3.1 Legal and Ethical Dimensions of a Right to Water

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Introduction

A growing number of arguments are being made to suggest that safe drinking water and adequate sanitation services are an essential pre-condition for the enjoyment of many fundamental human rights, such as the right to life and the right to a healthy environment (see Gleick, 1998; Barlow, 2007; and Boyd, Chapter 3.3 in this volume). In recent years, this recognition has incited discussion at the international level about the expected benefits of explicitly categorizing access to water and sanitation as a human right, and formalization of this debate has taken place through the United Nations system. An early recognition came in 2002 when the United Nations Economic and Social Council (ECOSOC) indicated that the right to water was essential (UN Economic and Social Council, 2002). A landmark report by the United Nations Development Programme (2006) recognized for the first time that access to drinking water and sanitation services was a human right. This dialogue concluded in July 2010 with a UN General Assembly resolution (64/292) that formally recognized 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" (UN General Assembly, 2010: 2). The same resolution urged member states to devote sufficient financial resources and to build capacity and technology transfer, particularly in developing countries, in order to ensure that this right is served (UN General Assembly, 2012).

In September 2010, the UN Human Rights Council also passed a resolution of its own that endorsed the General Assembly resolution and offered some additional detail (UN Human Rights Council, 2010). In particular, it asked member states to develop comprehensive plans and strategies to address drinking water and sanitation challenges. Moreover, it duly recognized the need for a review of existing legislation, and in many cases, the creation of new legislation. An analysis of the current legislation, included in this volume (see Boyd in Chapter 3.2), shows that the right to water is increasingly being recognized in new constitutions. At least 18 countries, including Kenya, South Africa, the Dominican Republic, and Morocco, have drafted new constitutions that explicitly recognize this right. However, in the absence of explicit constitutional protection, the right to water can still be implicitly protected in light of its inherent quality as a prerequisite condition for the enjoyment of other explicitly recognized rights, such as the right to a healthy environment. Indirectly, however, what this analysis shows is that there still exists a large gap between the total number of countries providing a formal recognition and those that still need to review their legislation.

Given the recent nature of these developments, the need for further clarity is obvious. For instance, there is a need for greater specificity in the literature with respect to the legal framework within which the human right should be taken up, since it arguably can be legally integrated within different frameworks. Moreover, given the fact that different manners of legal assimilation can each have different associated costs and benefits, the lack of clarity on these has the potential to hinder the ongoing analysis of legalizing the human right to water. A further obfuscation is introduced due to the fact that a large number of countries (41) abstained from voting in favour of the UN General Assembly resolution, indicating the underlying disagreements and challenges (UN General Assembly, 2012).

For any discussion on water as a human right to be effective, it is first necessary to have a basic understanding of the different kinds of legal frameworks available, and the different kinds of legal standards by which the enactment of human rights may occur in order to understand how and whether water can be considered a legal right.

1. Human Rights, Available International Frameworks and Norms

Let us begin with clarifying and establishing a conceptual background around human rights. It is important to distinguish between law and morality as representative of two distinct kinds of normative frameworks. On the one hand, morality represents the naturally occurring terms of proper conduct. Legal frameworks, on the other, represent the socially adopted standards of government, that is, those standards that are employed as organizing principles within a civil society.

According to Griffin (2008) and Nickel (2009), it seems clear that human rights necessarily comprise a class of moral rights. More specifically, human rights represent the minimum standards of acceptable treatment to which individuals have a natural entitlement (Nickel, 2009). However, it is also clear that these rights can be taken up within legal frameworks, as legal rights. When this happens, issues of fundamental moral concern become translated into a paradigm where citizens become rights-holders and governments become duty-bearers.

