

# **Human Rights and Access to Water**

**Comments by**

**the**

**Federal Republic of Germany**

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**of the**

**United Nations Human Rights Council**

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## **I. Introduction**

Providing access to water is one of the most exigent challenges of the 21<sup>st</sup> century. In the United Nations Millennium Declaration, heads of states and governmental leaders committed themselves “to halve the proportion of people who are unable to reach or to afford safe drinking water” by the year 2015.<sup>1</sup> In recent years, a development in international law has marked a fundamental shift in the approach of the water scarcity problem as an issue of the realization of human rights. Access to water is now seen as more than a “commodity or service provided on a charitable basis”, but as a justiciable legal entitlement.<sup>2</sup>

The Committee on Economic, Social and Cultural Rights (hereinafter the Committee) has played a significant role in this process by, *inter alia*, adopting its General Comment No. 15 on the right to water. Therein, the right to water is explicitly acknowledged as an existing right of the International Bill of Rights. Its legal foundation stems mainly from the rights to an adequate standard of living and to the highest attainable standard of health as enshrined in articles 11 (1) and 12 of the International Covenant on Economic, Social and Cultural Rights. Or, as the Committee puts it “[t]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.”<sup>3</sup>

Another important step in the recognition and realization of the human right to water is carried out by the Office of the High Commissioner for Human Rights, which asks for information from stakeholders regarding the equitable access to safe drinking water and sanitation at the request of the Human Rights Council.<sup>4</sup> The following remarks try to answer the questions of the Office of the High Commissioner for Human Rights as outlined in the questionnaire.

## **II. Views on international human rights obligations to be taken into account in relation to equitable access to safe drinking water and sanitation.**

The federal government of Germany, the *Bundesregierung*, has strongly supported the idea and the concept of a human right to water. The government has welcomed the adoption of the Committee’s General Comment No. 15 on the right to water and sees it as valuable assistance in the interpretation and fulfilment of the obligations of states under international law.

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<sup>1</sup> United Nations Millennium Declaration, General Assembly Resolution 55/2 of 2000, para. 19.

<sup>2</sup> WHO/OHCHR et al.: The Right to Water, p. 9.

<sup>3</sup> General Comment No. 15, UN Doc. E/C.12/2002/11, para. 2.

<sup>4</sup> Human Rights Council Decision 2/104, 27 November 2006.

A few examples will demonstrate the many projects, activities and initiatives realized by the German government regarding the right to water and water supply.

Germany, together with Spain, sponsored the present initiative in the Human Rights Council, leading to the Council's Decision 2/104 "Human Rights and Access to Water". The Federal Minister for Foreign Affairs, Frank-Walter Steinmeier, highlighted this initiative in the German Parliament, the *Bundestag*, on the occasion of a speech held there in November 2006, which proves the importance of this initiative for the German government. The requested study of the High Commissioner for Human Rights is supposed to be a first step towards the formulation of recommendations regarding the implementation and realization of the right to water. The German Federal Foreign Office will support this process and engage actively in it. In 2001, the International Conference on Freshwater was hosted and organized by the federal government of Germany. The Conference with over seven hundred participants adopted the "Bonn Recommendations for Action" which contain important principles for access to drinking water and which found worldwide attention. Replying to disputes in the course of the Conference as to whether there is or should be a human right to water the Federal Minister for Economic Cooperation and Development, Heidemarie Wieczorek-Zeul, made clear in her closing address: "When the poor have no access to water, it denies them the decent standard of living to which they are entitled as a human right."

In the year 2004, the Food and Agricultural Organization of the United Nations adopted the "Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security", which were essentially initiated, partly financed and strongly supported by the German government. Guideline 8c contains a provision which, *inter alia*, calls on States to strive to improve access to water resources. In 2005, the Federal Ministry of Food, Agriculture and Consumer Protection supported an International Workshop in Berlin, focussing on the question of how to implement the Voluntary Guidelines.

In 2005, the Federal Foreign Office sponsored an international conference on the human right to water with 130 participants in Berlin, continuing the national and international debate about the normative content and the national realization of the right to water. As an outcome of this conference, a publication of the results and contributions to this conference was released.

In the framework of development cooperation Germany assists developing countries realizing their obligations regarding the right to water by providing about 350 million euros annually. Non-discriminatory access to water and sanitation takes priority in these projects, which are mainly conducted under the aegis of the Federal Ministry for Economic Cooperation and Development. Already in 1996 in its 3<sup>rd</sup> Periodic Report under the International Covenant on

Economic, Social and Cultural Rights, Germany stressed the importance of the satisfaction of basic human needs and vital public services, mentioning explicitly the supply of drinking water as part of the fight against poverty within the scope of German development cooperation.

Germany in April 2007 has ratified the Protocol on Water and Health to the UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes. The aim of the protocol is to enable access to sufficient water supply and adequate sanitation in the UNECE region.

### **III. National legislation or draft legislation related to equitable access to safe drinking water and sanitation (constitution, specific law, regulation, etc.), including with regard to private sector provision of related services / Examples of judicial decisions related to access to safe drinking water and sanitation.**

#### **1) Constitutional Provisions**

##### **a. Preliminary Remarks**

The German Constitution, the *Grundgesetz* or *Basic Law*, contains a catalogue of basic and human rights as enshrined in articles 1 to 19. However, the Basic Law does not explicitly recognize the right to water *per se*. Nonetheless, the human right to water is indirectly acknowledged as part of the German Constitution by the way the relevant provisions are interpreted by courts and the legal doctrine. Thus, the provisions of the Basic Law have to be evaluated in the light of judicial decisions interpreting these norms. After introducing the applicable articles of the *Grundgesetz* their content with regard to the right to water will be highlighted.

