

Teisės aktualijos

LEGAL PROTECTION OF TRANSBOUNDARY WATERCOURSE: QUESTIONS OF SOLIDARITY

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2013 m. rugsėjo 13–15 d. Spetsuose (Spetses, Graikija) įvyko kasmetis Viešosios teisės organizacijos Europos grupės (European group of public law (EPLO) susitikimas (Reunion 2013) tema „Viešoji teisė ir solidarumas, skirtas solidarumo tiek nacionalinėje, tiek tarptautinėje teisėje įtvirtinimo klausimams“: skirta dėmesio solidarumo sprendžiant teisinės aplinkos apsaugos problemas klausimui nagrinėti. Toliau yra pateikiamas nacionalinio Lietuvos pranešimo, kurį metiniam susitikimui pristatė Vilniaus universiteto Teisės fakulteto Viešosios teisės katedros profesorius, Viešosios teisės organizacijos Europos grupės narys Bronius Sudavičius, tekstas¹.

¹ Pranešimo tekstas parengtas pagal Graikijos specialiojo sekretoriaus vandenims dr. V. Tzatzaki klausimyną.

1. In which ways can a transboundary watercourse enhance solidarity between the riparian countries?

The content of the concept of solidarity has become an object of the scholastic discussions [9], however from the general point of view, it is expressed (reflected) by unity, community of interests, common responsibility and mutual support. The concept of solidarity is usually associated with national welfare state, which includes tax redistribution². Though solidarity is not limited only to the borders of the national countries. Therefore, the importance of the concept of solidarity is currently increasing at the international level. Many global problems rely on international co-operation. This is especially the case for environmental problems, that are inherently transboundary in their character. These problems demonstrate little regard for country borders or sovereignty.

This is clearly reflected in the field of the transboundary watercourse. The stream of water disregards country's borders. Actually, most often the *river basins* run through the territories of different countries. In such way not only water is carried from the upstream State to the downstream

State, but also pollutants which in this water contains. Therefore, one country alone is practically not capable to ensure an effective prevention, reduction and liquidation of such pollution. Thus, such country is highly dependent on the other state's actions. The issues related to such dependence may be solved in the way of conflict or the way of solidarity. Indeed, the way of solidarity is accepted within the democratic members of the international community. Hence, the high level and long-term protection of the transboundary watercourse become a common objective for the riparian countries. Subsequently, this goal unites the riparian countries to take the collective actions. The common goal requires mutual understanding and cooperation. Therefore, the collective actions, interdependence and shared responsibility shall be the fundamental basis for the protection of transboundary watercourse [10, p. 98].

Hence, in this way, i.e. through the common interest on the protection of the transboundary watercourse of the riparian countries, the transboundary watercourse may inspire the riparian countries for the solidaristic behavior in one more area, i.e. the environmental protection. The attention shall be paid, that the right to the clean and safe environment is attributed to the third generation (the solidarity) rights. Indeed, the provisions which are related to the environmental protection in the European Union are stated in the Charter of Fundamental Rights of the European Union [2], the part IV „Solidarity“³.

² According to the Constitutional Court of the Republic of Lithuania it also need be noted that under the Constitution of the Republic, the State of Lithuania is socially oriented, thus, it has the constitutional obligation and must accept the burden of implementation of certain commitments. The constitutional principle of social solidarity implies the opportunity to distribute this burden to a certain extent also among the members of society, however, this distribution must be constitutionally grounded, it may not be disproportionate and it may not deny the social orientation of the state and the obligations to the state which stem from the Constitution [6].

³ Article 37 of the Charter provides: „A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development“.

It shall be noted, that solidarity in the protection of the transboundary watercourse is an issue of high importance in Lithuania. All four river basin districts in Lithuania are international, shared with Poland, Latvia, Byelarus and the Russian Federation. Subsequently, many international agreements are made between Lithuania and the above mentioned countries in the area of transboundary watercourse⁴. However, none of these agreements explicitly make a notion to the principle of solidarity. Nevertheless, it is considered that the initiation, conclusion and implementation of such international agreements (*inter alia* the measures determined in these agreements, such as joint monitoring, exchange of information, establishment of joint bodies⁵, consultations, joint assess-

ment, mutual assistance, development of effective techniques for the prevention, control and reduction of transboundary impact, warning and alarm systems, joint plans on the measures of the transboundary watercourse's protection⁶), explicitly express the concept of solidarity. Actually, these agreements reveal, that the riparian countries perceive the common interest of the transboundary watercourse's protection, coordinate their actions on a certain scale, adopt common regulations and establish institutions. In such way, these countries share the responsibility for the protection of the transboundary watercourse.

