Moving Water and the Law

 Europa Law Publishing, Groningen 2008

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On the Distribution of Water Rights and Water Duties Within River Basins in European and Dutch Water Law

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Typeset in Scala and Scala Sans, Graphic design by G2K Designers, Groningen/Amsterdam

NUR 828; ISBN 978-90-76871-99-8

I Introduction

Water moves, water flows

During the late 19th and early 20th century, Gustav Klimt painted a number of allegorical paintings of different sciences commissioned by the University of Vienna. They are known as the '*Fakultätsbilder*'. Klimt painted allegories of philosophy, medicine and law. The painting '*Jurisprudenz*' (1902-1903) is a beautiful, but rather pessimistic oil sketch, which was unfortunately lost in a fire in 1945. The painting was shown at the second Secession Exhibition in Vienna where it met with violent reactions. The paintings '*Jurisprudenz*' and '*Philosofie*' are monumental and threatening. They show people who are driven to an apocalyptic end after having been fatally connected with each other. Eventually, the University did not accept any of Klimt's '*Fakultätsbilder*' due to the negative depiction of the role of science in the works.

You understand that this is not the most optimistic source of inspiration for an inaugural address. Moving water – or '*Bewegtes Wasser*'- on the other hand, is a painting Klimt made around 1898. It provides a playful counter-weight for the severe '*Fakultätsbilder*'. Moving water shows a group of exuberant water nymphs with a line pattern of hair and water which strongly suggest wave movements. The painting is privately owned, but was on show at the Toorop/Klimt exhibition in the Gemeentemuseum in The Hague in 2006.[1]

Today, on World Environment Day, I will try to match the beauty of moving water with the severity of science. As the positive element of water prevails, this address is called 'Moving Water'. My argument is based on a dichotomy with, on the one hand, the wording of water rights and their scope, which constitute the normative aspect of this story, and, on the other, the instruments that can be used to realize these rights in practice, the executive aspect. The very fact that water must move means that we need the law to streamline these two issues.

At the moment, contradictory opinions can be heard on water law. European water directives give general rules, which provide strict requirements as regards the quality and targets to be met. Not everyone is happy about the European influence on national water legislation and national water management. Regional water management organisations seek cooperation with each other in order to create made-to-measure solutions.[2] Every area requires a different type of management. The Wadden Sea is unlike the Maas plain, the Dutch Veluwe is different from the Dutch polders. Interests of other policy areas like physical planning, nature and agriculture are also sought to be incorporated in the decision-making process and the goal is to create integral solutions for a particular area. The key word here is flexibility. Working together to find solutions, the

[1] The information comes from the catalogue of the exhibition 'Toorop/Klimt, Toorop in Wenen: inspiratie voor Klimt', published by the Gemeentemuseum Den Haag and Waanders publishers, Zwolle. I painted *Bewegtes wasser*, with the catalogue as an example, with thanks to the inspiring coaching of Semiramis Oner Muhurdaroglu, an Utrechts artist.

[2] See for examples J. Verwijmeren and M. Wiering (eds.), *Many rivers to cross, Cross border co-operation in river management*, Eburon Delft, 2007.

polder model, the exhaustive discussions on every issue for which the Dutch are famous, is not compatible with norms imposed from the top, at least that is what some people think. At the same time, there is a desire to provide a better protection of water rights. Drinking water companies and nature conservation organisations want guarantees that their interests are not overlooked in an integral balancing of arguments in which economic factors determine the level of protection. This leads to a bundle of contradictions.

These contradictions are also more generally recognized.[3] The Water Framework Directive is a clear example of the development in European environmental law from government towards governance. This means that there is a development from directives with concrete objectives, norms and standards towards legislation that is characterized by more attention to procedures, multi-level governance, adaptive governance, transition-management, co-operation and flexibility. When is comes to the protection of water rights legal protection and enforcement are important. Governance does not fit very well into this protective role of law nor in concepts such as the rule of law and the legitimacy of norms and standards that are created in a non-democratic decision-making process.[4]

To be able to understand the legal meaning of moving water, you have to think of the functions that moving water can have. Do you have any idea of how many litres of water you use every day? 3,400 litres daily. About 130 litres of this are for direct domestic use, the rest is hidden in water required for the manufacturing of clothing, food and industrial products. It is not just about luxury: The production of a T-shirt costs 2,700 litres of water, a hundred grams of meat 1,550 litres, a cup of coffee 140 litres and a slice of bread 40 litres. This means that we are all bulk consumers.

It should be clear what is done with water, or, in other words, what functions are fulfilled by water. Imagine being thirsty and already looking forward to the reception with the wine, beer and nibbles. Imagine yourself sailing on Frisian waters on a sunny day with a stiff wind. Ask yourself what uses we have for water and how we dump it in our rivers and eventually the sea after using it. Ask yourself where all this water comes from. Ask yourself where we would have to get water if there is not enough of it. What do we do when water is no longer clean enough? And where do you go, or where did you go in 1995,[5] when all of a sudden there is too much of it and floods threaten.

Maybe you do not ask these questions at all or you think that everything will be all right; that everyone, regardless of whether you are in the Netherlands,

3 L. Krämer, 'Better regulation for the EC environment: on the quality of EC environmental legislation', *Milieu en Recht* 2007, p. 70-74.

4 See on this development J. Scott, 'Flexibility, proceduralization and environmental governance in the EU', in: G. de Búrca, J. Scott (eds.) *Constitutional change in the EU. From uniformity to flexibility?*, Oxford and Portland, Oregon, Hart Publishing 2000. and J. Scott and D.M. Trubeck, 'Mind the gap: law and new approaches to governance in the European Union', *European Law Journal* 2002/8, p. 1-18.

5 In 1995 thousands of Dutch people had to be evacuated, due to a severe threat of the rivers Rhine, Meuse and Lek flooding.

Europe or the rest of the world, can live, work and recreate. That we will be safe and will always have enough clean water available. You assume that the government is taking care of this and, in the unlikely event of things going wrong, you can go to the famous citizen-friendly 'single counter' where you can explain what happened to you, seek redress and demand a quick solution for the problem and full compensation in the near future of the damage you have suffered. Maybe it is only right that this is what you are thinking. Sometimes, things can be so simple but this is not always the case nor can it be taken for granted.

Problems occur when all of us think like this simultaneously and no one is willing to take the water needs of others into account. The simple solution of water problems we know is based on a legal system, which provides for a distribution of water rights and water obligations as fair and reasonable as possible. As European and national water management is subjected to a complete overhaul, namely on water management based on a river basin approach, we now have to look into the question of whether the legal system must be adjusted to create a fair distribution of these rights.

It may be clear to you that water moves and flows, yet it was not such a long time ago that the fact that water flows was adopted as the guiding principle for its legal protection in Europe. Following international treaties, in particular the Helsinki Convention, concluded within the scope of the UN Economic Commission for Europe and the UN Watercourse Convention, river basins and river basin districts have been identified as objects of water management.[6] This has been the point of assumption in international water law as well as other scientific disciplines for a while now. There is an abundance of literature on the administrative and policy aspects of the river basin approach. Scientists have been researching water movements for years. To European and national water law lawyers, however, the legal consequences of moving water managed at the level of river basins is relatively new.

II Management based on river basins

What is a river basin? The Water Framework Directive[7] defines a river basin as the area of land from which all surface run-off flows through

6 The UNECE Helsinki Convention was adopted on 17 March 19992 and entered into force on 6 October 1996 and the UN Convention on the Law of Non-navigational Uses of International Watercourses adopted in 1997 and ratified by the Netherlands on January 9th, 2001.

7 Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Action in the Field of Water Policy, OJ 2000, L 327/1, 22-12-2000, Article 2. For further information see: E. Hey and H. van Rijswick, 'Transnational Water Management', in: *Transnational Law in Europe*, (forthcoming); Jean-François Neuray (ed.), *Directive 2000/60/ EC of 23 October 2000 Establishing a Framework for Community action in the Field of Water Policy, European Law, Belgian Law, Comparative Law* (Brussels: Bruylant, 2005); Götz Reichert, 'The European Community's Water Framework Directive: A Regional Approach to the Protection and Management of Transboundary Water

a sequence of streams, rivers and, possibly, lakes into the sea at a single river mouth, estuary or delta'' (Article 2 WFD).

Good river basin management requires taking into account the activities from the mainland that affect the river basin. That is why the river basin *district* was identified as the most important unit for river basin management. A river basin district is "the area of land and sea, made up of one or more neighbouring river basins together with their associated ground waters and coastal waters" (Article 2 WFD). In essence, this an *area-oriented approach* to water management.

What is the reason for using a river basin as an object of management? Wessel sums up the following arguments for this choice:[8]

- the boundaries of a river basin are provided by nature and are rather permanent; the sources of pollution and causes of floods are often inside the river basin;
- there is a relation between the upstream and downstream use of land and water;
- water use and water users can be clearly identified in a river basin;
- the water's flow can be reasonably predicted and manipulated and
- the river basin is suitable for a durable integral approach, focused on integrated chain management and the promotion of natural beauty;
- and finally, the river basin approach does justice to the interaction between the use of water and land.

These advantages must lead to the conclusion that the crossing border aspect, the integrated approach and the interaction and division between upstream and downstream land and water use also presents us with new legal issues.

The underlying principle of the river basin approach is much older. It was also the underlying principle of international treaties and older case law such as the *Trail Smelter* case. This case concerned a Canadian lead and zinc smelter – Trail Smelter – whose sulphur emission caused damage to farms in the United States. The outcome of this case is an expression of the principle of the non-transfer of responsibility. It was decided in the *Trail Smelter* case that "No state has the right to use or permit the use of its territory in such a manner as to cause injury (...) in or to the territory of another (state) or the properties of persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence"[9] The Helsinki Convention and Stockholm Declaration state as follows: "States have ... the responsibility to ensure

Resources?', in: L. Boisson de Chazournes and S.M.A. Salman (eds.) *Water Resources and International Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2005), 429-472

8 J. Wessel, 'Water, ruimtelijke ordening en stroomgebieden', in: *Lex Aquarum*, Liber Amicorum, Den Haag 2000, p. 176.

9 *Trail Smelter* Case, 11 March 1941, *Canada* v. *USA*, UN Reports of International Arbitral Awards, vol. 3, p. 1938.

that activities within their jurisdictions or control do not cause damage to the environment of others states or of areas beyond the limits of national jurisdiction."

The essence of river basin management is that the responsibility for problems is not shifted to others, not to the upstream areas nor to the downstream areas of the river basin. These aspects are also called good neighbourliness. The Netherlands obviously feels most attracted to the shift of responsibility to downstream areas. This principle of not shifting responsibilities is elaborated in principles and points of departure based on customary international law treaties, directives and national legislation. The parties involved (both governments and private parties) in a river basin carry joint responsibility for its management. The aim of integrated water management is to make water systems meet their objectives. The objectives are set to specify certain rights that must be protected and to distribute the related joys and burdens as justly and fairly as possible over all the parties involved in the river basin. It distributes the responsibilities over several policy areas. The EU Floods Directive is a clear example of this.

I would like to discuss a number of legal implications of the river basin approach. My argument will focus on the issue of how different water rights and water duties may be divided over the parties in the river basin area.

III Water rights and duties as a distribution issue

Water law has long been regarded as an issue of regulation. The idea was that the regulation of water use, the use of space and water pollution would lead to an adequate protection of water systems, making it possible for everyone to live a safe life and to have sufficient, clean water available. This approach produced good results but gradually it has become clear that the regulation of the activities alone does not suffice to realize sustainable water management. There is a shift from the regulation of activities towards the integrated management of the areas. A river basin, too, is an area. This shift towards sustainable management of river basins requires a different approach. Water law and water management based on river basins is in essence a distribution issue. An examination of the legal consequences of the river basin approach based on the question of how water rights and water duties are best divided provides a useful tool to structure and analyse this complex area and can help to find an answer to the question how new governance can be connected with 'old fashioned' government.

Water rights should be distributed over the entitled parties. International river basins require a distribution of the joys and burdens – the rights and duties – over more than one country. In the Netherlands, too, the joys and burdens in relation to river basins must be distributed. This applies to water management as well as other policy areas. Powers must be distributed among several

government bodies. Cooperation and dispute resolution also require powers and regulation.

The distribution issue also goes under the name 'equity'.[10] It is an aspect of water management that will increase in importance because the quantity of freshwater, which is limited anyway, is only decreasing, as a result of which it will be accessible to fewer people. Gupta stated in a recent publication by the Dutch Environmental Law Association that one of the most important jobs for lawyers in the nearby future is the better understanding of the scope of the principles in relation to the idea of the rule of law and the concept of good governance. She is referring with this statement to the issue of how different responsibilities must be distributed among the parties, how and which instruments must be designed and how important long-term goals should be realized.[11] I would like to take up the challenge of my colleague professor of water law and would like to focus my argument on the distribution of water rights and water duties. After all, water rights serve as the foundation for other distribution issues. The question of how a just distribution of rights and duties may be realized is a subject that belongs in particular (but not only) to the domain of legal science.

Are there any water rights at all? And if there are water rights, what do they mean? Does it mean that there is a fundamental right to drinking water, a right to clean water, a right to water for food production and other economic activities and a right to security in the sense of protection against floods? Is there also a right to the pollution of water and, if so, how must this pollution be distributed among the polluters within a river basin? Who may rely on these rights, is it just countries or private parties too (citizens and companies) and does nature have a right to water?[12] Are water rights unlimited? Granting a right to one party often means a restriction of the rights of others. Is there such a thing as water duties and whose duties are they? An important distribution issue concerns the distribution of water rights among different parties.

When we assume that water rights do exist, it must be made clear to what extent and how these rights must be protected. Here we touch upon the role of international, European and national water law. The protection of water takes places at different levels and each level has its own system, parties, instruments and line of approach. Unfortunately, these are not always well-attuned to each other.

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[10] See on equity D. Shelton in D. Bodansky, J. Brunnée and E. Hey, *The Oxford Handbook of International Environmental Law*, Oxford University Press 2007, p. 639-662.

[11] See J. Gupta, 'Climate Change and International Relations: Urgent Challenges anno 2007', in: J.H.G. van den Broek e.a., *Klimaatverandering en de rol van het milieurecht (Climate change and the role of environmental law)*, BJu, The Hague, 2007, p. 27.

[12] Treaties contain more and more general obligations and it is argued that treaties can give rights to individuals. See for example: E. Hey, 'Distributive justice and Procedural Fairness in Global Water Law', in: J. Ebbesson and Ph. Okowa, *Environmental Law and Justice*, Cambridge University Press (forthcoming).

For the time being, the main outline of the regulation of water rights and water duties takes place by the recognition and drafting of a right, the establishment of its scope and the provision of powers and instruments to realize and protect this right. And finally, possibilities for dispute resolution must be created.

Therefore, I would like to address the following aspects in the remainder of my argument:

- What is it that makes water so special?
- What are water rights and the corresponding water duties?
- How are water rights created? In this section I will pay attention to the water right as a fundamental right arising from principles, as a social basic right and as a right laid down in regular legislation where its objects are given a normative and qualitative description.
- How can we determine the scope of a water right?
- How can water rights be realized and protected? This section addresses the issue of the most suitable object of management, the distribution of powers and the instruments and measures to realize the right. This includes remedies, the classic instruments of regulation, financial instruments, shared responsibilities and cooperation, the last-mentioned being either voluntary or compulsory. And finally, dispute resolution.

IV What is it that makes water so special?

