

Water for all?

Developing a human right to water in national and international law

Grotius Lecture given by The Rt Hon Lady Justice Arden

23 March 2016

SUMMARY *

Few things are more fundamental to human life than water. Yet, according to the UN, there is a risk that within thirty years one in four people will live in a country affected by chronic or recurring shortages of fresh water. With continuing industrialisation and climate change, we now need a principle of law that entitles everyone to a minimum amount of safe water for drinking, sanitation and growing food.

Human rights law provides the obvious framework for achieving this aim, and by tracing recent developments on the national, supranational (e.g. the European Convention on Human Rights) and international level, it becomes clear that the human right to water is an idea whose time has come.

At the **national** level, the common law has historically been the main instrument for establishing water rights. In the first chapter of *Common Law and Modern Society – Keeping Pace with Change*¹, published in 2015, I note that there has been a regular stream of water-related cases in England and Wales in the two centuries since the industrial revolution, despite plentiful water in this country. Not surprisingly, therefore, the common law related to water is highly complex. Furthermore, it has not served non-owners. So, significantly for the international context, there has been a clear shift in recent years from riparian ownership to natural rights theory. This is significant for the international context. Beyond the UK, India has proved itself a pioneer in recognising a right to safe water.

The **supranational** courts responsible for human rights have also taken up the water challenge. Even where a human right to water is not conferred by their founding instrument, as in the case of the European Convention on Human Rights, they have been developing such rights.

However, where the right to water has been established, it can still be hard to determine water allocation, especially where there is not enough to go around or where rivers cross boundaries, as between China and the countries of the Mekong Delta. Some help may come from the case law of the Supreme Court of the United States. Its new “equitable utilisation

* The full text of this lecture is expected to appear in the *International and Comparative Law Quarterly* (published by Cambridge University Press for the British Institute for International and Comparative Law) in late 2016/early 2017.

¹ Oxford University Press, 2015.

doctrine” has enabled it to settle disputes arising from competing needs for water from rivers running through more than one of its states.

Finally, at the **international** level, there have been two main types of development. First, a number of countries decided to privatise their water industry, especially in South America, prompting a clash between water as an economic asset and water as a human right. They entered into agreements providing for arbitration in accordance with the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Second, the wider international community has recently moved closer towards creating a human right to water. For example, a new interpretation of the International Covenant on Economic, Cultural and Social Rights of 1966 (ICESCR) issued by the UN Committee on Economic, Social and Cultural Rights in 2002 has paved the way for recognition of a human right to water. And most recently (in 2015), the UN Agenda for Sustainable Development, with its targets for 2030, suggests that the concept of water as a human right is finally taking root.

In conclusion, with growing recognition of the problem, the right to water is well on the way to being recognised in international law. This will have many benefits. It will influence both the conduct of states attempting major infrastructure projects and the decisions of international lenders and investors. It could also make a huge contribution to the settlement of international disputes and proper water management worldwide. The establishment of a human right to water may even be the start of a new world order.

The Rt Hon Lady Justice Arden

March 2016

© Dame Mary Arden 2016

Speeches published on this website are personal views and do not necessarily reflect those of the judiciary as a whole.
