

# LEGAL PROTECTION OF THE RIGHT TO WATER IN THE EUROPEAN UNION

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## Introduction

In the European Union (EU), the coming into force of the Water Framework Directive (WFD) in 2000 marked a new approach in water management.<sup>1</sup> The Preamble to the Directive states that water is regarded as a heritage which must be protected, defended and treated as such. Water is explicitly considered not to be a commercial product like any other. Furthermore, the EU recognized the right to water in March 2010. This EU position does not necessarily reflect the position of the EU Member States. Not all have recognized the right to water. Some Member States regard water as a public or common good, while others have transformed water rights into property rights (Quesada, 2010; Dellapenna and Gupta, 2009; De Visser and Mbaziri, 2006; Kissling-Näf and Kuks, 2004). European citizens regard access to safe and clean water as important. The protection of water was one of the first topics to become regulated in the field of European environmental law (Jans and Vedder, 2008). Water quality in the EU has improved in the last few decades, but not enough. And increasingly, water scarcity is becoming an issue in the EU, especially in the south of Europe. In this regard it is important to realize that a lack of water and an eventual subsequent struggle for water does not so much take place between rich and poor or indigenous and 'new' inhabitants, but far more between different users of water, as water is used for drinking water, agriculture, energy, shipping, industry and recreation.

The European approach to the protection of the right to water is a combination of a human rights approach and integrated water resource management. This is logical in the sense that sufficient and clean water for all requires a sustainable and equitable use and the protection of water as a natural resource. Before we discuss the way the EU protects the right to water in more detail, some remarks on the system of EU law are given to ensure a proper understanding of the legal regime and the way public

participation and access to justice – necessary elements to legally enforce the right to water – are arranged (see also the chapter by Staddon et al).

### **The EU as a supranational organization**

The EU is neither a regular international organization nor a federal state. It is a supranational organization made up of 27 Member States and that has consequences for its organization and legal order. The EU legal order can be characterized as an integrated legal order (Jans et al, 2007). In the field of water law and policy, this means that the Member States, being France, Germany, Italy, Belgium, Luxembourg, the Netherlands (the six founding states of the European Community in 1951), Denmark, Ireland, the United Kingdom (accession in 1973), Greece (1980), Portugal, Spain (1986), Austria, Finland, Sweden (1995), Estonia, Latvia, Lithuania, Poland, the Czech Republic, Hungary, Slovakia, Slovenia, Cyprus, Malta (2005), Bulgaria (2007) share their responsibility with the EU. The European Union has the power to adopt binding legislation for all Member States and the power to enter into international agreements. When the EU is a party to an international agreement – for example, a Treaty or Convention in which the right to water is acknowledged – and it fulfils its international obligations by means of European legislation, international obligations become binding obligations for each Member State.

The EU regulates only what is absolutely necessary, which is based on the subsidiarity principle and the proportionality principle (Jans et al, 2007). In environmental policies, the most frequently used legal instrument is the directive, a piece of EU legislation that has to be implemented in the national legal orders of the different Member States in a way that guarantees that the objectives of the legislation are fully attained, while the choice of the means to realize them is to a large extent left to the Member States (Jans and Vedder, 2008). The Member States are accountable to the European Commission for compliance with their European obligations and can be brought before – and even sanctioned by – the European Court of Justice in case of non-compliance.

Because EU environmental directives should be transposed into national law by the Member States, the legal protection is based on the national law systems of the Member States. This follows from the principle of procedural autonomy. The boundary of this procedural autonomy lies in the obligation that legal protection has to be *effective*, which means that the national legal system has to guarantee that citizens may enjoy the full protection that EU law offers them. This means that when a European directive offers rights to citizens, these rights have to be implemented in binding legislation and it must be assured that citizens can enforce their rights before the national courts (Jans et al, 2007). This approach makes EU law more powerful than international law.

## EU water law and the role of human rights

European water law has been based on a river basin management approach since the year 2000 (Van Rijswick et al, 2010). It offers an integrated approach, with the aim of avoiding pollution, on the one hand, and promoting a sustainable and equitable use of water resources, on the other. These aims are influenced by the following guiding principles in EU environmental law. Substantive principles that are relevant for all environmental and water legislation are a high level of protection and improving the quality of the environment, sustainable development, the integration principle, the precautionary principle, the principle that preventive action should be taken, the principle that environmental damage should be rectified at the source, and the polluter (or user) should pay principle. For consumers this is important, because these principles protect the quality of drinking water resources and ensure that those who pollute or use most water will pay a proportionate part of the costs (Kaika, 2003).