Water is a scarce item. This is not in itself what makes water special. There are scarcer goods and these too must be distributed. This usually takes place by market forces. Water is characterized as a social-cultural, economic as well as an ecological good.[13] It is also a public commodity. It is this quality that makes water special and the distribution of water different from, let us say, a parking licence, market stall locations or landing rights. The protection and distribution of public goods cannot be achieved by market forces alone.

On an international level it is stated (in General Comment no. 15 International Covenant on Economic, Social and Cultural Rights, ICESCR) that "water must be treated as a social and cultural good, and not primarily as an economic good." The Water Framework Directive says the following: "Water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such."

Water has its own intrinsic value. Besides, water is essential for all life on Earth. We cannot live without it. Water is fundamental for our existence. A minimal quantity of drinking water and water for domestic use is regarded as the social cultural value of water. Furthermore, every human being needs

[13] See A. Hildering, *International Law, Sustainable Development and Water Management*, diss. VU, Amsterdam, 2004.

enough good quality water to make a living. That is the economic value of water. As far as nature is concerned, water can be characterized as an ecological good.

At the same time, water may pose a threat and we need protection against the consequences offloods and flooding. This concern for protection against water is known all over the world, though it hardly finds its expression in international water law. These values and functions of water require its protection by the governments as well as private parties. Or, as Mahatma Ghandi said: 'The quality of a society is reflected in the way it handles water'.

V What are water rights and their corresponding water duties?

What water rights am I referring to? I will restrict myself to water rights for 'the European citizen'. I know that the need for water rights goes beyond the needs of European citizens, but the scope of my chair – European and Dutch Water Law – justifies this restriction. It also makes the description more complex, though. We, in Europe and certainly in the Netherlands, are living in a very prosperous part of the world. It means that the scope of water rights in this part of the world is much broader. A few litres of clean drinking water a day is not enough for us. On the other hand, our resources are such that they enable us to realize our far-reaching ambitions with respect to water rights.

I would like to distinguish the following rights, whereby the order I have chosen to address them does not necessarily reflect the importance of one water right over another. It concerns fundamental rights which deserve a minimum level of protection. The definition of that minimum should be determined by democratically elected bodies in our society.

The right to sufficient clean and safe drinking water

The right to sufficient clean and safe drinking water has a quality and a quantity aspect. The absolute minimum is a quantity of 30 litres of water per person per day. Besides, water must be clean and safe. This quality standard with respect to water 'from the tap' is worked out in the Drinking Water Directive for Europe and in the Netherlands in the Drinking Water Act. In addition to the requirement of clean tap water, the right also aims at the protection of the sources of drinking water i.e. surface water and groundwater. Good quality water helps to safeguard the population's supply of drinking water. That is the reason why the Water Framework Directive aims at the integration of the protection of drinking water sources into the general protection regime for water.[14] The sources of drinking water in the Netherlands will be protected by the Water Act.

[14] See S. Wuijts and H.F.M.W. van Rijswick, *Sustainable river basin management under the European Water Framework Directive: an effective protection of drinking-water resources*, Conference proceedings, IWA International Specialised Conference on Watershed and River Basin Management, IWA, Budapest 4-5 September 2008.

The protection of water resources also makes the use of instruments from other policy areas, including spatial planning, an absolute necessity. Furthermore, the Drinking Water Act also has an explicit clause stating that the supply of drinking water is of a overriding public interest.

The right to sanitation

This is the year of sanitation. The right to sanitation includes the right to sanitary facilities, at home as well as part of water collection, water transport and the treatment of domestic waste water. In the early 20th century many Dutch city canals were filled in because their use as an open sewer caused many diseases. That is no longer required. This right is elaborated in Europe in the Urban Waste Water Treatment Directive and in the Netherlands in the Environmental Management Act which makes local government responsible for the collection of domestic waste water. The district water boards are responsible for the treatment of waste water (Water Act).

The right to adequate protection against floods and flooding

The right to adequate protection against floods and flooding is not often mentioned in foreign literature or legal documents. That does not mean, however, that it is not an important issue for many countries, and its importance is expected to increase due to climate change. As far as the Netherlands is concerned it is one of the oldest rights – in the sense that the government feels responsible for protection against floods – in the field of water management. This duty has traditionally been executed by the regional water boards, public authorities responsible for regional water management.[15] It is therefore for a good reason that they are the oldest public bodies in the Netherlands, a country lying for a great part below sea level. Water boards existed even before provinces, municipalities, yes, even before the Kingdom of the Netherlands. The main reason for this is the situation and development of the Netherlands. Without proper protection against floods and flooding (including water level management), life would not be possible in large parts of the Netherlands. Initially, the Dutch right to security was laid down in provincial regulations, regional water board regulations and the Water Management Act 1900, which was later supplemented by the Delta Act and the Dikes Act. The near future will see regulation by means of the Water Act, which means that norms will be laid down in the law, provincial regulations and the regional water boards' regulations.

The right to sufficient and clean water for food production and economic activities

The right to water must encompass more than just a sufficient amount of drinking water. Humans must also be fed and clothed. It requires the production of food and a certain amount of economic activities. At this moment, there

[15] See H. Havekes, R. Lazaroms, D. Poos and R. Uijterlinde, *Water governance, the Dutch water board model, Dutch Association of Water boards*, The Hague (year of publication not mentioned); H. Folmer and S. Reinhard (eds.), *Water problems and policies in the Netherlands*, RFF Press, 2008 (forthcoming).

are many food riots in the world due to soaring food prices. Famines are also the result of either a shortage or unfair distribution of the scarce amount of freshwater. The right to sufficient and clean water for food production and economic activities is one of those rights that must lead to a certain minimum amount guaranteed by the government. It is not absolute in the sense that it to apply to any agricultural production, regardless of where it is produced, and any economic product. On the other hand, the use of water as a means of transport, as cooling water for electricity supplies (which is also a basic amount) and as raw material for foodstuffs are covered by this right. Dutch law has elaborated this right by giving certain functions to waters so that they can fulfil their social, economic and ecological function, after which statutes such as the Surface Water Pollution Act, the Water Management Act and the Ground Water Act provide the details. The Water Act will provide more details on this right in the future as meeting the functions of water systems is one of its goals. The distribution is based on the granting of permits, general rules and statutory successive water displacement in case of water shortages.

The right to sufficient and clean water for the benefit of nature

The right to sufficient and clean water for the benefit of nature refers to enabling water systems to create a properly functioning ecosystem. Which fish and water fleas live where is of lesser importance and cannot be properly guaranteed. Climate change alone will ensure changes to or the relocation of species in certain areas. The distribution of the amount of water under Dutch law takes place by granting permits, general rules and, in case of a water shortage, successive water displacement arising from the Water Act. Vulnerable nature is given a high ranking in this series. Besides the distribution of the amount of water, nature also needs clean water. European law protects this right by means of the Water Framework Directive, the Marine Strategy Framework Directive [16] and the Birds and Habitats-directive. In the Netherlands the protection is based on the Nature Conservation Act 1998, the Flora and Fauna Act and the Water Act.

Protection for the benefit of nature can also be exaggerated. In the summer of 2007 the Dutch Directorate-General for Public Works and Waterways wanted to protect the flora and fauna in the North Sea Canal by placing plants and animals in cages under water. This should prevent them from being eaten by Chinese crabs, exotic animals which had arrived by accident in the Dutch water systems as a result of international transport. It was thought necessary in order to meet the ecological objectives of the Water Framework Directive. This sounds bizarre and so it is. This can never be the idea behind the ecological objectives of the Water Framework Directive.

The right to water for the benefit of recreation

The right to clean water for the benefit of recreation is partly a luxury, but it is also a public health issue. Ensuring good quality swimming water is a way to

[16] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy, OJ L 164/19, 25-6-2008.

prevent disease. European law regulates this right in the Bathing Water Directive and the Water Framework Directive, while in the Netherlands it is regulated in the Water Act and the Bathing Water (Hygiene and Safety) Act (Wet hygiene en veiligheid badinrichtingen en zwemgelegenheden).

Anthropological and ecological approach

What is striking about these water rights is that they are traditionally aimed at the needs of humans. Health and well-being of humans have been the motive for environmental and water protection for a long time and it is for the same reason why economic development often prevails over nature protection. The past decades have seen more attention being devoted to nature as an autonomous value worthy of protection. This is reflected on an international level in several treaties and on the European level in the Birds and Habitat Directives, but also, as I stated above, very explicitly in the Water Framework Directive and the Marine Strategy Framework Directive.

The ecological protection of water systems forms an important part of the Water Framework Directive. It is not easy, though, to protect ecological interests. Whenever there are conflicting interests, the human interest generally prevails. This is why strict legally binding preconditions are required so that the ecological water interest is not overlooked. The Water Framework Directive provides for this. Without these preconditions or norms, which are thought to lack flexibility according to some, the protection of nature and the ecological quality of water easily falls by the wayside, often with an argument based on the integrated and area-orientated regional approach with sufficient economic development possibilities. Cost-benefit analyses do not always do what they should because some of the costs and benefits are not part of the appraisal. On the other hand, too rigid legal protection may overshoot the mark. Without any realistic exceptions no member state will be willing to submit itself to a strict protection regime, or more in accordance with practice: far-reaching obligations are entered into, but not executed.[17]

The approach of the protection of water as common heritage, as well as transboundary river basins, gives rise to separate obligations. The method of implementation must meet strict requirements with respect to the exact transposition of the directive's obligations.[18]

The protection of water as heritage or public value may also present procedural law problems with regard to the availability of remedies. In countries such as Germany, where the protective norm criterion – *Schutznorm* – applies, it is difficult for individuals to invoke the protection of general interests before a

[17] B. Beijen, *Europese oorzaken van implementatieproblemen bij milieurichtlijnen (European causes of implementation problems in EC environmental law)*, (forthcoming), Utrecht University, Centre for Environmental Law and Policy.

[18] J.H. Jans and H.H.B. Vedder, *European Environmental Law*, Europa Law Publishing, Groningen, 2008, p. 128 and 133.

court. Subjective rights only may be relied on in court. The European Court of Justice, however, is of the opinion that the protection of general nature interests – such as the protection of water as an independent value – does not mean that individuals cannot rely on them. European law also offers rights to private persons in this respect.[19] National law then provides the details on the scope of the procedural rights of private persons.

After this period, during which nature also became entitled to water rights, there have been recent developments that show that in (environmental and) water law much attention is paid to health issues. The attention is focussed on the relationship between 'Water and Health', which is addressed in many international documents and the Protocol on Water and Health of the Helsinki Convention in particular.[20] This relationship will therefore be the subject of research in the next years.[21] As opposed to the past, it not only concerns the health of humans, but the relationship between the environment and health in which the sustainable protection of resources, in this case water, takes up an important place.

VI The formulation of water rights

A fundamental right to water?

When discussing the 'right to water', one refers, particularly in an international context, to the right to a certain amount of drinking water per individual often in combination with the right to sanitation. It refers here to a very modest amount (50 litres, some say that 30 litres will suffice) of clean drinking water or water for domestic use, just enough to survive. We in the Netherlands have already used up that amount before we go to work in the morning. The Dutch use about 130 litres of water daily whereas Americans use about 400 litres for domestic use only. International treaties increasingly recognize the right to water, though they fail to provide a binding fundamental right to water.[22]

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[19] ECJ case C-431/92, *Commission* v. *Germany* (Grosskrotzenburg), ECJ case C-72/95 (*Kraaijeveld*) and ECJ case C-127/02 (*Wadden sea*), see Jans and Vedder (2008) p. 171.

[20] Especially the relationship between Water and Health in the London Protocol on Water and Health of the UNECE Convention of the Protection and Use of Transboundary Watercourses and International Lakes. See E. Riedel, The Fundamental rights to Water and General Comment No. 15 of the CES, in: E. Riedel, P.Rothen (eds.), *The Fundamental rights to Water*, Berlin: BWV 2006, p. 19-36.

[21] For example as part of the Utrecht University Research Programme Earth and Sustainability and by the European Council of Environmental Law.

[22] See the International Covenant on Economic, Social and Cultural Rights (1966), Recognised as a fundamental right by the General Assembly of the United Nations (A/RES/54/175) and in General Comment No. 15 on the Right to Water, in 2002 adopted by the Committee of Economic, Social and Cultural Rights.

A definition of the right to water can be found in General Comment no. 15 on the Right to Water, which was adopted in 2002 by the Committee of Economic, Social and Cultural Rights: "The Human Right to water entitles everyone to sufficient, safe, acceptable, 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".

This is all very nice and important, but unfortunately it does not mean that everyone actually has this minimum amount of drinking water at his or her disposal. The General Comment is not binding on treaty partners. The actual protection of water rights must be based on rights incorporated in a treaty, from which a right to water may be implicitly deduced.

Even this basic right to drinking water and sanitation is not recognised by many countries. The Dutch Minister for Foreign Affairs recently (3 March 2008) confirmed at a UN meeting the willingness of the Dutch to recognise the right to water, following 13 other European countries.[23]

The European Parliament and the Council of Europe, it is true, are in favour of a right to water, but a legally binding right to water has not yet been turned into law. It means that not all European citizens are able to realize their right to water by seeking relief in court. The EU viewpoint with respect to water is that 'public authorities must take adequate measures to make this right effective and affordable".[24] It means that we have no explicit right to water at the European level. A European right to water can only be deduced indirectly from different international obligations of the EU and from several European water directives the EU has created. Fundamental rights and principles are closely interwoven in European law. By virtue of Article 6 of the EU Treaty, the EU regards fundamental rights that were granted pursuant to the European Convention on Human Rights (ECHR) as general principles of Community law. Substantive rights as laid down in Article 2 ECHR, which guarantees the protection of life, and Article 1 of the First Protocol of the ECHR (protection of property) are relevant to water rights and so are procedural rights, needed for the realization of the substantive rights, found in Articles 6 and 13 of the ECHR (right of access to the courts).

The London Protocol on Water and Health, which is part of the Helsinki Convention (UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes) is also of importance for substantive water law. The procedural rights can be found in the Treaty of Aarhus. The EU is a party to both treaties.

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[23] Belgium, France, Finland, Germany, Italy, Norway, Portugal, Spain, Sweden, Ukraïne, the United Kingdom, and Switzerland. Also in Latin America and Africa the right to water is recognised by several countries.

[24] 4th World Water Forum, European Regional Document, Europe, Water and the World.

Later, after the entry into force of the new EU Treaty, the Lisbon Treaty, in particular Article 6 paragraph 1, the Charter of Fundamental Rights of the European Union will also increase in importance.

The Dutch Constitution does not provide for a fundamental right to water. The right to water may be implicitly deduced from Article 21 of the Dutch Constitution, the right to the government's concern for the habitability of the Netherlands and the protection and improvement of the environment.[25] Furthermore, the right to water is also part of the government's concern for the promotion of public health (Article 22 of the Dutch Constitution) and even the inviolability of the human body (Article 11 of the Constitution) may be relevant here. The Dutch right to water can be qualified specifically as one of the social fundamental rights, which impose a duty of care on the government and are meant as an order to the government to enact legislation in that area. Incidentally, the right to the protection of the environment does not exist in all EU member states.[26]

As the Dutch courts cannot review laws as to their compatibility with the Constitution (Article 120 of the Constitution), the role of fundamental rights is merely symbolic. The prohibition of a constitutional review is of particular importance for classic fundamental rights. The social fundamental rights are in this respect more in keeping with principles.

