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*Director of CEERE, Series Editor*



RIGHT TO WATER AND PROTECTION OF FUNDAMENTAL RIGHTS IN HUNGARY



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Edited by  
Marcel Szabó  
Veronika Greksza

Studia Europaea 2013 Jurisprudentia et Practica 4



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Marcel Szabó  
and  
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## Preface

This book presents fourteen contributions from Hungarian lawyers on the fundamental right to water, as it is being discussed at international, at EU and at national level of several states. The reader will find a wealth of information, legal interpretations and conclusions on this right, which keeps on being discussed globally and locally, and which will obtain even more attention in these times of climate change.

“Water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such” states Recital 1 of the EU framework directive on water (2000/60); it indicates in Recital 15 that the supply of water is a service of general interest. These two statements describe well the barrier, which shields the human right to water from economic and commercial interests. Indeed, the statement that there is a fundamental right to water is a first and very important step on the way to allow all humans to benefit from water availability. However, all contributions in this book demonstrate that this recognition of the right to water as a human right is not sufficient.

Rather, the right to water shares the fate of the protection of the environment – or, if one so wishes, the right to a clean and healthy environment: in theory, hardly anybody would disagree that there is a necessity to protect the environment and to make water available to everybody. In practice, though, this is another question, as the contributions on the Mazibuko-case (*Szemesi*) and the issue of arsenic-containing drinking-water (*Kardos Kaponyi*) demonstrate.

Stipulating a human right to water is thus a first step only. As progress in our society can be measured, if at all, by fractions of millimetres, it is of paramount importance to make the right to water operational, to apply it in practice and to come to its general recognition. Some citizens in the European Union successfully went to court, arguing that they had to buy bottled water, because the water which was supplied to them contained too many pollutants, in breach of the EU directive on drinking-water. Another citizen initiative in the EU just succeeded in stopping plans from the European Commission to pave the way for privatizing water supply systems. These and other actions may progressively lead to concretizing the right to water in the 21<sup>st</sup> century.

There remain enough problems for research, though; some examples are given hereafter: does the right to water refer to fresh surface water only, or does it also include

underground water (*Szabó*)? And what about ocean water, its contamination by petroleum, plastic and other waste, its use for offshore activities and its possible desalination? What about wastewater: is not there already by now an obligation for every undertaking, acting in developed or in developing countries, to discharge wastewater only after treatment?

Is the transfer of water from rivers to regions with water scarcity only justified, when there is no, but really no alternative – such as desalination installations functioning with solar energy –, or is such a measure just a policy decision?

What about irrigation, one of the main uses of water: is not there already by now an obligation to use the best techniques for irrigation, in order to minimize the use of water? And is the “user pays” principle, another aspect of the “polluter pays” principle, not applicable already by now, requiring a price policy for water which is oriented on the general interest and not on vested interests, or on the maximization of benefits?

What about involvement of citizens in the decisions on water-related projects, plans and programmes? What about their participation in the process, their adequate information, the obligation of public authorities to educate citizens to participate and inform themselves?

These and numerous other questions around the right to water will give room for further exploration by human right lawyers. Indeed, we must be careful of not satisfying ourselves with the proclamation of a human right to water: *Csink-Kovács* refer to the US Declaration of Independence with the famous phrase that “all men are created equal”. Historically, though, it took some time for society to accept that this statement did not refer to men only, but also to women, and that slaves were also “men” and not something else. Arguing that there is a right to water, but then arguing that this is a right of the second or third generation, might already bring us too close to a situation as that of the 18<sup>th</sup> century United States, where rights were proclaimed, but lawyers’ interpretations made these rights worthless for slaves and women. The creativity of human right lawyers which is so eloquently demonstrated in all the contributions of this book should rather endeavour to make the right to water a right of first generation – and this for all people on this planet.

The best one can say on a legal book is that it does not constitute the end of a discussion, but that it is the beginning of new and further research on the topic. This book on the right to water convincingly complies with this assessment. Therefore, I recommend this book to lawyers, and in particular to young lawyers, who will have to

live with all the difficulties that the environment is facing in the coming decades, in particular with climate change, loss of biodiversity, the omnipresence of chemicals, the scarcity of resources and poverty – all items with a direct link to water problems. It is hoped that lawyers do not place it on their bookshelves, but take it as a source for inspiration to work for a better environment and for a right to water which leads to the necessary changes in society, in Hungary, in Europe and worldwide.

Particular thanks go to *Dr. Marcel Szabó*, the Hungarian green ombudsman, to his office, the Office of the Commissioner for Future Generations and to the Hungarian Ministry of Foreign Affairs, who assembled the different contributions and succeeded to generate a publication that will hopefully stimulate the discussion on water as a human right for several years to come. I hope that the applause which they receive from the readers, will encourage the contributors to write more on the subject – and the editors, to enable such writing.

Madrid, July 2013

Ludwig Krämer

# **PART I**

## **HUNGARIAN ASPECTS**

# The New Concept of the Constitutional Protection of Water Bases

*Marcel Szabó\**

## I. Introduction: the significance of water sources

Water has been a public good for thousands of years. Anyone could consume any amount of it anywhere. Now, at the beginning of the 21<sup>st</sup> century, however, there is much less water than what would satisfy the needs of mankind. The population of the world currently numbers 7 billion. Around one and a half billion people do not have access to clean drinking-water and every second individual must face the negative consequence of insufficient sanitation. 50 percent of all infectious diseases are caused by contaminated waters. As a result of these waterborne contagions, annually approximately 300 million people become ill and about 5 million people die every year.<sup>1</sup> Thus, water plays a crucial role in our lives. Although our planet is dominated by water and huge quantities of water are at our disposal, it is important to know that 97.5 percent of the water sources in the world are unfit for human consumption. About 70 percent of water that can be used for human consumption may be found in the great glaciers of the world, though in an ever decreasing amount, approximately 30 percent of which is contained in other surface and groundwater reserves. Thus, surface water sources and groundwater sources hold merely 0.3 percent of the total water quantity. Nevertheless, the greatest part (nearly 99 percent) of this water quantity is found in groundwater sources.<sup>2</sup> This clearly indicates the problem which lies in the fact that while international rivers and lakes are governed by nearly 2000 international treaties,

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1 See e. g. World Business Council for Sustainable Development (WBCSD) and United Nations Environment Programme (UNEP): Industry, Fresh Water and Sustainable Development. Geneva: WBCSD and UNEP, 1998; Gleick, Peter H.: The World's Water 2000-2001: The Biennial Report on Freshwater Resources. Washington, DC: Island Press, 2000.

2 See USGS: Earth's water distribution, <http://ga.water.usgs.gov/edu/earthwherewater.html>

both the international law and the European law have largely neglected the issue of groundwater sources.

It is important to sound the alarm because we are in the last hour. We shouldn't forget that mankind exploits for example river water to such an extent that a number of rivers do not even reach their estuaries, for instance the Colorado River which dries out before reaching the sea. Likewise, the Yellow River in China (or Huang He) does not contain any water at certain passages on 280 days of the year, since mankind actually uses up the entire water quantity available. This also clearly indicates the sort of conflicts river water may generate. In Africa, the River Nile is shared by three countries: Egypt, Sudan and Ethiopia.<sup>3</sup> Currently, more than 160 million people live here, who use up most of the available water for irrigation and human use, thus only 6 million m<sup>3</sup> reaches the sea out of 83 million m<sup>3</sup> of water. By 2050, the number of people living in the Valley of the Nile is estimated to reach 388 million capita, which is particularly worrisome in light of the fact that Sudan and Ethiopia have just begun to abstract water for irrigation.<sup>4</sup>

By 2050, the population of the Earth is expected to exceed 10 billion. Water demand shall increase by 70 percent as compared with the present situation, and as a result 40 percent of mankind will not have enough water by the middle of the 21<sup>st</sup> century.<sup>5</sup>

## **II. Development of the legal regulation of water**

Hereinafter, the development of the legal regulation of water will be analysed through different national examples. Subsequently, we shall focus on the question of how international law and/or constitutional law can reasonably address the abovementioned problems.

### **II.1. Water as the source of life**

In ancient times, water as the source of life was considered by mankind as the gift of God – a good illustration of this perception is given in the Bible in the Book of Job: “Surely, God is great and we do not know him; the number of his years is

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3 It was not an accident that Herodotos, father of historiography, called Egypt the gift of the Nile.

4 TEFAYSE TAFESSE, *The Nile Question: Hydropolitics, Legal Wrangling, Modus Vivendi, and Perspectives*. Munster, Germany: Lit Verlag, 2001. 2.

5 MOLDEN D. et al., *Pathways for increasing agricultural water productivity*. In: MOLDEN D. (Ed.): *Water for Food, Water for Life: A Comprehensive Assessment of Water Management in Agriculture*. London: Earthscan and Colombo: International Water Management Institute, 2007. pp. 279-310.

unsearchable. For he draws up the drops of water; he distils his mist in rain, which the skies pour down and drop upon mortals abundantly.”<sup>6</sup>

Verses 10-03 of Chapter 65 of the Book of Psalms are also a perfect example for the spiritual significance the Bible attributes to water in the relationship between God and people: “You water its furrows abundantly, settling its ridges, softening it with showers, and blessing its growth. You crown the year with your bounty; your wagon tracks overflow with richness. The pastures of the wilderness overflow, the hills gird themselves with joy, the meadows clothe themselves with flocks, the valleys deck themselves with grain, they shout and sing together for joy.”<sup>7</sup>

In the Canticle of the Sun by Saint Francis of Assisi, water is called the “Sister” who serves us and is humble, precious and pure.<sup>8</sup>

Although according to certain scholars, European natural science recognized the water cycle as a scientific fact in the course of the 17<sup>th</sup> century,<sup>9</sup> it is apparent from the previous biblical quotation that mankind already had knowledge of the origin of water and its cycle significantly earlier. This is substantiated by the results of historical research according to which for example in India several hundred years B.C. the quantity of rainfall of the given year was already measured in areas where significant cereals cultivation took place.<sup>10</sup>

Examining the development of the legal rules related to water, it is worth noting that the special status of water as a quintessential element of core value for the entire society was already recognized by the early legal systems, attributing a legal status to water resembling the special value it was afforded under religious approaches. The Roman law tradition should be also emphasized which denied the possibility of the ownership of river waters. The Institutes of Justinian classified water courses in the category of *res communis omnium usus* similarly to air, the seas and wildlife, the ownership of which is excluded; however, everybody could use them freely.<sup>11</sup> With respect of groundwater,

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6 Job 36: pp. 26-28.

7 Psalms 65: pp. 10-13.

8 “Be praised, my Lord through Sister Water; she is very useful and humble, and precious and pure”

9 See e.g. the work of PIERRE PERRAULT written in 1674: P. PERRAULT, De l’origine des fontaines. Paris, P. le Petit, 1674.

10 ALAIN GIODA, A Short History of Water, Nature&Resources, 35 (1999) 1: pp. 42-48. 43.

11 STEPHEN HODGSON, Modern water rights: Theory and practice. Rome, Food and Agriculture Organization of the United Nations, 2006. 10.

however, in compliance with Roman law, the owner of the area was entitled to exploit the groundwater sources.<sup>12</sup>

Taking Roman law as their point of departure, but developing their own institutional system, the *common law* countries ensured prerogatives to the owners of riverside land properties. On this basis, each proprietor of a riverside land property could abstract a water quantity not exceeding normal use (*riparian rights*). The doctrine of *Prior appropriation* (first use) may be considered another important milestone in the evolution of the Anglo-Saxon legal tradition in the American legal development. Its significance is that the persons entitled to use surface water are differentiated on the basis of first use and other users are obliged not to substantially limit the right to use water legally enjoyed by the first users.<sup>13</sup>

The basis of the continental tradition is the French Code Napoleon, the legal roots of which go back to Roman law as well. Regarding the licences related to the public and private river waters, the basic difference can be described as that while in the case of public river waters the use may commence after the acquisition of the state permit, the use of private river waters was not subject to a permit, the proprietor could use water as part of his or her ownership. The difference between public and private water courses was basically established by the nature of the navigable water courses, since navigable water courses could not be privately owned in accordance with the French legal tradition.<sup>14</sup>

## **II.2. Development of the international protection of the right to water**

The development of international public law is determined by the French legal tradition, thus it is not by chance that international water right rules can be related to the water right rules of the French national law. Since the 1815 Vienna Congress, the navigable rivers have been considered international water courses. The then established international legal rules are based on the free navigation of navigable rivers. These provisions constitute the first bases of the international water right.

While international law included rules on water use, drawing timber, free navigation related to international water courses since the first half of the 19<sup>th</sup> century, non-navigable rivers and brooks are under the states' own sovereign jurisdiction.

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12 Ibid. 16.

13 Ibid. 12-13.

14 Ibid. 14-15.

International law has not addressed these, at least earlier, similarly to the doctrine of the French national law on the division of public and private water courses.

### **II.3. Water as a commodity**

At the time of the establishment of the General Agreement on Tariffs and Trade (GATT), in 1947, water was not more than a commodity.<sup>15</sup> Article 9 of the GATT furthermore excludes the possibility of the limitation of free trade with respect to the trade of water. As such, it is a reflection of Keynesian economics, according to which the free market will treat everything at its due value; consequently, market turnover will contribute to appreciation of drinking-water as well.

### **II.4. Recognizing access to water as a human right in international law**

In recent decades it is increasingly recognized that access to water should be considered within a human rights framework. Twenty years ago, Principle 4 of the Dublin Statement on water and sustainable development declared an important approach satisfying different interests by stating that – acknowledging its economic value – water is an economic good and recognizing that several human rights are attached to water.<sup>16</sup>

Nowadays, we are witnessing the infiltration of the human rights approach into international law. The guidelines for the realization of the right to drinking-water and sanitation adopted by the UN Commission on Human Rights in 2005<sup>17</sup>, establish that water is the source of life. The Commission clearly declares that the right to drinking-water is unquestionably a human right. The guidelines provide for the obligation to ensure that everyone has a sufficient amount of safe water and enshrine the requirement of the equitable distribution of water.<sup>18</sup> Furthermore, the guidelines call on UN states to regulate the right to drinking-water as a human right and to ensure that drinking-water

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15 General Agreement on Tariffs and Trade (GATT 1947).

16 Dublin Statement on Water and Sustainable Development, 31 January 1992. Available at <http://www.inpim.org/files/Documents/DublinStatmt.pdf>

17 Full text of document available at

[http://www2.ohchr.org/english/issues/water/docs/Sub\\_Com\\_Guisse\\_guidelines.pdf](http://www2.ohchr.org/english/issues/water/docs/Sub_Com_Guisse_guidelines.pdf)

18 Sufficient amount means about 50 l/day. It should be noted that there are significant differences between the water consumption of the states. In Africa the water consumption/person/day is only 8-10 l, while in the United Kingdom this quantity might be 200 l, and in the United States 500 l. It is worth mentioning that in the 1980s water consumption did not exceed 300-380 l/day. See: M.L. DEWANE – T L. HOLTHUSEN, Water: The New Currency. Journal of Freshwater. Special Report, 1982, Vol. 6: S-3-S-14. S-3.

should not be the subject of business investments, while everyone should be afforded access to equitably distributed drinking-water service as a human right.<sup>19</sup>

In several countries such as the United States or China, due to the intensity of non-renewable groundwater use it is expected that these resources will be completely depleted by 2030 in the North China Plain and by 2025 in the United States. As a consequence, new approaches emerged, urging for the recognition that underground water resources form part of the common heritage of mankind. The result of an international regulation based on this common heritage of mankind concept would be that states which have not yet used their underground drinking-water resources to an excessive extent may not dispose of their own drinking-water wealth. It seems that such aspirations regarding the development of international law are not always guided by good intentions, but fortunately, the international community rejects this idea. Instead of formulating the concept of water as a common heritage of mankind, recognizing the right to water as a human right would amount to real protection under international law.

In this respect it should be mentioned that in the '70s several important draft conventions on international rivers were prepared. The most important international document on this issue is the Helsinki Convention on the protection and use of trans-boundary watercourses and international lakes which was adopted in 1992 and which became part of European Law with the accession of the European Community to the Convention.<sup>20</sup> Efforts related to the UN General Assembly resolution 2669 concerning the global settlement of regulations on international watercourses<sup>21</sup> failed; therefore the Helsinki Convention became the relevant international norm concerning international rivers and lakes at a global level. This convention, however, applies only to renewable groundwater resources in river basins.<sup>22</sup> Nevertheless, the real wealth of humanity are underground water resources. In this regard, the UN International Law Commission adopted in 2008 a draft convention; however, this will only become customary

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19 The guidelines are in line with the 15. general comments on the right to water prepared by the UN Committee on Economic, Social and Cultural Rights (CESCR) in 2002. In Bulto's opinion the Committee did not "invent" a new right, but discovered the right to water which had previously appeared in several international documents. See: Bulto, Takele Soboka: The emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery?, Melbourne Journal of International Law. 2011, Vol. 12., 292.

20 The UNECE Water Convention. Helsinki, 17 March 1992. The Convention on the Protection and Use of Trans-boundary Watercourses and International Lakes, <http://www.unece.org/fileadmin/DAM/env/water/pdf/watercon.pdf>

21 A/CN.4/244/Rev.1 General Assembly resolution 2669 (XXV) on progressive development and codification of the rules of international law relating to international watercourses, 8 December 1970.

22 40% of humanity's water demand is supplied from trans-boundary water resources, therefore managing international conflicts in this respect is essential.

international law in a very long time, since there is little chance that states will transform it into a formally adopted international convention.<sup>23</sup>

### **III. Constitutional protection of groundwater resources around the world**

Given the fact that international law and European law cannot address this problem at the global and the European Union level, we should take recourse to the constitutional provisions of the states in order to establish an effective international protection of water bases. These provisions might pervade international law and European Union law through the inspiration these legal systems may gain from the general principles of member states' national constitutions. Consequently, constitutional dialogue between the states is of crucial importance in respect of water resources.

At present, only 18 out of 200 countries in the world provide for the protection of water resources at constitutional level. In the European Union, only three countries, Austria, Hungary and Lithuania belong to this small group of states. Apart from this, in Europe the constitution of Andorra, Switzerland, and the Albanian constitution have some provisions referring to water protection.

#### **III.1. National examples: features of water legislation in Africa and Asia**

As Ruth Meinzen-Dick and Leticia Nkonya stated, the cornerstone of questions concerning water rights are: who uses water, from which resources, when and for which purposes. However, the question concerning the acquisition and enforcement of these rights is determined on different levels.<sup>24</sup>

State rules may determine rights of access and abstraction, decision-making rights of persons or organizations to limit, control water use and to exclude others from using these resources. As a Kenyan saying goes, even the hyena has a right to water, meaning that no one should be denied the quantity of water essential to stay alive.<sup>25</sup> It should be

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23 A/CN.4/595. International Law Commission (ILC): Shared natural resources: draft articles for an international framework convention on trans-boundary aquifers, 5 August 2008.

24 MEINZEN-DICK RUTH – NKONYA, LETICIA, Understanding legal pluralism in water rights: lessons from Africa and Asia. In: VAN KOPPEN BARBARA – GIORDANO MARK – BUTTERWORTH JOHN (Eds.), Community-Based Water Law and Water Resources Management Reform in Developing Countries, Wallingford: UK: CABI International, 2007.

25 LEAH ONYANGO et al: Coping with History and Hydrology: how Kenya's Settlement and Land Tenure Patterns Shape Contemporary Water Rights and Gender Relations in Water. In: VAN KOPPEN

noted that Islamic law formalized this as the right of thirst which applies to all humans and animals providing that everyone should have access to the quantity of water essential for life.<sup>26</sup>

In the course of examining and analyzing examples from African and Asian legal systems, Meinzen-Dick and Nkonya found that different regulatory systems exist concerning the right of access and control of water use but most states, and even local customary or religious laws do not grant alienation rights to sell or drain water from water resources to make profit.<sup>27</sup>

Water law may provide different rules for members of the local community or for the thirsty strangers which is considered appropriate and reasonable in most countries. Investment of water abstracted from streams, in the Roman law terminology the *usus fructus*, however is not part of water law in the legal system of most countries. Therefore, groups or individuals may gain special benefits with water acquisition. As for national regulations, water is broadly classified as public property or a common good, but in general African legal systems consider water as a natural resource which may not be subject to private ownership.

### **III.2. Ensuring the right to water in India**

India plays a leading role in the process of the recognition of access to water and sanitation as a human right. In its decision, the Supreme Court of India declared the right to water as a basic human right referring to Art 21 of the Constitution of India on the right to a healthy environment.<sup>28</sup>

In its subsequent decision the court also declared that water is a community resource that should be recognized by the state as common property under the *public trust* doctrine,<sup>29</sup> considering the equality of generations.<sup>30</sup>

Critics of the human rights approach to water generally argue that if we consider water as a human right we forget that water is not an easily accessible and obtainable natural

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BARBARA – GIORDANO MARK – BUTTERWORTH JOHN (Eds.), *Community-Based Water Law and Water Resources Management Reform in Developing Countries*, Wallingford: UK: CABI International, 2007. 182.

26 MEINZEN-DICK – NKONYA (2007) i. m. 16.

27 Same 16-18.

28 *Narmada Bachao Andolan v. Union of India* AIR 2000 SC 3751; 248 (2000) 10 SCC 664.

29 See: NARAIN VRINDA, *Water as a Fundamental Right: a Perspective from India*, *Vermont Law Review*, 2010, Vol. 34, No. 4, 5-8.

30 *M.C. Mehta v. Kamal Nath* AIR 2000 SC 1997 34.

resource anymore like it used to be in the times of our ancestors, since industrial facilities and sophisticated systems ensure water supply for the population of a country. Critics warn that the recognition of water as a human right will abolish the economic foundations of private investments which would – in case the price of water were set on a market basis – otherwise be made to secure high level water services.

The Indian court's decision made clear, however, that the decision originated the right to water from the right to life being the most important fundamental right and part of the first generation of human rights, therefore, the state is obliged to ensure the conditions for the enjoyment of the right to water to each citizen. The state must also ensure that not only present generations but future generations enjoy fundamental constitutional rights connected to the right to water.<sup>31</sup>

#### **IV. Extraction of groundwater resources and enforcement of the right to water for future generations**

There are some critical zones in the world where instead of using stream water, water is extracted from groundwater resources. In Texas, for example, there are 66 thousand wells pumping water to the surface from the non-renewable water resources of a huge underground fossil aquifer. This aquifer supports 40% of water demand for cattle livestock operations and 50% of water demand for cereal cultivation and other agricultural cultivation.

Humanity considered groundwater resources to be inexhaustible for a long time. However, science has proved that this view is – in part – wrong. Groundwater resources can be divided into two groups. The first group is formed by the so-called fossil aquifers, which are non-renewable water resources formed several thousands of years ago. We can mention as an example the huge groundwater resource nurturing the main agricultural states of the United States. The second group of groundwater resources is formed by renewable aquifers, meaning groundwater resources in water basins of underground streams which, if they are used with due care, may be renewable.<sup>32</sup> Consequently, if humanity manages groundwater resources with due care these will last for a long time. Humanity, however, did not manage these resources wisely.

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31 MARCUS MOENCH, *Allocating the Common Heritage: Debates over Water Rights and Governance Structures in India*, *Economic and Political Weekly*, 1998, Vol. 33, No. 26, p. 48.

32 MARTIN-NAGLE RENEE, *Fossil Aquifers: A Common Heritage of Mankind*. *Journal of Energy and Environmental Law*. January 2011, pp. 39-40.

It is worth mentioning the example of the gigantic stream nourished by a non-renewable underground water resource in Libya, which is considered to be the eighth wonder of the world. This \$ 5 billion investment was realized to ensure the water supply of Tripoli through a 2,000-kilometer-long water passage draining the water from the faraway desert. It was fed by a huge groundwater reservoir, which however, seems to be running out. The International Atomic Energy Agency – which does not normally deal with such issues – explicitly warned Libya that this water wealth accumulated over thirty thousand years will be exploited in a few decades.

Apparently, it was also a popular idea in Saudi Arabia to use oil resources for the exploitation of underground water resources, and to use it to create huge agricultural areas. As a result, Saudi Arabia has been able to export grain for some time, using water resources which might become more valuable in a few decades than oil itself.

Mention must also be made of the drying up of the Aral Sea due to drainage satisfying the high water demand of cotton, rice and fruit cultivation.

## **V. Various concepts of water as a resource**

We could conclude our short review and comparative analysis of the development of water rights by stating that ever since the ages of the Roman Empire, mankind has considered water as a life-giving source that society will deny to no one. This concept has been adopted, in one way or another, by both civil and common law, although both legal traditions maintained some restrictions on the use of water as a special natural resource put in place by the state for the public good.

Analysing the evolution of local legal systems in Asia and Africa, we can see that local customary law and religious perceptions exert greater influence than state law; however, contradictions between local and state law may be best apprehended through examining whether they consider water as community or state property. In the course of the development of the legal systems of these countries, exploitation of water as a natural resource serving the common good for individual economic benefit has been rejected.

For centuries, mankind has considered water as a common good, *res communim usus*, and not as a potential source of getting rich and accumulating profit.

The conclusion of free trade agreements was one of the milestones of the post second world war economic system based on Adam Smith's approach. The architects of the agreement thought that the elimination of tariffs and trade restrictions from international

trade would be equally beneficial for both rich and poor countries because if everybody produced competitive goods and acquired other goods through barter and import, the system would guarantee the most efficient economic development of each country.

According to the provisions of the General Agreement on Trade and Tariffs of 1947, the GATS<sup>33</sup> and NAFTA<sup>34</sup>, water shall not be considered as an exhaustible natural resource but as a commodity on the distribution of which any state party to these agreements may impose taxes and duties, but states may not deem water non-marketable. This particular provision raises special worries and difficulties since, due to the increase in the world's population, the available amount of water per capita is continuously decreasing and it seems that already today our Earth fails to satisfy the needs of more than 1 billion people.

Naturally, as long as states regulate where, by whom and how much water may be consumed, the basic self-preservation instinct of their political regimes, however undemocratic they may be, demands that the thirsty masses should not be barred from using water. The example of the so-called 'water war'<sup>35</sup> in Bolivia may serve as a deterrent for many governments in the future. With the active participation of the IMF, the firm Bechtel acquired exclusive rights to exploit and bottle water from an underground source in the Bolivian settlement of Cochabamba and the company, with the help of the IMF, also won the right to manage the water supply and the sewage system of the Bolivian town. As a result of the firm's activities, however, the dramatic increase of water prices and fees led to a revolt against the company.<sup>36</sup>

Nevertheless, the international treaty systems do not consider water as such a special object, in connection with which states could restrict the application of the standard provisions regulating the international trade of commodities. The GATS is especially clear on this subject stipulating that water supply shall not be restricted by price regulations impeding its trade on the free market.<sup>37</sup>

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33 General Agreement of Trade and Services, 1994.

34 North American Free Trade Agreement, 1994.

35 For details see in DAVID BONNARDEAUX, The Cochabamba "Water War": An Anti-Privatisation Poster Child? International Policy Network, March 2009.  
[http://www.policynetwork.net/sites/default/files/Cochabamba\\_March09.pdf](http://www.policynetwork.net/sites/default/files/Cochabamba_March09.pdf)

36 M. SORNARAJAH, The International Law on Foreign Investment. Third Ed. New York: Cambridge University Press, 2010. p. 326.

37 JOY BRAUNSTEIN, Trading the Rain: Should the World's Fresh Water Resources be an Internationally Traded Commodity? In: CLIVE LIPCHIN et al. (Eds.): Integrated Water Resources Management and Security in the Middle East. Berlin: Springer, 2007. p. 274.

Several theoretical specialists and scientists argue for accepting water as a commodity serving economic purposes.<sup>38</sup> These are generally the advocates of free market competition who claim that trading in water contributes to the establishment of the reasonable price of water and therefore the market value of water will ensure that water supply, including sewage treatment and drainage, shall have sufficient funds in order to provide high quality and clean drinking-water sources to all who can pay for it.

As long as economic activities related to water supply are limited to one particular state, the given state's regulatory powers shall ensure that a minimum of basic services should be available even to citizens with limited or no resources. It is the global water crisis, however, that poses serious questions to the liberal free trade approach regarding the international trade in water. On an extremely resource-deficient market, it is not at all unlikely that communities that are far from the given natural resources and have polluted or used up their own water sources might buy up the natural resources of other countries and, having acquired those resources, radically deteriorate the living conditions of those poorer societies. Some countries treat water as a natural resource in a certain way when it comes to satisfying their water needs, and in quite a different way where international trade is concerned.

On the 2009 World Water Forum<sup>39</sup> the representatives of several countries argued for recognising the right to water as a human right, while other countries, such as the United States, Canada or China would have classified access to water as a basic need of mankind.

## **VI. Conclusion**

Having reviewed the national and international aspects of the evolution of water-related legal regulation, we may establish that, for centuries, mankind has attached much greater attention to surface water sources, mainly to rivers, while the legal regulation of underground water sources has not seemed all that necessary.

For centuries, mankind had appreciated and admired water, and it is historically preposterous that, by the end of the 20<sup>th</sup> century and the first half of the 21<sup>st</sup> century, water was transformed from a resource and an asset to be protected into a simple commodity. This happened in a period when the economic resources of our world are

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38 See e.g. in JAFFE M. – JAMES O.P., Point: counterpoint, should water be managed as a commodity? Advisor, 8, November–December, 2002.; BRUCE MITCHELL, The Value of Water as a Commodity. Canadian Water Resources Journal, 1984, Vol. 9 No. 2, pp. 30-37.

39 5th World Water Forum, from 16 to 22 March 2009 in Istanbul, Turkey.

more unevenly distributed than ever before in the course of our history, and when more and more people are suffering from the scarcity of water in adequate quantity and quality.

We cannot blame our ancestors for simply having placed underground water sources at the disposal of the owners of the land. At that time, especially in Europe, there was plenty of clear, surface freshwater, rivers and lakes available for quenching one's thirst, irrigating one's land and watering the livestock. Human greediness started to exploit water sources deep under the surface by the end of the 20<sup>th</sup> century, using and depleting the water resources that had been believed inexhaustible before for daily economic needs, such as irrigation. The majority of people do not bring water in pitchers from the brook anymore, they buy water made potable through purification from the network of water supplying companies. For the majority of people water is not for free anymore, satisfying their needs in water requires the investment of serious material funds. And although mankind had considered water a miracle, God's gift to us for a long time, the consumers of our days have lost their illusions, they see the water running from the faucet as something they are entitled to since they have paid for it.

This approach, however, denies the right of equal access to water from those who cannot pay for it. The concept of "I'm entitled because I paid" in a world of free market, where there is a significant demand and a scarce supply, may push the needs of the local consumer to the background vis-à-vis the interests of those consumers who, although live farther away, are richer. This attitude must be changed, we must return to a more humanist approach in our relation to water. In this process we might be guided, on the one hand, by the Roman concept of surface waters which considered water useable by anyone and did not allow such sources to fall into private hand and, on the other hand, by the concept currently prevailing in African and several Asian countries, according to which everyone has the right of access to water.

If mankind wants to assume responsibility for its future, for the needs of its children, it has to adopt three different legal approaches and make them part of its legal system and way of thinking:

The right to water is a human right that may be derived from the right to life. No one may be deprived of the amount of water necessary to quench their thirst and cover their daily needs (50 litres per day according to certain estimates), even if their financial background prevents them from receiving this amount. From the concept of the right to water as a derivative of the right to life ensues the need to limit the international trade in

water, since the interests of economic utilization must not jeopardise fundamental human rights.

The right to water is related not only to the fundamental right to life, a first generation human right, but also to the third generation human right to a healthy environment. As a result, the state bears responsibility for adopting the necessary legal regulations and making the necessary investments that may relate to the rational, healthy and renewable utilization of rivers, lakes and underground water sources.

Part of the usable water comes from underground sources that are either non-renewable or are renewable only in a vast period of time. When using or utilising these sources, one should act with extreme caution and care, taking into consideration the requirement of maximal equitableness towards future generations. Since the water resources of our Earth are interlinked, its freshwater system, providing us with life-giving water, constitutes the common heritage of all mankind. Its protection can only be ensured with joint efforts. It may be practical and useful to transform the concept of the 'common heritage of all humankind', the current practical implementation of which serves intra-generational equality, i.e. smoothing out inequalities between richer and poorer nations within one generation, into a concept serving the interests of future generations, to complement it with the mosaic of the joint heritage of individual nations. In this sense, each and every nation shall bear responsibility for using the water resources under their sovereignty in a way that will contribute to the preservation of the global water system, our common heritage.

Only the implementation of the above presented measures may ensure the adequate preservation of the livelihood of mankind, a future that would be worth putting in perspective so that the human race, cooperating in a humane world and easing global suffering, could embark upon a better path to that future.

# **Paradigm Shift in the Constitutional Character of Environment?**

*Lóránt Csink – Júlia T. Kovács\**

The right to environment and the duty of the preservation and maintenance of a healthy environment are declared at the constitutional level by a number of countries. Yet, unduly little attention has been paid to the right to environment by the scholars of constitutional law. The principal explanation for this is that the right to environment is “different” from other basic rights, it differs from classical human and fundamental rights in many important aspects (subject and object of the rights, the possibilities of enforcing them, etc.).

Within the framework of this study regarding environment, we will examine whether there is a theoretical possibility for a change in its nature regarding basic rights, whether this will lead to a shift in the dogmatic approach and what changes the Fundamental Law that entered into force in 2012 has brought about or may bring about in the field of environmental protection. Our hypothesis is that there is a possibility for the right to environment to be reinforced, this may, however, be the result of a change in social attitude rather than the normative strength of a legal rule or the constitution. For the substantiation of this claim, we shall review the direction of the development of basic rights, the constitutional aspects of the right to environment and environmental protection and lastly, the regulations of the Fundamental Law on environmental protection.

## **I. Constitutional development and society**

Today the most fashionable views are those which assess the development of the democratic state on the basis of the rule of law, basic rights or the human rights as a one

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way street.<sup>1</sup> This view, however, does not take into account the historical experience that the development of basic rights is not linear, in certain periods different priorities are set, as a result of which different basic rights became dominant. Meanwhile, in the course of development the character of basic rights has also changed.

Two political documents adopted at the end of the 18<sup>th</sup> century, the Declaration of Independence in the US and the Declaration of the Rights of Man and of the Citizen (Declaration) in France, played an important part in the development of basic rights. The two documents were conceived on the basis of different philosophical convictions, and under different political circumstances. As regards their central message, however, there is an essential similarity: individual rights are not granted by the state, individuals have rights that cannot be taken away, not even by the state. In the wording of the Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.” The Declaration sets out that the rights of people are innate and inalienable. The objective of the government is the protection of these rights, the source of its power is the consent of the governed, that is, the people itself. The French Declaration conveys a similar message, setting out that “Men are born and remain free and equal in rights.”

Both Declarations were not merely documents stating political will, but reflected the desire of contemporary societies for freedom. This led to the recognition and constitutional declaration of personal and political freedoms (so-called first generation rights). These rights typically require the non-intervention of the state; the state is required abstain from adopting certain legal rules and measures that could violate the individual’s right to life, property, freedom, etc. Constitutional development however, was not, linear. Already at the end of the 19<sup>th</sup> century, social claims were formulated towards the state, gaining more impetus after World War I. The desperate economic and social situation (unemployment, underdeveloped social service systems, lack of schools) gave rise to new demands within the society, as a consequence of which the so-called second generation rights, economic, social and cultural rights, appeared. As to their character, they differ completely from first generation rights. They require active state intervention: in their case a mere constitutional declaration is insufficient, state action is

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1 Fórum, SOMODY BERNADETTE, *Fundamentum* 2011/1. p. 48., 1718/B/2010. A minority report by László Kiss to the CC decision NÓRA CHRONOWSKI – TÍMEA DRINÓCZI – JUDIT ZELLER: Túl az alkotmányon... (Beyond the Constitution) *Közjogi Szemle*, 2010/4.

needed for their enforcement (building schools, hospitals, creating workplaces, ensuring social care, etc.). The philosophical character of these basic rights is also different: the natural-rights approach was substituted by the positivist approach.

Just as the emergence of civil personal and political freedoms was the result of the individuals' desire for freedom, a social phenomenon, the citizens' desire for security gave rise to the economic, social and cultural rights in the first half of the 20<sup>th</sup> century. The codification of the second generation rights did not entail the disappearance of the first generation rights. This meant, however, a shift in balance, social change gave rise to new basic rights besides the earlier ones.

## **II. Appearance of the right to environment**

Similarly to other basic rights, the appearance and strengthening of the right to environment is related to social changes.<sup>2</sup> The existence of several environmental legal rules of the past proves that human interventions have been increasing since the appearance of mankind on the Earth. Also, measures taken against their negative impact on the environment has been justified in all ages.<sup>3</sup> From the middle of the 20<sup>th</sup> century, more and more powerful signs of serious environmental damages appeared, for example the notorious London Smog in 1952, as a result of which 4,000 people died because of the dense smog in a matter of just a few days. Similarly severe damages were caused by oil spills after tanker accidents, which even drew the attention of the public.<sup>4</sup> Among others, such incidents led to the reinforcement of the legal regulation of environment protection, in particular in the past 50 years, although certain initiatives already emerged centuries ago as well.<sup>5</sup>

The right to environment surfaced on the international plane in the 1970s, before it became enshrined in national constitutions, a phenomenon which became widespread

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2 DINAH SHELTON: Human Rights, Environmental Rights and the Right to Environment. *Stanford Journal of International Law*. Vol. 28. 1991-1992. p. 106.

3 GYULA BÁNDI: *Környezetjog (Environment law)*. Budapest, Szent István Társulat, 2011, p.13.

4 Environment protection in the interest of preserving the health of people became inevitable when the relation of biosphere (the environment ensuring the conditions for life with the living things therein) and technosphere (the artificial environment formed by human civilization, part of the biosphere which has changed due to human activity forming nature) has ultimately changed due to the industrial revolution. See it in more detail: Majtényi, Balázs: *A környezet nemzetközi jogi védelme (The international law protection of environment)* Budapest, ELTE Eötvös Kiadó, 2012.

5 GYULA BÁNDI: *Környezetjog (Environment law)*. op.cit. p. 15.

only later.<sup>6</sup> The tendency therefore stands in stark contrast to the direction of the general development of basic rights. The right to a healthy environment first appeared in international law documents and the environmentally conscious attitude found its way into national constitutions from these international *soft law* norms.

With respect to the international regulation of the right to environment, the relevant international documents may be divided into three groups from the aspect how much significance they carry in the system of human rights.<sup>7</sup>

The official catalogues of human rights pertain to the first group,<sup>8</sup> such as the UN covenants and the European Convention on Human Rights. These usually make no direct mention of environmental protection and the right to environment. The principal purpose of this is that these conventions are older than the emergence of the worldwide problem of environment protection.<sup>9</sup>

Those non-binding international documents belong to the second group, which formulate at the level of basic principles the right to environment.<sup>10</sup> First, the principle No. 1 of the UN 1972 Stockholm Environment Protection World Conference declares that “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.” 20 years thereafter, principle No. 1 of the Rio Declaration actually repeats the abovementioned: “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.” The Commission on Human Rights passed a decision in 2003 with respect to human rights and environment protection, taking account of sustainable

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6 JANELLE P. EURICK: The constitutional right to healthy environment – enforcing environmental protection through state and federal constitutions. *International legal perspectives*. Vol. 11. (1999-2001) No. 2 pp. 185-222.

7 Classification of Gyula Bándi. See: BÁNDI GYULA: *Környezetjog (Environment law)*. Osiris Kiadó, Budapest, 2006. p. 63.

8 Ibid.

9 Pursuant to Article 25 of the Universal Declaration of Human Rights: “*Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care...*” Pursuant to Article 7 of the International Covenant on Economic, Social and Cultural Rights: “*recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: ...b) Safe and healthy working conditions.*” Pursuant to Article 12.1: “*...recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*” Pursuant to Article 12.2: “*...shall include those necessary for... b) the improvement of all aspects of the environmental and industrial hygiene...*”

10 GYULA BÁNDI: *Környezetjog*. Osiris Kiadó, Budapest, 2006. p. 63.

development.<sup>11</sup> In this, the issues of peace, security, stability (third generation problems) and the right to development were brought into context with sustainable development.

Those non-global international treaties can be classified into the third group, which, albeit unrelated to human rights, are issues of environment protection where the right to environment plays a significant role.<sup>12</sup>

The basis of the comprehensive procedures for the enforcement of the right to environment established by the Aarhus Convention was the right to environment. The preamble of the Convention establishes that: “Recognizing that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.”<sup>13</sup> This Convention connects human rights with environmental rights, it recognizes that we have an obligation towards future generations which forms the basis of the view that sustainable development may be achieved only through the involvement of all stakeholders. The Convention also connects the accountability of government with environment protection.

### **III. Parts of the right to environment**

Although the full recognition of the right to environment as a human right is a long time coming, in recent decades we are witnessing the “division” of this right; some of its aspects have sprung into independent existence: the right to water is increasingly acute, trying to find its place in the new system of human rights slowly gaining shape.<sup>14</sup> According to the Recommendation of the Committee of Ministers of the Council of Europe (on the European Charter on Water Resources) issued in 2001, “Everyone has the right to a sufficient quantity of water for his or her basic needs.” Pope John Paul II, in his message to a group of Brazilian bishops, wrote that “as a gift from God, water is a vital element essential to survival, thus everyone has a right to it”.<sup>15</sup> It is important to mention, however, that the interpretations of these partial rights by constitutional law vary significantly. Some elements of the right to a healthy environment may be defined

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11 Human rights and the environment as part of sustainable development, Commission on Human Rights resolution 2003/71. quoted by: GYULA BÁNDI: *Környezetjog (Environment law)*: i.m. p. 101.

12 GYULA BÁNDI: *Környezetjog (Environment law)*. Osiris Kiadó, Budapest, 2006. p. 63.

13 *Ibid.*

14 GYULA BÁNDI: *Környezetjog*: op. cit., p. 102

15 GYULA BÁNDI: *Környezetjog*: op. cit., pp. 102-103

as fundamental rights; however, others are much rather state objectives, state priorities (*Staatsziel* in the German doctrine).

The aspects of the right to a healthy environment, such as the right to participate in environmental decision-making (active participation in making decisions related to the quality of the environment), the right to information (one has the right to learn about environmental hazards) and the right to legal remedy<sup>16</sup>, are primarily of procedural character.

It has already become clear that the protection of the environment is a necessary and integral part of the enjoyment of the right to health, food and life.<sup>17</sup> The pursuit of happiness is hardly imaginable without a healthy environment. The close link with these rights clearly shows that the right to environment may easily be incorporated into the core of the human rights protection system, the ultimate purpose of which is the unfolding of the personality of all human beings in dignity.<sup>18</sup>

The right to environment requires states to refrain from activities harmful to the environment, and to adopt and enforce policies promoting the conservation and improvement of the quality of the environment; furthermore, states must ensure that people are protected against environmental risks generated either by governmental or private agencies.<sup>19</sup> Secondly, the right to environment is not purely an individual right. In the case of the right to environment, there is a strong separation between positive and negative rights, individual and collective rights.<sup>20</sup>

The right to environment, as pointed out by *Philippe Cullet*, should not be classified as a synthesis right, embodying a number of elements that may also be found in other rights

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16 Under the right to legal remedy we mainly understand, on the one hand, beside the legal status of the client in the traditional sense and the right to participate, manifesting itself in the decision-making process, the right of legal remedy against decisions not acceptable to those concerned and, on the other hand, the appearance of *actio popularis* as a communal means of the protection of rights. The environmental protection organisations are entitled to this right to sue: they may sue any user of the environment in the interest of the environment. For further details, see JULESZ MÁTÉ: *Környezetvédelmi civil szervezetek és az actio popularis*. *Acta Humana: Emberi jogi közlemények*. No. 3-4, 2006, pp. 129-172.

17 DINAH SHELTON: *Human Rights and the Environment: what specific environmental rights have been recognized?* *Denver Journal of International Law and Policy*. Vol. 35. No. 2. 2006. pp. 129-172.

18 PHILIPPE CULLET: *Definition of an Environmental Right in a Human Rights Context*. 13 *Netherlands Quarterly of Human Rights* (1995) ([www.ielrc.org/content/a9502.pdf](http://www.ielrc.org/content/a9502.pdf)) p. 26.

19 PHILIPPE CULLET: *Definition of an Environmental Right in a Human Rights Context*. op. cit. p. 28.  
20 *Ibid.*

and the recognition of which is often deemed a precondition of the enjoyment of other human rights (see, e.g., the right to development).<sup>21</sup>

There is a close connection between the right to environment and other human rights, since these may only be exercised in a clean environment of a quality that permits a life of dignity.<sup>22</sup> Principle 1 of the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment also refers to this connection as regards the rights to life, human dignity, equality and health. The right to environment consists of elements that can also be found in other rights and the recognition of which is often the prerequisite of the enjoyment of other human rights. The practice of the European Court of Human Rights evokes, in many cases related to industrial pollution and environmental damage, the right to life<sup>23</sup>, the right to health, the right to fair trial<sup>24</sup> or the sanctity of family life and private home<sup>25</sup>, since the right to environment itself is not explicitly mentioned in the European Convention on Human Rights. In his separate opinion to the decision<sup>26</sup> of the International Court of Justice in the *Gabčíkovo-Nagymaros* dispute between Hungary and Slovakia, Judge Veeramantry pointed out: “The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights mentioned in the Universal Declaration and other human rights instruments.”<sup>27</sup> Certain international environmental movements also mention the right to water, the right to development and the prohibition of discrimination at this point.<sup>28</sup>

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21 PHILIPPE CULLET: Definition of an Environmental Right in a Human Rights Context. *op. cit.* p. 27

22 DINAH SHELTON: Human Rights, Environmental Rights and the Right to Environment. *Stanford Journal of International Law*. Vol. 28. 1991-1992. p. 104.

23 See, e.g., *Oneryildiz v. Turkey*, 48939/99 [2004] ECHR 657 (30 November 2004)

24 See, e.g., *Zimmerman and Steiner v. Switzerland*, 8737/79 [1983] ECHR 9 (13 July 1983)

25 See, e.g., *Lopez Ostra v. Spain* 16798/90 [1994] ECHR 46 (9 December 1994) és *Guerra v. Italy* 14967/89 [1998] ECHR 7 (19 February 1998)

26 *Gabčíkovo–Nagymaros Project (Hungary v. Slovakia)* 25. September 1997, General List 92.

27 For more details see DINAH SHELTON: Human Rights and the Environment: what specific environmental rights are have been realised? *Denver Journal of International Law and Policy*. Vol. 35. (2006) No. 2, pp. 129-172; Szabó, Marcel: The Implementation of the Judgment of the ICJ in the *Gabčíkovo-Nagymaros* dispute. *Iustum Aequum Salutare*. Vo. V. (2009) No.1, pp. 15-25.

28 <http://www.righttoenvironment.org/default.asp?pid=36> Downloaded from the Internet on 26 May 2012

#### IV. The right to environment in constitutional law

The right to environment has several important features distinguishing it from conventional rights, including both classical freedoms and second generation human rights. These rights have a global aspect: on the one hand, they serve not only the rights of individuals and their smaller or bigger groups but also the preservation of human life, the survival of the entire human race; on the other hand, due to the global character of environmental problems, the efforts of a single state are far from sufficient to exercise the right to environment.<sup>29</sup> Another characteristic of the right to environment is that its infringements may not be directly and immediately assessed, the damage may manifest itself only in the long run – immediate perception is often possible only through instrumental investigation.<sup>30</sup> Its significance from the aspect of enforcing this right is that the infringement does not immediately invoke the need for remedy, unlike in the case of the loss of liberty.<sup>31</sup>

The right to a healthy environment is usually classified as a third generation human right. Third generation human rights (e.g., the right to peace) are most often criticised because they are almost completely unenforceable, since they do not have a definite subject, definite content or an obligor; therefore, they are not authentic subjective rights. Therefore, they cannot be enforced before the court, either, at least not in a way other fundamental rights can. It is another issue that certain elements of the right to environment may appear as an authentic individual entitlement or as a concrete obligation of the state.

Nevertheless, it is the criminal, civil, and administrative law aspect and not the constitutional law aspect that is most often mentioned in the context of environmental protection.

The Constitutional Court already came to face the problem of interpreting the environmental provisions of the Hungarian Constitution, taking shape after the democratic transformation, in 1990, the first year of its existence. In 1990 the then Prime Minister moved that the Constitutional Court should interpret the environmental provisions of Sections 18 and 70/D of the Constitution. He explained his motion pointing out that the provisions concerned did not specify the exact content of environmental protection and the state's obligations in connection therewith. He argued

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29 JÁNOS SÁRI: *Alapjogok*. op. cit. p. 289.

30 JÁNOS SÁRI: *Alapjogok*. Ibid.

31 JÁNOS SÁRI: *Alapjogok*. Ibid.

that the interpretation was needed in order to lay the foundation for future legal regulation on the basis of the Constitution. The Constitutional Court did not adopt a decision but, besides rejecting the motion, in 1993<sup>32</sup> it determined out the legislator's obligations in connection with the protection of the environment. According to this decision, "by virtue of Sections 18 and 70/D of the Constitution, the state is undoubtedly bound to establish and operate specific institutions serving the enforcement of the right to a healthy environment. (...) It may also be stated that the state's obligations should include the protection of the natural foundation of life, cover the establishment of the institutions managing exhaustible resources, ensuring the access to information related to the environment and the participation of those concerned in the preparation of decisions. However, the specification of the concrete legislative and administrative measures deriving from these obligations of the state may only be carried out through legislation."

In addition, the Constitutional Court elaborated the normative constitutional law specifics of the right to a healthy environment, as stipulated in Section 18 of the Constitution, in Decision 28/1994 CC.

The disposition of the Decision states that "The Constitutional Court declares that the right to a healthy environment, as defined in Art. 18 of the Constitution, incorporates inter alia the responsibility of the Republic of Hungary to ensure that the State does not reduce the degree of the protection of nature as guaranteed under law, unless this is unavoidable in order to enforce any other fundamental right or constitutional value. Even in the latter event, the point to which the degree of protection is reduced cannot be disproportionate to the goal to be achieved."<sup>33</sup>

In the reasoning of the decision the Constitutional Court held that "the right to environmental protection is (...) primarily an independent and unique institutional protection meaning a specific fundamental right with a predominant and significant objective of institutional protection. The right to a healthy environment places the guarantees of the fulfilment of state obligations concerning environmental protection at the level of fundamental rights, including the conditions for restrictions on sustainability. Because of the special characteristics of this right, the state must ensure its protection with legislative and organizational guarantees instead of via protection of subjective rights." The Constitutional Court also pointed out that the right to

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32 Decision 996/G/1990 CC

33 The Constitutional Court declared in several decisions that this standard shall be normative not only for the protection of nature but also for the protection of the environment. [Decision 14/1998 CC Decision 30/200 CC]

environmental protection means that the state is obliged to protect the environment and sustain the natural basis of life. “[Legislation] has not simply a more important role in environmental protection than concerning constitutional rights that may be directly protected by the court (Constitutional Court) but – within the limits of dogmatic possibilities – it should provide all those guarantees which are otherwise ensured under the provisions of the Constitution.” Therefore, the extent of institutional protection of the right to environment does not depend on someone’s discretion. Apart from the dogmatic characteristics of the right to environment above mentioned, the extent of protection is significantly determined by the subject of environmental protection: the limited nature of life’s natural bases, the irreversibility of most damages to natural resources and finally the fact that these are the conditions for human life. The right to environment guarantees the physical conditions for ensuring the right to life. This requires the special and stricter legislative protection of the right to environment. In its decision, the Constitutional Court has also stated that “the State is not free to decide whether to let environmental conditions deteriorate or to risk deterioration (...) Damages suffered by nature devastate limited goods, often in an irreparable way, failure to take preventive steps might lead to irreversible processes.”

## **V. Provisions of the Fundamental Law concerning environment**

Compared to the previous Constitution, the Fundamental Law effective from 1 January 2012 contains several provisions mentioning environment and its protection. Therefore, we should examine whether these formal changes lead to substantive changes, have the protection of the environment and its constitutional assessment changed or not.

According to the seventh phrase of the Avowal of National Faith (Preamble) “*We commit ourselves to cherishing and preserving our heritage, [...] the natural and man-made riches of the Carpathian Basin. Bearing responsibility for our descendants, we shall protect the living conditions of future generations by making prudent use of our material, intellectual and natural resources.*”

In fact, the preamble highlights the protection of the environment, meaning the protection of natural and built environment. On the other hand, it refers to sustainable development<sup>34</sup> [reference is made to sustainable development *[prudent use of our*

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34 According to many, the concept of sustainable development is a simple oxymoron and does not apply in this context since the current economic development is based on growth while this phenomenon presumes that our natural resources are constant.

*natural resources*] which harmonizes environmental needs with economic and social development. Thirdly, future generations appear as the final addressees of the right to environment.

The Constitution mentions the protection of the environment several times. First, in the chapter titled Fundamentals, which contains general values, principles and goals concerning social arrangement, protecting nature is mentioned as a key element. Secondly, in Art XXI of Freedom and Responsibility setting out basic rights, declares the right to a healthy environment with the same content as the previous Constitution did.<sup>35</sup> Exact legal consequences of this dual designation are doubtful,<sup>36</sup> constitutional court case law has not yet been developed in this regard.

### **V.1. The right to environment as the purpose of the state: Article P) of the Fundamental Law**

According to Art. P):

*“(1) Natural resources, particularly arable land, forests and water resources, as well as biological diversity, in particular native plant and animal species and cultural values shall comprise the nation’s common heritage; responsibility to protect and preserve them for future generations lies with the State and every individual.*

*(2) The regulations relating to the acquisition of ownership of arable land and forests, including the limits and conditions of their use for achieving the objectives set out under Paragraph (1), and the rules concerning the organization of integrated agricultural production and on family farms and other agricultural holdings shall be laid down in an implementing act.”*

In Article P), the object, the subject, the content and the objective institutional protection of the right to environment and – above all – the obligation to environmental protection are determined.

The subjects of the right to environment – as the nation’s common heritage – are natural resources, biological diversity and cultural values, that is environment itself. The

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35 This view was confirmed by the Constitutional Court in its CC decision 3068/2013 (III.14.). According to this: *“The wording of the Fundamental Law concerning the right to a healthy environment corresponds to the wording of the Constitution therefore statements made by the Constitutional Court in its previous decisions should be considered as guiding principles to the interpretation of the right to a healthy environment.”* (Reasoning [46])

36 See more: ANDRÁS JAKAB, *The new Fundamental Law and its practical consequences*. HVG-ORAC. Budapest, 2011. p. 197.

Fundamental Law particularly determines as natural resources arable land<sup>37</sup>, forests and water resources which are protected values under the provisions of specific laws.<sup>38</sup> In this provision of the Fundamental Law the basic elements of environment are granted constitutional protection: land, water, wildlife (flora and fauna), with the exception of air. The Fundamental Law does not mention air as an element of environment or natural resource (despite the fact that wind offers significant energy reserves), and air as a natural resource “vanished in the haze” contrary to the Lugano Convention<sup>39</sup> and the national laws concerning environmental protection<sup>40</sup> and general natural scientific concepts. For this reason, the normative definition of environment is not appropriate since it narrows the scope of the subjects under protection which reduces the extent of fundamental rights protection.

As to the content, natural resources, biological diversity and cultural values (i.e., protection of natural and built environment are mentioned here), constitute the nation’s common heritage which should be protected, sustained and preserved as a primary duty considering the protection of basic values of environment as a primary goal. Within the obligation of objective institutional protection, three different activities are distinguished as a duty. According to Article P) the triad of activities are protecting, sustaining and preserving the environment for future generations.

The third activity, “preservation” is addressed to “future generations”. Concerning this category of subjects, the Constitutional Court has stated – referring to the right to life – that the state’s objective obligation to institutional protection comprises human life in itself, and this includes the safeguarding the livelihood for future generations. In accordance with CC decision 28/1994 (V.20.), this objective protection “is not only

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37 It should be noted, that while Act LV of 1994 on arable land considers forest as arable land, in Art. P) of the Fundamental Law forest is mentioned separately. See more in ANDRÁS TÉGLÁSI, Protection of arable land under the Fundamental Law in view of derogation ending in 2014. Bulletin of Law Science, No. 2012/11., pp. 449-460.

38 Act LV of 1994 on arable land, Act. CXXIX of 2007 on the protection of arable land, Act LVII of 1995 on water resources management, Act CCIX of 2011 on public water supply services, Act XXXVII of 2009 on forest, on the protection of forests and forest management.

39 In accordance with Council of Europe Convention on civil liability for damage resulting from activities dangerous to the environment (Lugano, 1993) “*Environment includes natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape.*”

40 In accordance with the provisions on the definitions of Act LIII of 1995 on the general rules of environmental protection environmental component means land, air, water, the biosphere as well as the built (artificial) environment created by humans as well as the constituents thereof; environment means the environmental components and the systems, processes and structure thereof; natural resource means the environmental components or certain constituents thereof (with the exception of the artificial environment) that may be used for satisfying the needs of society.

wider but is different in quality than the simple accumulation of the protection of individual subjective rights.” It is not appropriate, however to consider the environment as a task prescribed merely for future generations because naming such a futuristic subject might alienate present generations from the protection of environment. This raises the question whether it would have been more appropriate to use the expression of “mankind” or “present and future generations”?<sup>41</sup> It is to be hoped that the case law of the Constitutional Court will unfold this new constitutional situation and clarify whether we can interpret this provision of the Fundamental Law as a concrete interpretation of the right to environment set out in Art. XXI?

The formulation of the provision shows that this right is addressed not only to the state, but to “everyone”; consequently, the protection of the environment is no longer the exclusive task of the state in the future, but it will be the fundamental duty for every person, moreover for “all” the legal entities which fall under the definition of general legal entities (legal persons and entities, corporations without legal personality). By defining the groups of those bound by the provision, the legislator establishes a positive utopian (“ecotopic”) idea . It means that the prerequisite of the realisation of the right to healthy environment would be if all entities (from individuals to state) set its guaranteeing as an objective.<sup>42</sup>

Beyond the obligation of environmental protection, the requirement of sustainability is stipulated, as well.<sup>43</sup> The concept of sustainability and sustainable development can be found in other national constitutions as well. The Swedish constitution provides that public institutions should assist sustainable development creating a “good” environment for present and future generations, and declares as a state obligation to achieve environmental goals. In addition, several national constitutions specify sustainable development, which is described as a state purpose by the Swiss constitution and is included in the general provisions of the Polish constitution while the constitution of Lithuania mentions it as a state obligation.

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41 There are 22 national constitutions in the world specifying the obligation to environmental protection in the interest of future generations. The summary of the provisions concerning environmental protection of each constitution can be found at:  
[http://standupforyourrights.org/ip/uploads/downloads/ANNEX%20II\\_Call\\_for\\_input\\_NJCM\\_OHCHR%202011%20-%20Constitutional%20rights%20to%20environment.pdf](http://standupforyourrights.org/ip/uploads/downloads/ANNEX%20II_Call_for_input_NJCM_OHCHR%202011%20-%20Constitutional%20rights%20to%20environment.pdf) Downloaded from Internet: 27 May 2013

42 Mr. BALÁZS MAJTÉNYI quotes the utopian novel of Ernest Caltenbach’s Ecotopia.

43 On the right to sustainable development see more: ISABELLA D. BUNN, The Right to Development. American University of International Law Review. Vol. 15. (1999-2000) No. 6. pp. 1425-1467.