Discussions of the costs and benefits of legally enacting basic human rights, such as the right to water, must be undertaken in the context of the above dynamic. But it is worth noting that all human rights that are integrated into legal frameworks do not share the same legal authority, normative force, jurisdiction, or the even same ability to effectively govern. Within the debate over the legal right to water, the most important of these distinctions is the difference between domestic and international law. For, as highlighted by Bruce Pardy (see Chapter 3.3 in this volume), the rule of law cannot exist without a basic architecture that has the capacity to enforce compliance through "independent courts; separation of power between legislatures; executive officials and judiciary; representative democracy; accountable bureaucracies; and so on". However, international law, unlike most of its national counterparts, lacks these foundational components. This absence of institutional structure, in turn, raises many questions about the effectiveness of legal integration at the international level, which would not be relevant to the enactment of a right to water at the national level.

As illustrated in Figure 1, the picture is still more complex than this. For, just as human rights can be adopted into different kinds of legal frameworks, they can also be accorded different levels of institutional force. This is to say that legal norms, such as the right to water, can be established as actionable or non-actionable standards. Put simply, an actionable standard is one whose violation gives grounds for legal action. Conversely, the violation of a non-actionable standard does not provide such grounds. Thus, the implications of incorporating a human right as one or the other are dramatic. While actionable rights are used to directly organize a society, non-actionable rights tend to have a symbolic function. To understand this, one only has to think of the difference between the role of constitutional rights within domestic legal systems and those contained in the non-binding *Universal Declaration of Human Rights* (United Nations General Assembly, 1948). Further, a human right can be legally established as one of two different sorts of norm: as a statute or as a customary standard. Statutory norms have content that is formally constructed and that is authoritatively enacted by a legislature or other governing body. On the other hand, customary norms are identified with the substance of community attitudes and are generally adopted into law in a way that is readily open to revision and adjustment. An appreciation of this distinction is key to debates about the legal introduction of the human right to water. For, the choice to legally establish the human right to water as a matter of statute or as customary law depends upon what group has the final say on the content of the right, the degree of its institutional entrenchment, and even the ability to clearly identify its contours. With all of the above distinctions in mind, it is clear that arguments for or against the legal incorporation of the human right to water must be constructed carefully and must take into account the variety of ways in which this might be achieved.

