

Book Reviews

The Human Right to Water: Legal and Policy Dimensions

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Throughout the past five decades, the human rights movement has been engaged in efforts to upgrade the quality of its work. The growing professionalization of the movement is evident in its increasing sophistication in dealing with legal issues. The second and the third decades of the movement were, in particular, characterized by a number of important innovations and a series of attempts by scholars to define and redefine general as well as specific rights. The attempts also took such scholars to search for a linkage between human rights and water rights, a linkage that had remained difficult to be clearly established if not missing altogether. In this context, therefore, the publication of the above-captioned book by two experts, lawyers at the World Bank, is a welcome addition to the vast, yet growing, literature on human rights.

Divided into four main parts, along with a conclusion and a comprehensive bibliography, the book is methodically well structured. In a logical fashion, it analyses the resolutions and declarations of the various international conferences and forums and the manners in which the international community confronted the issue of the right to water.

After a short, yet clear, introduction, the book continues by discussing the evolution of the international legal regime for the protection and promotion of human rights. In that context, it reviews the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, always systematically with a view to tracing the source of the right to water. The role of each of the committees established to oversee the implementation of the two Covenants is also considered, although a greater emphasis is laid on the Committee on Economic, Social and Cultural Rights (CESCR). This is ostensibly justifiable in view particularly of the fact that it is not a treaty-based but an organ that matured into its current structure after gradual evolution (that needed to be discussed), and of its role in the practice of issuing General Comments, an important source of interpretative laws in the area of human rights, no doubt of direct topical relevance to the authors. Interestingly, one of the general Comments has dealt specifically with water rights.

Indeed, the strength and uniqueness of the book is on the last two parts, devoted to a detailed analysis of the General Comment No. 15, which recognizes the human right to water. These parts analyse the extent to which the Comment recognizes a legal right to water, and highlights some policy aspects that are related to this right. The thesis defended by the authors is that there exists, within the legal framework of the International Covenant on Economic, Social and Cultural Rights, a human right to water, that this right inheres in

several other rights, and that without this specific right, key provisions of the Covenant would be meaningless.

In dealing with the General Comment No. 15, which was issued by the CESCR in 2002, the authors carry out an exceptionally painstaking analysis to establish a link between human right and water. According to them, the crux of General Comment No. 15 is Paragraph 2, which entitles every human being to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. But, in so doing, they also admit that the adequacy of requirement for water varies according to differing prevailing conditions, for which reason, the availability, quality and accessibility—factors the CESCR had identified—also need to be considered. Indeed, the CESCR did not only limit itself to exhorting the states Parties to realize the right to water; but also provided analytical devices such as derivation and inference, centrality and necessity, or prior recognition to help them do so.

In sum, for Salman and McInerney-Lankford, the recognition of the right to water is primarily through derivation and inference, particularly from articles 11 and 12 of the International Covenant on Social and Cultural Rights. This approach, indeed, appears safe in view of the still prevailing doubts, amongst scholars, about the claim of right by inference. Whatever the strength of the contextual claim by inference may be, the recognition *per se* calls for state responsibility and action. That is what has been dealt with by the authors in Part 4 of the Book, which discusses the legal and policy dimensions of the Comment No. 15. In so doing, the authors, on one hand, touch upon the specific legal obligations to ‘respect’ (states refraining from interfering with the enjoyment of the right), to ‘protect’ (protection of such right from interference from a third party) and to ‘fulfill’ (facilitate, promote and provide), and on the other, deal with the violations against the right to water, for which a general approach would require states Parties to adopt comprehensive measures and programs to ensure that there is intergenerational guarantees for safe water. It may be recalled that to achieve such sustainable use of water resources, the General Comment suggested nine methods, which, *inter alia*, include reducing depletion of water resources through unsustainable extraction and increasing the efficient use of water by end users.