EU water law is based on shared responsibilities between the EU and the individual Member States. EU water law contains goals that Member States should meet, but offers room for policy discretion for the Member States concerning the way these goals can be attained. The EU protects the right to water by a combination of human rights law and water law. When it comes to the protection of human rights and more specifically the right to water, international treaties and the European Convention on Human Rights play a more important role than EU environmental and water legislation.<sup>2</sup> However, since the reform of the European Union last year, human rights and environmental protection have been further encapsulated in the EU legal framework, being articulated in the Charter of Fundamental Rights, the EU Treaty and the Treaty on the functioning of the European Union.<sup>3</sup>

EU water law also has a procedural component, which ensures that citizens are informed and involved in planning and decision-making. These procedural rights can be found in the international Aarhus Convention and its implementation in European law.<sup>4</sup> Article 14 of the WFD contains more specific obligations with regard to public participation, which relate in particular to informing and consulting the public at large. According to the Court of Justice, these obligations must be implemented in the national law of the member states.<sup>5</sup> These procedural rights are important because they give citizens the possibility to check if their interests are well protected, to further them during the decision-making stage and if necessary to enforce them before the courts.

### Scope of the right to water

Worldwide, voices are calling for a 'right to water' to be seen as a human right (Smets, 2005; Filmer-Wilson, 2005). A right to water guarantees a given

quantity of drinking water per individual, often combined with a right to sanitation. A common figure cited for levels at which this might be set is 50 litres per person per day, although there is considerable debate over whether this figure is sufficient or whether volumetric considerations are themselves problematic. Whatever, this is a very limited quantity of clean drinking water or water for domestic uses. The average European uses at least 175 litres a day. The right to water is increasingly being recognized in international conventions, but not to such an extent that a binding human right to water exists.<sup>6</sup> A broader scope of the right to water includes the protection of safety against flooding and sufficient, clean water for domestic use, sanitation (Smets, 2010), food production, energy supply and the protection of ecosystems (Van Rijswick 2008).

The right to (drinking) water can be inferred from various conventions which form part of the EU legal framework. Article 14(2) of the 1979 Convention on the Elimination of All Forms of Discrimination against Women compels states to ensure 'adequate living conditions, particularly in relation to . . . water supply' for women.<sup>7</sup> The 1989 Convention on the Rights of the Child compels states to combat disease and malnutrition 'through the provision of adequate nutritious food and clean drinking water' (Art. 24(2)).<sup>8</sup> The International Covenant on Economic, Social and Cultural Rights of the United Nations (ICESCR) is based on the Universal Declaration of Human Rights.<sup>9</sup> The ICESCR contains a basis for the right to water in Articles 11 and 12. Under Article 12(1) ICESCR everyone has the right to the enjoyment of the highest attainable standard of physical and mental health. Article 12(2) ICESCR stipulates that States Parties to the Covenant must improve all aspects of environmental and industrial hygiene and take steps to achieve the healthy development of the child.

According to the General Comment (no. 14) of the UN Committee of the ICESCR, Article 12 ICESCR refers not only to health care, but also to all other factors that determine the enjoyment of good health, such as access to clean drinking water, personal hygiene requirements, an adequate supply of safe food, and housing. Article 11(1) ICESCR – the right to an adequate standard of living – also covers the availability of drinking water. The definition of the right to water can be found in General Comment no. 15 on the Right to Water, adopted in 2002 by the Committee of Economic, Social and Cultural Rights. It states that the Human Right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.