Within the scope of environmental protection, the issue of animal protection arises partly from the question of animal welfare and animal health issues, as in order to protect them it is necessary to take these concerns into account.<sup>44</sup> Regarding the issue of biodiversity, the Fundamental Law emphasizes the protection of native flora and fauna. The realization of this constitutional requirement and the collection of these national values have already been put in progress by the so-called Hungaricum Act,<sup>45</sup> as the preservation of these values for the next generation would be an almost impossible mission without the prior step in which the national values to be protected are registered.

## **V.2. The right to environment as a fundamental right: Articles XX and XXI of the Fundamental Law**

The part regarding Freedom and Responsibility of the Fundamental Law of Hungary is actually a catalogue of fundamental rights and duties, in which articles XX. and XXI. also include the issue of the environment. According to these provisions:

*Article XX. (1) Every person shall have the right to physical and mental health.*

*Article XX. (2) Hungary shall promote the exercise of the right set out in Paragraph (1) by ensuring that its agriculture remains free from any genetically modified organism, by providing access to healthy food and drinking-water, by managing industrial safety and healthcare, by supporting sports and regular physical exercise, and by ensuring environmental protection.*

Article XX (1) declares that everyone is entitled to the right to health. Regarding the previous Constitution's Article 70/D, the Constitutional Court declared earlier that the right to physical and mental health on the highest level entails the full responsibility of the state. In regard to the current national economic capacity and the conditions of the state and the society, the state should create such an economic and legal environment which provides the best possible conditions within the specific historical circumstances for everyone to be able to live a healthy lifestyle. Therefore, according to the Constitutional Court's definition of that time, the assurance of the right to physical and mental health on the highest possible level was one of the goals of the state.

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44 The Act XXVIII of 1998 on the protection and welfare of animals. In regard the health of animals and the health of plants, the present legal provision, the Act XLVI of 2008 on the food chain and its official control is the normative, because of the single chain – "from farm to fork"- approach.

45 The Act XXX of 2012 on the Hungarian national values and "hungaricums".

In Article XX (2), the objective institutional guarantees of the right to health appear. Thus, the state guarantees the right to health by GMO-free agriculture, healthy food<sup>46</sup> and access to water, and – along with occupational safety, healthcare and sports – it also promotes environmental protection.

This provision can be associated with Hungary’s responsibilities based on international treaties: it refers to the right to food and water as the institutional guarantees of the right to health. The access to adequate quantity and quality of food and drinking-water appears explicitly in the charter of second generation fundamental rights included in the International Covenant on Economic, Social and Cultural Rights of 1966. On the other hand, by having the constitutional status of GMO-free country, Hungary has become the pioneer of the fight for GMO-free status which is favoured on the European level. Apart from us, only Ecuador’s newly adopted constitution of 2008, stated in *expressis verbis* the ban on of the genetically modified organisms.<sup>47</sup>

In addition, the part of the Fundamental Law of Hungary related to Freedom and Responsibility enshrines the right to environment in a separate article:

*Article XXI*

*(1) Hungary shall recognise and enforce the right of every person to a healthy environment.*

*(2) A person who causes any damage to the environment shall be obliged to restore it or to bear all costs of restoration as defined by law.*

*(3) No pollutant waste shall be brought into Hungary for the purpose of dumping*

The text of paragraph (1) has an identical content to the former Constitution. In the following paragraphs one of the most striking novelty – at least on the constitutional level – is the “polluter pays” principle; namely, those who cause any damage to the environment shall be obliged to restore it or bear all costs of restoration as defined by law.<sup>48</sup> The “polluter pays” principle as a basic principle is also employed by the OECD

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46 Hereby, we would like to note that the word use of the secure food would be more suitable, as only living bodies and organisms can be healthy, and normally living organism in a biological sense are not served on tables.

47 Article 15. [...] “*The development, production, ownership, marketing, import, transport, storage [...] and genetically modified organisms that are harmful to human health or that jeopardize food sovereignty or ecosystems, as well as the introduction of nuclear residues and toxic waste into the country’s territory, are forbidden.*” The text of the Constitution of the Republic of Ecuador can be available on the following website: <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>

48 In connection with the “polluter pays” principle the liability of legal persons and the State itself often arises in relation to environmental damages.

and the European Union. Linked to the EU, the principle was defined for the first time in 1975. In conjunction with this fundamental duty, the Fundamental Law does not specify a substantive standard, but leaves the implementation to the particular legislation. In this regard, the provisions of the Civil Code and the Act LXXXI of 1995 on the general rules of environmental protection are relevant.

The Article XXI (3) of the Fundamental Law is also a new element, according to which the import of polluting waste for placement purposes to the territory of Hungary is forbidden. It means that the real norms directly applied by the courts and public administration originate from the expression of “forbidden”. Environmental law in Hungary does not recognize the definition of “placement”, and it is also unclear how the concept of “placement” relates to the definition of “disposal” (including “landfill”) and “storage” defined in Act XLIII of 2000 on waste management, therefore it is questionable whether it involves the concept of placement and storage. However, this rule can only be applied to cases which are compatible with the EU’s derogations on the free movement of goods.

The sanction of paragraph (1) and (2) determines the concept of liability for environmental damages. Thus, the right to environment is defined on one hand as a human right of everyone, on the other hand as the individual’s responsibility toward the environment- as it is described in the Article P of the Fundamental Law. However, it is an important difference that while Article P specifies a fundamental, and universal moral duty in the Fundamental Law, Article XXI defines the subjective side of the right to healthy environment.

Despite the fact that both the former Constitution and the new Fundamental Law recognize the right to a healthy environment, there is a significant difference between the two norms. The Fundamental Law has already prescribed concrete tasks regarding the protection of the environment by protecting each natural resource, and by the prohibition of the import of polluting waste into the country for placement purposes. While the former Constitution put more emphasis on the protective duty of the state institutions and did not raise the issue of civil obligations; the Fundamental Law now makes it mandatory for everyone to protect the environment. In addition, the Fundamental Law raised several provisions to the rank of constitutional principle for the purpose of sustainable development, however, some very important principles – mainly regarding entitlement to the right to a healthy environment – are still missing from the Fundamental Law, such as right to environmental information and public participation in environmental decision-making.

Pursuant to this Article of the Fundamental Law, the subject of the right to environment is “everyone”, every person regardless whether he/she was born or not, as the condition of future life is the healthy environment – as a result, the future generations are included this category, although this is not explicitly mentioned (contrary to the provisions of Article P).

## **VI. Will there be a paradigm-shift?**

As outlined above, the right to a healthy environment is closely linked to the institutional guarantees of the right to life; as the healthy living environment is integral part of life conditions. Therefore, certain interpretations of the right to environment cannot be precluded in which the requirements of a healthy environment must be guaranteed and result from the state’s obligation to protect life. This would have dual consequences for constitutional law. On the one hand, the protective aspect of the right to environment would be strengthened. In case of human intervention in the environment, it would become a constitutional requirement to exclude harmful behaviour and to enforce remedy. On the other hand, the positive responsibility of the state would be reinforced regarding the conservation and protection of the environment.

The textual changes of the Fundamental Law provide a suitable basis for all these, since Articles P and XXI result in a double protection of environmental values.

Are these changes sufficient to actually strengthen the constitutional dimension of the right to environment? The answer is a clear no. As it can be seen in the preamble, the text of the constitution and society must be closely related, the Constitution cannot be distant from social reality. For strengthening the right to environment, change in social attitude is needed. However, the change of attitude cannot be compelled by the Constitution.

At the same time, a constitution can be suitable for providing an adequate framework for social changes; furthermore it can even inspire such changes. Without the change of social attitude, Article P of the Fundamental Law only remains a declaratory provision. If this article is implemented properly, one of its interpretations can be that the healthy environment is considered the institutional guarantee of the right to life.

Pursuant to the Constitutional Decree Nr.11/1992 (5 March), the rule of law is a fact-finding process and a program at the same time. The same is true for Article P of the Fundamental Law which declares such values as facts which must be protected by the state, and at the same time it also calls for the implementation of programs raising

environmental awareness. This process has already started, and there is significant improvement in the social perception of environmental protection. The principle of “acting locally, thinking globally” is widely applied and on local – micro – levels the environmentalist attitude is strengthened (e.g.: selective waste collection, educational programs in school and kindergartens..., etc.). On the macroeconomic level, the breakthrough is still waited according to our evaluation. On this level, paradigm-shift could not take place without making sacrifices; short-term interests of the society (economic profit, convenience) would need to be sacrificed for the long-term achievement of environmental sustainability.

# Right to Environment and Right to Water in the Hungarian Fundamental Law

*László Fodor & Ágnes Bujdos\**

This essay examines the Hungarian Fundamental Law by analyzing its provisions relating to environment and water. After the general introduction to the right to water from a human rights perspective under international law, we will turn our attention to Hungarian law. First, we will share some thoughts about the Fundamental Law, afterwards we will introduce the environmental regulations in general, as well as the articles that explicitly mention water and finally, we will draw some conclusions.

## I. Situation of waters

Earth is called the water planet as more than 70 per cent of its surface is covered with water.<sup>1</sup> The total amount of water on Earth is fixed, therefore, it is merely the physical state of the water that is changing continuously between the three phases (ice, liquid and water vapour). Despite of this abundance, about 97 per cent of these waters can be found in the ocean. That means that the vast majority of water on Earth is unfit for human consumption and for other uses because of its high salt content.<sup>2</sup> Two thirds of the remaining fresh water are locked up in glaciers and permanent snow cover<sup>3</sup> and just 0.7 percent is available as fresh water, 0.66 percent of which is ground water and

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1 J. BOBERG, *Liquid assets: How Demographic Changes and Water Management Policies Affect Freshwater Resources*, RAND Corporation, Santa Monica, CA, 2005, pp. 15-17.

2 A. K. De & A.K. De, *Environmental Engineering*, New Age International Ltd., New Delhi 2009, pp. 66-67.

3 *Water for people. Water for Life*, The United Nations World Water Development Report, 2003, p. 8.; A. KISS & D. SHELTON, *International Environmental Law*, 3rd edition, Transnational Publishers, Ardsley, New York, 2004, p. 453.

just 0.03 percent is available as fresh water in rivers, lakes and streams.<sup>4</sup> Furthermore, water is unevenly distributed. Some countries such as Canada or Austria are rich in water, while others like Australia or China belong to water stressed areas. In spite of its limited availability the demand for freshwater is continuously increasing due to population growth, urbanisation and economic development.<sup>5</sup> Furthermore, wasting water can also contribute to its scarcity. The severity of this waste can be illustrated by the following examples. According to estimates, about half of the piped waters flow away due to leakages. In the developing countries 70 to 90 percent of water stocks are used for irrigation in the agriculture, while in the developed countries water is overused in the industrial and energy sector.<sup>6</sup> In 1992, the Dublin Principles had already declared and warned that “freshwater is a finite and vulnerable resource”.<sup>7</sup> Now, approximately twenty years later the situation is particularly worrying. Based on the data published by the Food and Agricultural Organisation, water scarcity already affects every continent and more than 40 percent of the Earth’s population. According to current predictions, by 2025, almost 2 billion people will live in countries with absolute water scarcity, and two-thirds of the world’s population may live under water stressed conditions.<sup>8</sup>

However, it is not only its scarcity which makes it necessary to deal with the question, but the significance of water for our life. Water is a precondition for life and has no alternative.<sup>9</sup> Without water humans cannot survive for more than a week (while without food we may survive for a month). However, plants and animals also gain water as well as the whole ecosystem.<sup>10</sup> Beyond drinking, water has plenty of other functions in everyday life such as recreation, agriculture (irrigation), growing crops, producing energy, industrial production just to name a few of such uses.<sup>11</sup> These functions raise competition among different users and uses,<sup>12</sup> as beyond scarcity, water pollution also threatens and reduces the Earth’s waters.<sup>13</sup> In the 1960s the International Law Association declared that issues relating to water pollution are the most important topic

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4 De & De, 2009, p. 66.

5 <http://www.eea.europa.eu/articles/water-in-the-city>

6 G. KARDOS, ‘A vízhez való jog’, *Acta Humana: emberi jogi közlemények*, Vol. 15, No. 1, 2004, p. 95.

7 <http://www.gwp.org/The-Challenge/What-is-IWRM/Dublin-Rio-Principles/>

8 <http://www.fao.org/newsroom/en/focus/2007/1000521/>

9 De & De, 2009, pp. 66-67.

10 J. VERSCHUUREN, *Recht op water* in Th. G. Drupsteen (Ed.), *Weids water. Opstellen over waterrecht*, Centraal Boekhuis, Sdu Uitgevers, Den Haag, 2006, p. 425.

11 De & De, 2009, p. 65.; P. Gleick, ‘Basic Water Requirement for Human Activities: Meeting Basic Needs’, *Water International*, Vol. 21, No. 2, 1996, p. 83.

12 S. KLAWITTER & H. QAZZAZ, *Water as a Human Right: Understanding of Water in the Arab Countries of the Middel East* in H. Shuval & H. Dweik (Eds.), *Water Resource in Middle East (Israel-Palestinian Water Issues – From Conflict to Cooperation)*, Springer, Berlin, Heidelberg, 2007, p. 284.

13 De & De, 2009, p. 66.

of international water law.<sup>14</sup> The major sources of water pollution are domestic sewage, agricultural run-off and industrial waste which are directly or indirectly discharged into water bodies.<sup>15</sup> The largest proportion of water uses, such as domestic use, agricultural use and industrial use are also the main the sources of the water pollution.<sup>16</sup> Protection against pollution is crucial as it is directly linked with human welfare. It is known that earlier in the history the pollution of the drinking-water killed the entire population of cities in extreme cases. Unfortunately, water-borne diseases are responsible for the death of some 25,000 people in the developing countries.<sup>17</sup>

Water knows no boundaries and most of the waters on Earth are linked, although the legal systems applicable to them vary widely because of the different geographic, economic, social and political factors. Furthermore, nearly half of all land and 40 percent of the world's population are found within international river basins.<sup>18</sup> Inside the European Union waters are not doing well in terms of quality and the situation of water quantity is equally distressing as water scarcity is spreading in Europe. The EU has to face old and emerging challenges such as water pollution, water abstraction for agriculture, land use as well as the impacts of climate change.<sup>19</sup> Inside the European Union, the vast majority of the secondary law relating to water protection may be found in directives<sup>20</sup> and the most significant<sup>21</sup> of these is the Water Framework Directive<sup>21</sup>. The Directive creates a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater. It also tries to assist in the mitigation of effects of floods and droughts and in strengthening the relationship between issues related to water quality and quantity. The Water Framework Directive introduced a new planning unit for the management of the water. This is the river basin district.<sup>22</sup> Thanks to the introduction of the (integrated) river basin management referred to the river basin, which works as a geographical management unit, Community water law and management is oriented by ecological criteria instead of previous administrative,

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14 J. BRUHÁCS, *Nemzetközi Vízjog*, Akadémiai Kiadó, Budapest, 1986, p. 249.

15 De & De, 2009, p. 65.

16 J. CHENOWETH, 'Minimum water requirement for social and economic development', *Desalination*, Vol. 229, No. 1-3, 2008, p. 248.

17 De & De, 2009, p. 65.

18 KISS & SHELTON, 2004, p. 455.

19 [http://europa.eu/rapid/press-release\\_IP-12-1216\\_en.htm](http://europa.eu/rapid/press-release_IP-12-1216_en.htm).

20 J.E. SZILÁGYI, 'A vizek védelmének jogi alapjai az EU vízvédelmi jogában', *Publicationes Universitatis Miskolcensis. Sectio Juridica et Politica*, Vol. 30, No. 2, 2012, p. 578.

21 European Parliament and Council Directive 2000/ 60, OJ 2000 L 327/1

22 E. LOUKA, *Water Law & Policy: Governance Without Frontiers*, Oxford University Press, Oxford, New York, 2008, pp. 49-53.

political factors or other artificial criteria.<sup>23</sup> Hungary's entire territory belongs to the Danube River Basin shared by 19 countries, which makes it the world's most international river basin extending beyond the borders of the EU.<sup>24</sup> 95 percent of Hungary's waters originate from beyond the borders and approximately 90 percent of this water leaves the country at the southern part of the country.<sup>25</sup> Hungary is rich in water. Its borders are crossed by 24 incoming rivers of which the two most important waterways are the Danube and the Tisza. Another important freshwater is situated here as well: Lake Balaton is the largest lake in Central Europe.<sup>26</sup> Beyond surface water, groundwater plays an equally important role, as 95 percent of drinking-water comes from ground water.<sup>27</sup> Hungary is also famous for the unprecedented supply of healing, thermal and mineral water springs that can be found beneath almost the entire country.<sup>28</sup> However, this seemingly favourable condition is not constant and sometimes takes a turn to the worse. As a result of the climate change extreme weather conditions are more common, therefore the size of lands threatened and affected by flood, inland water and drought are continuously growing. The fact that about 50 percent of the territory of Hungary is threatened by flood or inland water<sup>29</sup> perfectly illustrates how widespread these phenomena are.

## II. Human right to water

In this chapter we will first describe the evaluation of the right to water in light of the currently dominant human rights approach. Following this, we will present the human right to water based on General Comment No. 15 and evaluate the significance of this document by examining its relevance in other UN universal human rights conventions and finally the status of the human right to water will be presented.

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23 P. CANELAS DE CASTRO, *European Water Policy* in J. W. DELLAPENNA & J. GUPTA (Eds.), *The Evolution of the Law and Politics of Water*, Springer, Netherlands, 2009, pp. 233-234.

24 <http://www.icpdr.org/main/danube-basin/countries-danube-river-basin>

25 J. BRUHÁCS, *Nemzetközi Jog II. Különös rész, Dialóg Campus*, Budapest, Pécs, 2010, p. 85.

26 <http://www.icpdr.org/main/danube-basin/hungary>

27 J. E. SZILÁGYI, *Vízjog*, Miskolci Egyetem, Miskolc, 2013, p. 5.

28 <http://www.eu2011.hu/land-healing-thermal-and-mineral-waters>

29 T. PETRÓ, 'A helyi vízkár elleni védekezés helyzete napjainkban, védekezés feladatai', *Hadmérnök*, Vol. 6, No. 1, 2011, pp. 172-173.

## **II.1. Right to water<sup>30</sup>**

Traditionally, in the international legal regulation of water resources territoriality and state sovereignty played a central role.<sup>31</sup> As a result of this, water issues were regulated by bilateral agreements<sup>32</sup> with the national interest at their core. However, the growing pollution and the overuse of water resources resulted in scarcity raising competition among the different users and uses.<sup>33</sup> These conflicts may lead to a shift from the state to the individual level.<sup>34</sup> Nevertheless, in our opinion, the role of the state is still significant in the management of waters shared with other states in order to ensure the necessary water for them and their population.

As water has several functions, right to water can be approached from several aspects. The human rights approach puts the people's need first in comparison with other uses. It is especially used to challenge the economic and social injustice affecting the most vulnerable groups<sup>35</sup> and it is supposed to be a better way to respond to water scarcity than the traditional approach that handles water as a commodity.<sup>36</sup>

## **II.2. Human right to water in universal human right documents**

In the older universal human right documents, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the right to water was not explicitly mentioned. However, later conventions relating to vulnerable groups such as children or women refer to water explicitly. According to Sacher and Windfuhr, three trends can be identified that have contributed to the explicit mentioning of this right. Firstly, the growing demand for water apart from drinking-water is increasing and it causes continuous conflicts among users. Secondly, the privatization of the water supply systems both in the North and the South has generated fears that privatization can contribute to increase in prices and may negatively affect the accessibility of water

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30 We agree with that approach that the term right to water covers the comprehensive category of the individual sub-categories. See: J.E. SZILÁGYI, 2013, p. 215.

31 T. KIEFER & C. BRÖLMANN, 'Beyond State Sovereignty: The Human Right to Water', *Non-State Actors and International Law*, Vol. 5, No. 3, 2005, p.183.

32 J. BRUHÁCS, 1986, p. 11.

33 KLAWITTER & QAZZAZ, 2007, p. 284.

34 KIEFER & BRÖLMANN, 2005, p. 184.

35 KLAWITTER & QAZZAZ, 2007, p. 284.

36 M. FITZMAURICE, 'The Human Right to Water', *Fordham Environmental Law Review*, Vol. 18, No. 3, 2007, p. 539.

especially for the poor. Thirdly, the global water problem that generates conflicts due to water scarcity threatens the enjoyment of other human rights.<sup>37</sup>

In 2002 the United Nations Economic and Social Council adopted General Comment No. 15 that contributed to clarifying the scope of the right to water and provided a guideline for states based on Article 11 and 12 of the International Covenant on Economic, Social and Cultural Rights. Article 11 declares “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions,” while Article 12 ensures “right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” The General Comment determines “the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.” This definition means that the elements of the right to water have to be adequate for human dignity, life and health and adequacy should not be interpreted narrowly. While the requirement of adequacy may vary under different conditions, availability, quality and access apply under all circumstances. In order to ensure availability, water supply has to be sufficient and continuous for personal and domestic uses, such as drinking, personal sanitation, washing of clothes, cooking, personal and household hygiene. The quality requirement means that water has to be safe as well as acceptable in colour, odour and taste for both personal and domestic use. Accessibility has four overlapping dimensions such as physical accessibility, economic accessibility, non-discrimination and information accessibility. The Comment imposed three types of obligations on State parties: obligations to respect (“refraining from interfering directly or indirectly with the enjoyment of the right to water”), obligations to protect (“preventing third parties from interfering in any way with the enjoyment of the right to water”) and obligations to fulfil (“it can be disaggregated into the obligations to facilitate, promote and provide”).<sup>38</sup>

Even though, General Comment No. 15 is the most comprehensive interpretation of right to water, it is based on only one document (moreover it does not contain water explicitly). That is why we decided to study three universal human right documents explicitly mentioning the right to water, namely Convention on the Elimination of

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37 D. SACHER & M. WINDFUHR, The Debate on “Water as a Human Right” and its Implication for Development Assistance in W. Scheumann & S. Neubert & M. Kipping (Eds.), *Water Politics and Development Cooperation*, Springer, Berlin, Heidelberg, 2008, pp. 150-151.

38 General Comment No. 15 (2002) The right to water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)

Discrimination against Women<sup>39</sup>, Convention on the Rights of the Child<sup>40</sup> and Convention on the Rights of Persons with Disabilities.<sup>41</sup> The aim of these conventions is to ensure additional rights for the vulnerable groups of society, beyond the scope of the previous UN documents. We wanted to know how common it is that other documents mention water in connection with these rights. Furthermore, this analysis also proves how strong the relationship between the right to water and other rights is. We concluded that all of the conventions mention water at least implicitly in connection with either the right to an adequate standard of living or the right to health. Two conventions, such as the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities refer to them explicitly. It can be also observed, that water is referred to in connection with the right to an adequate standard of living as “water supply” and “water service”, while in the case of the right to health the term “clean drinking-water” is used. The latter approaches water from the perspective of human beings. In our opinion there is a strong connection discernible from the Conventions between the right to health, the right to an adequate standard of living and the right to dignity. The right to dignity appears in all the Conventions either generally or specifically connected to other rights. Even though there is no direct mention of dignity in connection with water, but we are convinced that beyond the right to health and the right to an adequate standard of living, the right to dignity plays equally important role.

28 July 2010 can be considered a milestone when the UN General Assembly recognized ‘the right to safe and clean drinking-water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.’<sup>42</sup> In September 2010 the Human Rights Council affirmed that “the human right to safe drinking-water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity.”<sup>43</sup> Our research backs up this approach considering that water is indispensable to life.

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39 GA Res. 34/180, 18 December 1979.

40 GA Res. 44/25, 20 November 1989.

41 GA Res. 61/106, 24 January 2007.

42 GA Res. 64/292, 3 August 2010.

43 HRC Res. 15/L.14, 24 September 2010.

### **II.3. The status of human right to water**

Bulto calls the evaluation of human right to water “both slow and controversial”.<sup>44</sup> According to Fitzmaurice, among the debates relating to the legal status of the human right to a clean environment, “the human right to water is probably the most disputed”.<sup>45</sup> These examples illustrate the uncertainty that has characterised the legal debate about the status of the right to water.

The right to water has generally been described as a derivative right, implicit within other human rights. Cahill argues that the right to water possesses ‘unique status’ somewhere in-between a derivative and independent right.<sup>46</sup>

The declaration of the Human Rights Council and our research prove the derivative nature of the right to water, even though after the right to water was recognized by UN General Assembly as a human right, it will probably get a more independent status.

The United Nations concept of water as a human right is characterized as a people-centred approach to development, without recognizing the ‘water rights’ of the environment in an equal manner. However, water is also necessary to maintain the environment. That is why special attention should be paid to finding the right balance between the human and the environmental needs.<sup>47</sup> Water is also necessary to ensure the sustainability of economic growth and at the same time preserve the quality and quantity of existing water resources.<sup>48</sup>

### **III. The Hungarian Fundamental Law**

In this part we will put the emphasis on the provision enshrining the right to environment in the Hungarian Fundamental Law, namely Article P and Article XX relating to water as well as the jurisprudence of the Constitutional Court at this field. We find it important to pay due attention to the right to environment as it has formed part of the constitution for decades, and the new provision in connection with water has a strong connection with it.

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44 T.S. BULTO, ‘The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery?’, *Melbourne Journal of International Law*, Vol. 12, No. 2, 2011, p. 291.

45 FITZMAURICE, 2007, p. 539.

46 M. GOOD, ‘Implementing the Human Right to Water in Australia’, *The University of Tasmania Law Review*, Vol. 30, No. 2, 2011, p. 109.

47 KLAWITTER & QAZZAZ, 2007, p. 289.

48 <http://cis.uchicago.edu/outreach/summerinstitute/2010/documents/sti2010-tata-basic-water-needs.pdf>

### III.1. The Fundamental Law in Hungary

The Hungarian Fundamental Law entered into force on 1 January 2012. The regulations of the Fundamental Law have significance and influence on the environmental and environmental-economic legislation. Since 1972, Hungary belongs to those countries the constitution of which explicitly refers to environmental protection. In the 21<sup>st</sup> century, constitutional values would be unimaginable without the citizens' environmental rights and commitments, even if those are not declared explicitly. To the vital medium of the constitution belong not only the amendment of the constitution or a new constitution, but new elements may also be added by way of interpretation reflecting the changes in the living conditions and social values.<sup>49</sup> Both scientific literature and the practice of the Constitutional Court confirm that the explicit declaration of these new elements can be the source of stronger and a wider range of commitments than in the absence of such declaration.<sup>50</sup>

The real enforcement of environmental rights and commitments was only possible after the end of the communist regime in 1989. At this time an economic system based on private property was put in place, and the state was empowered to hold companies responsible for their environmental damage. After the end of the communism era, the right to a healthy environment became part of the constitution in its current form. This was also the time of the foundation of institutions entrusted with legal protection tasks such as the Constitutional Court and the ombudsman. Their decisions pointed out that the state has commitments in the field of environmental protection, by ensuring the reasonable management of natural resources, creating legal regulations to prevent environmental degradation and establishing the necessary institutional system as well as enforcing environmental requirements. Naturally, the state is not the only entity responsible for upholding environmental requirements, but e.g. also citizens have to cooperate in order to reach the environmental goals.<sup>51</sup>

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49 In relationship with the environment. See: R. STEINBERG, *Der ökologische Verfassungsstaat*, Suhrkamp, Frankfurt a. M., 1998, p. 45, 47.

50 D. MURSWIEK, *Umweltschutz als Staatszweck*, *Economica*, Bonn, 1995, p. 76.; B. Söhnlein, *Landnutzung im Umweltstaat des Grundgesetzes – Eine Dogmatik des Art. 20a GG und ihre praktische Anwendung*, Boorberg, Stuttgart, 1999, p. 52.; D. Murswiek 'Staatsziel Umweltschutz (Art. 20a GG) – Bedeutung für Rechtsetzung und Rechtsanwendung', *Neue Zeitschrift für Verwaltungsrecht*, 1996, p. 226.; LÁSZLÓ FODOR, *Környezetvédelem az Alkotmányban*, Gondolat-DE ÁJK, Budapest, 2006, p. 51; Decision of the Constitutional Court, No. 28/1994. (V. 20.) III. 3.

51 GYULA BÁNDI, 'A társadalmi részvétel és előfeltételei a környezetvédelemben', *Jogállam*, Vol. 2, No. 3-4, 1994, p. 140.; Decision of the Constitutional Court No. 675/B/2005. (2006. 04. 03.).

Although these thoughts were formulated in connection with the Hungarian Constitution of 1989, they are still valid for the new Fundamental Law.<sup>52</sup> The scale of values of the Fundamental Law has changed in particular by introducing general requirements such as the interest of future generations or the issue of the relationship between human beings and the environment. This also holds true for water that features in the Fundamental Law not only as part of the right to environment, but also as a separate subject of protection.

### **III.2. Right to environment in the Hungarian Fundamental Law<sup>53</sup>**

The right to environment is a fundamental right that is at least in range with the other rights and it is stronger than just state purposes, state tasks. The commitments of the state in this field may be derived from other constitutional values, in particular from the right to life. Unlike the classical fundamental rights, the right to environment is not a subjective right. This means that the environmental requirements are determined by the state, not by the individual claims. Furthermore, these requirements are determined based on objective criteria in order to protect the environmental basis of human life.

In order to ensure the right to environment, the main responsibility lies with the state and specifically the legislation, considering that it is the legislator's task to create the legal framework of the reasonable management of natural resources. The protection ensured by the regulation should be stringent, preventing the degradation of the environment, as it ensures the natural background of human life. However, the legislator is not obliged to follow the scientific recommendations or to ensure maximum protection, as other circumstances, such as other constitutional values, the issue of feasibility as well as economic and social policy goals should also be taken into account.

The “non-derogation principle” belongs to the most precious articulations of the Constitutional Court. Based on this principle, it is forbidden to reduce the level of environmental protection (or environmental requirements) that were previously

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<sup>52</sup> We share that viewpoint, that the fourth amendment of the Fundamental Law does not question the validity of the system of the principle assumption that was formulated by the Constitutional Court. See: The proposal of the Commissioner of the Fundamental Rights to the review of the fourth amendment of the Fundamental Law by the Constitutional Court. 2013. 04. 22., pp. 10-11. [http://public.mkab.hu/dev/dontesek.nsf/0/1e09722e15eb5da0c1257b5d001b9851/\\$FILE/ATTHHCNG.pdf/II\\_648\\_0\\_2013.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/1e09722e15eb5da0c1257b5d001b9851/$FILE/ATTHHCNG.pdf/II_648_0_2013.pdf); B. Vissy: Túlélő gyakorlat? <http://szuveren.hu/jog/tulelo-gyakorlat>

<sup>53</sup> This part is based on LÁSZLÓ FODOR, *Környezetvédelem az Alkotmányban*, Gondolat-DE ÁJK, Budapest, 2006, pp. 41-70.

determined and reached by law, because this would lead to irreversible environmental degradation. The Constitutional Court has not yet declared any concrete derogation constitutional, which proves how exceptional such a permissible derogation would be. (According to the Constitutional Court the derogation may be acceptable, if it is necessary to ensure the enforcement of an other fundamental right. However, even in this case the proportionality requirement should be taken into account, thus, in the presence of an other fundamental right for which priority was granted it is not possible to abolish the environmental protection completely.

The object of the right to environment is the healthy environment. According to the Constitutional Court, neither the attribute healthy nor its relationship with the right to health can be interpreted as the limitation of the right to environment. As a result, the scope of the protection cannot be limited exclusively to human life conditions.

In order to interpret the right to environment as well as to determine the tasks of the legislator, the Constitutional Court has already dealt with the principles of the environmental regulation. As a result of this, it has declared among others that preventive tools should be given preference over subsequent sanctions. When defining the scope of the protection, the interest of future generations should be taken into account. The requirements of other legal fields such as construction law, water transport and animal husbandry belong to the significant tools of environmental regulation. For some years, the cooperation principle has formed part of the Constitutional Court argumentation system. (Based on this the citizens are also obliged to actively participate in environmental protection by e.g. removal of the ragweed from publicly owned land bordering on their property.)

### **III.3. Right to water in the Hungarian Fundamental Law**

The content of the right to environment connects to environmental protection and as such it has the closest relationship with the constitutional values of human life, health and dignity. In this sense the declaration of the right to environment is the symbol that the economical growth and the exploitation of natural resources in order to reach it are not necessarily acceptable and sustainable. It also means that the state steps up against those economic actors who exploit nature. However, there is an approach in which the two, opposite approaches converge. Based on this the right to environment extends to the enjoyment of natural resources, the exploitation of the resources and the shaping of the environment. Thus, in this sense it is strongly connected to economical rights (such as the freedom of enterprise, right to work) and right to development. In our

opinion this approach is also acceptable; nevertheless the scope of interpretation is only possible within framework of environmental, social and economical sustainability. In our opinion the requirement of sustainability is part of the present concept of the right to environment. According to the most common interpretation of this concept, beyond the requirement of harmony between human activity and the environment, it covers the equal access to natural resources.<sup>54</sup> This constitutes a fair division between both present and future generations. In sum, sustainability must also include the equitable and fair access to natural resources.

In our opinion, the regulations of the Hungarian Fundamental Law relating to water recognise the former protection concept: even though access to resources appears in connection with drinking-water (as water is one of and the most closely related service of the environment) it is indirectly located in the concept of sustainability.

#### **III.4. The relevance of environmental protection in Article P and Article XX**

If we take a look at environmental regulations, it is easy to recognise that the vast majority of these are much rather general goals than concrete requirements. There are just a few norms which have a relatively concrete content in comparison with general constitutional norms. It is interesting to observe that while the more general requirements relate to environment from the aspect of the protected legal object, the concrete provisions approach the elements of the environment with regard to the jeopardizing factors. Thus, concrete environmental provisions can be found only in a limited number of constitutions and relating to very different topics (e.g. environmentally friendly energy system), so we cannot find exactly the same provisions anywhere else in Europe.<sup>55</sup>

From an environmental aspect both provisions (Article P and Article XX) may seem concrete in relation to water, in our opinion, however, these should be qualified as general norms, as none of them ascertain new environmental requirements.

Article P aims at protecting the natural resources, nevertheless, it declares only two general and not merely environmental requirements, such as the postulation that natural

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54 GYULA BÁNDI et al., A fenntartható fejlődés koncepciójának megjelenése a nemzetközi és európai jogban, valamint az EU-tagállamok gyakorlata, NFFT Műhelytanulmányok, No. 6, Budapest, 2011, p.

9. According to the International Union for Conservation of Nature, every inhabitant of the Earth has equal right to the access of the natural resources.

55 LÁSZLÓ FODOR, 2006, pp. 15-40.

resources form part of the nation's common heritage that shall be preserved and sustained for future generations.

The explicit mentioning of future generations refers to the forward looking stance of the legislator which is nowadays interpreted as a component of sustainable development. The other provision also has environmental relevance as it classifies natural resources as factors binding together the nation. However, we would not dare to state that the level of protection could be derived from this provision. On the contrary, we find it rather doubtful that this would be of any consequence for the level of protection due to the nature of the natural resources, especially the nature of water which ignores boundaries or the declarative character of the provision relating to common heritage.

The Hungarian Constitutional Court stresses the commitment of the state in connection with natural resources. It has to ensure the framework of the reasonable management of natural resources and the prevention of the degradation of nature.<sup>56</sup> In our opinion, this requirement shall continue to serve as a guideline in the future regardless of the fact that some natural resources such as water are appraised in the Fundamental Law.<sup>57</sup> Thus, in our view, Article P merely reaffirms the requirements which derive from the right to environment created by the Constitutional Court.

Article XX does not even go this far regarding the protection of drinking-water. It only declares the commitment of the state to ensure the right of access to drinking-water. Even though this provision is relatively concrete, it has relevance rather from the viewpoint of the right to health and the right to life instead of the environment. It declares the commitment of the state in respect of a concrete service. However, it also has environmental aspects, as water only can fulfil its physiological function under certain circumstances. As a result of this, water is the subject of strict environmental-sanitary rules. This means that only quality drinking-water falls under the constitutional definition of drinking water. This approach is connected to the right to health. Based on this, drinking-water has to be healthy, of sufficient quality and quantity from the aspect of human health. This requirement fits well with the other tasks of the state in connection with drinking-water. This environmental requirement may be and should be implied into the right to a healthy environment.

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<sup>56</sup> Especially in the Decision of the Constitutional Court No. 28/1994. (V. 24.).

<sup>57</sup> In line with this, the Parliamentary Commissioner for Future Generation proves with examples that Art. P backs the protection of natural resources considering the interest of future generations. S. Fülöp, *Az egészséges környezethez való jog és a jövő nemzedékek érdekeinek védelme az Alaptörvényben*, in Cs. CSÁK (Ed.), *Jogtudományi tanulmányok a fenntartható természeti erőforrások témakörében*, Miskolci Egyetem, Miskolc, 2012, p. 86.

Finally, it is worth mentioning that the objects of the two provisions differ from each other. The commitment to preserve water for future generations based on Article P refers not only to drinking-water in comparison with Article XX, but to the entire water stock.

Beyond the national level, it may be useful to examine the right to water in the international context in order to check whether or not the Fundamental Law fulfils the requirements set forth by international documents.

In our opinion, the observations of the General Comment are properly implemented by the Fundamental Law, as the elements of the right to water can be derived from the individual fundamental rights, in particular from the right to life<sup>58</sup>, the right to health and the right to environment. As regards the provisions relating to the right to water explicitly mentioned in the Fundamental Law, Article P contains the state commitment that is necessary to ensure the right to water. In comparison with this Article, Article XX addresses the right to water more directly, however, only in its relatively narrow scope.<sup>59</sup> It is narrowed down to drinking-water, declaring the state's commitment to ensure the right to water.

#### **IV. Conclusion**

In the Hungarian Fundamental Law, water is connected in particular to the right to health by referring to drinking-water. It is laudable that beyond human rights aspects and current human needs, the requirement of a long-term perspective by reference to future generations also appears. In connection with water this long-term perspective means considering the capacity of renewal of water as natural resource, its hydrological cycle and the environmental needs. So, in our opinion, the Fundamental Law assumes a forward looking perspective.

In the Fundamental Law, the provisions relating to water can be interpreted not only from the aspect of environmental protection. Even though these regulations are strongly connected to environmental ones, they also have a close connection to other

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58 If we approach this question from the other side, we have to interpret the right to subsistence broadly, implied all the claims that are necessary to the satisfaction of all the human needs. G. Kardos, *Az élelemhez, illetve a vízhez való jog védelme az univerzális nemzetközi jogban*, in Zs. Csapó (Ed.), *Ünnepi tanulmánykötet Bruhács János professor emeritus 70. születésnapjára*, PTE ÁJK, Pécs, 2009, p. 116.

59 Raisz has similar standpoint in the light of several international documents. See: A. RAISZ, *A vízhez való jog egyes aktuális kérdéseiről*, in Cs. Csák (Ed.), *Jogtudományi tanulmányok a fenntartható természeti erőforrások témakörében*, Miskolci Egyetem, Miskolc, 2012, p. 157.

fundamental rights and state commitments. The latter can be considered a novelty, because the other aspects already formed part of the previous Constitution. Appraising water and distinguishing it from other environmental elements *per se* does not mean that the Fundamental Law would determine special requirements for its protection. In lack of further guidance, the significance of such appraisal is rather symbolic, because it just confirms state commitments (especially in connection with the right to environment), without raising the level of protection.

In the practice of other countries (especially in the Mediterranean and post-socialist countries), the relatively high number of environmental provisions in the constitution can trigger the depreciation of their subject due to the rather symbolic mentioning of the environment. This would not be acceptable in Hungary, as the apparent aim of the new provisions in the Hungarian Fundamental Law was to improve and strengthen the concept of the environmental protection. According to the new Fundamental Law, the dominant unit of the society is the Hungarian nation, therefore this new approach of the Hungarian Fundamental Law may be called national. The national values (such as national thought, national heritage and national interests) pervade the entire Fundamental Law which also affects the protection of natural resources and as a result, the protection of water stocks. This approach did not prevail in the previous Constitution. The new Fundamental Law, by raising the preservation of the natural resources to a long-term perspective, has led to the appreciation of the natural resources. We truly hope that this approach will be more than just a current political ambition.

# **Access to Safe Drinking-water in Hungary – with Particular Reference to the Issue of Arsenic in Water**

*Erzsébet Kardos Kaponyi* \*

The water in Hungary is a common good which has to be safeguarded for a sustainable and fair use, respecting the right to water of every citizen. As an EU Member State, Hungary is obliged to ensure that all inhabitants enjoy the right to water and sanitation including safe drinking-water. However, in Hungary approximately eight hundred thousand consumers use drinking-water with arsenic concentration in excess of the WHO guideline (GDWQ).<sup>1</sup> The EU Water Framework Directive (2000) is intended to protect among others human health by laying down health and purity requirements which must be met by all waters within the European Union. Reducing the arsenic content of drinking-water is likely to be one of the biggest challenges Hungary is facing, in particular now that our derogation for arsenic from the EU Drinking-water Directive already expired.

## **I. Introduction**

Access to safe and good quality water in sufficient quantity is fundamental to the daily life of every human being. UN General Assembly resolution 64/292 of 28 July 2010 recognized the right to safe and clean drinking-water and sanitation as a human right that is essential for the full enjoyment of life and all human rights. However, the appropriate way of providing safe drinking-water is lacking in many regions of the world. The States have the primary responsibility to ensure the full realization of all human rights including the full realization of the right to safe drinking-water.

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<sup>1</sup> The Hungarian Red Cross, Campaign: ArzénStop (Arsenic Stop), October 2012.

<http://www.voroskereszt.hu/hireink/133-2012-evi-hirek/1494-indul-az-arzenstop-program.html> [12-12-2012]

Roughly, 71% of the area of the Earth is covered by water, but the majority of this water is salt water.<sup>2</sup> The big question is how much water will be suitable for drinking? The ratio of salt water to fresh water on Earth is around 40 to 1, and less than 1% of the water supply on Earth can be used as drinking-water.<sup>3</sup> Of the freshwater on Earth, about 2.200 km<sup>3</sup> flows in the ground, mostly within half a mile from the surface. The available resources of fresh water are the groundwater, the glaciers and icecaps, mainly in the Polar Regions and in Greenland. Small quantities of water also exist in the atmosphere and in living beings. Ecosystem disturbances caused either by humans or by natural events, exacerbate the threat to freshwater resources. These resources are increasingly affected by climate change across the world, but the nature of the vulnerabilities varies from region to region. In the Polar Regions and in Greenland in recent years, the overall warming trend has resulted in the thawing of the permafrost in Alaska and northern Russia and climate change is expected to make matters worse.<sup>4</sup> Not only climate change has multi-dimensional, interacting impacts on the fresh water resources, but the heavily exploited groundwater-based systems and the environment pollution are likely to cause additional stress for fresh water resources that will lead to serious problems as well. Among considerable negative environmental impacts industry practices such as mining, chemical industry, oil and gas exploration and production process, moreover intensive agricultural production – poisoning water with agricultural chemicals – jeopardise the

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2 An estimated 11,000 desalination plants exist in some 120 countries around the world, especially in Saudi Arabia, Israel and Japan. Environmentalists argue that depleting ocean water is no solution for the drinking-water, but creating serious problems. In any case, research and development into improving desalination technologies is ongoing. The water desalination based on the use of renewable energy, mainly solar and the availability of mature technologies is becoming more and more forge ahead.

3 The parameters for saline water:

Fresh water – Less than 1,000 ppm (parts per million)

Slightly saline water – From 1,000 ppm to 3,000 ppm

Moderately saline water – From 3,000 ppm to 10,000 ppm

Highly saline water – From 10,000 ppm to 35,000 ppm

By the way, ocean water contains about 35,000 ppm of salt.

<http://ga.water.usgs.gov/edu/earthwherewater.html> [12-05-2013]

4 Misled on Climate Change: How the UN IPCC (and others) Exaggerate the Impact of Global Warming  
By INDUR M. GOKLANY, Project Director: JULIAN MORRIS, Reason Foundation, 3415 S. Sepulveda Blvd., Suite 400 Los Angeles, CA 90034, [www.reason.org](http://www.reason.org) [21-04-2013]

fresh water resources.<sup>5</sup> These findings have been confirmed by the World Water Development Reports (WWDR) and by many other scientific papers.<sup>6</sup>

As the population of the world keeps growing, more pressure is put on water resources.<sup>7</sup> Water use has been growing at more than twice the rate of population growth. Water withdrawals are predicted to increase by 50 percent by 2025 in developing countries, and 18 per cent in developed countries. By 2025, 1.8 billion people will be living in countries with water scarcity and two-thirds of those will be living in conditions of severe water stress.<sup>8</sup> It is a well known fact that people are using groundwater faster than it can be naturally replenished.<sup>9</sup> Water use is impacted by economy and technology, growing food demand including the agriculture as the largest water-using sector, and it is also impacted by the lifestyle of people.<sup>10</sup>

The undesirable environmental changes have been affecting the ecosystems of the world; also the amount and quality of fresh water. In regions where the amount of surface water and groundwater recharge are projected to decrease, water quality will

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5 Environmental impact of the oil shale industry includes the consideration of issues such as land use, waste management, and water and air pollution caused by extraction and processing of oil shale. Water concerns are particularly sensitive issue in arid regions. (Environmental impact of the oil shale industry [http://www.unconventionalfuels.org/factsheets/Oil\\_Shale\\_Environmental\\_Fact\\_Sheet.pdf](http://www.unconventionalfuels.org/factsheets/Oil_Shale_Environmental_Fact_Sheet.pdf)) [21-04-2013]

6 See more: The fourth edition of the World Water Development Report (WWDR4), 'Managing Water under Uncertainty and Risk' Volume 3: Facing the Challenges, 2012

Since March 2003, every three years the United Nations released the World Water Development Report (WWDR), a flagship UN-Water report published by UNESCO.

<http://unesdoc.unesco.org/images/0021/002156/215644e.pdf#page=812> [21-04-2013]

R. S. BRADLEY: Past global changes and their significance for the future, 2000 Quaternary Science Reviews 19:, pp. 391-402. <http://www.journals.elsevier.com/quaternary-science-reviews/> [11-05-2013]

7 It took thousands of years, from the dawn of human history until 1804, for the human population to reach 1 billion worldwide. Yet it took only a little more than a century for the population to double to 2 billion in 1927, and less than 50 years for the global population to double again to 4 billion in 1975. According to the United Nations, around October 31, 2011, the human population of the world reached 7 billion.

8 [http://www.unwater.org/statistics\\_use.html](http://www.unwater.org/statistics_use.html) [17-05-2013]

9 In 60 percent of European cities with more than 100,000 people, groundwater is being used at a faster rate than it can be replenished. Source: World Business Council for Sustainable Development (WBCSD) [http://www.unwater.org/statistics\\_use.html#sthash.4vmvZgR9.dpuf](http://www.unwater.org/statistics_use.html#sthash.4vmvZgR9.dpuf) [17-05-2013]

10 SANDRA POSTEL published "Last Oasis – Facing Water Scarcity" (Earthscan Publication Ltd., pp. 239) back in 1992, year of the Rio Conference on Development and Environment. She predicted big water availability problems as populations of so-called "water-stressed" (Africa, Middle-East and Other) countries as those with annual supplies 1,000-2,000 cubic meters per persons – jump perhaps six fold over the next 30 years. "It raises tons of issues about water and agriculture, growing enough food, providing for all the material needs that people demand as incomes increase, and providing drinking-water." Part: 'Signs of Scarcity' pp. 28-29, Table 2.-1. Water scarce countries 1992: Hungary is among "Other" countries.

also decrease.<sup>11</sup> It is estimated that in some regions the use of low-quality water may be necessary, even if water quality problems already exist. In regions where for example water contains arsenic, due to lack of alternatives, it may still be necessary to consume the water even if health and environmental risks are evident.

## II. Arsenic in water

As the fourth World Water Development Reports (2012) stated; the ‘quality’ of water is a relative term, and the notion of ‘good’ or ‘bad’ water quality not only depends on a function of its state and what it contains, but also depends on what it is used for.<sup>12</sup> The term ‘safe, clean’ water is susceptible to several interpretations, and moreover ‘clean’ water does not mean in all cases that it is also safe. As it has already been mentioned above, the Earth’s water resources are only partially suitable for drinking and farming and very few of them could be regarded as potable water. Some of them inherently contain certain inorganic elements (such as arsenic, radon or fluoride) whereby these resources are unsuitable for drinking-water supply. Arsenic is responsible for the contamination of water supplies in various parts of the world and poses a major risk to human health. Arsenic is a drinking-water contaminant which causes serious concern in more than seventy countries around the World including Argentina, Bangladesh,<sup>13</sup> Chile, China, India,<sup>14</sup> Japan, Mexico, Mongolia, New-Zealand, Taiwan, Thailand, the Philippines, the United States of America and also Hungary. Arsenic is a semi-metal element in the periodic table, which occurs naturally in rocks and soil, water, air, plants and animals. It can be further released into the

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- 11 M.L. PARRY, O.F. CANZIANI, J.P. PALUTIKOF, P.J. VAN DER LINDEN & C.E. HANSON (Eds.): Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, 2007, Cambridge University Press, United Kingdom and New York, USA. Chapter 3: Freshwater resources and their management p.178.
- 12 Executive summary: Chapter 3 ‘The water resource: Variability, vulnerability and uncertainty’, Water quality, p. 20. Published in 2012 by the United Nations Educational, Scientific and Cultural Organization 7, place de Fontenoy, 75352 Paris 07 SP, France.
- 13 In Bangladesh, 27% of shallow tube-wells have been shown to have high levels of arsenic (above 0.05 µg/L). It has been estimated that 35-77 million of the total population of 125 million of Bangladesh are at risk of drinking contaminated water (WHO bulletin, volume 78, (9): page 1096). Approximately 1 in 100 people who drink water containing 0.05 mg arsenic per litre or more for a long period may eventually die from arsenic related cancers.  
[http://www.who.int/water\\_sanitation\\_health/diseases/arsenicosis/en/](http://www.who.int/water_sanitation_health/diseases/arsenicosis/en/) [21-04-2013]
- 14 Arsenic contamination has been found in the States of Bihar, Uttar Pradesh, Jharkhand, Assam, Chhattisgarh and Andhra Pradesh. R. Nickson, C. Sengupta, P. Mitra, SN. Dave, AK. Banerjee, A. Bhattacharya et al.: Current knowledge on the distribution of arsenic in groundwater in five states of India. *J Environ Sci Health* 2007; 42: pp.1707-1718.  
<http://www.ncbi.nlm.nih.gov/pubmed/17952772> [21-04-2013]

environment through natural activities such as volcanic action, erosion of rocks and forest fires, or through human actions. Arsenic may be found in ground water sources and in surface water sources (i.e. lakes and rivers) of drinking-water. In the environment, arsenic is combined with oxygen, chlorine, and sulphur to form inorganic arsenic compounds. As noted earlier, levels of arsenic in drinking-water is a matter of serious concern in many countries, because arsenic is highly toxic in its inorganic form.<sup>15</sup> Organic arsenic compounds such as those found in seafood are less harmful to health.<sup>16</sup> This odourless and savourless semi-metal could enter drinking-water supplies from natural deposits in the Earth or from agricultural and industrial practices. The industrial use of arsenic e.g. in wood preservatives, in paints, dyes, metals, glass, pigments, textiles, drugs, soaps and semi-conductors is common in the world. Some other industry practices such as mining, copper smelting and coal burning also contribute to the arsenic levels in our environment. Some agricultural products like fish, shellfish, meat, poultry, dairy products and cereals can also be dietary sources of arsenic. Mention should also be made of people who smoke tobacco. They can also be exposed to the natural inorganic arsenic content of tobacco because tobacco plants essentially take up arsenic naturally present in the soil. Most waters in the world have natural arsenic concentrations of less than 0.01 mg/L.<sup>17</sup> The acute toxicity of arsenic has been well documented.<sup>18</sup> It is well-established that the quality of water and health are closely linked. The study also found that arsenic harms the central and peripheral nervous systems, as well as the heart and blood vessels, however, the most characteristic effects are associated skin problems (skin lesions, thickening and discoloration of the skin and skin cancer).<sup>19</sup> Non-cancerous effects can include stomach pain, diarrhoeal disease, numbness in hands and feet, partial paralysis and blindness. It also may cause birth defects and reproductive problems. As with all trace-toxins a well-nourished and otherwise healthy person will withstand the poison for a long time while an undernourished individual will perish quickly. Children are especially vulnerable.<sup>20</sup>

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15 WHO Fact sheet N° 372, December 2012

16 ROSEANNE M. LORENZANA, AARON Y. YEOW, JOAN T. COLMAN, LARA L. CHAPPELL, HARLAL CHOUDHURY: Arsenic in Seafood: Speciation Issues for Human Health Risk Assessment, Volume 15, Issue 1, 2009, Taylor & Francis, pp. 185-200.

17 WHO's Guideline Value for arsenic in drinking-water is 0.01 mg/L.

18 See more: Diseases suspected to be caused or aggravated by Arsenic in drinking-water <http://www.sustainablefuture.se/arsenic/diseases.html> [21-04-2013]

19 Ibid.

20 UNICEF: Monitoring the situation of children and women. Key findings of the Bangladesh multiple indicator cluster survey 2009 Preliminary Report, Progotir Pathey 2009, January 2010 p. 26. <http://www.sustainablefuture.se/docs/Unicef%20statistics.pdf> [21-04-2013]  
UNICEF (2008) UNICEF Water Quality Handbook . New York: UNICEF.  
[http://www.unicef.org/wes/index\\_resources.htm](http://www.unicef.org/wes/index_resources.htm) [21-04-2013]

Short or acute effects of arsenic can occur within hours or days of exposure. Long-term exposure to inorganic arsenic, mainly through drinking contaminated water, eating food prepared with this water and eating food irrigated with arsenic-rich water, can cause both short and long term health effects, and can lead to chronic arsenic poisoning. The long term or chronic effects of arsenic poisoning usually develop over a long time period such as from five to twenty years.<sup>21</sup> Long term exposure to arsenic has been linked to bladder, lung and skin cancer, and may also cause kidney and liver cancer. Another point worth making at this juncture is that inorganic arsenic is known to be a human carcinogen since 1987 when the International Agency for Research on Cancer (IARC) based on sufficient evidence classified it into this category (IARC Group 1).<sup>22</sup> The US Environmental Protection Agency (EPA), the other major classification body on carcinogenicity also considers arsenic compounds carcinogenic to humans (EPA Group A).<sup>23</sup> Article 57 (a) of Regulation (EC) 1907/2006 (REACH) classifies these compounds into carcinogen category 1 (human carcinogens) according to the consolidated list of CMR (carcinogenic/mutagenic/reprotoxic) substances of the EU (relating to points 29, 30 and 31 of Annex I of Directive 76/769/EEC).

It is also worth considering that arsenic is also a potential agent for chemical terrorism.<sup>24</sup>

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21 WHO: Water-related diseases “Drinking arsenic-rich water over a long period results in various health effects including skin problems (such as colour changes on the skin, and hard patches on the palms and soles of the feet), skin cancer, cancers of the bladder, kidney and lung, and diseases of the blood vessels of the legs and feet, and possibly also diabetes, high blood pressure and reproductive disorders. Absorption of arsenic through the skin is minimal and thus hand-washing, bathing, laundry, etc. with water containing arsenic do not pose human health risks.” Sources: Arsenic in Drinking-water, WHO Fact Sheet No. 210., Revised May 2001, [21-04-2013]

22 Arsenic, inorganic; CAS 7440-38-2 (04/10/1998)

23 <http://www.epa.gov/iris/subst/0278.htm>

24 Terrorists could use chemical agents. These chemical agents are poisonous gases, liquids or solids that have toxic effects on people, animals or plants. Most of these chemical substances have a legitimate use. Among these chemical agents is Arsine (SA) as a blood chemical (chemicals acting on the blood). The arsenic is a potential agent because a good agent for chemical terrorism should be colourless, odourless, inexpensive and readily available and not detectable until symptoms are experienced. <http://www.thefreedictionary.com/chemical+terrorism> [21-04-2013]. On April 27, 2003, 78-year-old man died of arsenic poisoning after drinking coffee at the Gustaf Adolph Lutheran Church in New Sweden, and 15 other, mostly elderly churchgoers became ill, three of them seriously. Five days later, a church member shot himself, leaving a suicide note in which he confessed to the poisoning. [murderpedia.org/male.B/b/bondeson-daniel.htm](http://murderpedia.org/male/B/b/bondeson-daniel.htm) [21-04-2013]. See more: STEVEN L. HOENIG, Handbook of Chemical Warfare and Terrorism, Greenwood Publishing Group, 2002, [www.greenwood.com](http://www.greenwood.com). ALAN L. MELNICK, Biological, Chemical, and Radiological Terrorism: Emergency Preparedness and Response for the Primary Care Physician, Springer, 2008, [www.springer.com](http://www.springer.com)

### III. International standards for an acceptable level of arsenic in drinking-water

So as not to give rise to misunderstandings, the aim of this short study is clearly not to analyze all standards for drinking-water, in the lime light of the paper stands the specific problem of arsenic in water. In this area, in particular the World Health Organization (WHO) and the European Union standards are in the focus. As it has been mentioned before, arsenic, even in small quantities is contaminating. Therefore the determination of the acceptable, unarmful levels of arsenic in drinking-water in which the daily human exposure to arsenic is likely to be without appreciable risk is very important. The WHO has played an important role in establishing well-founded standards for drinking-water. Arsenic is one of WHO's ten chemicals of major public health concern.<sup>25</sup> In 1953, WHO distributed a questionnaire to all member states to assess the status of water treatment plants and their production of water of acceptable quality. The consultation was aimed at collecting ideas and contributions on the question of how the WHO should adapt to new challenges. However, the aim of this consultation was also to collect interested parties' views on acceptable water quality, so the direct consequence of the replies to the questionnaire was for the WHO to establish drinking-water standards. Following this procedure the contributions were analysed and summarised and a report was adopted in a meeting in 1956 in Geneva: the *International Standards for Drinking Water*. The final report was published in 1958. The primary aim of the WHO *Guidelines for Drinking-water Quality* (GDWQ) is the protection of public health. The WHO Guidelines for Drinking Water Quality include fact sheets and comprehensive review documents for many individual chemicals.<sup>26</sup> In spite of this the WHO Guidelines are not mandatory limits; nonetheless they have been widely used as a basis for setting national standards to ensure the safety of public water supplies. In other words, these WHO standards are recommendations and guidelines (soft law) and they should be set by national authorities, using a risk-benefit approach and taking into consideration local conditions (environmental, social, economic and cultural). The first version of International Standards for Drinking Water in 1958 included arsenic in the category of toxic substances which, if present in drinking-water supplies at concentrations above certain levels, may substantiate an actual danger to health. It established 0.20 mg/L as a permissible concentration. The updated standards in 1963

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25 Air pollution, Arsenic, Asbestos, Benzene, Cadmium, Dioxin and dioxin-like substances, Inadequate or excess fluoride, Lead and Mercury,

[http://www.who.int/ipcs/assessment/public\\_health/chemicals\\_phc/en/](http://www.who.int/ipcs/assessment/public_health/chemicals_phc/en/) [26-04-2013]

26 A routine monitoring for all of the chemicals is not possible, the guidelines set out practical approaches to 'rule out' some chemicals and to prioritize others using readily available information.

kept arsenic in the same category and established a more stringent concentration of 0.05 mg/L, although no specific reason for this reduction was disclosed. In 1971 based on research results WHO advised to keep the level of arsenic in drinking-water as low as possible. The last edition of WHO Guidelines (GDWQ)<sup>27</sup> has recently lowered its level to 0.01 mg/L with a view to reducing the concentration of arsenic in drinking-water, because lower levels preferred for health protection cannot be measured reliably.<sup>28</sup> However, WHO Member States may set higher values as standards taking into account local circumstances, resources and risks stemming from low arsenic sources that are contaminated microbiologically.<sup>29</sup>

In the last decade much has been written on the effect of arsenic on human health. Particular attention needed to be given to the Joint FAO/WHO Expert Committee on Food Additives (JECFA) report published in 2010. The Expert Committee re-evaluated the effects of arsenic on human health, taking new data into account. The JECFA concluded that for certain regions of the World where concentrations of inorganic arsenic in drinking-water exceed 50-100 µg/L, there is some evidence of adverse effects. In other areas, where arsenic concentrations in water are elevated (10-50 µg/L), the JECFA concluded that while there is a possibility of adverse effects, these would be of a low incidence that would be difficult to detect in epidemiological studies.<sup>30</sup> It should further be mentioned that the WHO Guidelines for Drinking-water Quality (GDWQ) are kept up-to-date by a “rolling revision”. The work plan involved development of addenda published in 2005 and 2007 and a fourth edition was scheduled for 2008. It also included development and publication of documents on guidelines, derivation and describing the state of knowledge on good practice in drinking-water safety.