The importance of national fundamental rights may be increased in two ways. The first possibility is the entry into force of an international treaty which has been ratified by the Netherlands with provisions that have direct effect, enabling Dutch citizens to rely on them in court. This is the case when these provisions are unconditional and sufficiently clear. At the moment there are no such provisions with respect to a fundamental right to water. The underlying fundamental rights may be able to fulfil this function. In a recent case the District Court of Maastricht decided that "the right to water was part of the rights already codified by the Netherlands, in particular the right to life and health, as laid down in Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights). Recognising the right to water and sanitation therefore makes this element of existing rights more explicit. Moreover, at the 7th sitting of the Human Rights Council (3-28 March 2008) in Geneva the right to water and sanitation was recognised as a human right". The court decided that it was disproportional to refuse further access to drinking water as long as the water bill had not been paid.[27]

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[25] J. Verschuuren, 'The constitutional right to environmental protection', *Revue Juridique de l'Environnement*, 340.

[26] I. Larmuseau (ed.), *Constitutional rights to an ecologically balanced environment*, Vlaamse Vereniging voor Omgevingsrecht (Flemish Environmental Law Association), V.V.O.R. vzw, Gent, 2007.

[27] *Rechtbank* Maastricht, Sector Kanton, 25 June 2008, nr. 294698 CV EXPL 08-4233, LJN: BD5759.

It is particularly through legislation that the government can – and must – enhance the role of water rights as a fundamental right by making them more concrete. This is the second way to give meaning to social fundamental rights.

In this respect there is reason for concern as the Dutch legislator principally restricts itself to what is strictly required for the implementation of European directives. The result is that, whereas the scope of the protection offered by Dutch environmental and water law used to be broader than European law, this is no longer the case. An example of this is the intention not to incorporate the quality standards arising from the Drinking Water Directive in the Water Quality Standards and Monitoring Order. It is therefore doubtful whether this is in compliance with the European obligations arising from the Water Framework Directive, as it lays down that the level of protection should not drop below the standards of the present directives. The failure to set standards for the quality of drinking water obtained from ground water also suggests a very minimalist approach.

The Judicial Division of the Council of State sometimes even takes this minimal approach a step further without the legislator wanting this or laying it down. Recent case law of the Judicial Division that gives a narrow interpretation to national statutory obligations, as a result of which parties only have to comply with that part of national legislation that is required for the implementation of European obligations, should not be followed in my view.[28]

The same applies to the wholesale replacement of the obligation to have a licence by general rules, which also reduces the level of protection. Firstly, general rules do not generally allow taking into account local and specific circumstances. Secondly, general rules are less suitable to meet environmental quality standards because the factual water quality differs from water to water. Local circumstances and needs may demand further requirements, but this possibility is not meant to be applied to every activity. Enforcement of general rules is also more complicated because the government is less well informed on the activities that actually take place. General rules usually only require that a certain activity is reported.

The most important object of the proposed Act on General Provisions regarding Environmental Law is the reduction of the amount of rules and bureaucracy, but its aim is certainly not the creation of a higher level of environmental protection.

In addition to this substantive component which makes the scope of water rights more concrete, there is a procedural component which enables citizens to invoke water rights before a court.[29] As citizens who make use of their proce-

[28] ABRvS (Judicial Division of the Council of State) 5 December 2007.

[29] See Verschuuren, 'The constitutional right to environmental protection', *Revue Juridique de l'Environnement*, 340; J. Verschuuren, 'Country report and Case study: the Netherlands annexe 6a', in: De Sadeleer, Roller & Dross (eds.), *Access to justice in Environmental Matters and the role of NGO's, Empirical Findings and Legal Appraisal*, Europa Law Publising 2005, H.F.M.W. van Rijswick and J. Robbe,

dural rights are increasingly regarded as a nuisance, some feel that the abilities of citizens to affect the decision-making process by means of legal procedures must be reduced as much as possible.

The restriction in Dutch environmental law of the availability of a remedy to interested parties only instead of the so-called *actio popularis*, could still be qualified as a pointless restriction, although its consequences are further reaching than were originally anticipated.[30] There is also a discussion as to whether the Dutch should – following the example of German *Schutznorm* – introduce the protective norm criterion in administrative law as it can also be qualified as a restriction of interested parties in their actual abilities to enforce the level of protection to which they are entitled. Jurgens and Widdershoven have examined the introduction of the protective norm criterion in water law. They concluded that it would lead to a huge increase in legal proceedings which would eventually hardly lead to a restriction of the number of interested parties; furthermore, it would result in an increase in the workload of the courts and complicated legal issues.[31]

It may be clear that I am not a supporter of this new approach. Here, too, the conclusion is inevitable that international and European law have now laid down not just a minimum level but also a maximum level of protection. It is doubtful, incidentally, whether the Treaty of Arhus allows a reduction in the present level of participation and remedies.[32] It is therefore for a good reason that there is an ongoing discussion in Germany as to whether their system is in compliance with the obligations arising from the Treaty of Arhus and the directives issued by the EU for the implementation of this treaty.[33]

The conclusion is that there are wholehearted pleas for the introduction of a fundamental right to water, but that this right has not actually been incorporated into statutory regulations as yet. A fundamental right to water may be too evident: Life is impossible without water. Yet it cannot do any harm to entrench such a right in a statutory provision. Today, when we have to assume that the

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'Does a constitutional right to environmental protection and improvement guarantee environmental protection and improvement?', in: I. Larmuseau (ed.), *Constitutional rights to an ecologically balanced environment*, Vlaamse Vereniging voor Omgevingsrecht, , V.V.O.R. vzw, Gent, 2007, p. 30-37.

30 See the zoning plan case law from the Judicial Division of the Council of State. Vz ABRvS 7 March 2007, cases 200608966/1 and 200608966/2.

31 G. Jurgens and R. Widdershoven, 'De betekenis van de invoering van een relativiteitseis voor de rechtsbescherming in het waterrecht' (the consequences of a Schutz norm for legal protection in water law), in: Drupsteen, Havekes and Van Rijswick (eds.), *Weids Water*, SDU 2006, p. 161-186.

32 Oral information from V. Koester, chair of the Arhus Compliance Comittee.

33 G. Jurgens, 'Introduction of a Relativity-related Requirement in Dutch Administrative Law. Will the Introduction of a Relativity-related Requirement in Dutch Administrative Law be in Breach of Community Law?', *Journal of European Environmental and Planning Law*, 2007/4; A. Schwerdtfeger, 'Schutznormtheorie and Aarhus Convention – Consequences for the German Law', *Journal of European Environmental and Planning Law*, 2007/4.

availability of sufficient water for everyone will become increasingly difficult, we have to make a point that living in a civilised country means that everyone is entitled to a certain amount of clean water. A certain level of water protection is obtained by its regulation in directives and national legislation or as a result of the elaboration of some fundamental rights that partly include the right to water.

The formulation of water rights by way of principles

Water rights may be formulated as classic or social fundamental rights, but can also be laid down in the form of principles. These principles are part of international water law as well as European law. European law shows a growing intermingling of principles and fundamental rights. Dutch law has principles of water law or environmental law but these are not incorporated into the Dutch Water Act.

Principles of international water law

Fundamental principles regarding water rights are laid down in the UN Convention on the Law of Non-navigational Uses of International Watercourses. They must be regarded as the codification of customary international law. They concern the principle of equitable and reasonable utilization of water (Articles 5 and 6),[34] the principle not to cause any significant harm and to make good or compensate, should it occur anyway, this damage as much as possible, a codification of the precautionary principle (Article 7).[35]

The elaboration and details of some water rights, in particular the optimal use and sufficient protection of international watercourses, is laid down as follows: The obligation to cooperate (Article 8) on the basis of sovereign equality, territorial integrity, mutual benefit and good faith; the obligation to exchange data and information (Article 9) and the obligation to protect and preserve ecosystems (Article 20 with details in Articles 21-26).

The Helsinki Convention also gives a number of fundamental principles and points of assumption (Article 2) which are elaborated in obligations imposed on all parties to the convention (Articles 4, 5, 6 and 7) or riparian states (part 2 of the Convention): A general obligation imposed on parties to take appropriate measures to prevent, to control and reduce transboundary impact, an obligation to prevent, control and reduce any adverse impact, to monitor the situation of transboundary waters, to cooperate in the conduct of research, to exchange of information and drawing up rules, to enter into bilateral or multilateral agreements or other arrangements on the basis of equality and reciprocity and to

[34] See for a case law example: ICJ 25 September 1997, *Gabcikovo-Nagymaros Project* (Hungary/Slowaky).

[35] See A. Trouwborst, *Evolution and Status of the Precautionary Principle in International Law*,, International Environmental Law and Policy Series, nr. 62, Kluwer Law International, The Hague/London/New York 2002.

consult each other on the basis of reciprocity, good faith and good-neighbourliness.

The River Conventions the Netherlands has entered into (related to the Rhine, Meuse and Scheldt)[36] also lay down a number of fundamental principles such as the precautionary principle, the principle of pre-emptive action, the principle that environmental damage must first of all be tackled at source, the ' polluter must pay' principle and he stand-still principle. These principles will also be elaborated in more detail in obligations for the parties.

Traditionally, treaties are aimed at states. And with the exception of human rights treaties, private persons cannot rely on them, although this is gradually but progressively changing. The meaning of international water law is changing, however, in the sense that states are given joint responsibility for sound and sustainable water management, which also includes, more than before, an increasing importance of the rights – Hey calls them interests – of private persons and certain vulnerable groups.[37]

Principles of European law

European law also recognises fundamental principles which have been laid down in the EU Treaty. Some of the fundamental principles apply to European law in general, such as the principle that any government action must be based on a power it has been given, the principle of proportionality and the principle of integration. Article 174 of the EC Treaty elaborates some environmental principles and states that EC environmental policy must contribute to the preservation, protection and improvement of the environment, the protection of human health and a prudent and rational utilization of natural resources.

Community policy regarding environmental protection is based on the precautionary principle, the principle that environmental pollution must be tackled, preferably at source, and the polluter must pay principle. These principles have been elaborated in detail in European rules, for water in particular in the form of directives, see *inter alia,* the preamble to the Water Framework Directive and the Floods Directive.

Generally speaking, private parties cannot directly invoke a European environmental principle. These principles lack direct effect. The role of principles in European law, however, is increasing. Principles are useful, *inter alia,* to interpret European obligations laid down in directives. Initially, this was done in particular with regard to procedural aspects, but their importance is also

[36] The Convention on the Protection of the Rhine (Rhine Convention), 12 April 1999, entered into force 1 January 2003 (OJ L 289, 2000/31, 15-11-2000). The Rhine Convention replaced earlier conventions concerning the Rhine; the Treaty on the Meuse, for further information see: http://www.cipm-icbm.be/page.asp?id=35&langue=NL and the Treaty on the Scheldt, For further information see: http://www.isc-cie.com/index_nl.asp.

[37] E. Hey, 'Distributive justice and Procedural Fairness in Global Water Law', in: J. Ebbeson and Ph. Okowa, *Environmental Law and Justice*, Cambridge University Press (forthcoming).

increasing with respect to substantive law issues. Often, fundamental principles make an appearance in the preamble to a directive.

Principles of Dutch water law

As far as Dutch water law, as laid down in the Water Act, is concerned the legislator made a conscious choice not to include any principles in spite of recommendations in that vein by jurisprudence and the Advisory Board on Water Legislation.[38] In his inaugural address Lambers advocated the incorporation of environmental policy principles and points of assumption in the law.[39]

The incorporation of principles in Dutch environmental law is difficult, as is also evidenced by the Water Act. On the one hand, there is the fear that fundamental principles must actually contribute to the decision-making process. On the other hand, it can be stated that principles are precisely doing that at the moment by virtue of international and European rules. The legislator's reply to this, in the case of the Water Act anyway, is that there is no need to incorporate principles in our national legislation as it would only be symbolic. It does not do any credit to the added value of principles, in my view, particularly not in times when we must use all possibilities at our disposal to meet higher standards of water protection. Some have said that statutory principles in national legislation are always preponderant in the decision-making process and that they can be more easily relied on before the courts.[40]

The formulation of water rights by means of their elaboration in regular legislation

The elaboration of water rights can also be seen in 'regular' legislation, at a European as well as at a national level. Examples in the European context are the Water Framework Directive, the directives regarding drinking water, urban waste water, the Nitrates Directive, the Floods Directive and the Plant Protection Products Directive. As citizens can now often seek redress based on the rights arising from environmental directives because access to the courts – either the national courts or the European Court of Justice – is ensured, it may be assumed that meeting the European obligations helps to give meaning to the right to water. At a national level this elaboration of water rights can be found in the Water Act, the Environmental Management Act, the Soil Protection Act, the Act on Plant Protection Products and Biocides, the 1998 Nature Conservation Act and the Flora and Fauna Act. With respect to the decision-making process on town and country planning, too, the consequences of certain decisions for water management must be taken into account by carrying out the water means test.

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[38] Commissie van Advies inzake de waterstaatswetgeving, Voorontwerp Waterwet: voldoende waarborgen voor een duurzaam en samenhangend watersysteembeheer, Den Haag 2005.

[39] C. Lambers, *De onbrekende schakel in het milieurecht (The missing link in environmental law)*. Inaugural address, University of Groningen, Kluwer, 1994.

[40] Th.G. Drupsteen, P.C. Gilhuis, C.J. Kleijs-Wijnnobel, S.D.M. de Leeuw and J.M. Verschuuren, *De toekomst van de Wet milieubeheer (The future of the Environmental Management Act)*, W.E.J. Tjeenk Willink, Deventer 1998.

How can we check whether Europe and the Netherlands actually protect water rights and distribute them fairly? For an answer to this question we have to take a look at the legislation which elaborates water rights. Smets has designed a useful test for this.[41] Further elaboration of the right to water must be subject to a clear distribution of tasks and responsibilities, rights and duties among the interested parties. Even though Smets has only designed this system for the right to drinking water and sanitation and not for all the water rights I mentioned earlier, it offers a useful tool for further analysis. The framework of this test has two important aspects. Not only is it related to legislation that primarily aims to protect water rights (such as the right to clean drinking water), it also refers to legislation required for the protection of the source of that right. The test also does not only concern legislation that grants and elaborates a water right, but also the obligations arising from the realization of water rights. These are obligations imposed on governments as well as on citizens. The realization of water rights requires certain rights to be awarded to the government. Furthermore, Smets points at the procedural aspect of water rights: They must be legally enforceable, otherwise they will be no more than empty promises because no one will feel responsible.

Smets also states that the obligations of citizens to protect water rights must be given lesser weight than those imposed on the government. These obligations cannot be fully seen in the same vein as citizens' obligations introduced by Gio Ten Berge in his valedictory lecture.[42] Water rights are often social fundamental rights. Citizens' obligations vary from duties to care (in the Environmental Management Act, the Act on Plant Protection Products and Biocides, the Soil Protection Act, the Housing Act) to a prohibition to act without or contrary to a licence or administrative order (Environmental Management Act, Water Act, Soil Protection Act), notification and information duties (Water Act) to duties to tolerate (Water Act). European law does not recognise a general duty of care for citizens to use water economically and sustainably. The Water Framework Directive aims, incidentally, at a sustainable, balanced and equitable use of water.

Obviously, the government's many duties may be distributed among the central and local governments. If the above-mentioned obligations and rights have been met, we can assume that a country has given meaning to the right to water, even if such a right has not been explicitly recognised as a (fundamental) right, as is the case in the Netherlands and in the EU. The privatisation of water companies must be subject to a clear specification of their obligations and those of the government in a contract or statutory arrangement. The role of civic societies must be such that they can help the realization of the right to water by public participation and access to the courts.