Implementing the internationally protected right to water therefore requires the following conditions to be met:

1. Availability: the supply of water for each individual must be adequate and continuous for personal and general uses, e.g. drinking, sanitation, washing clothes, preparing food and personal and household hygiene.
2. Quality: the water for personal and general use must be safe, and therefore free of micro-organisms, chemical substances and radiological hazards that are a danger to health. The colour, odour and taste of water must also be acceptable.
3. Accessibility: water and water facilities must be accessible to everyone, without discrimination. Accessibility comprises:
  - Physical accessibility: water and water facilities must be located within safe physical reach for all sections of the population. Sufficient, safe and acceptable water must be accessible within each household, school and workplace.
  - Economic accessibility: water must be affordable for everyone.
  - Equal accessibility: water must be accessible to all, including the most vulnerable and marginalized sections of society, with no conditions or penalties being attached.
  - Information accessibility: accessibility also covers the right to seek and receive independent information on water issues.

An important aspect of the accessibility of drinking water is economic accessibility. General Comment no. 15 does not require water to be free, but financial obstacles must not be such that they restrict accessibility. It states that any payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households. Although a General Comment is not binding on the States Parties, this comment is regularly referred to.

For the actual protection of water rights it is necessary that individuals can rely on the right to water before a national court. This means within the EU that they depend on the inclusion of a provision from which a right to water can be derived in a treaty or agreement to which their state is a party or a national constitutional provision. They cannot rely on EU Directives, as none explicitly contains a right to water. They only elaborate aspects that are necessary to realize the right to water.

The WFD comes closest to incorporating the right to water as one of its objectives is to protect the quantity and quality of freshwater resources. Its Preamble asserts that good water quality will contribute to securing the drinking water supply. Article 1 WFD mentions as relevant goals a sustainable use of water and contributing to the provision of a sufficient supply of good quality surface water and groundwater as needed for sustainable,

balanced and equitable water use. In addition, the Drinking Water Directive contains a responsibility for administrative authorities as well as for drinking water companies to ensure good quality drinking water.

Other aspects of a broader right to water can be derived from a range of EU Directives. The obligation to take care of proper sanitation derives from the Urban Waste Water Treatment Directive (Directive 91/271).<sup>10</sup> The protection of water for food production and economic activities derives from the WFD, while the protection of water necessary for the functioning of ecosystems is based on the WFD, the Birds Directive (Directive 79/409/EC) and the Habitat Directive (Directive 92/43/EC).<sup>11</sup> Finally, the protection against flooding is based on the Floods Directive (Directive 2007/60/EC).<sup>12</sup>

### **Recognition of the right to water by the EU**

There is no separate human right to water embodied in European legislation (Van Rijswijk, 2011). The right to water is based on international commitments undertaken by the EU and is detailed in European water directives that have been enacted. In European law, fundamental rights and principles are closely interwoven. The right to (drinking) water can particularly be deduced from the general principles of EU law, the EU Charter of Fundamental Rights and the European Convention on Human Rights (ECHR).

On the basis of Article 6 of the Treaty on the Functioning of the EU (TFEU), the EU considers fundamental rights that have been granted on the basis of the ECHR to be general principles of Community law. Of relevance to water rights are both the substantive rights as laid down in Article 2 ECHR, which guarantees the protection of life, and Article 1 of the first Protocol to the ECHR (protection of property) as well as the procedural rights needed to realize the substantive rights. The latter can be found in Articles 6 and 13 ECHR (right of access to the courts).<sup>13</sup> With the entry into force of the Lisbon Treaty (amending the Treaty on European Union, and amending and renaming the EC Treaty), the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union have gained importance. Also of importance for the substantive right to water is the London Protocol on Water and Health, as part of the Treaty of Helsinki,<sup>14</sup> and for the procedural rights the Aarhus Convention. The EU is a party to both treaties.

Even though the European Parliament and the Council of Europe support the right to water, a legally binding right has yet to be incorporated in a statutory text. On 22 March 2010 the EU took a tougher stance on the fundamental right to water:

On World water day the EU reaffirms that all States bear human rights obligations regarding access to safe drinking water, which must be available, physically accessible, affordable and acceptable.

(...) The EU recognizes that the human rights obligations regarding access to safe drinking water and to sanitation are closely related with individual human rights – as the rights to housing, food and health. But even more than being related to individual rights, access to safe drinking water is a component element of the rights to an adequate standard of living and is closely related to human dignity. The principles of participation, non-discrimination and accountability are crucial. Water for personal and domestic use must be safe, therefore free from substances constituting a threat to a person's health. Access to adequate and safe sanitation constitutes one of the principal mechanisms for protecting the quality of drinking water.<sup>15</sup>

So the EU considers the fundamental right to water as an essential component of existing human rights and links its realization both to substantive and procedural obligations on the part of the Member States. However, even the restricted right to drinking water and sanitation is not (yet) recognized by all European Member States.<sup>16</sup> This means that not everywhere in Europe is it possible for citizens to ensure their right to water by commencing legal proceedings.