Certainly, the reference to obligation remains crucial and warranted. But state obligation vis-à-vis the citizen needs to be in harmony with the state’s obligation vis-à-vis other countries. The Comment requires states Parties to comply with international obligations in relation to the right to water, asserting that international cooperation requires states Parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Whether there is a right under international law to receive water from a riparian country may continue to remain a valid question, but has nonetheless been partly answered within the realm of the UN Watercourses Convention of 1997, which gives priority to the use of water for drinking purposes in one state, over its use for hydropower generation, or agriculture in another riparian state. On the international level, thus arguably, one state can no longer deny a co-riparian state water necessary for the survival of the latter’s population on the ground that the water is needed for its own economic development. International law confirms this right, if not in letter, certainly in spirit.

Whilst the General Comment does not create new rights, it extrapolates the normative and practical bases of a human right to water within the fabric of the International Covenant on Economic, Social and Cultural Rights. Together with a number of General

Assembly resolutions on the issue, including the Millennium Development Goal related to water, other international and national instruments, as well as the myriad soft law provisions, the General Comment provides further evidence that there is an incipient right to water evolving in contemporary public international law. The authors, cautiously and correctly so, conclude that the Comment has offered a new momentum to efforts aimed at translating several soft law commitments into substantive, precise, and legally binding obligations, although they remain short in arguments to fully convince the readers on the legally binding aspect of such commitments.

The human right to water is one of the most crucial topics in the international debates, and has been on the global agenda since the 1970s. However, the resolutions and declarations that have been adopted since that time at the different international conferences have vacillated between declaring water a basic human need and a human right. It is in this context that the authors' review of the General Comment No. 15, recognizing a human right to water, has its relevance and importance. Indeed, according to them, the Comment has heightened and energized the debate, adding both legal and policy dimensions, and ultimately leading to the conclusion that there exists in international law of today an emerging human right to water, and that there is an evolving relationship between the parallel developments at the international and domestic levels.

The book by Salman and McInerney-Lankford is an essential reading and will certainly be an important tool for researchers who intend to deepen the study of human rights in a broader developmental context.

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Organization for Economic Cooperation and Development (OECD) Economic Surveys 2002–2003, Mexico

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The OECD's Economic Survey of Mexico, analyses, among other issues, the status of the water resources in the country. The survey correctly concludes that the water use in Mexico is on "an unsustainable path". However, analyses used to reach this conclusion are simplistic and not all the essential factors are used for discussing the present situation. Overall, the report presents a very impartial understanding of the current situation of water use and management in Mexico.

According to this report, irrigation is the only sector responsible for groundwater depletion. It does not consider that an increasing number of cities and industries are depleting aquifers to meet their escalating water needs. The solution to groundwater depletion in Mexico requires more than "ending direct subsidies for the irrigation districts" or "obliging the irrigation sector to pay the market price for electricity used for pumping" (p. 17). What is needed is a realistic understanding of how groundwater is used in Mexico at present, who are using it, at what rates over which regions, and what are the social,

economic and environmental impacts of such uses. Without proper understanding of the current overall situation, the solutions offered treat only one of the symptoms of the disease. It may result in partial relief, but it will not cure the disease.

In their studies on groundwater mining through agricultural energy policy in Mexico, Scott & Shah (2004) and Scott *et al.* (2004) note that several strategies have been implemented to reduce groundwater mining, including regulatory and participatory strategies, with some success. The Law on Rural Energy was passed unanimously by the Mexican Chamber of Deputies in December 2002. This law caps an annual energy limit in kilowatt-hours, which, based on the depth of the water table and a fixed electro-mechanical efficiency, yields an equivalent annual volume of groundwater concessioned for a specific well. The Law on Rural Energy mandates a rural energy programme with an annual budget and implementation plan that must be included in the federal budget. The objective of the law seems to be to support the farmers so that they can face more fairly their main competitors, the American and Canadian agricultural producers, who enjoy significant energy subsidies. This means that, in spite of groundwater depletion being a serious problem due, among other reasons, to the over-use by the agricultural sector, 'forcing' the farmers to pay the market price of energy would not be helpful, since there are constraints imposed by the North American Free Trade Agreement (NAFTA), mainly in terms of uneven competition.