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[41] H. Smets, *The right to water in national legislations,* United Nations Fundamental rights Council, Sub-commission on the Promotion and Protection of Fundamental rights, A/HRC/sub.1/58/NGO/1, 4 August 2006.

[42] G. ten Berge, 'Towards an equilibrium between citizens rights and civic duties in relation to government', *Utrecht Law Review,* 2007, volume 3, issue 2, see: www.utrechtlawreview.org.

In addition to the obligations of citizens as described above, Smets also remarks that companies and the agricultural sector carry a responsibility towards the realization of the right to water in the sense of the protection of the environment and seeking sustainable development. Water pollution must be prevented and the 'polluter must pay' principle ought to be applied. As I believe that water rights encompass more than just the right to drinking water and sanitation, and also include water rights for the benefit of the agricultural sector and economic activities, it is obvious that water rights not only give rise to obligations but also to rights to which these groups are entitled.

The elaboration of water rights by normative objectives

New European water directives and Dutch legislation often show environmental objectives drafted as a general and qualitative provision. Examples are the Water Framework Directive whose ultimate environmental goal is to ensure that European water has 'a good status', the Framework Directive on Marine Strategy which seeks to have a 'good environmental status' in marine regions, the Floods Directive that wants 'adequate management of flood risks', the Bathing Water Directive which aims to have 'acceptable bathing water', and the Drinking Water Directive which states that 'safe and clean drinking water' must be provided for. And that is how each directive has its own generally drafted normative environmental goal.[43] The Dutch Water Act has laid down two objectives in section 2.1: Prevention and, if necessary, restriction of floods, flooding and water scarcity, in connection with protection and improvement of the chemical and ecological quality of water systems and fulfilment of all social functions of water systems.

Environmental objectives worded as norms instead of standards seem vague and unfocused, particularly for lawyers who love to know what it is exactly that they can be held accountable for, but they form the backdrop for the explanation of the other obligations and instruments.

It is argued that these vague and normative norms are a result of a development towards governance and more proceduralization and flexibility in environmental law. It is now not only the European institutions that create legal norms and standards, but also the member states together with the other parties involved.[44] As far as the Water Framework is concerned, norms and standards

[43] These differ from the general objectives of a directive; for the Water Framework laid down in Article 1, while the environmental objectives are laid down in Article 4. General objectives do not have direct effect and private parties can not rely on them before the courts. See Jans and Vedder (2008) p. 177/178.

[44] See Krämer (2007), p. 70-74; Scott, 'Flexibility, proceduralization and environmental governance in the EU', in: G. de Búrca, J. Scott (eds.) *Constitutional change in the EU. From uniformity to flexibility?*, Oxford and Portland, Oregon, Hart Publishing 2000. and J. Scott and D.M. Trubeck, 'Mind the gap: law and new approaches to governance in the European Union', *Euorpean Law Journal* 2002/8, p. 1-18; Pallemaerts & co., *Drowning in Process? The Implementation of the EU's 6th Environmental Action Programme*, Report for the European Environmental Bureau, London, IEEP 2006.

are elaborated within the Common Implementation Strategy for the Water Framework Directive.

The main problems of the governance concept are a diminishing ability to enforce regulations because there are less uniform and concrete standards that must be met. Furthermore, there is the possibility of a lack of democratic legitimacy and responsibility in political and legal fora, because legislation is partly made by executive powers and third parties. The controlling role of parliaments is diminishing.[45]

Although this all seems quite severe and worrying, a solution for this tension between the more classic government approach and new governance approaches can be found by using the concept of water rights which are provided in European and national legislation.

At first sight, the wording of vague objectives and goals appears not to be unconditional and sufficiently clear, as a result of which these provisions do not meet the requirements for having direct effect. The latter is of importance for private parties as it enables them to enforce their rights arising from the directives before the courts. After all, member states must work out the details of the normative goals in river basin management plans and programmes of measures and it is beyond the competence of the courts to make a choice from different instruments because it will restrict the legislator's discretion in this respect. Nevertheless, it does not seem hopeless.

A system with normative objectives is not new; we have seen it before in other environmental directives, such as the 'significant effects on the environment' of the EIA Directive, and the 'favourable conservation status' and 'significant effect' of the Habitats Directive. The European Court of Justice's case law shows that these provisions may have direct effect as far as they touch on the limits of a member state's discretionary powers. The Dutch Council of State has also qualified the provisions of the IPPC Directive as having direct effect, such as the requirement that a permit must determine emission ceilings based on the best available techniques. This requirement must be elaborated by the member states.[46]

The more generally drafted environmental objectives in directives give, as it were, policy and assessment restrictions (depending on what is granted by the directive) which the member states must bear in mind when implementing the obligations arising from the directive. The general – or ultimate – objective must eventually determine the scope of all the obligations, and not just of the provisions that have direct effect. This approach can also be found in the case law of the European Court of Justice with respect to the French L'Étang de Berre.[47]

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45 A. van Trigt, *Proceduralisering in de Europese milieuwetgeving, een case-study naar de Kaderrichtlijn water,* University of Amsterdam, 2007.

46 ECJ case C-72/95 (*Kraaijeveld*), ECJ case C-127/02 (*Wadden sea*), ABRvS 13 November 2002, *Milieu en Recht* 2003, nr. 39.

47 ECJ case C-213/03 (preliminary ruling) and ECJ C-239/03, *Commission* v. *France* on (L'étang de Berre).

Finally, we must also be able to trust the legislator's loyal commitment to the transposition of the obligations arising from the directive which does justice, as far as substantive law and procedural law are concerned, to the water rights granted. If this fails to occur, the European Commission can act in its capacity as the European law watchdog and start an infringement procedure. Direct protection of water interests for private parties or interested third parties before the European courts (the Court of First Instance and the European Court of Justice) is practically impossible. After all, it requires a direct and individual interest, which is often difficult to prove. I will not delve any deeper into this issue here.[48] Private parties do have the possibility to ask the national courts for a preliminary ruling to the European Court of Justice. More specifically, national courts must guarantee the water rights arising from European law.

VII The scope of water rights

Conflicting water rights

Just like with classic fundamental rights such as the right to equal treatment, the freedom of religion or the freedom of speech, water rights may be in conflict with each other or be contradictory. Sufficient water for economic activity is not always compatible with the need for sufficient water for the benefit of nature. Protection against floods may harm areas abounding in water, even if it is temporary, such as flood storage areas. Economic activity causes water pollution, which damages the enforcement of the right to clean drinking water and the right to water for the benefit of agriculture and recreation. Now that the Biesbosch has opened for tidal movements in the interest of ecology and water storage, we must bear in mind that by doing so we have removed a large reservoir from our stock of drinking water that could be used in case of calamities. Building houses and industrial estates in vulnerable areas may be in conflict with protection against floods and flooding.

There must be statutory instruments that enable a just and fair treatment of conflicting water rights or other interests and prevent the misuse of water rights. It requires a distribution of water rights and corresponding water duties. The law must also provide for remedies that enable private parties to seek relief in court.

Distribution of water rights: prioritization

The distribution of water rights may occur in more than one way. Every method of distribution, however, must meet the requirements of proportion, proportionality and solidarity.

First of all, water rights can be ranked according to their priority. That is not as easy as it seems, though. Safety above recreation may be acceptable, and so

[48] See for example Jans and Vedder (2008) p. 212 et seq. where they discuss the *Greenpeace* case.

will drinking water be above economic activity, but the choice between safety or drinking water is already debatable, certainly in the Netherlands. This is, in my view, not primarily about the priority given to one water right at the expense of another, but about a balanced distribution of and between different rights. Distribution is a political choice.

Distribution: establishing the scope of water rights with the help of norms

After providing the outline of an order of ranking, we will need to select a further restrictive mechanism. The restriction is introduced by determining the scope of a water right with the help of norms. As norms define the right's scope, which will lead to the establishment of the duties with which parties (the government and private parties) are encumbered, norms must preferably be laid down in statutory provision arrangements. This is in the interest of legal certainty; it is the result of the principle of legality and enables citizens to seek relief in court. Furthermore, it defines citizens' own responsibility and makes clear when they are deemed to take measures to ensure their own safety, to prevent flooding or to have sufficient and clean drinking water available. These are some of the water duties with which private parties are encumbered.

The incorporation of objectives and norms in legislation provides the justification for the government to exercise certain powers and use certain instruments. Case law from the Administrative Judicial Review Division of the Council of State shows that when norms are laid down by way of policy objectives in plans or other policy documents it is uncertain whether this will help citizens in court.[49] The binding force of norms laid down in policy rules is much stronger.

Statutory norms also indicate the general interest pursued by the government when it wants to restrict certain citizens' rights in order to achieve its goals.

Any required tightening of the standards must be explicitly and clearly provided for by the statute setting these standard rules, as a result of which it is clear why this may happen and the conditions it is subjected to. A tightening of norms will generally interfere with citizens' rights. This may lead to a duty for the government to compensate any disproportional damage. Due to 'preparing the Netherlands for climate change' – but of course also other countries – we may expect to see the tightening of water rights and duties on a regular basis.[50] It will then involve the protection and improvement of water quality and the tightening of the safety standards and norms for flooding.

As an awareness of the importance of water rights and legal certainty grows, the policy makers' discretion will be less, as a result of which they will not be able to make any decision on an ad hoc basis that could not have been provided

[49] See H. van Rijswick, *De kwaliteit van water (The quality of water)*, diss. Utrecht, Kluwer 2001, pp. 147-150.

[50] See for example on Dutch safety norms: Delta Commission, *Samen werken met water (Working together with water)*, The Hague, 3 September 2008.

for. That is a powerful argument in the Dutch practice of water management, but in my view it cannot be decisive.

Who sets the norm?

The issue of the scope of a water right and the corresponding norm is a political choice which must be made by a democracy's representative bodies. The norms and corresponding measures, it is true, must be laid down in a statutory arrangement but their content should not solely be determined by scientists such as technicians and ecologists. [51] Gupta has said that the creation of norms and measures must, in addition to results from the exact sciences, involve the input of lawyers, social scientists, psychologists and policy makers. If not, a policy is reduced to an economic valuation of policy instruments. The practice that standards are determined by Brussels' most powerful lobby, as was the case with the REACH regulation and NEC directive, is unfortunate. This is all the more relevant as a proper discussion of the choices to be made in the European Parliament or the national parliaments is not likely to happen since the subject-matter is difficult to grasp thanks to its very technical content. The representative organs must be able to and should determine the scope of water rights and the balance between water rights and water duties. If these organs fail to do so, the inevitable conclusion is that democratic checks are falling short.

The role of the Common Implementation Strategy for the Water Framework Directive and the use of soft law to subsequently elucidate the scope and meaning of a directive's obligations is now steadily increasing. The guides for the implementation of the Water Framework Directive are an example of this. There is no doubt that it is good to know the meaning of the obligations arising from the directive and to work together to improve the aquatic environment in a multi-level framework with a great deal of room for flexibility, decentralised decision making within networks with a focus on effective problem solutions and the development of knowledge, but I would rather like to know what the consequences of legal obligations following from environmental directives are before making a commitment. The issue with soft law is the lack of democratic legitimacy. It is not clear who establishes a guidance and the powers of the democratically elected bodies (the national and European Parliament) are negligent, while at the same time the impact of a guidance on the implementation and final execution may be substantive, particularly when the European Commission was involved in its wording. Moreover, everyone can find an argument to prove his point in the guides for the Water Framework Directive as there are so many of them.

Part of the political balance of the scope of water rights, however, must be that the lower limit of each water right is monitored. The lower limit is formed by the minimal water rights without which a decent existence would not be possible. These minimal water rights, laid down in norms are about safety,

[51] See J. Gupta (2007), p. 23.

drinking water, clean and scarce water. For this minimum an effective enforcement by the courts is necessary and public and political responsibilities must be clear. New governance could be used for all water ambitions that go further than these minimal rights.

Which norms are addressed here and how can they be formulated?

Objectives with a qualitative aspect often require more detailed rules to determine the scope of water rights. The legal status of these norms may differ, depending on the words of the directive or statute.

Obligations of best intent make sense when the guarantee of a water right suffers from the major impact of natural circumstances such as climate or ecology. In that case, too, it must be clear who is responsible for the protection of the water right and which powers and instruments designed for that purpose are available.

European directives also have mechanisms to prevent the directive's obligations from becoming too strict or inoperable. There are many ways to do this. Some norms allow deviations therefrom, and still the obligation is met. This can be noticed in directives that lay down quality standards for waters with a certain function such as water for fishing or shellfish. Some directives give a set of exceptions subject to certain conditions. If a member state relies, rightly and with good reason, on one of these exceptions it will meet the obligations stemming from the directive and justify its violation of a right. Exceptions, however, must be interpreted restrictively because they violate rights.

Water safety

There are no standards for safety and flooding at a European level. Flooding and safety often lead to a choice of standards in the form of obligations of best intent because meeting the norm cannot always be guaranteed due to the unpredictability of natural circumstances. There is no such thing as a guarantee of rain, drizzle or regular precipitation. It is remarkable that the Floods Directive does not set any norms and neither does it prescribe them. Risks must be assessed, maps must be made indicating which locations run which major flood risk and member states must make management plans leading to proper risk management. No clear norms are set, and no vague ones either. Whether member states are willing to grant their citizens the right to safety and protection against flooding is not a subject in which the EU wishes to become involved for the time being. It happens by referring to the different physical situations in the member states, which make it impossible to give any general norms. If a certain water right to protection against floods and flooding had been assumed, it could have been incorporated in the general wording of the directive, to be elaborated at a later stage by the member states. Now it is just guessing whether European law recognizes this water right and the only conclusion that can be drawn is that parties have an obligation and a right due to which measures in one member state must not lead to an increased flood risk in another.

With respect to water safety the Dutch have had detailed norms providing for the level of protection citizens are entitled to for decades. The Netherlands is a low-lying delta and has opted for protective precautionary measures. Some countries have no statutory provisions granting their citizens the right to safety (such as the United States of America), or only provide for compensation of the damage after it has occurred, sometimes by means of insurance (the United Kingdom).[52] The choice for preventive precautionary measures is not an odd one in the Netherlands as the possibility of being killed by a flood is substantially higher than being killed by a terrorist attack. The Dutch situation then features the recognition of the right to safety, which is incorporated in legislation and norms.

Measures taken by the government to guarantee water safety rights do not have to be applicable throughout the country in the same way. Some areas will need dike improvements to implement the right to safety, while other areas will emphasize the need for alternatives such as more storage, the guarantee of good escape routes and maybe escape locations. The idea that every Dutchman is entitled to the same efforts to guarantee his safety was rejected a long time ago. Dutch dike circles establish their own level of protection, which is based on risk management. It includes the possibility of the occurrence of a flood as well as the possible consequences (as far as human cost and economic damage are concerned). The recently implemented Floods Directive is also based on this risk management approach.

Water quantity and flooding

Norms regarding water quantity and flooding must also be incorporated in a statutory arrangement and not in policy plans. The fact that the norms are worded as an obligation of best intent does not affect the recognition of this water right; in view of the natural causes of floods and often also of flooding it is better this way. Although European law does not make it compulsory, it is my view that European law must not restrict Dutch water rights.