##### **b. Relevant Provisions of the Basic Law**

The most important provision of the Basic Law is laid down in article 1 (1) and reads: “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.” The fundamental principle of human dignity at the very beginning of the *Grundgesetz* guarantees the anthropocentric orientation of the Constitution, recognizing the paramount importance of the Basic Rights of the individual person for the legal order in Germany. In article 1 (2), the Constitution determines that “[t]he German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of

peace and of justice in the world”. More specifically, article 25 of the Basic contains the provision that “[t]he general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.”

Article 3 of the Basic Law contains the central non-discriminatory provision in German Law and ascertains in paragraph (1): “All persons shall be equal before the law.” Paragraphs 2 and 3 comprise special equality rights. Article 3 (2) guarantees: “Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist. Article 3 (3) continues: “No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability” establishing a higher level of protection compared to the general clause of article 3 (1).

Article 20 (1), which reads “The Federal Republic of Germany is a democratic and social federal state”, includes the so called *Sozialstaatsklausel* or Social State Principle. In the context of local water supply, another article is important as well: In article 28 (2), municipalities are entitled to a certain degree of self-administration, they “must be guaranteed the right to regulate all local affairs on their own responsibility...”

The Basic Law also mentions the “adequacy of food supply” and “the management of water resources”, although these do not constitute substantial provisions, but merely govern the competences in these areas.

### c. International Human Rights and the *Grundgesetz*

Article 1 (2) names the “inviolable and inalienable human rights as the basis of every community”. The aim of article 1 (2) is, however, not to incorporate international human rights instruments directly into the German Constitution, but to commit the legal order of Germany to the idea of human rights as entitlements which by their nature are anterior to and independent of the State. With regard to the most important international human rights instruments, article 1 (2) allows for an interpretation of the Basic Rights of the *Grundgesetz* in the light of international human rights. Therefore, this provision might serve as a gateway to interpret the provisions of the German Basic Law in view of the International Covenant on Economic, Social and Cultural Rights including the right to water.

Furthermore, it shows, just like the aforementioned provision of article 25, the permeability of the German constitutional order for provisions and standards of international law (*Grundsatz*

*der Völkerrechtsfreundlichkeit*). According to article 25, general rules of international law are actually part of the German Federal Law, preceding the laws and directly creating rights of individuals. The term “general rules of international law” is to be understood as covering international customary law and general principles of law as defined by article 38 (1) of the Statute of the International Court of Justice. Consequently, if the right to water was qualified as a provision of customary law, it would automatically be part of the Federal Law of Germany and directly applicable, preceding other non-constitutional laws.

d. Social State Principle in conjunction with human dignity

The Basic Law contains, as explained above, the Social State Clause. At first, this clause establishes an objective legal order, requesting the State and especially the legislation to create a social order. This is to say, the Social State Clause of the German *Grundgesetz* constitutes an obligation to guarantee the *Existenzminimum*, i.e. the subsistence level. Or as the *Bundesverfassungsgericht*, the Federal Constitutional Court puts it: Article 20 (1) requires the State to create the minimum conditions for a citizen’s existence in dignity.<sup>5</sup> There is consensus that essential foodstuff, clothing, housing and health services fall into this category. Moreover, there can be no doubt that drinking water as a vital need belongs to this category of ‘minimum existence’ as well.

However, the Social State Clause does *per se* not enable an individual to demand any services or goods from the State, since the individual is not provided with a subjective legal position by the clause as part of the objective legal order. In 1951, the Federal Constitutional Court mentioned the possibility, that, in case the State should arbitrarily violate this obligation, an individual could be directly entitled by this provision.<sup>6</sup> Three years later, the Federal Administrative Court, for the first time, acknowledged the existence of a constitutional entitlement to a minimum of benefits.<sup>7</sup> Today, this legal entitlement extracted from the Social State Clause of article 20 (1), in conjunction with the guarantee of human dignity as enshrined in article 1 (1), is accepted by the jurisprudence as well as by legal scholars.

It is important to note that, according to the jurisprudence<sup>8</sup> and legal theory, the minimum existence level is not limited to a mere survival of the individual. The social assistance safeguarded by the constitution encompasses a so-called “socio-cultural minimum existence level”, guaranteeing a life in dignity comprising, for instance, participation in cultural life.

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<sup>5</sup> BVerfGE 82, 60 (80), 1990.

<sup>6</sup> BVerfGE 1, 97, 1951.

<sup>7</sup> BVerwGE 1, 159, of 1954.

<sup>8</sup> BVerfGE 92, 112 (114).