### Case study of the right to water in the Netherlands

Since the effectuation of the right to water within the EU depends on the Member States, it is interesting to take a closer look at one of them. Like the EU, the Netherlands does not have an explicit right to water in its Constitution (*Grondwet, GW*) either. The right to water can be implied from Article 21 of the Constitution, the right to government care for keeping the country habitable and for protecting and improving the environment.<sup>17</sup> It can also be assumed that the right to water also constitutes part of the government's task to promote the health of the population (Art. 22 *GW*), and it may even be possible to link it to the inviolability of the physical person (Art. 11 *GW*). The Dutch right to water can thus be considered to be part of Dutch social fundamental rights, which should be seen as a duty of care on the part of the authorities and are intended as a task for the government to enact legislation.

In a case before the Maastricht district court, the right to water was for the first time explicitly recognized. The case was between a drinking water company and a citizen who had not paid his drinking water bill. Therefore the drinking water company refused to deliver any drinking water until the bill was paid. The court found that the defendant could not bypass the WML, the regional monopoly company for the supply of drinking water, to invoke his right to water. It found this right to be embodied in rights that have been codified and recognized by the Netherlands, especially the right to an adequate

standard of living and the right to health (Articles 11 and 12 respectively of the International Covenant on Economic, Social and Cultural Rights). It also mentioned that the Netherlands had recognized the right to water at a session of the Human Rights Council in 2008. The defendant won the case, because the sum or arrears (around Euro 150) was too low to justify water being cut off.<sup>18</sup>

In a later ruling by the court of appeal in Den Bosch in a similar case, the court also recognized the existence of the right to water on the basis of a similar reasoning. However, in this case the defendant lost. Referring to General Comment no. 15, the appeal court held that the recognition of a human right to water does not mean that a claim can be made for the provision of water at no cost. It concluded that the right to suspend delivery is not in itself in conflict with the right to water.<sup>19</sup> A thousand litres of drinking water in the Netherlands costs around Euro 1.50, which can be deemed to be a reasonable price that does not exclude even vulnerable groups from the supply of drinking water.<sup>20</sup> Moreover, in addition to this relatively low price for drinking water, the available social security assistance to poor households in the Netherlands also ensures that citizens can realize their right to water.

### **Realization of the right to water in combination with an IWRM approach: protection of drinking water resources**

Within the EU, the practical task of ensuring the right to water is embedded in an integrated water resources management (IWRM) approach (Van Rijswijk, 2011). The IWRM approach covers the protection of the resources of drinking water. Adequate protection of the quality of water resources reduces the necessity for further purification treatment of groundwater and surface water in order for the water to be used for consumption. IWRM is also about the sustainable use of water, including water to be used for the drinking water supply. Securing the supply of sufficient, safe and clean drinking water requires such an integrated approach.

The Drinking Water Directive (Directive 75/440/EC), which established the protection of drinking water resources was one of Europe's first environmental Directives (it dates from 1975). It established quality requirements for the quality of fresh surface water which, after appropriate treatment, was to be used for the production of drinking water. This Directive has now been integrated into the WFD and was repealed as of 22 December 2007. However, the case law of the Court of Justice relating to the Drinking Water Directive 75/440/EEC is still of relevance for a correct interpretation and understanding of the WFD in so far as it protects the quality of drinking water.