The OECD survey also notes that "in urban areas, the challenge is to convince local authorities, who control the utilities, to place water distribution on an economic footing. Raising water charges would also help finance the major investment programme that is needed both to improve the treatment of wastewater ... and to expand the provision of potable water in rural areas and its quality in both rural and urban areas" (p. 18). It seems that higher water charges are considered as the principal instrument to finance investment programmes, which is a somewhat limited approach to solve the problem of lack of investment funds. Water charges could be viewed to be an instrument to induce users to a more rational use of water, which in turn will result in higher incomes for the water, or development, institutions to plan future investment programmes. In addition, more appropriate wastewater treatment and better provision supply of drinking water for urban and rural people in terms of quantity and quality depend, not exclusively on higher prices, but on a long-term drinking water and wastewater management plans by the institutions responsible for water and wastewater management. Issues that deserve special consideration include efficiency of the institutions and the appropriate training of its personnel, among others. Simply "Placing water distribution on an economic footing" will not solve the major mismanagement problems, which are simply too numerous and extensive to discuss here. Suffice to say that, it would not be fair for the users, any users, to pay for the inefficiencies of the water institutions' situation which is widespread.

The OECD report notes that "... water supply in Mexico would be more than adequate if it were evenly distributed across the country. But in the areas of high population and strong economic activity, i.e. in the northern and central areas of the country, water use, especially by the agricultural sector, exceeds the renewable supply and underground water stocks are being depleted" (p. 117). While the above is true, it is also important to clarify that the problems in Mexico, like in most other countries, in terms of water distribution are basically hydrological. A striking characteristic of the country's economic structure is the fact that a significant proportion of the territory (64%) considered as having low or very low quality of natural resources, water included, is the area in which more than one-third

of the population lives, and where more than 80% of the production by value is generated. This disparity has meant that in some regions the resources are over-exploited and in other regions, natural resources, including water, are under-utilized. Water is naturally scarce in the north and centre of the country, but abundant in the south of the country (Biswas, 2003, pp. 243–379).

The OECD report further notes that substantial sections of the population in Mexico are still without access to potable water. However, while the percentage of people served in the urban areas (95%) of the country are based on the statistics for the year 2000, this data is compared with information on the people served within the Metropolitan Area of Mexico City from the 1990 census. Data from two different decades are simply not comparable, and such analyses are scientifically erroneous and unacceptable. If the objective is to provide a reliable comparison, data for the same year should have been used. With very little effort, the authors could have found out that in 2000 (INEGI, 2000), 95.3% of the population in the Federal District, and 84.2% in the state of Mexico, which comprise the Metropolitan Area of Mexico City, had access to water, either through direct house connections or from common faucets in the neighbourhood.

Statements on potable water supply are equally confusing. The report states "... in thirteen administrative areas within the Metropolitan Area (of Mexico City) that accounted for one quarter of the national population, 18 percent of households had no access to water on their property, against 3 percent elsewhere in the region" (p.118). According to INEGI (2000), the Metropolitan Area of Mexico City includes both the Mexico City in the Federal District (with 16 boroughs) and 34 municipalities of state of Mexico, with 8.6 and 13 million people, respectively. Since there is no reference in the OECD report as to which ones are the 13 administrative areas, and to the exact places where 3% of the population have no access to potable water "elsewhere in the region", the statements are meaningless.

So far as the river basin authorities are concerned, the report shows no idea of the real situation in Mexico. The report states that "the newly created river basin councils could serve as water distribution authorities as well as producing sustainable water extraction plans" (p. 121), and "(the government) establishes the river basin as the basic unit for decision making" (p. 124). A thorough analysis would have found that unlike in most other countries of the world, institutional arrangements for water resources management at the river basin level were first put in place in Mexico during the 1940s, with the primary objective to foster socio-economic development of the several regions based on water availability. These institutions, known as river basin commissions, operated for almost 40 years. When their importance disappeared, new institutional arrangements, policies and instruments were developed according to the then priorities of the country. Later, during the 1990s, institutions were established again at the river basin level with the objective of improving water management practices. River basin councils have been expected to work at the river basin level, and river basin commissions, committees and groundwater technical committees at the sub-basin, micro-basin and aquifer levels, respectively. In other words, the river basins have not just been established as the basin unit for decision making, but they have existed as management units for the last six decades (Tortajada, 2005).