Insofar, it is obvious that – indirectly – the German Constitution acknowledges a right to water as an individual entitlement being part of the right to a “minimum existence” or to social assistance. However, the practical relevance of this legal construction has been quite marginal, since an entitlement to social assistance can also be found in non-constitutional provisions. Nevertheless, the constitutional entitlement establishes a minimum prerequisite to be met by all ordinary laws, i.e. by laws hierarchically below the constitution.

e. Services for elementary requirements (Concept of *Daseinsvorsorge*)

Besides the Social State Clause, another concept of German Law is of high relevance for the right to water as formulated under the ICESR and other provisions of the international human rights system. The idea of *Daseinsvorsorge* (roughly: “services for elementary requirements”) is a specific German concept, which dates back into the 19<sup>th</sup> century. Although originating in the municipal sphere, the Federal Constitutional Court made clear that “services for elementary requirements” are an issue of constitutional importance.<sup>9</sup> *Daseinsvorsorge* is to be understood as an area in which the State directly cares for the individual citizen by providing services or goods. In this regard, the State has to create particular structures or an appropriate framework for those areas in which the free market alone could not effectively guarantee the supply of essential goods or services. This is to say, the concept of “services for elementary requirements” is seen as an important public duty, which cannot, however, be understood merely in a sense that the State itself would have to provide services or goods. The municipalities can freely decide to leave some areas to the private sector.

To illustrate this concept *Daseinsvorsorge* covers areas beyond water supply such as energy supply, waste disposal, public transport, cemeteries, and cultural or sports facilities, etc. As both water supply and access to sanitation are embraced by “services for elementary requirements” this concept is of high importance for the national implementation of the right to water.

According to the German system of legal competences, “services for elementary requirements” fall into the responsibilities of the municipalities. The above mentioned article 28 (2) of the Basic Law secures the right of municipalities to deal with all “local affairs on their own responsibility”, i.e. also with the local water supply and sanitation services. So far, offering services for elementary requirements is a municipal right, but not a municipal obligation.

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<sup>9</sup> BVerfGE 66, 248 (258).

But on further analysis, the concept of *Daseinsvorsorge* is constitutionally rooted in the Social State Clause, the guarantee of human dignity and the idea of the substantial effectuation of the Basic Rights, i.e. as a means to realize and to implement the Basic Rights. As a consequence thereof, providing citizens with goods and services including water supply is not only a right of municipalities but will turn out to be a constitutional obligation, provided that an unbearable situation emerges.

#### f. Non-discrimination and equality

Article 3 of the Basic Law provides for equal access to all State-run systems and facilities. From this it follows that all public water or sanitation systems have to be accessible on a non-discriminatory basis.

In this context, the difference between the concepts of social assistance and “services for elementary requirements” becomes evident. Social assistance is intended to support individuals in need by providing services, goods and especially financial means in order to allow them to satisfy essential and vital needs. From this point of view, social assistance flanks the non-discrimination provisions of article 3 to provide – to a certain extent– social justice and equality.

On the other hand, the concept of *Daseinsvorsorge* is not limited to a certain group of individuals in need, but aims to secure an equal accommodation with certain goods, such as water, of all individuals within the competence of a municipality. It is the task of “services for elementary requirements” to establish area-wide coverage. For example, the municipality in principle has to offer a water connection also to those citizens who live in a rural or remote area of a community, irrespective of economic profitability.

To summarize, both the concepts of social assistance and the idea of “services for elementary requirements” aim, at least to a certain extent, to safeguard substantial equality, but each with different approaches.

## **2) Legislation guaranteeing aspects of the human right to water**

The right to water is not explicitly mentioned or guaranteed in German ordinary law. Nonetheless, German law mirrors many aspects of the human right to water as it is interpreted by the Committee, which shall be illustrated in the following paragraphs.

a. The International Covenant as Federal Law

The International Covenant on Economic, Social and Cultural Rights, is a binding instrument of the national law in Germany. After it was approved by the German Parliament in 1973 and entered into force in 1976, the Covenant has been applicable as statutory law even with a primacy over other colliding national provisions. Therefore, articles 11 und 12 of the International Covenant on Economic, Social and Cultural Rights, which contain the right to water, have to be applied by German courts and authorities.

Occasionally, courts directly refer to provisions of the ICESCR. The Administrative Court of Frankfurt, for instance, ruled that the relevant provisions have to be taken into account as a concretizing element of the administrative margin of discretion.<sup>10</sup> In another decision, the Higher Administrative Court of Baden-Württemberg dealt with the applicability and justiciability of the Covenant. In 2003, the Federal Administrative Court made clear that individuals are entitled to invoke the provisions of the International Covenant on Economic, Social and Cultural Rights before German Courts, dealing with the right to education as enunciated in article 13 of the Covenant.<sup>11</sup>

It is therefore not unlikely that German Courts will directly refer to the right to water as enshrined in articles 11 and 12 of the Covenant to consider them in their decisions.

b. Social Law

The central legal act dealing with the issue of social assistance is the *Sozialgesetzbuch XII* or Social Security Code XII. Section 17 of the Social Security Code XII implements the constitutional prerequisites and clarifies that individuals are entitled to receive social assistance. The granting of social assistance is neither a matter of charity nor has the public administration a margin of discretion. Section 27 (1) outlines the content of social assistance for a necessary livelihood and reads basically: The necessary livelihood encompasses in particular food, housing, clothing, personal hygiene, household contents, heating and personal needs of daily life including to an appropriate extent the participation in cultural life. Of course, access to water and beverages is a vital component of social assistance. Water required to prepare food is covered as well as water for personal hygiene, whereas housing comprises a connection to the water distribution system in general.