The Drinking Water Directive set up a system of European and national quality standards by establishing limit values and target values for drinking water resources. Member States had to take all necessary measures to ensure

that the water was in conformity with these values and the Directive was to be applied without distinction to national waters and waters crossing the frontiers of Member States. The approach of the Drinking Water Directive 75/440/EEC was programmatic. In order to achieve the objectives, Member States were to draw up systematic action plans, including a timetable for the improvement of the quality of surface water. If the quality of the surface water fell short of the mandatory limit values, it was, in principle, not to be used for the production of drinking water. The Member States were allowed to set stricter requirements; and the Directive also included a standstill principle. The various quality standards had to be transposed into binding national legal rules. In case of non-compliance with the Directive, third parties harmed by this non-compliance had to be able to rely on these mandatory rules before a court in order to be able to enforce their rights.<sup>21</sup>

The WFD established that the integration of the system for the protection of drinking water resources in the WFD should not lead to a lower protection regime. On the one hand, that is most certainly not the case, as the WFD even adds protective requirements. The WFD adds a quantitative element to the previous drinking water resource protection regime. It provides that the Member States have to protect, enhance and restore all bodies of groundwater, ensuring a balance between abstraction and the recharge of groundwater. An explicit quantitative requirement for surface water seems to be lacking, but this requirement is implied in the binding WFD obligation for surface water management to realize ecological objectives. That would be impossible without managing the abstraction of surface water. Moreover, the EU Drought Strategy (COM/ 2007/414) also encourages the sustainable use of water. The financial instruments as proposed by the WFD to ensure the cost recovery of water services are also expected to encourage the sustainable use of water. Indeed, the concern for a potential increase in the price of water among farmers made the provision on the payment of costs for water services a heavily debated one in the coming into being of the WFD and led to substantial weakening. Full cost recovery is not mandatory, but only something to be taken into account (Kaika, 2003).

On the other hand, the governance approach taken by the WFD (Scott and Holder, 2006; Van Rijswick, 2008, Van Rijswick et al, 2010) has resulted in a great deal of discussion on the legal status of the environmental objectives which are now mostly set by the Member States instead of by the EU (Keessen et al, 2010). This turmoil may have been unavoidable in so far as it concerns the new, ecological requirements (Howarth, 2006). Such requirements are arguably best set at lower levels than the EU level and perhaps cannot but be obligations of best effort as nature is unpredictable. However, the discussion on the legal status of the WFD objectives can easily contaminate the established obligation of result status of the old, chemical quality standards whose attainment is important for the quality of drinking water resources (Keessen et al, 2010). Indeed, the rules on hazardous substances

and the legal character of the objectives of the WFD constituted major points of conflict in the drafting of the final text of the WFD (Kaika, 2003). Conclusive case law of the ECJ on the legal qualification of the objectives of the WFD is needed to put an end to this discussion.

Any undesirable developments regarding the protection of drinking water resources under the WFD might be offset by the newly introduced area-related provisions regarding drinking water resources. Under Article 6 WFD, all water bodies used for the abstraction of water intended for human consumption must be included in a national register of protected areas. These water bodies have to be explicitly identified and monitored (Article 7 WFD) and may be subject to a stricter protective regime. This will depend on how the WFD obligation is interpreted so that all Member States achieve compliance with any standards and objectives in 2015 at the latest unless otherwise specified in the European legislation under which the individual protected areas have been established. Arguably, this means that all objectives have to be met in good time in protective areas.

However, it is also possible that Member States may invoke exemptions in protected areas as well as elsewhere because the exemptions are part of the objectives. These exemptions are a delay in achieving the objectives, a lowering of the objectives, force majeure and changes or developments justified by overriding public interests. Or it may mean that Member States may invoke exemptions in protected areas in so far as the European legislation that established these areas offers exemptions. In the case of water bodies used for the abstraction of drinking water, the WFD provides that water must meet the requirements of the Drinking Water Directive 98/83 (see below). Article 9 of Directive 98/83 allows for a temporary derogation from the chemical quality standards, provided that it does not constitute a potential danger to human health and provided that the supply of water intended for human consumption in the area concerned cannot be maintained by any other reasonable means. If this interpretation of the WFD is correct, this derogation would then be the only justified reason for non-compliance with the WFD objectives for water bodies used for the abstraction of drinking water.<sup>22</sup>

Despite the formulation 'aim to achieve' good water status in the Preamble to the WFD, it is evident from the judgment of the Court of Justice in Case C-32/05 that the quality requirements relating to drinking water of Article 7 (2) WFD constitute obligations of result, because these obligations are formulated in a clear and unequivocal manner in order to ensure, in particular, that the water bodies of Member States meet the specific objectives laid down under Article 4 of the Directive. According to the Court, this provision thus imposes obligations as to the results to be achieved and must be transposed by means of measures having binding force. Member States must ensure the protection of the identified water bodies with the aim of avoiding any deterioration in their quality, in order to reduce the level of

purification treatment required in the production of drinking water. Member States may establish safeguard zones for those bodies of water.