Case law on water level decisions made by water authorities show that natural circumstances are duly taken into account and so are the number of water courses that are managed, and the investments to be made. The discretion which water authorities have is adequate and their exercise of this discretion must duly take into account the interests of private parties in particular.

Water quality

Standards regarding water quality are often formulated as obligations to achieve a certain result. They are often the result of European law. This applies to standards applicable to the quality of potable water and water quality standards to be satisfied by the government with respect to the right to clean water for nature, economic activity and recreation.

[52] See Ministry of Transport, Public Works and Water Management and DHV, *In search of good governance, an exploration of watergovernance arrangements abroad*, The Hague, May 2008.

Even though it is possible to rank these water rights (drinking water is more important than recreation), the legal status of these *quality* standards in particular, in other words the water right they guarantee, are often worded as an obligation of the government to achieve a certain result. This applies, also thanks to European Court of Justice case law, particularly to drinking water as well as bathing water. It is not recommended to base the order of rank on the distinction between obligations to achieve a certain result and obligations of best intent. Both rights require obligations to achieve a certain result. The order of rank may be formed by incorporating exceptions in a provision laying down an order in case of conflicting demands.

An environmental quality standard with a quantity aspect is clear and, in principle, enforceable. It says, for example, in the definitions of a directive that the standards laid down by the EU or a member state may not be exceeded. I would like to qualify this as a ceiling or cap: the ceiling or cap is the established norm that must not be exceeded. The European Court of Justice's case law is very clear on this type of formulation: the standard must be met, it is an obligation to achieve a certain result and the environmental quality standards in the directives have direct effect.[53]

An exception will only be granted if the directive provides such, and whereby exceptions must be interpreted restrictively.[54] The European Court of Justice has added that as far as the Water Framework Directive is concerned environmental quality standards must be seen in relation to the umbrella objectives.[55] By looking at the scope of the quality standards in the light of a directive's general objectives, it becomes clear that the importance of principles is increasing.[56]

The case law on earlier environmental directives[57] as well as the early case law on the Water Framework Directive shows that environmental quality standards must be incorporated in statutory arrangements. The reason for this is that the transposition of the directive's obligations must be such that: "the full application of the directive is ensured and that the legal situation arising from those principles is sufficiently precise and clear and that the persons concerned are put in a position to know the full extent of their rights and, where appropriate, to be able to rely on them before the national courts."[58] This means that the objects and standards may be regarded as an elaboration of water rights. It is

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53 See H.van Rijswick, 'The relationship between the Water Framework Directive and other environmental directives, with particular attention to the position of agriculture', *Journal of Water Law*, 2007, p. 193-203.

54 See Jans and Vedder (2008), p. 176 and 178 et seq.

55 ECJ case C32/05, *Commission* v. *Luxembourg*.

56 See also J. Verschuuren, 'Invloed van het EVRM op het materiële omgevingsrecht in Nederland', in: *De betekenis van het EVRM voor het materiële bestuursrecht*, VAR nr. 132, BJU, Den Haag 2004.

57 See among others: ECJ case C-361/88, *Commission* v. *Germany* and ECJ case C-144/99, *Commission* v. *the Netherlands*.

58 ECJ case C 32/05, *Commission* v. *Luxembourg*.

an important feature that a party must be able to rely on a right he or she was granted in a court. This seems clear, but the Dutch legislator is still in limbo on how to do this.

The wording of norms in relation to legal remedies

The Dutch are still struggling with the transposition of European quality standards. We learned hard lessons with the implementation of the standards for air quality, which according to some 'put a lock' on the Netherlands. It was caused by the direct link between the quality standards and the powers to make countless concrete decisions that could affect the air quality.[59]

It cannot be denied that another implementation method would have resulted in more flexibility. Not every restriction of the planned projects imposed by the Judicial Division of the Council of State has actually ensured an improvement of the air quality.

The transposition of the water quality standards is given a different treatment. Just like the new Air Quality Act (incorporated in chapter 5 of the Environmental Management Act), the Dutch have chosen an implementation method thanks to which attempts are made to avoid any needless restrictions. There will no longer be a direct link between powers and individual decisions but a link between environmental quality standards and packages of measures laid down in a programme of measures. These packages of measures must be reflected in the various national water plans.

It offers more flexibility, though one has to realize that as far as the water quality standards are concerned the aim is still to achieve a 'good status' in 2015. This is a water right granted on a European level. Regardless of the method of implementation, the object must be achieved, because that is what the Netherlands has agreed to do in the European context. Only the implementation allows us to be flexible, the norms imposed do not. Another aspect that is often forgotten is that it is of major importance for the Netherlands to have an integrated and transboundary management of river basins. Furthermore, the air quality file has made it clear that without the strict implementation of the standards, irrespective of whether that is because of the link to individual decisions or plans, the necessary measures were not taken. Otherwise 'a lock' would never have been put on the Netherlands. Apparently, it had not occurred to anyone any earlier to think about a fair distribution of the benefits and burdens among the parties.

59 See F. Fleurke and N. Koeman, 'The impact of the EU Air Quality Standards on the planning and authorisation of large scale infrastructure projects in the Netherlands', *JEEPL* 5/2005, p. 375-383; Ch.W. Backes a.o., 'Transformation of the first Daughter Directive on air quality in several EU Member States and its application in practice', *European Environmental Law Review*, June 2005, p. 157-164 and A.A.J. de Gier, F.A.G. Groothuijse, J. Robbe and H.F.M.W. van Rijswick, 'The influence of environmental quality standards and safety standards on spatial planning, Water and air as examples', *Journal Of European Environmental and Planning Law*, 2007, p. 23-36.

Water plans give information on how to achieve the required water quality. Plans and programmes are difficult things for Dutch lawyers. They give a description of how an administrative body exercises its powers, how it makes its policy choices. An administrative body is bound by its own plan and its concrete implementation decisions must comply with it. A plan means that the administrative body has committed itself, although a plan or programme is generally not binding on third parties nor on other public authorities. It is through water plans that the actual distribution of benefits and burdens, of water rights and water duties takes place. This is called allocation, although it is not given this name explicitly. The plan determines, for example, how the pollution space available is distributed among the agricultural sector, industry and domestic households. It also considers subjects such as the location for water storage, where building activities should be scaled down, where rivers must be broadened and which policy measures have to be chosen to protect nature against dehydration. This is how plans touch directly on private parties' personal interests. They include distribution choices that can be far-reaching and measures the government wants to take for the implementation of water rights. Plans are the link between the normative and the instrumental aspect(s) of water rights.

It is of importance that "the full application of the directive is ensured and that the legal situation arising from those principles is sufficiently precise and clear and that the persons concerned are put in a position to know the full extent of their rights and, where appropriate, to be able to rely on them before the national courts" It is a well-known phrase from European case law, though its legal meaning is not entirely clear. What does this requirement say, for example, about the implementation of water quality norms in a Dutch administrative order by virtue of the Environmental Management Act? The legal approach chosen by the Netherlands for transposition means in practice that quality standards are, in a way, linked to the power to make water plans by virtue of the future Water Act. A link with a water permit or any other decision is definitely not what is meant (see the Explanatory Memorandum). This approach is in keeping with the obligations arising from the water directives as well as the objectives and features of environmental quality standards. Water quality standards are related to the quality of water itself and not to concrete actions. The implementation is realized by making plans and programmes that describe how the desired water quality should be achieved. It must be incorporated in such a way in a plan or programme that it guarantees that the pursued water quality is met. Such a programme should preferably also contain a balancing arrangement.

Whether a plan and/or a programme that is only binding on the administrative body can do all this is doubtful. It may be argued that a package of measures must be supplemented by binding arrangements between administrative bodies on how they will exercise their powers, which measures they will take and how these are funded. These arrangements can for example be laid down in a water agreement and, if the name water agreement is too restrictive in relation to the integrated area-oriented goals, it may also be called an environmental or area agreement.

How can citizens enforce their water rights?

The statutory arrangement with the quality and safety standards is a generally binding provision against which no appeal lies with the Dutch administrative court. Nor is a water plan an order against which relief can be sought in the administrative courts. There is, however, one exception and that is the management plan of the district water boards (regional water management plan), which must be approved by the provincial executive. This decision can be appealed. The reason for this is that the policy of the operational district water boards must be incorporated in general democracy. There are no legal remedies before the administrative courts against any of the other water plans. The origins of this distinction are not clear in view of citizens' rights which arise from, for example, quality standards.

It means that a number of major distribution issues cannot be put before the administrative courts. Not which rights deserve protection, nor their distribution or the government's plans to enforce them. All of that is determined by democratically elected bodies. It requires a great deal of confidence in democracy and if this is lacking, it will be reflected in the implementation phase. Only when concrete decisions are made, such as granting a permit, establishing a zoning plan, an infrastructure decision, or the decision on a waterway construction, will private parties be able to seek relief in court when their rights are violated.

The proposals that are now being prepared to implement quality standards in Dutch law consciously try not to link the quality standards with the granting of a permit or other decisions. This is another way in which resorting to the administrative courts to claim an infringement of water rights is frustrated. Of course, parties can always seek relief in the civil courts but experiences with the civil courts in the past are not promising. Civil courts will only apply a test of reasonableness and cannot order the legislator, for example, to create a specific regulation or work.[60] Such actions are deemed to be contrary to the division of powers which the Dutch recognise under the rule of law. I hope that the restraint exercised by the civil courts will change if the legal remedies before the administrative court are increasingly eroded. Incidentally, the chances of success before a court will increase if a party tries to stop any undesired decisions and measures rather than trying to have specific measures adopted.[61]

Only the future will tell whether concrete decisions will allow reliance on quality standards and the distribution chosen in water plans. As a result, the Netherlands does not have to be 'put in a lock'. A judicial review of an indirect link between quality standards and concrete decisions is less far-reaching. The

[60] District Court [rechtbank] of The Hague 30 September 1998, AB 1998, 427, with case note Backes, and the following judgement of the Court the Hague (Hof Den Haag), 21 October 1999, *M en R* 2000, nr. 2, with case note Verschuuren; also the so-called Dutch *Waterpakt* cases did not lead to any success for NGOs, see Supreme Court [HR] 21 March 2003, *Waterpakt I*, *SEW* 2004, with case note Besselink and AB 2004, with case note Backes and after that the Court of Appeal of The Hague [Hof Den Haag] *Waterpakt II*, 27 October 2005; LJN AU5626. See also Supreme Court 1 October 2004, JB 2004/385.

[61] See District Court of Utrecht, 22 November 2006, AB 2007, 171.

feared link between quality standards and concrete decisions cannot be entirely avoided. This is in itself not desirable either, because it undermines any possibility to place the scope of water rights and questions on the distribution of these rights before the courts. If we choose not to protect water rights any further, and the choice is ours as we live in a democracy, we will have to make that clear concerning the recognition of the right. Then everyone will know where we stand.

Summary

In sum, with respect to the elaboration of water rights into objectives and standards the following arguments apply: European directives aimed at the protection of water rights are binding as far as the achievement of a certain result is concerned. The result is to meet the directive's objectives. This obligation must be satisfied by the member states. Every member state must ensure the transposition of the directive's obligations. In principle, there are not many restrictions for a member state in its choice of instruments. Having said that, some directives also lay down how the objectives must be met. These instruments elaborate the water duties. Particularly in the case of transboundary environmental protection and/or the protection of common heritage and/or the protection of human health, all of which is usually the case with water, the transposition is subject to extraordinarily strict requirements. The rights and duties arising from a directive on which a citizen can rely must be incorporated in such a way in legislation that the scope of the rights is well defined, thus enabling him to exercise these rights. This also makes clear how water rights, which will only arise from executive decisions such as the provision of grants or obligations to tolerate certain water works, are distributed among the parties.

A preliminary conclusion is that once water rights have been recognized and their scope has been determined, their *scope* is no longer negotiable. All of that is determined by democratically elected bodies. There are hardly any legal remedies in this normative phase, even though this is an essential part of the protection of water rights, which involves the making of important choices of distribution. After this determination of rights, objectives, norms and plans the next phase is that of implementation, during which instruments can sought that allow for flexibility.

VIII The allocation and granting of powers

After the recognition of a water right and the determination of its scope, we need powers, instruments and measures to ensure its actual implementation and protection. Before we do that, we first have to decide the right level of protection of the managed object. At the international, European as well as the national level it has been decided to base the management on a river basin approach.

Is there a cause for functional water management?

As I stated earlier, modern European and national water management is based on river basins as a management unit. Moving water, just like river basins, ignores state boundaries or a country's administrative regions (the national state, provinces and municipalities). A major distribution issue is the distribution of powers, rights and duties between different states in a transboundary river basin area and, following that, the distribution of these powers, rights and duties in the parts of this river basin in one state. The question arises here, too, whether water is something special. Is there a reason why a specially created body (the competent authority) should be responsible for the water management and what should be the extent of its interference? An extensive discussion of these issues can be found in Dutch publications by Van den Berg and Havekes.[62]

The above shows that water management is something special that cannot be compared with other areas of policy. It is essential for human life. We need sufficient and clean water as well as protection against floods. Europeans consider water as part of their common heritage. Water management has always been something special in the Netherlands, too. As far as responsibilities are concerned, the conclusion can be that there are good reasons to create an authority with special powers, a functional government. The Dutch have had this special functional government for centuries and new visions on water policy and management support this choice made a long time ago.[63]

The level of water management must be based on river basins. The Water Framework Directive requires the creation of an 'appropriate competent authority' on the level of the member state as well as on the international level. This is a plea for retaining the functional body for the river basins at the Dutch national level. As a number of extensive international river basins (Rhine, Meuse, Ems and Scheldt) are in the Netherlands, the national functional administrative body will have to be responsible for the management on the level of a part of the river basin. I cannot think of a compelling reason to retain the distinction in Dutch law under the river basins approach between the water management of the national main system (which is now executed by the Ministry for Transport, Public Works and Water Management) and the regional system (which is managed by the district water boards), although in other countries this distinction is also made, for example in Germany.

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[62] See J.T. van den Berg, 'De constitutionele verankering van de functionele decentralisatie. Een leemte in de Grondwet', in: Th.G. Drupsteen, H.J.M. Havekes and H.F.M.W. van Rijswick, *Weids Water, opstellen over waterrecht*, SDU 2006, p. 89- 108; J.T. van den Berg, *Waterschap en functionele decentralisatie*, diss. Utrecht, Alphen aan den Rijn, 1982; H.J.M. Havekes, *Functioneel waterbestuur; borging en beweging*, (forthcoming).

[63] See Ministry of Transport, Public Works and Water Management and DHV, *In search of good governance, an exploration of watergovernance arrangements abroad*, The Hague, May 2008; H. Havekes, R. Lazaroms, D. Poos and R. Uijterlinde, *Water governance, the Dutch water board model*, Dutch Association of Water Boards, The Hague (year of publication not mentioned); H. Folmer and S. Reinhard (eds.), *Water problems and policies in the Netherlands*, RFF Press, 2008 (forthcoming).

The choice for the river basin approach, including the appropriate authorities, also has its disadvantages. Firstly, a major disadvantage lies in the distribution of responsibilities and powers in other policy areas than water (integration principle). Secondly, the European tier of the river basin approach is not compatible with the general system of individual member states having obligations to reach the objectives in their part of the river basin instead of joint member states within a transboundary river basin. At the moment this can only be solved by cooperation between states and administrative bodies. I will come back to this later.

The rule of law, principles of legality and legal certainty

The protection of water rights often requires measures to be taken. These measures, however, may infringe citizens' rights. The water rights and corresponding objectives, standards and duties of the government must be based, in my view, on the law, which grants the power to the competent authority to order measures to be taken or to take them itself.