Another important legal basis for social assistance can be found in the Social Security Code II, establishing basically the same entitlements as a special provision for all employable individuals. Sections 19 and 20 of the Social Security Code II comprising the entitlement to

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<sup>10</sup> Verwaltungsgericht Frankfurt/Main 1997 (Az. 9 G 1638/97), Zeitschrift für Beamtenrecht 1998, S. 219.

<sup>11</sup> BVerwG vom 03.12.2003 (Az. 6 C 13/03).

the so-called *Arbeitslosengeld II* provide financial means to cover the same needs as under the Social Security Code XII. This means, that a provision of water as a beverage, for cooking, for personal hygiene and under the aspect of housing is supposed to be protected in the framework of *Arbeitslosengeld II* as well.

#### c. Consumer and Health Protection

Several federal laws secure the quality of drinking water. The Drinking Water Ordinance (*Trinkwasserverordnung*) provides for the cleanliness as well as the quality of the drinking water and lays down certain microbiological and chemical requirements establishing as well standards for the drinking water treatment. Besides, it includes specific limits for harmful substances, such as heavy metals, nitrate or organic compounds. This Ordinance is based on the European Union's Drinking Water Directive (Directive 98/83/EC), which states as its objective "to protect human health from the adverse effects of any contamination of water intended for human consumption by ensuring that it is wholesome and clean."

Additionally, an Ordinance about Mineral Water (*Mineral- und Tafelwasserverordnung*) establishes special qualitative criteria for these types of drinking water.

Furthermore, the Infectious Diseases Protection Act (*Infektionsschutzgesetz*) aims at preventing transmissible diseases and avoiding their diffusion (Section 1). Section 37 (1) requires water for the human use to be of a certain quality to prevent threats to human health stemming from consumption or use of water especially by pathogenic germs.

To protect the consumer the Ordinance concerning general conditions for the water supply (*Verordnung über allgemeine Bedingungen für die Versorgung mit Wasser*) provides for certain minimum prerequisites which have to be implemented within the contracts between water supply companies and the consumer. Among other issues, the Ordinance also deals with water quality standards and the volume in terms of time and quantity of the supply.

#### d. Federal Laws pertaining to Water as interpreted by German legislation

The German Water Resources Act (*Wasserhaushaltsgesetz*) forms another legal act mirroring aspects of the human right to water. The scope of application of the Act encompasses surface waters, groundwater and coastal water. The Act deals with the use and the protection of the waters in question. Among other aims, its prime objective is to protect water as drinking water. Or, as the EU's Water Framework Directive (Directive 2000/60 EC), on which the

Water Resources Act is based, puts it in the preamble: “Good water quality will contribute to securing the drinking water supply for the population.”<sup>12</sup>

It follows from Sections 2 and 6 of the Act that any use of water as defined by the Act requires permission by public administration. The Water Resources Act makes clear that permissions must be denied, if the use of water constitutes “a threat to the public welfare, particularly to the public water supply.”

In 1989, the Federal Administrative Court made an important decision concerning the interpretation of the phrase “threat to the public welfare.” The court clarified that “public welfare” is not only to be seen in the context of the protection of water resources, but has to be interpreted in its broader, comprehensive meaning. Therefore, measures which jeopardize the use of water as drinking water from the point of view of public health constitute a “threat to the public welfare” also in the sense of the Water Resources Act.<sup>13</sup> Consequently, this decision has led to a higher level of protection for the water under the Water Resources Act.

In 1976, the Water Resources Act was supplemented by Section 1a (4), a provision which rules that real property does not entitle the owner to the use of water which would, according to the Act, require permission. These restraints on the use of water causing disadvantages for the owners of real property caused severe legal problems, especially as regards the effects on mining or digging companies. Many, including the Federal High Court of Justice perceived the power of disposition about ground water as part of the right to property including real property as guaranteed by article 14 of the German Basic Law.

Yet, the Federal Constitutional Court confirmed the special importance of water as a public and social good especially vis-à-vis the right to property in the groundbreaking case *Naßauskiesung*<sup>14</sup> (roughly: “water gravel exploitation”). Therein, the court affirmed the legislative decision to exclude ground water from the scope of application of the right to property as being in line with the limitations foreseen by the Constitution. Furthermore, the Court highlighted that “water is one of the most important fundamentals of all human, animal and vegetable life”.<sup>15</sup> In this case, the Federal Constitutional Court clarified as well, that the provision in question does not constitute an expropriation which would require compensation according to constitutional provisions.

Already in 1959, the Federal Constitutional Court ruled in the case *Großer Erftverband* that limitations on the rights of mining companies in favour of the water resource management

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<sup>12</sup> Water Framework Directive, Preamble No. 24.

<sup>13</sup> BVerwGE 81, 347 (350).

<sup>14</sup> BVerfGE 58, 300, 15 July 1981.

<sup>15</sup> BVerfGE 58, 300 (341).

have to be accepted since they are a consequence of article 14 (2) of the Basic Law which states that property entails obligations and has to serve the public good.<sup>16</sup>

In 1995, the Court again stressed the importance of water in its decision *Wasserpfeffnig*. It ruled explicitly that water as a scant natural resource is a good of the public at large and, further, affirmed that since drinking water supply is dependent on top-quality water ground water should be primarily used to gain drinking water. Thereby, the Court justified worse conditions for the taking of water for other purposes compared to the extraction of water to be used as drinking water, e. g. higher prices for those who extract water for economic or industrial aims.<sup>17</sup>

Besides, the Water Resources Act provides for the liability of those who change the physical, chemical or biological quality of a water body by discharging substances or by otherwise affecting the water (Section 22). It is important to note that the liability according to this provision is not dependent of a fault or negligent act or omission, but implements an absolute liability.

