have been appealed to the international community starting from the late 70s at the first United Nations Water Conference, where action plans were adopted in order to improve water management in agriculture and increase the accessibility to healthy drinking water to all human settlements⁹.

However, while the right to water was constantly mentioned, it was hardly formally recognized as a binding obligation. Fundamental rights, such as life, health and well-being, similar to the ones contained in the Stockholm Declaration and on the Declaration on the Right to development, rest on the premise that water is guaranteed on sufficient quality and quantity, but both mentioned declarations fail to include instruments on how to safeguard it; The World Water Forums in Hague, Bonn and Kyoto enhanced a link between clean water and sanitation to human dignity and global effort to eliminate poverty, but did not expressly recognise it as a fundamental human right; Even on the Universal Declaration on Human Rights of 1948, which many provisions are now currently the foundation of the many legal branches in international law, does not specifically include water as one of the essentials factors for an adequate standard of living. As Article 25 emphasises how "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services [...]", one is left to assume that water was perhaps implicitly presumed to be one of the necessary components, since in order to

⁹ Preamble, United Nations. (1977). Report of the United Nations Water Conference, Mar Del Plata. March 14-15, 1977. No E 77 II A 12, United Nations Publications, New York.

satisfy the such premise, water is of vital importance for both human health and quality of life¹⁰.

Specifically, the few international human rights treaties which somehow endorse specifications regarding accessibility to safe drinking water and sanitation are the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities¹¹ and the Millennium Development Goal, of which the objective was to halve by the end of 2015 the proportion of the population without sustainable access to safe drinking water and basic sanitation¹². Yet, the most important milestone in entrenching the right to water and sanitation into international's affairs came in July 2010, when the United Nations' General Assembly was finally formally recognised. This resolution calls upon member states and international organizations to provide financial support, technology support and capacity building assistance to scale up efforts to increase accessibility and affordability to water and sanitation¹³.

However, though by official recognising the water and sanitation the United Nations is unquestionably pressuring the international community to develop mechanisms in order to reach the resolutions related to hydric resources, this resolve nevertheless a non-binding one. Despite a wider recognition and improved awareness, in order for member states to compromise themselves with the common goal, there is still the urgent need for the right to water and sanitation to be ratified within member States' legal systems, which will be later discussed in this article.

¹⁰ Gleick, P. The Human Right to Water. *Water Nepal*, v. 10, n. 1, 2003.

¹¹ Cassar, A.; Nemes, N.; Scanlon, J. Water as a Human Right?. *IUCN Environmental Policy and Law Paper*, v. 51, 2015.

¹² United Nations, *The Millennium Development Goals Report 2015*. New York: United Nations, 2015.

¹³ Van der Valk, Michael R. and Keenan, Penelope, eds, "The right to water and water rights in a changing world". Papers presented at a colloquium held on 22 September 2010 in Delft, the Netherlands, 2011. Available in: http://www.hydrology.nl/images/docs/ihp/nl/21_Sep_2010/2011.10_The_right_to_water_and_water_rights.pdf

Water as a Human Right:

Water as a human right is part of a third wave of fundamental legislation, based on a new trend of judicial precedent characterized for its collective or diffuse ownership of basic resources, closely related to sustainable practices and social ethics¹⁴. However, similar to its counterparts of this third generation, the right to water and sanitation is one of conflicting nature: while international sources of law claims this fundamental right should be physically and financially available, free of discrimination and unfairness, 800 million people still crave for safe drinking water and astonishing 2,5 billion lack proper sanitation¹⁵. Moreover, many countries do not have explicitly recognised water and sanitation within their constitutional documents, though it strongly related to health, shelter and food security¹⁶. Though different approaches could be taken in order to tackle this troubled scenario, this article will take a legal point of view and argue how law plays an important role in safeguarding the universal right to water and sanitation, especially when discussing national inequality due to privatization of hydric resources and popular empowerment through legal awareness.

The entrenchment of legal frameworks inclusive of water and sanitation as human rights would result in a significant improvement towards combating unequal accessibility to hydric resources due to privatization. Theoretically, no individual or group should be denied access to water and sanitation due to their social-economic conditions, regardless of whether they reside urban or rural areas. However, in practice, far from what is theorised, the poor and powerless are more than often unable to afford drinking water and sewerage services.

¹⁴ Castro, L. Direito Fundamental de Acesso a Água Potável e a Dignidade da Pessoa Humana. *Âmbito Jurídico*, v. XVI, n. 117, 2013.

¹⁵Van der Valk, Michael R. and Keenan, Penelope, eds, "The right to water and water rights in a changing world". Papers presented at a colloquium held on 22 September 2010 in Delft, the Netherlands, 2011. Available in: http://www.hydrology.nl/images/docs/ihp/nl/21_Sep_2010/2011.10_The_right_to_water_and_water_rights.pdf

¹⁶ Cassar, A.; Nemes, N.; Scanlon, J. Water as a Human Right?. *IUCN Environmental Policy and Law Paper*, v. 51, 2015.

As currently described by economists, ecologists think tanks and stakeholders, water became a twenty-one century commodity, alongside to soy and oil¹⁷. In 1998, the World Bank conducted a research which predicted the recently called “water industry” to reach by the end of millennium values over 800 billion dollars¹⁸. Ten years after, in the contemporary economic scenario, private supply, drainage and treatment of hydric resources add up to a global profit of over one trillion dollars annually¹⁹.