The Water Act is a fine piece of legislation in this respect. The Act refers to Article 21 of the Dutch Constitution as well as explicit objectives with corresponding norms that must be observed.

The quality of water is subject to the quality standard of 'good status', which is mentioned in the Act itself with a reference to the Water Framework Directive. This is considerable progress compared to the laying down of quality standards in plans, which used to be the practice. Incidentally, the required quality standards will be established pursuant to the Environmental Management Act. I would recommend, however, establishing the water quality standards by virtue of the Water Act. The Water Act also includes standards on safety as well as standards regarding flooding and, in the future, standards regarding the protection of the marine environment.

The rule of law requires legislation to be properly legitimized and this feature must be observed in water management too. Frank Westerman mentions in his beautiful book "Ingenieurs van de ziel" a quotation from Marx: "The more colossal the water works undertaken by a state, the more despotic its rulers."[64]

In my view, the rights of interested parties to be properly informed, to be involved in the decision-making process and the right of access to the courts when their interests are wrongfully damaged or their rights violated must not be eroded.

Proper water management and good quality water law does not mean that citizens can be named and treated as 'a nuisance' as it is called nowadays. Law plays an essential part in achieving the goals set by water managers. This applies not only to the coordination of projects and streamlining them, but also to the possibility to take measures swiftly and efficiently. It also helps to

[64] Frank Westerman, *Ingenieurs van de ziel*, Atlas, Amsterdam/Antwerpen, 2002, p. 112.

define and protect the water rights and duties of citizens for the benefit of legal certainty by enabling them to realize their rights with the aid of the law.

Part of this is in agreement with the conclusions of the Elverding Commission, which found that delays in the Netherlands in the construction of public works – motorways in particular – are not so much caused by private parties but rather by lower government bodies.[65] Therefore it is important to safeguard the rights of private persons, particularly since there does not seem to be a connection with internal government issues. Offering compensation as one of the most important remedies – as the Elverding Commission suggests – does not do justice to the protection and realization of water rights the government has granted.

If it is the local governments' job to protect water rights, their right to seek redress against decisions of other government bodies that obstruct their meeting of this objective cannot be taken away from them. This is of particular importance with respect to water rights arising from European rules, such as meeting the quality standards with respect to detailed requirements of the 'good status' of water. Early consulting and cooperation alone, though very important, are not enough to safeguard the protection of water rights for the government are often worded as water duties.

On the other hand, sometimes it cannot be avoided that citizens' rights are restricted in order to be able to guarantee the water rights of others. An example is the removal of the dike in Lent near Nijmegen. The inhabitants of the area immediately behind it, including those who live on the major Vinex location the Waalsprong, deserve better protection against the high water in the river Waal. The rights of some must be restricted dramatically for the protection and safety of large groups of residents. The implementation of the Major Rivers Delta Act, enacted after the near floods of 1993 and 1995 also made it necessary to restrict the rights of citizens to ensure adequate safety in the future.

If citizens' rights are restricted in order to protect water rights, one may ask what the legitimization of this restriction is. What is the extent of the restriction and what conditions govern the restriction of the rights of citizens, such as taking away their property or the regulation of their ownership rights? All of this, evidently, must be done within the limits of proportion and proportionality. This is also a distribution issue that must be properly addressed in the near future.

The distribution of powers and responsibilities among water management and other policy areas

When the powers with regard to the use of instruments and the taking of measures are distributed, one of the issues to be addressed is whether every measure to protect water rights is part of water law. My view is that this is not the case. Many measures belong to other policy areas. This raises the following questions. How can and should we distribute the necessary measures among

[65] Stcrt. 2008, 216.

several policy areas in and outside environmental law? And to what extent can we or should we take into account the preconditions set by water management in this or other policy areas?

The principle of integration must play an important role here. The integration principle is known in European as well as Dutch environmental and water law. The EU Treaty also mentions the integration principle explicitly. The integration principle means that other policy areas must take into account the environmental objectives of the EU Treaty. That sounds great, but research has shown that not much has come of it.[66] The Dutch distinguish internal and external integration. Internal integration is defined as the process of merging the different regulations of one policy area. This happens, e.g., with the Water Act now being read by the First Chamber, which will be merged with nine existing water acts. External integration occurs when other policy areas must take into account, e.g., water policy. Dutch law does not allow this just like that, owing to its speciality principle: A power may only be exercised with a view to the goal for which it has been granted. Drupsteen, Van Hall and Jans devoted some wise comments to this subject.[67] We have to assume that when the demands arising from water management must be taken into account in other policy areas, the explicit power to do so must be stated as such in statutory arrangements. The relationship between water legislation and other policy areas has been the subject of quite some research by our research centre. This research is concerned with, on the one hand, legislation on water issues and, on the other, legislation on medicine and plant production products, environmental policy, nature policy and spatial planning.[68]

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[66] N.M.L. Dhondt, *Integration of Environmental Protection into other EC Policies*, Groningen, Europa Law Publishing, 2003.

[67] J. H. Jans, 'European Law and the Inapplicability of the Speciality Principle', *Review of European Administrative Law*, Vol. I, no. I, p. 35-49, Europa Law Publishing 2008; Th. Drupsteen, 'Een brede kijk, het specialiteitsbeginsel en de Waterwet' (a broad view, the speciality principle in the Water Act), in: Th. Drupsteen, H. Havekes and H. van Rijswick, *Weids Water*, SDU 2006, p 285-302; A. van Hall, *Het specialiteitsbeginsel in het waterstaatsrecht* (the speciality principle in water law, inaugural address), inaugural lecture, Universiteit Utrecht, Tjeenk Willink, 1995;

[68] The research was conducted by Annelies Freriks, Toon de Gier, Frank Groothuijse, Jan Robbe, Andrea Keessen and Chris Backes in cooperation with the National Institute for Public Health and the Environment, the Netherlands Environmental Assessment Agency and the University of Amsterdam: M.H.M.M. Montforts, H.F.M.W. van Rijswick and H.A. Udo de Haes, 'Legal constraints in EU product labelling to mitigate the environmental risk of veterinary medicins at use', *Regulatory Toxicology and Pharmaclogy*, Volume 40, Issue 3, December 2004, p. 327-335; M.H.M.M. Montforts, H.F.M.W. van Rijswick, A.A. Freriks, A.M. Keessen, S. Wuijts, *De relatie tussen productregistratie en waterkwaliteitsregelgeving: geneesmiddelen, diergeneesmiddelen en veevoederadditieven*. Bilthoven, RIVM, rapport 601500003, 2006 (with a summary in English); A.A.J. de Gier, F.A.G. Groothuijse and J. Robbe, H.F.M.W. van Rijswick, 'The influence of environmental quality standards and safety standards on spatial planning, Water and air as examples', *Journal Of European Environmental and Planning Law*, 2007, p. 23-36;

In answer to the question of how to distribute powers among policy areas rightly in order to protect water rights and distribute water duties fairly, the adage 'no responsibility without a corresponding power' as worded by Gilhuis in his preliminary report for the Dutch Society of Environmental Law on the relationship between water management and environmental management must play an important role.[69] There are two sides to this adage: A responsibility cannot go beyond the powers granted for the implementation of an assigned duty. On the other hand, the task and the responsibility demand the actual use of the powers that were granted. Energetic use of the powers and instruments granted is therefore required to protect water rights and distribute duties fairly. For the relationship with spatial planning it means that as the Dutch water test is no more than a minor part of the procedure in spatial planning, water managers will have to use their own instruments such as district water board regulations and the granting of permits to protect water interests. Frank Groothuijse will give a clear analysis on this subject in his dissertation, which will be published soon. Now that member states grant statutory water rights (in treaties, directives and national laws), a proper protection of water rights demands that other policy areas also take these rights into account as far as possible with regard to the speciality principle and that the existing powers and instruments must be used to protect water rights. With regard to the speciality principle it

H.F.M.W. van Rijswick, 'The relationship between the Water Framework Directive and other environmental directives, with particular attention to the position of agriculture', *Journal of Water Law*, 2007, p. 193-203; S. Wuijts and H.F.M.W. van Rijswick, *Drinkwateraspecten en de Kaderrichtlijn water, Criteria voor de bescherming van drinkwaterbronnen en kwaliteitsdoelstellingen*, RIVM-rapport 7343010028/2007, 2007 (with a summary in English); H. van Rijswick, 'The relationship between the Water Framework Directive and other environmental directives, with particular attention to the position of agriculture', *Journal of Water Law*, 2007, p. 193-203; H.F.M.W. van Rijswick and E.M. Vogelezang-Stoute, 'The Influence of Environmental Quality Standards and the River Basin Approach taken in the Water Framework Directive on the Authorisation of Plant Protection Products', *European Energy and Environmental Law Review*, April 2008, p. 78-89; F.A.G. Groothuijse and H.F.M.W. van Rijswick, 'Water en ruimtelijke ordening: méér dan de watertoets! (I)', *Bouwrecht*, March 2005, p. 193-210 and (II), *Bouwrecht*, March 2005, p. 384-401; H.F.M.W. van Rijswick, P.P.J. Driessen, C.W. Backes, C. Dieperink, A.A.J. de Gier and F.A.G. Groothuijse, *Juridisch-bestuurlijke capaciteit in het waterbeleid, enkele toekomstschetsen voor de externe integratie van water en ruimtelijke ordening*, Centrum voor Omgevingsrecht en – beleid, Universiteit Utrecht; H.F.M.W. van Rijswick, 'Waterrecht op orde en in goede toestand', in: Th.G. Drupsteen, H.J.M. Havekes and H.F.M.W. van Rijswick (red.), *Weids Water*, SDU 2006, p. 463-492; H.F.M.W. van Rijswick, 'De Waterwet in relatie tot andere delen van het Omgevingsrecht, in: *De Waterwet*, Vereniging voor Milieurecht, 2007, p. 23-41; H. van Rijswick, 'De watertoets in Vlaanderen en Nederland: Een geschikt instrument voor externe integratie?', in: L. Lavrysen and F.C.M.A. Michiels (red.), *Milieurecht in de Lage Landen, Rechtsvergelijkende studies over de milieuvergunning, emissiehandel, de watertoets, natuurbescherming en bestuurlijke handhaving in Vlaanderen en Nederland*, BJU, Den Haag 2004, p. 203-213.

69 Republished in J. Verschuuren (red.), *Fundament onder het omgevingsrecht, een selectie uit het werk van Piet Gilhuis*, Wolf Legal Publishers, 2006.

could be necessary to change the scope of other environmental legislation in such a way that water interests can be taken into account.

IX Existing and new control mechanisms to protect water rights

When water management is based on conferring and protecting water rights and the duty of the government to realize these, the incorporation of the objectives and norms in the law will, in essence, suffice. Part of the government's duties will be the creation of rules and the taking of – also *de facto* – measures. Obviously, it must be possible to uphold water rights (by the government as well as citizens) and upholding them must actually take place (by governments). Citizens must know what they may demand in court. The same applies when other governments, national as well as international, fail to meet their obligations. This may lead to more court cases, which is not always appreciated in Dutch administrative culture or in the international context. On the other hand, only a few procedures are necessary to bring more clarity to relationships and obligations.

Laying down the objectives and norms, or rights and duties, in a European directive gives every member state, in principle, the choice of instruments with which it wants to meet the norms and how it wants to achieve its objectives. This is another feature of a directive: Directives are aimed at member states that have to transpose them in such a way as to achieve the required result. How a member state wants to achieve the required result is, in principle, its own choice. As a rule, however, directives are full of detailed obligations that member states must copy rather exactly into their national laws. The idea that directives are binding on member states as regards the result and that member states have a freedom of choice as to how they want to achieve this result has become a fiction.

Going back to the original intent of the directive as an instrument seems to be an attractive thought that deserves further consideration at the European level, with 27 member states each with their own law systems and differing geographical situations and distribution of economic activity over several sectors. It must be examined what are the minimum of obligations that must be incorporated in a directive in order to ensure that its water rights will actually be implemented. It would give member states far more flexibility than is the case now.[70]

In addition to the need for flexibility and the desire to be able to choose the type of management that is appropriate for regional river basin areas, the nature of water management and environmental management is changing too. Striving for a sustainable and integrated management of river basins demands, *in addition to* the classic control mechanisms, new instruments that are better

[70] See also European Governance, COM (2001) 428, p. 23; COM (2002)278, p. 12 and OJ 2003, C 321, p. 1.

suited for an approach based on a just and fair distribution of water rights and water duties: From regulation to distribution, a development that goes together with the development of a governance approach. Generally speaking, it can be said that the classic control mechanisms are easier to use for all parties. Governments, for example, have the power to grant permits in which they can give detailed rules on the exercise of water rights. It means permit holders immediately know where they are: what they can do and what they cannot do and the measures that must be taken.

The protection and implementation of water rights is complex. The objectives and norms define the water rights. After that, the scope of water rights should no longer be an issue. This scope is no longer negotiable. This approach may offer more flexibility in the implementation phase when the water rights are realized. It offers more individual or area-oriented discretion. It also requires different instruments, which, on the one hand, offer more flexibility but, on the other, must guarantee meeting the objectives and norms in order to prevent a violation of the water rights.

Classic control mechanisms

At the moment, regulation, including the distribution of water rights and duties, takes place by the prescription of countless instruments and measures such as making plans, general rules, permits with emission limit standards and monitoring. All this takes place in more than one policy area. The granting of permits also serves as an instrument which can be used to distribute, more or less, the amount of water available or pollution space. This does not happen very often, though. Permits are usually granted on a first come, first served basis and their granting is usually based on the application that is submitted. There is not much room for innovation or newcomers. Furthermore, the importance of extra-legal documents as soft law besides the detailed directives is increasing, while their legal status is not always clear and the democratically elected bodies do not have a great deal to say about them. Examples are the guidance documents on the Water Framework Directive and the BREF documents from the IPPC Directive.

Specifying the methods for protecting water rights in these instruments and guides is, however, quite different from defining and protecting the right itself by laying down objectives and norms. They must be regarded as aids to improve the protection of water rights rather than as further details on their substance. This is probably the reason why the European Court of Justice requires an exact transposition of a directive's obligations, including the instruments and measures prescribed, when a directive is aimed at the protection of our common heritage.

All the instruments mentioned above are considered to be classic control mechanisms, also called 'command and control' of government. For all the modern ideas on control mechanisms and governance, classic control mechanisms are still necessary, as the big stick to use for the *de facto* realization

and protection of water rights. The support for voluntary cooperation on the implementation of water rights – regardless of whether it is by governments or private persons – is of major importance, but tends to be stronger if backed up by regulation.

Financial instruments

Money comes after principles. I stated above that the Water Framework Directive does not regard water as ordinary merchandise but as part of our common heritage that as such deserves protection. This protection has traditionally been provided by the classic command and control instruments. On the other hand, the Water Framework Directive also allows the use of economic or financial instruments to achieve its objectives. It is based on "the polluter pays" principle and one could say 'the user (of natural resources) pays' principle. The Water Framework Directive uses the term water services and demands the cost recovery for water services provided by the government. This concerns the use of financial instruments. They may be used to fund activities undertaken by the government to make water available, which may concern the primary availability of the source (the distribution) as well as the treatment of waste water in order to make it fit to be used as a source again (the polluter pays for the treatment), and the construction and management of the systems required for this.[71]

Levies

Water rights – or at least their use – may be restricted by charging for the exercise of a water right (water levies). This financial bar must ensure that water rights are not misused at the expense of the rights of others. It also aims at a sustainable use of the source and protection against its pollution. Charges also ensure that the government has the means available to meet its obligations, particularly its ability to guarantee everyone's right to water. The point of departure must be a certain degree of solidarity. This financial burden often comes in the form of levies. A realistic price for drinking water ensures that there is no needless waste of water. A realistic price for safety may lead to people not living or investing in places where the price for safety is disproportionally high, or, when a certain location is selected anyway, the price is higher because of the guarantee of safety.