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27 Guidelines for drinking-water quality, fourth edition World Health Organization 2011, ISBN: 978 92 4 154815 1. Arsenic in Drinking-water Background document for development of WHO Guidelines for Drinking-water Quality WHO/SDE/WSH/03.04/75/Rev/1, Maximum Contaminant Level Goal, MCLG = 0 ppm. In Australia this standard is lower than 0.01 mg/L (0.007, mg/L 1996) and is some counties e.g. Jordan (1991), Japan (1993), Namibia, Syria (1994), in the Member States of the European Union (1998), Mongolia (1998), Laos (1999), this standard is 0.01 mg/L. In Canada this standard is lower than 0.05 mg/L but higher than 0.01 mg/L (1999) (0.025 mg/L). In the majority of the countries this standard is higher than 0.05 mg/L.

28 DRAFT Chapter 5: Drinking-water Guidelines and Standards by SOMBO YAMAMURA  
In collaboration with Jamie Bartram, Mihaly Csanady, Hend Galal Gorchev, and Alex Redekopp  
World Health Organization, Geneva, Switzerland  
[http://www.who.int/water\\_sanitation\\_health/dwq/arsenicun5.pdf](http://www.who.int/water_sanitation_health/dwq/arsenicun5.pdf) [12-05-2013]

29 United Nations (2002). United Nations Synthesis Report on Arsenic in Drinking-water  
[http://www.who.int/water\\_sanitation\\_health/dwq/arsenic3/en/](http://www.who.int/water_sanitation_health/dwq/arsenic3/en/) [14-05-2013]

30 <http://www.who.int/mediacentre/factsheets/fs372/en/> [12-05-2013]

The European Union legislation covers a large area of water-related issues such as flood management, chemicals in water, clean drinking-water, bathing-water quality, groundwater protection and urban waste water. According to Commission statistics 20% of all surface waters in the European Union is seriously threatened by pollution, 60% of European cities overexploit their groundwater resources which supply around 65% of all drinking-water in Europe, 50% of wetlands belong to the ‘endangered status’ due to groundwater over-exploitation, and the area of irrigated land in Southern Europe has increased by 20% since 1985.<sup>31</sup> In May 2012, the European Commission proposed a *European innovation partnership (EIP)* on water which was endorsed by the Council. The objective of the EIP on water is to support and facilitate the development of innovative solutions to deal with the many water-related challenges Europe and the world are facing, as well as to support economic growth by bringing such solutions to the market.

The central element of European water policy is a Directive for ‘*Community action in the field of water policy*’ (2000/60/EC) – often referred to as the Water Framework Directive (Hereinafter: WFD)<sup>32</sup> which is one of the most important pieces of European environmental legislation in recent years, It aims to achieve a good ecological and chemical status of European waters by 2015. In November 2012 the European Commission adopted its ‘*Blueprint to safeguard European waters*’, a new strategy to reinforce water management in the EU. The Blueprint integrates the results of a policy review concerning: water scarcity and droughts; an analysis of the implementation of river basin management under the WFD; a review of the vulnerability of environmental resources (such as water, biodiversity and soil) to climate change impacts and man-made pressures; and a review of the whole of the EU’s water policy framework in the light of the European Commission’s ‘better regulation’ approach. The Blueprint aims to ensure that good quality water is available across Europe in sufficient quantities for all legitimate uses. In order to achieve this, it focuses on changes required to the EU’s

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31 EU Water statistics, Eurostat Data from September 2012.

[http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Water\\_statistics](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Water_statistics) [23-04-2013]

32 The main aim of the WFD is to achieve at least good water status by defining and implementing the necessary measures within integrated programmes of measures. Where good water status already exists, it should be maintained. The key elements of the WDF are the integrated management of surface and groundwater, protection of both quantity and quality, river basin approach, combining emission controls and water quality standards, economic instruments supporting environmental objectives, public involvement.

water policy framework through 2020 as it is closely related to the Europe 2020 strategy and, in particular, to the roadmap to resource efficiency.<sup>33</sup>

In close connection with the European water-policy strategy the European Union has set the arsenic standard for drinking-water at 0.010 mg/L to protect consumers served by public water systems from the effects of long-term, chronic exposure to arsenic. Water systems must comply with this standard by 23 January 2006 providing additional protection to the European citizens. The EU Member States and water systems have to comply with the standard so that additional protection solutions exist which are technically, socially and economically sustainable.

#### **IV. Hungarian experiences and solutions for arsenic in water**

The population of Hungary is 9.938 million<sup>34</sup> and the area of the country covers 93,030 km<sup>2</sup>. Hungary is a landlocked state; it is mostly flat with low mountains in the north. Hungary is rich in thermal water resources, with approximately 400 public baths, of which 36 are therapeutic facilities. Lake Balaton is the largest lake in central Europe. Hungary is highly dependent on upstream countries for water (dependency ratio is approximately 95%). The entire territory of Hungary is situated in the middle of the Danube River Basin, which is the second largest basin in Europe. The Danube River Basin is shared by 19 countries including Hungary.<sup>35</sup> Hungary has been a Signatory Party to the Danube River Protection Convention since 1994. In Hungary safeguard zones to protect drinking-water abstraction areas have been established. In addition to safeguard zones other (basic or supplementary) measures specific to safeguarding drinking-water quality were also reported. Measures addressing the issues are changes in water treatment technology, keeping drinking-water resources in a safe condition, transition to alternative drinking-water resources in case of resource shortages, development of a drinking-water safety plan and implementation of safety measures specified in the National River Basin Management Plan (Hereinafter: RBMP).<sup>36</sup> The

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33 The scope of the Fitness Check includes 1) the Water Framework Directive, 2) the Groundwater Directive, 3) the Directive on Environmental Quality Standard (EQS), 4) the Urban Waste Water Directive, 5) the Nitrates Directive and 6) the Floods Directive  
[http://ec.europa.eu/environment/water/blueprint/fitness\\_en.htm](http://ec.europa.eu/environment/water/blueprint/fitness_en.htm) [23-04-2013]

34 The final data of the population census held in 2011 started to be disclosed on 28 March 2013.

35 The Danube River Basin District (Danube RBD) has a total area of 807 827 km<sup>2</sup>, of which 11.52% belongs to Hungary.

36 The Decision was published in the Hungarian Official Journal 2010, No. 84. RBMP was reported to WISE on 3 June 2010. Institutional change of the Hungarian administration was reported to WISE on 5 June 2012. [WISE is a partnership between the European Commission (DG Environment, Joint

Hungarian RBMP is based on the time schedule and work programme published originally in a draft version on 21 December 2006 and finalized after a half year of public consultation in 2007.<sup>37</sup> The draft of the river basin management plan was published on 22 December 2008. Hungary was making steady progress in implementing the directive, establishing a Water Management Plan (WMP) at the end of 2009. The National River Basin Management Plan was adopted by the Hungarian Government on 21 May 2010, issuing also Governmental Decision No. 1127/2010 putting the RBMP into force.<sup>38</sup> Due to reasons of formal legal mandate, the Governmental Decision was later repealed and the RBMP, with unchanged content, was newly adopted on 23 February 2012 by Governmental Decision No. 1042/2012.<sup>39</sup> The RBMPs are adopted by way of Government Decisions, which cannot be considered as formal sources of law, as they do not create rights and obligations for individuals, but have legally binding effects only on public authorities. For the time being, there is no legal instrument that formally regulates the legal effect of the RBMP; its legal effect is a consequence of its nature as a Government Decision. However, legal value is given to the RBMP by other laws that provide direct reference to the RBMP.<sup>40</sup> In particular, the Law on water management stipulates that environmental objectives must be taken into account in the course of planning and carrying out activities that concern the environment. The RBMP calls for the revision of legislation applicable to licensing procedures, in order to make sure that existing and new installations are in accordance with the environmental objectives of the WFD. The RBMP considers the revision of the legislation applicable to licensing procedures a necessary step for its implementation. The RBMP also calls for the revision of existing licenses, without specifying a timeline. Legislation applicable to the licensing procedures does not contain a time-frame for the revision of existing licenses. Finally, it must be noted that the RBMP does not refer to any circumstances that could

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Research Centre and Eurostat) and the European Environment Agency, known as “the Group of Four” (Go4).]

37 “Promoting the implementation of Water Framework Directive Phase II.” run in Hungary in 2006-2007 (supported by EU Transition Facility)

38 By 2010, Member States must ensure that water pricing policies provide adequate incentives for users to use water resources efficiently and that the various economic sectors contribute to the recovery of the costs of water services including those relating to the environment and resources. This cost recovery rule is expected to impact particularly irrigated agriculture, where users have not paid the full costs of water supply.

39 The new decision was published again in the Hungarian Official Journal 2012, No 21.

40 European Commission Brussels, 14.11.2012 SWD(2012) 379 final Commission Staff Working Document 15/30 Member State: Hungary. Accompanying the document Report from the Commission to the European Parliament and the Council on the Implementation of the Water Framework Directive (2000/60/EC) River Basin Management Plans {COM(2012) 670 final} pp.6-7. [http://ec.europa.eu/environment/water/water-framework/pdf/CWD-2012-379\\_EN-Vol1.pdf](http://ec.europa.eu/environment/water/water-framework/pdf/CWD-2012-379_EN-Vol1.pdf) [16-05-2013]

trigger the review of licensing procedures.<sup>41</sup> It is worth mentioning that the system was developed in close co-operation with the International Danube River Basin Management Plan. The RBMP lists the chemical pollutants in which Hungary included dissolved zinc, copper, chromium and arsenic to be investigated as these compounds are specific to the Danube River Basin.

According to the Working Document of the European Commission, 11% of the surface water bodies are in good ecological status in Hungary. More than half of the surface water bodies are in less than good status while the ecological status of one third of the river water bodies and of nearly two thirds of the lake water bodies is unknown.<sup>42</sup> For synthetic substances: a national limit, the same as the threshold value of the EU for the same environmental limits has been applied. 80% of the groundwater bodies (147 GWBs) are in good chemical status in Hungary and 20% of them are in poor chemical status (38 GWBs). The quantitative status of 158 GWBs are good (85%) while 27 of them are in poor quantitative status (15%).<sup>43</sup> There are no groundwater bodies in unknown status in Hungary.<sup>44</sup> As far as the groundwater's chemical status is concerned, it has been reported that the needs of the terrestrial ecosystems associated with groundwater bodies have been taken into account in the assessment of the chemical status. When a groundwater body is considered to be of good chemical status less than 20% of its area is affected by pollution and this pollution does not endanger

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41 Ibid. p. 7.

42 Ibid. 6. Overview of status (ecological, chemical, ground water) p.14.

43 *"The misclassification of a water body can have serious consequences. If a good quality water body is misqualified to moderate class, an improvement plan has to be done and executed resulting in unnecessary extra costs. In the reverse case, a moderate quality water body is regarded as good quality water, it is possible, that no further degradation of water body will be observed in time, only when the costs of the improvement is already high and the chance of success is uncertain. In this case, the basic concept of WFD fails. Consequently, the adequate reliability and accuracy of monitoring and classification is very important."*

B. LÁSZLÓ, F. SZILÁGYI, E. SZILÁGYI, GY. HELTAI, I. LICSKÓ: Implementation of the EU Water Framework Directive in monitoring of small water bodies in Hungary, I. Establishment of surveillance monitoring system for physical and chemical characteristics for small mountain watercourses Microchemical Journal, Volume 85, Issue 1, January 2007, pp. 65-71.

<http://www.sciencedirect.com/science/article/pii/S0026265X06001305> [20-04-2013]

44 Groundwater bodies are identified by aquifer units (geological formations that make up a unit according to specific parameters) rather than major aquifers and have been classified into three groups: basin porous bodies (52 cold and 6 thermal) separated by the isotherm surface of 30°C; karst water bodies (13 cold, 15 thermal) and upland water bodies (22). More than half (60) of the groundwater bodies are divided by international borders and some are shared by two neighbouring countries in addition to Hungary. The status of groundwater should be evaluated in terms of chemical composition and volume.

Danube Facts and Figures: Hungary ICPDR p.5. <http://www.icpdr.org> [20-04-2013]

groundwater resources used for drinking-water purposes.<sup>45</sup> It may be noted that according to Hungary's National Council for Sustainable Development (NFFT), the European Danube Strategy (EDS) is the right instrument to solve water management problems. *"The currently most important task of strategic importance in the field of water management of the countries sharing the Danube basin is the provision of the good ecological status of all surface and ground waters, in accordance with the Water Framework Directive, by 2015, and, if that is not possible, by 2021 or 2027."*<sup>46</sup> Operational duties have been divided among different national and regional organisations. In 2011 the Ministry of Agriculture and the Ministry of Environment and Water were merged into the new Ministry of Rural Development. Under the new Ministry, the State Secretariat for Environmental Affairs took over the responsibility for the implementation of the WFD. At the same time some duties related to water management were transferred to the Ministry of the Interior. Hungary has so far submitted three reports to the European Commission on the WFD implementation process. The First Hungarian National Report (June 2004) according to Art. 3 dealt mainly with administrative issues, such as the description of the country within the Danube river basin, the identification of the competent authority (Ministry of Environment and Water), the sphere of responsibilities of the Ministry in relation to the WFD and the international settings (bilateral agreements, the coordination of WFD implementation within the Danube basin by the International Commission for the Protection of the Danube River – ICPDR).<sup>47</sup> The second Hungarian National Report (June 2004) according to Art. 5 of the WFD gives details about surface and groundwater bodies, information on their actual state and on the human pressures, as well as on the estimated risk of failing good status.<sup>48</sup> The WFD classifies Hungary as part of the ecological region called Hungarian Plains, which is part of the system of European ecological regions. When classifying surface water bodies (such as a lake, a reservoir, a stream, a river or a part thereof), Hungary relied on what is known as the "B system" of the WFD.

The WFD provides a typological framework using two systems (A and B) for characterising natural freshwater surface water bodies (rivers and lakes). System B comprises obligatory factors (altitude, latitude, longitude, geology and size) and non-

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45 A substantial number of laboratory toxicity data are available.

46 <http://www.euractiv.com/sustainability/hungary-push-water-policy-overha-news-442324>

47 [http://www.kvvm.hu/cimg/documents/Implementing\\_the\\_Water\\_Framework\\_Directive\\_in\\_Hungary\\_June\\_2010.pdf](http://www.kvvm.hu/cimg/documents/Implementing_the_Water_Framework_Directive_in_Hungary_June_2010.pdf) [20-04-2013]

48 KVVVM (2005): Nemzeti jelentés az EU-nak a Víz Keretirányelv bevezetéséről (National Report on Implementation of Water Framework Directive in Hungary). Kvvm, manuscript, pp. 85. (in Hungarian).

obligatory physical and chemical factors, regarded as important determinants of aquatic biotic assemblage structure and composition. Moog et al. (2004) have stated that the listed non-obligatory factors could also be regarded as features that could be affected by man.<sup>49</sup> The WFD requires that 48 microbiological and chemical substances, or parameters, be monitored and tested regularly to ensure wholesome and clean water. At the time of writing 876 natural and 150 artificial surface water bodies are identified in Hungary. 579 have been classified as being “at risk” from organic, nutrient or priority hazardous substances (according to the Directive’s definitions).<sup>50</sup> Pollution affects the upper part of the generally several hundred meter deep groundwater bodies while the major part of these (including drinking-water sources) is in good status.<sup>51</sup> As far as drinking-water is concerned in Hungary, some deep aquifers contain natural contaminants (such as explosive gases, harmful minerals e.g. arsenic, iron or manganese in high concentrations) but the overwhelming majority can be used without significant treatment. Protection against anthropogenic hazards is a priority for water resource management.<sup>52</sup> Hungary has a Government decree (201/2001. (X. 25.)) on drinking-water quality criteria<sup>53</sup> and a Joint Decree No. 6/2009. (IV. 14.) KvVM-EüM-FVM laying down limits necessary for the protection of geological medium and groundwater against pollution. If the relevant ‘B’ contamination value is reached, the geological medium or groundwater is designated as polluted.<sup>54</sup>

“*Environmental quality standard*” (EQS) means the concentration of a particular pollutant or group of pollutants in water, sediment (*any material transported by water and settled to the bottom*) or biota (*all living organisms of an area*) which should not be exceeded in order to protect human health and the environment. Having said that, the WFD requires that all inland and coastal waters achieve ‘good status’ by 2015. Article 16 of the Directive describes how and by when *Environmental Quality Standards* for pollutants should be developed, and states that pollutants presenting a significant risk to or via water should be identified by the European Commission and classified as priority

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49 Samantha Jane Hughes: Application of the Water Framework Directive to Macronesian Freshwater Systems. *Biology and Environment: Proceedings of the Royal Irish Academy*, 2005, VOL. 105B, NO. 3, pp. 185-193.

50 Approximately 70% of artificial lakes (mainly fishponds) are “at risk” from organic and nutrient loads. None of the 108 groundwater bodies identified are considered to be “at risk” due to human intervention, but 46 sites are listed as “possibly at risk” (mostly from nitrate pollution from diffuse sources).

51 International Commission for the Protection of the Danube River – ICPDR <http://www.icpdr.org> [20-04-2013]

52 Danube Facts and Figures: Hungary ICPDR – <http://www.icpdr.org> [20-04-2013]

53 [http://net.jogtar.hu/jr/gen/hjegy\\_doc.cgi?docid=A0100201.KOR](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0100201.KOR) [20-04-2013]

54 [http://net.jogtar.hu/jr/gen/hjegy\\_doc.cgi?docid=A0900006.KVV&celpara=#xcelparam](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0900006.KVV&celpara=#xcelparam) [20-04-2013]

substances, with the most hazardous of these classified as priority hazardous substances. The directive also foresees the design of the most cost-effective set of measures aimed at achieving load reduction of such substances, taking into account both product and process sources. Thus a directive (2008/105/EC) was approved to establish “*Environmental Quality Standard*” limits for 33 priority substances and 8 priority hazardous substances in surface waters, but also, for some of these compounds, in sediment and biota. EU Member States must ensure compliance with the *Environmental Quality Standards*, and verify that the concentration of substances concerned does not increase significantly in sediments and/or the relevant biota.<sup>55</sup>

The European Union has a history of over 30 years of drinking-water policy. This policy ensures that water intended for human consumption can be consumed safely on a life-long basis, representing a high level of health protection. The main pillars of the policy are to ensure that drinking-water quality is controlled through standards based on the latest scientific evidence; secure an efficient and effective monitoring, assessment and enforcement of drinking-water quality; provide the consumers with adequate, timely and appropriately information; contribute to the broader EU water and health policy.<sup>56</sup> Under certain conditions and for limited time derogation the Drinking-water Directive allows for boron, arsenic and fluoride to be present in drinking-water. Derogations can be granted, provided it does not constitute a potential danger to human health and provided that the supply of water intended for human consumption in the area concerned cannot be maintained by any other reasonable means.<sup>57</sup>

As it has already been noted above; most of the drinking-water resources in Hungary come from groundwater and Hungary has some water sources with dangerous levels of arsenic (As) which do not comply with the standard for arsenic required by the WFD (WHO). In Hungary, the natural bedrock geology has been responsible for contamination of aquifer water. In a big part of Hungary the high arsenic content of the well-waters is a great problem. Arsenic levels in drinking-water in Eastern Hungary are above EU limits and significantly higher than in some neighbouring counties such as either Romania or Slovakia. In Eastern Hungary nearly 70% of monitored water sources were beyond the 10 microgram EU drinking-water standard for arsenic.<sup>58</sup> The problem

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55 [http://ihcp.jrc.ec.europa.eu/our\\_activities/public-health/eqs](http://ihcp.jrc.ec.europa.eu/our_activities/public-health/eqs) [20-04-2013]

56 <http://ec.europa.eu/environment/water/water-drink/>

57 [http://ec.europa.eu/health/scientific\\_committees/environmental\\_risks/docs/scher\\_o\\_120.pdf](http://ec.europa.eu/health/scientific_committees/environmental_risks/docs/scher_o_120.pdf)

58 This is shown by a doctoral thesis by ANNA-LENA LINDBERG of Karolinska Institute. “Factors influencing the metabolism of inorganic arsenic in humans”, Institute of Environmental Medicine.”(2007)

is bigger than scientists had thought and Hungary has made a great effort to decrease the arsenic (As) in drinking-water concentrations in 80 waterworks systems (supplying about 400,000 people) to come below the 50 µg/L guideline. WHO and the EU however, decreased this guideline (1993 and 1998, respectively) to 10 µg/L.<sup>59</sup> Growing awareness led to increased testing, which revealed that arsenic was more widespread in drinking-water: the extent of arsenic pollution is actually much bigger than people realized. Southeast Hungary has been affected the most.<sup>60</sup> In Hungary more than a million consumers use drinking-water with arsenic concentration in excess of the WHO guideline<sup>61</sup> and the WFD of the European Union. The European Commission gave parts of Hungary temporary exemption for meeting standards for arsenic in water in 2004 and Hungary has made a great effort to decrease the arsenic in drinking-water. On 25 December 2009 the deadlines for the implementation expired and several settlements received assurance that young children under 6 years of age and pregnant mothers would receive bottled drinking-water. The European Commission granted an extension of the exemption from meeting the EU drinking-water standards for arsenic, boron and fluoride content for Hungary until 25 December 2012. To decrease the arsenic concentration below 10 µg/L in the foreseeable future appears to be very difficult

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A.-L. LINDBERG, W. GOESSLER, E. GURZAU, K. KOPPOVA, P. RUDNAI, R. KUMAR, T. FLETCHER, G. LEONARDI, K. SLOTOVA, E. GHEORGHIU AND M. VAHTER, Arsenic exposure in Hungary, Romania and Slovakia, *J. Environ. Monit.*, 2006, 8, 203 (DOI: 10.1039/b513206a)

The studies included two different populations: one from Central Europe (Hungary, Romania and Slovakia) and one from Bangladesh (the Matlab area). The results show that most people in the Matlab area and a large number of those in certain parts of Hungary are exposed to high contents of arsenic in their drinking-water.

<http://ki.se/ki/jsp/polopoly.jsp?a=36698&d=3297&l=en&newsdep=3297> [27-04-2013]

59 Chapter 5: Drinking-water Guidelines and Standards by SOMBO YAMAMURA World Health Organization, Geneva, Switzerland In collaboration with JAMIE BARTRAM, MIHALY CSANADY, HEND GALAL GORCHEV & ALEX REDEKOPP, Box 5-5: Application of national arsenic drinking-water guidelines / standards in Hungary pp.13-14.

[http://www.who.int/water\\_sanitation\\_health/dwq/arsenicun5.pdf](http://www.who.int/water_sanitation_health/dwq/arsenicun5.pdf) [28-04-2013]

60 Related studies: I. VARSÁNYI, Z. FODRE, A. BARTHA, Arsenic in drinking-water and mortality in the Southern Great Plain, Hungary, *Environ. Geochem. Health*, 13 (1991) 14-22. doi: 10.1007/BF01783491

M. BORZSONYI, A. BERECZKY, P. RUDNAI, M. CSANADY, A. HORVATH, Epidemiological studies on human subjects exposed to arsenic in drinking-water in Southeast Hungary, *Arch. Toxicol.*, 66 (1992) 77-78. doi: 10.1007/BF02307274

E. Deseo, J. Deak, Groundwater quality in Hungary – a general view, *FRESHWATER CONTAMINATION*, 1997, pp. 227-234. IAHS Publication. no. 243.

61 WHO (2006) Guidelines for Drinking-Water Quality, Third edition incorporating first addendum. Vol. 1, Recommendations (electronic resource). Geneva: WHO  
[www.who.int/water\\_sanitation\\_health/dwq/guidelines/en](http://www.who.int/water_sanitation_health/dwq/guidelines/en)

without the development of appropriate and economically viable water treatment technologies which can be utilised at the municipal levels.<sup>62</sup>

The question is whether people do have a right to clean air, safe drinking-water and a healthy environment in Hungary? The Constitutional Court of Hungary was the first in Central and Eastern Europe to enforce this type of provision. In *Case 28/1994*, the Court held that the Hungarian legislature's efforts to sell previously nationalized forested lands for cultivation under the former communist regime was unconstitutional, ruling that it violated the constitutional environmental rights enshrined in the Hungarian Constitution. The Court rejected the state's justification for the repeal, reasoning that "[t]he right to a healthy environment guarantees the physical conditions necessary to enforce the right to human life... extraordinary resolve is called for in establishing legislative guarantees for the right." Thus, it held that once the State created a baseline of environmental protection, it could not thereafter degrade it.<sup>63</sup>

As it stands, the Hungarian constitution protects human rights, sets forth the obligations of the state. Since 2012 the right to water and sanitation in Hungary is expressly contained in legislation. Article P of the fundamental law of Hungary states that "*All natural resources, especially agricultural land, forests and drinking-water supplies, biodiversity – in particular native plant and animal species – and cultural assets shall form part of the nation's common heritage, and the State and every person shall be obliged to protect, sustain and preserve them for future generations.*" Moreover Article XX. 2) states that "*Hungary shall promote the exercise of the right set out in Paragraph (1) by ensuring that its agriculture remains free from any genetically modified organism, by providing access to healthy food and drinking-water, by managing industrial safety and healthcare, by supporting sports and regular physical exercise, and by ensuring environmental protection.*"<sup>64</sup>

It is not the same as the right to safe, acceptable, physically accessible and affordable water for personal and domestic uses, but it seems like a good basis to develop it. For

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62 Chapter 5: Drinking-water Guidelines and Standards by SOMBO YAMAMURA World Health Organization, Geneva, Switzerland In collaboration with JAMIE BARTRAM, MIHALY CSANADY, HEND GALAL GORCHEV & ALEX REDEKOPP, Box 5-5: Application of national arsenic drinking-water guidelines / standards in Hungary pp.13-14.

[http://www.who.int/water\\_sanitation\\_health/dwq/arsenicun5.pdf](http://www.who.int/water_sanitation_health/dwq/arsenicun5.pdf) [28-04-2013]

63 Case 28/1994. (V. 20.) AB and see 48/1997. (X. 6.) és a 48/1998. (X. 23.) AB Decisions

See more: GÁBOR KECSKÉS, A vízhez való jog nemzetközi jogi koncepciója. Állam és jogtudomány, 2009. (50. évf.) 4. sz. [569]-598. [In Hungarian]

GÁBOR KARDOS, A vízhez való jog. in: Acta Humana: emberi jogi közlemények, 2004. (15. évf.) 1. sz. [93]-98. [In Hungarian]

64 The Fundamental Law of Hungary (25 April 2011) <http://www.kormany.hu> [16-04-2013]

the time being, the Hungarian Government has used an innovative arsenic removal technology developed by affiliated institutions of the Hungarian Defence Forces. The Ministry of Defence developed water purification and arsenic removal equipment based on new patents. Thanks to their unique filtering technology, these devices produce water with significantly lower arsenic content than the limit value set by the European Union. Close to 50 such devices are already operating nationwide in Hungary.<sup>65</sup>

The Hungarian Government has allocated HUF 5.7 billion to the Ministry of Defence so that such filtering containers can be installed in the communities concerned as a temporary solution to replace the supply of water by means of bags and tankers, which has been the solution employed since 1 January. This solution makes it possible to provide residents with access to healthy drinking-water in all affected areas of Hungary.<sup>66</sup> The definitive solution, however, will be the fitting of filtering devices on the waterworks' wells – with healthy water flowing from the taps.<sup>67</sup> The recent innovations include a bus that may also be deployed in extreme circumstances. For experimental purposes, one of such machines was installed on the water base at a small village Érmellék, in Békés County, and after a four-month trial, the average arsenic level of 120 micrograms/litre was reduced to 2 micrograms.<sup>68</sup>

## V. Summary

Water is more and more a strategic good in the world as drinking-water resources are not used sustainably. The global climate change and the world's rapid population growth are also worsening the current situation; while our resources are decreasing, the demand for drinking-water is increasing. The quantity and quality issues

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65 Military to aid municipalities in dealing with arsenic contamination of drinking-water, December 28, 2012. <http://www.kormany.hu/en/ministry-of-defence> [16-04-2013]

66 Mention should also be made of the Austrian company BWT (Best Water Technology) which has developed the world's first anti-arsenic water filter able to remove toxic arsenic from tap water. In a joint venture with BWT, the Hungarian Red Cross distributed 500 water filters and cartridges to people living in regions where the drinking-water has been polluted by arsenic. BWT was donating its products to the Hungarian Red Cross.

News: Safe drinking-water using BWT anti-arsenic filters (15-03-2012)

<http://www.bwt-group.com/en/company/press/releases/Latest-press-release/Pages/Safe-drinking-water-using-BWT-anti-arsenic-filters.aspx> [27-04-2013]

67 <http://www.kormany.hu/en/ministry-of-defence/news/access-to-healthy-drinking-water-is-important> [20-04-2013]

68 The Hungarian Armed Forces has been distributing drinking-water in 123 towns from January 1, 2013. Ministry of Defence of Hungary <http://www.kormany.hu/en/ministry-of-defence/news/military-to-aid-municipalities-in-dealing-with-arsenic-contamination-of-drinking-water> [20-02-2013]

of waters are interrelated and a wise water management and new technological solutions may be able to smooth or maybe solve our water problems.

The EU Water Framework Directive is an ambitious regional initiative for bringing our surface waters to a 'good ecological and chemical status' and our groundwater to a 'good quantitative and chemical status' by 2015. Hungary, as an EU Member State is obliged to meet these criteria and a big challenge for the country is to sustainably meet the criteria for arsenic in our drinking-water everywhere in Hungary. The groundwater naturally has a higher arsenic content due to geological origin especially in the Eastern part of Hungary. Since the water cleaning process is costly, waters with a lowered arsenic level should not be used for flushing toilets for example, but preferably only for drinking purposes, cooking, and irrigation, etc. avoiding human arsenic intake. Nonetheless this would require further infrastructure developments and awareness raising.

The right to water itself is apparently not enough to ensure safe and clean drinking-water for the citizens. It will be a question for the future how successfully we will be able to meet the quality criteria for drinking-water in a sustainable and affordable way on the long term.

# Affordability of Drinking-water and the New Hungarian Regulation Concerning Water Utility Supplies

*Ede János Szilágyi* \*

The present article<sup>1</sup> concentrates on one element of the human right to water (hereinafter referred to as HRTW), namely: financing. In this connection, the paper emphasizes that ensuring the HRTW in a developing country diverges from ensuring it in a developed country. The article also stresses the relationship between financing and the determination of the water price. Besides the social aspects, the determination of the water price is also affected by economic and environmental aspects. The present article makes an attempt to analyse the above mentioned topics and to interpret the nature of the HRTW through the example of a concrete state, i.e. Hungary, and its water utilities' system under reconstruction.

As for the name and the content of the human right to water, there are numerous methods to determine and classify the HRTW both in nominal and substantial ways. Taking the international and national laws into consideration, politicians, experts and stakeholders cannot find a single and universal concept of the HRTW, resulting in a considerable variation of concepts. In the present article, the denomination of the HRTW is applied as a general and comprehensive category of the different variations and concepts.

In Part A of this article, the essential features of the HRTW are summarized.<sup>2</sup> In Part B, the analysis focuses on the Hungarian implementation of the HRTW, especially on the

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1 This research was supported by the European Union and the State of Hungary, co-financed by the European Social Fund in the framework of TÁMOP 4.2.4. A/2-11-1-2012-0001 'National Excellence Program'

2 Author of the present paper applied the significant and outstanding research of ANIKÓ RAISZ in the several paragraphs of the Part A; see especially: A. RAISZ, A vízhez való jog egyes aktuális kérdéseiről, in CS. CSÁK (Ed.), *Jogtudományi tanulmányok a fenntartható természeti erőforrások*

relationship of the affordability of the HRTW with the new Hungarian constitution (called the Hungarian Fundamental Law) and the new Hungarian act concerning water utilities.

## **I. Introduction to the concept and the implementation of the human right to water**

### **I.1. The development of the HRTW in international documents and national constitutions**

The determination of the date when the HRTW appeared in legal documents is complicated, since, besides the documents which explicitly contain the HRTW, also documents which merely implicitly include the HRTW (hereinafter referred to as implicit HRTW) have a significant role in the development of the HRTW.

In connection with the implicit HRTW, the most significant international legal document is General Comment No. 15 on the right to water.<sup>3</sup> Up to now, General Comment No. 15 provides the most commonly accepted and the most comprehensive interpretation of the HRTW.

Other relevant universal international conventions including the HRTW are the following: Geneva Convention relative to the Protection of Civilian Persons in Time of War<sup>4</sup> and the Geneva Convention relative to the Treatment of Prisoners of War,<sup>5</sup>

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témakörében, Miskolci Egyetem, Miskolc, 2012, pp. 151-159. In connection with the human right to water, a considerable amount of books and articles is accessible; see, e.g.: C. ALBUQUERQUE, On the right track. Good practices in realising the rights to water and sanitation, Human Rights to Water & Sanitation UN Special Rapporteur, Lisbon, 2012; S. MCCAFFREY & K. NEVILLE, 'Small Capacity and Big Responsibilities: Financial and Legal Implications of a Human Right to Water for Developing Countries', The Georgetown International Environmental Law Review, No. 21, 2008-2009, pp. 679-704; S. Tully, 'A Human Right to Access Water? A Critique of General Comment No. 15', Netherlands Quarterly of Human Rights, No. 23, 2005, pp. 35-63; L. WATROUS, 'The Right to Water – From Paper to Practice', Regent Journal of International Law, No. 8, 2011, pp. 109-136. p. From the articles and books of Hungarian authors see particularly: D. G. ANTALI, 'A kék bolygó kincse – A vízhez való jog szabályozása nemzetközi és nemzeti szinten', Jog- és Politikatudományi Folyóirat, No. 4, 2011, pp. 1-40; G. KARDOS, 'A vízhez való jog', Acta Humana, No. 1, 2004, pp. 93-98; G. KECSKÉS, 'A vízhez való jog nemzetközi jogi koncepciója', Állam- és Jogtudomány, No. 4, 2009, pp. 569-598; M. SZAPPANYOS, A vízhez való jog érvényesíthetősége az ENSZ keretében (PhD theses on file at the University of Pécs, Pécs, 2012).

3 ECOSOC General Comment No. 15, 11-29 November 2002, on The right to water (arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights).

4 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287. According to Articles 85 and 89:

*Internees shall have for their use, day and night, sanitary conveniences which conform to the rules of*

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);<sup>6</sup> Convention on the Rights of the Child;<sup>7</sup> Convention on the Rights of Persons with Disabilities.<sup>8</sup> Besides these conventions, the UN General Assembly Resolution A/RES/64/292<sup>9</sup> is also considerable in a political sense (i.e. this decision does not create or stipulate any legal obligation of the states). Resolution A/RES/64/292 formally recognises the right to water and sanitation and acknowledges that clean drinking-water and sanitation are essential to the realisation of all human rights.

The HRTW appears in numerous national constitutions (e.g. Republic of South Africa, Oriental Republic of Uruguay, Republic of the Gambia). The new Hungarian constitution (the Fundamental Law of Hungary) adopted in 2011 also recognised the HRTW.

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*hygiene and are constantly maintained in a state of cleanliness. They shall be provided with sufficient water and soap for their daily personal toilet and for washing their personal laundry; installations and facilities necessary for this purpose shall be granted to them. Showers or baths shall also be available. The necessary time shall be set aside for washing and for cleaning...*

*Sufficient drinking-water shall be supplied to internees.*

- 5 1949 Geneva Convention relative to the Treatment of Prisoners of War, 75 UNTS 135. According to Articles 20, 26, 29 and 46:

*The Detaining Power shall supply prisoners of war who are being evacuated with sufficient food and potable water, and with the necessary clothing and medical attention...*

*Sufficient drinking-water shall be supplied to prisoners of war...*

*... prisoners of war shall be provided with sufficient water and soap for their personal toilet and for washing their personal laundry; the necessary installations, facilities and time shall be granted them for that purpose...*

*The Detaining Power shall supply prisoners of war during transfer with ... drinking-water to keep them in good health...*

- 6 1979 Convention on the Elimination of All Forms of Discrimination Against Women, 1249 UNTS 13. According to Article 14 (2) (h) of CEDAW provides:

*States parties shall take all appropriate measures to eliminate discrimination..., in particular, shall ensure to such women the right: ... (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communication.*

- 7 1989 Convention on the Rights of the Child, 1577 UNTS 3. According to Article 24 (2):

*States Parties... shall take appropriate measures: ...*

*c) to combat disease and malnutrition... through the provision of... clean drinking-water, taking into consideration the dangers and risks of environmental pollution.*

- 8 2006 Convention on the Rights of Persons with Disabilities, 2515 UNTS 3. According to Article 28:

*2. States Parties... shall take appropriate steps to safeguard and promote the realization of this right, including measures: (a) To ensure equal access by persons with disabilities to clean water services.*

- 9 GA Res. 64/292, 28 July 2010. According to Resolution on the human right to water and sanitation: *The General Assembly ...*

*1. Recognizes the right to safe and clean drinking-water and sanitation as a human right that is essential for the full enjoyment of life and all human rights;*

*2. Calls upon States and international organizations to provide financial resources ... through international assistance and cooperation ... in order to scale up efforts to provide safe, clean, accessible and affordable drinking-water and sanitation for all.*

## **I.2. Classification and place of the HRTW in the system of human rights**

The classification of the HRTW is controversial from the aspect of the classical system of the human rights; i.e. the first, second or third generations of human rights. The significance of this classification lies in the way the HRTW may be enforced in international and national laws. According to the most commonly accepted approach confirmed even by the UN General Assembly Resolution A/RES/64/292, the HRTW is essential to the realisation of numerous human rights.

## **I.3 The classes of the HRTW and the normative content of the HRTW(s)**

The HRTW is referred to under different names in international documents and national constitutions. Thus, we can speak of, *inter alia*, the right to sufficient drinking-water, the right to clean drinking-water, the right to equal access to clean water services, the right to safe and clean drinking-water and sanitation. Recently, the tendency is that the HRTW includes sanitation services as well.

The different denominations cover (or may cover) different contents. There are various ways to determine these contents. One of these methods is based on the approach correlating the HRTW with various human rights. As far as this approach is concerned, the question is which other human right is the basis, the source of the HRTW. The most frequently mentioned human rights are the following: right to life, right to human dignity, right to health, right to a healthy environment, right to food, right to an adequate standard of living, etc. Thanks to this variegation, the concept of the HRTW enables states to adopt a flexible legislation concerning the implementation of the HRTW taking their own demands into consideration. The implementation of the HRTW could give rise to different solutions in a developing country and a developed country. E.g. while it is the lack of water utilities that cause trouble in an African country, the developed countries of Eastern Europe struggle with the maintenance of their existing water utilities. Both of the above mentioned problems have a strong relationship with the implementation of the HRTW.

General Comment No. 15 is the most frequently applied source in connection with the interpretation and analysis of the HRTW. General Comment No. 15 interprets the HRTW as a second generation human right under Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights, namely in the frame of the right to an adequate standard of living and the right to the highest attainable standard of physical and mental health.

According to General Comment No. 15, the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. Necessarily, the different elements of the HRTW's normative content could be analysed only in consideration of each other. The individual elements cannot be examined independently of the others. They are interdependent. Although the present article focuses on the issue of affordability, it also reckons with the other elements of the content of the HRTW.

As regards affordability, General Comment No. 15 emphasizes that “water should be treated as a social and cultural good, and not primarily as an economic good”.<sup>10</sup> In connection with this, General Comment No. 15 determines the definition of *affordability* (referring to this as *economic accessibility*): “[w]ater, and water facilities and services, must be affordable for all. The direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the realization of other Covenant rights.”<sup>11</sup> As for the price of water, General Comment No. 15 also emphasizes the unacceptable practice of “discriminatory or unaffordable increases in the price of water”.<sup>12</sup>

Besides determining the elements of the HRTW's normative content, General Comment No. 15 highlights the strong relationship between the HRTW and the protection of water resources from pollution. The Comment also notes the importance of ensuring sustainable access to water resources for agriculture to realize the right to adequate food. Taking these statements into consideration, the affordability of the HRTW might only be assessed in conjunction with the environmental and economic relations besides social relations. These environmental and economic relations shall also be taken into account in the course of the determination of the price of water and the price of water (utilities') services.

General Comment No. 15 notes the progressive realization of the HRTW and states that “retrogressive measures taken in relation to the right to water are prohibited”.<sup>13</sup> Finally, it is worth stressing that with regard to the HRTW, “states have to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other

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10 General Comment No. 15, 11.

11 General Comment No. 15, 12 (b) (ii).

12 General Comment No. 15, 44 (a).

13 General Comment No. 15, 19.

countries”); and they are obliged “to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries”.<sup>14</sup>

## **II. Application of the human right to water in the sector of the Hungarian water utilities**

### **II.1. The interpretation of the concerned provisions of the Fundamental Law of Hungary**

Article XX of the Hungarian constitution which entered into force in 2012 deals primarily with the right to water in connection with the right to physical and mental health.

According to Article XX of the Fundamental Law of Hungary (25 April 2011):<sup>15</sup>

(1) Every person shall have the right to physical and mental health.

(2) Hungary shall promote the exercise of the right set out in Paragraph (1) by ensuring that its agriculture remains free from any genetically modified organism, by *providing access to* healthy food and *drinking-water*, by managing industrial safety and healthcare, by supporting sports and regular physical exercise, and by ensuring environmental protection.

According to the interpretation of *Anikó Raisz*, the right to water applied in the Hungarian constitution points towards a narrower concept and content in comparison with General Comment No. 15 and Resolution A/RES/64/292. Owing to this, the narrower determination of the HRTW in the Hungarian constitution does not include numerous aspects of the HRTW in a wider sense. In this manner, the Fundamental Law of Hungary does not guarantee, *inter alia*, sanitation services, the financial affordability of drinking-water, other aspects of domestic use of water and the agricultural use of water. Nevertheless, the Fundamental Law of Hungary can be considered as a

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<sup>14</sup> General Comment No. 31, 33.

<sup>15</sup> For an analysis of the new Hungarian constitution in connection with the environment and water, see especially: A. RAISZ ‘A Constitution’s Environment, Environment in the Constitution – Process and Background of the New Hungarian Constitution’, *Revue Est Europa*, Special Edition 1, 2012, pp. 37-70. See furthermore GY. BÁNDI, *Gondolatok a környezethez való jogról*, in A. RAISZ (Ed.), *A nemzetközi környezetjog aktuális kihívásai*, Miskolci Egyetem, Miskolc, 2012, pp. 6-15; L. Fodor ‘Természeti tárgyak egy új alkotmányban’, *Pázmány Law Working Papers*, No. 21, 2011, pp. 1-9; A. PÁNOVICS, ‘Környezetvédelem az új alkotmányban’, *Kül-Világ*, No. 1-2, 2011, pp. 117-133.

progressive constitution, because the acceptance of the HRTW in the international law is still in its early phase.<sup>16</sup>

Although the Hungarian constitution includes only a narrower concept of the HRTW, the Hungarian legal order may comply with the wider concept of the HRTW. For this reason, the present article shall assess the Hungarian legal order, especially the law concerning water utilities, in connection with the HRTW in a wider sense (e.g. from the perspective of affordability).

## **II.2. The new Hungarian law concerning water utilities**

At the end of December 2011, the Hungarian Parliament adopted Act CCIX of 2011 on water public utility supply (hereinafter referred to as ActWPUS). The new Hungarian law concerning water utilities enters into force progressively (approximately between 2012 and 2016). The financing of the water utilities and maintenance of the existing water utilities are cardinal questions of the new system.

Before analysing the financing of the Hungarian water public utilities however, it is worth focusing on the ActWPUS provisions fulfilling the social standards of the HRTW. Certain provisions of the ActWPUS, especially in Article 58, ensure everybody's right to a certain quantity of drinking-water and prohibit exclusion from the access to drinking-water. Besides the fulfilment of appropriate water for purposes of material needs, sanitation and disaster management, the water company responsible for water service can restrain the service concerning drinking tap water if the residential consumers do not meet their payment obligations (i.e. in the case of default in payment). The requirement of 'appropriate (quantity of) water for material needs' can be considered as fulfilled in case access to 20 litre/person/day drinking-water is ensured with a water withdrawal opportunity (e.g. public well, fireplug, transported water) (a) in a distance of 150 meters if the height of the concerned building is up to four storeys; or (b) within four levels if the height of the concerned building is above four storeys. Finally, it is worth stressing that the access to drinking-water can be provided not only through the water public utilities. Where the proper water public utility supply is not ensured, the responsible authorities shall provide the appropriate quality and quantity drinking-water for the people concerned in other ways.

The financial bases for sustainable water utility supplies can be acquired from various sources (and a community has to endeavour to create a careful diversification of the

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16 A. RAISZ 2012, pp. 156-157.

financial sources). Thus, besides the state's and local governments' budget, the typical financial sources can be the following: EU supports,<sup>17</sup> (foreign) investment<sup>18</sup> and the financial contributions of the users themselves. As for these financial sources, owing to the significant impact on sovereignty issues, and otherwise following the tendencies perceptible abroad, the Hungarian government that came into power in 2010 attempts to become as independent from (foreign) investors as possible (or at least achieve a negotiating position that is more acceptable from the aspect of Hungary's long-term interests). Due to this governmental intention and since the EU sources – supposedly – are not going to be available in perpetuity, the Hungarian society can only charge the costs to the users of the water utilities in the long run. Therefore, the *price of water and water utility supply*<sup>19</sup> and the issue of related fees, which is also suitable to consider *environmental*<sup>20</sup> and *social* aspects (*inter alia* in the form of price subsidies<sup>21</sup>), in addition to *economic* considerations, may be deemed one of the most significant elements of water utility provisions. Namely, numerous criticisms were formulated regarding the previous system of water utilities in connection with their financing model.<sup>22</sup> On the one hand, the local governments were appointed as the pricing

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17 Supports of the EU's cohesion policy are typically co-financed by the Hungarian national budget and the budgets of local governments.

18 About the unfavourable experience of the privatization and foreign investment in Hungary see L. SOMLYÓDY (Ed.), *Magyarország vízgazdálkodása: helyzetkép és stratégiai feladatok – Water Strategy of the Hungarian Academy of Sciences*, Hungarian Academy of Sciences, Budapest, 2011, p. 265.

19 In connection with determining the price of water, see particularly: World Water Assessment Programme (WWAP), *The United Nations World Water Development Report 4*. UNESCO, Paris, 2012, pp. 276-288, pp. 533-550; the prices of the environmental services see for example: S. Wunder, *Payments for environmental services. Some nuts and bolts*, CIFOR Occasional Paper No. 42. Centre for International Forestry Research, [-], 2005; ECO2, *Assessment of Environmental and Resource Costs in the Water Framework Directive*, July 2004, [http://circa.europa.eu/Public/irc/env/wfd/library?l=/framework\\_directive/thematic\\_documents/economic\\_issues/environmental\\_resource/version\\_05-07-04pdf/\\_EN\\_1.0\\_&a=d](http://circa.europa.eu/Public/irc/env/wfd/library?l=/framework_directive/thematic_documents/economic_issues/environmental_resource/version_05-07-04pdf/_EN_1.0_&a=d); The Hungarian River Basin Management Plan – part of the Danube River Basin Management Plan (hereinafter referred to as HRBMPlan), April 2010, pp. 268-269; KOSKOVICS ÉVA & UNGVÁRI GÁBOR: *Áttekintés a magyar víziközmű-ágazatról*, in KISS FERENC LÁSZLÓ & NAGY CSONGOR ISTVÁN & VALENTINY PÁL (Eds.), *Verseny és szabályozás 2010*, Hungarian Academy of Sciences, Budapest, 2011, pp. 305-328.

20 Under the relevant EU survey, in connection with the statement on 'The price of the water should reflect the environmental effects of the water usage', the Hungarian population was the most dismissive of the EU member states; *Attitudes of Europeans towards water – related issues*, Flash Eurobarometer 344., March 2012, pp. 15-16.

21 See furthermore the Hungarian Environmental Protection Program 2009-2014 which is the annex of the Parliament decision 96/2009. (XII.9.), p. 40; Hungarian Competition Authority (hereinafter referred to as HCA), *A hazai víz- és csatornamű üzemeltetési piac feltárása, a víz- és csatornaközművek árazási, árszabályozási gyakorlatának vizsgálata*, HCA & Expert Management Consulting Kft., Budapest, 15 December 2008, p. 10.

22 In 2010, in regard with the previous price regime, the National Water Technology Platform formulated as criticism on (a) the lack of the legal provisions concerning the prices, (b) the high proportion of the Hungarian water prices compared to the Hungarian households' income, (c) the anarchy in the system

authorities of the water utilities but this decision had several unfavourable effects. Because of their other roles played in the economic and legal relationship of water utility supplies (water utility owner, owner of the company operating water utility, customer), the local governments often determined the price of water utility supplies considering political<sup>23</sup> (short-term) interests (i.e. they were motivated by the results of the approaching elections). On the other hand, applying the legal opportunity of *cross-financing*<sup>24</sup> it could also happen that the local governments used the profits arising from the water utility industry to finance their other activities which happened to be in a disadvantageous situation, instead of developing the water utility supplies and their sustainable operation. In addition to these causes, as the industry lacked the objective assessment and evaluation of its water utilities, the introduction of any tariff system serving a sustainable operation was almost impossible. Consequently, the restorations performed in the Hungarian water-utility-supply-industry proved to be practically unsuitable even to maintain the existing standard and status.<sup>25</sup>

Before introducing the provisions in effect, it is worth stressing that in the course of determining the pricing policy related to water utility supplies, it is not enough (for an EU member state<sup>26</sup>) to consider the domestic needs and characteristics but also the requirements<sup>27</sup> included in Article 9 of the Water Framework Directive,<sup>28</sup> with special

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of the price support. Nemzeti Víztechnológiai Platform, Stratégiai Kutatási Terv – 2010, p. 27, [http://www.maviz.org/system/files/filemanager/private/active/5/NVP\\_skt\\_2010\\_marc\\_22.pdf](http://www.maviz.org/system/files/filemanager/private/active/5/NVP_skt_2010_marc_22.pdf). On the previous Hungarian legislation concerning public water utility supplies and water companies see the analysis of J. PUMP, A jog hatása a fenntartható közszolgáltatásra a hulladékgyűjtés és a vízgazdálkodás területén (PhD theses on file at the Eötvös Loránd University, Budapest, 2011).

23 The State Audit Office of Hungary (hereinafter referred to as SAOH) called attention to the phenomenon: Some local government stood off the Union support because it is a provision in such projects, the service done by the new utilities has to cover the price of the maintaining of the asset; SAOH, Jelentés a vizek védelmének és a vízgazdálkodási feladatok ellátásának ellenőrzéséről, Report No. 1049, February 2011, p. 28.

24 See HCA 2008, pp. 67-69.

25 See SAOH 2011, p. 86.

26 See in detailed on the price regimes of other countries: HCA 2008, pp. 73-92.

27 On the aspect of water utility pricing methodology see: European Commission, Pricing policies for enhancing the sustainability of water resources, COM (2000) 477 of 26 July 2000. According to the document, it is important to distinguish the groups of the users, (household, industrial, agricultural) and sectors along different realization on prices. See furthermore: European Commission, Addressing the challenge of water scarcity and droughts in the European Union, COM(2007) 414 of 18 July 2007, pp. 3-14; European Environment Agency 'Water resources across Europe – confronting water scarcity and drought', EEA Report, No. 2, 2009; European Environment Agency 'Towards efficient use of water resources in Europe', EEA Report, No. 1, 2012; European Commission Green Paper on market-based instruments for environment and related policy purposes, COM(2007) 140 of 28 March 2007, point 4.2.1; HCA 2008, pp. 56-60; it formulates actually this union standard: Ministry of Rural Development (hereinafter referred as to MRD): Az aszály kezelésének hosszú távú koncepciójáról – Concept of the National Drought Strategy, published: 25 June 2012, p. 35.

emphasis on the principle of 'recovery of costs for water services' (hereinafter referred to as principle of cost recovery) and the polluter pays principle, as well as the effective use of water resources.<sup>29</sup> The reports of the State Audit Office of Hungary (hereinafter referred to as SAOH)<sup>30</sup> and the Hungarian Competition Authority (hereinafter referred to as HCA)<sup>31</sup> related to the determination of charges and prices before 2012 drew attention to serious deficiencies (essentially, to non-compliance with the Water Framework Directive).<sup>32</sup>

The ActWPUS, according to which the effect of Act LXXXVII of 1990 on the price-determination-regime no longer covers<sup>33</sup> prices determined under the ActWPUS, introduced progressive changes as compared to the previous provisions. On the one hand, the ActWPUS defined numerous water utility servicing principles that have an essential effect on the establishment of the pricing policy. Thus, the ActWPUS determined the polluter pays principle, the principle of solidarity, the principle of cost recovery, the principle of the lowest cost and the principle of the prohibition of cross-financing.<sup>34</sup> By coherently realising the *polluter pays principle*, the establishment of charges and fees can be performed in a fairer way. The chances are that the *principle of solidarity* is going to play an important role during the integration of water utility services, in a way compensating the imbalances arising from the diverse conditions of the water managements (i.e. this principle is beneficial for users in a more disadvantageous situation, while a little less beneficial for users in a better position, who have to give up some of their advantages due to this principle). Through the appropriate application of the *principle of cost recovery*, it is possible to ensure that water utilities remain available in the long run for Hungarians and that none of the aspects of

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28 Parliament and Council Directive 2000/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ 2000 L 327/1.

29 On the compliance of the polluter pays principle in Hungary, see furthermore Bobvos et al. 'The polluter pays principle in the agriculture', Journal of Agricultural and Environmental Law, No. 1, 2006, pp. 29-54; P. BELÉNYESI 'A szennyező fizet elv a Víz Keretirányelv fényében,' Gazdaság és Jog, No. 4, 2011, pp. 20-24; CS. CSÁK 'Thoughts About the Problems of the Enforcement of the 'Polluter Pays' Principle', European Integration Studies, No. 1, 2011, pp. 27-40; CS. CSILLA, A környezet jogi felelősség magánjogi dogmatikája, Miskolci Egyetem, Miskolc, 2013, pp. 74, 118-123, 184-185; L. Fodor, Az Alaptörvény esete a szennyező hulladékokkal és az európai jog, Magyar Jog, No. 11, 2012, pp. 641-652. The State Audit Office referred to the opinion of the environment protection and water management ministry; according to this opinion, it is difficult to apply the polluter pays principle in the case of some environmental problems; SAOH 2011, p. 81.

30 SAOH 2011, p. 28.

31 HCA 2008, p. 5.

32 On the non-compliance with the Water Framework Directive see: KOSKOVICS & UNGVÁRI 2011, p. 327.

33 § 1 (2) i) of Act LXXXVII of 1990.

34 See § 1 (1) e), g), h), i), k) of ActWPUS.

maintaining the service needs to be disregarded due to short-term interests.<sup>35</sup> The *principle of the lowest cost* might ensure that users are protected in a way, by decreasing the possibility of abusing the natural monopoly position of water companies. The *principle of the prohibition of cross-financing* may prevent that other fields (e.g. social insurance) benefit from the profit realised by water companies. (It is worth highlighting that another type of cross-financing, diverse from that defined in the ActWPUS, is also known; namely, when unsubstantiated differences are made between the different classes of users (industry, households, public institutes), thus financing the water service costs of one group by another (typically industrial users are forced to finance costs of households<sup>36</sup>). Presumably, this last principle will provide serious change in a lot of areas. The industry of water utility supplies can finally become self-supporting and sustainable in case these principles are rigorously observed...

Before assessing the ActWPUS provisions affecting the price system of waters and water utility supplies, it is worth stressing that besides the provisions of the ActWPUS, other acts and regulations also stipulate financial solutions concerning water pricing. First, the present article deals with the provisions of the ActWPUS; e.g. fees of water utility services, water utility related service fee, water utility development contribution. Second, the fees and charges determined in other laws are analysed; *inter alia*, environmental pollution duties, water utilization contribution, penalties, administrative service fees, extra-tax of the public utilities.

The ActWPUS pays special attention<sup>37</sup> to the following fees, charges and contributions related to water utility supplies, the amount of which can have a remarkable affect the quantity of consumption and as such constitutes a significant instrument of water-saving.<sup>38</sup>

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35 The HRBMPlan draws attention to the fact that the reconstruction rate of the Hungarian networks of water public utilities is extremely low (250-300 years) which is not unrealistic; HRBMPlan 2010, p. 258. In connection with the Hungarian public utility networks, the Water Strategy of the Hungarian Academy of Sciences announces that *“the specific way of establishing fees is not sufficient to finance the thoroughly considered reconstruction. The present rate is 0.3%/year, as opposed to the recommended value of 1-2%”*; Somlyódy 2011, p 37; *“The percentage of the reconstruction expense in the Hungarian water price is less than 11% which percentage is low even in international comparison. This percentage is 69% in Switzerland and 45% in Germany.”* SOMLYÓDY 2011, p. 263.

36 HRBMPlan 2010, p. 257.

37 See HRBMPlan 2010, p. 39; and SOMLYÓDY 2011, 58. p. As opposed to the findings of HRBMPlan, the plan of the Hungarian draught strategy emphasizes that a rise in prices does not necessarily cause a reduction in consumption (although it notes that agricultural water consumption vigorously reacts to changes made in the system of fees and subsidies); MRD 2012, p. 35.