### **Protection of the quality of drinking water as a product**

For the consumer, a realization of the right to water depends on the quality of the product and its supply (Van Rijswick, 2011). The Drinking Water Directive (Directive 98/83/EC) regulates the quality of drinking water as a product and has remained in force despite the entry into force of the WFD.<sup>23</sup> It establishes a number of quality requirements for drinking water as a product, which can be supplemented by national law quality requirements. Only the duty to supply drinking water is not regulated by EU law. Provisions on the supply of drinking water in the WFD are limited to the requirement that Member States ensure an adequate contribution to the costs of water services, including the supply of drinking water (Howarth, 2009). Consequently, Member States are free to place the supply of drinking water in public or private hands, subject only to the EU and national regulations on the protection of the sources of drinking water, the quality of the product and the general competition rules.

Drinking water for human consumption obtained through the application of water treatment must meet the requirements of the Drinking Water Directive. The objective of this Directive is to protect human health from the adverse effects of any contamination of water intended for human consumption by ensuring that it is 'wholesome and clean'. The Member States must take the necessary measures to that effect. In accordance with the minimum requirements of the Directive, water intended for human consumption is wholesome and clean if it is free from any micro-organisms and parasites and any other substances in numbers or concentrations which constitute a potential danger to human health; if it meets the minimum requirements set out in Annex I, Parts A and B of the Directive; and if Member States take all other measures necessary to ensure that water intended for human consumption complies with the requirements of the Directive. The measures taken to implement the Directive may in no circumstances have the effect of allowing, directly or indirectly, either any deterioration of the present quality of water intended for human consumption so far as that is relevant for the protection of human health, or any increase in the pollution of waters used for the production of drinking water.

Here, too, quality requirements and corresponding monitoring must be established. Member States must adopt values which are applicable to water intended for human consumption for the parameters set out in Annex I. Annex I of the Directive lays down the limit values for these substances. Member States must set values for other additional parameters where this is necessary for the protection of human health within their territories or a part thereof.

Water supplied from a distribution network must comply with the parametric values as set out in the Directive, at the point, within premises or an establishment, at which the water emerges from the taps that are normally used for human consumption. In the case of water supplied from a tanker, it must comply with the parametric values at the point at which it emerges from the tanker, in the case of water put into bottles or containers intended for sale, at the point at which the water is put into the bottles or containers; and in the case of water used in a food production undertaking, at the point where the water is used in the undertaking.

Strict rules apply if the requirements are not met. In the case of water supplied from a distribution network, Member States are deemed to have fulfilled their obligations where it can be established that non-compliance with the quality requirements is due to the domestic distribution system or the maintenance thereof. This is different when it concerns premises and establishments where water is supplied to the public, such as schools, hospitals and restaurants. In such a situation and if there is a risk that water supplied from a distribution network might not comply with the quality requirements, Member States must nevertheless ensure that appropriate measures are taken to reduce or eliminate the risks, such as advising property owners of any possible remedial action they could take. Member States must ensure appropriate treatment techniques, installations and materials and have an obligation to inform and advise consumers. Informing the public is considered to be very important.

### **Comparing the international and European right to water**

In this section we analyse the right to water as it is protected in EU law and assess whether it meets the constitutive elements of the right to (drinking) water in international law conform the analytical framework developed by Van Rijswick (Van Rijswick, 2011). We can conclude that:

- 1 Availability is not formally guaranteed by an explicit provision in the Treaty mentioned with regard to the right to water, nor in the Charter of Fundamental Rights or the ECHR. It must be stated that, in practice, for almost all EU citizens water is available.
- 2 The requirements that water for personal and general use must be safe, and therefore free of micro-organisms, chemical substances and radiological hazards that are a danger to health, and that the colour, odour and taste of water must be acceptable is guaranteed by the Drinking Water Directive and enforceable before the national courts.
- 3 Accessibility, i.e. that water and water facilities must be accessible to everyone, without discrimination, is not formally guaranteed by European law. Citizens have to rely on the ECHR to enforce these rights. Nevertheless, in most EU Member States water is physically accessible, but

that may not be enough. Much will depend on the national legislation of the Member States. In a situation of drought and water scarcity the European Drought Strategy recommends that Member States place the supply of drinking water first in ranking. Member States can establish a water hierarchy for that purpose, and then drinking water should be placed at number one. Only when a national drought strategy is implemented in river basin management plans, the WFD provides for public participation requirements and legal enforcement before the national courts.