The Water Resources Act also contains provisions regarding wastewater. In line with Section 7a of the Act, wastewater has to be treated according to the state-of-the-art. The Wastewater Charges Act (*Wasserabgabengesetz*) also contributes to the aim of clean and unpolluted waters and, therefore, to the water supply of the population, by establishing charges for direct discharges of wastewater into a water body. The Act introducing an “eco-tax” is seen as an instrument to reduce the volume of discharge. Additionally, the Act requires that the wastewater charges have to be spent for sewage plants or similar measures to further reduce pollution in the waters. The Wastewater Ordinance (*Abwasserordnung*) deals with the technical details of the discharge of sewage into water bodies, stating minimum prerequisites for the discharge of waste water.

Besides, according to the Cleaning Agents Act, *Wasch- und Reinigungsmittelgesetz*, cleaning agents are only allowed to be placed in circulation in such a manner that they do not prejudice the quality of waters especially as regards the drinking water supply.

#### e. Penal law provisions

Water quality is also an issue of German penal law. The Criminal Code, *Strafgesetzbuch*, states in its Section 324 (1): “Whoever, without authorization, pollutes a body of water or otherwise detrimentally alters its qualities shall be punished with imprisonment for not more than five years or a fine.” The notion of “body of water” is defined as “surface water, ground

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<sup>16</sup> BVerfGE 10, 89.

<sup>17</sup> BVerfGE 93, 319.

water and the sea” by the Code. An alteration of the quality of the water is to be understood as every non-irrelevant deterioration of the natural quality of the water, be it physical, chemical or biological.

Furthermore, Section 330 (1) continues that in “especially serious cases” an intentional act shall be punished with imprisonment from six months to ten years and defines: “an especially serious case exists, as a rule, if the perpetrator ... endangers the public water supply...”

#### f. Laws of the German States

Under the federal order of Germany, the States or *Bundesländer* are provided with their own legislative competences for certain areas. The States’ Water, Municipality and Building Acts are of special importance regarding the realization of the right to water in Germany.

The Water Acts of some States encompass detailed provisions regarding the water supply based on the concept of “services for elementary requirements”. The Water Act, *Landeswassergesetz*, of the State of *Rheinland-Pfalz*, for instance, obliges the municipalities to safeguard the public water supply, which includes the establishments of the necessary facilities for that end. The same Act requires the municipalities to ensure that waste water is treated properly. Both duties can be transferred to private parties by the municipality under certain prerequisites.

According to the *Berlin* Water Act it is up to the State of Berlin and the *Berliner Wasserbetriebe*, a public water supply organization, to safeguard a proper water supply within this State.

The Municipal Acts of the States contribute to the realization of the right to water in municipalities by ruling that citizens are entitled to use every existing municipal facility on a non-discriminatory basis. Therefore, every citizen is in principle entitled to take part in the public water supply system of the municipality and to be treated according to equal principles. Moreover, many local authorities also adopted municipal regulations to administer the details of the connection between the individual and the local water supply plants.

To assure a regular water supply and high hygiene standards (the latter also with regard to wastewater treatment), many municipal laws of the States order a “compulsory connection and use system” (*Anschluss- und Benutzungszwang*), but the relevant laws also provide for exceptions under certain circumstances.

According to the States’ Building Acts, construction projects are generally only admissible if the water supply is ensured, usually by a connection to the local distribution system.

Consequently, these provisions also contribute indirectly to the issue of water supply coverage in Germany.

### **3) Implications on the Private Sector**

Private law is usually dominated by the doctrine of privity of contract, leaving it to private parties to decide whether and with whom they enter into a contractual relationship. This principle can evoke severe problems if private-run water supply enterprises refuse to conclude an agreement with individuals wishing to be provided with water.

To address this problem, German legislation, jurisprudence and doctrine developed different approaches. First, the concept of *Kontrahierungszwang*, meaning an obligation to contract under certain conditions, has been established. In some areas, like the provision of energy, gas or public transport, this concept has found an explicit legal formulation, for instance in the Energy Supply Act (*Energiewirtschaftsgesetz*) or in the Passenger Transportation Act (*Personenbeförderungsgesetz*).

As regards water supply, an explicit provision does not exist, but it is recognized by jurisprudence and doctrine. Accordingly, an entrepreneur offering vital goods such as water can only refuse to contract for objective reasons in cases in which there is no other possibility for the customer to satisfy his or her needs.

Furthermore, the General Equal Treatment Act, *Allgemeines Gleichbehandlungsgesetz*, prohibits discrimination on the grounds of race, ethnic origin, sex, religion, disability, age and sexual orientation as regards contracts which typically are concluded under comparable conditions for a high number of persons, e.g. standardized services, such as water supply by private parties.

Another approach concerns private companies which are created by public entities or municipalities. Usually, private parties are not directly bound by constitutional provisions. Municipalities, when offering goods, services or facilities, can decide if the legal relationship between the municipality and the individual shall be governed by private or by public law. Even, if the municipality chooses private law to shape the legal relationships with individuals, their entitlement regarding the admission as such falls always in the area of public law. This means that the Basic Rights and especially the principle of equality as enshrined in article 3 of the Basic Law is directly applicable allowing the individual to enforce his or her demand.