38 See also the utilisation fee regulated in § 18 of ActWPUS.

The *fees of water utility services* must be calculated for each water company or water utility system and for each water utility industry (i.e. drinking-water or sewage), applying the comparative economic analyses on expenses, prices, fees and charges, also considering the following aspects (§ 62 (1) of ActWPUS): (a) the fees shall encourage secure water services with the lowest costs, the improvement of the effectiveness of operation, the efficient use of capacities, the continuous development of water service quality and the observation of the principle of sparing natural resources; (b) the reasonable costs of continuous and secure water service must be considered together with the justified costs of performing environmental obligations, especially regarding the reasonable costs of water base protection. The price of water service must be established as a two-factor fee (§ 63 (1) of ActWPUS), consisting of the *basic fee* (§ 63 (2)-(3) of ActWPUS) and the *consumption-proportional fee* (§ 64 of ActWPUS). The ActWPUS makes it possible to apply different fees in case of certain types of users. Taking the EU documents into consideration, e.g. COM(2000) 477, the related HCA-study emphasizes that the differentiation between the various user classes (industrial sectors, public institutions, households) may further increase the effectiveness of pricing.<sup>39</sup> The fee of public utility drinking-water supply, as well as that of public utility sewage draining and cleaning are *fees approved by the authorities*, which are determined by the minister responsible for water utilities (i.e. Ministry of National Development<sup>40</sup>), taking into consideration the recommendation<sup>41</sup> of the Hungarian Energy and Public Utility Regulatory Authority<sup>42</sup> (hereinafter referred to as HEPURA) (§ 65 (1) of ActWPUS). Until the ministerial decree on the establishment of the approved fee comes into force, the ActWPUS determines provisions concerning a transitional period (§ 76 (1) of ActWPUS). In case the approved price changes after signing the water utility service contract, the *changed approved fee becomes part of the valid public utility contract*. Fees differing from the approved fees can only be stipulated in a valid manner in the water utility service contract with the prior approval of the Office (§ 66 of ActWPUS).

Similarly to the water utility service fee, the *water utility related service fee* (also known as the transfer price) is also determined by the minister in a decree, taking the

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39 HCA 2008, pp. 7-8.

40 See § 84 o) of governmental decree 212/2010 (VII.1.) on the tasks and competences of ministers.

41 The HEPURA is to send his first recommendation until 15th October 2014; § 76 (7) of ActWPUS.

42 See Act XXII of 2013 on HERUPA.

recommendation of the HEPURA into consideration. Water utility related services<sup>43</sup> may be provided on the basis of a commutative contract (a so-called transfer contract), through transfer points of connected water utility systems, operated by water companies.<sup>44</sup>

The HEPURA will determine the size of the *water utility development contribution* for the first time until 30<sup>th</sup> November 2015.<sup>45</sup> This contribution shall be paid by non-household users to the water company according to the provisions of the contract signed with the water company. By paying the water utility development contribution, the non-household user becomes entitled to use a certain extra service up to the purchased utility development quota. (§ 71 (1)-(2) of ActWPUS). The water utility development contribution can only be expended on the water utility development demands of the municipality, where the place of consumption related to the payment of the contribution is situated. (§ 72 of ActWPUS).

As for the settlement of the problems related to the price of water and water services, in addition to the ActWPUS, other acts also play an important role in the regulation. (a-b) Two significant elements of the environmental aspects in the water price are the environmental pollution duties and the water utilization contribution.<sup>46</sup> (a) The objectives of Act LXXXIX of 2003 on the environmental pollution duties are to facilitate the reduction of emissions of substances into the environment and to encourage the fair distribution of burdens between the government and polluters of the environment. From the different classes of the environmental pollution duties, the water and soil pollution duties have great importance in connection with the price of water and water services. (a1) As regards the *water pollution duty*, according to Act LXXXIX of 2003, any polluter engaged in activities which are subject to water license shall be liable for the water pollution duty payable as charged.<sup>47</sup> The water utility company operating a public sewage system or water treatment plant shall charge the duty payable on water

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43 “*Water public utility related service: services related to the sale of drinking-water or the drainage and cleaning of sewage water provided by the water company to another water company, based on a contract*”; § 2 Point 27 of ActWPUS.

44 §§ 67-68 of ActWPUS. In connection with the regulation of a transitional period see: § 77 (1)-(2) of ActWPUS.

45 § 87 of ActWPUS. See the provisions of § 70, which will enter into force on 1st January 2015.

46 Regarding these duties and the water utilization contribution, the HRBMPlan of 2010 highlighted that “*they define the right direction in order to ensure the sustainability of the environment and the water supplies. However, the present size of the duties and contribution only partly covers the real environmental and resource-related costs*”; HRBMPlan 2010, p. 266.

47 Water pollution duty is charged for the emission into surface waters of the water polluting substance specified in Schedule 2 of Act. § 7 of Act LXXXIX of 2003 (e.g. phosphor, inorganic nitrogen, mercury, cadmium, chromium, nickel, lead, copper).

polluting substances discharged into surface waters through the public conduit system to the persons receiving the service, consistent with the volume of service. (§ 10 of Act LXXXIX of 2003]. (a2) As far as the *soil pollution duty* is concerned, under Act LXXXIX of 2003, any polluter who disposes waste water by means other than through the local public sewage system and who is in possession of the authorization of the local water management authority or a valid water license, including the use of individual closed sewage ponds, shall be liable for the water pollution duty payable as charged. (§ 11 (1) of Act LXXXIX of 2003]. The lawmaker significantly (tenfold!) increased the size of the soil pollution duty,<sup>48</sup> which charge presents a serious motivation<sup>49</sup> regarding connections to the public sewage system. However, the question may rise what other steps should be made to supplement this kind of motivation (i.e. the high level of soil pollution duty) in case of low-income polluters, to provide them with financial assistance to connect. (b) From the aspect of validating environmental aspects in the water price, the *water utilization contribution*, stipulated in the Water Management Act (hereinafter referred as to WMAct),<sup>50</sup> is just as relevant. Under the WMAct, this contribution is payable by water users after the water quantity they use in accordance with the amounts reserved in the licence or used without permission, and by industrial water user after the water quantity applied in reality.<sup>51</sup> Analysing the price of water and water services, it is also worth mentioning (c) *penalties* related to water (from the other aspect of the polluter pays principle, related to unlawful activities)<sup>52</sup> and (d) referring to

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48 § 12 (3) of Act LXXXIX of 2003. HRBMPlan preferred previously the increase of the measure of the original price; HRBMPlan 2010, p. 266.

49 HRBMPlan draws the same conclusion, according to which, “*the soil pollution duty introduced a few years ago stimulates consumers to connect to the network...*”; HRBMPlan 2010, p. 41. However, it also draws the attention to interesting changes as it continues: “*The burden caused by the sewage water drained through public sewage systems dynamically increases if it expressed per inhabitant; however, its volume has stagnated or only slightly increased since 2000.*” HRBMPlan 2010, p. 41.

50 Act LVII of 1995 on water management.

51 According to the WMAct, industrial water user is an entity that uses more than 10,000 cubic metres of water per settlement a year for its own water consumption of business purposes from the public utility providing drinking-water; § 15/A of WMAct. See also the Ministry of Environment and Water Decree 43/1999. (XII.26.) on the calculation of the water supply contribution. The 2011 report of SAOH on the water supply contribution refers to the opinion of the Water Management Department, according to which – “*... the water management administration has made several attempts to be able to spend at least part of the water supply contribution received as a tax type revenue for water management (e.g. the maintenance of flood protection objects, water sources protection, planning of water catchment management) but these attempts have failed*”; SAOH 2011, p. 83.

52 See governmental decree 220/2004 (VII.21.) on the rules of the protection of the quality of water under surface and the governmental decree 219/2004 (VII.21.) on the protection of groundwater. The 2011 report of the State Audit Office emphasized that the number of the polluters and fine payers did not change in the past few years. SAOH 2011, pp. 81-82.

the *administrative service fees*<sup>53</sup> connected with the topic. (e) Finally, the price of water and water services is also influenced by the national tax regime. It is worth emphasizing one of the special taxes related to the public utilities (not only to the water sector); the new law concerning extra-tax of the various public utilities (inter alia water utilities) may significantly increase the costs of water companies and therefore the price of water services as well.<sup>54</sup>

In 2011, before the ActWPUS was adopted, a study published by the Economics Institute of the Hungarian Academy of Science concentrated on the fees<sup>55</sup> related to water utility supplies based on three criteria levels, in connection with the principle of cost recovery. The *financial recovery* of water services is referred to as the first criterion of cost recovery, where the goal is to make users finance the operational and maintenance costs needed to provide water utility services. According to this study, regarding the situation in 2011 (that is before the ActWPUS came into force), this criterion has only been realised partly. The second criterion of cost recovery is connected to the *environmental costs*, which arise as water utility services are used. According to the study, this should primarily be achieved through environmental pollution duties (or e.g. the sewage penalty). The third criterion means the *recovery of water resource costs*; this criterion, related to excessive water extraction, covers the costs of so-called missed opportunities, which must be borne by other water utilisations because water resources are depleted at a greater extent than their natural recovery. According to the study, the current regulation does not know the water resource cost; in the opinion of study's authors, the *water utilization contribution* applied by the WMAct does not reflect the actual limitedness of the used supplies.<sup>56</sup>

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53 For more about the administrative service fees of environmental protection, nature conservation and water management, see: KvVm decree 33/2005 (XII.27.).

54 Act CLXVIII of 2012 on the taxes of utilities' passage and cable. About the antecedent of the introduction see Z. NAGY, 'Az adó- és díjpolitika szabályozási eszközei az energiaszektorra vonatkozóan szolgáltatási szempontból', forthcoming. See furthermore Z. NAGY, *Környezeti adózás szabályozása a környezetpolitika rendszerében*, Miskolci Egyetem, Miskolc, 2013, pp. 88-251.

55 KOSKOVICS & UNGVÁRI 2011, pp. 306-307. See furthermore in detail Koskovics & Ungvári 2011, pp. 320-325; see furthermore HRBMPlan 2010, p. 253.

56 HRBMPlan 2010, p. 267; "*drinking-water supply in the Great Plain region is based on such groundwater that are already utilised in nearly 100%. Owing to the climate change, the utilisable water supplies in certain parts of the Great Plain may decrease by up to 50% by 2050..., therefore, it will hardly be enough to ensure the supply of drinking-water*"; SOMLYÓDY 2011, p. 58.

### **III. Conclusions**

Besides ensuring the minimum social standards of the HRTW, the new Hungarian law concerning water public utility supply creates the opportunity of the sustainable operation of water utilities. At the same time the lawmaker shall pay more attention to the more efficient fulfilment of environmental aspects.

# Water as the Nation's Common Heritage in the Frame of the Common Heritage of Mankind\*

Anikó Raisz\*\*

The New Hungarian Constitution (Fundamental Law) has come to the centre of international attention even before its entering into force on 1 January 1 2012. But not necessarily for the right reasons: from the environmental protection aspect, it would have deserved more attention. Even the former Hungarian Constitution<sup>1</sup> contained a – brief – provision on the protection of the environment,<sup>2</sup> but the Fundamental Law has definitely taken a step forward in this regard, dedicating various provisions to the countless aspects of sustainability. And while doing this, it is still one of only a few constitutions<sup>3</sup> including environment or sustainability.

In the following, of all the environmental issues mentioned in this constitution,<sup>4</sup> only water shall be in the focus. The growing international attention regarding this element originates in the recognized quality and quantity crisis, i.e. that the water supplies at our disposal may only partly cover the growing needs of humankind.

This New Constitution has chosen to express the general protection of water in the introduction, the so-called National Avowal, considering water to be not only our heritage, but a natural resource essential for the future generations we are responsible for as well.<sup>5</sup> When it comes to explicit protection though, the Hungarian Constitution

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1 Act XX of 1949 on the Constitution of the Hungarian Republic as amended in 1989

2 See furthermore L. FODOR, 'A környezethez való jog dogmatikája napjaink kihívásai tükrében', *Miskolci Jogi Szemle*, No. 1, 2007, pp. 5-19.

3 See among others the French, Norwegian, Finnish, Argentine or South African constitutional solutions.

4 For an overview see A. RAISZ, 'A Constitution's Environment, Environment in the Constitution – Process and Background of the New Hungarian Constitution', *Revue Est Europa*, Special Edition 1, 2012, pp. 37-70, pp. 48-50.

5 "[W]e commit to promoting and safeguarding our heritage, [...] along with all man-made and natural assets of the Carpathian Basin. We bear responsibility for our descendants; therefore we shall protect the living conditions of future generations by making prudent use of our material, intellectual and natural resources."

focuses on only one aspect, i.e. healthy drinking-water<sup>6</sup> and drinking-water supplies.<sup>7</sup> On a theoretical level, these may be regarded as the (both direct and indirect) manifestation of the human right to water: while the provision of drinking-water along with its related activities is the present, the responsibilities connected to the common heritage are the future dimension of the right to water.<sup>8</sup>

But what does this constitutional protection mean in the international legal context? Does it have international relevance and what are the tendencies in this regard?

The present paper examines the possibility of maintaining water as part of national sovereignty versus various solutions of labelling it a (different) kind of common heritage of mankind. As some highly interesting issues have occurred in relation to groundwater (and aquifers) recently, this aspect is going to be elaborated in more depth in the following.

Chapter A deals with groundwater in general, focusing on its relevance. Chapter B examines the new theories regarding the common heritage of mankind, while Chapter C seeks to answer the question whether a constitutional protection has any practical relevance whatsoever on the international level, before coming to the concluding remarks.

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6 According to Article XX:

(1) *Every person shall have the right to physical and mental health.*

(2) *Hungary shall promote the exercise of the right set out in Paragraph (1) [...] by providing access to healthy food and drinking-water [...] and by ensuring environmental protection.*

7 According to Article P(1):

*All natural resources, especially [...] drinking-water supplies [...] shall form part of the nation's common heritage, and the State and every person shall be obliged to protect, sustain and preserve them for future generations.*

8 In a way, the Hungarian Constitution takes a stand in the conceptual insecurity regarding the right to water, interpreting the access to drinking-water as part of the right to physical and mental health. This concept is nevertheless much narrower than the ones contained in – the in this regard primordial – General Comment No. 15 by the Committee on Economic, Social and Cultural Rights (2002) and General Assembly Resolution 64/292 of 28 July 2010. See furthermore G. Kecskés, ‘A vízhez való jog nemzetközi jogi koncepciója’, Source: (2012.09.08.): [http://www.mta-ius.hu/page\\_0\\_hu/kecskes\\_gabor\\_2011jun20.pdf](http://www.mta-ius.hu/page_0_hu/kecskes_gabor_2011jun20.pdf); A. Raisz, A vízhez való jog egyes aktuális kérdéseiről, in Cs. CSÁK (Ed.), *Jogtudományi tanulmányok a fenntartható természeti erőforrások témakörében*, Miskolci Egyetem, Miskolc, 2012, pp. 151-159. On the measures following the provisions of the Constitution see J. E. SZILÁGYI, ‘A vizek védelmének jogi alapjai az EU vízvédelmi jogában’, *Publicationes Universitatis Miskolcensis, Sectio Juridica et Politica*, Tomus XXX/2, 2012, Miskolc University Press, pp. 577-599; J. E. SZILÁGYI, ‘Vízjog: A vizek tulajdonának és használatának főbb magyar előírásai a nemzetközi tendenciák tükrében’, *Publicationes Universitatis Miskolcensis, Sectio Juridica et Politica*, Tomus XXIX, 2011, Miskolc University Press, pp. 595-622; J. E. SZILÁGYI, ‘Megjegyzések a vízgazdálkodási társulatok szabályozásának fejlődéséhez és új szabályozásához’, *Publicationes Universitatis Miskolcensis, Sectio Juridica et Politica*, Tomus XXVIII, 2010, Miskolc University Press, pp. 491-502.

## I. The relevance of groundwater

The link between groundwater and the – in the New Hungarian Constitution expressly protected – drinking-water is evident. As in Hungary – like in many other European countries<sup>9</sup> –, drinking-water is primarily (in 94 percent<sup>10</sup>) provided by groundwater supplies.

Groundwater – i.e. water beneath the surface of the Earth, in the porous spaces of soil and rock – may be classified in different ways, among others as to place or origin.<sup>11</sup> Although the relevant – but not so numerous – international documents are not always clear on the terminology and the exact denotation of these different types of groundwater, we may still risk the statement that currently groundwater of a confined aquifer, i.e. water situated between two confining beds is in the centre of international attention.

One of the most significant problems of managing groundwater is that we lack accurate data on groundwater – regarding its various features, e.g. volume, place, quality, etc. –, which is an obstacle both to finding the problematic points and the solutions thereto.<sup>12</sup> Even the most credited organizations and institutions work with – sometimes heavily – differing data. It is slightly easier to give an overview of the situation of a specific, smaller territory, in our case, Hungary (although the vast majority of data here are also – if possibly relatively close – estimations).

Despite this incertitude, we are aware that the excessive use (discharge) of groundwater is becoming a more and more acute question, as – according to certain experts – already more than half of the Earth's population depends on these supplies as the source of drinking-water.<sup>13</sup> According to the UN World Water Report 2009,<sup>14</sup> one fifth of all the

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9 See International Law Association, Berlin Conference (2004), Water Resources Law. Source: [http://www.internationalwaterlaw.org/documents/intldocs/ILA\\_Berlin\\_Rules-2004.pdf](http://www.internationalwaterlaw.org/documents/intldocs/ILA_Berlin_Rules-2004.pdf) (Retrieved 13 June 2013), p. 36.

10 Including bank filtered water; when including only subsurface water, it comes only to 60-65 percent.

11 Among others meteoric water/juvenile water/fossil water or subsoil water/water in confined aquifers/karst water, etc.

12 See furthermore G. E. ECKSTEIN & Y. ECKSTEIN, 'A Hydrogeological Approach to Trans-boundary Ground Water Resources and International Law', *American University International Law Review*, No. 2, 2003, pp. 201-258.

13 See Y. ECKSTEIN & G. E. ECKSTEIN, 'Trans-boundary Aquifers Conceptual Models for Development of International Law, Groundwater', No. 43, 2005, p. 679., p. 697., cited by R. MARTIN-NAGLE, 'Fossil Aquifers: A Common Heritage of Mankind', *George Washington Journal of Energy and Environmental Law*, No. 2, 2011, pp. 39-60, p. 40; while the UN World Water Report 2012, (World Water Assessment Programme, 2012. The United Nations World Water Development Report 4: Managing Water under Uncertainty and Risk. Paris: UNESCO and London: Earthscan; hereinafter 'UN World Water Report 2012') Vol. 1, 31. mentions two billion people.

water used by mankind originates in groundwater, and this proportion will surely increase in the future.<sup>15</sup> The waning or pollution of these supplies has tragic consequences. But even the discharge has its effects from an environmental point of view: according to the mentioned UNESCO report (UN World Water Report), 7 percent of all energy produced is used for the discharge of groundwater.<sup>16</sup>

Groundwater is mainly used for agricultural, industrial and municipal purposes. The World Water Reports of the UNESCO regularly present the list of countries which are the main abstracters of groundwater. According to UN World Water Report 2012, the current top 10 are India, China, USA, Pakistan, Iran, Bangladesh, Mexico, Saudi Arabia, Indonesia and Italy. India, Pakistan and China discharge water situated in the confined aquifers much faster than its renewal phase, therefore, despite the considerable water supplies to be found in their territories, the beginning of a period of water scarcity is in sight.<sup>17</sup>

The question of over-exploitation becomes an even more complicated issue in the case of trans-boundary aquifers. Half of Hungary's total 185 aquifers are trans-boundary, exposing the country to significant quality and quantity concerns.<sup>18</sup> (Currently only 12 plus one aquifers are of crucial importance when it comes to drinking-water supplies,<sup>19</sup> drawing a more optimistic picture of the country's future supply opportunities.) Trans-boundary aquifers are nevertheless not a particularity of the Carpathian Basin. Although the Danube Aquifer System is the one spreading under most countries (19) in the world,<sup>20</sup> other parts of the world experience similar problems, see among others the case of the Nubian Aquifer or the North-Western Sahara Aquifer System,<sup>21</sup> which are – besides being relevant sources of drinking-water – also so-called fossil – i.e. non-renewable<sup>22</sup> – waters. In Hungary, probably half of the subsurface waters are to be

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14 World Water Assessment Programme, 2009. The United Nations World Water Development Report 3: Water in a Changing World, Paris: UNESCO and London: Earthscan (hereinafter 'UN World Water Report 2009')

15 UN World Water Report 2009, p. 100.

16 UN World Water Report 2009, p. 16.

17 Martin-Nagle, Id. p. 39.

18 The Hungarian River Basin Management Plan – part of the Danube River Basin Management Plan, April 2010 (hereinafter 'HRBMPlan'), p. 47.

19 HRBMPlan, pp. 134-135.

20 J. E. SZILÁGYI, *Vízjog*. Miskolci Egyetem, Miskolc, 2013, p. 95.

21 See furthermore R. M. STEPHAN (Ed.), 'Trans-boundary Aquifers: Managing a Vital Resource – The UNILC Draft Articles on the Law of Trans-boundary Aquifers', UNESCO, 2009, pp. 7-8, p. 13; S. BURCHI & K. MECHLEM, 'Groundwater in international law – Compilation of treaties and other legal instruments', FAO/UNESCO, Rome, 2005, pp. 4-8.

22 In fact, from a hydrogeological point of view, it may even be renewable, but the renewal phase is very long (for human perception), i.e. several 100 000 years. Fossil waters got into the fossil confined

found in confined aquifers; fossil water containing aquifers prevail under the Big Plain. But there are certain countries which have even started to discharge fossil waters to a large extent, like the United States of America, China, Jordan, Saudi Arabia, Libya and Algeria.<sup>23</sup>

Regarding fossil waters, an even more complex issue is the rise of certain theories which are based on the ‘common heritage of mankind’, a relatively new principle of international law, suggesting nothing less than the withdrawal of fossil waters from the sovereignty of the states. Therefore, only these fossil waters receive serious attention in the context of the present article, in an attempt to find an answer to the question: would the New Constitution’s nation’s common heritage concept be hollowed out because of these new theories?

## II. New Concepts of the Common Heritage of Mankind

The theory of the common heritage of mankind<sup>24</sup> basically replaced the *res communis omnium usus* principle, thus providing a more advantageous position for states with smaller economic potential. As according to the *res communis* principle, common use meant nothing else than to place the more powerful state in an even better position: it was more probable to exploit the minerals of the deep sea, harvesting even more profit. The core issues of the common heritage of mankind – developed in order to regulate the potential commercial mining operations in the deeper seabed in the second half of the 20<sup>th</sup> century – are the prohibition of proclaiming sovereignty over so-far free land (i.e. the deep seabed), the use for peaceful purposes, shared management and shared benefits.<sup>25</sup> Besides the law of the sea, this principle is acknowledged in space law, and considered in other areas (e.g. Antarctica) as well.<sup>26</sup>

This regime is primarily of an economic nature (e.g. in the law of the sea) or places peaceful utilization in the forefront (see space law); while environmental protection aspects come only second. Still, it provides the possibility of maintaining the concerned

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aquifers thousands or millions of years ago; nevertheless, this is not possible anymore amongst the current climatic situation, so they basically mean a static water supply with no current refill.

23 The latter three discharge the most. See UN World Water Report 2009, p. 100. See furthermore Martin-Nagle, Id. p. 40.

24 For further reading see A. A. C. TRINDADE, *International Law for Humankind: Towards a New Jus Gentium*. Martinus Nijhoff Publishers, Leiden, Boston, 2010, pp. 339-340., pp. 344-352.; P. KOVÁCS, *Nemzetközi közjog*, Osiris, Budapest, 2006, p. 580., pp. 615-618., p. 622.

25 See E. GUNTRIP, ‘The Common Heritage of Mankind: an Adequate Regime for Managing the Deep Seabed?’ *Melbourne Journal of International Law*, Vol. 4, No. 2, 2003, p. 1.

26 See E. CSATLÓS, ‘Az Arktisz nemzetközi jogi helyzete’ (PhD theses on the file at the University of Szeged, 2011), pp. 246-248.

areas in their original condition. However – and the reasons hereto are grounded already in its evolution<sup>27</sup> –, the proper content of the ‘common heritage of mankind’ principle is not clear. It is therefore astonishing to hang a new concept on this very problematic notion. Nevertheless, it happened.

A new, groundwater-related common heritage principle has emerged a few years ago, the main points of which may be summarized as follows: taking into consideration the imminent water crisis, fossil waters shall be excluded from the sovereignty of the states, and instead, they should be regarded as a common heritage of mankind and to be shared with others. The theory stresses that fossil waters should have a different legal status than minerals, as water is essential to life, while energy is not. Before doing more harm than good (despite the promising designation), the very core issues of this new common heritage principle have to be addressed.

First of all, while in the other fields (law of the sea, space law) basically *res nullius* was concerned, the new theory targets and urges the restriction of the (already existing) sovereignty over fossil waters.<sup>28</sup> This solution, excluding fossil confined aquifers from state sovereignty on the basis of not having direct contact with the surface, is highly questionable regarding the general rules of international law.<sup>29</sup> As the territory of the state encompassed with the state border is three dimensional: it goes downwards until the centre of the Earth and upwards until the Kármán line.

The regulation of minerals in international law follows the same logic. Even if we know that water is much more important than mineral oil or natural gas, it seems a hardly defensible point of view to allow states with fossil energy to exploit (to the utterance) the supplies found in their territory, while forbidding the same to states possessing fossil waters, obliging them to share it with the other states. At this point, based on the experience gathered regarding the deep seabed, practical difficulties should be referred to as well. Besides the lack of clarity on the level of notions, controllability is a major question along with other factors of execution. Controlling the discharge of subsurface

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27 See the events before the General Assembly, the adoption of the UNCLOS (1982 Montego Bay Convention on the Law of the Sea, 1833 UNTS 3.), and the 1994 New York Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea, 1836 UNTS 3. See furthermore Guntrip, Id. pp. 4-11.

28 For a critical approach as to this theory see A. RAISZ, ‘A felszín alatti vizek határon átnyúló szennyezésére vonatkozó nemzetközi szabályozás’, *Publicationes Universitatis Miskolcensis, Sectio Juridica et Politica, Tomus XXX/2*, Miskolc University Press, 2012, pp. 371-382 and A. RAISZ, ‘Magyarország felszín alatti vizei a nemzetközi jog újabb megközelítésében – Kincs, ami nincs?’ in A. RAISZ (Ed.), *A nemzetközi környezetjog aktuális kihívásai*. Miskolci Egyetem, Miskolc, 2012, pp. 149-160. On this theory see furthermore R. MARTIN-NAGLE, ‘Fossil Aquifers: A Common Heritage of Mankind’, *George Washington Journal of Energy and Environmental Law*, No. 2, 2011, pp. 39-60.

29 Martin-Nagle, Id. p. 47.

waters is much more challenging than controlling mining operations at high seas. Not only is there no concept for the way of management, our previously mentioned lack of data prevents us from establishing any form of accountability.

Particularly interesting moral questions arise in this regard, considering that in the near future there are going to be quite a few countries suffering from water scarcity but possessing mineral oil supplies, exploiting it, while having had completely exploited the – sometimes considerable amount of – fossil waters found in their sovereignty beforehand, partly for agricultural (and alimentation) and partly exactly for industrial purposes. A solution like that proposed by this new theory would obviously repugn states not having benefited from the exploitation of mineral oil and natural gas, but having considerable groundwater supplies at their disposal (like Hungary, for instance). (Here, the – not at all secondary – question where the profit coming from fossil energy went in reality, i.e. whether it has been shared with the population of the given country, cannot be elaborated.) In its current state, this theory could only contribute to a discriminative realization of the right to water, as it would only result in the more powerful states having exploited their own resources gaining control over the remaining (not renewable, fossil) groundwater of states mostly not disposing of fossil energy or otherwise being in a weaker position. This would hurt the principle of non-discrimination established in General Comment No. 15 of the Committee on Economic, Social and Cultural Rights as essential with regard to the realization of the right to water.<sup>30</sup> Is it a coincidence that this theory comes from territories that have already used up their own fossil waters (or are about to do so very soon)? Hardly. History is rarely about justice, but the alarm bells are ringing here. Another key – and so far unanswered – question is what it would mean to convert fossil waters into the common heritage of mankind: complete intangibility or use under certain conditions? The former seems unrealizable. And in the latter case, it is unclear whether (and to whom?) it has to be paid for when the resource is discharged.

Nevertheless, theories like this raise important questions, not only as to the concept of the common heritage of mankind, but also as to the legal nature of water as such. It is worth mentioning that this problem already appeared before the 21<sup>st</sup> century. In connection with various exploitation licences, already in the middle of the last century

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30 For further reading see inter alia T. S. BULTO, ‘The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery?’ *Melbourne Journal of International Law*, No. 12, 2011, pp. 290-314., pp. 312-314.; J. Bruhács, ‘A nemzetközi folyók jogáról szóló 1997. évi New York-i egyezmény’, *Jura*, Nos. 1-2, 2000, pp. 46-51., p. 47.; D. SHELTON, ‘Equity’, in D. BODANSKY & J. BRUNNÉE & E. HEY (Eds.), *The Oxford Handbook of International Environmental Law*, Oxford University Press, New York, 2007, pp. 639-649; M. FITZMAURICE, ‘The Human Right to Water’, *Fordham Environmental Law Review*, No. 18, 2006-2007, pp. 537-585, p. 544.

whether or not water is a mineral has been in the centre of heated legal debates.<sup>31</sup> No final and definite answer was found, but water is mainly dealt with separately from minerals. Probably not for this reason, but the International Law Commission divided in its codification programme the originally undivided question of fossil energy and groundwater.<sup>32</sup> These facts seem to back up the mentioned theory concerning the distinction between fossil water and fossil energy, but do not help explain the arbitrary restriction of (equal) state sovereignty, one of the core principles of international law.

The idea alone of protecting, maintaining and sharing (some of the Earth's) groundwater resources should not result in acute protestation, as the problem should be worthy discussion on the basis of human solidarity. Even a proper realization of a similar theory could follow an elevated aim and pursue sustainability. Repugnance originates in two facts: first that these theories come from regions where fossil waters have been almost completely exploited, along with its economic profit and environmental damage. Second, that the very same fathers of these theories (i.e. the states concerned) dispose of considerable fossil energy, but according to the theory (in its current, admittedly raw form), fossil waters shall not be confused with fossil energy: while former is essential to life (correction needed here: water is essential, not necessarily fossil water), one can live without the latter. Therefore, the theory says that states disposing of fossil energy do not have to share it with others (according to the classical regulation on state borders), but states disposing of fossil water will soon have to put it at the others' disposal. The logical inconsistency of this theory is visible without any further explanation. It is even more the case when mentioning that the countries being at the objective very end of the exploitation of fossil waters are in general the same who benefit the most from fossil energy, and would support such theories – of course with no immediate but a later realization, the date of which would correspond to the complete exhaustion of their own water supplies.

Of course, the theory – once appearing at the level of real politics – would not only face the resistance of states poor in minerals but rich in fossil waters, but also of those simply very rich in fossil waters, such as the Russian Federation, a possibly strong

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31 J. D. SCHLOSSER, 'Mines and Minerals – Mineral Reservations in Deeds – Is Subsurface Water a Mineral?' *North Dakota Law Review*, No. 37, 1961, pp. 298-300.

32 See International Law Commission (ILC), *Shared natural resources (Law of trans-boundary aquifers), 2008 versus Shared natural resources (Oil and Gas)*, "discontinued". Source (Retrieved on 2 September 2012): <http://www.un.org/law/ilc/>.

opponent of such ideas, on the basis that the theory should be used equally to every country concerned, just as stipulated by the principles of international law.<sup>33</sup>

### **III. Constitutional protection of waters – any practical relevance?**

In the current status of international law, i.e. the prevalence of state sovereignty (as well as in view of the above mentioned principles of international law) and the so far complete ignorance at political level of the examined theory, a constitutional declaration of the protection of waters is of great significance.

First of all, an overview of the current international regulation on groundwater should be given, in order to try and find a place for the mentioned theory in its context.

Initially, no provisions on groundwater emerged in (obligatory) international agreements, it was only after decades that certain basic rules were inserted in water-related conventions.

Nevertheless, the significance of groundwater has previously been recognised by experts of international law.<sup>34</sup> The International Law Association created in 1966 the Helsinki Rules on the Uses of Waters of International Rivers,<sup>35</sup> this later several times (e.g. Berlin, Seoul) amended document led to the adoption of the – later mentioned – Helsinki Convention. Article II of the Helsinki Rules expressly states that the provisions apply not only to surface water, but also to groundwater – of course only if it is connected to the drainage basins of international rivers. The Helsinki Rules have already determined rules such as reasonable and equitable utilization, declaring not only the principles of prevention or co-operation in cases of pollution, but also ruling on compensation.<sup>36</sup> Although not a document of binding character, it is widely regarded as a sort-of summing up of the relevant international customary law.<sup>37</sup> The Helsinki Rules

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33 See GA Res. 25/2625, 24 October 1970 on the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations

34 Here the further projects will not be elaborated, e.g. the Bellagio Treaty, prepared by experts of groundwater. See R. D. HAYTON & A. E. UTTON, *Trans-boundary Groundwaters: The Bellagio Draft Treaty*, 1989 (revised version). See <http://www.colsan.edu.mx/investigacion/aguaysociedad/proyectorfrontera/Documentos/INSTRUMENTOS%20INTERNACIONALES/bellagio%20%28ingl%20E9s%29%201989.pdf> (Retrieved 30 May 2012)

35 Helsinki Rules on the Uses of the Water of International Rivers. ILA, Helsinki, August 1966 (hereinafter 'Helsinki Rules')

36 Helsinki Rules, Chapter 2, Articles IX-X

37 MARTIN-NAGLE, *Id.* p. 43.

have been amended in 1986 in Seoul and in 2004 in Berlin. The former amendment concerned groundwater, the latter – a more comprehensive reform – concerned among others the right to water, further protection of the ecosystem, and as to groundwater, common management, precaution, information acquisition or the recharge of aquifers.<sup>38</sup>

In 1992, in Helsinki, the Convention on the Protection and Use of Trans-boundary Watercourses and International Lakes was adopted in the framework of the UNECE – basically on the basis of the Helsinki Rules which – according to its definition in Article 1 – extends to groundwater, but does not contain detailed rules in this regard, and, furthermore, excludes fossil aquifers from its scope. As such, it could serve as a basis for the new theories on the common heritage of mankind, if it weren't for the general confusion of terminology as to groundwater in the related international documents.<sup>39</sup>

The 1997 UN Convention on the Law of the Non-navigational Uses of International Watercourses – still not in force – declares only that its scope extends to groundwater, but contains no further provisions.<sup>40</sup> Its significance was nevertheless underlined by the International Court of Justice in its *Gabčíkovo-Nagymaros* judgment where it declared that some of its provisions may be regarded as part of international customary law, e.g. the principle of equitable utilization, the obligation not to cause significant harm, or the obligation to cooperate and to exchange information.<sup>41</sup>

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38 Berlin Rules, Arts. 37-40. The Berlin Rules have nevertheless not been widely agreed on, according to some critics – contrary to the Helsinki rules – in Berlin, the ILA radically deflected from customary law (see S. Bogdanovic et al., *ILA Berlin Conference 2004 – Water Resources Committee Dissenting Opinion*, 9 August 2004, point 5, [http://www.internationalwaterlaw.org/documents/intldocs/ila\\_berlin\\_rules\\_dissent.html](http://www.internationalwaterlaw.org/documents/intldocs/ila_berlin_rules_dissent.html) (Retrieved 30 May 2012)). Others nevertheless claim that the Berlin Rules repeat old views like the principle in Art. VII of the Helsinki Rules according to which no present reasonable use may be denied for a potential future use (see Martin-Nagle, *Id.* p. 43.).

39 See among others the differing content of notions in the Water Framework Directive (Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy), the Helsinki Convention (1936 UNTS 269), the 1997 New York Convention or the 2008 ILC draft. Such inconsistency and, above all, incertitude is one of the greatest challenges as to international groundwater regulation.

40 See furthermore G. ECKSTEIN, 'A Hydrogeological Perspective of the Status of Ground Water Resources under the UN Watercourse Convention', *Columbia Journal of Environmental Law*, No. 3, 2005, pp. 525-564; N. R. PINCUS, 'Groundwater and International Law: The Need for Specific Regulation', *University of Denver Water Law Review*, No. 2, 2008, pp. 313-336.

41 ICJ, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 25 September 1997, ICJ Rep. 1997, para. 85. See furthermore G. ECKSTEIN, 'Application of International Water Law to Trans-boundary Groundwater Resources, and the Slovak-Hungarian Dispute Over Gabčíkovo-Nagymaros', *Suffolk Transnational Law Review*, No. 19, 1995, p. 67; M. SZABÓ, 'Implementation of the 25th September, 1997 Judgement of the International Court of Justice – Comparing Theoretical Perspectives and Practice', in P. KOVÁCS (Ed.), *International Law – A Quiet Strength*, Pázmány Press, Budapest, 2011, pp. 271-283.

Excluding fossil waters from the sovereignty of states would not be easy, as it is visible that the international tendencies focus rather on the aquifers than on water itself, see the first global document containing recommendations and guidelines as to the sustainable management of trans-boundary aquifers, the 2008 draft of the International Law Commission. It was recommended by the UN General Assembly to be taken into consideration by the states in their bilateral or regional relations.<sup>42</sup> The General Assembly, like previously Principle No. 12 of the Rio Declaration, entrusts the states to settle the problems concerning groundwater, placing sovereignty and co-operation in the foreground,<sup>43</sup> a change in this approach is not visible any time soon. International political culture decides therefore in the next decades whether the given regions or sub-regions may successfully face the challenges arising more and more often in relation to groundwater. Europe has a good position in this regard, despite all the obvious problems.<sup>44</sup> Nevertheless, the problem is global, so its solution cannot rely on one or two continents.<sup>45</sup>

Good examples may pave the way though for a successful, more comprehensive regime,<sup>46</sup> e.g. the working multilateral agreements or – bearing in mind the often trans-boundary feature of groundwater – for instance the ISARM (International Shared Aquifer Resources Management) project – launched in the framework of the UNESCO, focusing expressly on trans-boundary problems of groundwater and following the evolution of the situation from (sub)continent to (sub)continent. Still, such initiatives may only alter the global picture of non-regulation and lack of control, and it is to be feared that the international community does not react in time to the oncoming problems.

In the meantime, states can strengthen the protection of waters in their own capacity. A constitutional declaration (and any realizable protection) is a good start. Currently, declaring water a common heritage of the nation seems more valuable than an uncertain declaration of the common heritage of mankind, having all its above mentioned weak points in mind.

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42 See GA Res. 63/124, 15 January 2009 on the Law of Trans-boundary Aquifers.

43 Lacking political consequences, the draft may only have more than moderate, rather “academic significance”. See MARTIN-NAGLE, *Id.* p. 48.

44 See e.g. the examples of Barberis on European cooperation, especially as to the pollution of groundwater: J. BARBERIS, ‘The Development of International Law of Trans-boundary Groundwater’, *National Resources Journal*, 1991 (Winter), pp. 167-186, p. 173.

45 See furthermore A. PAULE, ‘Underground Water: A Fugitive at the Border’, *Pace Environmental Law Review*, No. 2, 1996, pp. 1129-1170; G. Loibl, ‘Groundwater Resources – A Need for International Legal Regulation’, *Austrian Review of International and European Law*, No. 5, 2000, pp. 81-120.

46 On future development proposals see J. E. SZILÁGYI, ‘Az átfogó vízjogi szabályozás kérdései’, *Magyar jog*, No. 2, 2013, pp. 75-86, pp. 78-80.

A rushed acceptance of the above described common heritage of mankind theory in international law is not in sight anyway, also because it would radically differ from the visible logic of the international regulation adopted so-far, as briefly referred to above. Sovereignty is indeed – and it is to be assumed, remains for a longer period – at the core of international law. Nevertheless, international law evolves, the appearance of human rights law, humanitarian law or international environmental law shows that – although slowly, and definitely not optimally, but – more and more other aspects are included in the positive law. As to water, and especially as to drinking-water, delicate questions will arise soon, we must give credit to this new theory in this regard. The authors of these new theories are also right in recognising that the principle of absolute territorial sovereignty<sup>47</sup> may not lead to any visible results in the case of groundwater, among others also as it is more difficult to prove the potential damage, for instance.

Referring to the problems mentioned in the previous chapter, I would nevertheless propose a different path, a more comprehensive approach.

In the case of Hungary, the inclusion of the water protecting provisions in the Constitution has not been without a prelude: the so-called national consultation preceding its adoption had reinforced such an intention of the society as well. For the realization of the relevant provisions of the New Constitution however, i.e. the safeguarding and maintenance of the national water resources, several aspects are essential: above all, not unknown to international law, diplomacy plays a significant role. In this field, lacking positive law reinforces the necessity of this basic interstate communication, the alpha and omega of every international relation. So first, international cooperation of – mostly neighbouring – countries may not be circumvented when considering the protection of subsurface waters. It is an evident statement, nevertheless one that seems necessary to be recalled. Second, the importance of an effective international accountability procedure can no longer be denied. It is clear that the region which introduces first an effective international system gains advantage ahead of the oncoming hydro-conflicts. Therefore, realization of the new constitutional provisions would require an initiation and constant support policy of the establishment of an effective international dispute settlement system, preferably a (regular, i.e. not arbitral) international tribunal for quality and quantity questions related to trans-boundary aquifers. Such a tribunal would require experts with broad knowledge both as to international (environmental, water) law and hydrology. Such a mechanism would be indispensable even if the new common heritage theory came to an effect. But one may quite confidently profess that it would not, as too many problems are connected to it – at

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47 According to this theory, the state may practically not be restricted when acting within its own borders.

least now, in its current form. A system of cooperation – based on state sovereignty – is more likely to work than an arbitrarily forced regime with obvious defects, that alone is eligible to provoke serious international conflicts – exactly what we are trying to avoid.

#### **IV. Concluding remarks**

Providing constitutional protection for a natural resource – like the one in the New Hungarian Constitution – is a nice gesture which has to be filled with content. If done, and paired with the effective cooperation of neighbouring countries, it may have more positive effects than a global declaration of being a common heritage of mankind.

As Guntrip correctly notes, ‘[g]lobal commons regimes have not, so far, provided guidance in ascertaining whether the common heritage of mankind principle can become a legal standard’.<sup>48</sup> Relying on such an uncertain notion *and* introducing a regime defying a basic element of classic international law, without the slightest hint of feasibility is in my view not a great launch for the new common heritage of mankind theory. Environmental protection aspects should prevail this time – at least theoretically –, but economic aspects are advanced. It is perhaps not irrelevant that the origin of this new theory is a region where a significant part of fossil waters has already been discharged (of course, for internal use) and that countries in a similar situation would support such an idea. The new common heritage of mankind theories do not forget to remind us that water as a natural resource is quite different from other natural resources, such as gas and oil, these latter not being indispensable to (human) life. Therefore, according to this theory, fossil waters –indispensable for human life due to the overuse of other water resources – should be regarded as the common heritage of mankind, while for gas, oil and other minerals the sovereignty – and so the right to profit – remains... Creating too many unnecessary conflicts, this cannot be the solution.

True: only to recognise that something has to be done with regard to groundwater is not enough. However, the above presented new common heritage of mankind theory does not actually help. It lacks the fairness seen in the case of other global commons, and, furthermore, its legal frame is so vague that it would easily create more disputes than solutions. With the idea of sustainability in mind, only a more comprehensive approach could succeed, i.e. even if trying to protect fossil waters, a successful solution *has to* be based on integration, a combination of groundwater aspects, but also taking into consideration the local economy, energy sector, or even social issues.

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<sup>48</sup> Guntrip, Id. p. 23

# Guaranteeing the Life Conditions of Future Generations in the Light of the Right to Water

*Szilvia Kéri\**

## I. Duty of the Commissioner for Fundamental Rights

The Commissioner for Fundamental Rights is the “eye and ear” of the Parliament. The ombudsman’s institution was set up in 1995 by the Parliament with the aim of inquiring the improprieties related to constitutional rights and initiating general and specific measures to remedy them. For the purposes of fulfilling the goals set forth by the Fundamental Law effective as of 1 January 2012 and the Act CXI of 2011 on the Commissioner for Fundamental Rights, a system based on the ombudsman and his deputies responsible for the protection of the interests of future generations and of nationalities living in Hungary was set up. In order to protect fundamental rights, the Commissioner for Fundamental Rights is elected by the Parliament and is responsible exclusively to this institution. He is not authorized, however, to pass binding decisions. He may only make recommendations for remedying (including repealing or modifying legislation) the improprieties revealed and initiating minor offence proceeding or disciplinary proceeding.

As an institution dealing with the protection of fundamental rights, the duty of the Commissioner is, principally, to reveal the shortcomings in the practice of legal interpretation and the grievances deriving from them, affecting fundamental rights. Fundamental rights are contained in the Fundamental Law in the form of a catalogue. The inquiry proceeding of the Commissioner takes place mostly on the basis of specific complaints arriving to the Office. At the same time, it is also possible to launch inquiries *ex officio* or in relation to the complaint, the specific inquiry may be extended *ex officio* into a comprehensive proceeding. Delivering opinions on draft legislation constitutes a large part of the Commissioner’s field of activity. In addition, the

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Commissioner may also initiate the review of legislation as to its conformity with the Fundamental Law before the Constitutional Court.

Pursuant to the Act setting out the competence of the ombudsman, in the course of his or her activities, the Commissioner for Fundamental Rights shall pay special attention, especially by conducting proceedings, to the protection of the values determined in Article P of the Fundamental Law, that is, the protection of the interests of future generations. Pursuant to Article P, natural resources, in particular agricultural land, forests and the reserves of water, biological diversity, in particular indigenous plant and animal species, as well as cultural assets shall form the nation's common heritage; the State and every person shall be bound to protect, maintain and preserve them for future generations.

The purpose of this study is to shed light on the kind of improprieties, shortcomings and negative impacts on fundamental rights the Commissioner has drawn attention to in the last one and the half year in relation to the right to water in the course of inquiries launched *ex officio* or in the framework of an opinion on legislation. The present paper shall also demonstrate how the Commissioner interprets the provisions of the Fundamental Law regarding the right to water and natural resources as the nation's common heritage.

## **II. The ombudsman's legal interpretation regarding the protection of natural resources and the right to a healthy environment and the right to health.**

In the opinion of the Commissioner, natural resources are strongly protected by the Fundamental Law. Concerning the right to water, several reports have analysed the system of horizontal, integrated protection offered by provisions of the Fundamental Law, which, interpreted together ensure the right to the reserves of water, to a healthy environment and the right to health. Considering that the Fundamental Law is at the apex of the hierarchy of legislation, no legal rule may conflict with it. Consequently, the requirement of strong protection set out in the Fundamental Law has to be enforced in the course of law-making and the application of the law as well. If this were not the case, then the right to the protection of reserves of water, the healthy environment and the fundamental rights to health will be infringed.

Why is it important to protect horizontally the natural resources as the nation's common heritage? The importance of this lies in the interest of protecting justice between the

generations and the life conditions of future generations. The economic and social development of the impending decades is likely to be influenced most sharply by the scarcity of natural resources (drinking-water, energy, fertile soil, etc.). Article P of the Fundamental Law provides uniform guidance not only in relation to environmental law but to the content of all the legal rules relevant from the perspective of justice between the generations.

The ombudsman's report<sup>1</sup> on the subject of the inquiry of the official problems and regulatory issues related to sand- and gravel mining pointed out that pursuant to the provision of the Fundamental Law, the protection of agricultural land and reserves of water in the interest of future generations poses a fundamental requirement towards the means of extraction of mineral raw materials. Pursuant to the regulation, the groundwater, their natural water holding strata belong to the exclusive ownership of the State. Article P of the Fundamental Law underlines that agricultural land and the reserves of water as a natural resource shall form the nation's common heritage. The requirement of the horizontal protection of the natural resources is reinforced by Article 38 (1) of the Fundamental Law which says "The property of State and of local governments shall be national assets. The aim of the management and protection of national assets shall be to serve the public interest, to satisfy common needs and preserve natural resources, and to take into account the needs of future generations."

Pursuant to the Fundamental Law, the principal aim of the extraction of mineral wealth as national assets is the satisfaction of common needs, in the course of which natural resources need to be treated carefully. In the course of a mining activity, the principles set out in the Fundamental Law have to be applied. The report established that pursuant to the effective regulation, mining activity is largely determined by the development of market relations. Based on the foregoing, the management of mineral wealth cannot be solely left to the law of the market. Reasonable and efficient assets management has to be facilitated by legal rules which are not fully implemented in the regulation. Otherwise, the right to a healthy environment may be infringed. The main finding of the report is that the satisfaction of common needs, the public interest is the standard that sets limit to the extraction of the mineral wealth in the interest of the protection of the reserves of water and agricultural land and that the relevant legislation must follow this principle.

Remediation processes aim at eliminating contamination in the groundwater and the geological structure. The ombudsman reviewed the system of remediation processes on

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<sup>1</sup> No. AJB-1078/2012. Report

the basis of the complaints submissions and press releases<sup>2</sup>. In general, the complaints centred on the fact that the remediation processes were delayed, and over several decades the contamination had not been technically eliminated in groundwater. The inquiry of the remediation processes should receive priority consideration as they are closely connected to the protection of groundwater as state property and the protection of water bases. Consequently, this way a bigger group of citizens may be affected indirectly. The fact that the contamination had not been eliminated gives rise to a higher level of emergency, since these processes will have occurred hidden from human eyes, beneath the earth's surface. Those responsible for the less obvious contamination or those obliged to eliminate the contamination may rid themselves of the remediation processes or at least they may delay the performance of the obligation more easily. Pursuant to Article P and Article 38 of the Fundamental Law, groundwater and their natural water holding strata are national assets. At the same time, they also constitute the nation's common heritage. The report reiterated that on one hand this reinforces the requirement of the horizontal protection of the natural resources. As another legal interpretation, the report explained that on the other hand this prescribes the requirement of justice between the generations.

In other words, horizontal protection means that before any state or municipal decision affecting natural resources is taken, the requirement of preserving natural resources has to be taken into account in an integrated manner. When taking these decisions and adopting legal rules, not only the common needs of the present generation has to be weighed but guaranteeing the life conditions of the future generations must also be taken into account.

As regards the remediation processes, the report established that the right to a healthy environment is a prerequisite to the right to health in certain cases. This interpretation is also reinforced by the Fundamental Law as under the realization of the right to health it specifies that Hungary furthers the realization of this right by ensuring the protection of the environment and access to drinking-water.

In one case regarding groundwater, because of the spread of ineliminable contamination, the contamination also reached the residential wells generally used by inhabitants for watering their garden. However, there was a case where a condominiums were built at contaminated sites in the green belt where due to the heavy rainfall of the

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2 [http://www.napi.hu/magyar\\_vallalatok/veszelyben\\_az\\_ivoviz\\_huzavona\\_budapest\\_szegyenfoltja\\_korul.518739.html](http://www.napi.hu/magyar_vallalatok/veszelyben_az_ivoviz_huzavona_budapest_szegyenfoltja_korul.518739.html),  
<http://energiaoldal.hu/otmilliard-forintert-takarit-az-allam-a-peremartoni-vegyipari-vallalat-utan/>  
<http://www.greenfo.hu/hirek/2013/01/20/szunetel-a-szekszardi-karmentesites>

summer period an explosion occurred in the yard of the condominium in the soil because of the hazardous waste buried in one of the cellars, unknown to the then owners. According to the national registry of the contaminated areas, there are 164 such areas located on water resource protection areas or otherwise affecting, jeopardizing such areas. The responsible Minister gave the information in the inquiry that in some of these, the remediation process is underway and some of them were introduced as priority actions among state duties. In these cases, the conduct of a remediation process is not only an environment protection issue and it does not only affect the right to a healthy environment but it indirectly also affects the right to health through the right to drinking-water. Concerning the guarantee of the right to drinking-water, protection of the groundwater is of special importance since Hungary ensures the water quantity required for the provision of drinking-water principally from ground water resources.

In the framework of the project launched in 2013 analysing children's right to a healthy environment, the ombudsman started an inquiry *ex officio* entitled "Can a child drink tap water when he or she is thirsty?" in view of the increased government liability arrangement<sup>3</sup>. States party to the UN Convention on the Rights of a Child<sup>4</sup> shall make endeavours to ensure the comprehensive realization of the children's right to the best health condition possible and they take measures, *inter alia*, connected to drinking-water service. The inquiry analysed the relationship of the rights to the protection of water resources, health and a healthy environment set out in the Fundamental Law from the perspective of guaranteeing access to drinking-water.

Water resources are also specified by Article P among the natural resources to be protected. The definition of "water resources" can be established primarily from the legal rules on water resources management. According to the ombudsman, on the basis of the abovementioned legal rules the definition of water resources incorporate both surface water and groundwater. According to the ombudsman's practice, groundwater and its natural water holding strata are national assets, at the same time they form part of the common heritage of the nation. This holds true for water on the surface as well. Consequently, the previously derived requirement of horizontal protection is valid for the entirety of water resources, that is, both for surface water and groundwater.

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3 No. AJB-677/2013. Report

4 Act LXIV of 1991: Proclamation of the Convention on the Rights of the Child adopted by the General Assembly of the UN in New York in 20 November 1989 (It was adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with Article 49)

Technically, water can only be ensured in Hungary if there is a water abstracting well based on water resources. Therefore, the rules in the Hungarian legal system refer certain questions of the protection of utilized water base to the responsibility and duty of the water utility service provider. For example, among the principles of water utility service one can find the principle of sparing natural resources. According to this, in the ambit of the development and improvement of water utility service, priority must be given to the economic and organizational solution that serves the protection of the country's natural resources, in particular the long term sustainable utilization of the water resources. The definition of water supply system also interprets water abstraction and transferring water into the water supply network: the water supply system is defined as all water facilities ensuring the supply and service of drinking-water. The definition of the water utility is set out in the legal rule following the same logic: a technical establishment serving public utility water supply (water abstraction, protection of the water base connected to that, storage, water delivery, water distribution) of one or more settlements. However, for example, the operator of a water utility shall ensure the intended and proper functioning of the buildings serving water abstraction, water treatment, water delivery, structures, engineering, electronic, operational technical equipment, water quality controlling instruments and that the water of the water base and the abstracted water not be contaminated.

On the basis of the above, the report established that access to drinking-water must include interpretation of Article P. Hungary's water supply is ensured in 95 percent from groundwater. In case groundwater and to a smaller degree, surface water is not available suitable for drinking-water, then at the same time access to drinking-water cannot be ensured, either. Thus, the protection of water resources pursuant to Article P is a *quasi* prerequisite for access to drinking-water, therefore it is a priority.

In each decision concerning water resources, in law-making affecting the quantity and quality of water resources, the fact must always be taken into account that this may influence later the guaranteeing of the right to health and within that the insurance of access to drinking-water. In other words, the insurance of the protection of water resources and/or management of water resources and drinking-water supply are closely related to each other both at the level of fundamental rights protection and legal regulation and with respect to the technical system as well. The report also established that the insurance of the access to drinking-water includes the guaranteeing of both the appropriate quality, that is healthy drinking-water, and the appropriate quantity of water. In summary, it can be concluded that based on the legal system the insurance of the right to healthy drinking-water means that water resources as a finite natural resource

must be protected horizontally and an appropriate quality and quantity of drinking-water has to be delivered to citizens.

In compliance with the strong protection set out in the Fundamental Law, the various government and parliamentary strategies also determine directions accordingly in each question concerning the environment in its various aspects. Unfortunately, however, in the course of the interpretation of legal rules and certain inquiries, the ombudsman established several times that law-making and the application of law do not develop along the lines of the above objectives, that is, theory and practice do not fully comply with each other in all respects. The following chapter shall highlight some examples established in certain reports which stand in stark contrast to the requirement of fundamental rights protection described above.

### **III. Inquiry regarding the contamination of drinking-water and the water base at a Hungarian university in 2010 (Report No. AJB-831/2012.)**

This report focused on the inquiry of certain questions related to the right to healthy drinking-water and water base protection from the perspective of fundamental rights. The report can be divided into two parts. The first part analysed the improprieties related to fundamental rights that had been caused by the failure to take action on the side of the authorities and institutions, while the second part revealed the shortcomings of legal regulation gleaned from the case. In the case, the principle of rule of law and the requirement of legal certainty deriving from that as well as the suspicion of the infringement of and/or the imminent danger to the right to a healthy environment and the right to health were raised.

According to a complaint received by the ombudsman, in the area of one of the universities teaching agricultural science, the concentration of nitrate (fertilizer) and pesticides was measured above the threshold values. In connection with a laboratory study carried out in the beginning of summer 2010 by the students of the university, it turned out that the network water does not comply with the threshold values. Principally, the complainant emphasized that the university and the water utility provider did not fulfil their obligation to inform those affected about the quality of drinking-water and/or did not take the required measures in order to explore the source of the contamination and to avert it. In the course of the inquiry of the case, it turned out that the contamination of network water was preceded by the contamination of the water base.

The report established that from the perspective of the safety of drinking-water, one of the major questions is where the drinking-water network sampling sites are designated, at which the quality of water to be consumed is checked at regular intervals. The water supply of the university was insured by four wells connected to the system at different places. However, before the review in 2010, only one place was designated as a network sampling site. The designated sampling site could not be considered representative, it was not sufficient for the water utility service provider to continuously monitor the quality of the network water in order to comply with the legal rules, and it did not ensure the continuous control of water provided from network parts supplied from certain wells of the university's group of wells. This way, the water utility service provider had knowledge only about the water quality of well water. The report established that the designation of insufficient sampling sites is derivable from the failures of actions of those organs that are competent for the designation. The report also stated that the legal rules do not contain obvious, sufficiently detailed regulation on the designation of sampling sites. Therefore the Commissioner requested the legislator to specify the rules for the designation of sampling sites serving the objective of water quality examination and the requirements for designating the sampling sites, including the sampling order from internal drinking-water supply networks with various connections to several wells. According to him, it is required to regulate the special rules for connecting and/or taking out the wells that the likelihood of the safety of water supply endangered due to contaminated wells is reduced to the least possible degree.

According to the report, nitrate and pesticides found their way into the drinking-water supply system of the university from certain wells of the university's group of wells. Considering that in the whole drinking-water base, in wells situated several hundred metres from each other, the same contaminants emerged, it is almost sure that the contamination of the drinking-water stemmed from the contaminants leaked into the area serving the recharge of wells. The contamination was increased by disregarding certain legal provisions on the building of wells, the operation of wells and the control of the quality of the provided water.

The water base protection measures aim at preventing the water resources recharging the wells from being contaminated. If the cleanness of the water constituting the drinking-water supply is not solved by the water purification unit, then the water base has to be placed in safekeeping in order to ensure that no contaminant of human origin is in the abstracted water in a quantity exceeding the threshold values. The water abstracted by the university's group of wells was channelled into the network so that there was no technical possibility for removing the contaminants therein, therefore the

safety of the drinking-water supply depended basically on the protection of the water base.