There is no formal legislation to protect economic accessibility, although the WFD prescribes that costs should be recovered from the users of a water service, which includes the supply of drinking water, and it can thus be deduced that more than a reasonable margin of profits should not be imposed on water service users. Equal accessibility can be deduced from the ECHR and the Charter of fundamental rights, because they provide that all European citizens should be treated equally. Information accessibility is taken care of in the European legislation that obliges the Member States to keep the public informed of environmental information, which implements the Aarhus Convention. This obligation is also reflected in the Water Framework Directive and the Drinking Water Directive.

Protecting the sources of drinking water through the Water Framework Directive imposes mandatory quality standards on the Member States, quantitative requirements relating to the management of groundwater resources and monitoring obligations. In addition, it encourages the use of other instruments, e.g. the creation of drinking water protection areas. Proportionate cost recovery for water services is not limited to water abstraction and water delivery, but also includes levies on water pollution as an instrument to reduce water pollution in addition to the existing regulation of water pollution. The European protection of the resources of the drinking water regime also benefits from the general public participation and judicial protection requirements that characterize European environmental law.

In addition to these aspects we would like to mention the legal regime of compensation for damages, which can be caused by the wrongful and lawful acts of the government. An example of the last category may be a reallocation of water use to protect the right to water of certain citizens which may harm existing users of the water. Finally, the Environmental Liability Directive (Directive 2004/35/EC) is relevant for the protection of water resources. This Directive provides for fault or negligence-based liability for damage to the environment. Its purpose is the prevention of damage and the provision of remedies once harm has occurred.

This brings us to the conclusion that the protection and enforcement of the core right to water does not fully meet the requirements set out in international law. On the other hand, in some aspects the European right to water has a broader meaning than usual in the international context. One should

also realize that legal remedies against distribution measures, permits, plans, the costs of drinking water supply etc. depend on the national courts of the Member States, which may lead to different protection levels within the EU.

### Concluding remarks

The European approach to integrated water management protects the right to water to a great extent, and perhaps even better than a formal right which cannot be enforced. European law tries to facilitate a just distribution of water rights and duties, but not in a clear way. There is room for improvement when it comes to the formal recognition of the right to water and to the transparency of the supply of information and the involvement of the public in decision-making under the current legal framework. Although the EU recognizes the right to water, it can only be enforced by means of classical human rights as protected in the ECHR and the Charter of Fundamental Rights. The combined approach of protecting the right to water by a human rights-based approach and IWRM ensures that there is not only a right, on paper, to water but also a real possibility of enjoying the right to water through the availability of sufficient and clean water. Without sufficient clean water, a right to water is an illusion.

In developed and industrialized states like the EU Member States the ambition to protect the right to water should be extended beyond the protection of a small amount of drinking water. For this purpose, first of all the quality and status of the norms that determine the scope of water rights should be clear. Even more important is clarity concerning the position and the balance struck between several aspects of (the broader) right to water. After all, that is what the European water struggle is all about. Thus, the allocation of water for domestic use and other than domestic uses should be fair, i.e. transparent and legitimate. A lack of transparency makes it difficult to judge whether the allocation of water has occurred in a fair way. The legitimacy of the allocation of water to various uses and the protection of the right to (drinking) water is served by taking public participation seriously and ensuring that legal remedies are available for everyone to enforce their rights.