#### 4) The German legal order and the requirements of General Comment No. 15

In General Comment No. 15, the Committee outlined the legal content of the human right to water and developed a comprehensive understanding of its legal implications. Therefore, the question arises as to whether the German legal order regarding water supply meets the requirements of General Comment No. 15, especially as formulated in paragraphs 10 et seqq. of the General Comment.

Probably the most important condition for the realization of the right to water is the *availability* of the water supply which “must be sufficient and continuous for personal and domestic uses.” The concept of the *Daseinsvorsorge* under the responsibility of the municipalities provides for the existence of water facilities in virtually all households in Germany, guaranteeing a sufficient and continuous supply.

German laws, such as the Drinking Water Ordinance or the Infectious Diseases Protection Act, in combination with the respective control and enforcement mechanisms serve for the good *quality* of the drinking water in Germany.

Moreover, according to the Committee, water must be *accessible* in physical and economic terms and on a non-discriminatory basis. Since almost all households, educational institutions or workplaces are supplied with water, water is accessible for all people. The social assistance system in Germany ensures that water is economically accessible and affordable for poorer or marginalized groups of the society. Furthermore, due to the granting of a socio-cultural minimum existence level, the cultural function of the water, which is necessary to enjoy certain cultural practices, is also taken into account for those in need. The principle of non-discrimination binds all public actors, forcing state-run water facilities to operate on the basis of equality. Private actors in the area of water supply are subject to the legal concept of the “obligation to contract”, so that discriminatory measures may be addressed by individuals. As mentioned above, the principle of *Kontrahierungszwang* is flanked by the provisions of the General Equal Treatment Act.

Regarding the international dimension of the right to water as outlined by the Committee<sup>18</sup>, the German government is well aware of the fact that the issue of water supply is not only dependent on legal efforts, but also on environmental and climatic factors. That is why assisting countries without favourable conditions to advance their water supply systems and infrastructure is, as mentioned above, one of the most important aims of German development cooperation.

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<sup>18</sup> General Comment No. 15, UN Doc. E/C.12/2002/11, para. 30 et seqq.

#### **IV. National plans of action, development programmes, public policies or emergency responses related to access to safe drinking water and sanitation.**

In Germany, there is no specific national plan of action regarding the right to water. Nonetheless, the federal government adopted a Plan of Action on Human Rights which deals, *inter alia*, with the realization of economic, social and cultural rights. In particular, the Government wants to lobby for the proper consideration of the Committee's views and recommendations regarding the right to water as laid down in General Comment No. 15.

Germany is well prepared to expeditiously and effectively safeguard access to water in cases of emergency. In 2004, the Federal Office of Civil Protection and Disaster Assistance, *Bundesamt für Bevölkerungsschutz und Katastrophenhilfe*, was founded as the central authority covering and coordinating all relevant obligations and information. Among other competences, the Federal Office has to fulfil the Federation's duties regarding the emergency drinking water supply by planning and preparing measures as well as coordinating the management of the Federation and the States.

Furthermore, the Federal Ministry of the Interior controls the Federal Agency for Technical Relief, *Technisches Hilfswerk (THW)*, established in 1950. The agency consists of approximately 80.000 staff members, mostly volunteers, and is technically well equipped. Among many other tasks, the *THW* deals with drinking water purification, water analysis, and drinking water supply by the use of mobile drinking water treatment plants, emergency fountains, or the transportation of water. The Agency also fulfils its tasks in foreign countries; since 1953 thousands of missions have been completed abroad, such as building drinking water facilities in Africa.

Having established these institutions, the German government also realizes elements of the right to water, since emergency responses are part of the accessibility dimension of the right to water according to the Committee on Economic, Social and Cultural Rights, referring especially to "victims of natural disasters, persons living in disaster-prone areas".<sup>19</sup>

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<sup>19</sup> General Comment No. 15, UN Doc. E/C.12/2002/11, para. 16 (h).

**V. The impact of these national laws, judicial decisions, plans of action, development programmes, public policies and other measures in promoting or restricting equitable access to safe drinking water and sanitation.**

Of course, the direct impact of national laws or judicial decisions is difficult to measure. In any case, the German system of water distribution and supply proved to be very successful. As of 2004, 81.6 million citizens were connected to the water distribution system, corresponding to 99 % of the German population; per capita, 126 litres a day were consumed.<sup>20</sup> The price for private households averaged 1.77 Euros per 1000 litres, amounting to 23 cents a day or 84 Euro per year for each German citizen, which is equivalent to 0.4 % of the disposable household income.<sup>21</sup> The remaining less than one percent of individuals not connected to the public water supply use their own wells.

The total number of public wastewater treatment plants sums up to 9.994 in 2004, meaning that 96 % of all wastewater has been purified.<sup>22</sup>

**VI. Examples of approaches considered to represent “best practice” related to access to safe drinking water and sanitation.**

**1) Advantages of the concept of *Daseinsvorsorge***

It follows from these figures that, in particular, the system of *Daseinsvorsorge* or “services for elementary requirements” might serve as an example representing “best practice” regarding the access to safe drinking water and sanitation. Starting in the middle of the 19<sup>th</sup> century, the system of water supply as part of the *Daseinsvorsorge* has been predominantly organized by the municipal authorities, and it has stood the test of time.