The protection areas of the drinking-water bases are designated in the framework of an administrative procedure conducted by the water authority. As Hungary's river basin management plan forms part of the enforcement of the EU Water Framework Directive<sup>5</sup> there remains a lot of room for catching up in the designation of the protection areas of vulnerable drinking-water bases and in the enforcement of the measures required for placing in safekeeping. The designation of water bases, passing the decisions concerned is not done at a sufficient rate, which jeopardizes the safety of Hungary's water supply, and the exercise of the right to a healthy environment. Therefore, in compliance with Article P of the Fundamental Law, the diagnostic assessment and the designation of water bases must be continued. One of the proposals of the report was that the responsible Minister should examine what kind of measures may be taken in order to accelerate the designation of protection areas of drinking-water bases, to take measures required for placing in safekeeping, to cease lagging behind in this field as soon as possible and to ensure the conditions needed for fulfilling the duties falling under the competence of the operator of the water bases.

In case of drinking-water, the operator of the water plant is obliged to check the quality of drinking-water. The parameters to be examined have to be determined taking into account the characteristics of the water supply system. The examination of the presence of pesticides is only obligatory if it had been prescribed by the authority in advance, or if for some reason the transgression of threshold values had become known. If so, the authority determining the scope of components to be examined does not know what types of contaminants are to be expected to appear as a result of agricultural activities, and taking into consideration the high costs of the examinations, the authority does not order an examination.

This latter finding is supported by the order of water examinations at the university: namely, the authority ordered the examination of the pesticide, when it had already been known in connection with a case study that there was a significant transgression of time limit. Consequently, it cannot be established subsequently what time the contamination of such kind emerged and how long the unsuitable water quality jeopardized the health of consumers. As a result, the right to health is infringed by such a late order of examination.

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<sup>5</sup> Parliament and Council Directive 2000/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ 2000 L 327/1

The report established that on the basis of the conclusions of the contamination at the university it is high time for the review of the relevant legal rules, since the current order of examination disregards the probability of the combined occurrence of the contaminants. In case of the university, high concentration of nitrate was measured in several wells of the water base even relatively far from inhabited areas. In case of significant nitrate contamination deriving from agricultural overhead producer activity, there is also some risk of the pesticides leaking into the groundwater. The examination of the presence of the pesticides with long-term degradation time is not prescribed by the norm in case of high nitrate contamination of agricultural origin. Therefore, the Commissioner asked the legislator to prescribe the examination of atrazine (pesticide) and its derivatives as obligatory in the framework of annual examinations for every well the water of which is contaminated by nitrate and those wells which are situated in a designated protection area or in the absence of this in its estimated recharge area where in the previous decades a pesticide treatment was known or presumed to have been carried out.

The order of examination disregards the connection concerning the degradation time of the values of the shorter access time of certain water base protection zones and the contaminants eventually leaking from the potentially contaminating activities conducted on the water base. It is not established in the order of examination, either, that if such contamination is detected in either of the wells of the water base which may derive from an activity conducted in an area of another well of the water base, then this component has to be examined in all potentially affected wells. Therefore, the ombudsman asked the respective minister to impose a regulation according to which only those pesticides are applicable whose degradation time is shorter than the lower limit of the reach time on which the designation of the protection area and protection belt are based.

An impropriety related to legal certainty is caused by the absence of prescriptions on the protection of water base and the examination of the quality of abstracted and provided water and the placing on the market of pesticides. The legislation in force does not ensure effectively the protection of water bases and does not put due emphasis on the protection of groundwater against pesticides. For example, the water utility service providers do not have information on the nature of agricultural activity pursued and the nature and the quantity of fertilizer and/or pesticide used in the area of the water base operated by them. The ombudsman raised the attention of the respective minister to settle the situation by amending the required legal rules. It would be particularly important to work out the fundamental rules of the contact between the utility service provider and the agricultural producers pursuing plant production in the protection areas

and/or protection belts. The same applies to the regulation of the content of data reporting obligation on fertilization carried out and use of pesticides by agricultural producers to the operator of the water utility.

#### **IV. Report examining the sand and gravel mining-related administrative issues and regulatory questions (No. AJB-1078/2012. Report)**

The inquiry focused on the regulatory proceedings and the legal regulation of gravel and sand mining. According to the NGO submission to the Ombudsman, assistance was requested regarding the conflict of gravel mining, the protection of agricultural land and water, the state's function, the regulatory deficiencies, and the unfeasibility of enforcing the interests of landowners and local governments. Following the complaint, the basic requirement of the rule of law and legal certainty were raised, as well as the violation of the right to a healthy environment, the fundamental right to health, and the suspicion of their imminent threat.

A mining activity is carried out by using agricultural lands of different qualities. Nowadays, gravel mining is carried out on thousands of hectares in Hungary, and the areas exploited by mining are ultimately removed from agricultural cultivation. The decline of agricultural land is a worldwide phenomenon. According to the European Union's strategy paper on soil of 2006, significant loss occurred in Hungary exceeding the EU average (In relation to the 27 EU member-states, after Bulgaria, this is the second highest rate.<sup>6</sup>)

Due to gravel mining, numerous large and small lakes emerged which have even remained after the completion of the activity as the original environment cannot be restored. As a result, for example on the Pest plain, more than 2000 hectares of open water surface evaporate groundwater. According to scientific analysis water loss from excessive evaporation of open waters already exceeds the drinking-water demand of a medium-sized town. This excessive evaporation results in exhaust emission, therefore the level of groundwater in the surrounding agricultural areas decreases. As a result, a much greater area can be damaged than the area affected by the thousands of hectares of mining land altogether. This also applies to those areas of the country, where many lakes and/or lakes with large surface area have formed. The lakes that have formed due to the impact of mining activity have a negative effect on the groundwater balance, as

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<sup>6</sup> EU, DG ENV, 2006. Overview of best practices for limiting soil sealing or mitigating its effects in EU-27; <http://ec.europa.eu/environment/soil/sealing.htm>

more water evaporates from the open water surface than from the original surface. This lowers the level of groundwater. According to the impact assessments carried out, the mines individually do not cause more than 10 cm decrease of groundwater level, but for instance on the Pest plain area, the lakes are so densely situated that a major depressive regional area is likely to develop<sup>7</sup>.

Another problem is that due to the changes of the market conditions, in a number of cases after exploitation the “destroyed” areas were left behind in a way that only part of the gravel wealth was extracted. The mining entrepreneur stopped its activity, and left the territory after –usually insufficient – landscape management. Where the mining entrepreneur stops its mining activity after the extraction of the top layer and cheaply extractable mineral wealth, such activity cannot be considered efficient either from an environmental perspective or from a mineral resource management perspective. The open-pit mining in land uses results in durable and often irreversible change. The landscape as well as its use will be transformed and changed. The production – due to the cumulative effects of lowering groundwater levels – may cause changes in the natural vegetation of the surrounding areas, in the composition of the species, and it may result in the change and degradation of the areas designated for the conservation of the protected habitat.

The report stated that during the authorization of mining activities, the authorities find it difficult to enforce the fundamental public interest relating to the coordinated regional development and the protection of land and water resources due to the discrepancies of sectorial legislation. For example, the mining and management of water resources approach and define the same geological formation (e.g. gravel, sandy gravel) differently. The water management legislation treats it as an aquifer, the function of which is to support and protect the underground water resources. Contrary to this, mining law considers it as mineral raw material and encourages its exploitation.

It is a common phenomenon that opening a new mine or a significant expansion of an existing mine area is planned in an area where there is another – possibly more- mine(s) having a similar effect. The practice of the authority is not uniform as to what should be examined relating to the impact assessment proceedings conducted prior to the new activities: whether they just examine the environmental impacts of the new activities or the cumulative effects of the already on-going forms of activities should also be taken

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7 Water Management Research Institute: The impact of gravel mines' lakes on groundwater balance, Manuscript 1-2, 1995-1996, (Vízgazdálkodási Tudományos Kutató Rt: Kavicsbánya tavak Talajvízháztartásra gyakorolt hatása 1-2. rész, kézirat, 1995-1996), VITUKI, Budapest.

into account. A new activity does not usually cause environmental jeopardy, and does not harm the environment. The ban on the construction and lot formation of mining lots, as well as their withdrawal from agricultural land do not affect fundamentally the specific land use. However, the real impact of the new activity can only be assessed if it is examined in a combined way together with the impact of similar activities carried out in the region.

Although, the law allows for the assessment of cumulative environmental impacts, due to regulatory failure, the threshold values are missing under which the authorities may deny the request for obtaining a mining permit for carrying out mining activity, qualifying the impact to be extreme. Law provides that in the preparation of river basin management plans the exposure threshold values should be defined for the water bodies, groundwater bodies, and the value of available water resources should also be determined. In spite of this, the river basin management plans do not contain these values and figures, therefore the Commissioner called upon the minister to resolve this gap. The Minister agreed with the proposal and indicated that during the preparation of the second river basin management plan (in 2015) the Ministry will clarify the exposure threshold values based on modelling. In his response, the Commissioner expressed his concern that the Ministry makes the pursuit of the task subject to the budget. For satisfying the increased water demand emerging in agriculture due to possible future droughts, it is of utmost importance to determine the threshold values for the usable ground water resources.

In respect to the excessive evaporation of the mine lakes, the relationship between environmental law and water law was examined. The excessive evaporation of the mine lakes causes the increased use of groundwater resources. The excessive evaporation is clearly caused by human interference and can be considered as indirect use of water – thus, actual use of environment. However, currently there is no economic regulatory instrument which would encourage the mining companies to reduce the surface of evaporation to an absolute minimum. Dehydration due to the excessive evaporation of the lakes can be of only such an extent, as a result of which all the water removal does not exceed the usable groundwater resources; i.e. water removals and excessive evaporation together do not exceed the utility threshold values. The law clearly states that after the utilization methods of any element of the environment, the user must pay a fee. Despite this statutory provision, the law-maker has so far failed to create the detailed rules relating to the payment obligation due to evaporation, therefore the Ombudsman requested the due settling of the situation.

## **V. Report issued on the Inquiry on the unreasonable delay of indemnification (Report No. AJB-813/2012.)**

In the previous years, several complaints have been received by the Commissioner's office in relation to indemnification proceedings, and in the press news also appeared in connection with different proceedings. Following the review of the documents provided in the petitions, the ombudsman established that the indemnification proceedings have been delayed in all four cases, eventually for several decades the technical interference has not been carried out, that is, elimination of contamination in geological formation and groundwater. Consequently, the primary objective of the inquiry has been to reveal how typical the delay of indemnification proceedings in practice was and which factors and/or causes contributed to this. Objective of the inquiry was to review what the four complaints received by the office revealed in relation to the issue described above, and to ascertain whether the conflicts are due to the discrepancies of legislation, the application of law and/or legal interpretation, or eventually to the absence of interest.

Launching the inquiry was of a particular concern since pursuant to the legal rule establishing the competence of the ombudsman, out of four specific complaint issues three had to be denied as specific complaints. Pursuant to the legal rule on competence, however, the Commissioner in the course of its activity pays special attention to the values described in Article P of the Fundamental Law, that is, the protection of the interests of future generations, especially by conducting proceedings launched ex officio. Indemnification proceedings aim at eliminating contamination in groundwater and geological media, so they are closely connected to the protection of water resources. The legal rule enables the Commissioner for Fundamental Rights to launch a proceeding ex officio in order to terminate the impropriety related to fundamental rights that occurred in the course of the authorities' activity, regarding either a concrete case or a general problem. The ex officio proceeding aims at comprehensively inquiring into an impropriety or the enforcement of a fundamental right, affecting a precisely not definable, larger group of natural persons. On the basis of what has been said above, the conditions of a comprehensive inquiry launched ex officio existed, consequently the ombudsman examined all the four complaint issues, however, not as a specific complaint. The inquiry sought an answer for the question what types of improprieties had occurred in the four cases and whether these improprieties may occur in general in connection with the indemnification proceedings. In case there is a risk of the

impropriety occurring in several indemnification proceedings, may it be remedied by amending legal rules or by an appropriate practice of law?

The report concluded again that the drinking-water supply of the Hungarian population stems from groundwater in 95 percent. The Program for Drinking-water Base Protection serves the protection of water bases in operation that ensure the abstraction of the required water and of the water bases on the long term, preserving water resources. The quality of groundwater is influenced by a number of other factors, for example the contaminants in the groundwater.

The competent Ministry is of the view that the establishment of the delay of the indemnification proceedings is only true for bigger, more complicated duties, the causes of which could be established mostly from the examination of the specificities of the given case. At the same time, this conclusion cannot be stipulated for smaller areas, simpler interferences and the enforcement of more transparent indemnifications. Accepting the view of the Ministry, according to the ombudsman, the delay as a factor is of special significance for the elimination of contamination in groundwater as a consequence of the purpose of the indemnification proceedings, as it is necessary to eliminate the existing contamination as soon as possible, preventing it from spreading further. The later the technical phase of the indemnification proceeding is taking place, the greater the chance that the contamination will spread further. The more complicated, more time-consuming indemnification proceedings may be considered to be atypical cases, however, the passing of time may cause an impropriety regarding the right to a healthy environment and the right to health, for example in the two cases where 10 years have passed since the issuance of the basic decision.

In one of the cases, the authority has not continued the already commenced indemnification proceeding for 6 years. There is no information on the causes of the authority's failure to act. In compliance with the ombudsman's practice, the real enforcement of the fundamental rights may be prevented by the uncertainty arising from the faults, discrepancies of the regulation or the enforcement of law and by disregarding safeguard rules of proceedings. The conduct of the authority that failed to enforce the implementation of the decision, causes a severe impropriety related to the delay of the proceeding, the omitted measure, the requirements of legal certainty and the rule of law and due process. What can be done if the authority has not ensured the implementation of the decision? Considering that the defendant had not implemented the decision requiring indemnification, the authority should have launched the enforcement proceeding. If the authority fails to act in spite of its procedural obligation, in

compliance with the law its supervisory organ may order the defaulting authority to launch or conduct the proceeding. At this time, the next question is how the supervisory organ becomes aware of the situation. In the proceeding where there is no direct party with competing interests, considering the nature of the obligation, the supervisory organ of the defaulting authority is not likely to receive any complaints describing that the authority does not enforce the decision. Hopefully the authority's failure to act, omission for 4-6 years is considered an atypical case, however, it cannot be excluded that there is a similar indemnification proceeding which got stuck unnoticed. According to the ombudsman, regarding the purpose of the indemnification proceedings, passing a legal rule on the system following up the outcome of the indemnification proceedings launched should be considered at least in the proceedings concerning the elimination of greater contamination. Another solution may be the introduction of a practice according to which the supervisory organ pays increased attention to the conduct of the indemnification proceedings already launched in the course of the control of the administrative work of the regional organs within the scope of its public core activity. It is not necessary to adopt a legal rule for each atypical life situation, however, there are some severe improprieties and/or cases where the adoption of a legal rule should be considered for avoiding extraordinary situations on the basis of the principles of prevention and caution. It should be considered what consequences the omission of the measure can have. According to the ombudsman a further solution may be orientation, information and involvement of the public. Enforcement of the decisions in the indemnification proceedings may be facilitated in case civil society receives more emphasis in the course of the proceeding. It should be considered to make the publishing of the decision ordering indemnification compulsory.

In relation to the indemnification proceeding, the regulation sets a strict rule on the application for extension. The deadline may be amended only in exceptional cases with regard to the complexity of the case. According to the Commissioner, the legislative intent in this case is evident: the indemnification proceeding has to be completed as soon as possible, considering the weight of the public interest, therefore extension of the deadline is only possible in very few cases. It turned out from the examined complaints that in case of the same facts the authorities assessed the extension requests in the most different ways, thus the Commissioner asked the competent Ministry to develop a uniform practice. The report also pointed out that in the deadline extension requests there are often references to the absence of financial collateral. It is not necessarily the defendant's intention that is missing, since the performance and/or obtaining the financial collateral also takes time. In connection with this, the ombudsman proposed

that the legislator consider elaborating a system (tender system, possibility for discounted bank loan, trust fund) where the defendant receives some kind of financial subsidy.

The report is also a good example for the difference between theory and practice. The government adopted and decided on launching the National Environmental Indemnification Program (NEIP). The objective of the NEIP is the national registration, survey and priority setting of the contaminated areas, the potential contaminants and the environmental damage left behind as a result of the abovementioned activities and the scheduled elimination of the environmental damage classified as high risk. The NEIP includes the general and national duties which ensure the activities required for the direction and concerted practice of the NEIP (for example research, regulatory, information technological and registration duties) besides the specific indemnification investments independent of the extent of responsibility. The report pointed it out that the NEIP is part of the duties set out in the framework of the river basin management plan. Operating the NEIP is therefore part of the implementation of the EU Water Framework Directive. The Hungarian Central Budget Acts for the years 2012 and 2013 have not ensured resources for operating the NEIP. On the basis of the above, this decision does not comply with the horizontal decision-making principle derivable from Article P and Article 38 of the Fundamental Law and the requirement of justice between the present and future generations, thus it causes an impropriety related to the right to a healthy environment. The report analysed that the fact that the NEIP has not received subsidy from the central budget in the years 2012 and 2013 is not in compliance with the strategies in force adopted by the Parliament and the government. Consequently, the ombudsman requested the decision-makers to ensure the appropriate enforcement of the aspects for operating the NEIP and make available the necessary resources.

## **VI. Summary**

Water as an environmental element has three major aspects: on the one hand water resources need protection against the contaminating human activity, on the other hand humans also need to be protected occasionally against the so-called water damage. Water damage means the damage originating from the excess or absence of waters. Adversely excessive water means flood and internal waters, while adversely little water means drought. The third major aspect of water is the services provided by water, that is, the satisfaction of water demands. Treatment with our waters is dependent on the social attitude and culture related to water. It is a popular view that Hungary has almost

limitless groundwater resources due to its hydro-geological characteristics which is of special significance even in international comparative terms. However, also this natural resource belongs to the “finite goods,” the protection and sustainable use of which is of national interest. The water resources available will remain utilizable and the services depending on water can be sustained only if in the interest of its protection the state, the municipality, the private sphere, the society and the civil sector cooperate closely. For this, understanding the water cycle is also necessary as well as the appropriate knowledge of the importance of water in nature and in society by both the decision-makers and members of the society. The argument according to which Hungary is considered a “big power” as regards its available water resources is only justified if the requirement of horizontal protection is enforced ranging from the level of decision-making through operative actions to everyday activities. One of the bases of justice between the generations is the creation of a knowledge-based society, because without proper knowledge and information neither the decision-makers nor the society can enforce the requirement of horizontal protection of natural resources.

The present study attempted to illustrate how the ombudsman’s practice interprets the applicable provisions of the Fundamental Law from the perspective of the protection of fundamental rights. On the basis of the specific experience gathered in the field, this paper had the objective of drawing the attention to the fact that the strong fundamental rights “theoretical” bases and “strategic theoretical” bases in the practice (legislation, law enforcement) are not always enforced.

## **PART II**

# **INTERNATIONAL AND EUROPEAN ASPECTS**

# **Towards a Human Rights Based Water Governance: Challenges for the Post-2015 Thematic Consultations on Water**

*Aline Baillat & Tobias Schmitz\**

## **I. Introduction**

This article outlines the emergence of a Human Rights Based Approach (HRBA) to water governance in the post-2015 framework. Water is a resource that is essential to life itself, to all forms of economic production, to many forms of social interaction and to many cultural activities. Because water is so fundamental, a wide variety of institutions are involved in its governance, and this immediately creates challenges in the sphere of complementarity and coherence. Just within the UN system, for instance, 28 organizations and agencies have mandates in which a responsibility for water governance is integral to their work. At the national level, similar challenges exist.

Fortunately, the human rights system offers a broadly (almost universally) endorsed normative and legal framework that sets minimum standards for governance and defines the rights and obligations of different categories of institutions. Because water has been recognized as a human right, the human rights system offers opportunities to streamline global (and national) water governance and provide coherence both in the sphere of environmental sustainability and in terms of human development. In addition, since 1997 and in the context of the UN programme for reforms, human rights have been mainstreamed into the activities and programmes of many UN organisations and agencies. In 2003 the UN produced a statement of Common Understanding on a Human Rights Based Approach to Development Cooperation, and in 2009 the United Nations Development Group, consisting of 19 organisations and entities, established the Human Rights Mainstreaming Mechanism (UNDG-HRMM)<sup>1</sup>. Human rights therefore

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<sup>1</sup> UN (2003): Statement of Common Understanding on Human Rights Based Approaches to Development Cooperation and Programming.

increasingly provide a common point of departure within the UN system as regards human development issues, and especially water governance<sup>2</sup>.

At the national level, the spread of democracy and the rule of law worldwide offers unprecedented opportunities to improve public responsiveness, access to information, and citizen participation and accountability in the planning, implementation and evaluation of water and sanitation related programmes and projects. Where the world only had 66 democracies in 1987, there are now approximately 123. This historic development provides huge opportunities for water governance in the post-2015 framework. And at a deeper and perhaps more complex level, the rights and obligations related to environmental conservation are emerging as a subject matter for legal practitioners. Sustainability – often framed in terms of the rights of future generations – is now in the *avant garde* of legal development. Thus for instance more than 100 countries currently have constitutions that contain references to the right to a healthy environment, leading one author to speak of ‘an environmental rights revolution’<sup>3</sup>. Nor is this merely a paper revolution: court rulings on the human right to a healthy environment are imposing a paradigm shift on sustainability issues all over the world: for instance a court ruling forced a clean-up of the world’s dirtiest river, the Matanza-Riachuelo basin in Buenos Aires, Argentina; a court ruling revoked the license of Coca-Cola to abstract groundwater in Maharashtra, India, because it was interfering with the right of villagers to access water; a court ruling on the Tana Delta in Kenya clarified the need for participatory land use planning to secure the long term enjoyment of the right to a healthy environment<sup>4</sup>. In short, these subjects place human rights at the heart of the post-2015 debate.

The post-2015 debate is marked by two main initiatives. Firstly, one of the main outcomes of the UN Conference on Environment and Development ‘Rio+20’ Conference in June 2012 was the decision to prepare a set of Sustainable Development Goals that are “coherent with and integrated into the United Nations development agenda beyond 2015”<sup>5</sup>. Secondly, on a somewhat parallel track, the Millennium

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2 WaterLex, *Shaping a New Water Governance*, Geneva, 2012. Available at: [http://waterlex.org/resources/documents/ShapingWaterGov\\_Final.pdf](http://waterlex.org/resources/documents/ShapingWaterGov_Final.pdf)

3 See DAVID BOYD (2012). *The Environmental Rights Revolution*. Canada: UBC Press and Luc Lavrysen (2012): *The Right to the Protection of a Healthy Environment. An International Comparative Perspective*. Saarbrücken: Lap Lambert.

4 *Mendoza Beatriz Silva et al v State of Argentina et al on damages resulting from environmental pollution of Matanza Riachuelo River*, 2008/07/08 *Perumatty Grama Panchayat v State of Kerala High Court (Kerala)* 16 December 2003; *Abdallah Rhova Hiribae and others, Republic of Kenya at Nairobi*, civil case no. 14.

5 “The Future We Want”, June 2012, Rio+20 Conference, §246.

Development Goals are being revised and a new set of goals is being prepared for the sixty-eighth session of the General Assembly in September 2013. Impressive efforts are currently being deployed at all levels to define these goals for the post-2015 development agenda. While there was initially some concern that these two proposals would set in motion separate or parallel processes, many nations have since emphasized the need for coherence in the definition of the “post-2015 sustainable development agenda”. Concretely, the current process is advancing towards integration of Sustainable Development Goals (SDG) within the framework of the post-2015 MDG process. Whatever the outcome of these discussions, however, it is likely that human rights will increasingly become an anchor for issues related to both development and sustainability.

## **II. The right to water and sanitation in the post-2015 development agenda**

*The UN Special Rapporteur on the rights to water and sanitation, Catarina de Albuquerque, states on the post-2015 consultations that:*

*“Perhaps as a result of the Millennium Development Goal process, reaching targets has been the major preoccupation of many countries, both developing and developed. Inevitably at times this focus on quantity has been at the expense of quality, and on immediate impact rather than lasting change. Reconciling the desire for quick, readily quantifiable results with substantive, long-term progress has been one of the most salient difficulties with targeting resources for meeting the MDGs. Implementing the rights to water and sanitation suggest that it is the means, as well as the end, that define a rights-compliant approach to delivering services, the key principles being participation, access to information, transparency, non-discrimination and accountability. The current MDGs also do not take into account the enormously important human rights question for which portions of the population should be prioritised. In recent discussions, water and sanitation experts agreed that applying the principle of non-discrimination, and ensuring that the most vulnerable and marginalised individuals and groups are prioritised, should be reflected in new goals and targets.”*

In the thirteen years since the Millennium Declaration, the global perspective on water and sanitation has shifted fundamentally in that both water and sanitation have come to be officially recognised as human rights under international law. This commenced with an expert opinion: in November 2002, the Committee in charge with monitoring and interpreting the International Covenant on Economic, Social and Cultural Rights

(ICESCR) dedicates its General Comment no. 15 to the right to water. In an assessment of existing human rights law, General Comment no. 15 declared that access to water was an integral part of the right to life. It declared that “the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements”<sup>6</sup>.

This authoritative interpretation of the ICESCR set in motion a global debate on a human rights approach to water and sanitation, resulting in more than 30 countries adapting their legislation to incorporate water as a human right. General Comment no. 15 also provides international standards for what constitutes ‘sufficient, safe, acceptable, physically accessible and affordable’ water as well as providing guidance on procedural issues framing the governance of water and sanitation. However, the recognition of the right to water extends much further than an expert legal opinion. On the 28th of July 2010, 122 countries formally recognised water and sanitation as human rights through a resolution of the United Nations’ General Assembly (A/64/292). On the 24th of September 2010, the Human Rights Council adopted a resolution (A/HRC/RES/18) recognising that the right to water and sanitation are part of the right to an adequate standard of living. In short, in the post-2015 era, a fundamentally different approach is required to water and sanitation that takes into account the obligations of states and the rights and duties of non-state actors under human rights law.

Currently, human rights methodology is even beginning to playing a role in the revision of the Millennium Development Goals (MDGs). We cannot review here in detail the various MDGs or evaluate their outcomes, but most observers confirm that the MDGs did have a positive effect on global access to drinking-water and sanitation. There is a general consensus that the MDGs have contributed to an overall improvement to human development and the reduction of poverty. Although they are not formal (legally binding) commitments, the Millennium Development Goals’ simple wording, clear priorities and measurable targets succeeded in raising public awareness and focusing efforts of the world community on fundamental issues. However, it is equally clear that the MDGs left room for improvement. Critiques of the MDGs are significant (including the lack of explicit targets on environmental sustainability and the targeting of the

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6 Committee on Economic, Social and Cultural Rights (2002): Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights. General Comment no. 15: The Right to Water.

poor(est) in interventions). Therefore, the current discussion about the post-2015 development agenda is a great opportunity to overcome their weaknesses and perhaps, more ambitiously, to introduce new governance mechanisms for sustainable development.

MDG no.7, target C on water and sanitation was to halve, by 2015, the proportion of people without sustainable access to safe drinking-water and basic sanitation. It is critiqued for being narrowly formulated, unrelated to human rights, and having weak links to environmental sustainability. Progress on this goal was measured through the WHO/UNICEF Joint Monitoring Program for Water Supply and Sanitation (JMP). In its capacity as co-host of the post-2015 consultations, the JMP created four working group in January 2012: Water, Sanitation, Hygiene and Equity/Non-Discrimination. These working groups proposed 4 WASH targets<sup>7</sup>, with an interesting innovation: the integration of human rights language on universal access, non-discrimination and progressive realisation into the MDG framework. In a paper for the thematic consultation on addressing inequalities, the UN Special Rapporteur on the Human Right to Water and Sanitation states that:

- A key role in the realization of rights is to be played through data collection and monitoring mechanisms such as the Joint Monitoring Programme (JMP) and the Global Analysis and Assessment of Sanitation and Drinking-water (GLAAS), which are beginning to incorporate rights-based indicators into their monitoring framework. Such indicators need to include the affordability of services and should enable disaggregation that can help identify inequalities in access to

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7 Consolidated proposal for post-2015 targets and indicators discussed in The Hague (December 2012): *“Target 1: By 2025 no one practices open defecation, and inequalities in the practice of open defecation have been progressively eliminated. Target 2: By 2030 everyone uses a basic drinking-water supply and hand-washing facilities when at home, all schools and health centres provide all users with basic drinking-water supply and adequate sanitation, hand-washing facilities and menstrual hygiene facilities, and inequalities in access to each of these services have been progressively eliminated. Target 3: By 2040, everyone uses adequate sanitation when at home, the proportion of the population not using an intermediate drinking-water supply service at home has been reduced by half, the excreta from at least half of schools, health centres and households with adequate sanitation are safely managed, and inequalities in access to each of these services have been progressively reduced. Target 4: All drinking-water supply, sanitation and hygiene services are delivered in a progressively affordable, accountable, and financially and environmentally sustainable manner.”* See WHO/UNICEF (2013): Joint Monitoring Programme the Hague Consultation.

services that are structured along geographical, religious, and ethnic lines and include information in access to services in slums<sup>8</sup>;

- There would be great value in ensuring a stand-alone goal on equality to ensure that the elimination of inequalities are addressed under the substantive targets<sup>9</sup>;

In addition to these specific points on the post-2015 agenda, the Special Rapporteur has in earlier work emphasised other aspects of a rights based approach that are crucial to ensuring access to water, sanitation and hygiene in future. Many of these points are related to the thematic area of financing, spending, tariffs and costs<sup>10</sup>:

- States should aim to spend a minimum of one percent of GDP on water and sanitation;
- External (foreign) funding should be driven by the programming and budgets delivered by states;
- To ensure sustainability, spending needs to be spread more broadly over data gathering and dissemination of information, legal and policy development, capacity building, public participation in planning, and monitoring and evaluation relative to spending on technology and ‘hardware’ (see also text box on page 3 above);
- Tariff and subsidy policies need not ensure that water and sanitation services are free, but they should ensure that services are *affordable*. As a general rule spending on water services should not exceed 3% of the household income of the poorest groups in society.

Other points are related to the more general oversight and regulatory roles of the state, including:

- The elaboration of national plans and strategies for the realization of the right to water and sanitation;

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8 DE ALBUQUERQUE C (2012): The Future is Now. Eliminating inequalities in sanitation, water and hygiene. Paper for the Thematic Consultation on “Addressing Inequalities” the heart of the post-2015 agenda and the future we want for all. Geneva: OHCHR.

9 Ibid.

10 DE ALBUQUERQUE C. (2012): On the Right Track. Good Practices in Realising the Rights to Water and Sanitation. Geneva: OHCHR.

- The provision of mechanisms for accountability such as consultations, systems of access to information, complaints procedures and equal access to competent and effective judicial bodies such as ombudspersons, courts and tribunals;
- The obligation to regulate water use (i.e. water resources management) in such a way as to prioritise basic human requirements before allocating water to other uses<sup>11</sup>.

### **III. Human rights and water in the anthropocene**

Sustainability is essential for the long term enjoyment of the human rights to water, sanitation and health, as it is essential to ensure that future generations can enjoy the same rights. However, the following three excerpts from key international statements on water indicate that these rights are insufficiently protected:

One: “Scarcity and misuse of fresh water pose a serious and growing threat to sustainable development and protection of the environment. Human health and welfare, food security, industrial development and the ecosystems on which they depend, are all at risk, unless water and land resources are managed more effectively in the present decade and beyond than they have been in the past”<sup>12</sup>.

Two: “The widespread scarcity, gradual destruction and aggravated pollution of freshwater resources in many world regions, along with the progressive encroachment of incompatible activities, demand integrated water resources planning and management. In developing and using water resources, priority has to be given to the satisfaction of basic needs and the safeguarding of ecosystems”<sup>13</sup>.

Three: “the continuing contamination, depletion and unequal distribution of water is exacerbating existing poverty. Water is required for a range of different purposes, besides personal and domestic uses. Nevertheless, priority in the allocation of water

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11 Special Rapporteur on the right to water and sanitation (2012): Human rights and WASH, water resources and wastewater. Paper for Thematic Consultation on Water in the post-2015 development agenda / Cross-cutting discussion on human rights and inequalities.

12 Dublin (1992): International Conference on Water and the Environment: Dublin Statement on Water and the Environment, 1992.

13 United Nations Conference on Environment and Development (UNCED, 1992), Agenda 21, chapter 18.

must be given to the right to water for personal and domestic uses. Priority should also be given to the water resources required to prevent starvation and disease”<sup>14</sup>.

Together, these statements indicate that in the current era, we are reaching planetary boundaries with regard to our claim on freshwater resources. This era has recently been referred to as the ‘anthropocene’, i.e. the most recent in a long list of geological epochs dating back to the early Cambrian, 3800 million years ago. Each epoch has its own unique climate, ecosystems and flora and fauna. We are currently in the anthropocene because the earth’s surface, climate and biodiversity are being fundamentally affected by mankind. We are transforming and degrading the world’s soils and have degraded more than 40% of the world’s agricultural land, we have increased carbon dioxide levels from 280 parts per million (ppm) in the preindustrial era to 400 parts per million in 2013, and we have contributed to the largest mass extinction of species in 65 million years<sup>15</sup>. What about our impacts on water?

The first known irrigation systems were developed by the early Sumerians in Mesopotamia some 7,500 years ago. This began a process of replacement of *natural water systems* by man-made *water use systems*. In the last century, water use systems have extended across the globe, and global water withdrawals have increased from 580 km<sup>3</sup> in 1900 to 5,190 km<sup>3</sup> in 2000<sup>16</sup>. Agriculture accounts for 70% of this consumption: the global land area under irrigation increased from 100 million hectares in 1900 to 277 million hectares now<sup>17</sup>. Groundwater based irrigation accounts for 45% of world irrigation, mostly in arid areas, resulting in ‘hydrological debt’ or unsustainable groundwater abstraction levels: global groundwater depletion has increased from 126 km<sup>3</sup> to 283 km<sup>3</sup> between 1960 and 2010. Surface water is also being used at levels that undermine both sustainability and human rights: in a study of 424 major river basins, Hoekstra and Mekonnen found that environmental flow requirements were violated in 223 basins, implying that 2.67 billion people face severe water scarcity during at least one month of the year<sup>18</sup>. Although some 2 billion people have obtained access to safe water since 1990, and although there are still some 780 million people without access to safe water, clearly current large scale human interventions in water resources currently

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14 Committee on Economic, Social and Cultural Rights (2002): Substantive issues arising in the implementation of the international covenant on economic, social and cultural rights. General Comment no. 15: the right to water.

15 For more on this see the proceedings of the Planet Under Pressure conference, London, March 2012

16 McNEILL J.R (2000). An environmental history of the twentieth century. London: Penguin Press.

17 SANDRA POSTEL in Gleick (1993): Water in Crisis. A guide to the world’s water resources. Oxford: Oxford University Press.

18 HOEKSTRA, A. & MEKONNEN, M. (2012): The Water Footprint of Humanity. PNAS: February 28, 2012, vol. 109 no. 9.

undermine the continuity of access to water for basic human requirements and therefore infringe on the human right to water. The geographical concentration of water demand has also increased rapidly: during the second half of the 20<sup>th</sup> century world population grew by 150% but the world urban population by 300%. Many cities depend on groundwater for clean water but are also leaching pollutants into the groundwater. Most urban areas lose 25-35% to leakage & pollute heavily through inadequate sanitation and overloaded purification systems. Cities are increasingly claiming water resources of the hinterland. World industrial water use is expected to increase from 752 km<sup>3</sup> in 1995 to 1,170 km<sup>3</sup> in 2025. Industrialisation creates heavy pollution loads: some 300-500 million tonnes of heavy metals, solvents, toxic sludge, etc. are dumped untreated into waters every year<sup>19</sup>. As a result, the biodiversity of freshwater ecosystems has been degraded more than any other ecosystem. In addition, vegetation removal, urbanisation, river channelling, floodplain alteration, land use changes and climate change are destabilising river basins. In the last twenty years the number of flood related disasters for instance has increased by 230%<sup>20</sup>.

Although the human right to a healthy environment is still an evolving field, it is clear from the above that, in the words of the UN Independent Expert on the human rights obligations relating to the enjoyment of a safe, clean and healthy environment, “environmental degradation can and does adversely affect the enjoyment of a broad range of human rights, including rights to life, health, food and water”<sup>21</sup>. Current interventions in water resources carry grave risks for human health and often infringe on the human right to water. It would therefore seem evident that:

- States have the responsibility to take measures to protect citizens from exposure to toxic substances released into water bodies by agriculture, industries, mines and household wastes (including excreta and pathogens);
- States have the responsibility to take measures to protect citizens from floods;
- States have the duty to inform citizens of the risks to the health of present and future generations caused by the degradation, pollution and destabilisation of water resources;

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19 See [http://www.unwater.org/statistics\\_pollu.html](http://www.unwater.org/statistics_pollu.html)

20 UNEP (2012): Global Environmental Outlook (GEO) 5, chapter 4: Water. Nairobi: UNEP.

21 OHCHR (2012): Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, JOHN H. KNOX. Geneva: 22nd session of the Human Rights Council.

- The implementation of Integrated Water Resources Management, agreed on in Rio in 1992 and the WSSD in 2002 would seem to be an urgent priority to ensure the realisation of the human rights to water and sanitation.

It is important to note in this regard that the Independent Expert has argued that there is a ‘virtuous circle’ between procedural and substantive rights in respect of environmental governance in that free and effective participation of all concerned citizens in environmental decision-making, on the basis of appropriate access to information, results in better environmental protection and, as a consequence, greater protection of the human rights that may be threatened by environmental degradation.

#### **IV. The post-2015 consultations on water and sustainability**

The global consultations on the post-2015 goals for development and sustainability are structured around 11 thematic areas, of which water is one<sup>22</sup>. It is widely recognized, though, that water has a particular importance and that if it is appropriately governed, it can contribute substantially to the realization of all the other post-2015 goals. Perhaps not surprisingly, the consultation on Water that commenced in November 2012 has elicited a response larger than the response on all other ten topics put together<sup>23</sup>.

A key event from the point of view of water was a meeting convened on the post-2015 agenda consultation on water that was held in Geneva in the 27th and 28th of February 2013 and hosted by the Swiss government. This meeting aimed to produce an initial and brief discussion document, highlighting possible targets and indicators for a future water goal. At this stage three ‘streams’ were already identified within the topic of water, i.e.: Water, sanitation and hygiene; Water resources management; Wastewater management and water quality. The global consultations on water subsequently reached a critical phase in March, during World Water Day, when the Government of the Netherlands hosted both the World Water Day celebrations and the High Level Panel on the post-2015 Development Agenda. This event formally marked the submission of the main messages from the ‘World We Want’ thematic consultations on water to the UN High Level Panel. It resulted in a synthesis report that contains a group of ‘emerging recommendations’ for each of the above ‘streams’ within the thematic consultation on

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22 The eleven topics are: Conflict and Fragility, Education, Energy, Environmental Sustainability, Food Security, Governance, Growth and Employment, Health, Inequalities, Population Dynamics, and last but not least, Water.

23 See the Post-2015 Water Thematic Consultation Synthesis Report.

water. Although the debate is still continuing and the emerging recommendations are not set in stone, it would be nothing short of historic if goals on water resources management and wastewater management were indeed to be added to the post 2015 goals. This broadening of the subject matter of a water related goal would serve to substantially increase the emphasis on sustainability through management of water at the level of the resource and through consideration of issues related to water pollution.

How will these messages be integrated and translated into the post-2015 development agenda? In any case, the broadening of MDGs to wider thematic discussions and the large participatory processes are already a sign of the impacts of Rio+20 conference on the definition of the post-2015 development agenda. It remains to be seen to what extent the sustainable agenda (SDGs) will be integrated into the development agenda (MDGs). Of course there is a lot at stake in the process leading up to the discussion at the General Assembly in the autumn of 2013, as this could imply no less than a paradigm shift. The results from the thematic consultations and the first proposed goals over WASH, water resources, and wastewater management and water quality offer a good start to think the wider post-2015 sustainable development agenda. It is great news for the wider sustainable development agenda that the water discussions are so well organized and advanced: the way the human right to water and sanitation has been explicitly related to the ‘Big water’ issues is welcomed<sup>24</sup>.

## **V. Human rights and sustainable development**

In the run-up to the Rio+20 Summit, the Special Procedures mandate-holders of the Human Rights Council to States submitted an open letter on the links between human rights and sustainable development to states negotiating the Rio+20 outcome document. They jointly called on states to incorporate universally agreed international human rights norms and standards in the Outcome Document of the Rio+20 Summit with strong accountability mechanisms to ensure its implementation. Their main argumentation was procedural in nature, raising the question how decision-makers could be held accountable to the commitments made:

*“A real risk exists that commitments made in Rio will remain empty promises without effective monitoring and accountability. We offer proposals as to how a double accountability mechanism can be established. At the international level, we support the proposal to establish a Sustainable Development Council to monitor progress towards*

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<sup>24</sup> Water Thematic Consultation Report, April 2013, pp. 17, 18. available at <http://www.worldwewant2015.org/node/341163>

*the achievement of the Sustainable Development Goals (SDGs) to be agreed by 2015. We recommend building a mechanism based on the Universal Periodic Review of the Human Rights Council inaugurated in 2007 to provide a peer review of the human rights records of all 193 Member States of the United Nations every four years. At the national level, we recommend establishing participatory accountability mechanisms through which people's voice can be reflected and independent monitoring can be conducted''<sup>25</sup>.*

The key proposals in this letter included the strengthening of the institutional framework for sustainable development, arguing in support of the scientific community that the urgency of the world's current environmental problems required a 'constitutional moment' similar to that which led to the establishment of the Bretton Woods institutions. The letter argued that the stark increases in natural disasters, food and water security problems and biodiversity loss provide evidence that humanity may be crossing planetary boundaries and approaching dangerous tipping points, and that an effective environmental governance system needs to be instituted as a matter of urgency. In this light the letter supported the idea to establish a Sustainable Development Council to oversee the implementation of the Sustainable Development Goals (SDGs) and recommended a mechanism built on the Universal Periodic Review system of the Human Rights Council to provide periodic peer review every four years. Because the actual implementation of the UNCED commitments from 1992 on biodiversity, desertification, land degradation and climate change is limited, and because biodiversity loss, climate change and land degradation hold the threat of irreversibly damaging societies, destabilising economies and multiplying natural disasters, developing legal mechanisms to hold governments to their environmental commitments and clarify the roles of non-state actors is no luxury.

In a similar vein, Rio+20 was unique in that for the first time ever, national Supreme Court Judges were assembled to review environmental commitments from a legal perspective. Organised by UNEP, the World Congress on Justice, Governance and Law for Environmental Sustainability was held in Brazil, from 17-20 June 2012, with the aim to contribute to the support of Chief Justices, Attorneys General, Auditors General and other legal experts to the achievement of sustainable development and to provide inputs to the United Nations Conference on Sustainable Development Rio+20. In a joint

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25 Office of the United Nations High Commissioner for Human Rights (2012): If Rio+20 is to deliver, accountability must be at its heart. Geneva: OHCHR.

Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability the group asserted that<sup>26</sup>:

- Without adherence to the rule of law, without open, just and dependable legal orders the outcomes of Rio+20 will remain unimplemented;
- An independent Judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and members of the Judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental law;
- Environmental law is essential for the protection of natural resources and ecosystems and reflects our best hope for the future of our planet;
- Environmental litigation often transcends national jurisdictions, therefore more effective national and international dispute settlement systems are needed for resolving conflicts.

International environmental law and human rights are becoming ever more interconnected. Human rights, especially their procedural aspects, that is the right to access to information, participation and remedy, have increasingly found their way into environmental law (e.g. UNCED Principle 10<sup>27</sup>). These principles were further codified in the 1998 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention). The Committee on Economic, Social and Cultural Rights in General Comment 15 on the ‘human right to water’ also defines state obligations relating to these rights:

*“The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy,*

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26 UNEP (2012): Joint Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability. World Congress on Justice, Governance and Law for Environmental Sustainability, Brazil, 17-20 June 2012.

27 United Nations Conference on Environment and Development (1992): Rio Statement, principle 10: *Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*

*programme or strategy concerning water. Individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties.” (GC 15 §48)*

Interestingly, a recent pending case before the Compliance Committee of the UNECE Aarhus Convention raises the question of the nature of private water services providers’ obligations relating to disclosure of environmental information. The delimitation between what is strictly related to drinking-water services and what concerns water resources management may indeed become tricky in some situations. In this regard, access to information, participation and access to justice as recognized in international environmental law may directly contribute to the realization of the human right to water.

## **VI. Human rights and water resources management**

Environmental sustainability is an integral part of the human right to water. The human right to safe drinking-water of current generations has a direct implication for water resources and sanitation management: the protection of water resources as *sources* of drinking-water<sup>28</sup>. One of the legal bases for the human right to water is the human right to health (article 12 of the International Covenant on Economic, Social and Cultural rights). Departing from the right to health, the Committee on economic, social and cultural rights in its General comments 15 points to the need for states to take steps to prevent threats to health from a range of malpractices in the water field.

And although the human right to water and sanitation focuses largely on domestic water supply and sanitation issues, it has far reaching implications in the realm of water resources management. General Comment no. 15 is replete with references to ‘upstream’ requirements that need to be fulfilled in order to give effect to the RTWS. Some examples are given here.

For instance, in its introductory paragraph, General Comment no. 15 declares that water is a limited natural resource and that “the continuing contamination, depletion and unequal distribution of water is exacerbating existing poverty”<sup>29</sup>. Clearly this opening links, at the outset, poverty to the current state of water resources, and provides a preamble to the clarifications that follow;

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28 WaterLex Declaration on International Water Law Commitments derived from Human Rights Obligations, 2012. Available at: <http://waterlex.org/waterlex/fr/news/archives-des-news/212-waterlawdeclaration>.

29 See CESCR (2002): General Comment no. 15, Op. Cit.

Next, paragraph 6 places the right to water in the context of the multiple uses of water, emphasising other uses of water that are central to the realisation of ICESCR rights such as the need to produce food (right to food), the need to ensure environmental hygiene (right to health), the importance of water in securing a livelihood through work (right to gain a living through work), and the right to engage in certain cultural practices (right to take part in cultural practices). Importantly, it states that despite these multiple uses, priority of allocation should be given to the fulfilment of the right to water for personal and domestic purposes. Also, it states that priority should be given to the allocation of water needed to prevent starvation and disease. Here, there is a direct impact on water resources management in that a hierarchy of allocation is clarified that limits or places conditions on the scope for water licensing in any given area. Similarly, paragraph 7 states that a people should not be deprived of its means of subsistence and therefore states should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples. This note on balancing competing needs for water offers normative authority on Chapter 18 of Agenda 21, the agenda for sustainable water resources management adopted at the United Nations Conference on Environment and Development in Rio in 1992.

Furthermore, departing from the right to health, paragraph 8 points to the need for states to take steps to prevent threats to health from unsafe or toxic water conditions. These include the need for states to protect water resources from being polluted by harmful substances and pathogens, as well as the monitoring and control of areas where waterborne diseases could be spread.

Paragraphs 10 and 11 refer to the right to sustained access, by pointing to the right to be free from arbitrary disconnections or contamination as well as the right to the *sustainable* realisation of the right to water for present and future generations.

Paragraph 12 defines the adequacy of water in terms of availability, quality and accessibility as mentioned in section 3 above. These criteria place strict demands on water resources management, requiring supply to be continuous, free from pollutants and accessible for all. They also require full information accessibility by communities on issues related to water supply. At this point procedural rights become an important issue, as interventions in watercourses that affect communities can be analysed from the point of view of the access to information and the degree of participation of communities in water projects affecting them or their access to water. Where in the past NGOs campaigned for the legal recognition of notions such as Free Prior Informed Consent and encountered difficulties in getting these concepts accepted by those

investing in large scale water infrastructure such as dams were difficult, General Comment no. 15 contains similar provisions such as paragraph 56 that states that

*“Before any action that interferes with an individual’s right to water is carried out by the State party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and that comprises: (a) opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies”<sup>30</sup>.*

Clearly, given the number of countries that have ratified ICESCR, this provides great opportunities for the improvement of the governance of water infrastructure by opening the door to participatory and accountable decision-making in a sector often troubled by corruption, opaque decision-making, unsustainable investments and inadequate compensation for loss of property and livelihoods<sup>31</sup>.

Paragraph 13, for its part, establishes a clear baseline for the equitable distribution of water. It does so in the first instance by emphasising the fact that the right to water should be enjoyed without discrimination on the grounds of race, colour, sex, age, language, religion, etc. This aspect of the RTWS places a responsibility on investors in water infrastructure to avoid falling into the trap of reaching for the low hanging fruit by investing in areas where payment for services carries a reasonable guarantee, and to proactively seek means to reach out to the vulnerable and the marginalised. Non-discrimination, by definition, then, requires a pro-poor focus.

In the second instance, paragraph 13 points to the need to protect the access of vulnerable communities to water even in times of severe resource constraints. This falls under the obligation of states to **protect** the right to water, i.e. that the state should act to prevent third parties from interfering with the enjoyment of the right to water. This requires practical measures at catchment level to ensure a continued flow of water for basic needs purposes. An example of this kind of measure was piloted in South African legislation, which provides for a ‘basic needs reserve’ that needs to be maintained in a catchment over and above water abstraction licenses for economic purposes such as irrigation and mining. Paragraph 14 continues this argument by stating that

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30 Ibid.

31 See for instance Transparency International (2008): *Corruption in the Water Sector*. Cambridge: Cambridge University Press.

*“States parties should ensure that the allocation of water resources, and investments in water, facilitate access to water for all members of society [...] investments should not disproportionately favour expensive water supply services and facilities that are often accessible only to a small, privileged fraction of the population”<sup>32</sup>*

The obligation to protect the right to water extends to the duty to proactively restrain third parties from interfering in the enjoyment of the right to water. In terms of paragraph 23, the obligation to protect includes “adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying access to adequate water, and polluting and inequitably extracting from water resources”<sup>33</sup>.

Apart from the obligation to protect the right to water, states also have the duty to **respect** and **fulfil** it. Under the obligation to fulfil, paragraph 28 is replete with criteria that are designed to ensure the sustainable management of water resources:

*“States parties should adopt comprehensive and integrated strategies to ensure that there is sufficient and safe water for present and future generations. Such strategies and programmes may include: (a) reducing depletion of water resources through unsustainable extraction, diversion and damming; (b) reducing and eliminating contamination of watersheds and water related ecosystems by substances such as radiation, harmful chemicals and human excreta; (c) monitoring water reserves; (d) ensuring that proposed developments do not interfere with access to adequate water; (e) assessing the impacts of actions that may impinge upon water availability and natural ecosystems and watersheds such as climate changes, desertification and increased soil salinity, deforestation and loss of biodiversity; (f) increasing the efficient use of water by end users; (g) reducing water wastage in its distribution; (h) response mechanisms for emergency situations; (i) and establishing competent institutions and appropriate institutional arrangements to carry out the strategies and programmes.”<sup>34</sup>*

Clearly, a human rights approach offers not only minimum standards with regard to water and sanitation services but also provides a range of norms for sustainable water resources management

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32 See CESCR (2002): General Comment no. 15, Op. Cit., art. 14.

33 Ibid, art. 23.

34 Ibid, art. 28.

## VII. Human rights, water allocation, and water efficiency

A human rights-based governance of water is not limited to the human right to drinking-water and sanitation, but also in securing access to water resources for other human rights, such as the right to food. In addition, human rights-based water governance implies that human rights are both an end and a means for water governance: the human right to water for instance is in place to ensure access to water for drinking, hygiene and cooking. However, the access to water for drinking, hygiene and cooking is also a means to the realisation of other rights, such as the right to health, the right to food, etc. Thus on the right to food, in interpreting the ‘right to water’ in the overall context of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Committee specifies States’ obligation relating to access to water resources derived from the International Covenant states that:

*“The committee notes the importance of ensuring sustainable access to water resources for agriculture to realize the right to adequate food (see 1999 General Comment n°12). Attention should be given to ensuring that disadvantaged and marginalized farmers, including women farmers, have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology” (GC 15 §7).*

The Committee further explains:

*“Taking note of the duty in article 1, paragraph 2, of the Covenant, which provides that a people may not ‘be deprived of its means of subsistence’, States parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihood of indigenous peoples.”(GC 15 §7)*

Clearly, therefore, decisions need to be taken at the level of water resources management to guarantee and interrelated set of human rights such as the right to sufficient and safe water, the right to sanitation, and the right to food. In the allocation of water over various competing uses, allocations for the realisation of such human rights take priority over other categories of water use by virtue of the priority accorded to human rights law over other forms of law. Furthermore, since these rights apply not only to present generations but also to future generations, the water utilisation of present generations may not compromise the rights of future generations to enjoy the right to water, the right to food, etc. This introduces the issues of environmental sustainability into water resources management and brings the renewability of freshwater into the heart of human rights law. Ensuring water allocations for ecosystems maintenance is not just a necessity from the point of view of environmental conservation, it is a cornerstone

of intergenerational equity and is therefore essential from the point of view of human rights law. It follows from the above that the point of departure for water resources management, before giving consideration to other allocations of water, should be to ensure access to water and sanitation, to ensure subsistence food production, and to maintain the renewability of the resource by ensuring that catchment areas continue to perform their key hydrological functions.

Does this stand in the way of economic growth? Do human rights impose an inflexible system upon water resources management in such a way as to undermine the efficiency of market processes? Historically, various forms of water allocation systems have been adopted at the national level. These include prior appropriation systems, which accord rights of water use in the order in which claims were historically made to water courts, riparian systems, which accorded water abstraction rights to water users owning land adjacent to a water source, market systems which enable the transferability of water abstraction permits through their sale, and public water allocation mechanisms whereby the state issues water abstraction licenses. Over time, as water demands have become greater, the exclusive rights of prior appropriation and riparian rights holders has been modified to allocate water to new claimants such as growing cities and towns. In this process the role of the state has grown, but it has historically been state planned water allocation in the interests of balanced economic growth, allowing for the growth of emerging economic sectors such as industry, mining, and services. However this economic growth did not incorporate the true social and environmental costs into the price of water, and it became possible for instance for polluting industries to pass on the costs of water purification to downstream recipients. In a green economy, these costs are either internalised into the production process, or the waste stream is treated as a source of revenue from biogas, phosphorous extraction, compost, etc. And in many case this green economy is vibrant and highly competitive. For instance, the market for organic produce is growing as fast as the Chinese economy. Equity and efficiency in water uses are also heavily influenced by other – not-water specific- policies: food prices, agricultural and industrial subsidies or trade and investment policies. While aiming at water efficiency, policy-makers should not overlook the following aspects: first, water efficiency does not necessarily mean water sustainability. Second, one needs to pose the question: what is the ultimate goal of water efficiency?

## VIII. Conclusion

In this article we reviewed the post-2015 debate on the Millennium Development Goals and Sustainable Development Goals from a human rights perspective. In doing so we focused specifically on a human rights approach to water governance in order to establish to what extent human rights have a role to play in water governance after 2015.

We conclude that the human rights framework offers ample guidance for a more coherent and accountable water governance at all levels. At both the international and national levels, the role of human rights is rapidly expanding – in the UN system, in international cooperation, in the globalisation of democracy. This is linked to environmental protection for instance through the embedding of the human right to healthy environment in more than 100 constitutions. During the period in which the Millennium Development Goals were being implemented, a revolution took place in the way in which water and sanitation are approached through the recognition of water and sanitation as human rights. Therefore the post-2015 framework cannot approach water and sanitation in the same way as before: human rights need to take centre stage.

In the current post-2015 debate, the thematic area of water has undergone significant expansion to include water resources management and wastewater treatment sustainable water management, providing a further anchor for sustainability in the water governance field. From the point of view of human rights and sustainable development, we witness for the first time a strong contribution from the legal field to sustainability, emphasising the role of law in ensuring accountability for the environmental commitments made by governments and supporting new forms of institutional development that can solidify progress on sustainability. We see that although the human right to water and sanitation aims predominantly at the domestic sphere, General Comment 15 has far reaching consequences for water resources management. And in the broader realm of water rights for production, there appears to be no reason to expect that human rights guarantees will have a negative effect on water efficiency.

# **Upcoming Challenges for the Governance and Regulation of Eater Services in 2013**

## **Policy, Law and Economics of Sustainability in the Time of the Economic Crisis**

*Daphne Von Buxhoeveden – Pál Belényesi\**

*The view of the authors does not represent the official opinion of the European Commission.*

### **I. Introduction**

Freshwater constitutes less than 3% of global water, but with continuing trends a 40% water shortage is envisaged by 2030<sup>1</sup>. Water problems are apparent in Europe, yet represent a different threat to the member states<sup>2</sup>.

The water sector is subject to more comprehensive and far reaching EU environmental regulation than any other sector, and is regarded by many as the “jewel in the crown” of European environmental policy<sup>3</sup>. Yet, waters in the EU are still far from achieving the environmental quality and sustainable economic objectives set in EU law.

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1 Proposal for a Decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2020 “Living well, within the limits of our planet”. [the “Proposal”] COM(2012) 710 final, p. 11.

2 See the Member States’ RBMPs.

3 The Economists; Economist Intelligence Unit; “EU Economy, water worries” (2007)

This means that water services are still ineffectively organized in Europe. When organizing water services economic competition, public service character and market mechanisms are equally important. In spite of the more and more manifest regulatory fiddles in Europe, a light handed approach has neither led to a significant development in water services nor to more cost based pricing and more efficient delivery of the services.

Challenges in the water sector are interlinked with competitiveness, resource efficiency, economic growth and the well being of consumers. Topping the urgent needs to reform the sector, the economic crisis halts innovation: the water sector in Europe counts 600,000 jobs only in the utilities, plus cca. 9,000 active Small- and Medium sized Enterprises.<sup>4</sup> This makes it difficult to effectively regulate and raise efficiency of water service provision.

We look at how policy considerations are interlinked at different international levels and how economics should play a much stronger role in these considerations. By doing this, we focus on the specific challenges in 2013 and after.

## **II. New challenges**

The issue of water, water regulation, climate change and the economics behind them is a much-loved subject of conferences and corridor talks in international institutions nowadays. The initial steps in this direction were taken a long while ago and now the rising challenge is no longer which institution will take the lead and where it is best to gather expertise. It is to see how the numerous – and sometimes diverging – interests and policy ideas will be streamlined.

Can the United Nations' specialized bodies work something out with respect to sustainable development, while the developing countries continue to advocate for continuing subsidies and less strict measures on their schedule to catch up? Can the European Union powerfully enforce its Water framework directive? Will the member states live up to the expectation and truly introduce economics based pricing of water services in order to preserve the ecosystem? These are the core policy related questions in 2012 and will continue to be so in 2013.

According to a recent comment by scholars, *“The overwhelming task of regulation is to mediate between the high expectations of society, with equally high reluctance to allow*

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4 A Blueprint to Safeguard Europe's Water Resources, COM(2012) 673 final.