### Notes

- 1 Directive 2000/60 of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ 2000 L 327/1. See also: [http://ec.europa.eu/environment/index\\_en.htm](http://ec.europa.eu/environment/index_en.htm).
- 2 Available at: <http://www.echr.coe.int/echr>.
- 3 Consolidated versions of the Charter of Fundamental Rights, the EU Treaty and the Treaty on the functioning of the European Union, OJ 2010 C 83. See also: <http://eurlex.europa.eu/en/treaties/index.htm>.
- 4 Aarhus Convention: Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, available at: <http://www.unece.org/env/pp/>. The EU acceded to this Convention (Decision

- 2005/370/EC). Concerning access to information and public participation two Directives were adopted, Directive 2003/4/EC and Directive 2003/35/EC. Although both contain provisions on access to justice, a proposal for a Directive on access to justice has remained a proposal. A Regulation to apply the provisions of the Directive to EU institutions and bodies was adopted in 2006 (Regulation 1367/2006/EC). See: <http://ec.europa.eu/environment/aarhus/index.htm#legislation>.
- 5 ECJ, Case C-32/05 (Commission/Luxembourg) ECR 2006, I-11323.
  - 6 For example, in the International Covenant on Economic, Social and Cultural Rights (1966) and as a fundamental right recognized by the General Assembly of the United Nations (A/RES/54/175) and defined in General Comment no. 15 on the Right to Water, adopted in 2002 by the Committee of Economic, Social and Cultural Rights.
  - 7 See: <http://www2.ohchr.org/english/bodies/cedaw/index.htm>.
  - 8 See: <http://www2.ohchr.org/english/law/crc.htm>.
  - 9 Respectively available at: <http://www2.ohchr.org/english/law/cescr.htm> and <http://www.ohchr.org/EN/UDHR/Pages/Introduction.aspx>.
  - 10 Council Directive 91/271/EEC of 21 May 1991 on Urban Waste Water Treatment, OJ 1991 L135/40.
  - 11 Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (codified version) OJ 2010 L 207 and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and wild fauna and flora OJ 1992 L 206/7.
  - 12 Directive 2007/60 of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks, OJ 2007 L 288/27.
  - 13 See, for example, ECHR 20 March 2008 (deaths as a result of mudslides in Russia, violation of Art. 2 ECHR); ECHR 27 January 2009 (a violation of Art. 8 ECHR because the government did not provide the people living in the neighbourhood with sufficient information about the risks associated with a company that used cyanide to extract gold); ECHR 12 November 2006 (a violation of Art. 8 ECHR); ECHR 30 November 2004 (Oneryildiz, a violation of Art. 2 ECHR); ECHR 10 November 2004 (Taskin, a violation of Art. 8 ECHR); ECHR 16 November 2004 (Moreno Gomez, a violation of Art. 8 ECHR); ECHR 9 June 2005 (Fadeyeva, a violation of Art. 8 ECHR).
  - 14 Treaty of Helsinki, Convention on the Protection and Use of Transboundary Watercourses and International Lakes (UNECE Water Convention), available at: <http://www.unece.org/env/water/text/text.htm>.
  - 15 Brussels, 22 March 2010, 7810/10 (Presse 72) P12/10.
  - 16 EU Member States that have recognized a fundamental right to water are Belgium, France, Finland, Germany, Italy, Norway, Portugal, Spain, Sweden, Switzerland, Ukraine, the Netherlands and the United Kingdom. The right to water is also recognized in a number of Latin American and African countries.
  - 17 Parliamentary Proceedings II 2005/06, 21 501–30, no. 137, p. 3.
  - 18 District court of Maastricht, subdistrict section (Heerlen), 25 June 2008, no. 294698 CV EXPL 08-4233, LJN BD5759, NJCM-bulletin 2009, pp. 249–255.
  - 19 Court of appeal of Den Bosch, 5 March 2010, LJN BL6583.
  - 20 In a similar vein: District court of Groningen, 19 February 2010, LJN BL4579.
  - 21 ECJ Case C-60/01 ECR 2002 I-05679; ECJ, Case C-266/99 ECR 2001 I-01981; ECJ, Case C-56/90 ECR 1993 I-04109; ECJ, Case C-92/96 ECR 1998, I-00505; ECJ, Case C-337/89 ECR 1992 I-06103; ECJ, Case C-316/00 ECR 2002 I-10527; ECJ, Case C-147/07 OJ 2008 C 79/8; ECJ, Case C 58/89 ECR 1991 I-4983.
  - 22 This discussion led to several articles in the Dutch environmental law journal *Milieu en Recht*.
  - 23 Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption, OJ 1998 L 330/32.

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