The argument *per se* is not how water and sanitation should be fully covered by public services, but since the vast majority of private hydric providers are presently left legally unchecked, water and sanitation prices are costly, leaving those who cannot afford it to search for alternative unhealthy and unsafe means to meet their needs. For example, according to Haitian household report, since properly treated water is unaffordable for a significant part of the inhabitants, over 30% of the population’s water supply consequently comes from contaminated or garbage filled streams²⁰, similar to conditions observed in other poor developing countries²¹.

Consequently, there is an eminent need to adopt a two-level approach; a conceptual framework based on legal changes within national constitutional level and in compliance with international water and sanitation rights standards. Firstly, national legislation must expressly entrench water and sanitation as fundamental rights to be protected. Formally acknowledging and giving constitutional status to water and sanitation is at its very core a promising way to encourage local and regional efforts to meet this basic human need. Legal instruments must utterly regulate prohibitions, preventing therefore illegal appropriations of natural resources, unlawful pollution and discriminatory

¹⁷ Cardoso, J. A Água Como Patrimônio Comum da Humanidade. *Âmbito Jurídico*, v. IX, n. 30, 2006.

¹⁸ Quadrado, A.; Vergara, R. Vai Faltar Água?. *Superinteressante*, n. 189, p. 42-46, 2003.

¹⁹ *Ibid.*

²⁰ Varma, M. et al. Wòch nan Soley: The Denial of the Right to Water in Haiti. *Health and Human Rights*, v. 10, n. 2, 2008.

²¹ Cassar, A.; Nemes, N.; Scanlon, J. Water as a Human Right?. *IUCN Environmental Policy and Law Paper*, v. 51, 2015.

practices with regards to water distributions. Secondly, independent judicial systems should be reformed, free from influence of political or private parties, hence improving transparency and raising therefore means to directly combat corruption. By guaranteeing protection against arbitrary decision-making, the complementary step in improving water and sanitation quality is to progressively implement reforms to tackle local and regional disparities, mainly in poor areas. Finally, national legislation must ultimately satisfy and endorse international parameters of water and sanitation. Without the incorporation of external treaties and regulations, such as the United Nation's International Covenant on Economic, Social and Cultural Rights optional protocol, respective citizens are nonetheless still unable to appeal internationally once their rights to water and sanitation have been violated, leaving any international pressure or external intervention unviable.

Final Considerations:

It is therefore possible to conclude that amongst many needed solutions to reverse the current water crisis, the entrenchment of the right to water and sanitation is of major importance. The scarcity of hydric resources and worldwide water pollution demand a major shift in policy making and legislation in order to significantly improve both substantive and procedural aspects of equal accessibility to quality water. Water and sanitation as human rights need to go beyond the boundaries of academic debate, which is why giving content and effect to such right pressures governments, both on national and international level, to satisfy such basic human need. Water represents at its very core the essence of the right to life thus it is, and will always be, a global commitment and of international legal obligation.

References

- Cardoso, J. A Água Como Patrimônio Comum da Humanidade. *Âmbito Jurídico*, v. IX, n. 30, 2006.
- Castro, L. Direito Fundamental de Acesso a Água Potável e a Dignidade da Pessoa Humana. *Âmbito Jurídico*, v. XVI, n. 117, 2013.
- Escritório das Nações Unidas de apoio à Década Internacional de Acção (UNO-IDFA) "Água para a Vida, 2005-2015/Programa da Década da Água da ONU-Água sobre Advocacia e Comunicação (UNW-DPAC),. O Direito Humano à Água e ao Saneamento: Marcos. [s.l: s.n.]. Available at: <http://www.un.org/waterforlifedecade/pdf/human_right_to_water_and_sanitation_milestones_por.pdf>. Accessed in: 18 set. 2015.
- Gleick, P. The Human Right to Water. *Water Nepal*, v. 10, n. 1, 2003.
- Quadrado, A.; Vergara, R. Vai Faltar Água?. *Superinteressante*, n. 189, p. 42-46, 2003.
- Scanlon, J.; Cassar, A.; Nemes, N. Water as a Human Right?. *IUCN Environmental Policy and Law Paper*, v. 51, 2015.
- United Nations Educational, Scientific and Cultural Organization,. Water for a sustainable world: The United Nations World Water Development Report 2015. Paris: [s.n.]. Available at: <<http://unesdoc.unesco.org/images/0023/002318/231823E.pdf>>. Accessed in: 20 set. 2015.
- United Nations,. The Millennium Development Goals Report 2015. New York: United Nations, 2015. Available at: <[http://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20\(July%201\).pdf](http://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20(July%201).pdf)>. Accessed in: 23 set. 2015.
- Van der Valk, Michael R. and Keenan, Penelope, eds, "The right to water and water rights in a changing world". Papers presented at a colloquium held on 22 September 2010 in Delft, the Netherlands, 2011. Available in: http://www.hydrology.nl/images/docs/ihp/nl/21_Sep_2010/2011.10_The_right_to_water_and_water_rights.pdf. Accessed in: 22 set 2015.
- Varma, M. et al. Wòch nan Soley: The Denial of the Right to Water in Haiti. *Health and Human Rights*, v. 10, n. 2, 2008.

World Water Assessment Programme, UNESCO,. Water for People, Water for Life: UN
World Water Development Report (WWDR), 2003.