[http://ec.europa.eu/environment/water/blueprint/pdf/COM-2012-673final\\_EN\\_ACT-cov.pdf](http://ec.europa.eu/environment/water/blueprint/pdf/COM-2012-673final_EN_ACT-cov.pdf)

*a reasonable price.*”<sup>5</sup> From the market’s point of view, the pertinent problems continue to be whether consumer empowerment can have an effect on market mechanisms and economic regulation of the markets and service providers, while maintaining the public service function of water supply. In other words, choice and low prices continue to combat efficient use of water and praiseworthy pricing of the ecosystem.

In our paper we will look at two distinct issues: the policy debates of recent water regulation both worldwide and in the EU, and the economics behind sustainable water pricing. These two issues, in our opinion are strongly interlinked and the failure of international negotiations or regional regulation is to be found principally in the lack of credible implementation mechanisms that use sound economics when establishing water legislation, including sustainable water quality standards. We argue that the very recent EU developments in this field are promising but a stricter application of economic principles is required. We also point out that 2013 will be a crucial year both internationally and regionally. The success of the coming year will depend on how policies are streamlined among the key players and on the role given to economisation of water.

## **II.1. Water policy – the key players in policy making in 2012 and beyond**

### *II.1.1. The United Nations Friends of Water Steering Committee*

Although (access to) water is a human right, it has also an important role in the economy, partly as an input sector and partly because of its economic value, which is paid for even if it is not recognized by international organizations. If the characteristics of this human right, property rights and the economic value of water are not well defined, we may soon face a situation when competing rights will fight for the ever more restricted amount of water and individual states and neighbouring countries will argue over these rights of individuals (societies) and the rights of market players.

The UN Friends of Water group is a steering committee (an extending community of countries and other stakeholders) within the General Assembly of the United Nations. The group is coordinated by Hungary, Tajikistan, Thailand and Finland. The Committee’s work was reinvigorated in early 2012. It then briefed the Secretary-General for the Rio+20 United Nations Conference on Sustainable Development in June

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<sup>5</sup> Regulating water and sanitation for the poor. Economic regulation for public and private partnerships. Ed.: R. FRANCEYS AND E. GERLACH. Earthscan, 2008., p. 17.

2012<sup>6</sup>. The work of the group has also been endorsed by Ms Catarina de Albuquerque, Special Rapporteur on the human right to safe drinking-water and sanitation. The group tries to mitigate the diverging approaches of the member states of the UN for water related sustainability issues in the world<sup>7</sup>.

This can put international environmental arbitration to the test and can also create fierce neighbouring relations between countries.

### *II.1.2. United Nations Conference on Sustainable Development, Rio+20<sup>8</sup>*

The conference held in Rio de Janeiro on 20-22 June 2012<sup>9</sup> proved to be rather meaningless. With the outcome document “The Future We Want”<sup>10</sup> the assembly produced a highly political document of endless pages with little hands-on results. Perhaps, the only direct impact already in short terms can be given to the fact the United Nations Environmental Program has been strengthened.

On one hand, water became part of health, biodiversity, food security and sustainable agriculture<sup>11</sup>, and on the other hand it was highlighted in six points of the total 283, without any economics factors being included in the considerations<sup>12</sup>.

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6 <http://www.uncsd2012.org/>

7 One of the authors of this article, PÁL BELÉNYESI, has been a pro bono adviser to the Ambassador of Hungary on water related matters since January 2012.

8 An extensive UN report is available here:

<http://www.uncsd2012.org/content/documents/814UNCSD%20REPORT%20final%20revs.pdf>

9 The conference was established by the General Assembly Resolution of 64/236 of 24 December 2009. 10 A/RES/66/288

11 Point 109 of the “The Future We Want” document.

12 Extract from “The Future We Want” document of the United Nations. “*Water and sanitation 119. We recognize that water is at the core of sustainable development as it is closely linked to a number of key global challenges. We therefore reiterate the importance of integrating water in sustainable development and underline the critical importance of water and sanitation within the three dimensions of sustainable development. 120. We reaffirm the commitments made in the Johannesburg Plan of Implementation and the Millennium Declaration regarding halving by 2015 the proportion of people without access to safe drinking-water and basic sanitation and the development of integrated water resource management and water efficiency plans, ensuring sustainable water use. We commit to the progressive realization of access to safe and affordable drinking-water and basic sanitation for all, as necessary for poverty eradication, women’s empowerment and to protect human health, and to significantly improve the implementation of integrated water resource management at all levels as appropriate. In this regard, we reiterate the commitments to support these efforts, in particular for developing countries, through the mobilization of resources from all sources, capacity-building and technology transfer. 121. We reaffirm our commitments regarding the human right to safe drinking-water and sanitation, to be progressively realized for our populations with full respect for national sovereignty. We also highlight our commitment to the 2005- 2015 International Decade for Action, “Water for Life”. 122. We recognize the key role that ecosystems play in maintaining water quantity*”

Though the different headlines of the conference – and its reporting<sup>13</sup> – may have created the false impression that the conference has achieved great results and all is under way for the accomplishment of the millennium development goals, its real outcome remains highly doubtful. For water related issues, it seems that the UN has only realized that much more needs to be completed.

### *II.1.3. UN Water conference, Budapest, October 2013*

In June 2012 the Rio+20 UN Conference confirmed the importance of water in sustainable development. In the overarching development policy framework – laid down by the Rio+20 outcome document “The Future We Want” – water as horizontal issue was inseparably linked to the main priority areas identified for global action. Water and the related ecosystems are to be managed in an integrated and sustainable manner in view of their role in supporting economic, social and human development. Yet, while fulfilling basic human needs, the management of these resources should also help to preserve the ecosystem and finance their regeneration.

Hungary, as one of the hosting members of the Friends of Water SC events at the UN, has taken up the duty to organize a water summit in Budapest in October 2013. This event will form part of the UN International Year of Water Cooperation, which is led by the UNESCO<sup>14</sup>.

The conference aims to take stock of the developments in the preparation of water-related sustainable goals under the Rio+20 agenda. It is hoped that besides the usual policy-driven and highly compromised talks, the conference will present practical solutions in an affordable and accessible manner to all. Therefore the ever more important consensus-building nature of the conference is pertinent. It is imperative that

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*and quality and support actions within respective national boundaries to protect and sustainably manage these ecosystems. 123. We underline the need to adopt measures to address floods, droughts and water scarcity, addressing the balance between water supply and demand, including, where appropriate, non-conventional water resources, and to mobilize financial resources and investment in infrastructure for water and sanitation services, in accordance with national priorities. 124. We stress the need to adopt measures to significantly reduce water pollution and increase water quality, significantly improve wastewater treatment and water efficiency and reduce water losses. In order to achieve this, we stress the need for international assistance and cooperation.”*

13 See, in particular: J.C. DERNBACH, The Unfinished Story of the Rio Plus 20 Conference. Widener Law School Legal Studies Research Paper Series NO 12-18. Daily Environment Report, 194 DEN B-1, 10/09/2012.

14 See General Assembly Resolution A/RES/65/154. Available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/65/154](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/65/154)

the participants find solutions for the financing of the sustainable development goals, at least as much as they related to water.

The question remains whether Hungary will be able to combine the leading European developments with high-level UN policy issues. In other words, will the small European country show leadership in how to present regional best practices when the occasion is timely?

#### *II.1.4. Water related developments in the European Union*

Despite the fact that the EU has adopted the Water Framework directive in 2000<sup>15</sup>, a so far lengthy procedure has hardly produced the expected results<sup>16</sup>.

According to the European Environment Agency's (EEA) State of Water Report<sup>17</sup>, and the Commission's assessment of the River Basin Management Plans of the Member States, the target of 2015 for the good status of the EU waters is to be achieved in 53% of the total EU waters<sup>18</sup>. This is half of what was planned in the timeframe of 15 years: hardly a promising result.

The EU needs to focus on green growth and become more resource efficient (including water) to achieve a sustainable recovery from the current economic and environmental crisis, and to adapt to climate change. These pressures are complemented by the effects of agricultural use of water, tourism and urbanisation.

The EEA's assessment<sup>19</sup> points to the rising challenges, namely to water pollution and *excessive water use*. While the first is purely an environmental problem, the latter is undoubtedly linked to market regulation and the economisation of water services. In this respect, one of the central conclusions of this document is that though essential and finite, the water related services are not accounted for in financial systems, in other words, they are priceless. Industry, agriculture and personal use is not efficient in Europe, scarcity is caused by excessive and uncontrolled human use of water resources.

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15 Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for Community action in the field of water policy. OJ L327, 22.12.2000.

16 Perhaps it is more accurate to say that developments are noticeable but they are the results of the range of environmental directives since the 1970s rather than the exponential internal water control measures since the adoption of the WFD.

17 Detailed status reports are available here: <http://www.eea.europa.eu/themes/water>

18 See also: COM(2012) 673

19 European waters- current status and future challenges. European Environment Agency, EEA Report No 9/2012. <http://www.eea.europa.eu/publications/european-waters-synthesis-2012>

According to the report's broad-line recommendations, the pricing structure of water use and domestic metering should be reconsidered. As agricultural use leads to the most exceeding use of water, the report also proposes that the possibility of linking agricultural subsidies to water efficiency standards should be entertained.

The report points out that *“In order to be environmentally effective, efficiency measures need to avoid any ‘rebound effect’, where the increased efficiency of resource use actually encourages greater overall use of that resource because the efficiency gain makes that resource relatively cheaper to use. (...) Efficiency measures need to ensure the maintenance of the natural capital. (...) the Water Framework Directive and the Blueprint provide the key elements to guide water efficiency measures in this direction in other policy areas, such as agriculture, renewable energy, regional development, or green transport.”*<sup>20</sup>

#### *II.1.5. The Commission's proposal for the 7<sup>th</sup> Environmental Action program*

The European Commission has recently submitted its legislative bid for the 7<sup>th</sup> Environmental Action Program (EAP)<sup>21</sup>. This proposal is yet to be adopted by the Council and the Parliament, and to be fitted in the multiannual financial framework<sup>22</sup>. Nevertheless, its policy messages are valuable.

As the document emphasizes, the EAPs have been the flagship initiatives of the European Commission in the field of environmental policy since the seventies. At present, since the expiration of the 6<sup>th</sup> EAP, the EU is without a sound environmental policy document. This might echo neglectfully, it is important to note that the EAPs guided several benchmarking events in the history of European environmental regulations<sup>23</sup>, especially in the field of air contamination, water and bathing water pollution<sup>24</sup>, sustainable development, and everything in general until the mid-eighties,

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20 EEA Report, point 4.1.2., p. 40.

21 Proposal for a Decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2020 “Living well, within the limits of our planet”. [the “Proposal”] COM(2012) 710 final.

22 Status of 15 January 2013, when the paper was submitted.

23 For example, the first EAP laid down the basic principles of Environmental policy in the EU. See: 1st Environmental Action Programme, 1973-1976. OJ C 112, 20.12.1973

24 Though, according to the Proposal, “water quality and air pollution levels are still problematic in many parts of Europe”. See: Proposal, p. 11.

when the Treaty of Rome has been patched with the environment chapter as part of the modernisation of the Single European Act<sup>25</sup>.

The Commission's proposal that the EU should align its related policies with the Rio+20 goals and global dimensions, especially, given that the current economic crisis has presented us with the opportunity to structurally reform our parsimonies towards a greener and more sustainable future<sup>26</sup>. This points in the direction that the price of the ecosystems – and water –, in other words, the stable framework of ecological economics should be defined and implemented EU-wide. Ecosystem-based approaches do not only mean the priceless reservation of the ecosystem services, but also the economisation and public nature of resources. *“Resource efficiency in the water sector will also be tackled as a priority to help deliver good water status.”* – concludes the proposal.<sup>27</sup> In addition, the Commission's plan declares that market more stable based mechanisms, in particular, water pricing should be introduced. This is needed in order to reflect the true value of water. From a critical point of view, there is nothing new here, Article 9 of the Water Framework Directive already advocated for this.

The EAP proposes the alignment of sectorial policies in the field of water sustainability and environmental protection.<sup>28</sup> Governmental action and public support are also proposed for the achievements of these objectives<sup>29</sup>. Yet, we warn that continuing public spending on environmental related issues and the recovery from the economic crisis may be a helpful and unpopular exercise and one must not lose sight of the true goals. The European Innovation Partnership of Water – as a new form of public private partnerships in the EU – could be one of the new business models, provided that the details reflect the true purpose<sup>30</sup>.

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25 See articles 130r-130s together with the 4th EAP. 4th Environmental Action Programme, 1987-1992. OJ C 328, 7.12.1987.

26 *“This EAP aims to step up the contribution of environment policy to the transition towards a resource-efficient, low-carbon economy in which natural capital is protected and enhanced, and the health and well-being of citizens is safeguarded. The programme provides an overarching framework for environment policy to 2020, identifying nine priority objectives for the EU and its Member States to attain.”* See: Proposal, p. 2.

27 See: p. 19 of the Proposal.

28 See p. 16 of the Proposal.

29 *“Government action, at Union and Member State level, is essential to provide the right framework conditions for eco-innovation, stimulating the development of sustainable business or technological solutions to environmental challenges.”* See: Proposal, p. 17.

30 This is reflected in priority objective 2 of the Proposal: *“Improving water efficiency by setting targets at river basin level and using market mechanisms, such as water pricing.”*

### *II.1.6. A blueprint to safeguard Europe's waters*<sup>31</sup>

The Blueprint is based on a wealth of information and analysis including the EEA State of Water report<sup>32</sup>, the Commission assessment of the Member States River Basin Management Plans (RBMPs) and Review of the Policy on Water Scarcity and Droughts<sup>33</sup>, and the Fitness Check of EU Freshwater Policy<sup>34</sup>.

The Blueprint is not an ordinary Commission in-house document: it is based on extensive public consultations both in the framework of its development and under the Fitness Check which has involved the general public, stakeholders, Member States as well as other EU institutions and bodies<sup>35</sup>.

The document, in line with the principle of subsidiarity, does not propose a one-size-fits-all solution. Amongst others, it emphasises key themes such as: water pollution treatment, increasing water efficiency and resilience, and improving governance by those involved in managing water resources. It also suggests better implementation and increased integration of water policy objectives into other policy areas, while restricting over-extraction of water.

In order to enhance the objectives – which were actually presented to the member states already in 2000 – and remedy the failures, the Commission proposes a series of measures and actions to be taken as of 2013. Unfortunately, these are usually measures which involve strong member state participation. The authors are of the view that this

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31 For detailed information, see: [http://ec.europa.eu/environment/water/blueprint/index\\_en.htm](http://ec.europa.eu/environment/water/blueprint/index_en.htm). A Blueprint to Safeguard Europe's Water Resources. Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the committee of the regions. COM(2012) 673 final

32 <http://www.eea.europa.eu/themes/water/publications-2012>

33 Commission report on the Implementation of the Water Framework Directive (2000/60/EC) – River Basin Management Plans, and Commission Communication on the Report on the Review of the European Water Scarcity and Droughts Policy, adopted together with this Blueprint

34 Commission Staff Working Document on the Fitness Check of EU Freshwater Policy

35 European Parliament resolution of 3 July 2012 on “The implementation of EU water legislation, ahead of a necessary overall approach to European water challenges”, available at:

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0273&language=EN&ring=A7-2012-0192>.

See also the opinion of the Committee of the Regions (30 June 2011) on “The role of local and regional authorities in sustainable water management”;

[http://www.toad.cor.europa.eu/ViewDoc.aspx?doc=cdt%5cenv-e-v%5cdossiers%5cenv-e-v-008%5cEN%5cCDR5-2011\\_REV2\\_PAC\\_EN.doc&docid=2770279](http://www.toad.cor.europa.eu/ViewDoc.aspx?doc=cdt%5cenv-e-v%5cdossiers%5cenv-e-v-008%5cEN%5cCDR5-2011_REV2_PAC_EN.doc&docid=2770279); and the opinion of the European Economic and Social Committee (15 June 2011) on the “Integration of water policy into other EU policies” <http://www.eesc.europa.eu/?i=portal.en.nat-opinions.18788>

could have a negative effect on rigorous implementation and hands-on results due to the shown reluctance of the member states so far.

## **II.2. The Economics behind Water Pricing**

There are many different ways to promote equity, efficiency and sustainability in the water sector and water pricing is probably the simplest conceptually, but maybe the most difficult to implement politically. According to the Commission's Blueprint<sup>36</sup>:

“Pricing is a powerful awareness-raising tool for consumers and combines environmental with economic benefits, while stimulating innovation.”<sup>37</sup>

Without taking sides and advocating for a specific pricing formula, this section focuses on the role of pricing in the water sector, in particular in terms of the concept of recovery of costs.

The problem faced by the water sector is that prices and tariffs are almost universally below the full-cost of supply. This means that almost everywhere there are large inefficiencies in the water sector and that water prices need to be raised.

The realisation of the above has led to the inclusion of the concept of “Recovery of costs for water services” into the principle EU legislation<sup>38</sup>. Article 9 “[...] requires member states to price water services at their full economic costs”. This is considered to be essential as it acts as a helpful incentive for the sustainable use of water resources and allows the environmental objectives of the WFD to be better achieved.

Pricing water at full economic costs derives from the ‘Polluter Pays’ Principle found in Article 174(2) EC, which aims at preventing and remedying environmental damage while maintaining the principle of common responsibility. Applied to the water context this means that the costs of pollution or environmental externalities should be “internalised” into the production costs of the firms concerned and eventually reflected in the price charged to the end user.

Before analysing the concept of ‘full economic costs’, a few key concepts of pricing theory are briefly outlined below.

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36 European Commission; Com (2012) 673 final , “A blueprint to safeguard Europe’s water resources”; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0673:FIN:EN:PDF>

37 European Commission; Com (2012) 673 final , “A blueprint to safeguard Europe’s water resources”; p. 10.; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0673:FIN:EN:PDF>

38 Article 9 of the Water Framework Directive (Directive 2000/60/EC)

### *II.2.1. Price elasticity of demand*

As is well established in classical economic theory<sup>39</sup>, total costs can only be passed on to the end user if demand is inelastic.

Price elasticity of demand in turn is defined as the change in the quantity demanded with respect to a change in the price of the environmental asset. It is given by the formula<sup>40</sup>:

$$p = \frac{\% \Delta Q}{\% \Delta P} \quad \text{– where } P \text{ is price and } p \text{ is the price elasticity.}$$

According to the recent OECD study<sup>41</sup>, the price elasticity of demand ranged from a low of -0.27 for Norway to a high of -0.59 for Italy, while the average price elasticity across the entire sample was -0.43<sup>42</sup>.

This means that a 10% increase in the average water price across households lowers urban water use in the OECD by about 4.3%. Thus, the higher the average volumetric price of water, the lower household water consumption. While in terms of economic efficiency this can be considered as consumers marginally readjusting their demand to the optimal levels, raising prices can also be regressive and therefore seen as reducing equity.

Volumetric charges were found to be the most important cause of respondents undertaking water saving behaviours such as: turning off the water while brushing teeth, taking a shower instead of a bath, watering the garden in the coolest part of the day, and collecting rainwater and recycling wastewater.<sup>43</sup>

An additional difficulty faced by the pricing mechanisms is that price elasticity, when considering non-domestic water users such as industry and/or agricultures, usually loses its inelasticity<sup>44</sup>, i.e. demand does not adjust effectively.

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39 ALFRED MARSHALL is credited with defining PED (“elasticity of demand”) in his book *Principles of Economics*, Macmillan and Co., 1890.

40 Parkin, Michael; Powell, Melanie; Matthews, Kent, *Economics*. Harlow: ADDISON-WESLEY, 2002. pp. 74-75.

41 PROF. M. WARD; *Managing residential water demand in OECD*; *Economics – Urban Water*; 2012; <http://www.globalwaterforum.org/2012/01/16/managing-residential-water-demand-in-the-oecd/>

42 Out of the 10 countries surveyed 5 were EU member states.

43 PROF. M. WARD; *Managing residential water demand in OECD*. *Economics – Urban Water*; 2012; <http://www.globalwaterforum.org/2012/01/16/managing-residential-water-demand-in-the-oecd/>

44 OECD, *Pricing Water Resources and Water and Sanitation Services*; 2010; available at [http://www.oecd-ilibrary.org/environment/pricing-water-resources-and-water-and-sanitation-services\\_9789264083608-en](http://www.oecd-ilibrary.org/environment/pricing-water-resources-and-water-and-sanitation-services_9789264083608-en)

### *II.2.2. The concept of full cost pricing*

Full cost pricing<sup>45</sup> (operational, capital and environmental) was a mandatory measure in the first draft of the WFD<sup>46</sup>. However, MS resisted this measure and it was changed into article 9.1: “MS shall take account of the principle of recovery of the costs of water services, including environmental and resource costs of water services (...)”.

A rigorous economic definition of environmental and resource costs requires that price equates with: (i) the long run marginal cost (LRMC) of supply, (ii) any user costs if the resource is used unsustainably, and (iii) marginal external costs.

LRMC, i.e. the cost to supply an extra unit of water in the long run, is usually estimated by looking at expansions to the infrastructure for supplying water, e.g. the costs of a new reservoir or a borehole and should theoretically include any social costs or scarcity value<sup>47</sup>.

To achieve socially optimal allocation of water, the principle of equi-marginal valuation should hold, i.e. the marginal benefit from the use of the resource should be equal across all user sectors<sup>48</sup>.

If not, society would benefit by allocating more water to the sector where the benefits will be highest. LRMC equates water’s unit price with the marginal cost and therefore maximises total value of production across all affected sectors of economy. LRMC pricing, for example, reduces or eliminates artificial incentives to develop irrigation as it will exceed the “threshold of convenience” (exit price) of low value production.<sup>49</sup> In other words, inefficient pricing acts as a hidden subsidy to the agriculture sector.

The opportunity cost of water will decrease because more water becomes available to other users. To achieve fully efficient use of water, Briscoe showed that LRMC should be combined with full trading of water use in order to reduce opportunity costs. However, because of constraints on length, this will not be discussed further in this paper.

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45 Defined as full-supply cost, full economic cost and full opportunity costs.

46 DAPHNE VON BUXHOEVEDEN, A cost benefit analysis of the EU Water Framework Directive, extracts of which can be found in an article of David Pearce published in *World Economics*, Vol. 5, 2004.

47 PROF D. PEARCE, Conceptual framework of analysing the distributive impacts of environmental policy. Prepared for the OECD Environment Directorate Workshop; 2003.

48 BRISCOE J., Managing water as an economic good: rules for reformers, *Water Supply* 15 (4), 1997. pp. 153-172.

49 MASSARUTTO A., Water pricing and irrigation water demand: economic efficiency versus environmental sustainability; *European Environment* 13, 2003. pp. 100-119.

Even though the full cost recovery principle is very attractive in theory, its practical implementation has so far not proven feasible, both because of the lack of empirical data and political considerations.

### *II.2.3. Water pricing – in practice*

In the UK (as in most EU Member states), costs are allocated as follows amongst the different segments of society:

- Costs for point source discharges by the water industry and the industry more widely fall onto the following sectors: food processing, textiles, chemicals, pulp and paper and municipal waste water treatment works. Small businesses affected are those that make abstractions from surface or groundwater, those that discharge directly to water courses and those that discharge to sewers. Costs of point source reductions fall between industry and water services. The costs of treating waste water are partly passed onto water users, including domestic customers<sup>50</sup>.
- Costs for non-point source discharges fall on society at large. Pollution from diffuse sources is a growing problem in the EU and one that is most difficult to solve. Reducing agriculture's detrimental impacts on water quality is often strongly contested by interested parties. This because farm businesses act as a monopsony, i.e. price takers rather than price setters, and are therefore unable to pass on costs of tighter environmental regulations to their customers. As a consequence, water companies and consumers bear the cost of removing pesticides from drinking-water supplies.

Furthermore, it should be noted that in the agricultural sector, costs often exceed the value of the crop. Low cost water to agriculture does not take account of the opportunity cost<sup>51</sup> principle. If environmental costs were reflected in the charging system it is likely that some farmers would be driven out of business. This would improve economic efficiency as the resources would be put to the highest value user, thereby maximising its total value to the end user. It has even been suggested<sup>52</sup> that the governments should

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50 DEFRA; Third consultation paper on the implementation of the EC Water Framework Directive (2000/60/EC); Water Quality Division, London; available at <http://www.defra.gov.uk>; 2003.

51 'Opportunity' cost is the cost of any activity measured in terms of the value of the next best alternative forgone. Definition provided by JAMES M. BUCHANAN *The New Palgrave Dictionary of Economics Online* (Second ed. 2008.) Retrieved on 18 September 2010.

52 ANDREWS K; et al.; *Integrated Appraisal for river Basin Management Plans final report*; (WRc; R&D Technical Report 10793/TR); 2003

place more emphasis on the fact that costs to the agricultural sector need to be viewed dynamically, since the business-as-usual case may alter over time as a result of developments in other sectors (e.g. CAP policy). If the baseline scenario changes, the consequent level of additional measures needed, as well as the prevailing prices and incentives structures for agriculture will vary as well.

In its report, OECD<sup>53</sup> compared public water pricing for some EU member states and showed that, with few exceptions, public water services are priced at operational and maintenance costs (O+M).

O+M pricing is lower than the required LRMC pricing as it does not recover full capital costs. In England and Wales for example, the pricing structure of water and sewerage undertakers recovers the costs of the services, both overall and by sector of customer through average cost pricing. Prices regulated by Ofwat estimate pricing limits on a 5-year basis by using the “tariff basket” concept<sup>54</sup>.

LRMC pricing applies only to “large users” and other water users, such as agriculture benefit from cross subsidies from the water industry and its customers<sup>55</sup>.

A final reason as to why cost based pricing might not yet have taken full effect is the wording of Article 9. Indeed, the term ‘take account of’ gives MS the discretionary power to determine the degree to which they implement cost recovery, which undoubtedly affects potential legal enforceability. We agree with the conclusions of the Blueprint of the Commission that “[...] not putting a price on a scarce resource like water can be regarded as an environmentally-harmful subsidy”.<sup>56</sup>

#### *II.2.4. Sustainability*

The World Commission on Environmental and Development Report of 1987 – the Brundtland Commission (WCED, 1987) defines sustainable development as: “Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”

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53 OECD; Pricing water resources and water and sanitation services; OECD publishing; ISBN:9789264083462; 2003

54 Ofwat; Period review 2009; available at <http://www.oecd.org>

55 MCMAHON, P & POSTLE, M.; Environmental valuation and water resources planning in England and Wales; Water Policy 2, 2000. pp. 397-421

56 European Commission; Com (2012) 673 final , “A blueprint to safeguard Europe’s water resources”; p. 10.; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0673:FIN:EN:PDF>

It thus incorporates an intergenerational commitment of the current generation not to prohibit future ones from meeting their needs, while at the same time addressing the very uneven question of income distribution.

The United Nations 2005 World Summit Outcome Document<sup>57</sup> refers to the “interdependent and mutually reinforcing pillars” of sustainable development as economic development, social development, and environmental protection.

Economists have since focused on viewing the economy and the environment as a single interlinked system with a unified valuation methodology<sup>58</sup>. The economics literature has firmly established that a rising level of per capita well being (utility) over time is the prime condition for achieving sustainability. The ability of humans to improve their wellbeing is equal to their ability to create productive capacity and is determined by the quantity and quality of capital assets available at the time<sup>59</sup>.

The stock of all capital assets can be defined as total wealth and consists of man-made capital (Km), human capital (Ks) and natural capital (Kn). The basic condition for sustainability can therefore be stated formally as follows<sup>60</sup>:

$$\dot{k} = \frac{d}{dt} \left( \frac{K}{N} \right) = \frac{K}{N} \left( \frac{\dot{K}}{K} - \frac{\dot{N}}{N} \right) = \frac{K}{N} \left( \frac{\dot{K}}{K} - n \right) \geq 0$$

where K is total wealth (the sum of the four forms of capital),  $\dot{K}$  is the rate of change of total capital (also known as ‘genuine savings’ in the sustainable development literature, or  $S_g$ )<sup>61</sup>, N is population,  $\dot{N}$  is the rate of change in population, n is the (percentage) growth rate of population, and  $\dot{k}$  is the growth rate of total capital per capita<sup>62</sup>.

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57 2005 World Summit Outcome Document, World Health Organization, 15 September 2005.

58 DASGUPTA P., The idea of sustainable development. *Sustainability Science*; 2 (1): 5-11. doi: 10.1007/s11625-007-0024-y; 2007.

59 PEARCE D.; Conceptual framework for analysing the distributive impacts of environmental policy; prepared for the OECD environment Directorate Workshop; 2003

60 PEARCE D.; Economics and sustainability in the UK water sector; Report to Southern Water; 2002

61 Genuine savings is equal to gross savings minus the depreciation on all forms of capital. Savings can be thought of as the fund available each year to invest in creating new capital assets. Intuitively, if genuine savings is less than depreciation, the capital stock must be declining and hence the basic condition for sustainability is not met. Positive genuine savings is thus the cornerstone of the condition that wealth be increasing, but the formula in the text also takes account of population change. Note that genuine savings meets the condition indicated earlier for a meaningful indicator of sustainability: it has a zero value for the threshold between sustainability and non-sustainability. If genuine savings are persistently negative there is unsustainability. If it is persistently positive there is

To meet the intergeneration conditions of sustainable development each generation must leave the next generation a stock of productive capacity that is capable of producing more well being per capita than that enjoyed by the current generation.

In other words, *whatever the object of policy, policy must secure an increase in total capital stock greater than population growth* (population growth is assumed to be taking place exogenously, i.e. is not determined by factors such as K).

The constant capital rule set out above is based on the following assumption. Total capital (K) is a sum of individual capital stocks ( $K_m+K_s+K_h+K_n$ ). All constituent parts can be measure in a common unit (money) and are substitutable for each other. In other words, sustainability rules are consistent with decisions to allow the stock of water assets to decline through time, as long as there is an offsetting investment. The value of any asset creation must exceed the value of asset lost, i.e. any asset reduction must pass a cost benefit test.

EU water legislation, however, imposes on member states that water bodies must be restored and improved, i.e. must not be allowed to deteriorate further. Achieving this goal involves costs and benefits, both in terms of individual preferences as the appropriate basis for considering social welfare.

The conceptual basis for measuring those preferences is given by the notion of willingness to pay (WTP) and willingness to accept (WTA); both are expressed in monetary value and are the basis of Cost Benefit Analysis.

The assessment of the total costs and benefits of meeting the objectives of EU water legislation is crucial in order to evaluate the cost-effectiveness of measures and foresee the feasibility of implementation.

### **III. Conclusion**

The regulation of water sector in Europe and outside faces severe challenges in 2013. Law needs to be stabilized and the policy work should be aligned with international developments.

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sustainability. Countrywide data on genuine savings can be found in K. Hamilton and M. Clemens. 1999. Genuine saving in developing countries. World Bank Economic Review 13, 2, 33-56, and are now published annually as part of the World Bank's World Development Indicators – [www.worldbank.org](http://www.worldbank.org).

62 This formulation follows that of K. Hamilton, *Sustaining Economic Welfare: Estimating Changes in Wealth per capita*, Washington DC: Environment Department, World Bank, 2000.

After 12 years of direct and indirect European water legislation, Europe's waters still need more protection. The question to be raised is how much more protection can be justified on economic grounds. We have shown that by setting ambitious environmental targets, the EU aims to bring long-term improvements in water quality and management. Although this sounds very promising, a closer examination of the current situation shows that there are flaws to this approach. The EU has targeted green growth and sustainable economy<sup>63</sup>, which includes a more resource efficient and sustainable recovery from the economic crisis. In parallel, the EU is the leader in setting climate change related targets at international negotiations, which targets can remain shallow if they are not implemented in the member states<sup>64</sup>.

The recently communicated *Blueprint*<sup>65</sup> by the Commission points to the lack of integration of water policies into other policy areas, such as agriculture, transport, renewable energy and the cohesion and structural funds<sup>66</sup>. The lack of knowledge and ominous governance related issues in the member states are the prevalent scapegoats when the failure of sustainable water sector regulation is questioned, yet the most pertinent problems remain the commitment of the member states to the use of economic instruments when regulating water supply and sanitation, or in other words, the economization of the basic human right, water.

We think that the participation of the member states in vigorous implementing, and monitoring the implementation of the WFD is a necessity and is much needed nowadays, when the credit of the EU is greatly debated. We also believe that one must not forget that the European Union's most significant watchdog remains the Commission. Without the enforcement powers, the statement of objections, the reasoned opinions and not-so-rare direct actions against the member states, Europe can only infrequently expect a perfect implementation of EU policy. Member States, particularly concerning environmental protection and economics, tend to favour domestic interests and are ready to pay with taxpayers' money if the government's popularity is at stake.

In this paper the authors make 2 suggestions. One, the regulation of water services should be based on sound economic pricing principles. In particular, the price of water

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63 See, for example the Europe 2020 strategy.

64 See also in the Blueprint document of Commission, p. 3. In addition, the European Trading Scheme is a classic example of international commitments, which have been implemented in the EU and to which the member states live up to.

65 [http://ec.europa.eu/environment/water/blueprint/pdf/COM-2012-673final\\_EN\\_ACT-cov.pdf](http://ec.europa.eu/environment/water/blueprint/pdf/COM-2012-673final_EN_ACT-cov.pdf)

66 Blueprint document of Commission, p. 4.

should be set at the long-run marginal cost (LRMC) of supply. LRMC reflects the full economic cost of water supply: the cost of transmission, treatment and distribution; some portion of the capital cost of current reservoirs and treatment systems, as well as those future facilities necessitated by current patterns of use; and the opportunity cost in both use and non-use value of water for other potential purposes.

Without having adequate pricing mechanisms acting as a signal, water consumption proceeds during periods of scarcity at a faster-than-efficient pace. Water conservation takes place only under ‘moral suasion or direct regulation’<sup>67</sup>. In contrast, if water prices rose as reservoir levels fell, consumers would respond by using less water, reducing or eliminating uses according to their preferences.

In the long run, inefficient prices alter land use patterns and industrial location decisions. The sum of all these individual decisions affects the sustainability of local and regional water resources. The authors argue that using prices to manage water demand is more cost effective than implementing non-price conservation programs.

Second, we suggest that the new approach to sustainably regulate the water sector and preserve our water resources should not make any compromise with historical carry-overs<sup>68</sup>, socialist regimes’ leftovers,<sup>69</sup> and domestic popularity politics<sup>70</sup>. *“An assessment of the WFD RBMPs reveals that [...] incentive and transparent water pricing is not applied across all Member States and water-using sectors, also due to the lack of metering. Only 49% of RBMPs plan to change the water pricing system to foster a more efficient use of water and only 40% include measures to improve water metering.”*<sup>71</sup>

No opt-out should be made available for the member states and the narrow implementation of water services in the member states should no longer be tolerated by the Commission<sup>72</sup>. In this respect, a guidance document by Commission, outlining the best ways to implement the “polluter pays principle” – and perhaps setting prerequisites for certain environment related funds – would be welcomed. If not, we see difficulties if

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67 GIBBONS D. C. (1986), “The Economic Value of Water, Resources for the Future”, Washington, D. C., p. 21.

68 Mostly in the Western member states.

69 Mainly the EU-12 countries.

70 Southern Europe and CEE countries (e.g. Italy, Hungary, Greece)

71 Blueprint, p. 10.

72 See the IP/12/536, Commission refers Germany to Court over incomplete cost recovery for water services.

the member states are given full discretion as to how and to what extent they are taking hard core legislative actions as part of the Common Implementation strategy<sup>73</sup>.

We advocate for a centrally driven, thoughtful, economics-based water pricing/sustainability policy in Europe and outside. We warn that if UN and EU policy making is not streamlined much more is at risk than unsuccessful negotiation rounds.

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73 The Blueprint moves back to the soft suggestion, and gives the responsibility to member states for taking actions. *“Clearly, the success of the approach proposed by the Blueprint will depend on Member States’ willingness and action to involve stakeholders and follow up to the Commission’s proposals to improve implementation of existing legislation. In this respect, the WFD Common Implementation Strategy (CIS), involving all Member States and relevant stakeholders, should continue to play a positive role in WFD implementation.”* Blueprint, p. 4.

# Environmental Rights and the Enforcement of the Right to Water

*Attila Pánovics\**

## I. Introduction

Water is a chemical compound that is a key to ensure everyone's well-being. Undoubtedly, the declining of water resources is going to be one of the most challenging issues of the 21<sup>st</sup> century. Increased water scarcity reinforces the competition over limited resources between countries and sectors such as industrial, agricultural and domestic water use.

Under international human rights law, water is already implicitly<sup>1</sup> and explicitly<sup>2</sup> protected as a human right. The legislative recognition of the right to water in several countries also indicates a pressing need for an explicitly codified universal human right to water and sanitation.

At present, the right to water is an abstract and ambiguous right. The acknowledgement of water as a human right proves to be the most valuable approach in addressing the challenge of providing people with the most basic element of life. Water is a basic condition essential to human survival – adopting an autonomous right to water recognizes the vital character of water as a basic condition of life. It has a critical role in all environmental, social and economic systems and should therefore be recognized as a human right. At the same time, water and sanitation are at the core of sustainable

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1 See, for example, the 1948 Universal Declaration of Human Rights and the two 1966 International Covenants on, respectively, Economic, Social and Cultural Rights (ICESCR), and Civil and Political Rights (ICCPR).

2 See, for example, the 1979 Convention on the Elimination of all Forms of Discrimination against Women and the 1989 Convention on the Rights of the Child.

development;<sup>3</sup> they have critical importance within the three dimensions of sustainable development.

Environmental issues are always complex and closely interrelated; no response to an environmental issue can be considered in isolation of other issues. Consequently, water issues cannot be separated from the wider problems of ecosystems. The key role that ecosystems play in maintaining water quantity and quality are also well-known.

The future of global environmental governance and international environmental law are very much linked to tackling water problems. The development of international environmental law has traditionally taken place within the UN system. Unfortunately the future of global environmental governance is unclear. The failure of the Copenhagen Conference (2009) to produce any meaningful progress in shaping a truly global and effective response to climate change demonstrated that it will be no easy task to tackle global environmental challenges. Neither the climate change negotiations, nor the Rio+20 conference marked the beginning of a new era of global environmental governance. All these conferences fell short of expectations; the overall negotiations were generally thought to have been cumbersome.

Rio+20 raises serious questions about the effectiveness of the international community in resolving the growing global water crisis. In the outcome document of the Rio+20 conference (“The Future We Want”) an international consensus evolved around the human right to safe drinking-water. Governments reaffirmed their commitment to the progressive realization of access to safe and affordable drinking-water and basic sanitation for all, “with full respect for national sovereignty”. Moreover, the document underlined the importance of investments in infrastructure for water and sanitation services, “in accordance with national priorities”.<sup>4</sup> Providing water services, ensuring its affordability, is an obligation of the state and a right of each individual. Discussions within international organisations and institutions involving the right to water are comprehensive and useful for future policy and legislative development regarding integrated water resource management. Nevertheless, current discussions lack the specificity about how such a human right can be enforced at all levels. Such claims do

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3 The essence of sustainability is to establish a system of relations – a culture – in which people, in their relations established with each other and with the environment, do not deplete but preserve resources for the future. Sustainability is in search for this proper system of relations, to allow next generations to also be able to meet their needs; see ‘In search for the future – Summary Report of the National Council for Sustainable Development for Hungarian Society’, 2009. pp. 9-10.

4 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/476/10/PDF/N1147610.pdf?OpenElement>

not necessarily entail conferring rights that are directly enforceable through legal proceedings.

## **II. Right to water and right to environment**

There is a growing political will to declare the right to water as a human right at the international level, but the declaration of a global right is only a preliminary step that could serve the enhancement of the effectiveness of water policies. The declaration will not automatically lead to the improvement of the situation of the billions of people without access to safe drinking-water and proper sanitation. Ensuring safe drinking-water and sanitation for all will require considerably more measures and resources.

The concept of the right to water is controversial, with commentators disputing whether it is a right at all, and new to many governments, despite progress in the adoption of such a human right at the international level. When mentioning the human right to water, it implicitly includes the right to sanitation.<sup>5</sup> The adoption of the right to water and sanitation contributes significantly to the debate on the relationship between human rights and other areas of international law, as well as the future of human-rights law.

The right to water and sanitation has varying contents, ranging from adequate access to sufficient water for all needs, to the use of water for specific purposes (drinking, food, health, household, etc.). Fundamentally, the right to water and sanitation means access to water for life and dignity. The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water. It is limited to water for personal and domestic use and does not cover other water uses.

Governments may privatize water services and allow user fees, but essential water must be affordable for everyone. There has to be an enforceable minimum standard: a quantity of water sufficient for human life, dignity and health. The quantity must suffice to meet basic human needs in terms of drinking, bathing, cleaning, cooking and sanitation. The minimum quantity must be determined taking into account geographic, cultural and other considerations; the minimum quality of household water is dependent on its specific use.<sup>6</sup> A minimum standard of water supply services necessary for the

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<sup>5</sup> 'The right to water: From concept to implementation', World Water Council, 2006. p. 1.

<sup>6</sup> Drinking-water must be safe for consumption, whereas lower standards may be set for water for sanitation.

reliable supply of a sufficient quantity and quality of water to households must be ensured as well to support human life and personal hygiene in every case.<sup>7</sup>

In the case of traditional policy formulation a fragmented approach to policy development and implementation is used regarding the different sectors. The right to water and sanitation requires an integrated and holistic approach and inter-sectorial thinking. Adding the right to water to the existing repertoire of rights may complicate matters, but then again, this in itself should not be a reason against its introduction. Existing human rights instruments, institutions and mechanisms can also be used in order to realize this right. The right to water and sanitation is closely linked to a number of human rights, including:

- the right to life,
- the right to human dignity,
- the right to health (to the highest attainable standard of physical and mental health),
- the right to an adequate standard of living,
- the right to housing (including secure tenure),
- the right to food,
- the right to environment.

In order to ensure a high quality of life, water is as essential as a clean and healthy environment. The development of the right to environment is basically important to the understanding of the nature of the right to water. It is not easy to identify what is an environmental case, but water related issues usually have an environmental aspect. Therefore, infringement of the right to water would also be an infringement of environmental interests. The law of the sea, the protection of international watercourses or the marine environment are intimately related to international environmental law; the right to water and environmental rights are also inextricably interlinked. The link between water and the environment can also be found in a number of international treaties.

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<sup>7</sup> This also means that a human right to water and sanitation cannot see the environment as a good in its own right. Unfortunately, human rights disregard the intrinsic value of the environment, including natural ecosystems and non-human species. The right to water implies again an unambiguous anthropocentric approach.

Much more attention should be paid to the possible scope and content of the right to environment, although there is little international consensus on the correct terminology. Soft and hard law documents alternately refer to a ‘healthy’, ‘clean’, ‘safe’, ‘satisfactory’, ‘ecologically balanced’, ‘pleasant’, etc. environment.

Especially the adoption and enforcement of environmental rights can help the right to water to find its place among other human rights. The right to water can be regarded as an integral component of the right to environment,<sup>8</sup> and may be considered in conjunction with the development of environmental rights, assessing the progress of environmental rights to date, and the remaining gaps in their implementation.

### **III. The enforcement deficit of environmental law**

International environmental law is significantly fragmented. There are now more than 1100 multilateral, over 1500 bilateral treaties and 250 other international instruments dealing with environmental issues,<sup>9</sup> in addition to the thousands of “soft law” instruments such as declarations, strategies and action plans. There are signs of “treaty congestion”, in the form of separate negotiating fora, secretariats, monitoring and dispute settlement procedures, funding mechanisms, overlapping provisions and inconsistencies between international agreements. Even developed states with strict regulations and strong bureaucracies show signs of being overwhelmed.

Laws and regulations are of minor importance when they are not observed. Monitoring and enforcement are, therefore, essential for a sound environmental policy.<sup>10</sup> The practical and effective application of environmental provisions is the most serious problem that national, EU and international environmental law face today. The central problem is that environmental concerns are systematically under-represented. Failures to see the linkages between different areas of (international) law have also undermined the effectiveness of environmental policy and law.

Breaches of environmental law are often not adequately prosecuted. This results in shortcomings in the enforcement of environmental law at local, national and European as well as international level – as has been pointed out for many years. Law which seeks

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8 The right to environment is also necessary for the enjoyment of others human rights including the right to life and human dignity, or the right to health.

9 International Environmental Agreements (IEA) Database Project  
<http://iea.uoregon.edu/page.php?query=home-contents.php>

10 ‘Manual on Public Participation in Environmental Decision-making, Current Practice and Future Possibilities in Central and Eastern Europe’, Regional Environmental Centre for Central and Eastern Europe, Budapest, 1994. p. 47.

to manage environmental change must be (and perceived to be) enforceable and enforced.<sup>11</sup>

Practice always lags behind law, especially in environmental matters. Implementation of environmental rules has always been criticized as weak at all levels. The challenge of effective implementation of environmental law through legislative, administrative and judicial measures is one faced by all states, regardless of their respective constitutional systems.

Global environmental governance involves many actors and stakeholders at all levels. While nation-states are the legitimate bearers of rights and duties under international law, responses emerging from many new environmental challenges are occurring outside the existing state-centric UN system. NGOs, transnational corporations and other organisations must have a role to play in shaping and implementing responses to new and emerging global challenges; governments can no longer ignore the role of the public in matters affecting the environment. Citizens and their organisations can serve as the eyes and ears of specialized monitoring institutions and other state organs.

Environmental decision-making cannot be left to governments alone. Moreover, governments which operate with openness, accountability and the involvement of the public are more likely to implement and enforce existing environmental standards. Therefore, public participation is one of the most fundamental and crucial principles of environmental policy and law that must be ensured at the policy, planning and project levels. This principle has its origin in Principle 10 of the Rio Declaration. Public participation can be an effective tool in enforcing environmental policy, but the potential contribution of public participation may not be overrated. The involvement of the public in environmental decision-making cannot be expected to resolve all problems, but it is a useful tool for resolving environmental issues.

It is generally supposed that the involvement of the public facilitates more transparent and accountable decision-making in environmental matters. Public participation in environmental decision-making, through consultation processes for example, can lead to better decisions as a wider range of considerations may be taken into account.<sup>12</sup> Additionally, public participation methods improve the legitimacy of decision-making as, *inter alia*, the participation of citizens can potentially render decisions more

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11 Scott, Joanne: 'EC Environmental Law', Longman, London and New York, 1998. p. 148.

12 B. J. RICHARDSON & J. RAZZAQUE, 'Public Participation in Environmental Decision-Making', In: B. J. RICHARDSON & S. WOOD, (Eds.). 'Environmental Law for Sustainability', Hart Publishing, Oxford, 2006. p. 165. et seq.

democratic.<sup>13</sup> Truly available rights motivate and empower people to participate in decision-making in an informed and meaningful manner.

#### **IV. Substantive and procedural environmental rights**

The global environmental crisis is an important factor spurring the development of the right to a clean and/or healthy environment. The emergence of individual environmental rights marks perhaps the most significant shift in the focus of international environmental law.<sup>14</sup>

There is no consistent formulation of the right to environment. It was already declared in 1972 by the famous Stockholm Declaration on the Human Environment, but this statement was not repeated in the 1992 Rio Declaration. While the well-known Principle 1 of the Stockholm Declaration (“man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations”)<sup>15</sup> has inspired many national constitutional provisions since the early 1970s recognizing the right to environment as a fundamental right under domestic law, that right has not been transposed to date into a binding rule of international law of universal application.<sup>16</sup>

The 1992 Rio Declaration contains no explicit right to environment, but its Principle 10<sup>17</sup> emphasizes participatory rights with great specificity and environmental focus. These features justify the proposition that there is a role for human-rights law in promoting procedures for the protection of the environment, and a need for further

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13 EBBESSON JONAS, ‘The Notion of Public Participation in International Environmental Law’, *Yearbook of International Environmental Law*, Vol. 8 (1997), pp. 75-81.

14 PATRICIA BIRNIE – ALAN BOYLE – CATHERINE REDGWELL, ‘International Law & the Environment’, Third edition, Oxford University Press, 2009. p. 268.

15 Declaration of the United Nations Conference on the Human Environment, UN Doc. A/Conf.48/14/Rev.1.

16 For a more detailed discussion of this question, see M. DÉJEANT – PONS & M. PALLEMAERTS, ‘Human Rights and the Environment’, Council of Europe Publishing, Strasbourg, 2002.

17 ‘Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.’ (Principle 10 of the Rio Declaration on Environment and Development) Requirements of Principle 10 are to some extent reflected in various treaties and international instruments.

development over and above those more general rights already protected in human-rights treaties.<sup>18</sup>

The main focus of the ‘greening’ of human rights law has been the rights to life, private life, health, property and water. National constitutions often contain a narrow interpretation, providing a link between health or well-being and the environment. The right to life has also been a fruitful source of the enactment and interpretation of the right to environment. The case-law of the European Court of Human Rights shows in particular how other human rights can be used to compel governments to enforce environmental laws, without expressly creating specifically environmental rights.<sup>19</sup>

The most far-reaching case for environmental rights comes in the form of claims to a substantive environmental right involving the promotion of a certain level of environmental quality. Within environmental law in general, there is no universally accepted substantive environmental right. There have been declarations which amount to ‘soft law’ and in terms of human rights law itself, specific substantive environmental rights have been included within some regional human rights treaties. Moreover, among human-rights treaties only Article 24 of the 1981 African Charter on Human and Peoples’ Rights proclaims environmental rights in broadly qualitative terms, but only as a collective right. Other human-rights treaties make no explicit reference to the environment at all or do so only in a relatively narrow term.<sup>20</sup>

Procedural rights, on the other hand, have become commonly accepted and are legal norms in many regions.<sup>21</sup> The strongest argument for environmental rights focuses not on environmental quality but on procedural rights. The effectiveness of substantive environmental rights presupposes the establishment of a wide range of procedural rights. Such procedural safeguards not only help remedy the current under-representation of environmental interests but also provide a firmer guarantee of environmental decision-making according to law.

These procedural rights have deep roots in human rights instruments, although not specifically in the environmental context. They play a substantial role in the protection

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18 GUNTHER HANDL, ‘Human Rights and the Protection of the Environment: A Mildly Revisionist View’, In: A.C. TRINDADE (Ed.), ‘Human Rights, Sustainable Development and the Environment’, San Jose, 1992. p. 117.

19 Neither Article 8 (Right to respect for private and family life) nor any of the other articles of the Convention are specifically designed to provide general protection of the environment.

20 The ECHR says nothing about the environment, other documents, such as the Lisbon Treaty or the EU Charter of Fundamental Rights are also silent in declaring a substantial right to the environment.

21 S. J. TURNER, ‘A Substantive Environmental Right – An Examination of the Legal Obligations of Decision-Makers towards the Environment’. Wolters Kluwer, Alphen aan den Rijn, 2009. pp. 42-43.

of the environment and are given significant attention within the international community. Environmental rights have already been introduced in some jurisdictions with considerable success.

The procedural aspect of the right to environment is generally described as having three pillars. The first pillar grants the public the right of access to information (in lack of which any further opportunities for public participation are meaningless), the second deals with public participation in decision-making, and the third provides for access to justice, i.e. the right of recourse to administrative or judicial procedures to dispute acts and omissions of private persons and public authorities violating the provisions of environmental law. These ‘access principles’ can perform a modest instrumental role in encouraging regulators to keep the public interest at the forefront of regulation.<sup>22</sup>

## V. The importance of the Aarhus Convention

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters<sup>23</sup> was adopted exactly 15 years ago, by representatives of 35 States and the European Community at a UN ECE-sponsored pan-European Ministerial Conference<sup>24</sup> in the Danish city of Aarhus.<sup>25</sup> The Convention entered into force on 30 October 2001 and progress of ratification is still relatively rapid.<sup>26</sup> A large part of the Convention was built upon existing EU legislation,<sup>27</sup> and the EU has already adopted several legal instruments, binding on its Member States, implementing provisions of the Convention.<sup>28</sup>

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22 MARIA LEE, ‘EU Environmental Law: Challenges, Change and Decision-Making’, Hart Publishing, Oxford and Oregon, Portland, 2005. p. 54.

23 <http://www.unece.org/env/pp/>

24 The “Environment for Europe” process is an ECE-wide cooperation on environmental issues, established following the collapse of communism in Eastern Europe at the end of the 1980s and punctuated by a series of Ministerial Conferences (Dobřis, Czechoslovakia, 1991; Lucerne, Switzerland, 1993; Sofia, Bulgaria, 1995; Aarhus, Denmark, 1998; Kiev, Ukraine, 2003; Belgrade, Serbia, 2007; Astana, Kazakhstan 2011).

25 The text of the Convention is available at <<http://www.unece.org/env/pp/>>.

26 As of 2 April 2013, there were 46 Parties to the Convention; see: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-13&chapter=27&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en)

27 See COM(1996) 344 final, 02.06.1996, p. 3.

28 By signing the Convention on 25 June 1998 and formally adopting it on 17 February 2005 the EC obliged itself to present adequate legal instruments for implementing the provisions of the Convention; see Council Decision 2005/370/EC, OJ 2005 L 124, p. 1.

The Aarhus Convention, based on the UN ECE Sofia Guidelines adopted in 1995, is an important achievement of international environmental law.<sup>29</sup> The subject of the Convention goes to the heart of the relationship between the peoples and governments. According to the Implementation Guide to the Convention, whereas most multilateral environmental agreements (MEAs) cover obligations that Parties have towards each other, the Aarhus Convention covers obligations that Parties have towards the public.<sup>30</sup> It goes further than any other convention by imposing clear obligations on Parties and public authorities towards the public. The Parties to the Convention affirmed the objective of stepping up the involvement of citizens and their organisations in environmental matters, with a view to encouraging them to participate more fully in conserving and protecting their natural environment. The provisions of the Convention must be applied on a non-discriminatory basis.<sup>31</sup>

The adoption of the Convention in 1998 marked a milestone in the development of the environmental rights of the public. The Convention lays down the basic rules to promote citizens' involvement in environmental matters and the enforcement of environmental law.<sup>32</sup> The focus of the Convention is strictly procedural in content; it guarantees environmental rights by implementing Principle 10 of the Rio Declaration.

The Convention is not only an environmental agreement; it is also an international treaty about government accountability, transparency and responsiveness. The Convention also forges a new process for public participation in the negotiation and implementation of international agreements.<sup>33</sup> It has helped shape national law and practice throughout the pan-European region and beyond.

The Aarhus Convention does not create a substantive right to a clean and/or healthy environment. Rather, it creates procedural rights to assert the 'right to live in an environment adequate to his or her health and well-being'.<sup>34</sup> Concentration on the procedural dimensions of an environmental right can avoid certain problems in attempting to set appropriate standards to be maintained through some substantive right to the environment.

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29 It was a good example of soft law transformed into hard law at international level.

30 STEPHEN STEC – SUSAN CASEY – LEFKOWITZ, 'The Aarhus Convention, An Implementation Guide', United Nations, New York and Geneva, 2000. p. 1.

31 See Art. 3(9) of the Convention.

32 The entire preparatory period for the Convention was a unique possibility to work together with non-governmental organisations (NGOs), governments and international institutions on equal basis and demonstrated a great openness for NGO involvement.

33 <http://www.unece.org/env/pp/introduction.html>

34 Aarhus Convention, Preamble. para. 7.

The Convention is innovative not only in highlighting and furthering the notions of access to environmental information, participation in decision-making and access to justice in environmental matters. It also penetrates into issues previously perceived as parts of the national *domaine réservé*. Governments as Parties are required by international law to make it easier for the members of the public to challenge legally environmental decisions.

The Aarhus Convention represents an important extension of environmental rights. The Convention is an essential step forward in further encouraging and supporting public awareness in the field of environment and better implementation of environmental legislation in the UN ECE region. It has led to greater transparency and accountability in a wide range of international bodies and processes dealing with environmental issues on which the Parties to the Convention have an influence. Despite of the fact that the Convention is open for global accession, turning the Convention into a global legal framework for public participation in environmental matters, no States outside the UN ECE region have acceded to it. Nevertheless, it has a significant influence on the jurisprudence of national courts, the European Court of Human Rights and the Court of Justice of the EU.

## **VI. The role of national courts**

Laws and policies affect the environment and the rights of people living in those environments. National law is the medium through which nation-states usually implement their international obligations and regulate the conduct of their own nationals and other legally significant entities.

Especially national administrations have great powers to influence the state of the environment (positively or negatively, by acting or by omitting to act), but the administration is not the owner of the environment. Insufficient practice stems largely from the absence of adequate public capacity to use the existing rights and mechanisms, and insufficient official capacity to implement laws. An insufficient capacity and competence of the administration together with a lack of funds for the implementation of environmental regulations, incompatible economic and social priorities, a lack of political will, corruption and other social and cultural factors imply that legal norms directed towards environmental protection remain an empty word.

Individuals and environmental NGOs should have the same amount of environmental information as the administrations have. There might be, and in practice, there is more

and more divergence between the public and the administrations on the necessary degree of environmental protection. Additionally, environmental law suffers more than any other field of law from shortcomings in its implementation and enforcement. These shortcomings would require court intervention, if they are not remedied by executive regulation. Courts therefore have a crucial role to play in the protection of the environment, and the fragile state of the global environment requires the judiciary to be the guardian of the Rule of Law,<sup>35</sup> guardian of both human rights and the constitutions themselves.<sup>36</sup>

Judicial institutions undertake the task of interpretation and the adjudication of alleged breach. Though administrative review mechanisms are often quicker and cheaper, they cannot substitute the judicial review of administrative acts or omissions. Public authorities are forced to comply with environmental law if their decisions are likely to be subjected to judicial review. The mere possibility that a public interest lawsuit can be instituted seems to encourage adherence to environmental rules. This particular effect was observed in many countries and is probably the most important outcome of an environmental association taking legal proceedings.<sup>37</sup> Only the independent courts as arbiters can decide on the controversies between the administrations and the public, and balance the diverging interests. Moreover, for a number of reasons – length of judicial procedures, costs, the criteria for legal standing, the complexity of cases, and others – access to the courts remains the last resort for the settlement of disputes in environmental matters. Additionally, the interpretive function of the judiciary is even more important in environmental law than in other areas.

In theory, in some jurisdictions and certain circumstances international law is directly applicable as national law. In practice international environmental treaties are interpreted and applied differently by nation-states, even when acting entirely in good faith. The role of national courts in implementing international environmental law has been rather limited to date.<sup>38</sup> The only notable exception is that some human-rights

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35 L. J. KOTZÉ & A. R. PATERSON, 'The Role of the Judiciary in Environmental Governance – Comparative Perspectives', Wolters Kluwer, Alphen aan den Rijn, 2009. p. 24.

36 Legal provisions for compulsory judicial settlement or arbitration are relatively rare in international environmental treaties. Specialist tribunals are most useful when they have a special body of law to apply, such as the European Convention on Human Rights (ECHR), or the 1982 UN Convention on the Law of the Sea.

37 NICAOLAS DE SADELEER et al., 'Access to Justice in Environmental Matters and the Role of NGOs, Empirical Findings and Legal Appraisal', The Avosetta Series (6), Europa Law Publishing, Groningen, 2005. pp. 198-199.

38 MICHAEL ANDERSON & PAOLO GALIZZI (Eds.): 'Environmental Law in National Courts', The British Institute of International and Comparative Law, 2002. p. 9.

treaties have become a significant basis for environmental claims such as the ECHR or the Aarhus Convention.