The advantages of this concept are obvious. First, “services for elementary requirements” have to be effected in a way that an area-wide supply is guaranteed, irrespective of economic profits. Moreover, as has been outlined before, the concept provides for an access to water on the basis of equality and non-discrimination along with constitutional, national and local laws.

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<sup>20</sup> Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (ed.): Environmental Policy. Water Resource Management in Germany, p. 60.

<sup>21</sup> Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (ed.): Environmental Policy. Water Resource Management in Germany, p. 66.

<sup>22</sup> Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (ed.): Environmental Policy. Water Resource Management in Germany, p. 71 et seq.

In addition, *Daseinsvorsorge* ensures the continuity and stability of supply, because the responsibility rests on the municipality as a permanent and stable institution. This goes hand in hand with sustainable provisioning, since the management of water resources by municipalities is supposed to act on the bases of a long term strategy. The concept of “services for elementary requirements” also contributes to the safeguarding of a certain quality of the water supply and helps, furthermore, to secure affordable charges.

The “Bonn Recommendations for Action” call for the decentralization to the lowest level possible of decision-making, implementation of projects and operation of services.<sup>23</sup> Since the system of *Daseinsvorsorge* cedes the responsibility of water supply to the municipalities, this criterion can be met. Thereby, it is assured that the water system is managed at a level where needs, wishes or problems of concerned individuals can be taken into account. From this it follows, that this locally based system facilitates the participation of individuals in the different processes of decision-making, construction, operation of facilities, pricing, etc.

The high level of the German system of water supply, admittedly, partly depends on the concept of “compulsory use and connection”, as described above. Nevertheless, the disadvantages for few individuals who do not wish to participate in the local water distribution system are justified by the overwhelming importance of a safe, stable, affordable and continuous water supply.

## **2) *Daseinsvorsorge* and the private sector**

Over the last few years, the privatization of formerly State run facilities including water supply has been a highly controversial issue. The “Bonn Recommendations for Action” suggest to States “in view of the high capital demand for water infrastructure investment ... to augment public funding by mobilising private funding for water utilities...”<sup>24</sup> Or, as the report of the United Nations Secretary-General puts it: “...the role of government has been shifting from one of service provider to one of providing an enabling environment for integrated water resources management and coordination of the much-needed investments in the water sector.”<sup>25</sup> Considering it a more political question, the Committee leaves it open as to whether a public, a private or a public-private management of the water supply systems is preferable. The Committee rather preferred to focus on the effective realization of the right to water from the individual’s point of view.

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<sup>23</sup> Recommendation No. 11 of the Bonn Recommendations for Action.

<sup>24</sup> Recommendation No. 16 of the Bonn Recommendations for Action.

<sup>25</sup> Implementing Agenda 21, Report of the Secretary-General, UN Doc. E/CN.17/2002/PC.2/7, para. 137.

Regarding the concept of *Daseinsvorsorge*, it has to be stressed that it does not run counter to attempts to privatize the water supply and distribution system. It allows privatization, leaving it up to the municipalities to decide within their constitutionally guaranteed self-administration how to ensure the water supply. But still, the local authorities remain under a legal and even constitutional obligation to guarantee the water supply to their citizens, irrespective of the private or public organization of the water sector. Consequently, especially as regards the failures or bankruptcy of private enterprises, the municipality is in charge of implementing the requirements of the *Daseinsvorsorge*.

Lastly, the concept of “services for elementary requirements” is in line with the relevant provisions of European Law, which generally provides for open competition within the European market, pushing privatization in many areas. Article 86 (2) of the Treaty establishing the European Community states: “Undertakings entrusted with the operation of services of general economic interest ... shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.” According to the jurisprudence of the European Court of Justice and legal doctrine enterprises, like the German “services for elementary requirements” including water supply, fall into the scope of the exception of “services of general economic interest”, so that the rules on competition are not fully applicable.

Furthermore, the concept of *Daseinsvorsorge* is also compatible with the relevant provisions of the World Trade Organization.

## **VII. Any other existing initiatives and standards relating to equitable access to safe drinking water and sanitation, and the scope and legal status of these initiatives.**

A great number of initiatives or institutions deal with aspects of the right to water, but only a few can be mentioned here.

An important issue to secure the water quality is Water Monitoring, especially Groundwater Monitoring, conducted as an affair of the Federal States. The States have been installing networks of groundwater monitoring sites to detect detrimental changes in the quality. The existing system of the monitoring sites is used to provide two more monitoring networks with data which are established under the aegis of the European Union: The European

Environment Agency in Copenhagen and the EU nitrate monitoring network under the EC Nitrate Directive.

Another effective means to safeguard water quality is the identification of Water Protection Areas to protect the areas around water resources against harmful effects. Today, 13.428 such areas are designated which amount to approximately 12 % of the total territory of the Federal Republic of Germany<sup>26</sup> based on the Water Acts of each of the Federal States and on the Federal Water Resources Act.

Several administrative provisions, which are internal rules within the public administration designed to harmonize the application of law, regarding water supply and sanitation supplement the Federal legislation. Among others, there are guidelines dealing with hazardous substances, defining danger categories (*Allgemeine Verwaltungsvorschrift über wassergefährdende Stoffe*) and establishing criteria for tubes transporting substances hazardous to water (*Richtlinien für Rohrleitungsanlagen zum Befördern wassergefährdender Stoffe*). Although these guidelines are not binding law, they are fairly effective since the authorities are directed to take their decisions in line with these administrative decisions.