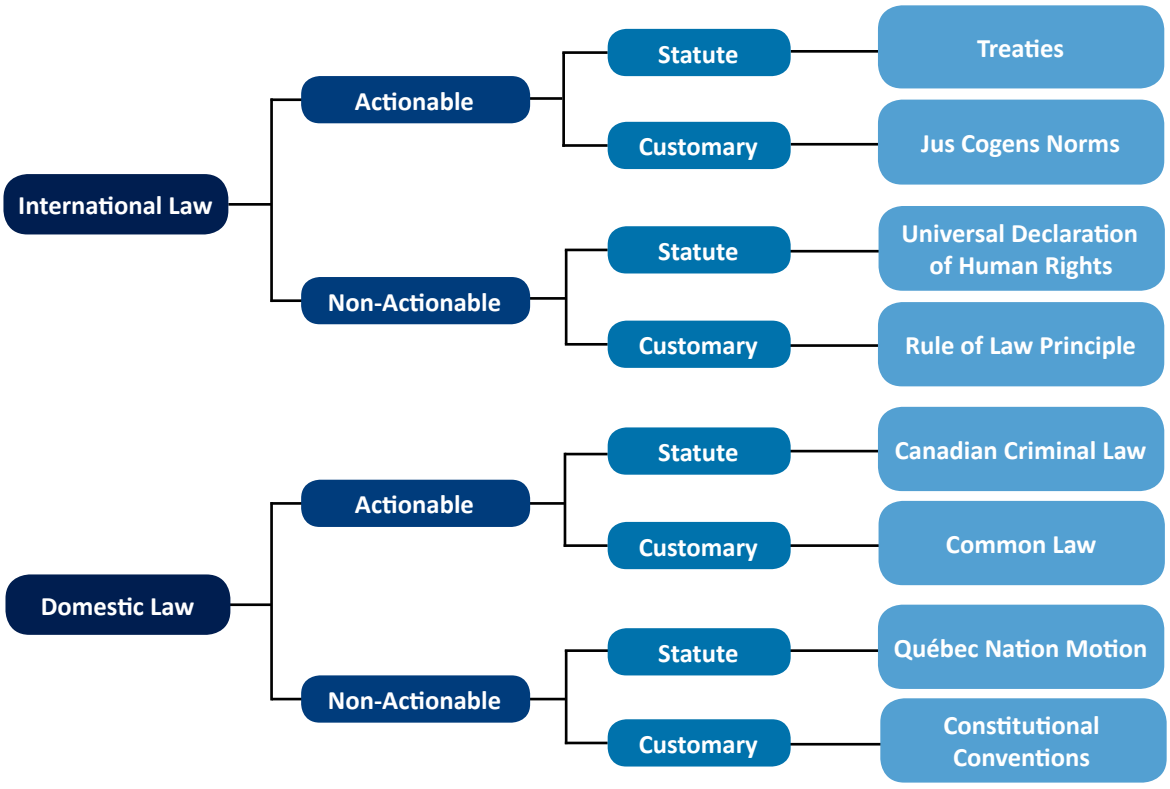

Figure 1. The various ways that norms can be incorporated into law.

2. Ethical Perspectives on State Obligations

A challenge to understanding state obligations regarding the human right of access to drinking water and sanitation is understanding the underlying ethical considerations that accompany it. These considerations are most often either consequentialist or deontological in nature.

2.1. Consequentialism

Consequentialism associates the maximization of positive consequences and the minimization of negative consequences with moral correctness, so that the net positive effects are used to morally justify an act. When put into practice, this approach imposes an obligation on the state to maximize the general welfare.

Utilitarianism is the predominant form of consequentialism, which maintains that we ought to act in such a way so as to achieve the greatest possible happiness for the greatest number while reducing unhappiness for the greatest number (Mill, 1871). More than a normative standard for interpersonal conduct, this approach can be used to assess the moral correctness of governmental institutions and social policies and their effects on human happiness. More importantly, it can be used to establish binding obligations on the state. For, as illustrated by Jeremy Bentham, "…over the long run, in human circumstances as we know them, making rules and assigning rights to people is most likely to conduce to happiness overall" (Bentham in Ripstein 2009: 8).

One can thereby argue that utilitarianism provides a justification for the human right to water and sanitation as long as respecting this norm would lead to greater human happiness. Put differently, provisioning of safe drinking water and adequate sanitation services could arguably lead to the maximization of positive consequences in society.

2.2. Deontology

Deontology, on the other hand, is not concerned with the consequences of actions. This approach considers conformity with moral principles as more important than calculations of happiness, or for that matter, of any other consequentialist good.

Immanuel Kant (1724-1804) was a philosopher and deontologist. His moral theory focused on the importance of human reason and its ability to align itself with the supreme principle of morality. This processserves to test the underlying principles of human action, and moreover, serves as a revelatory function by making one's moral duty apparent in any situation.

Associated with a person's ability to exercise their moral capacities are certain key values: autonomy, freedom, and human dignity. From these values, Kant identifies one innate human right, the right to freedom. Some have suggested that Kant is further committed to certain positive rights, known as welfare rights, which comprise a class of norms that entitle one to state assistance in light of the need to safeguard human dignity. The right to water and sanitation is by definition a welfare right, and many have used Kantian standards to argue for having such access as a pre-condition to both human dignity and the exercise of autonomous agency. Both the UN General Assembly and the UN Human Rights Council resolutions both state this premise explicitly (UN General Assembly, 2010; UN Human Rights Council, 2010).

Each of the above approaches provides a basis for placing duty on the state to respect the individual need to access safe drinking water and adequate sanitation services as a moral norm. Further, one could argue that a reliance on ethical norms would positively influence the conduct of individuals by imposing constraints on societal behaviour. This, in turn, might mitigate the negative effects of competitive water use. Moreover, one could also argue that the legal recognition of the human right to water as an actionable standard under either national or international law imposes an absolute moral imperative on governing bodies – an imperative that cannot be subordinated to goals of industrial production, or other forms of economic activity that require the use of water.

