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Obligations arising from the right to water in Finland and South Africa

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Abstract

While the right to water is recognized as a human right, its precise legal implications remain unclear. This article discusses obligations related to the right to water in the constitutional contexts of Finland and South Africa by using a specific framework of obligations. It argues that the right to water first and foremost obligates public authorities to realize the right as best they can and not to lower the level achieved. Despite different legal systems, cultures, levels of development and contexts, the right to water can be sufficiently realized in various ways unique to a specific country.

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1. Background, purpose and relevance

The General Assembly of the United Nations (UN) adopted a resolution on the right to safe and clean drinking water and sanitation as a human right in 2010 (UNGA, 2010a). The resolution marked a turning point in the long-running debate on the human right to water that has included various statements of normative intent such as the 1977 Mar del Plata Action Plan (UN Water Conference, 1977) and the 2003 General Comment No. 15 on the Right to Water by the UN Committee on Economic, Social and Cultural Rights (UNCESCR, 2003).

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Several scholars have also dealt with the human right to water and its domestic and international juridical and broader governance implications (Gleick, 1999; McCaffrey, 1992; McIntyre, 2012; Tully, 2005). More recently, the UN Special Rapporteur on the human right to safe drinking water and sanitation produced a comprehensive publication on good practices in realising the rights to water and sanitation (de Albuquerque and Roaf, 2012).

As a normative foundation for the human right to water, the UN General Assembly resolution recalled several key human rights treaties such as:

- The International Covenant on Economic, Social and Cultural Rights (ICESCR),
- The International Covenant on Civil and Political Rights (ICCPR),
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),
- The Convention on the Rights of the Child (CRC),
- The Convention on the Rights of Persons with Disabilities (CRPD) (UNGA, 2010a).

The ICESCR and ICCPR mention neither water nor sanitation, whereas water is mentioned in the CEDAW, CEC and CRPD in relation to the right to enjoy adequate living conditions, the right to health and the right to social protection without discrimination. Usually, the human right to water is derived from Articles 11 and 12 of the ICESCR that provide the right to an adequate standard of living and the right to the enjoyment of the highest attainable standard of physical and mental health. Incidental rights on which the right to water could be based also include the rights to life, human dignity and adequate food (UNCESCR, 2003).

Despite the long-running debate on the human right to water, it remains unclear precisely what legal obligations arise from it (McIntyre, 2012). Partly for this reason, it seems, the UN General Assembly resolution on the right to water and sanitation was only adopted after a vote that included 41 abstentions. Illustratively, the representative of the United States clarified before the vote that “the legal implications of a declared right to water have not yet been carefully and fully considered” (UNGA, 2010a, 2010b).

In light of the prevailing paucity as to the specific obligations that could arise from the right to water, our contribution aims to briefly illuminate the legal implications of the right to water at the national level. The article investigates and compares the constitutional frameworks of Finland and South Africa in order to clarify the obligations of the right to water (excluding the right to sanitation) in developed and developing countries. Through transnational lessons, it is possible to distil comparatively the various legal obligations that flow from the right to water as it is entrenched constitutionally and statutorily in the two countries.

The analytical methodology used is a legal doctrinal one with a specific emphasis on legal comparison, which includes an assessment of the legal implications of the sources of the right to water such as human rights treaties and national constitutions. Against the generally accepted State obligations to respect, protect and fulfil human rights (UNCESCR, 2003), we apply a more specific framework – largely following the Finnish discussion on socio-economic rights obligations (Karapuu, 1987; Tuori, 2011) – to determine and compare the obligations of the right to water in Finland and South Africa. In terms of this framework, the right to water may obligate public authorities:

- to fulfil the justiciable substantive right of an individual,
- to implement the right (implementation obligation),
- not to lower the level achieved in the realization of the right (impairment prohibition obligation),
- to take the right into account in the interpretation of law (interpretative obligation).

In addition to their application to public authorities, all or some of these obligations may apply to non-state parties such as private water companies (non-state party obligations) (Irujo, 2007).

Finland and South Africa are two interesting countries to compare since their circumstances differ significantly. While Finland is one of the world’s water-richest countries that uses only 2 per cent of the total water flow for human

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