The national legal systems and court procedures are still designed to protect economic interests (property rights, rights to free enterprise) or personal interests, related to the person such as health, freedom of expression or non-discrimination.<sup>39</sup> If only public interests are at stake, the enforcement of rules and the initiation of legal procedures are matters exclusively within the domain of governmental or administrative institutions. Environmental issues cannot simply be reduced to private or public interests, because environmental interests are collective, diffuse and fragmented to a large extent.

Loosening the conceptual dichotomy between private and public interests makes it possible for the public, including citizens or non-governmental organizations (NGOs), to initiate or take part in administrative and judicial procedures concerning the environment.<sup>40</sup> The involvement of the public can empower citizens and their organizations to assume responsibility for the environment; the result would be the improvement of the level of environmental protection.

The substance of the right to water and sanitation has to be determined by legislation, and the integrity of that may not be weakened in its national application. Without an international body capable of enforcement, national courts can give content to the human right to water and sanitation. In those countries where the right to water is enshrined in the national constitution,<sup>41</sup> courts have the possibility to support and enforce an explicit right to clean water and sanitation. The future work of national courts will clarify the legal content of the right to water, and how the right to water and sanitation can be implemented in a practical and affordable manner.

Another problem is the question of definition and adjudication. Here, the basic problem is that abstract and general formulations, such as ‘the right to water’ or ‘the right to water and sanitation’, are desirable claims, but the judiciary cannot make meaningful rulings in the absence of clear and settled standards of adjudication. These objections constitute the Achilles’ heel of the case for environmental rights as well.<sup>42</sup> Therefore,

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39 S. PRECHAL & L. HANCHER, ‘Individual Environmental Rights: Conceptual Pollution in EU Environmental Law’, *Yearbook of European Environmental Law*, Vol. 2 (2001), p. 114.

40 JONAS EBBESSON, Comparative introduction, In: JONAS EBBESSON (Ed.): *Access to Justice in Environmental Matters in the EU*, Kluwer Law International, the Hague, 2002. pp. 4-5.

41 The lack of explicit mention of the right to water and sanitation in national laws could be an excuse not to implement it.

42 ROBYN ECKERSLEY, ‘Greening liberal democracy: the rights discourse revisited’, In: Brian Doherty & MARIUS DE GEUS (Eds.): *Democracy and Green Political Thought – Sustainability, rights and citizenship*, Routledge, London and New York, 1996. p. 229.

international documents have to define precisely such notions as safe, sufficient or affordable water.

The declaration of the right to water and sanitation for everyone is only the first step in the development of an enforceable right. The national governments are primarily responsible for enabling implementation of the right to water and sanitation through legislation, regulation, policies, work plans and associated budget allocations, but much will depend on how national courts will interpret and use these. Changing social values can be reflected in the jurisprudence of courts. In this case, courts may develop their own interpretations, as they have done in respect of many other human rights.

## **VII. Concluding remarks**

In July 2010 the United Nations General Assembly recognised the right to safe and clean drinking-water and to sanitation as a human right that is essential for the full enjoyment of life in dignity. Then the Rio+20 UN Conference on Sustainable Development in June 2012 confirmed the cross-cutting importance of water in sustainable development. Access to water and sanitation is a human right under international law and several national constitutions, but there is much debate on the meaning of it.

The right to environment (and the right to water and sanitation) does not fit neatly into any single category or generation of human rights.<sup>43</sup> A right to environment is best envisaged, not as a civil and political right, but within the context of economic and social rights, where to some extent it already finds expression through the right to water, food, and environmental hygiene.<sup>44</sup>

The inclusion of both substantive and procedural environmental rights in human rights conventions can promise to empower citizens and (environmental NGOs) to take action to remedy both local and trans-boundary environmental problems. Nevertheless, human rights law falls short of guaranteeing the right to environment in qualitative terms.

The development of human rights approaches to environmental protection is an increasingly attractive means of dealing with environmental problems, such as water scarcity and water pollution. However, the increasing importance of environmental rights perspectives at international and national levels may prove to be one very

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43 However, not all human-rights lawyers favour the recognition of third generation rights.

44 ALAN BOYLE, *Human Rights and the Environment: Where Next?* *The European Journal of International Law* Vol. 23 no. 3 (2012). p. 628. <http://www.ejil.org/pdfs/23/3/2296.pdf>

important vehicle for providing a consistent common approach in the context of the right to water and sanitation.

The preparation and adoption of a new, global, legally binding instrument declaring a substantial right to water and sanitation can be a far-reaching option that has the potential to ensure that such a right is incorporated into national law. At a minimum, international organisations and institutions should declare a substantial right to water and sanitation for everyone, in particular for the most vulnerable, excluded and marginalized and disadvantaged persons.

All countries have to take an official position on the right to water and sanitation. There will never be an effective global plan to address water challenges without the active participation and cooperation of all countries. Strong political commitment must be secured; all governments must demonstrate their support for the progressive realization of access to safe and affordable drinking-water and basic sanitation for all.

After the clarification of the content of the right to water and sanitation, we must move forward with its implementation at regional, national and local levels. Once the right to water is established, the governments must focus on developing the capacity to operationalize it and make it meaningful for the communities. The full implementation of “water rights” must be considered, and substantial efforts must be made to make it enforceable in all countries.

At the same time, much still remains to be done to identify key factors for effective implementation of the right to water and sanitation. Whether the potential of water rights can be realised remains an open question. The practical realisation depends on the cooperation of nation-states, and the enactment of appropriate regional, national and local laws. The real test of an enforceable right to water and sanitation lies less in international documents than in national law. Courts can finally strike a fair balance between the various conflicting interests at stake, and resolve the conflicts that may result with other rights or claims.

# **A Human Right to Water? The Mazibuko Case before the South African Constitutional Court**

*Sándor Szemesi\**

Although rain falls everywhere, access to water has long been grossly unequal all over the world, including South Africa. While piped water is available for industries and wealthy families, millions of people spend hours laboriously collecting their daily supply of water from streams, pools and distant taps. In 2006 approximately 8 million people (more than 20 percent of the population of South Africa) did not have adequate access to water.

In 2009 in the well-known Mazibuko case<sup>1</sup> (or Phiri case) the Constitutional Court of South Africa had to decide whether there is a human right to sufficient or adequate water. In this study I examine the question of the human right to water in the light of the judgment of the South African Constitutional Court rendered in this case.

## **I. Background**

The applicants of the case were five poor residents of Phiri in Soweto, one of the poorest urban areas south west of Johannesburg developed as a black township during the era of apartheid. The respondents were the City of Johannesburg, the Johannesburg Water company owned by the City, and the national minister for water affairs and forestry.

The name of Soweto was derived from South Western Township, an under-serviced and predominantly poor area, which essentially functioned as a labour camp to service mines and industry with cheap black labour, becoming part of the apartheid project from 1948, which resulted in the expansion of Soweto.

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1 Case CCT 39/09 [2009], *Mazibuko, Munyai, Makoatsane, Malekutu and Paki v. City of Johannesburg, Johannesburg Water Ltd. and Minister for Water Affairs and Forestry*.

For many years water had been piped to the area of Phiri via an unmetered and unlimited supply for which a flat fee of 68,40 South African Rands (cca. 9 USD) per month was charged on the basis of a “deemed” monthly consumption of 20 thousand litres of water per household. However, monthly consumption of water per household in Soweto was 67 thousand litres per month. Johannesburg Water company estimated that up to a third of all water it purchased was supplied to Soweto, but only one percent of its revenue was generated from there because of leaking pipes and because of the fact that many residents of Soweto did not pay the deemed consumption charges.

In May 2003 Johannesburg Water company initiated “Operation Gcin’Amanzi” (to save water) to revamp Soweto’s distribution of water services. Its goals were to reduce water losses and demand, rehabilitate the water network, and improve the rate of payment. Phiri, as one of the poorest parts of Soweto, was the area where the first phase of the implementation of the project took place. After installation of pre-paid meters each household could get 6 thousand litres of free water per month (or 25 litres per person per day), and could get more after paying its fee in advance. It is interesting that whereas other municipalities had remedies deemed consumption through conventional metering, Johannesburg was determined that Soweto residents would not access more water than the free basic water project allows without first paying for it.

Lindiwe Mazibuko (the first applicant of the case) was an unemployed single mother living on a small property with 20 people. On 17 March 2004, a Johannesburg Water company employee came to her house to tell her that her water supply system was old and rusty and it is necessary to replace it. The employee gave Mazibuko a letter entitled “Decommissioning of the old secondary mid-block water supply system”, which made no mention of pre-paid water meter system. When Mazibuko realized (from the workers digging trenches in front of her house to install the pre-paid water meter system) that her method of water delivery will change, she protested against it. Finally, at the end of March 2004, without any further notification, Mazibuko’s water supply was totally disconnected until October 2004, when she asked for a pre-paid water meter. Many other Phiri residents experienced a similar process in the same time.<sup>2</sup>

As far as the quantity of free basic water is concerned, Mazibuko stated that the free 6 thousand litres of water per month had never lasted the entire month, it was usually finished between the 12<sup>th</sup> and 15<sup>th</sup> of each month, and taking into consideration her

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2 J. DUGARD, Civic action and legal mobilisation: the Phiri water meters case. In: J. HANDMAKER, R. BERKHOUT, Mobilising social justice in South Africa: Perspectives from researchers and practitioners. Pretoria University Law Press, 2010, p. 84.

financial possibilities (i.e. she had no money to buy more water) this meant that her household was without any water for more than half of every month.<sup>3</sup> Seeing Mazibuko's household of 20, the 6000 litres of free water a month means that a person in this household can use only 10 litres per day, which is below the 25 litres minimum standard.

The lack of water caused not only the infringement of dignity and health, but a direct tragedy in fact. On 27 March 2005, Vusimuki Paki, a resident of Soweto awoke to the shouts of a tenant, who was trying to put out a fire in one of the backyard shacks on his property. In the first minutes they tried to extinguish the fire using the pre-paid water meter supply, however the monthly free basic water allocation was soon exhausted, and the pre-paid water meter automatically disconnected due to insufficient water credit. After battling for an hour, residents finally put out the fire, but not before the shack had burnt to the ground, and two small children died.

In July 2006 Mazibuko, Paki and three other Phiri residents submitted an application challenging the constitutionality and lawfulness of pre-paid water meters and the sufficiency of the free basic water allocation. The applicants stated that even if 25 litres per person per day can be deemed sufficient, the clause of 6 thousand litres per household per month violates section 9 (3) of the South African Constitution, as it directly or indirectly discriminates against poor black people who live in large households.

## **II. The right to water in international and South African law**

There are three provisions of the Universal Declaration of Human Rights (UDHR, adopted in 1948)<sup>4</sup>, which can be used to construe a right to water. Article 3 UDHR states that "everyone has the right to life, liberty and security of person", Article 22 UDHR provides that everyone have a right to "realization ... of economic, social and cultural rights indispensable for his dignity and the free development of his personality", and finally Article 25 UDHR provides for every person to have the "right to a standard of living adequate for the health and well-being of himself and his family." It is clear that the list of specific provisions listed in Article 25 cannot be deemed all inclusive: one of the essential components not listed is water, however it is impossible to fulfil the conditions of Article 25 without the use of water. For this reason we can state that water is a precondition to realize the right to an adequate standard of living.

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3 Affidavit of Lindiwe Mazibuko, 3 July 2006, para. 101.

4 GA Res. 217A (III), UN Doc A/810 at 71 (1948).

As far as the International Covenant on Civil and Political Rights (ICCPR, adopted in 1966) is concerned, taking into consideration that a basic supply of fresh water is essential to sustaining human life, the human right to water can be implied under Article 6 (1) ICCPR, which declares that “Every human being had the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”, but this is obviously a weak basis of this right.

The International Covenant on Economic, Social and Cultural Rights (ICESCR, adopted in 1966) and in particular Articles 11 and 12 is the primary source of General Comment No. 15 as an express codification of the international right to water. These provisions guarantee everyone the right to an adequate standard of living, including adequate food, clothing and housing, as well as to the enjoyment of the highest attainable standard of physical and mental health. General Comment No. 15. recognizes a specific international law “human right to water” that “entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses”, which includes drinking, personal sanitation, food preparation, washing of clothes, and personal and household hygiene.

It is interesting, that South Africa has only signed but not ratified the ICESCR, but at least its objects and purpose (securing and promoting economic, social and cultural rights) are binding on South Africa by virtue of customary international law and Article 18 of the Vienna Convention on the Law of Treaties. This means that after its signature South Africa had to refrain from acts contravening the right to water.

On the other hand, South Africa is a party to numerous international instruments that mention the right to water directly or indirectly. For example, Article 14 (2) h of the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW) provides that the State shall “take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right ... to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.”

The African Charter on Human and Peoples’ Rights guarantees in Article 16 “the right to enjoy the best attainable standard of physical and mental health.” According to the African Commission, “the failure of the Government to provide basic services such as safe drinking-water and electricity and the shortage of medicine as alleged in

communication 100/93 constitutes a violation of Article 16.”<sup>5</sup> Moreover, Article 18 of the African Charter requires that women and children shall be protected “as stipulated in international declarations and conventions”, thus incorporating the explicit obligations of CEDAW (and other instruments) to ensure adequate water, sanitation, food and shelter. For example, in SERAC v. Nigeria case the African Commission ruled that the rights to shelter and food are implied from a range of provisions in the African Charter, including the rights to health, dignity, life and political participation. By analogy, the same arguments may be applied in relation to access to water, which cannot be contemplated separately from the right to food and nutrition.<sup>6</sup>

The Constitution of South Africa is one of the most progressive constitutions in the world: for example, there are only a few constitutions which declare *expressis verbis* the right to water. Section 27 (1) b of the Constitution declares everyone’s right of access to sufficient water. Moreover, according to Section 7 (2) of the Constitution the “state must respect, protect, promote and fulfil the rights in the Bill of Rights”, including the socio-economic. In the Grootboom case the Constitutional Court of South Africa stated that “Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only [...] The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in each case.”<sup>7</sup>

### **III. The decision of the Constitutional Court**

The Constitutional Court had to decide whether the City’s free basic water policy of 25 litres per person per day (or 6000 litres per household per month) may be reasonable under section 27 (1) of the Constitution of South Africa, and whether the introduction of the pre-paid water meters was lawful, procedurally fair, and not discriminatory.

The South Gauteng High Court found that the installation of pre-paid water meters in Phiri was unlawful and unfair, and the City’s free basic water policy was unreasonable and therefore unlawful, ruling that the City should provide 50 litres of free basic water daily to the applicants and “similarly placed” residents of Phiri. The High Court emphasized that pre-paid meters stopped the water supply to a resident once the free

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5 Free Legal Assistance Group, Lawyers’ Committee for Human Rights, Union Interafricaine des Droits de l’Homme, Les Témoins de Jehovah v. Zaire (Democratic Republic of Congo), Communication Nos. 25/89., 47/90., 56/91., 100/93 (joined), 18th Session, October 1995, 47.

6 SERAC v. Nigeria, Communication No. 155/96, 27 May 2002, paras. 64-65.

7 Government of the Republic of South Africa and Others v. Grootboom and others [2000] ZACC 19, 2001. para. 20.

basic supply has been exhausted, until the resident purchases credit, which is an unlawful and unreasonable discontinuation of the supply of water.<sup>8</sup> Moreover, the pre-paid meter system is discriminatory because the residents of Soweto were not given the option of credit meters that are provided by the City to residents in other areas (particularly areas inhabited by white people).<sup>9</sup> For this reason, the City should provide the option of a metered supply in Phiri installed at the cost of the City of Johannesburg.<sup>10</sup>

The City appealed to the Supreme Court of Appeal, which on 25 March 2009 varied this order, holding that 42 litres of water per day would be “sufficient water” within the meaning of the Constitution of South Africa<sup>11</sup>, and directed the City to reformulate its policy in light of this conclusion. The Supreme Court of Appeal also held that the installation of the pre-paid water meters was unlawful on the ground that the City’s By-laws did not make provision for them in these circumstances. The Supreme Court of Appeal declared that the installation of the pre-paid meters is unlawful, but suspended that order for two years to give the City an opportunity to rectify the situation by amending its by-laws.<sup>12</sup>

The applicants applied to the Constitutional Court for leave to appeal against the judgment of the Supreme Court of Appeal, and, in effect, sought reinstatement of the High Court order. According to the South African legal system, it is possible to appeal against the Supreme Court of Appeal’s judgment to the Constitutional Court if the applicant demonstrates that the case concerns a constitutional matter, what is obviously not an automatic right to appeal. Taking into consideration that one of the main questions of the Mazibuko case was the interpretation of Section 27 of the South African Constitution, the Constitutional Court granted the application for leave to appeal in the present case.

#### **IV. Interpretation of the South African Constitution**

In my opinion Section 27 (1) b, of the South African Constitution is key to the Mazibuko case. This section states that “Everyone has the right to have access to [...] sufficient food and water.” The three courts had different interpretations of Section 27.

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8 See e.g. paras. 92-93. of the judgment of the South Gauteng High Court.

9 See e.g. para. 94. and 155. of the judgment of the South Gauteng High Court.

10 Para 183. of the judgment of the South Gauteng High Court.

11 Para. 24. of the judgment of the Supreme Court of Appeal.

12 Para. 58. of the judgment of the Supreme Court of Appeal.

The court of first instance strictly declared that “the State is obliged to provide free basic water to the poor”<sup>13</sup>, and on the basis of Section 27 (2) the respondent company is obliged to provide more than the minimum amount of water if the residents need more water, and if the City is able to provide more water within its available resources. According to the first instance judgment, 50 litres of water per person per day can be deemed “sufficient”.

The Supreme Court of Appeal followed in the interpretation of Section 27 (1) b, the method used by the Constitutional Court: “The obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water, and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them ... an unqualified obligation to meet these needs would not presently be capable of being fulfilled.”<sup>14</sup> This means that everyone may have the right to access to sufficient water, but everyone does not have a claim to immediate fulfilment of that right if the resources are not available to the government to provide the infrastructure and services that the right requires.<sup>15</sup>

The Constitutional Court’s interpretation of Section 27 of the Constitution declares that Section 27 (1) b, of the Constitution creates a right to access sufficient water. According to the Constitution, it is clear that the state’s role in the protection of human rights is traditionally to uphold negative rights, however in the present case (applying socio-economic rights) the state shall take reasonable legislative and other positive measures, within its available resources, to achieve the progressive realization of this right – as Section 27 (2) declares. This is similar to the interpretation of the Supreme Court of Appeals: citizens cannot appeal for immediate fulfilment of the right to water, because the government has only limited resources, and for this reason the immediate fulfilment of this right is impossible.<sup>16</sup> The Constitutional Court accepted that the City and Johannesburg Water company operates under a development strategy that requires the recovery of the full cost of the service in question. This means that the Constitutional Court rejected the idea of a minimum core content to the right to water.

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13 *Mazibuko and Others v. City of Johannesburg and Others* (Centre on Housing Rights and Evictions as *amicus curiae*) [2008] 4 All SA 471, para 40.

14 *Soobramoney v. Minister of Health (KwaZulu-Natal)* 1998 (a) SA 765 (CC) para. 11.

15 E. A. LARSON, At the intersection of neoliberal development, scarce resources, and human rights: Enforcing the right to water in South Africa. Honors Project, Paper 10., p. 50.

16 It is interesting that the highest court in the State of Parana in Brazil found that “the disconnection of needed water supply constitutes a violation of human rights – even if it is the result of a non-payment”. See: *Mazibuko and Others v. City of Johannesburg and Others*, para. 86.

## V. Consequences

The justiciability of socio-economic rights is an emerging subject. These rights are generally positive rights that require supplementary state action, and enforcement of these rights would require courts to order the state to do something, such as supply all citizens with sufficient water.

The United Nations Committee on Economic and Social Rights emphasized the concept of minimum core content to a socio-economic right<sup>17</sup> on the basis of Article 2.1 ICESCR. The right to water in section 27 of the South African Constitution contains similar wording as the ICESCR, providing that the state must take “reasonable legislative and other measures, within its available resources, to achieve the progressive realization” of the right to water. Without the concept of minimum core obligation, the idea of progressive realization could be interpreted as giving states an excuse for not implementing the right to water.<sup>18</sup> The High Court and the Supreme Court of Appeals both adopted the minimum core standard in their judgments, while the Constitutional Court rejected it, because the Constitutional Court believed that asserting a minimum core content to the right to water would have budgetary implications, and the Constitutional Court has no power to determine the quantity of water that should be the minimum amount provided.

Instead of the minimum core obligations, the Constitutional Court used an alternate standard, the standard of so-called reasonableness. This standard is based on the *Grootboom* case<sup>19</sup>, in which case the Constitutional Court focused on whether or not the housing policy adopted by Cape Town was a reasonable method to fulfil its obligations under section 26 of the Constitution. The test of reasonableness contains three parts:

- First, the action must have substantive measures that are comprehensive, coherent, flexible, balance and feasible, and it must have a workable legal and administrative infrastructure (mere framework legislation is insufficient), and it cannot exclude large swaths of people.<sup>20</sup>

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17 See e.g. K. G. YOUNG, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*. *The Yale Journal of International Law* (Winter 2008), p. 115.

18 E. A. LARSON, *At the intersection of neoliberal development, scarce resources, and human rights: Enforcing the right to water in South Africa*. Honors Project, Paper 10., p. 71.

19 *Government of the Republic of South Africa and Others v. Grootboom and others* [2000] ZACC 19, 2001.

20 R. FRANCIS, *Water Justice in South Africa: Natural Resources Policy at the Intersection of Human Rights, Economics and Political Power*. *Georgetown International Environmental Law Review* 18, No. 149. (2005), p. 189.

- Second, the rate at which the action is implemented must reflect progressive realization (it must move towards the goal as quickly as possible, but it is not necessary to reach the goal immediately).
- Finally, the reasonableness of an action is weighed against the government's available resources.<sup>21</sup>

As far as the burden of proof is concerned, if a party sues the government to contest the constitutionality of an action, the applicant must prove that the state's plan is unreasonable.

Applying these principles in the present case, the Constitutional Court declared the free basic water policy reasonable, for the following reasons. The Constitutional Court concluded, in contrast to the two lower courts, that it is not appropriate for a court to give a quantified content to what constitutes "sufficient water" because this is a matter best addressed in the first place by the government. It is impossible to base the free water policy on a per capita allocation, because of the continual movement of people between households. Moreover, the City is not obliged to provide a specified amount of free water to citizens per month, but the City is under a duty to take reasonable measures progressively to realize the achievement of this right. As far as the inflexibility of the free water system is concerned, the Court found that the City was continually reviewing its policy and investigating ways to ensure that the poorest households were able to gain access to water.<sup>22</sup> The Constitutional Court emphasized that 80% of the households in the City will receive adequate water under the present free water policy.

## **VI. Concluding remarks**

The significance of the Mazibuko case lies in at least two points. First, the case can be deemed a new chapter of enforcing economic and social rights (including the right to water) on the domestic level. It is interesting, that the two lower courts accepted the international approach of the minimum core obligations (based on the ICESCR and especially General Comment No. 15.), but the Constitutional Court, by contrast, applied the doctrine of reasonableness. Secondly, the Mazibuko case is an interesting case study

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21 E. A. LARSON, *At the intersection of neoliberal development, scarce resources, and human rights: Enforcing the right to water in South Africa*. Honors Project, Paper 10, p. 74.

22 P. DANCHIN, *A Human Right to Water? The South African Constitutional Court's Decision in the Mazibuko Case*. *Blog of the European Journal of International Law*, 2010, p. 4.

on how economic and social rights can be enforced before national courts (independently of the final decision).

It is obvious that the lower courts played different role in this case than the Constitutional Court: the South Gauteng High Court and the Supreme Court of Appeal wanted to reach a fair judgment in a concrete situation, taking into consideration the current position of the parties, whilst the Constitutional Court wanted to interpret only Section 27 of the South African Constitution, independently from the factual background of the Mazibuko case. In my opinion this role of the Constitutional Court is lawful but incorrect, because the Constitutional Court shall decide not only constitutional matters but concrete legal disputes which arise constitutional matters as well.

Anyway, it can be stated that the Mazibuko case is an important milestone on the road of the enforcement of economic, social and cultural rights. The judgments of the lower courts demonstrated that in the 21<sup>st</sup> century the enforcement of these rights (exactly, the right to water in the present case) is possible at least on the basis of international human rights norms. In my opinion this is the main lesson of the Mazibuko case.

# Respect for the Human Right to Water in Hungary based on the Practice of Certain UN organs

*Melinda Szappanyos\**

Although the human right to water is not explicitly declared as an independent human right in international treaties, its recognition by the international community is beyond doubt. However its enforcement is rather limited in lack of a legal source with binding force. Although some of the universal human rights treaties enable individuals to turn to expert bodies within the system of the Organization of the United Nations, the main means of monitoring the respect for human rights are still the reports sent by state parties to the treaties which are examined by the expert bodies. This paper examines the reporting cycles of Hungary with special regard to the respect for the human right to water, including the facts reported by the state and recommendations elaborated by the expert bodies.

## I. Introduction

After almost two decades of efforts made by the members of the international community, international organisations and expert bodies, non-governmental organisations (NGOs) and academics, there is a well-established, widely used definition of the human right to water at our disposal. According to the definition of the Committee on Economic, Social and Cultural Rights (CESCR) “[T]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.”<sup>1</sup> The content of this human right has been defined and thoroughly analysed during these two decades.<sup>2</sup> Its sources were also collected maintaining the distinction between explicit and implicit sources, taking into account not only the human rights treaties, but also sources of environmental law and

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1 CESCR, General Comment No. 15. The Right to Water, E/C.12/2002/11, 20 January 2003, point 2.

2 M. SZAPPANYOS, *Víz és jog. A vízhez való jog érvényesíthetősége az ENSZ keretében*, Veszprémi Humán Tudományokért Alapítvány, Veszprém 2013, pp. 17-63.; G. KECSKÉS, *A vízhez való jog nemzetközi jogi koncepciója*, Állam- és Jogtudomány, Vol. L., No. 4., 2009, pp. 569-598.

humanitarian law. Based on the legal approach<sup>3</sup> to the right to water, to some extent the possibilities of enforcement have also been recently analysed.

Obviously, when a state becomes the contracting party to an international treaty explicitly containing the human right to water, it will be obliged to respect such right and shall also have a procedural obligation of reporting on the measures taken for the implementation of the treaty. All human rights treaties imposing the obligation on state parties to respect the right to water (and other human rights) provide the opportunity for the states to decide themselves on the appropriate measures of implementation. But the final decision “as to whether all appropriate measures have been taken”<sup>4</sup> is always made by the expert bodies. Therefore, if we want to have complete picture on the respect for human right to water in Hungary it is necessary to examine not only the measures taken by Hungary, but also the decisions made by expert bodies within the system of the Organization of the United Nations (UN) on the appropriateness of these measures. Consequently, this paper examines the practice of human rights bodies within the UN system in connection with the respect for human right to water in Hungary.

## **II. Hungary’s Obligations Concerning the Right to Water and their Monitoring**

Hungary is a contracting party to several universal human rights treaties. These treaties are either explicit or implicit sources of the human right to water and all of them established an expert body for the monitoring of the implementation of the human rights included in the treaties. Based on the act of ratification, Hungary is obliged to protect the human rights included in the treaties and also to send national reports to expert bodies. According to the text of some treaties or optional protocols, some of the expert bodies also have the competence to examine individual complaints and inter-state communications submitted against Hungary. The following chart presents the universal human rights treaties, the expert bodies established by them, the human rights to be protected and closely related to the right to water and finally, the procedural obligations deriving from the treaty.

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3 The Rights to Water and Sanitation, Legal approach

<http://www.righttowater.info/ways-to-influence/legal-approaches/> (last accessed 10 May 2013)

4 CESCR, General Comment No. 3., The nature of States parties obligations (Art. 2, par.1), 14 December 1990., point 4.

Treaty	Expert Body	Relevant Protected Human Rights	Procedural Obligations <sup>5</sup>
Convention on the Elimination of Discrimination Against Women <sup>6</sup>	Committee on the Elimination of Discrimination against Women (CEDAW) <sup>7</sup>	Explicit: Art. 14, point h) Implicit: Arts. 10, 11, 12	<b>Reporting Obligation</b> initial report: within 1 year regular reports: every 4 years <b>Individual complaints</b>
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women <sup>8</sup>			
Convention on the Rights of the Child <sup>9</sup>	Committee on the Rights of the Child (CRC) <sup>10</sup>	Explicit: Art. 24 Para. (2) point c) Implicit: Arts. 6, 14, 19, 27, 28, 29, 30, 37, point a), 39	<b>Reporting Obligation</b> initial report: within 2 year regular reports: every 5 years
Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict <sup>11</sup>			
Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography <sup>12</sup>			
Convention on the Rights of Persons with Disabilities <sup>13</sup>	Committee on the Rights of Persons with Disabilities (CRPD) <sup>14</sup>	Explicit: Art. 28, Para. (2), point a) Implicit: Arts. 10, 11, 15, 24, 25, 26, 27	<b>Reporting Obligation</b> initial report: within 2 year regular reports: every 4 years <b>Individual complaint Inquiry procedure</b>
Optional Protocol to the Convention on the Rights of Persons with Disabilities <sup>15</sup>			
Charter of the United Nations <sup>16</sup>	-	general obligation to protect human rights	-
International Convention on the Elimination of All Forms of Racial Discrimination <sup>17</sup>	Committee on the Elimination of Racial Discrimination (CERD) <sup>18</sup>	Implicit: Art. 5, points e) iii), iv) vi)	<b>Reporting Obligation</b> initial report: within 1 year

5 In the chart the inter-state complaints are not presented, since until the time of the submission of the manuscript no inter-state complaint has been submitted.

6 GA Res., 34/180, 18 December 1979, New York, 1249 UNTS 14, Hungarian act: 1982. évi 10. törvényerejű rendelet a nőekkel szembeni megkülönböztetés minden formájának felszámolásáról 1979. december 18-án New Yorkban elfogadott egyezmény kihirdetéséről.

7 Established by the Convention on the Elimination of Discrimination Against Women, Art. 17.

8 GA Res. 54/4, 6 October 1999, New York, 2131 UNTS 83, Hungarian act: 2001. évi LX. törvény a nőekkel szembeni hátrányos megkülönböztetés minden formájának kiküszöböléséről szóló, 1979. december 18-án, New Yorkban elfogadott Egyezmény Kiegészítő Jegyzőkönyve kihirdetéséről.

9 GA Res. 44/25, 20 November 1989, New York, 1577 UNTS 3, Hungarian act: 1991. évi LXIV. törvény a Gyermek jogairól szóló, New Yorkban, 1989. november 20-án kelt Egyezmény kihirdetéséről

10 Established by the Convention on the Rights of the Child, Art. 43.

11 GA Res. 54/263, 25 May 2000, New York, 2173 UNTS 222, Hungarian act: 2009. évi CLX. törvény a gyermekek fegyveres konfliktusba történő bevonásáról szóló, a Gyermek jogairól szóló egyezményhez fűzött Fakultatív Jegyzőkönyv megerősítéséről és kihirdetéséről.

12 GA Res. 54/263, 25 May 2000, New York, 2173 UNTS 227, Hungarian act: 2009. évi CLXI. törvény a gyermekek eladásáról, a gyermekprostitúcióról és a gyermekpornográfiáról szóló, a Gyermek jogairól szóló egyezményhez fűzött Fakultatív Jegyzőkönyv megerősítéséről és kihirdetéséről.

13 GA Res. 61/106, 13 December 2006, New York, 2515 UNTS 69, Hungarian act: 2007. évi XCII. törvény a Fogyatékosággal élő személyek jogairól szóló egyezmény és az ahhoz kapcsolódó Fakultatív Jegyzőkönyv kihirdetéséről.

14 Established by the Convention on the Rights of Persons with Disabilities, Art. 34.

15 GA Res. 61/106, 13 December 2006, New York, 2518 UNTS 281, Hungarian act: 2007. évi XCII. törvény a Fogyatékosággal élő személyek jogairól szóló egyezmény és az ahhoz kapcsolódó Fakultatív Jegyzőkönyv kihirdetéséről.

16 1945, San Francisco, 1 UNTS XVI, Hungarian act: 1956. évi I. törvény az Egyesült Nemzetek Alapokmányának törvénybe iktatásáról.

			regular reports: every 2 years <b>Individual complaints</b>
International Covenant on Economic, Social and Cultural Rights <sup>19</sup>	Committee of Economic Social and Cultural Rights (CESCR) <sup>20</sup>	Implicit: Arts. 6, 7 point b), 11 Para. 1, 12, 15 Para. 1 point a)	<b>Reporting Obligation</b> initial report: within two years regular reports: every 5 years
International Covenant on Civil and Political Rights <sup>21</sup>	Human Rights Committee (HRCOM.) <sup>22</sup>	Implicit: Arts. 6, 7, 10, 18	<b>Reporting Obligation</b> initial report: within 1 year regular reports: every 4 years <b>Individual complaints</b> <b>Inter-State communications</b>
Optional Protocol to the International Covenant on Civil and Political Rights <sup>23</sup>			
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment <sup>24</sup>	Committee Against Torture (CAT) <sup>25</sup> + Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture <sup>26</sup>	-	<b>Reporting Obligation</b> initial report: within 1 year regular reports: every 4 years <b>Individual complaints</b>
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment <sup>27</sup>			

The monitoring of the implementation of state obligations is not limited to the procedures of the treaty-based bodies. Within the UN system, there are also charter-

17 GA Res. 2106 (XX), 21 December 1965, New York, 660 UNTS 212, Hungarian act: 1969. évi 8. törvényerejű rendelet a faji megkülönböztetés valamennyi formájának kiküszöböléséről New Yorkban 1965. december 21-én elfogadott nemzetközi egyezmény kihirdetéséről.

18 Established by the International Convention on the Elimination of All Forms of Racial Discrimination, Art. 8.

19 GA Res. 2200 (XXI), 16 December 1966, New York, 993 UNTS 4, Hungarian act: 1976. évi 9. törvényerejű rendelet az Egyesült Nemzetek Közgyűlése XXI. ülészakán, 1966. december 16-án elfogadott Gazdasági, Szociális és Kulturális Jogok Nemzetközi Egyezségokmánya kihirdetéséről.

20 Established by ECOSOC Res. 17, 28 May 1985.

21 GA Res. 2200 (XXI), 16 December 1966, New York, 999 UNTS 172, Hungarian act: 1976. évi 8. törvényerejű rendelet az Egyesült Nemzetek Közgyűlése XXI. ülészakán, 1966. december 16-án elfogadott Polgári és Politikai Jogok Nemzetközi Egyezségokmánya kihirdetéséről.

22 Established by the International Covenant on Civil and Political Rights, Art. 28.

23 1966, New York, 999 UNTS 171., Hungarian act: 1988. évi 24. törvényerejű rendelet a Polgári és Politikai Jogok Nemzetközi Egyezségokmányához kapcsolódó, az Egyesült Nemzetek Közgyűlése által New York-ban 1966. december 16-án elfogadott Fakultatív Jegyzőkönyv kihirdetéséről.

24 GA Res. 39/46, 10 December 1984, New York, 1465 UNTS 113, Hungarian act: 1988. évi 3. törvényerejű rendelet a kínzás és más kegyetlen, embertelen vagy megalázó büntetések vagy bánásmódok elleni nemzetközi egyezmény kihirdetéséről.

25 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 17.

26 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 2.

27 GA Res. 57/199, 18 December 2002, New York, 2375 UNTS 208.

based bodies protecting human rights, most importantly the Human Rights Council (HRC).<sup>28</sup> The practice of this latter should also be taken into consideration.<sup>29</sup>

The obligation of implementing Hungary's international duties is enshrined in the Fundamental Law of Hungary. According to it "Hungary shall ensure harmony between international law and Hungarian law in order to fulfil its obligations under international law."<sup>30</sup> As mentioned above, the implementation of these obligations is evaluated by human rights bodies, thus, the following chapter of the present paper analyses the procedures of charter- and treaty-based bodies in respect of Hungary's obligations.

### **III. Practice of the UN human rights bodies**

#### **III.1. Relevant UN organs and their procedures**

As mentioned before, according to the classical typology, the organs and bodies dealing with the protection of human rights within the UN system may be divided into two main types: charter-based bodies and treaty-based bodies. Recently, charter-based bodies are the HRC and the High Commissioner for Human Rights, while the number of the treaty-based bodies, each established by a universal treaty protecting human rights, is much higher.

As regards the most important charter-based body, the HRC, it has three main activities relevant from the point of view of this analysis: complaints of individuals, the Universal Periodic Review Mechanism (UPR) and the special procedures.

Although the complaint procedure<sup>31</sup> of the HRC is in theory an effective method for enforcing states' obligations to respect the human right to water, the practice of this procedure cannot be examined because of its confidential nature.<sup>32</sup>

In the framework of a quite recent procedure of the HRC, the UPR is examining all members of the UN every four and a half years. The subject of the examination is the analysis and further development of the human rights situation in the states. The

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28 GA Res. 60/251, Human Rights Council, 3 April 2006.

29 The right to water has further form of enforcement within the UN system in the area of humanitarian law (International Criminal Court and ad hoc international tribunals). See M. Szappanyos, *A vízhez való jog érvényesíthetősége az ENSZ keretében* (PhD thesis, University of Pécs, 2012) pp. 164-173.

30 Fundamental Law of Hungary, 25 April 2011., Art. Q, para. 2.

31 HRC Res. 5/1 Institution-building of the United Nations Human Rights Council, 18 June 2007, Ann. IV.: Complaint procedure.

32 Id., Ann. IV points 86 and 102.

advantage of this procedure is the examination of all human rights (meanwhile each treaty-based body examines the respect for only those human rights which are included in the treaty in question). Though there is no explicit obligation for the member states of the UN to participate in the UPR, no state has denied it until now.<sup>33</sup>

Under the supervision of the HRC, several special procedures are employed for the protection of certain human rights (thematic mandates) and all human rights in some states (country mandates). The mandate-holders are entitled to examine human rights situations in states with the consent of the government, also individual complaints within the range of their expertise and may elaborate scientific reports on the details of human rights under their protection.

The General Assembly of the UN established a position in 1993<sup>34</sup> exclusively for the protection of human rights, more exactly for the coordination of the protection mechanisms within the UN system, the High Commissioner for Human Rights, supported by the Office of the High Commissioner for Human Rights (OHCHR). The Commissioner is the deputy of the Secretary-General of the UN.<sup>35</sup> The establishment of this function was necessary, because from the first steps of human rights protection, the establishment of the Human Rights Commission, replaced by the HRC in 2006<sup>36</sup> and the adoption of the Universal Declaration of Human Rights (UDHR),<sup>37</sup> the system of organs, expert bodies, treaties and procedures became very complex.<sup>38</sup> The duties of the Commissioner are various,<sup>39</sup> in practice he/she executes these duties through the elaboration of human rights standards, promotion and control of implementation.<sup>40</sup> The

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33 M. SZAPPANYOS, *Obligatory or voluntary? – Participation in the UPR*, in Zs.Gy. Balogh (Ed.), *Studia Iuridica Auctoritate Universitatis Pécs Publicata 150: Essays of Faculty of Law University of Pécs Yearbook of 2012*, University of Pécs Faculty of Law, Pécs, 2012, pp. 273-290.

34 GA Res. 48/141, 20 December 1993, High Commissioner for the promotion and protection of all human rights.

35 Even if the UN Charter does not entrust the Secretary-Generals with duties connected to the protection of human rights, they sometimes take some tasks upon themselves. Besides using their influence for the protection of human rights, for example in case of humanitarian catastrophes, some reforms are also linked to their names. The reform worked out by Kofi Annan can serve as a good example. Though the subject-matter of the project was the reform of the whole UN system, it also included the reform of the protection of the human rights within. UN, *Renewing the United Nations: A Programme for Reform*, Report of the United Nations Secretary-General, A/51/950, 14 July 1997, point 79.

36 ECOSOC Res. 245/Rev.1, 26 February 1946, Commission on Human Rights.

37 GA Res. 217 A (III), 10 December 1948, Universal Declaration on Human Rights.

38 GA Res. 48/141, 20 December 1993, High Commissioner for the promotion and protection of all human rights, preamble, phase 16.

39 *Id.*, point 5.

40 OHCHR, *Report on Activities and Results*, 2009.

[http://www.ohchr.org/Documents/Publications/I\\_OHCHR\\_Rep\\_2009\\_complete\\_final.pdf](http://www.ohchr.org/Documents/Publications/I_OHCHR_Rep_2009_complete_final.pdf) (last accessed: 3 February 2012) p. 16.

Commissioner also has an important role to play during the special procedures: assisting the mandate-holders; he/she contributes to the success of the UPR as well and does relevant field work.<sup>41</sup> With respect to the human right to water, the Commissioner's most important activity has been the summing up of a Factsheet on this emerging human right, describing its legal basis, the problems of its enforcement as well as the best practices.<sup>42</sup>

As to the treaty-based bodies, they became quite numerous with the birth of the universal protection of human rights in the UN Charter.<sup>43</sup> Not only has the number of expert bodies increased, but also the number and range of the procedures used by them in protecting human rights. Every universal treaty in question established a reporting mechanism. The contracting parties to each treaty are obliged to submit an initial report and then regular reports periodically on the implementation of the treaty. In case of some universal treaties examined in the present paper, the treaty itself, or more frequently an optional protocol to the treaty, contains the possibility for contracting parties to authorize the expert body to examine complaints against them, submitted by individuals (or NGOs, group of individuals). Albeit today individual complaints are not rare in public international law, but they are far from being generally used.<sup>44</sup> With inter-state communications a contracting party to a treaty may draw the attention of the expert body to a violation of human rights committed by another contracting party. Finally, the most recent among the procedures is the inquiry procedure, which allows the expert body to "initiate a confidential investigation by one or more of its members where it has received reliable information of grave or systematic violations by a State Party of rights established in the [C]onvention."<sup>45</sup>

### **III.2. Methods of research**

The right to water is a newly emerged human right, not included explicitly in most of the universal human rights treaties. Most of the treaties considered as relevant sources of the right to water were adopted and entered into force before the burgeoning international political and academic interest for this human right due to the world water

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41 *Id.*, p. 17.

42 OHCHR, Fact Sheet No. 35. Right to water, 2010. (Factsheet No. 35.)

43 SZAPPANYOS 2013, pp. 93-94.

44 H. J. STEINER: Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?, in P., Alston, J., Crawford (Eds.), *The Future of UN Human Rights Treaty Monitoring*, Cambridge University Press, 2000, p. 15.

45 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Art. 8.

crisis.<sup>46</sup> Therefore, the practice of the UN human rights bodies did not focus *expressis verbis* on the right to water even a decade ago. Moreover, the documents born in the practice, especially the documents elaborated in the reporting procedures fairly often follow the structure of the treaties, reporting only on the human rights declared concretely in the treaties. Even under such conditions, the practice concerning the right to water still can be analysed using other human rights as starting points. Though it is common opinion that human rights cannot be easily categorized because they are inseparable,<sup>47</sup> this does not contradict the idea, that the right to water has closer relations to certain human rights than to others. Thus, a list of human rights closely related to the right to water and included in the relevant sources was worked out, and these rights were identified in the practice. Since the enjoyment of these rights cannot be secured without the right to water, the latter was also mentioned in the documents from some aspects.<sup>48</sup>

From the organs and their procedures mentioned above those were identified, which seemed relevant and could presumably give significant research material as a basis for further analysis. Among the charter-based bodies one procedure of the HRC the UPR could have remarkable practice concerning the implementation and respect for the right to water, because this mechanism examines the respect for (almost) all human rights and

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46 E.g. one of the most acknowledged experts on the right to water, Peter Gleick published a paper in 1996, then in 1999, which papers are considered as the first summaries on the right to water. Only the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and the Convention on the Rights of Persons with Disabilities were adopted after this date. See P. H. GLEICK, Basic Water Requirements for Human Activities: Meeting Basic Needs, *Water International Law* Vol. 21., 1996, pp. 83-92.; See also P. H. GLEICK, The Human Right to Water, *Water Policy*, Vol. 1., 1998, pp. 487-503.

47 World Conference on Human Rights, Vienna Declaration and Programme of Action, A/CONF.157/23, 12 July 1993, point 5.

48 Based on scientific documents with no binding force and the results of other academic research the following rights are closely related to the right to water: right to an adequate standard of living; right to the highest attainable standard of health; right to adequate housing; right to food; right to life and human dignity; right to gain a living by work; right to take part in cultural life (General Comment No. 15. 2003, points 3. and 6.); right to education (Fact Sheet No. 35. 2010, p. 21.); right to development (GLEICK 1998, p. 494., GA Res. 41/128, 4 December 1986, Declaration on the Right to Development, point 8.); right to healthy environment (GLEICK 1998; G. KARDOS, *Emberi jogok egy új korszak határán*, T-Twins, Budapest 1995, pp. 54-58.; see also Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador", 1988, San Salvador, Art. 11. Para. 1.) and the prohibition of torture or other inhuman or degrading treatment (A. TRIPATHY, P.R. MOHAPATRA, *Right to Water: Debating the Human Rights Perspective*, National University of Juridical Sciences Law Review, Vol. 2., 2009, p. 307.; The connection between the prohibition of torture and the right to water is proved also by the legal practice of states. See e.g. Human Rights Committee, Third periodic Report, Democratic Republic of Congo, CCPR/C/COD/2005/3, 3 May 2005, point 73 (c).).

it is one of the most recent procedures within the UN system.<sup>49</sup> In the case of treaty-based bodies, as the chart shows, the most basic procedure used for monitoring the respect for human rights in Hungary is the reporting system. With the exception of the UN Charter as an implicit source of the human right to water, all treaties use this method of monitoring. All documents prepared during the reporting procedure (national report, list of issues, replies to the list of issues and concluding observation) are relevant, including the core reports. In the matter of individual complaints and inquiry procedures it is to be noted that not only the number of treaties using this monitoring procedure is limited, but also the number of states which have authorised the expert bodies to examine individual complaints or conduct an inquiry procedure. At the moment there is a possibility to submit individual complaints against Hungary in respect to five treaties.

The thorough examination of the practice of the UN organs is challenging, because the documentation of the above mentioned procedures is extremely vast. Even though the documents help the researcher by building on the structure of the treaty itself, following the original order of human rights, reading all documents is time consuming. Moreover, even if the documentation is read through, there is a fairly big possibility of missing some relevant information. Therefore, the research serving as a background for this paper completed the empirical methods with using keyword search focusing on keywords related to the right to water and the human rights in close relation to it.<sup>50</sup>

Based on this extensive research a lot of research questions may be raised and analysed. This paper intends to examine only two aspects of the topic. First, it attempts to collect the list of topics related to the human right to water and mentioned in the practice. Secondly, it focuses on the reaction of the UN organs given to the problems, concerns, challenges mentioned in relation to Hungary.

### **III.3. Relevant practice**

Based on the examination of the practice of UN organs a list of topics related to the right to water may be elaborated. Although the aim of this paper is to present the

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49 The very first cycle of the UPR has started in 2008. See the schedule at <http://www.ohchr.org/EN/HRBodies/UPR/Documents/uprlist.pdf> (last accessed: 2 May 2013)

50 The keywords were determined at the beginning of the research, serving as a basis for several papers, including this one. The keywords were used in various forms and in different languages (English, Spanish, and French). See the original concept and its use in SZAPPANYOS 2012, pp. 12-13.; M. SZAPPANYOS, Enforcement of the Human Right to Water through the Universal Periodic Review Mechanism, *Kyungpook National University Law Journal*, Vol. 40., 2012, p. 788.

protection of the right to water in Hungary, this cannot be analysed and evaluated in isolation from other States. Therefore, we use as a starting point a full list of relevant topics, mentioned in any procedure examined *by/in connection with any member state of the UN*.<sup>51</sup> The chart below shows the topics mentioned during the examined procedures concerning all states, divided on the basis of human rights closely related to the right to water.<sup>52</sup>

<i>Right to water</i>	Legal recognition, declaration of the necessity of legal declaration, suggestion for legal recognition
	Supplying of data in details
	Constraints, challenges
	Goals, projects, strategies, concrete proposals for improvement
	Data about water management, proposals about the formulation of new concepts of management
	Privatization (problems of privatization or suggestion for privatization)
	Others (Quality of drinking-water, free water supply for the whole population, etc.)
<i>Right to food</i>	Direct relation (undernourishment, poverty not included)
<i>Right to adequate housing</i>	Standards in construction
	State grant and plans, projects for the development of living conditions
	Informal settlements, slums
	Non adequate housing
<i>Right to the highest attainable standard of health</i>	Water-borne diseases, child mortality
<i>Right to education</i>	Domestic work (fetching water) prevents girls' school attendance
	Poor or missing infrastructure in schools (sanitation, lack of water supply)
<i>Prohibition of torture or other inhuman or degrading treatment</i>	Bad conditions in prisons (generally)
	Limited or missing water supply in prisons, detention centres, etc.
<i>Right to healthy environment</i>	Protection of environment, protection of natural resources, right to healthy environment
	Effect of climate change on human rights
	Containment of waters, prevention
<i>Right to work</i>	Non adequate working conditions
<i>Especially vulnerable groups</i>	Bad conditions in camps, centres of refugees, migrants, internally displaced persons, including limited or missing water supply

51 Because this paper is one of the results of a thorough research, this chart has been already used in slightly different forms in several papers. See the different variations e.g. SZAPPANYOS 2012, pp. 103-104., 125-126., 130., 134., 141., 145-146., 149.; SZAPPANYOS, Enforcement of the Human Right to Water through the Universal Periodic Review Mechanism 2012, pp. 790-791.; SZAPPANYOS 2013, pp. 84., 102-103., 106-107., 111., 117-119., 123., 126.

52 Though basically the topics are divided into groups based on human rights, there is an exception. The analysis would be distorted without emphasizing those subjects of human rights, who are especially vulnerable, particularly because one group of people (ethnic minority – Roma population) has great relevance in this paper.

	Persons with disabilities, elderly
	Indigenous communities, ethnic and religious minorities
<i>Others</i>	

In the case of Hungary, there are some procedures mentioned above, which are not significant. As to the practice of the charter-based bodies it is worth mentioning that only one procedure of the HRC gives insight to the protection of the right to water in the state, the UPR.<sup>53</sup> Hungary was under examination in May 2011<sup>54</sup> and will be again during the second cycle in May 2016.<sup>55</sup> As to the treaty-based bodies the most important procedure, serving with most of the relevant information is the reporting procedure. According to the UN Treaty body database, Hungary is late on the submission of national reports to some treaty-based bodies, namely to the CEDAW, the CERD, the CESC and the CAT.<sup>56</sup> Despite this reporting status, Hungary generally fulfils its reporting obligations. Hungary has authorised a few expert bodies to examine individual complaints as well. Until May 2013, only three expert bodies examined individual complaints submitted against Hungary, the CAT, the CCPR and the CEDAW.<sup>57</sup> Among these individual complaints only one had relevance in respect the right to water, connected to it indirectly, when the CCPR decided that Hungary has violated the human rights of the victim (Art. 10 of the International Covenant on Civil and Political Rights) by not ensuring him enough time for personal hygiene.<sup>58</sup>

The following chart represents the topics related to the human right to water mentioned *by/in connection with Hungary* during the examined procedures.

<i>Expert body</i>	<i>Procedure</i>	<i>Relevant human right</i>	<i>Topics related to the right to water</i>
<i>HRC (UPR)</i>	reporting procedure	Right to adequate housing	State grant and plans, projects for the development of living conditions

53 The analysis of the practice of Special procedures did not show significant results evidently, since there is no country mandate examining the protection of human rights in Hungary. Also, none of the holders of thematic mandates has performed a country visit to Hungary. Moreover, the individual complaint procedure of the HRC is confidential, even if there is a complaint against Hungary, its content is unavailable for scientific research.

54 See the analysis of Hungary's examination in A. KOMANOVICS, *Keresztútjában Genfben, Magyarország emberi jogi helyzetének értékelése az ENSZ Emberi Jogi Tanácsában, Föld-Rész: Nemzetközi és Európai Jogi Szemle*, Vol. IV., Nos. 2-4., pp. 7-27.

55 See the schedule of the 2nd cycle at <http://www.ohchr.org/EN/HRBodies/UPR/PAGES/HUSession11.aspx> (last accessed: 2 May 2013)

56 UN Treaty Body Database, Reporting Status, <http://www.unhchr.ch/tbs/doc.nsf/newhvalrepyconv?OpenView&Start=1&Count=250&Collapse=1#1> (last accessed: 2 May 2013)

57 The UN Human Rights Treaties, <http://www.bayefsky.com/docs.php/area/jurisprudence/state/77> (last accessed: 2 May 2013)

58 Human Rights Committee, *Párkányi v. Hungary*, Communication No. 410/1990, 27 July 1992, CCPR/C/45/D/410/1990, point 8.2.

		Especially vulnerable groups	Indigenous communities, ethnic and religious minorities (Roma population)
<i>CRC</i>	reporting procedure	Right to water	Others (Quality of drinking-water – arsenic poisoning)
		Right to the highest attainable standard of health	Child mortality
<i>CERD</i>	reporting procedure	Prohibition of torture or other inhuman or degrading treatment	Bad conditions in prisons
<i>CESCR</i>	reporting procedure	Right to water	<input type="checkbox"/> Supplying of data in details <input type="checkbox"/> Constraints, challenges <input type="checkbox"/> Goals, projects, strategies, concrete proposals for improvement <input type="checkbox"/> Data about water management, proposals about the formulation of new concepts of management
		Right to adequate housing	<input type="checkbox"/> State grant and plans, projects for the development of living conditions <input type="checkbox"/> Non adequate housing
		Right to the highest attainable standard of health	Others (the development of water quality is one of the pillars of the National Environmental Health Action Programme)
		Especially vulnerable groups	Indigenous communities, ethnic and religious minorities (Roma population)
<i>HRCOM.</i>	individual complaint	Prohibition of torture or other inhuman or degrading treatment	Bad conditions in prisons

From the chart summing up the results of the research it is shown that the right to water itself was mentioned in the practice of only two organs, the CESCR and the CRC, while other human rights closely related to the right to water were mentioned several times. The topics mentioned several times during the procedures of different organs were the bad conditions of detention and the non-adequate housing conditions of the Roma population.

Even though individual complaints seem more suitable for the enforcement of human rights generally, in case of the right to water they are less common and noticeably less effective. A recent development can change this situation in the future, since the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights entered into force at the beginning of May 2013.<sup>59</sup>

Undoubtedly, the CESCR was the most active concerning the monitoring of the implementation and protection of the right to water in Hungary. This is attributable to several factors. First, Hungary has submitted relevant information on the respect for the

<sup>59</sup> Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 10 December 2008, New York, Doc.A/63/435; Hungary has not signed the protocol.  
[http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3-a&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en)  
(last accessed: 2 May 2013)

right to water in its national report to the CESCR. Thus, the CESCR had the opportunity to react to the questions raised by the government. Based on the research it is common, that an expert body reacts to the topics, problems mentioned by the state and raises further questions only, when the challenges or human rights violations, made known to it from a source other than the government (e.g. NGOs), are evident.<sup>60</sup> Second, the content of the right to water was elaborated by the CESCR and all relevant international documents originate this new right from the right of everyone to an adequate standard of living (Art. 11 of the International Covenant on Economic, Social and Cultural Rights).<sup>61</sup> Not only has the national report submitted to the CESCR dealt with the right to water, but the concluding observations also reacted to this matter, more exactly to one aspect: the Committee recommended to the government that it ensure the public services, including clean water to the Roma population.<sup>62</sup> Although the CESCR paid attention to the problem of water supply of the Roma population and made a recommendation, it did not give concrete suggestions regarding the possible solution of the problem. Of course this is usual customary in the practice of the treaty-based bodies, since their function is limited to the task of evaluating the steps of implementation made by governments; they are not supposed to solve the problem, but much rather to help in finding the solution.

#### **IV. Final remarks**

Although the UN organs have limited insight into the implementation of human rights obligations, the remarkable problems are usually not left unmentioned. These bodies limit themselves to making recommendations, but do not help states with concrete proposals for the solution of problems.<sup>63</sup> Summing up said the above, the role of UN organs is only to evaluate the achievements of states and call their attention to the problems to be solved. The watch over of the implementation is continuous; every national report should cover all questions raised by the expert bodies during the previous reporting cycles.

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60 The CAT can be considered an exception, because it usually sends a list of issues for states before the submission of the national report.

61 See e.g. General Comment No. 15., point 3.; GA Res. 64/292, 3 August 2010, The Human Right to Water and Sanitation, preamble, phase 3.

62 CESCR, Concluding observations, E/C.12/HUN/CO/3, 16 January 2008, point 48.

63 Though one of the declared aims of the UPR is sharing the best practices among states, during the first cycle the states did not formulate concrete proposals, solutions to problems, but their statements were limited to express their concerns or to making general suggestions for solving the problems risen during the process.

Based (exclusively) on the practice of the UN organs with respect to the implementation of the right to water in Hungary, we can say that one problem remains unsolved: the water supply of the Roma population is insufficient and needs to be improved until the submission of the next national report. The next national report (4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> reports together) to the CESCR was due 30 June 2009 but has not been submitted yet. In its next report the Hungarian government should react to the concluding observations and report on the steps made to improve the situation objected to by the CESCR. After that, the CESCR will evaluate the situation again.

Based on the Hungarian example, a few more general comments can be made. The efficiency of the universal protection of human rights is often strictly criticised.<sup>64</sup> Considering the general criticism and the experiences drawn from the present research, some consequences follow. Firstly, it is generally problematic that the examined UN organs cannot apply sanctions against states which do not respect the right to water, but can only evaluate the achievements and challenges of the states. Unquestionably, evaluation and pointing out the problems is useful in itself, but this process is also very slow. The national reports to expert bodies are to be submitted regularly, usually every four or five years. It is easy to see that those who suffer from the consequences of insufficient water supply do not have four or five years to wait for some kind of uncertain solution.

For people under the jurisdiction of Hungary and most European states there are other opportunities for the enforcement of the right to water (e.g. at the European Court of Human Rights) or at least there is more international pressure on their states to ensure this human right (Council of Europe, European Union). Along with the implementation of other human rights, the respect for the right to water is also monitored under the aegis of other international organisations (e.g. Organization of American States and its human rights bodies). These mechanisms are more than necessary for the protection of the right to water, because according to the experiences, the UN system alone is not capable of making a real difference at its present state.

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64 J. CRAWFORD, *The UN Human Rights Treaty System: a System in Crisis?*, in P. ALSTON, J. CRAWFORD (Eds.), *The Future of UN Human Rights Treaty Monitoring*, Cambridge University Press, 2000, pp. 4-11; T., Buergethal, *Nemzetközi emberi jogok*, Helikon Kiadó, Budapest 2001, p. 27.