While, more often than not, the aims of morality are aligned with the aims of law, morality does not necessarily inform the content of law. For this reason, moral solutions to legal problems – despite their intuitive appeal – cannot be solely relied upon to be effective in practice, in every case. Other challenges also exist, which must be considered if a right to water is to have legal implications. A few of these challenges are explored in the next section.

3. Challenges in Legal Implementation

There are a number of roadblocks to achieving a universal recognition and enforcement of the human right to access to drinking water and sanitation. These challenges can be categorized into three broad categories: ground realities, perceptional roadblocks and insufficient legal instruments. Let us consider each of these.

Ground realities pertain to both the physical and the institutional environments. Examples of ground realities in the physical environment include water scarcity due to climatic conditions, challenging topography in mountainous areas that defies traditional delivery infrastructure, and national imperatives to produce food that require major diversion of water to agricultural activities. Examples of ground realities in the institutional environment include corruption and graft, weak governance and a weak legislative environment prevalent in most developing countries, and lack of institutional capacity. The declaration of human rights through a UN General Assembly resolution does not address any of these ground realities. In order to bring about a change in these, a massive and drastic change in paradigms of human and economic development may be required. Alternatively, Boyd (see Chapter 3.2 in this volume) argues that entrenching this human right as an actionable standard within both the international and national domains would be of benefit to the global community, which may require a different action from the UN General Assembly.

Numerous perceptional roadblocks have also emerged. For example, Pardy (see Chapter 3.3 in this volume) contends that the constitutional recognition of the human right to water embodies a false panacea in that constitutional enactment represents an impotent attempt to address the conditions that underlie the global water crisis. Several human rights organizations are also now forwarding claims that water, being a human right, cannot be priced or commoditized and should thus be available free of cost to everyone, everywhere. They further extend this fallacy by claiming that if we pay for water today, governments may ask us to pay for the air we breathe tomorrow. This argument, though it may sound ethical on the surface, can potentially halt many significant efforts to provide water and sanitation services to those who need it most, because it puts a block on any rational discussion of water pricing to recover the costs of service-provisioning and simply scares away financial capital that is critical.

The legal instruments available in both national and international normative environments are insufficient at the moment; countries like South Africa may be the exception to this situation. Considerable legislation, and even litigation, may be needed to establish sufficient and actionable norms. Additionally, there is a concern that a literal constitutional enactment of the human right to water may have a significant adverse impact on practices of indigenous populations (see Ávila, Chapter 3.4 this volume). A forced legal integration, as an extreme form of implementation of the human right, would allow the state to forcibly dismantle indigenous water management systems for the purpose of pursuing public (and private) water management interests.

Conclusions

We believe that we find ourselves at the beginning of a much larger discourse around the ethics, law and norms surrounding the declaration of access to drinking water and sanitation as a human right – one that has only begun to be explored. As the legal ramifications of the UN resolution are fully understood and new legislative responses are created, better implementation will follow. It is not yet clear what kind of timeframe will be needed for these transitions to take place.

In a broad sense, the UN resolution provides a number of tools and concepts that will help improve the provisioning of these fundamental services. It provides a framework that can enable resource prioritization both internationally and at the national level. This resource prioritization not only includes financial capital but also encompasses natural resources – most importantly and prominently, prioritizing water as a resource. Future discussions around human water consumption and that for agricultural production would help clarify the relative priority for this human right in different settings. The UN resolution also provides potential remedies to communities and individuals who feel that their human right has been deliberately denied. This automatically empowers communities to better engage in decision-making around trade-offs in water consumption. Finally, recognition of water and sanitation as a human right allows the international community to consider it as an extension of the 'Responsibility to Protect' (also commonly referred to as 'R2P') paradigm to act in cases in which this human right is threatened by malicious actions of governments.

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