Due to the Federal Order of Germany, it is important to coordinate the different approaches, initiatives or laws of the States. That is why the Ministries for the Environment of the States and the Federation instituted a forum called the Conference of the Ministers for the Environment whose Working Group on Water Issues, *Bund/Länder-Arbeitsgemeinschaft Wasser (LAWA)*, deals with questions arising in the areas of water management and legislation, formulates solutions and puts forward recommendations for their implementation.

On the municipal level, smaller towns and communities cooperate to secure the water supply or water disposal by founding special-purpose inter-municipal organisations, *Zweckverbände* or *Wasserverbände*, combining their financial, personal and other potentials.

Besides, the German Institute for Standardisation, *Deutsches Institut für Normung*, influences the water supply to a great deal by formulating technical standards. One of their standards, *DIN 2000*, frames guidelines for drinking water supply including planning, construction and operation of water supply systems. The standards developed by the institute are not legal rules; however, they are not without any legal meaning as German jurisprudence frequently resorts to these standards when asking if a certain act or omission has to be assessed as negligent.

In 2001, the German Institute for Human Rights whose intention is to contribute to the prevention of human rights violations and to the promotion and protection of human rights

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<sup>26</sup> Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (ed.): Environmental Policy. Water Resource Management in Germany, p. 61.

was founded on recommendation of the German parliament, the *Bundestag*, based on the United Nations General Assembly's Paris Principles. The institute is financially supported by the German government, but it is neither subordinated to the government nor subject to any instructions. One of the focal points of the work of the institute is the area of economic, social and cultural rights dealing also with the right to water.

Moreover, the Federal Government of Germany is in a continuous and intensive dialogue with representatives of the Civil Society and Non-Governmental Organizations, of which several deal with the right to water, be it at the national or international level. Many of the Non-Governmental Organizations have been involved in the processes and initiatives mentioned above.

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**Annex 1: Human Rights Council Decision 2/104: Human rights and access to water**

Human Rights Council  
**Decision 2/104. Human rights and access to water**

The Human Rights Council,

Reaffirming the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child,  
Noting general comment No. 15 (2002) of the Committee on Economic, Social and Cultural Rights on the right to water,

Taking note of the draft guidelines for the realization of the right to drinking water and sanitation contained in the report of the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights (E/CN.4/Sub.2/2005/25),

Recalling the relevant provisions of declarations, resolutions and programmes of action adopted by major United Nations conferences, summits and special sessions and their follow-up meetings, in particular the Mar del Plata Action Plan of 1977, Agenda 21 of the United Nations Conference on Environment and Development of 1992, the Programme of Action of the International Conference on Population and Development of 1994, the International Decade for Action “Water for Life” 2005-2015, General Assembly resolution 54/175 of 17 December 1999 on the right to development and the Millennium Development Goals,

Decides to request the Office of the United Nations High Commissioner for Human Rights, taking into account the views of States and other stakeholders, to conduct, within existing resources, a detailed study on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments, which includes relevant conclusions and recommendations thereon, to be submitted prior to the sixth session of the Council.

*Adopted without a vote  
31st meeting  
27 November 2006*

## **Annex 2: Questionnaire prepared by the Office of the High Commissioner on Human Rights**

### ***Stakeholders views for the study on human rights obligations related to equitable access to safe drinking water and sanitation: deadline extended to 31 May 2007***

#### **Council's Decision 2/104 – Human Rights and Access to Water**

In its Decision 2/104 on Human Rights and Access to Water, the UN Human Rights Council (hereafter the Council) requested:

*“(...) the Office of the United Nations High Commissioner for Human Rights, taking into account the views of States and other stakeholders, to conduct, within existing resources, a detailed study on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments, which includes relevant conclusions and recommendations thereon, to be submitted prior to the sixth session of the Council.”*

The High Commissioner would be grateful to receive any relevant information for preparation of the requested study for submission to the Human Rights Council at its sixth session (September 2007) in compliance with paragraph 5 of that decision. The information received will be used for the study and will also be put on the OHCHR website. Information would be particularly welcome on:

- a) Views on international human rights obligations to be taken into account in relation to equitable access to safe drinking water and sanitation.
- b) National legislation or draft legislation related to equitable access to safe drinking water and sanitation (constitution, specific law, regulation, etc.), including with regard to private sector provision of related services.
- c) Examples of judicial decisions related to access to safe drinking water and sanitation.
- d) National plans of action, development programmes, public policies or emergency responses related to access to safe drinking water and sanitation.
- e) The impact of these national laws, judicial decisions, plans of action, development programmes, public policies and other measures in promoting or restricting equitable access to safe drinking water and sanitation.
- f) Examples of approaches considered to represent “best practice” related to access to safe drinking water and sanitation.
- g) Any other existing initiatives and standards relating to equitable access to safe drinking water and sanitation, and the scope and legal status of these initiatives.

Such information should be sent to the Office of the High Commissioner for Human Rights, United Nations Office at Geneva, CH 1211 Geneva 10, by 31 May 2007 either by post or preferably through e-mail at the following address: [water@ohchr.org](mailto:water@ohchr.org)