2. How is solidarity reflected in the interests of upstream and those of downstream states?

Solidarity is a measure to secure some balance between the interests of upstream and downstream states.

Undoubtedly, downstream states are foremost concerned about higher solidar-

⁴ Agreement between the Government of the Republic of Lithuania and the Government of the Republic of Poland on the Co-operation in the Field of Use and Protection of Transboundary Watersources (done on 7 June 2005); Agreement between the Government of the Republic of Lithuania and the Government of the Russian Federation on the Co-operation in the Field of Environment (done on 29 June 1999); Technical Protocol between the Ministry of Environmental Protection and Regional Development of the Republic of Latvia and the Ministry of Environment of the Republic of Lithuania on Exchange of Information on Emergency Ecological Situations (signed on 24 May 2001); Technical protocol between the Ministry of the Environment of the Republic of Latvia and the Ministry of Environment of the Republic of Lithuania on Co-operation in Managing the International River Basin Districts (signed on 24 October 2003). Agreements on inter-institutional co-operation have been done with the Kaliningrad Region of the Russian Federation and with Belarus on co-operation in the field of monitoring and exchange of data on the status of transboundary surface water bodies (signed on 21 October 2003) and a Technical Protocol between the Ministry of Environment of the Republic of Lithuania and the Ministry of Natural Resources and Environmental Protection of the Republic of Belarus on co-operation in the field of monitoring and exchange of data on the status of transboundary surface water bodies was signed on 10 April 2008.

⁵ E.g. Co-operation with Poland with regard to the

issues of water protection is ensured through the commission of co-operation of Poland and Lithuania. It was established on the basis of the Agreement between the Government of the Republic of Lithuania and the Government of the Republic of Poland on the Co-operation in the field of use and protection of transboundary watersources [4].

⁶ e.g. Article 4 of the Agreement between the Government of the Republic of Latvia, the Government of the Republic of Estonia and the Government of the Republic of Lithuania on co-operation in the field of environment [3] provides that: "(1) Cooperation in the field of environment shall be carried out by mutual consent of the Parties in the following forms: (a) exchange of scientific information; (b) arrangement of conferences, symposia and expert meetings; (c) exchange of scientists and experts; (d) elaboration and implementation of joint programmes and projects; (e) coordination and development of environmental standards and legal acts; (f) determination of strategic direction in the cross-border cooperation. (2) The Parties may also agree on other forms of cooperation".

ity. Indeed, the incentive to solidarity is their interest to protect environment, human health, life and property. As it is known, water and pollutants in it run namely from upstream to downstream. Therefore, downstream state's efforts to protect water resources can be in vain if the upstream state does not concern itself about the water protection. In this regard, as an example, Nemunas river basin is relevant for Lithuania. Water to this basin runs from Byelarus, Russia and Poland. Especially important is the cooperation with Byelarus, where all of the upstream of Nemunas is located. Accordingly, it can be noted that a downstream state is more concerned to proceed actively in order to enhance international solidarity. One of the measures of an active conduct can be an initiation of international agreements (bilateral, multilateral). For example, on the initiative of Lithuania, a draft cooperation agreement between the governments of Russia, Belarus and Lithuania and the Commission has been prepared on the protection and use of the waters of the Nemunas basin. It must be noted that a draft agreement has been drawn up but has not been signed yet.

However, it cannot be denied that the upstream states are also concerned about solidarity. Primarily, they have to implement not only national obligations regarding the protection of environment but also the EU and other international obligations. For example, to implement the provision of Article 2(3) of the *Convention on the protection and use of transboundary watercourses and international lakes* [1] (hereinafter referred to as the "Helsinki Convention") which states that „measures for the prevention, control and reduction of water pollution shall be taken, where possible, at source“. Otherwise, the rejection

of solidarity may lead to the conflict with the international community.

Solidarity is reflected in downstream and upstream states' interests also in the aspect of finance, as it allows to share (to reduce) a finance burden associated with pollution prevention, reduction and control. Thus, the coastal states' financial interest is evident. Moreover, international solidarity presents real opportunities to create and develop better technologies to fight pollution, to prepare and exchange specialists (experts) and scientists, to exchange reliable information, best practice, etc. In this way the coastal states get mutual benefit as well.

3. Can co-operation in good faith and good neighborliness, as principles of international law, guarantee the enhancement or even the establishment of solidarity between riparian countries?