The funding of Dutch water management is done by a water levies system, a pollution tax (both by virtue of the Act on District Water Boards) and the treatment tax (Pollution of Surface Waters Act and Water Act). There is a separate groundwater tax (Groundwater Act and Water Act), while the local governments' water duties benefit from (a wide scope of) sewerage charges (Act on Local Government Water Responsibilities, Act on Local Government).

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[71] R. Uijterlinde, A. Jansen and C. Figuères, *Succes factors in self financing local water management, Netherlands Water Partnership*, The Hague 2003; H. Folmer and S. Reinhard (eds.), *Water problems and policies in the Netherlands*, RFF Press, 2008 (forthcoming).

The fact that certain polluting acts must be paid for must be distinguished from the right to pollute or contaminate. Water rights are concerned with a particular use – in the sense of a fixed guaranteed amount of water of a specific quality – of a source which is protected by the government or which enjoys a certain degree of protection against floods and flooding. This is not the same as a right to pollute, which is often wrongly regarded as a result of the regulation and payment for the consequences of a particular use, as an entitlement to inalienable rights. In my view the essence of water rights is different from that of rights that were the result of earlier regularization of, for instance, the use of water or a permitted level of pollution. The latter may be subject to restrictions, which may be restricted if the water rights of others are to be guaranteed.

Compensation

The obvious question is whether and to what extent the government is liable for damages for its restriction of existing pollution rights. When the restriction of rights is the result of a general tightening of norms to realize everyone's water rights, I do not think that a right to compensation is likely to exist, unless there is a major breach of the equality principle, the principle of legal certainty or the principle of legitimate expectations. An example of the law enabling a regular tightening of norms can be found in the Water Framework Directive and the IPPC Directive, which have been implemented in the Dutch Environmental Management Act as the duty to keep up to date, which also applies to discharging in surface waters (section 6.18 paragraph 3 Water Act).

A right to compensation should only be considered when certain people suffer as the result of the tightening of the rules. When certain individuals suffer as a result of specific decisions or *de facto* measures that have special consequences for them because they violate ownership rights while protecting the safety of others, things may be different. Think of changing the qualification of a plot of land from belonging to the inner dike area into becoming an outer dike area, the denomination and use of storage areas or the imposition, by operation of law or a decision, of a duty to tolerate. I believe that there is good cause for awarding full compensation. It is therefore for a good reason that transport and waterways legislation – following the compensation for expropriation – has in the Netherlands traditionally been based on this principle of full compensation.[72] The fact is that there is a difference between expropriation or restriction of ownership rights, on the one hand, and the regulation of ownership rights, on the other. [73]

Priority of rights

The distribution of water in the Netherlands is not subject to norms that guarantee water rights. The Water Act introduces a priority of rights, which indicate who is first served in the case of a water shortage. The system is based

[72] Waterstaatswet 1900, Belemmeringenwet privaatrecht.

[73] ECHR, First Protocol.

on the Groundwater Act, which was the first environmental Act that in 1986 had already chosen distribution as its major point of departure. The details concerning this priority of rights show a clear distinction regarding the importance of different water rights; an order of ranking is introduced and there is a prioritization of the different 'parties entitled to water'. It is not clear, however, whether in case of water shortage there will be a decision aimed at certain groups in general (a decision of a general nature) or an individual decision against which an appeal lies.[74]

The present Dutch Water Management Act allows the introduction of hosepipe bans in case of a drought. On the European level the European Commission published its plan regarding water shortage and droughts in the European Union in a notification to the European Parliament and the Council of Ministers.[75]

The obvious question is of course: who are the interested parties who are banned from using water because of a shortage. Apart from that, the question is whether there would be any entitlement to damages, and if so, on what basis. To compare: When the water authority issues a drainage ban or orders the inundation of some areas in a situation of excess rainfall, it will be regarded as a *de facto* as well as a legitimate action. We have to assume in such a case that parties are entitled to damages (section 7.11 Water Act). It is not clear, however, whether this system also applies to the priority of rights in case of drought of the Water Act.

Trading systems as new supplementary instruments?

It is not difficult to imagine that trading systems for water rights may supplement the existing command and control and financial instruments.[76] We cannot do without the classic control mechanisms for a just and fair distribution of water rights and duties, even though they may not always achieve the desired environmental result. Nor is the 'polluter pays' principle always fully applied.[77] I have to make the observation here, though, that the Dutch have managed to achieve a very high environmental output in the sense of water quality protection by way of the pollution tax based on the Pollution of Surface Waters Act. This success came about thanks to the right level of tax as well as the fact that it was imposed by functional water authorities who used all of the proceeds for the benefit of water management.[78]

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74 F.J. van Ommeren, *Schaarse vergunningen*, inaugural address, VU, Amsterdam, Kluwer, 2004, p. 33.

75 Brussels 18 July 2007, COM(2007) 414 def.

76 See: M. Peeters, 'Towards a European System of Tradable Pollution Permits?', *Tilburg Foreign Law Review*, 1993, vol. 2: 116-133.

77 P. De Smedt and F. Maes, *Naar een markt voor verhandelbare lozingsrechten? Een verkennend onderzoek*, Maritiem Instituut Universiteit Gent (not dated, see www.steunpuntmilieubeleidswetenschappen.be), p. 11.

78 R. Uijterlinde, A. Jansen and C. Figuères, *Succes factors in self financing local water management*, Netherlands Water Partnership, The Hague 2003.

Other countries have experience with trading systems for water rights.[79] Our esteemed colleagues from Ghent – Frank Maes and Peter De Smedt – have already examined a possible trading system for the discharge of polluted waste into surface waters in Flanders. The Dutch government, too – the Directorate-General for Public Works and Water Management, the National Institute for Integrated Freshwater Management and Waste Water Treatment – has ordered pilot studies on the trading of water rights.[80]

There are different types of trading systems for water rights; a distinction must be made between trading systems aimed at:

- the distribution of water use rights (use of the source);
- the trade in the product water; [81]
- the distribution of water pollution rights;
- the distribution of developments rights with respect to the right to safety.

Different preconditions must be in place for these systems to work properly.

Trading water use rights

The distribution of water use rights often features levies to create a financial bar to ensure a sustainable use of water. A trading system for water use rights has the same goal and its aim is the distribution of a fixed amount of water. The design of a trading system for water use rights is determined to a large extent by the issue of whether water (groundwater or surface water) is a *res nullius* or a *res communes omnium*, or the object of ownership by private parties. Water as a source is a res nullius in the Netherlands (Article 5:20 under c Dutch Civil Code). Water is for everyone, but belongs to no one. It goes without saying that the owner of the plot often has the first rights. This does not always hold true, however, as drinking water companies, for instance, withdraw huge amounts of water also from under the plots of other owners. In the Netherlands water can be used on condition that others do not suffer any damage and that the rules aiming at a useful and sustainable use are complied with. The details of

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79 P. Holden and M. Thobani, *Tradable Water Rights, A property rights approach to resolving water shortages and promoting investment*, The World Bank, Policy Research Working Paper, July 1996; M. Keudel, *Climate Change and Water Resources, An International Perspective*, IWP Discussion Paper No. 2007/2, Institut für Wirtschaftspolitik an der Universität zu Köln, January 2007.

80 Rijkswaterstaat Waterdienst, *Verdeling van emissies, Verkennende studie naar de mogelijke instrumenten voor alternatieve verdeling van emissies naar water*, uitgevoerd door KPMG Sustainability BV i.s.m. Hofland Milieu Consultancy en Sterk Consulting, January 2008 and M. Verduijn, *Marktwerling als instrument voor waterschaarste in Nederland, een verkenning van de situatie in Amstelland*, Utrecht University 2008 (forthcoming).

81 See: E. Brown Weiss, 'Water Transfers and International Trade Law', in: E. Brown Weiss, L. Boisson de Chazourres, N. Bernasconi-Osterwalder (eds.), *Fresh Water and International Economic Law*, Oxford: Oxford University Press 2005, p. 61-89.

this right of use had been beautifully elaborated in the Groundwater Act, which arrangement has been copied in the Water Act.

The USA, Australia and Chile have experience with a trading system for water use rights. Spain and Great Britain, in particular, are the European countries which have gained experience with it. Sustainable use of water is the main focus in a trading system for the use of water. A rule that rights that are not used in a certain manner are lost may stand in the way of sustainable water use because people would rather waste water than lose water rights. This is what happens in the USA with the distribution of ground rights through a trading system.

Not using water rights that are, as we could say, 'still stored in the cupboard' may lead to an unforeseen outcome in case of a water shortage, as was recently the case in Spain. Unused water rights were used to lead water from a branch of the Ebro from Northern Spain towards Barcelona. This had become necessary because the level in water reservoirs was very low due to limited rainfall in winter. The downstream users of the river from which the water was 'siphoned off' were anxious whether there would be enough water left for them for the summer period.[82]

If certain water rights are guaranteed for everyone – such as the sustainable use of water for economic activity, nature and drinking water– everyone must be granted a certain minimum. That minimum must be non-negotiable. A trading system must contribute to the achievement of the water objectives. The design of a trading system for water use rights must therefore be based on a balanced and just distribution among the parties.

Trading in water pollution rights

Trading systems for the regulation of the emission of pollution must define the pollution covered by it. Negotiable greenhouse gasses and manure spreading rights have been the subject of trading systems before and so have tradeable water pollution rights been abroad. Several systems are imaginable, such as the "cap and trade" model and the credit-based model. Every trading system for water pollution rights must contribute to a more even and just distribution and protection of water rights.

A credit-based model fits in with a company's current environmental or water permit required for its operations. Its aim is the abatement of emissions allowed by the permit based on the best available techniques. The USA has this system. The system seems to be suitable for discharges from point sources but has its disadvantages too, particularly with respect to the establishment of the basic emission levels (what is the regular prescribed level of protection?). This system fails to guarantee the meeting of environmental objectives as it has no fixed emission limit values. Therefore it does not completely satisfy the condition that water rights and duties must be fairly distributed.

[82] NRC Handelsblad 18 April 2008, p. 5.

The cap-and-trade model involves capping – by setting a maximum – the total emission. Subsequently, the rights of polluters must be distributed among them and an emission trade system must be created to enable the trading of rights. It has become clear that the system requires the institution of a proper starting level for the trade cap. The quality standard established for the regulation of polluting substances constitutes the suitable cap for the guarantee of water rights and helps achieve the objectives.[83]

Specific substances – such as nutrients and chlorides – seem to be the most suitable for a trading system. Thermal pollution may also be included in such a system. In combination with trading in nutrients it enables the regulation of the oxygen balance in a river basin. A trading system functions best with substances that spread easily (quickly) and evenly through the water. Specific toxic (persistent bio-accumulative toxic) substances often tend to be excluded from trading systems. Priority hazardous substances, the discharge of which will be phased out, are best regulated by an old-fashioned prohibition system, unless the rights are intended to be reduced to nil within a certain period of time.

If the system's aim is the gradual reduction of pollution, the emission limit value cap and the restriction of rights must be strictly regulated. To do this, the government must gradually take the pollution rights off the market. Older polluting activities must be prevented from benefiting from the lack of investment during a long period of time. Sustainable use of resources and innovation must be encouraged. Considering the system's goal – the reduction of pollution – there should be equal norms for different activities (point source discharges and diffuse discharges), unless there are serious reasons against this. If diffuse discharges are excluded from the trading system because of the complexity of regulating them within a trading system, the system's cap for the negotiable rights must be proportionally lowered in order to meet the established objectives.

As water management takes place at the level of river basins, the cap as well as the distribution of these rights to pollute must be determined at the level of the river basins. The granting of the rights to pollute should remain within the limits necessary to meet the quality standards for the river basin. Incidentally, it is also argued that a trading system for pollution rights works best for a smaller demarcated part of the river basin.[84] Besides, there must be an even distribution of pollution within a river basin, which means that the upstream part of the river must not be entitled to all the rights available to the river basin. The physical fact that water moves from high to low must also be taken into account. The place where the pollution occurs is also of major importance, owing to its effect on the water quality of the downstream part of the river basin. After all,

[83] See on the differences between the two systems with regard to CO_2 emission trading : M. Peeters, S. Weishaar, J. de Cendra, 'A Governance Perspective on the Choice between "Cap and Trade" and "Credit and Trade" for an Emissions Trading Regime', *European Environmental Law Review*, 2007, p. 191-202.

[84] De Smedt and Maes, p. 53.

the required standards of water quality should be observed throughout the river basin. Trade cannot be completely free in that sense. The design of a trading system also depends on the ability of water to clean itself, the sedimentation rate, the interaction with the groundwater, possible water abstractions, the presence of protected areas as well as the moment when the rights are exercised (think of thermal discharges in a warm summer). The reason why 'moving water' must be taken into account arises, among other things, from the duty of good neighbourliness. We have to accept that we need additional regulation to ensure that the prevailing quality standards are met throughout the river basin in order to protect these.

A system of tradable water rights is complex owing to the physical features of water: It moves within river basins. The implementation and protection of water rights are of the utmost importance for the design of a water trading system.[85] If that does not happen, it is doubtful whether the trading system is politically feasible. The system must also be efficient from an economic point of view and it must be in keeping with existing regulatory instruments, in particular those laid down in the management plans by virtue of the Water Framework Directive and the Water Act. As I said earlier, these measures are established by virtue of statutory rules in many policy areas and it must therefore be examined whether there are any additional preconditions arising from regulations in other policy areas. Examples in jurisprudence are the habitat test, the EIA duty and IPPC Directive aimed at the regulation of organizations with emission limit values based on the best available techniques.[86]

The above leads to the following recommendations:

It is worth examining water trading systems because they can serve as a useful supplement to existing forms of regulation. When designing such a system the following points of departure should be observed:

The government guarantees specific water rights to private persons. The design of the trading system must give pride of place to the protection of these rights, also for third parties who do not participate in the trading system. It means that the legal remedies must be up to standard in order to enable private persons to seek redress for their water rights in court. The wording of legal remedies depends on the design of the trading system. This issue deserves to be examined further.

Enforcement of the system is of major importance, also because water rights must be protected properly.[87] The fact that water streams and moves in a river basin means that a trading system for water rights must meet stricter requirements.

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[85] One could use the waste water discharge system used by the USA EPA. See De Smedt and F. Maes, p. 65 et seq.

[86] De Smedt and Maes, p. 233.

[87] See M. Peeters, 'Inspection and market-based regulation through emissions trading. The striking reliance on self-monitoring, self-reporting and verification', *Utrecht Law Review*, June 2006, p. 177-195.

X Shared responsibilities: cooperation in river basin management

Several parties share the responsibility for the just distribution of water rights and duties. Their cooperation is essential. The competent water authorities of one river basin share responsibilities regarding the water management of a river basin. Water authorities also share responsibilities with the competent authorities of related policy areas. And finally, attention to the shared responsibilities of government bodies and private parties is growing.