It is also erroneous to claim that "the 25 river basin councils now in place might serve as the base for a system of water distribution but their powers would need to be strengthened" (p. 124). At present, only one of the 25 river basin councils that have been established is

operational. In most cases, other councils do not even have staff members or offices, not to mention implementable plans, financial support or management and technical capacities. In addition, the main problem of river basin management is that the overall operational framework to manage water resources at the basin level is still not functional in the country (Guerrero & García-León, 2003). If and when they become functional, whether they would actually improve the water management practices in the country still remain to be seen.

The report further notes that “Infrastructure development is also planned to bring more water to the Valley area . . .” (p. 120). A good analysis would have shown that the transfer of water to Mexico City (not Mexico Valley which comprises several states) has become a very difficult issue from the social, economic and political viewpoints. It was precisely because of the absence of water transfers in the foreseeable future that the Federal District has developed a new strategy for water management for Mexico City (Marañón, 2003, 2005).

In the section on water pollution, the report notes that “. . . the government introduced a simplified set of norms for pollution discharge in 1996. These norms are to be phased in over the period 2000 to 2010” (p. 123). What should also have been noted is that not only these set of norms have not been implemented, and hence, have not been of much help to reduce water pollution, but also the overall legal framework for wastewater management in the country includes different laws which contradict each other. Accordingly, the possibilities of implementing them successfully are remote. Additionally, the reason why “a portion of the discharge (of wastewater in the Mexico City area) is used for agricultural irrigation without further processing” is *not* because there is no river in the Mexico City area (p. 122). The authors should have had at least some rudimentary knowledge of the physical conditions of Mexico, otherwise they would not have made such simplistic statements.

The section on water in the OECD survey concludes saying that increase in prices of potable water should be pursued since it represents an important revenue for the government for investment purposes, and that the orientation of the federal water commission needs to be progressively reoriented, away from irrigation projects and large water projects towards expanding the water to smaller, principally rural communities (p. 124). Accordingly there is no need for overall demand-based water management programmes: increase in prices would solve the problems by itself, where the users would have to bear even the cost of existing very significant inefficiencies of the institutions concerned. The implementation of the suggestion that “the federal water authority should move away from the large water projects”, would mean chaos in terms of water management for the more than 60 million people who live in cities with more than 15 000 inhabitants. It is a fact that the supply of water to rural areas represents an enormous challenge to the country, since some 30 million people live in places with less than 2500 inhabitants. However, it is hard to accept that in order for the rural areas to receive services, the urban population should be left unattended. Supply of potable water cannot be an either/or issue: services must be provided to all rural and urban populations of the country.

Regrettably, analyses of the water sector in the report give a superficial, and sometimes erroneous, view of the present situation, which in reality is much more complex and difficult. The alternatives proposed do not reflect the conditions of the country in terms of water management, as well as its complexities and challenges. It is also interesting to see

that in this day and age, the solutions recommended are mainly market-oriented. Water problems in Mexico, or any other country for that matter, cannot be solved by exclusive market solutions. There has to be broader and more holistic approach, within which market-oriented solutions could play an important role.

OECD normally publishes authoritative reports, but its recent reports on Mexico on natural resources and environmental management have been consistently superficial, simplistic and often erroneous. The analysis of the water sector in Mexico in this report is continuation of this trend. Unless OECD improves the qualities of its reports very significantly, and starts producing definitive reports, it is likely to lose its credibility among serious scholars and analysts interested in natural resources and environmental management in Mexico.

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