The experience of various countries, including Lithuania, suggests a positive answer to this question. International water law is based on the cooperation in good faith and good neighborliness. Precisely these aforementioned principles of international law are the fundament for the international agreements (bilateral and multilateral) in the transboundary watercourse law. These agreements, as stated in the answer to the first question, are a step towards the increased and enhanced solidarity between the coastal countries.

As the good examples on this aspect may be mentioned the Article 10 of Helsinki Convention⁷, preamble of the Agree-

⁷ "Consultations shall be held between the Riparian Parties on the basis of reciprocity, **good faith and good-neighbourliness**, at the request of any such Party."

ment between the Government of the Republic of Latvia, the Government of the Republic of Estonia and the Government of the Republic of Lithuania on cooperation in the field of environment⁸, preamble to the Agreement between the Government of the Republic of Lithuania and the Government of the Republic of Poland on the Cooperation in the Field of Use and Protection of Transboundary Watersources⁹.

4. In the case of solidarity between riparian states, how are anthropocentric approaches being reflected?

The anthropocentric approach is reflected in the provisions of international agreements on water protection. The priority of human rights and interests is clearly indicated in the Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes. This Protocol aims to protect **human health and well being** by better water management and by preventing, controlling and reducing water-related diseases. Its Article 5(d) states: “Water resources shall be managed so that the needs of the present generation are met

without compromising the ability of future generations to meet their own needs”.

Human interests are also emphasized in the bilateral agreements on the protection of environment. For example, the preamble of the already mentioned Agreement between the Government of the Republic of Lithuania and the Government of the Russian Federation on the Cooperation in the Field of Environment [5] states: “*The government of the Russian Federation and the Government of the Lithuanian Republic, further referred to as by the Parties, <...> realizing responsibility for the ecological safety of the citizens, <...>*”.

However, it can be noted that the anthropocentric approach is not the only one regarding these agreements. Also it is not the dominating one. The analysis of the Lithuanian international agreements shows that currently they contain a more clearly expressed ecocentric approach. The agreements like these do not give references to the protection of human health, life or property, but rather to the protection of the transboundary watersource’s ecosystem. For example, the preamble of the aforementioned *Agreement between the Government of the Republic of Lithuania and the Government of the Republic of Poland on the Cooperation in the Field of Use and Protection of Transboundary Watersources* notes that the concerned countries are determined to prevent the degradation of the transboundary watersource’s ecosystem and recognize the necessity to improve its condition. The Article 5 of the Agreement also notes that a perpetrator who caused pollution or other negative impact on the transboundary watersource is liable for all the caused damage. Therefore, it is evident that the reparation of damage is not

⁸ “The Government of the Republic of Latvia, the Government of the Republic of Estonia and the Government of the Republic of Lithuania, hereinafter referred to as the “Parties”, recognizing **friendly relations** between the Republic of Latvia, the Republic of Estonia and the Republic of Lithuania, acknowledging responsibility for the improvement of the state of environment...”

⁹ “Government of the Republic of Lithuania and the Government of the Republic of Poland, hereinafter referred to as the “Contracting Parties”, realizing that the use and protection of the transboundary waters **requires a close cooperation** considering that a close cooperation is needed for the use and protection of the transboundary watersources, believing that a close cooperation in this field contributes **to the good-neighbourly relations**...”

exclusively linked to the damage caused to human health, life or property. It follows that, the view is not limited only to the anthropocentric approach but also creates a broader aim to international cooperation.

5. Integrated water resources management as a tool for achieving solidarity between states

The integrated water resources management is a tool for achieving solidarity between states. Integrated water resources management (hereinafter referred to as “IWRM”) is a process which promotes the **co-ordinated development** and management of water, land and related resources, in order to maximize the resultant economic and social welfare in an equitable manner without compromising the sustainability of vital ecosystems. IWRM is a cross-sectoral policy approach, designed to replace the traditional, fragmented sectoral approach to water resources and management. IWRM is based on the understanding that water resources are an integral component of the ecosystem, a natural resource, and a social and economic good. IWRM is a means of achieving three key strategic objectives: efficiency to make water resources go as far as possible; equity, in the allocation of water across different social and economic groups; environmental sustainability, to protect the water resources base and associated ecosystems. IWRM strategies are based on the four Dublin Principles [7] presented at the World Summit in Rio de Janeiro in 1992. One of them provides that water development and management should be based on a participatory approach, involving users, planners and policy-makers at all levels. According to the Dublin state-

ment, the most appropriate geographical entity for the planning and management of water resources is the river basin, including surface and groundwater. Ideally, the effective integrated planning and development of transboundary river or lake basins has similar institutional requirements to a basin entirely within one country. The essential function of existing international basin organizations is one of reconciling and harmonizing the interests of riparian countries, monitoring water quantity and quality, development of concerted action programmes, exchange of information, and enforcing agreements. A high priority should therefore be given to the preparation and implementation of integrated management plans, endorsed by all affected governments and backed by international agreements. Main factors for the development IWRM are legal agreements, information systems of transboundary basins, establishment of the transboundary basin organisations, monitoring, a long-term cross-border strategy, etc.¹⁰

Following what was said before, it can be stated that IWRM requires cooperation and actions not only on local, national but also international level. That is, the aims of IWRM can be reached (implemented) only if countries trust each other, realize their mutual dependence and responsibility and take collective action. In this way IWRM encourages solidary conduct of the coastal countries.