The cooperation with private parties may take different shapes. First of all, the government may confine itself to the compulsory private participation as prescribed by water legislation (Water Framework Directive, Floods Directive and the national Water Act). Furthermore, social organisations may be involved in the preparation and enactment of policies. Closer cooperation occurs in relation to public-private partnerships, which are used for the implementation of water works. This may vary from the contracting out of the construction and management of sewage treatment plants (Harnaspolder) to the realization of major area-orientated water projects such as the construction of a lake in Wieringer between the former coast and empoldered land and the payment for so-called 'blue services', which involves extra water protection measures taken voluntarily, at a charge. Public-private partnerships must be made to fit within the existing system of European and national legislation. It means, among other things, that no government assistance may be granted, the European rules on tendering must be complied with, the prohibition to pay for measures arising from statutory obligations applies and, finally, the cooperation may not obstruct the protection and realization of water rights.[88]

Shared responsibilities in water management and related policy areas

Which parties play a role in river basin management and the distribution of water rights and duties? An important condition and instrument for a proper distribution is that the cooperation between the parties involved must be geared towards achieving the objectives. Parties must agree on how the water rights and duties must be distributed among the different users in the river basin. One of the types of cooperation is the partnerships between the different parties – states and local governments – involved in water management. Another type of cooperation involves partnerships between the competent government bodies responsible for the policy and management of areas that are not primarily part of water management, such as the environment, nature, agriculture, substances and products, spatial planning, energy and transport.

Meeting the objectives – the water rights – usually takes place by taking different measures arising from the entire field of European environmental

[88] The execution of public-private partnerships in compliance with European preconditions is the object of the Phd research that is currently being conducted by Paul Heinsbroek.

law and national environmental law and even beyond. Think of the establishment of quality standards and emission limit values, the obligation to set up a permit system or any other form of regulation, the admission of substances and products on the market and the designation of areas or zones requiring special protection as well as the regulation with respect to energy sources and transport. All these measures are laid down in management plans and river basin management plans. The updating of norms, permits and measures, if that is required for the river basin management, must also be reasonable and fair for all parties involved in the management of the river basins. And finally, parties have to agree on the monitoring, alarm systems, the exchange of information, dispute resolution and the implementation of exceptions, if any.

Shared responsibility of water authorities based on the river basin approach

The distribution of burdens and benefits – water rights and duties – stemming from the required measures applies to the distribution among the countries that are part of the river basin as well as the different sub-basins within one member state. Contrary to what some believe in the Netherlands, the obligations arising from directives do not only apply to the relationship between member states, but also to the part of a river basin that is on the territory of one member state. This applies to the Water Framework Directive as well as to the Floods Directive.

The cooperation between Border States in a river basin is statutorily required in a number of treaties and directives (old and new ones). An example is Article 4 of the Treaty of New York (UN Watercourse Convention) which makes every state whose territory is the host of an international water course competent to participate in negotiations on the content and creation of a watercourse convention and become a party to it. Article 9 of the Helsinki Convention lays down the compulsory cooperation between riparian states in a shared river basin. The states must enter into bilateral or multilateral agreements or other arrangements on the basis of reciprocity and equality. Obligations to cooperate can also be found in multilateral treaties such as the Rhine Treaty, the Meuse Treaty and the Scheldt Treaty and bilateral treaties such as the Border Treaty between the Netherlands and Germany, which led to the creation of the permanent Dutch-German Boundary Waters Commission by virtue of Articles 57 and 64; and the Ems-Dollard Treaty with its supplementary environmental protocol, which caused the creation of the permanent Dutch-German Ems Commission pursuant to Article 29. An example from an older directive is the Bathing Water Directive, which made the cooperation between Border States compulsory in order to meet the objectives.[89] The Water Framework Directive provides for the cooperation within river basins in Article 3, the Floods Directive in Article 3 paragraph 1 and for the Marine Strategy Framework Directive[90] in Article 6.

[89] Directive 76/160/EEC, Article 4 paragraph 4 and ECJ case C-198/97, *Commission* v. *Germany*.

[90] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for Community action in the field of marine environmental policy, OJ L 164/19.

Within the EU an obligation to cooperate applies to member states as well as other states within the same river basin, although the cooperation cannot be made compulsory for non-member states.[91] This cooperation may also include the use of existing partnership arrangements. The river basin approach of the Water Framework Directive does not stand in the way of transboundary cooperation.There are already many forms of international partnerships in river basins, some of which have been especially created for water management while others aim at cooperation in general. Some forms – e.g. the treaty – are better suited to cooperation regarding the major rivers than other ones. Other forms, such as cooperation by virtue of the UNECE Water Convention, the European Charter of Local Self-Government, the Benelux Convention, the Anholt Convention or the European Grouping of Territorial Cooperation Regulation (EGTC) are better suited to cooperation with respect to smaller, regional transboundary water courses. Cooperation also takes place within Euregions. Besides, there are many forms of informal cooperation, which also lead to good results. The type of cooperation depends on the subject to be regulated, the participating parties – with special attention for the role of local and regional governments such as district water boards -, the administrative powers that may be provided for in a convention or their transferral to a joint or international public body, and the method of dispute resolution.[92]

Cooperation by means of treaties may lead to legal issues regarding the distribution of powers between EU member states and the EU. In the meantime it has become the case law of the European Court of Justice that international treaties with some relation to European law are, in principle, part of the European legal order. As a result, the Court applies these treaties and interprets them as if they were part of European law. European law has primacy in the European legal order and treaties must be compatible with European law.[93] The same applies, in principle, to treaties between member states and non-member states.[94] Treaties to which the EU is a party form an integral part of the legal order of the European Community.[95]

One of the major problems on a European level with respect to the distribution of water rights and duties is the situation that the obligation to cooperate is observed but that the desired result, required by the various water directives, does not always come about in a timely fashion. The obligations

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[91] See E.Hey and M. van Rijswick, 'Transnational watermanagement', in: Oswald Jansen and Bettina Schöndorf-Haubold (eds.). *The European Composite Administration*, Intersentia 2008 (forthcoming).

[92] See H.K. Gilissen, *Klinkt het waterakkoord ook over de grens? Grensoverschrijdende samenwerking in het waterbeheer*, Utrecht University, Centre for Environmental Law and Policy, (forthcoming).

[93] ECJ case C-3/91, *Exporteur SA/Lor SA et Confiserie du Tech*.

[94] See the "Open Skies" cases which are discussed in: R. Holdgaard, The European Community's Implied External Competence after the Open Skies Cases, 8 *European Foreign Affairs Review* 2003, *Journal for European Environmental & Planning Law* 2004, no. 3, p. 365-394).

[95] ECJ case 181/73, *Haegeman* v.. *Belgium* and ECJ case 12/86, *Demirel* v.. *Stadt Schwabisch Gmund*.

following from directives must be fulfilled by each individual state. It must be concluded, however, that the European system of obligations in directives to be fulfilled by individual member states, on the one hand, and the management of transboundary river basins, on the other, are not in keeping with each other. Mechanisms must be developed to bring both legal orders more into line with each other. In order to make the river basin approach more in keeping with the general system of European law, we have to examine the instruments available to member states to protect the recognised water rights in the way they have been laid down in the European water directives. These possibilities can be found, in addition to the partnerships mentioned earlier, in administrative and private law instruments to combat harmful activities in river basins in other member states.[96]

Dutch water law also makes the cooperation between government bodies compulsory. The Water Act has a number of provisions on this subject. The cooperation applies to the state, provinces, district water boards and local governments as well as between water managers and provinces that form part of the same river basin. An agreement based on public law between the parties involved in a specific (sub-)river basin district is the most appropriate instrument. The Water Act gives the water agreement as the instrument for government bodies with responsibilities in the field of water management to shape their cooperation.

XI Dispute resolution and conflict management

A legal system cannot properly function without an adequate mechanism for dispute resolution. These disputes may occur in many relationships.

On an international level, disputes usually occur between states and these may submit disputes before an arbitral tribunal or the International Court of Justice.

On a European level disputes may occur between various parties. First of all, disputes between member states can be submitted to the European Court of Justice. Arbitration or any other international form of conflict resolution is generally prohibited for the areas covered by EU regulation. Member states have few options for the submission of disputes regarding these subjects: they can either go to an international court (the Permanent Court of Arbitration or the International Court of Justice) or to the European Court of Justice. As it is, member states must seek redress with the European Court of Justice pursuant to Article 292 of the EU Treaty in the case of a dispute about the interpretation or application of European law. The United Kingdom and Ireland submitted a dispute to

[96] Jasper van Kempen is researching this subject at our research centre as a Phd student, with support from the local governments of the Meuse river basin.

the Permanent Court of Arbitration in the MOX Plant case. This arbitral tribunal suspended the case on 14 November 2003 to enable the European Court of Justice to give a decision.[97] The ruling of the European Court of Justice came on 30 May 2006. It decided that the European Court of Justice has exclusive competence to hear disputes between member states on the interpretation and application of treaties regarded as an integral part of European law.[98] If member states refer a dispute to an international court anyway, they risk acting contrary to the principle of Community loyalty contained in Article 10 of the EC Treaty.

Sometimes a case can be brought before a national court in one of the states involved in the dispute, although this requires overcoming quite a few legal obstacles.[99]

The Water Framework Directive provides for a dispute resolution mechanism which allows for the submission of specific problems, such as transboundary pollution or pollution caused by activities for which the member states lack adequate regulation powers, to the European Commission. It is not clear what may be expected from the Commission and what consequences a member state may face as a result of its submission of a problem or dispute to the Commission. The Commission does not have the power to give a binding ruling. The submission of a dispute to the Commission does not necessarily provide a justification not to meet the objectives in good time. It is possible, though, that one of the member states of a transboundary river basin submits a case to the European Court of Justice, for example in proceedings in which a preliminary reference is made.

The Marine Strategy Framework Directive and the Priority Substances Daughter Directive do provide explicit arrangements for the situation when it is beyond a state's control to meet the objectives. This happens in the form of an exception. As these are the two most recent directives on the waterfront, there is hope that this situation will improve in the future. In my view, the directives must also give a clear description of the obligations the Commission must meet, which would benefit the clarity of the rights and duties of member states and those of the Commission in this respect. It is in the interest of legal certainty and the credibility of European law. Furthermore, mechanisms can be developed which are already used in other policy areas such as the application for a binding ruling from the Commission or maybe the Council of Ministers by a majority of votes.[100]

Conflicts may also occur between the Commission and one or more member states. According to European law the Commission is the custodian of European

[97] Permanent Court of Arbitration 14 November 2003, Order no. 4, *Ireland* v.. *United Kingdom* (MOX Plant).

[98] ECJ, case C-459/03, *Commission* v. *Ireland*.

[99] J.J.H. van Kempen, *Interstatelijke civiele sancties wegens grensoverschrijdende milieuvervuiling. Hindernissen en kansen*, Utrecht University, 2007.

[100] See A.A. Keessen, *European Administrative Cooperation*, diss. (forthcoming).

law and it may submit cases to the European Court of Justice. The European Commission has indicated that it will first address the upstream countries when it comes to upholding the water directives, but this is not really a firm commitment.

Conflicts may also occur between private parties and the government. It is extremely difficult for private parties to bring a case before the European Court of Justice.They are able to defend their water rights before a national court, though, in their own country as well as elsewhere. The scope of these possibilities is determined by national law systems. The wording of the water rights also plays an important role regarding the remedies and private parties have to uphold them with the help of the courts. I dealt with this subject at the beginning of my address.

XII Conclusions and recommendations

Water management is changing from an approach based on sectors into an integral and sustainable management of river basins. Not only water, but water law, too, is moving. Classic control mechanisms alone are not enough to create a just distribution of water rights and duties. The change from regulation into distribution concerns the standardization of water rights as well as the implementation phase.

Water rights include the right to sufficient and clean water, the right to safety and nature's right to water. The protection of these rights is particularly by the application of common law. European and national water law largely comply with the requirements of a just distribution of water rights and duties. European law is today's best bet if you are looking for the protection of water rights. It is as if the Netherlands has hardly any ambitions left: only European obligations are elaborated or whatever it is that is absolutely necessary but no more than that. And even that does not always happen; we are far from meeting all the obligations from the directives and there are never enough funds in the national budget for the maintenance of the most important dikes to protect against flooding.

The integration within European water law is starting to come together more and more thanks to the introduction of the Water Framework Directive. There is room for improvement to keep in line with other policy areas – external integration -, however. The European law system is not in line with the protection of transboundary river basins. Major improvements may be affected here, which justify the shared responsibility for the protection of water rights within river basins.

The Dutch Water Act is also a mark of considerable progress. It offers more legal certainty. There is, however, also room for improvement with respect to its relation with other policy areas at a national level. A certain knock-on effect

of the water objectives in the decision-making process in other policy areas is necessary to protect water rights. Because of the speciality principle in Dutch law this is not always possible without a change of legislation. The consequences of the river basin approach can be improved with in the national legal system. In addition to the existing instruments, research into more market-oriented instruments for the distribution of water rights and duties can be conducted in the next few years, taking into consideration the fact that water is a public commodity and must be managed within river basins.

The government must protect water rights by providing for well-balanced distribution mechanisms for water rights and duties in legislation on all policy areas that are of importance for water law. The government itself needs rights and powers to enable it to realize water rights and it must actually exercise them.

Citizens not only have rights; they also have several legal water duties. There is no general duty, however, to handle water in a sustainable way. It is true that such a duty would mean that citizens are also one of the parties who share responsibility, but such a general duty of care would merely have a symbolic meaning from a legal point of view.

Legal remedies are crucial for realizing the implementation of water rights. They enable private parties to go to court to actually realize the implementation of their rights. The government also needs remedies to be able to comply with its own obligations. Therefore legal redress should not be restricted. Private persons want to appeal against concrete decisions because of the lack of remedies in the Dutch legal system regarding plans and general rules, in which important decisions on distribution are made and the fact that people do not blindly trust the legislator's and administration's promises. Would you? It is a matter of profound distrust and is part of a private party's own responsibilities. After all, if the government does not take any measures, a private party will have to do it itself. Of course, legal protection may become more efficient, in the sense that dispute resolution will become more efficient. European law gives many guarantees to private parties, but it is completely dependent on the national courts for their realization. The legal protection in Dutch law is decreasing rather than increasing.

As far as water protection is concerned you can see that water rights are easily promised, but observing them is quite another matter. It is becoming increasingly difficult to submit a violation of water rights to an administrative court. This is the result of the Dutch prohibition of a constitutional review, the lack of legal protection against (more) general rules, the increased use of general rules instead of permits, and the renouncing of legal redress against plans which distribute benefits and burdens. The recent proposals by Members of Parliament Rutte and Van Geel to examine how the concept of the interested party in the General Administrative Law Act may be restricted is also part of the trend which reduces legal protection by the administrative courts. All of this frustrates the party who has an interest in a water right and it is a cause for concern that undermines our confidence in the rule of law. I know that this

is not a modern view to have, but this is how I see it. I, too, was a student at Utrecht University and its study programmes then and now pay particular attention to the rights of vulnerable parties. It is an important principle for all areas of the law, whether it is about water rights, the protection of privacy, the protection of aliens, combating terrorism or wrongful government acts. Protection against the government takes up an important place in the law.

The guarantee of water rights by means of fixed objectives and norms and by offering adequate legal protection is the best option for a flexible implementation. It is recommended that a mixture of instruments are developed that enable more discretion. I see it as my duty in the coming few years to think along the lines of how water rights and duties may be distributed as justly and fairly as possible among the parties in a river basin.