It should be brought to attention that, water resource management in Lithuania is based on the EU Water Framework Directive. In 2010, while implementing this document, Lithuanian Govern-

¹⁰ See more The handbook for integrated water resources management in transboundary basins of rivers, lakes and aquifers [8].

ment passed four river basin management plans. However, those international river basin management plans are not adopted. Although there is some degree of cooperation with Russia and Belarus, it doesn't cover all relevant aspects. Coordination of some RBMP elements with Latvia has occurred, but a joint RBMP has not been elaborated. Moreover, although a description of international cooperation is present in one RBMP, it is missing in three out of the four RBMPs. This practice shows that river basin management creates one more (additional) incentive to solidary conduct of countries. On the other hand, it can be said that the high solidarity level between countries cannot be reached without the political will and honest co-operation.

6. What is the relationship between equitable utilization of watercourses and environmental security? How is this relationship reflected in a country's population?

The relationship between equitable utilization of watercourses and environmental security depends on a country's water resources. If water resources are scarce, environmental security is fairly low. This connection is also directly reflected in a country's population. The greater in numbers is country's population, the bigger environmental security problems a country faces.

Lithuania has abundant water resources, therefore it does not face any problems of utilization of watercourses. This fact has no impact on its population since even if Lithuania's population doubled (what is hardly believable in the nearest future), water resources still would be plentiful.

Actually, Lithuania is probably the single country in the world which uses only underground fresh water resources.

Furthermore, watercourses has to be used quite intensively to make any environmental security problems. In Lithuania watercourses, especially rivers, are used only for tourism, therefore no environmental security problems are encountered. The only greater problem of equitable utilization of watercourses is the possibility for any person to access any watercourse by feet. This access is also needed only for tourism and leisure time. Sometimes this access is denied by the land owners despite the fact that it is forbidden to deny this access.

7. The notion of sustainable development as it is reiterated in international law regarding transboundary fresh water resources

Transboundary fresh water resources have to be used having in mind the principle of sustainable development. Sustainable development refers to a mode of human development in which resource use aims to meet human needs while ensuring the sustainability of natural systems and the environment, so that these needs can be met not only in the present, but also for generations to come. Therefore it is crucially important that the use of any resource would be prudent.

However the use of transboundary fresh water resources is always a harsh question since the downstream riparian state can always accuse the upstream riparian state of breaching the principle of sustainable development. Therefore all ri-

riparian states have to negotiate on the use of transboundary fresh water resources and solve this problem by signing treaties. However if fresh water resources are scarce and country's population is high, the principle of sustainable development is denied. People want fresh water resources with all its commodities now and not in the next generation, what seems to be even less believable.

8. What would be the benefits of riparian states by setting intergenerational equity as the goal of integrated water resources management?

The benefits would be great and such a decision would help to meet the requirements of the principle of sustainable development. Actually, *intergenerational* equity is one of the cornerstones for implementing the principle of sustainable development.

Setting *intergenerational* equity as the goal of integrated water resources management would help the riparian states to negotiate on the use of transboundary fresh water resources more easily, the fresh water resources would be used more prudently and environmental security would be higher.

9. What is the role of intergenerational equity in the promotion of solidarity as regards transboundary watercourses?

The role of *intragenerational* equity in the promotion of solidarity as regards transboundary watercourses is of great importance. The use of *intragenerational* equity would help to solve many problems regarding transboundary watercourses. Nationally, the fresh water resources would be saved and the possible catastrophes caused by the overuse and destruction of fresh water resources avoided. Internationally, the conflicts among riparian states would be avoided and their co-operation for the safeguarding the fresh water resources would be possible.

Concluding remarks

The solidarity on national and international level can be exemplified by the allocation of water rights. Water is oblivious to human made boundaries. The hydrological system of any water system may reside in more than one country so the measures taken by one country can have a considerable impact on other riparian countries of a river basin. Thus the limitations to the territoriality principle seem to be necessary.

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