*“A democratic and equitable international order requires, inter alia, the realisation of the right of every person and peoples to a healthy environment.”\**

## **The Right to Water – a Specific Environmental Issue in need of a Comprehensive European System of Guarantees\*\***

*Veronika Greksza\*\*\**

### **I. Facing the problem**

At the beginning of the third millennium, in a world where the population is constantly increasing and economic interests have priority over environmental and social concerns<sup>1</sup>, the need to find a solution to a number of relatively new global environmental and human rights problems became obvious to the international community. In 1987 the international community developed the concept of sustainable development as an answer to increasingly prominent environmental issues. The Report of the World Commission on Environment and Development entitled “Our Common Future” (commonly known as the “Brundtland Report”) describes a development which “meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>2</sup>

The content of sustainable development is not sufficiently specified and due to its inconsistent use the term has been significantly diluted. The term “sustainable” became the synonym of “green” solutions which is incorrectly applied and used in decisions, politics, acts and activities in which an environmental dimension can hardly be

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\* United Nations Commission on Human Rights in Resolution 2005/57

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1 MALGOSIA FITZMAURICE, DAVID M. ONG, PANOS MERKOURIS (Eds.): Research Handbook on International Environmental Law. Edward Elgar. Cheltenham. UK. 2010. pp. 69.

2 Complete text of the “Brundtland Report” available from [http://conspect.nl/pdf/Our\\_Common\\_Future-Brundtland\\_Report\\_1987.pdf](http://conspect.nl/pdf/Our_Common_Future-Brundtland_Report_1987.pdf) Retrieved on 10 June 2013.

discovered.<sup>3</sup> Sustainable development is based on complementary and equal pillars of economic, social and environmental aspects as it was first conceived in 2002 in the Johannesburg Declaration on Sustainable Development.<sup>4</sup> It is easy to see the lack of consistency between the three components of sustainability, as the economic “interests” override environmental considerations. As the concept of sustainable development failed to meet expectations (at least until now), there is a need for new solutions regarding environmental protection which call for urgent action – especially if current water issues are taken into consideration.

The lack of freshwater is the most pressing issue of humanity. With the widely known words of John F. Kennedy, “anyone who can solve the problems of water will be worthy of two Nobel prizes – one for peace and one for science.”<sup>5</sup> Fresh water, which is fundamental for life and health, is a limited natural resource as three-fourths of the Earth is covered by water of which only 2.5% is fresh water<sup>6</sup>.

This paper aims to highlight the possibility and the need for a new European human rights catalogue and to outline its basic doctrinal issues by presenting the interrelation of the human rights movement, environmental protection, the human right to a healthy environment and the human right to water. Such a catalogue of human rights developed by the Council of Europe (which would ensure third-generation human rights, *inter alia* the right to a healthy environment and its segment area, the right to water) could provide a solution for water issues in Europe and could set an example for the international community to follow.

## **II. Relations between the environmental protection, the right to healthy environment and the right to water**

The recognition and protection of human rights appeared in international law in the middle of the 20<sup>th</sup> century.<sup>7</sup> Promotion and encouragement of the respect for human rights and fundamental freedoms is defined in the Charter of the United Nations as an objective in order to achieve international co-operation in solving international

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3 LUDWIG KRÄMER: *Az Európai Unió környezeti joga*. Dialóg Campus. Budapest-Pécs, 2012, p. 36.

4 Johannesburg Declaration on Sustainable Development available from [http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/POI\\_PD.htm](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI_PD.htm) Retrieved on 10 June 2013.

5 JOHN F. KENNEDY in the early 1960s.

6 [http://www.unwater.org/statistics\\_res.html](http://www.unwater.org/statistics_res.html) Retrieved on 10 June 2013.

7 ULRICH BEYERLIN, THILO MARAUHN: *International Environmental Law*. Hart Publishing. Oxford. 2011.

problems.<sup>8</sup> According to the definition of Conway W. Henderson human rights are freedoms and legitimate expectations: freedoms which people enjoy in order to make choices about their lives and expectations of people that they will be treated in a suitable manner.<sup>9</sup>

The development of human rights and the human rights movement are based on a great natural law tradition<sup>10</sup> which is indicated in the United Nation's Universal Declaration of Human Rights (UDHR) which was adopted on the 10th of December 1948. The UDHR states:

*“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”<sup>11</sup>*

Every person is a holder of human rights which represent basic rights and freedoms because of their universal and absolute nature. The complex relationship between human rights and the quality of the environment is extensively accepted by the doctrine which already recognized that the effective enforcement of human rights is threatened by environmental pollution. The quality of human life is based on maintaining a liveable planet, as the establishment of a secure environment is based on the development of human rights – these phenomena are intensely interacting. Nevertheless the sensitive relationship between human rights and environmental protection has experienced a slow development owing to conflicting views regarding this linkage. The fact that environmental and human rights lawyers represent disparate and sometimes extreme opinions accentuates the lack of a holistic approach<sup>12</sup> and is not beneficial neither for the development of human rights nor for environmental protection. According to some opinions<sup>13</sup>, since human rights and the protection of the environment are based on different values, they are incompatible and rather compete with than complement or

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8 Charter of the United Nations – Chapter I., Article 1., 3. Complete text available from <http://www.un.org/en/documents/charter/chapter1.shtml> Retrieved on 10 June 2013.

9 CONWAY W. HENDERSON, *Understanding International Law*, Wiley-Blackwell A John Wiley&Sons, Ltd., Publication 2010, p. 288.

10 DONALD K. ANTON-DINAH L. SHELTON, *Environmental Protection and Human Rights*, Cambridge University Press, 2011, p. 121.

11 The Universal Declaration of Human Rights Art. 2 available from <http://www.un.org/en/documents/udhr/> Retrieved on 10 June 2013.

12 see 10. p. 119.

13 see 10. p. 120.

reinforce each other. While on the one hand extremist environmental lawyers believe that “a human rights focus for environmental law ultimately reduces all other environmental values to an instrumental use for humanity so that the quality of human life can be enhanced,”<sup>14</sup> on the other hand some human rights lawyers think that “linking human rights and the environment diminishes the importance and focus on protection of more immediate human rights concern, such as ending genocide, extrajudicial killings, torture [...]”<sup>15</sup> While searching for harmony between the two extreme opinions it can be stated that although human rights and environmental protection share a core of common interests and objectives, not all human rights violations are linked to environmental degradation thus, environmental issues cannot always be addressed effectively by human rights.

The author is on the opinion that both environmental law and human rights are intertwined with a common purpose as their essence is to ensure better conditions for living, thus the enjoyment of human rights depends upon environmental protection. The protection of some special human rights is inseparable from environmental quality. The essence of this viewpoint was articulated by Christopher Gregory Weeramantry, judge and former vice president of the International Court of Justice, in his 32 page separate opinion in the judgment concerning the Gabčíkovo-Nagymaros Project in connection with the concept of sustainable development, the principle of continuing environmental impact assessment and the handling of *erga omnes* obligations in *inter partes* judicial procedure. In his often quoted separate opinion he wrote that the protection of the environment as the right to development is “a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights [...]”<sup>16</sup>

Well-known experts such as Dinah L. Shelton – who examined the relationship between the right to a healthy environment and human rights – highlighted that the existence of a safe and healthy environment constitutes a precondition of several human rights (*inter alia* the fundamental right to life, to health, to private life and family and to property).<sup>17</sup> Thus the enforceable regulation of the right to a healthy environment could not only be

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14 see 10. p. 119.

15 see 10. p. 119.

16 Separate opinion of CHRISTOPHER GREGORY WEERAMANTRY in Case Concerning the Gabčíkovo-Nagymaros Project available from <http://www.icj-cij.org/docket/files/92/7383.pdf> Retrieved on 10 June 2013.

17 See in more details: DONALD K. ANTON, DINAH L. SHELTON: Environmental Protection and Human Rights, Cambridge University Press, 2011.

a tool for environmental protection but could also contribute to a higher level protection and enforcement of human rights.

In line with the above, the present paper also shares the view that the issue of environmental protection, including the protection of freshwater, is a matter of human rights, thus the regulation of the right to a healthy environment is decisive as regards the development of environmental protection and ensuring human rights as well. Human rights are connected to the quality of the environment, *ergo* the development of the human right to a healthy environment is a prerequisite for the realization of other human rights such as the right to health or life. The clearest example for that is the water issue. The human right to water as a third-generation human right is part of the right to a healthy environment, and “entitles everyone to sufficient, safe, acceptable, physically accessible, and affordable water for personal and domestic uses.”<sup>18</sup>

If we accept environmental protection as a human rights issue (among others), the question arises whether the right to water should be regulated separately from the right to a healthy environment or whether the regulation should be integrated. This paper argues for the latter, since the protection of freshwater resources, oceans and marine resources, air, ozone, climate and outer space, flora, fauna and biological diversity, as well as waste and hazardous substance issues form a complex system, the separation of which would be advisable. We consider it unreasonable to emphasise the importance of these elements separately from each other at the level of a hypothetical European regional human rights catalogue. If the right to water requires protection on a regional level, then in the long run, according to the holistic approach, the most suitable solution is the declaration of the right to a healthy environment which includes – among others – the right to water as well. It is important to emphasize however, that this point of view is only true regarding a potential European level catalogue of human rights, and only when this system is ready to accept and accommodate such an extension. Since Europe, with the most effective human rights regime<sup>19</sup>, effectively protects first and second generation human rights, the idea of a new human rights catalogue on this regional level (which could serve as the basis for the third-generation human rights in this part of the world) seems realistic. In such a catalogue of human rights, the right to a healthy environment could be the subject of regulation with all its necessary elements.

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18 United Nations-Economic and Social Council-Committee on Economic, Social and Cultural Rights E/C.12/2002/11 20 January 2003 General Comment No. 15 (2002)

19 ANDREAS FOLLESDAL, BRIGIT PETERS & GEIR ULFSTEIN (Eds.): *Constituting Europe. The European Court of Human Rights in a National European and Global Context*. Cambridge University Press. 2013.

### III. Why Europe?

In order to ensure human rights, and particularly third-generation human rights, there is a need for appropriate background and collaboration. Since environmental protection is not bound by national borders, lack of water and water protection can only be solved through international cooperation. International cooperation is needed for a modernized, integrated and effective regulation of environmental and water protection. The international level is the most appropriate basis upon which harmonised national regulation may be built. However, a widely ratified international treaty in which the member states would accept the responsibility to fully integrate this human rights protection regulated by the treaty into their national legal system seems utopian. As the history of international law shows the international community is more willing to legislate new guarantees on an international level if the mentioned guarantees already proved successful on the national level.<sup>20</sup> There could be a risk that member states would have the feeling that something important was done without actually improving neither the level of environmental protection nor the living conditions of people, as the international community is not ready to take this step yet.

If we take a look at the development of the regulation of the right to a healthy environment as a third-generation human right we can see, that the international community has generated mainly soft law type documents up to now. At the 1972 United Nations Conference on the Human Environment which was held in Stockholm and symbolizes the beginnings of international environmental law, the legally non-binding Stockholm Declaration was adopted. The first principle of the Stockholm Declaration<sup>21</sup> states that:

*“Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.”*<sup>22</sup>

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20 CONWAY W. HENDERSON, *Understanding International Law*, Wiley-Blackwell A John Wiley & Sons, Ltd., Publication 2010.

21 Declaration of the United Nations Conference on the Human Environment.

22 First principle of the Declaration of the United Nations Conference on the Human Environment available from

Staying at the UN level: the first paragraph of the first annex to the Report of the World Commission on Environment and Development entitled ‘Our Common Future’ from 1987 – which was mentioned before<sup>23</sup> – states: “*All human beings have the fundamental right to an environment adequate for their health and well-being.*”<sup>24</sup> Further information cannot be found here regarding the contents of that substantive right. On the other hand, relevant procedural rights are discussed in the document.<sup>25</sup>

The three procedural rules of the right to healthy environment were formulated in the 10<sup>th</sup> principle<sup>26</sup> of the Rio Declaration which was adopted in 1992 at the United Nations Conference on Environment and Development in Rio de Janeiro: access to information, participation in decision-making and access to justice. These three procedural rights were expanded in the Aarhus Convention<sup>27</sup> which entered into force on 30<sup>th</sup> October 2001. This latter convention is a real milestone regarding the regulation of the right to a healthy environment since it is more than a soft law document as it contains not only well-known ideas, principles and guidelines but it is also enforceable.<sup>28</sup>

Turning to a more specific field, the first decisive point of the European regulation of the right to a healthy environment was the Conference on Environment and Health which was held in Frankfurt am Main on 7-8<sup>th</sup> December 1989. With the participation of 31 countries, the European Charter on Environment and Health<sup>29</sup> was adopted, stating two procedural rights three years ahead of the Rio Declaration: access to information

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<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1503&l=en>  
Retrieved on 10 June 2013.

23 See: Part ‘I’.

24 See: <http://www.un-documents.net/ocf-a1.htm> Retrieved on 10 June 2013.

25 E.g. “Our Common Future” Report Ann. 1., I.6.: “*States shall inform in a timely manner all persons likely to be significantly affected by a planned activity and to grant them equal access and due process in administrative and judicial proceedings.*”

26 “*Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*” Available from

<http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> Retrieved on 10 June 2013.

27 See, generally ATTILA PÁNOVICS: Az Aarhusi Egyezmény végrehajtása az Európai Közösségben [Implementation of the Aarhus Convention in the European Community], *Európai Jog*, VI, 5, 2006, September.

28 An eight membered “Compliance Committee” checks the compliance of the convention, whose members are elected individually and represent no country or organisation.

29 European Charter on Environment and Health, available from

[http://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0019/114085/ICP\\_RUD\\_113.pdf](http://www.euro.who.int/__data/assets/pdf_file/0019/114085/ICP_RUD_113.pdf) Retrieved on 10 June 2013.

and the participation in decision-making.<sup>30</sup> The first chapter of the Charter states furthermore that “[e]very individual is entitled to an environment conducive to the highest attainable level of health and wellbeing (...)” The Charter also creates an obligation by stating that “[e]very individual has a responsibility to contribute to the protection of the environment, in the interests of his or her own health and the health of others [...]”.<sup>31</sup>

The international community is unwilling to accept explicit written obligations regarding the right to a healthy environment. The Rio+20 Conference on Sustainable Development (which was held in the summer of 2012 in Rio de Janeiro and which unfortunately ended without substantive results) is an excellent example of that tendency. A final document entitled “The Future We Want” was adopted, but it achieved no breakthrough or innovative approach. Contrary to the high expectations attached to it<sup>32</sup>, only well-known aims and principles were repeated in the soft law document. The approach of the international community and that of Europe to the right to water and the right to a healthy environment represent different attitudes. Europe has the most stable human rights protection system which could serve as the basis for establishing a similarly stable and effective system guaranteeing the protection of third-generation human rights. Since water issues are such a pressing matter of significant importance, it is not possible to await the slow but reliable development of the right to water as a part of the right to a healthy environment at the international level. In this area the regional, and in particular European regulation, the framework of the Council of Europe, presents better opportunity and hope.

#### **IV. The role of the Council of Europe**

The Council of Europe (hereinafter: CoE) was the first real international organisation after World War II in Europe which considered the protection and development of human rights as its main aim.<sup>33</sup> Thus, under its aegis more than 200

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30 “Every individual is entitled to: ...information and consultation on the state of the environment, and on plans, decisions and activities likely to affect both the environment and health; participation in the decision-making process.” European Charter on Environment and Health – Entitlements and responsibilities, 1. Art.

31 European Charter on Environment and Health – Entitlements and responsibilities 2. Art.

32 <http://sustainabledevelopment.un.org/rio20.html> Retrieved on 10 June 2013.

33 See, generally ERZSÉBET SZALAYNÉ SÁNDOR, Az egyén jogi helyzete az Európai Unióban [The status of the individual in the European Union] University of Pécs, Faculty of Law, Centre for European Research and Education and International law and European Law department; University of Babeş-Bolyai Cluj-Napoca. 2010, p. 119. Available from <http://szse.eu/wp-content/uploads/2012/07/book.pdf> Retrieved on 10 June 2013.

international treaties were created in order to safeguard the common ideals and principles of the member states of the CoE. The most important one is undoubtedly the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR or Convention).<sup>34</sup> This relatively short European catalogue of human rights does not explicitly contain all fundamental rights: among others, the right to a healthy environment and thus the right to water are not included in the Convention. When asked why the Convention does not contain the mentioned rights, the answer is simple. At the time when the Convention was created (4<sup>th</sup> November 1950) the state parties have not yet faced such environmental problems which would have made the regulation of such a fundamental right necessary in the framework of the Convention. Therefore the right to a healthy environment is not included explicitly among the human rights protected by the Convention. The right to a healthy environment only became a generally protected value as time progressed, since the right to a healthy environment is a third-generation solidarity right. The idea to include the right to a healthy environment in the Convention has resurfaced repeatedly. Since 1999, various non-governmental organisations (hereinafter: NGOs) and the Parliamentary Assembly of the CoE have constantly put pressure – without success – on the Committee of Ministers, which directly represents national interests, in order to persuade it to supplement the Convention with the right to a healthy environment by a protocol – as it was done in the case of the right to property. Since the recommendation no. 12003<sup>35</sup> of the Parliamentary Assembly of the CoE was passed, the Committee of Ministers has stated several times that it recognises and acknowledges the importance of a liveable environment as a relevant factor of human rights protection, but added that numerous member state constitutions already contain the right to a healthy environment, and that the Convention indirectly also includes the aforementioned right.<sup>36</sup>

The joint reply adopted by the Committee of Ministers on 16<sup>th</sup> June 2010 at the 1088<sup>th</sup> meeting of the Ministers’ Deputies on “Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment” recognises the importance of a healthy environment and considers that it is relevant to the protection of human rights, but proclaims that “*although the European Convention on*

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34 Full text of the ECHR is available from

<http://www.conventions.coe.int/Treaty/en/Treaties/Html/005.htm> Retrieved on 10 June 2013.

35 Text of the recommendation:

<http://www.assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc09/EDOC12003.htm>  
Downloaded: 10.06.2013.

36 Recommendation no. 12003.

<http://www.assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc09/EDOC12003.htm>  
Retrieved on 10 June 2013.

*Human Rights does not expressly recognise a right to the protection of the environment, the convention system already indirectly contributes to the protection of the environment through existing convention rights and their interpretation in the evolving case law of the European Court of Human Rights. On both occasions, the Committee of Ministers did not consider it advisable to draw up an additional protocol to the convention in the environmental domain.*<sup>37</sup>

The reply of the Committee of Ministers states that several member states have already enshrined the protection of the environment as a human right and/or as a state objective in their Constitutions and that the programmatic provision on environmental protection has also been included in the Charter of Fundamental Rights of the European Union (hereinafter: Charter).<sup>38</sup> Regarding to the mentioned reply of the Committee of Ministers, it is important to note that even though the Charter contains one of the longest catalogues of human rights, it does not contain the right to a healthy environment. Article 37 of the Charter states the following: *“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.”*<sup>39</sup> The cited provision of the Charter – which is based on Article 3 of the Treaty on European Union (hereinafter: TEU) – only declares the high level of protection and improvement of the quality of the environment and sustainable development as general principles.<sup>40</sup> Article 37 gives the individual no actual enforceable right guaranteeing that a high level of environmental protection and an improvement of the quality of the environment is considered in the framework of the policies of the Union, and even less an actual right to a healthy environment. Therefore, Article 37 does not contain a fundamental right but is rather an aim of the European Union. Article 37 is consequently systematically misplaced in the Charter of Fundamental Rights of the European Union. The convention which drafted the Charter

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37 <https://wcd.coe.int/ViewDoc.jsp?id=1638385&Site=CM>

38 Doc. 10041 24 January 2004 Reply from the Committee of Ministers 3. Available from <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=10403&Language=EN> Retrieved on 10 June 2013.

39 Charter of Fundamental Rights of the European Union available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:EN:PDF> Retrieved on 10 June 2013.

40 ANDRÁS OSZTOVITS [Ed.], GABRIELLA GERZSENYI, Az Európai Unióról és az Európai Unió működéséről szóló szerződések magyarázata [Commentary on the Treaty on European Union and the Treaty on the Functioning of the European Union] Complex, 2011, pp. 2508.-2511.

could not agree on an individual fundamental right to environmental protection, since it had serious reservations to all social rights.<sup>41</sup>

Although the Convention does not expressly recognise a right to the protection of the environment, the system of the Convention already indirectly contributes to the protection of the right to a healthy environment owing to the case law of the European Court of Human Rights.<sup>42</sup> Thus, we may say that the Convention offers a certain degree of protection in relation to environmental issues. But is this enough, has it already reached its limits?

Since the Convention on which the CoE's human rights protection system is based gives a very narrow catalogue of the human rights it should constantly be adapted to the respective requirements. This "living instrument" character can be achieved with the help of the European Court of Human Rights (hereinafter: ECtHR). The human rights declared in the Convention serve as a framework for the ECtHR case law. If the ECtHR – which was established in order to guarantee the protection of the fundamental rights and freedoms included in the Convention – has to deal with environmental issues, it needs to derive the right to a healthy environment from other articles. The ECtHR already utilized this indirect method in connection with several human rights. Once the importance of the right to a healthy environment is acknowledged, the question arises whether such an indirect regulation and protection is sufficient. As it is nowadays accepted, the realization of the right to a healthy environment is the prerequisite of fundamental rights such as the right to life, the right to respect for private and family life or the right to property. The most relevant articles of the Convention in connection with environmental protection are Articles 2<sup>43</sup> and 8<sup>44</sup> which declare and protect the

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41 JÜRGEN SCHWARZE (Hrsg.) EU- Kommentar 3. Auflage 2012. Nomos Verlagsgesellschaft, Baden-Baden 2012. p. 2708. *“Art. 37 ist als Grundsatz der Union formuliert. Er gewährt dem Einzelnen kein Recht darauf, dass tatsächlich eine Einbeziehung und Sicherstellung eines hohen Umweltschutzniveaus und eine Verbesserung der Umweltqualität in den Politiken der Union stattfindet, geschweige denn ein Recht auf eine intakte Umwelt. Daher handelt es sich bei Art 37 nicht um ein Grundrecht, sondern vielmehr um eine Zielbestimmung der Union. Der Grundrechtskonvent konnte sich jedoch nicht auf ein Individualgrundrecht auf Umweltschutz einigen, da gegenüber allen sozialen Rechten große Vorbehalte bestanden.”*

42 See more about the practise of the ECtHR regarding to the right to healthy environment: SÁNDOR SZEMESI, *Környezetvédelmi kérdések az Emberi Jogok Európai Bírósága gyakorlatába [The case-law of ECtHR in connection with environmental protection]*, In: ANIKÓ RAISZ: *A nemzetközi környezetjog aktuális kihívásai [Current challenges of international environmental law]*, University of Miskolc, 2012, p.175.

43 The text of Article 2 ECHR [Right to life] is available from <http://www.conventions.coe.int/Treaty/en/Treaties/Html/005.htm> Retrieved on 10 June 2013.

44 The text of Article 8 ECHR [Right to respect for private and family life] is available from <http://www.conventions.coe.int/Treaty/en/Treaties/Html/005.htm> Retrieved on 10 June 2013.

right to life and the right to the respect for private and family life. In its case law the ECtHR<sup>45</sup> derived the right to a healthy environment from the freedom of expression<sup>46</sup> and from the right to property<sup>47</sup>. However the text of the Convention limits the possibilities of the ECtHR in enforcing environmental rights – the possible spectrum of environmental rights protection would obviously be much wider, if the right to a healthy environment was included in the ECHR. Generally speaking, the reason why a source of law does not contain a certain regulation is that the legislator (lawmaker) did not intend to regulate a problem as it did not want the regulation to extend to that question. This is basically also true for the Convention, thus the interpretative competence of the ECtHR is not infinite: it cannot improve the law unconstrained since it has no competence to do so. The question is thus the following: Is an indirect regulation of the right to a healthy environment enough in a Convention which represents the basis of European human rights protection in Europe in the 21<sup>st</sup> century, where everyday life is riddled with cross-border environmental damages?

In addition to the Convention, the European Social Charter (hereinafter: ESC/Social Charter) from 1961, which was also developed under the aegis of the CoE, provides a catalogue of second-generation human rights as a complementation of the Convention. Article 11 of Part II of the Social Charter declares the right to the protection of health: “With a view to ensuring the effective exercise of the right to protection of health, the Contracting Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures [...]”<sup>48</sup>

Article 20 of the ESC states that “[e]ach of the Contracting Parties undertakes to consider itself bound by at least five of the following articles of Part II of this Charter: Articles 1<sup>49</sup>, 5<sup>50</sup>, 6<sup>51</sup>, 12<sup>52</sup>, 13<sup>53</sup>, 16<sup>54</sup> and 19<sup>55</sup>”. As we can see, Article 11 is not included

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45 Öneriyıldız v. Turkey [Application no. 48939/99]; López Ostra v. Spain [Application no. 16798/90]; Fadeyeva v. Russia [Application no. 55723/00]; Hatton and Others v. The United Kingdom [Application no. 36022/97]; Balmer-Schafroth and Others v. Switzerland [Application no. 67/1996/686/876]; Steel and Morris v. The United Kingdom [Application no. 68416/01]; Deés v. Hungary [Application no. 2345/06]; Taşkin and Others v. Turkey [Application no. 46117/99]; Tatar v. Romania [Application no. 67021/01]; Budayeva and Others v. Russia [Application nos. 15339/02, 21166/02, 20058/02, 11673/02, 15343/02]; Flamenbaum and others v. France [Application nos. 3675/04, 23264/04]

46 The text of Article 10 ECHR [Freedom of expression] is available from <http://www.conventions.coe.int/Treaty/en/Treaties/Html/005.htm> Retrieved on 10 June 2013.

47 First protocol to the ECHR Art. 1 [Protection of property] available from <http://www.conventions.coe.int/Treaty/en/Treaties/Html/009.htm> Retrieved on 10 June 2013.

48 Text of the Social Charter is available from <http://www.conventions.coe.int/Treaty/en/Treaties/Html/035.htm> Retrieved on 10 June 2013.

49 Right to work.

50 Right to organise.

in these key articles which could contribute in an indirect way to the protection of the right to a healthy environment. Neither the Convention which declares first-generation human rights, nor the Social Charter which gives a catalogue of second-generation human rights ensures directly the right to a healthy environment and thus the right to water. The need for the regulation of the right to a healthy environment is undeniable: taking the level of the development of the European human rights protection regime into consideration, it can be stated that the circumstances are appropriate for the adoption of a new human rights catalogue which could enshrine third-generation human rights such as the right to a healthy environment and thus the right to water in the framework of the CoE.

## **V. Basic doctrinal issues regarding the regulation**

### **V.1. Depth of the regulation**

Several basic doctrinal problems could occur in the process of the formulation of a new third-generation human rights catalogue by the CoE. Firstly, the depth of the regulation should be clarified. Should it contain details or should it just draw the main lines, thus leaving detailed regulation entrusted to the member states? It should be borne in mind that in the latter case there is a risk that the desired effect would not be reached. On the other hand, if the regulation is too detailed, it might interfere with state sovereignty. If a human right is well-established at the international level, the corresponding constitutional right is more likely to have a positive impact on the national legal system. The author of this paper agrees that generally speaking a human rights catalogue should provide the framework with a necessarily high level of abstraction, avoiding details. Nevertheless the right to a healthy environment (including the right to water) requires a special regulating method due to its great importance and its large extent. The regulation cannot be based solely on the assumption that the institution, which interprets the law, will fill the frame with the actual content and derive rights from it.

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51 Right to bargain collectively.

52 Right to social security.

53 Right to social and medical assistance.

54 Right of the family to social, legal and economic protection.

55 Right of migrant workers and their families to protection and assistance.

## V.2.Scope of subjects

In the process of the regional regulation of the right to healthy environment, the question of the scope of the subjects of the right would undoubtedly arise. Who should be the subject of the right? Should the right be of a collective or an individual nature? Should concern of addressee of the right be a condition for access to justice, and if yes, then what level of concern would be required, and what qualifies as concern at all? Could an *actio popularis* be the solution? The latter would ensure the widest access, however determining individual concern as a condition would be a more general solution.

The Aarhus Convention for example, which declares the detailed regulation of the pillars of procedural rights (access to information, participation in decision-making and access to justice), rejected the introduction of an *actio popularis* in connection with environmental issues, but strengthened the status of environmental NGOs. The aim of this decision was to create an intermediate solution between the maximalist approach of the *actio popularis* and the minimalist approach according to which only those who are directly concerned have the right to individual actions.

What is required to consider someone as being concerned by an issue? Should direct and individual concern be required or would indirect concern be enough? According to the Aarhus Convention, the “public concerned” means “the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.”<sup>56</sup> Here we may discern the recognition of the special role of civil organisations, the NGOs.

In a request for a preliminary ruling<sup>57</sup>, a Swedish court asked the Court of Justice of the European Union whether it was permissible under Council Directive 85/337/EEC, as amended in 2003 to bring it into line with the Aarhus Convention, for national legislation to guarantee access to justice only to NGOs established for the protection of the environment having at least 2 000 members. As a result of the mentioned Swedish regulation, only two environmental NGOs were able to turn to the Swedish courts. The

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<sup>56</sup> Aarhus Convention Part 2. Art. 5. available from <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> Retrieved on 10 June 2013.

<sup>57</sup> Opinion of Advocate General Sharpston delivered on 2 July 2009 Case C-263/08 is available from <http://curia.europa.eu/juris/document/document.jsf?text=&docid=72567&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=99483> Retrieved on 10 June 2013.

opinion of the Advocate General dealing with the case stated that “unlike natural or legal persons, non-governmental organisations promoting environmental protection *always* have the status of ‘the public concerned’ [...] they comply with ‘any requirements under national law’. [...] Any environmental organisation which fulfils that definition will be deemed to have ‘rights capable of being impaired’ or an ‘interest’ that is deemed ‘sufficient’. Such organisations therefore have an *automatic* right of access to justice.”<sup>58</sup> In the Aarhus Convention we may detect the recognition of the special role of the NGOs.

Article 263 of the Treaty on the Functioning of the European Union (hereinafter: TFEU) requires direct and individual concern when it states the following: “*Any natural or legal person may... institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.*”<sup>59</sup>

The case *European Community v. ClientEarth* can be mentioned as an interesting dispute before the Aarhus Convention Compliance Committee regarding access to the European Court of Justice<sup>60</sup> in connection with the right to healthy environment. According to the arguments of the NGO ClientEarth, the NGOs practically do not have *locus standi* before the Court of Justice in annulment proceedings, and therefore the EU does not comply with certain regulations of the Convention. The outcome of the case was that the Compliance Committee decided not to determine non-compliance of the EC with the Convention regarding access to justice by members of the public. The Committee considered that a new direction of the jurisprudence of the EU Courts should be established in order to ensure compliance with the Convention. The Committee recommended furthermore that all relevant EU institutions take steps within their respective field of competences to overcome the shortcomings reflected in the jurisprudence of the EU Courts in providing the public concerned with access to justice in environmental matters.<sup>61</sup>

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58 Opinion of Advocate General Sharpston delivered on 2 July 2009 Case C-263/08, Paragraphs 42 and 43.

59 Art. 263 TFEU is available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF> Retrieved on 10 June 2013.

60 Case 32 (2008) *European Community v. ClientEarth* is available from [http://rac.org.ua/fileadmin/user\\_upload/publications/ACCC\\_Case\\_Law\\_Electronic\\_Advanced\\_Version.pdf](http://rac.org.ua/fileadmin/user_upload/publications/ACCC_Case_Law_Electronic_Advanced_Version.pdf) Retrieved on 10 June 2013.

61 The case law of the Court of Justice of the European Union could indeed contribute to solving this issue, provided that the Court is willing to take the necessary steps: for example, the *locus standi* of the European Parliament in annulment proceedings was developed by the jurisprudence of the Court

The main difference between the two sources of law is that the Aarhus Convention confirmed the role of NGOs, while the TEU has put them in an almost impossible position regarding annulment actions. The author of the present paper agrees with the priority protection of the civil society which was made possible through the Aarhus Convention, since NGOs express collective interests and speak on behalf of many with specific skills often not available to individuals.

### V.3. Future generations

When examining the subjects of the right to a healthy environment, the issue of intergenerational equity and the interests of the future generations arise. It is obvious that environmental pollution has an effect not only on our present but endangers future generations as well. Every step has an effect on the lives of future generations. In order to achieve minimal economic benefit, mankind is liable to cause an environmental damage which would have an exponential effect on the future. Intergenerational equity is a much discussed topic of environmental law, which expresses the responsibility of every generation to “give over the Earth” to future generations in the same condition as it was received from the past generations. Intergenerational equity has gained attention as the idea that the mankind as a whole could be the subject of the international law. But is it possible to recognise future generations as a legal entity? If so, what rights would they be entitled to? According to László Sólyom<sup>62</sup> it is more reasonable to consider the “rights” of the future generations as a symbol or a metaphor. In connection with the rights of future generations, several questions arise. Who should represent and protect future generations and against whom and at which level? Should it be an individual or an organisation – and in the latter case, a state organisation or an NGO? Where would it carry out its representative activities: on the national level, before international organisations or both? Could it be entrusted with the representation of future generations before courts? If yes, this would mean that the NGO-s would not only represent the interests, but could traditionally enforce concomitant rights.

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in a line of memorable judgments, and was later codified into the Treaties by the Member States as a result. For an analysis see: Mohay Ágoston: Az Európai Parlament a Bíróság előtt [European Parliament before the Court of the European Union] University of Pécs Centre for European Research and Education / Publikon, Pécs, 2012, pp. 20-35.

62 LÁSZLÓ SÓLYOM, A jövő nemzedékek jogai és ezek képviselete a jelenben [Representation of future generations in the present] In: Védegylet füzetek 1., A jövő nemzedékek jogai [Rights of future generations], Védegylet, 2002., pp. 3.-41.

#### **V.4.Substantive and procedural rights**

When regulating the right to a healthy environment, the problem whether substantive or procedural rights (or both) should be strengthened, or whether these should have the same level of protection, is a fundamental issue. Based on the success of the Aarhus Convention and on the failure of the substantive regulation of the right to a healthy environment, as a first step, improving procedural rights would be reasonable and promising.

While the subject of substantive environmental rights has the right to an environment with a specific quality, the subject of procedural environmental rights has the right of access to information, participation in decision-making and access to justice. However, the substantive and the procedural part of the right to a healthy environment developed at different rates.

Environmental procedural rights are widely accepted and regulated. In the European Union, any person has the right of access to environmental information without being obliged to justify the reason, and there is no need to prove concern. A broad access interpretation of the right is optimal, while the regulation of those cases when information could be refused would be important too, for example when the disclosure of information would have adverse effects for the environment to which the information relates. Furthermore, as the ECtHR stressed in the Case of *Steel and Morris v. The United Kingdom*<sup>63</sup>, the right to receive and impart information and its limitation by the authority should be proportionate to the legitimate aim and an appropriate balance should be created between the interests of the individuals and the interests of the community.

According to the right to participation in decision-making, the public should have a real opportunity in due time for participation in the activities, plans, programmes, policies, general regulations, executive preparations and modifications or reviews which could have an impact on the environment. It is a decisive question at which level the opinion of the public should be taken into considerations and in what kind of issues should the public have this right?

The right of access to justice functions as a separate right in environmental issues while the other two procedural rights –the right to participate in decision-making and the right of access to information– are linked. Moreover, the enforcement of the latter two rights

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63 Case of *Steel and Morris v. The United Kingdom*, Application no. 68416/01

is dependent upon the regulation of the right to access to justice. The right of access to justice is clearly the most controversial environmental procedural right. Its regulation is incomplete both on the national and the international level.

Substantive environmental regulation is weak, and since its current status and content is uncertain, people may consider its development to be impractical. This uncertainty increases if we think about the difficulties of judicial enforceability. Procedural environmental rights –contrary to substantive rights – received wide recognition in international law as its prevalence or violation may be easier reviewed by the courts.

## **VI. Closing remarks**

In Europe, the jurisprudence is striving to widen the reach of the codified law to include environmental rights, but this case law based proactive approach has reached its boundaries. The time has come for the international community to take the next step in the regulation of the right to a healthy environment (including but not limited to the right to water) in a binding way. A new catalogue of human rights developed by the Council of Europe (which would ensure third-generation human rights, inter alia the right to a healthy environment and its segment area, the right to water) would be that necessary first step. The first decisive point on the way to achieving that aim is to reconcile the interests of states. Unfortunately, the time when the political decision-makers will reach this point is not yet foreseeable.

# Water Protection via the Implementation of EU Directives – Case Study of Hungary

*Kecskés Gábor\**

## I. Introduction

This study gives an overview of the implementation solutions within the EU law in the field of water policy with special regard to the retrospective case study of implementation of such directives enacted by a certain EU Member State, namely, Hungary. This country is widely regarded as a powerhouse of water resources,<sup>1</sup> which determines its unique and special stance in the field analysed. I am utterly convinced that the practice gathered by a certain Central and Eastern European country can provide essential pools of information, regulation techniques and methodological assistance for the benefit of the international community, chiefly, for foreign actors, i.e. legislators and stakeholders abroad. The present study deals with the pivotal role,

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<sup>1</sup> *“Water has always played a decisive role in the life of the Hungarian people, which prompted the early development of a hydrographical observation and data processing network. Readings on the Danube river gauge at Budapest have been taken regularly since 1823. Water management planning – and catchment development planning as part thereof – have long traditions in Hungary.”* See SZILÁGYI (Ed.), *Trans-boundary Watershed – Joint Legal Action for Danube. Implementation of the Water Framework Directive. An Overview of the Hungarian, Croatian, Serbian and Slovenian Situation*. EMLA – Environmental Management and Law Association, 2010, p. 18.

The accentuated water protection of Hungary is explained by the population’s “exposure” of four substantial planning units governed and predominated by four crucial aquatic systems, such as the four sub-catchments:

River Danube: 34,730 km<sup>2</sup> and cca. 5,222,000 inhabitants;

River Tisza: 46,380 km<sup>2</sup> and cca. 4,000,000 inhabitants;

River Dráva: 6,145 km<sup>2</sup> and cca. 463,000 inhabitants; and

Lake Balaton: 5,775 km<sup>2</sup> and cca. 364,000 inhabitants.

See the elaboratum on implementing the Water Framework Directive in Hungary on the homepage of the former Ministry of Environment and Water (now, Ministry of Rural Development, State Secretariat for Environmental Affairs):

[http://www.kvvm.hu/cimg/documents/Implementing\\_the\\_Water\\_Framework\\_Directive\\_in\\_Hungary\\_03.pdf](http://www.kvvm.hu/cimg/documents/Implementing_the_Water_Framework_Directive_in_Hungary_03.pdf).

technique and relevance of the implementation of directives, whether it may be considered as a special and substantial method for enacting norms and developing rules or not.

## II. Roots of complex water policy in European integration

In order to detail the concerns raised in the given field, let us emphasize the milestones of our subject through the lenses of an EU Member State.<sup>2</sup> The roots of water policy can be traced back to the 1970s, when European environmental legislation “*designed to protect both fresh water and seawater generally aims to prevent pollution at its source whilst also laying down environmental quality standards (...) Since then European environmental water law has steadily evolved in what has been called four waves.*”<sup>3</sup> These cornerstones were introduced by, *inter alia*, four bellwether directives as secondary norms of the community.

In my opinion, these directives are closely linked to the influential periods, the milestones of environmental legislation, world summits, as well as the paradigmatic changes of environmental law and thinking. As it is generally accepted, water policy or – to be more precise – much rather the philosophy of the protection of waters, the “European environmental water law has steadily evolved in what has been called four waves.”<sup>4</sup> All of these waves had been preceded and “ignited” by significant new directives entailing paradigm-changes and changes on behalf of the attitude of States, towards the environment, towards the protection of water as one of the main sources of life.

As Jans and Vedder in their influential book demonstrate<sup>5</sup>, the first wave started with the 1975 Drinking-water Directive<sup>6</sup> and can be said to have lasted until the adoption of the 1980 Groundwater Directive.<sup>7</sup> The second wave began with 1991 Urban Waste

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2 Cf. G. KALLIS & P. NIJKAMP, ‘Evolution of EU Water Policy: a Critical Assessment and a Hopeful Perspective’, 3 *Journal of Environmental Law and Policy* 2000, pp. 301-355.

3 See J. JANS & H. VEDDER, *European Environmental Law After Lisbon*, 4th edn., Europa Law Publishing, Groningen, 2012, p. 391.

4 See D. GRIMEAUD, ‘Reforming EU Water Law: Towards Sustainability’, 2001 *European Environmental Law Review*, pp. 41-43.

5 See JANS & VEDDER, 2012, p. 391.

6 Council Directive 75/440/EEC of 16 June 1975 concerning the quality required of surface water intended for the abstraction of drinking-water in the Member States.

7 Council Directive 80/68/EEC on the protection of groundwater against pollution caused by certain dangerous substances.

Water Directive<sup>8</sup> and the Nitrates Directive.<sup>9</sup> It was followed by the third period that has been stamped by the adoption of the 2000 Water Framework Directive,<sup>10</sup> the *living consciousness and legislative policy-making pool of the EU* within this particular field. With the emergence of this Directive, several changes were pushed forward in accordance with the main aims and desired goals of this crucial secondary norm. Finally, the fourth wave was characterised by the adoption of the 2008 Marine Strategy Framework Directive.<sup>11</sup>

In sum, it can be stated that the paradigm shifts in the water policy of the EU have been furthered by new water-related directives, nothing more.

## **II.1. Right to water and water policy reflected in the primary norms – an emerging field?**

Currently, the protection of water quality is almost exclusively based on secondary norms; however their roots may be traced back to the primary norms. The primary norms of the EU are not silent on the role and scope of water policy from a wider perspective.<sup>12</sup> However, the later versions of the founding treaties (from the Single European Act to the latest version) explicitly include the single chapter of ‘environment’, but not more. Pursuant to the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (hereinafter:

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8 Council Directive 91/271/EEC concerning urban waste-water treatment.

9 Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources.

10 Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy.

11 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.

12 On the protection of water within the norms of the EU, see in Hungarian, J. E. SZILÁGYI, ‘A vizek védelmének jogi alapjai az EU vízvédelmi jogában [Legal Basis of the Protection of Waters in the Norms of Water Protection in EU]’, 30 *Publicaciones Universitatis Miskolcensis Series Juridica et Politica*, 2012, pp. 577-599. As for the potential – nowadays well accepted – human rights approaches of the issue, see P. GLEICK, ‘The Human Right to Water’, 1 *Water Policy*, 1998, pp. 487-503., C. DUBREUIL, *The Right to Water: From Concept to Implementation*, World Water Council, Marseilles, 2006., J. SCANLON & A. CASSAR & N. NEMES, ‘Water as a Human Right’, 51 *International Union for Conservation of Nature and Natural Resources Environmental Policy and Law Paper*, 2004. and M. SZAPPANVOS ‘A víz mint természeti erőforrás emberi jogi megközelítésben [Water as a Natural Resource within the Context of Human Rights Approach]’, 21 *Comitatus*, 2011, pp. 11-17. As for the evolution on human rights jurisdiction, cf. S. SZEMESI, *Környezetvédelmi kérdések az Emberi Jogok Európai Bírósága gyakorlatában [Environmental Issues within the Practice of the European Court of Human Rights]*, in A. RAISZ (Ed), *A nemzetközi környezetjog aktuális kihívásai [Current Challenges of International Environmental Law]*, Miskolc, Miskolci Egyetem, 2012, pp. 175-184.

Lisbon Treaty), the “*Union policy on the environment shall contribute to pursuit of the following objectives:*

- *reserving, protecting and improving the quality of the environment,*
- *protecting human health,*
- *prudent and rational utilisation of natural resources,*
- *promoting measures at international level to deal with region.*”<sup>13</sup>

The scope of environment, undoubtedly, embraces the whole subject of water-based issues (qualitative and quantitative issues, policy-making, usage and waste, etc.); thus, the fate and legal state of the abstract and all-inclusive notion of environment includes the extended topic of water. Such a *follow-up measure* (relationship of primary-secondary norms) should not be underestimated, because *i)* the artificial separation and constrained partition of environment-based issues to full-fledged and self-standing areas of confined scope are required to be avoided; *ii)* the systematic view on environment provides for the development and improvement of its elements (e.g. water, air, soil, flora, fauna, etc.) in multiple and integrative ways; and *iii)* the controversial discourse and nascent yet not fully evolved stances on environmental issues (their relationship with other, such as economic issues, etc.) cannot allow for ignoring the hierarchy and comparative approach of numerous elements of the environment. In the case of a separate consideration of these elements, the results would be misleading and unavailing, due to their hidden and cut-out system-based and inter-related character (a water policy without or separated from an integrative environment policy is inappropriate).

As for the Lisbon Treaty, Article 191 paragraph 2. constitutes the background of the systematic basis of environmental policy aiming to achieve the desired and conceived high level of protection thereof based on certain principles and policies. The paragraph is a crucial starting-point for the analysis of water policy and water regulation, and it is worth mentioning that the priorities and intentionally abstracted (or over-abstracted) principles<sup>14</sup> circumscribe its content of norms in detail.

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13 See Lisbon Treaty, Title XX (Environment) Art. 191. Para. 1.

14 The paragraph reads as follows: “*Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. In this context, harmonisation measures answering environmental protection requirements shall*

In sum, as regards the *explicit wording of the provisions*, it must be stated that an exact and concretely defined water policy is still missing from the founding treaties. However, an explicit notion is not a panacea, whereby the inherent anomalies (emerging from the inevitably abstract meaning of policies) could be eliminated. On the other hand, *implicitly*, under the umbrella of environment, the water issue is an integral and slowly but undoubtedly developing part of the fundamental treaty of the EU. Such integrative parts can be the basis for i) secondary norms further unfolding the meaning of the abstract parts; and ii) can frame and promote self-standing but harmonized legislation in Member States; whilst these States strive towards specifying primary norms irrespective of the further (mostly, secondary) legal acts, however, with special regard to other primary norms.

## II.2. Issue and Policy of Water on the Level of Secondary Norms

The nature of secondary norms (*inter alia*, for the purposes of the present study, chiefly the directive) is that of derivative norms in relation to the primary norms. Their legal basis is stipulated by Article 288 of the Lisbon Treaty, to “*exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.*” Directives are binding (without general application), their binding force is based upon “the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”<sup>15</sup>

In the context of Title XX (Environment, especially Article 192), this means that the “*European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the (environmental – the author) objectives referred to in Article 191*”, concretely in order to attain the foreseen preservation, protection and quality improvement as well as the prudent and rational utilisation in the general field of environment. Thus, also within the frame of water as its element. Based on this obligation, directives regulating the broad subject of environment may be adopted and substantiated. Under this paragraph, the denomination of the quantitative management of water resources and its availability establishes an *expressis verbis* obligation (“shall

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*include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union.*”

<sup>15</sup> See Art. 288.

adopt”) on the side of the Council in order to adopt secondary norms. This provision could hardly be taken into consideration as the first appearance of water policy, it is just a technical and procedural exception (connected to the derogation from the decision-making procedure), when a primary norm contains a rule on water topics. The text is *ad hoc* and conditional without so much as detailing the exact notion and content of water-related issues. Furthermore, it basically concerns both qualitative and quantitative management of water resources (these management “directions” are organic and crucial parts of water issues). However, it must be emphasized that the basis for the existence of environment- (and as a result: water-) based directives are textually and taxonomically appended to Articles 191-192 and Article 288 of the Lisbon Treaty, which enables us to carry out an analysis on the role and relevance of directives within the field of water protection.

Summing up the character, importance and legal constraints of directives, these secondary norms lay down the aims and goals to be achieved by the Member States, but national or State organs (legislative bodies, authorities or enforcement bodies) remain free to decide how to act, regulate and enforce such goals set forth by the text of the directive adopted by the afore-mentioned EU institutions. Therefore, the directives contain deadlines (for implementation, etc.), and besides this, also the aims and goals to be achieved. The directives take into account the specialities, differences and competence of states, whose legislation is of prime importance for the success and accomplishment of the Brussels- (and Strasbourg-, referring to the European Parliament<sup>16</sup>) based secondary norms. By means of such national implementation measures (it requires legal harmonization within the hierarchy of laws of the Member States and harmonization of policies, among them, enforcement measures) the States implement the provisions of the directives into domestic law.

Accordingly, the account of directives is, in theory, four-fold, since a directive can be simultaneously regarded as:

- as general frame for a policy in a given field,
- a pool or net of possible legal obligations borne by the Member States,
- an all-inclusive basis for the improvement of the given field and
- an all-pervasive reference method for policy-makers, stakeholders and other actors within the field concerned.

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<sup>16</sup> Cf. Art. 192 and 289.

### II.3. The “Bellwether” 2000/60 Directive

The corpus of water policy and law of the EU is governed by, first, the Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (hereinafter: Water Framework Directive, WFD or 2000/60 Directive). This secondary norm had been adopted by two bodies of the EU in a remarkably specific and bittersweet period of environmentalism – following the promising adoption of the Aarhus Convention but prior to the decline of environmental regulations in comparison with the peak-period of the early 1990s. Since it embraces the EU’s main policy regarding water issues and intends to frame its legal and policy-based boundaries and conditions, the earlier relevant norms had been repealed (or, at least, rendered obscure) by its philosophy of overall regulation, aiming for “a level of protection of waters at least equivalent to that provided in certain earlier acts, which should therefore be repealed once the relevant provisions of this Directive have been fully implemented.”<sup>17</sup>

As time went by since 2000, in hindsight we may yet again confirm that the objectives were/are very ambitious but all-embracing. In accordance with paragraph 14 of the WFD, inherent and latent danger and hindrance could be the lack of cooperation (it is worth thinking about the great number of trans-boundary river basins and lakes common to the EU Member States) and low coherency of actions enacted by the Community actors and States.<sup>18</sup> As for its other weakness, it must be emphasized that the WFD was for a long time “one of the least implemented of all environmental internal market directives”, due to a three-fold phenomenon.<sup>19</sup> Since then, this negative phase has passed. Its effectiveness is closely linked to the “highest common factor” of the 27 differing hydrological systems (including “maritime-powers”, landlocked States, relatively “dry” States, etc. – varying attitude of States upon these criteria could be detrimental to the entire process) and locally diverse geographical features, let alone the discrepant political and economic goals not mentioned in the present paper.

Beyond its practical application within the domain of Member States, in theory, the Water Framework Directive has five clear intentions and higher objectives.<sup>20</sup> Firstly, it

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17 Cf. Para. 51 of the WFD.

18 See Para. 14, which reads as follows: “[t]he success of this Directive relies on close cooperation and coherent action at Community, Member State and local level as well as on information, consultation and involvement of the public, including users.”

19 See D. GRIMEAUD, ‘The EC Water Framework Directive – An Instrument for Integrating Water Policy’, RECIEL, Vol.13, No.1, 2004, p. 27.

20 Cf. GRIMEAUD, 2004, pp. 29-38.

performs a simple normative integration within the wide-scope of water-related fields; secondly, the WFD intends to achieve minimum and holistic environmental objectives; thirdly, it combines water policy with further management duties towards attaining the ideal implementation situation; fourth, the WFD strives to regulate the pollutant discharges into special waters and last but not least, it promotes water pricing as an economic instrument with the magic slogan of “*better management of water demand and use*” (italics by the author).

Thus, the key and the most innovative feature of the WFD is the requirement of managing river basin management plans, which plans are of prime importance within the whole framework of water policy. Due to the abstract and framework type nature of the 2000/60 Directive, such river management basin plans (taking into consideration the unique geographical and hydrological characteristics of the different aquatic ecosystems based on which the States shape their own plans) are pivotal in assessing water policy. All aquatic ecosystems, all growths of water-based natural objects “are to be characterised according to their biological, chemical and hydromorphological characteristics. These together are to be compared with an assessment of waters unmodified by human activity and classified into different categories of ecological status”<sup>21</sup> – as the Directive concludes.

As paragraph 1 of Article 13 of the WFD prescribes, “the Member States shall ensure that a river basin management plan is produced for each river basin district lying entirely within their territory.” This binding requirement towards the legislation and practical management by States is supplemented by a further agenda laid down in the same article, such as

- coordination among States (with the aim of producing a single international river basin management plan – due to the hydrological fragmentation and relatively restricted territory of European States, coupled with a relatively high number of international rivers on the continent –it is of prime importance of the success of this process);
- obligation to include essential information detailed in an annex;

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21 See A. FARMER, Interaction of EU Legal Instruments Establishing Broad Principles of Environmental Management: The Water Framework Directive and the IPPC Directive, in S. OBERTÜHR & T. GEHRING (Eds.), Institutional Interaction in Global Environmental Governance, MIT Press, Cambridge, Massachusetts, 2006, p. 207.

- mandatory production of more detailed programmes and management plans for sub-basin, sector, issue, or water type, to deal with particular aspects of water management;
- publication of river basin management plans at the latest nine years after the date of entry into force (22 December 2000, implementation deadline: 22<sup>nd</sup> December 2003); and
- duty of revision and up-dating at the latest 15 years after the date of entry into force of the WFD and every six years thereafter.<sup>22</sup>

All in all, without going into deeper analysis, it is worth emphasizing that the main achievement and undisputed uniqueness of the WFD – beyond river basin management plans – is that it replaced “a fragmented assortment of water legal instruments of the European Community with an integrated subsidiarity-based water management system that relies upon a new river basin concept within which all surface and groundwaters, as well as ‘protected areas’ and associated territorial ecosystems, are to be dealt with together in a coordinated and mutually supportive fashion, in light of integrated river basin management plans and programmes of measures.”<sup>23</sup>

### **III. Water protection via directives – practice in Hungary**

As for technical as well as legislative concerns, Hungary incorporated relevant provisions into domestic law in the forms of acts and decrees; however, practical

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<sup>22</sup> See Para 2-7. of Art. 13.

<sup>23</sup> See GRIMEAUD, 2004, p. 39.

Page and Kaika declared seven – very apt and sententious – innovations of the WFD, such as the following:

Co-ordination of policies that previously addressed different water types separately, and co-ordination of water management strategies;

Switching to river management based on hydrological boundaries, not political administrative and national boundaries;

Introducing the ‘combined approach’ to pollution control by linking emission limit values to environmental quality standards;

Incorporating quantitative elements into environmental planning at the EU scale;

Redefinition of ‘good water status’ and redrawing of the list of priority hazardous substances;

Introduction of the costs of environmental externalities into water pricing in order to encourage demand management; and;

Increasing public participation in policy-making in order to increase transparency and compliance.

See: B. PAGE & M. KAIKA, ‘The EU Water Framework Directive: Part 2. Policy Innovation and the Shifting Choreography of Governance’, 13 *European Environment*, 2003, p. 4.

implementation enacted and completed by the country is still cumbersome.<sup>24</sup> Directives in the EU are, at the same time, both i) simple instruments entailing a limited freedom (in teleological respect) of the States regarding the aims to be achieved<sup>25</sup> and ii) overloaded with confusion. The latter confusion is derived from the *Janus-faced* inherent content of legal-technical implementation and, which is more difficult to achieve: the practical-administrative-enforcement implementation, that “rather refers to the establishment of administrative agencies, the setting up of necessary tools and instruments, monitoring and inspecting by regulators (i.e. enforcement) and the actual adherence to the law by the regulated (...) This understanding of the word implementation concerns the ‘law in action’.”<sup>26</sup>

At national level, the crucial points are the *willingness* and *capability to comply*. Toshkov compiles their pro and contra arguments and main characteristics,<sup>27</sup> however, in the case of Hungary, pro-EU governments (each government after 1990) have declared and shown their willingness to comply, which was evidenced by the high number of follow-up legislative measures enacted in order to harmonize water policy and water-related laws with the relevant norms of the EU (see *infra*). The existence of willingness can be linked to the existence of legal-technical implementation, whilst the existence of the capability to comply has bearing on the practical-administrative-enforcement implementation, conditioned by financial and economic as well as ecological issues, obstacles. The former corresponds to the interests of the Hungarian governments and the aims and goals of the hydrological system and aquatic basis of the geographical features of Hungary, while the latter has sociological and economic aspects to be registered as developing and in the must-be-developed stage.

In 2004, the year of Hungary’s EU-accession, the EU completed a successful and productive enlargement process with Hungary, which resulted in a more than adequate implementation. Hungary is a small and – in respect of hydrological and geographical parameters – uniform, organic and “proud” country, taking into consideration its capital,

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24 Albeit, this attitude is not without precedent within the framework of the legislation of EU. Compare with Versluis’ apt remark “[w]hereas considerable attention is paid to transposition into domestic legislation (the ‘law in the books’), the practical implementation (the ‘law in action’) remains to a large extent a ‘black box’.” See E. VERSLUIS, ‘Even Rules, Uneven Practices: Opening the ‘Black Box’ of EU Law in Action’, *West European Politics*, Vol.30, No.1, 2007, p. 50.

25 Upon these circumstances (directives allowing a certain amount of discretion for States, even more time and resources), the directives can be regarded closer to the policy preferences of governments instead of grading them as hard law instruments. Cf. D. TOSHKOV, ‘Embracing European Law – Compliance with EU Directives in Central and Eastern Europe’, *European Union Politics*, Vol.9, No.3, 2008, p. 384.

26 See VERSLUIS, 2007, p. 52.

27 See, generally, TOSHKOV, 2008, pp. 384-385.

Budapest as the “spa capital” of Europe, the high number of spa places, Lake Balaton and its two main streamlines, River Danube and Tisza. All of these are closely linked to the *raison d'état* and tourism-based, industrial and economic interests of Hungary.

As is apparent from the official bilingual (Hungarian and English) homepage of the WFD,<sup>28</sup> the EU candidate countries in the Danube River Basin (*inter alia*, Hungary at that time) have committed themselves to transpose and implement the WFD without any specific transposition provisions with the same deadlines the old 15 Member States. Hungary – together with the other nine countries of the 2004 accession round – was committed to completing transposition by 1 May 2004.

As regards the follow-up legislative measures of the WFD and other EU-based directives, Hungary – due to its constitutional system – shapes the harmonization via *acts* and *government decrees* (exceptionally, ministerial decrees).

Prior to EU-accession, Hungary (in the course of the enlargement process) harmonized its core sectorial laws pursuant to the relevant directives emerging from the wider scope of environment or specifically the field of water law and policy. The *Act LIII of 1995* (on environment protection, the main sectorial environment-based law of Hungary), the *Act LVII of 1995* (on water management), the *Act XLIII of 2000* (on waste management) and the *Government Decree 201/2001. (X. 25.)* on the quality of drinking-water and the order of control had amended the core laws on the basis of the European directives.

Following the 2004 EU-accession, Hungary had two main “harmonization booms” and more minor legislative steps relating to the adaptation of five pivotal directives of the analyzed field. These directives are the following:

- the abovementioned Water Framework Directive;
- the 2004/35 Directive on environmental liability with regard to the prevention and remedying of environmental damage;
- the Directive 2006/7 concerning the management of bathing water quality Bathing Water Directive (Bathing Water Directive);
- the Directive 2006/118 on the protection of groundwater against pollution and deterioration; and
- the Directive 2008/98 on waste and repealing certain Directives.

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<sup>28</sup> See <http://www.euvki.hu/euwfd/index.html>.

The “harmonization boom” of 2004 included the *Government Decrees 219, 220 and 221/2004* (VII. 21.) on groundwater,<sup>29</sup> surface waters and river basin management, chiefly based on the requirements of the WFD.

The “harmonization boom” of 2007, on the one hand, entailed the amendment and reshaping of the abovementioned legislation on groundwater and surface water (*Government Decrees 92 and 93/2007* (IV. 26.), and on the other hand, by means of *Act XXIX of 2007* and *Government Decrees 90 and 91/2007* (IV. 26.), the legislators set up new provisions on liability for environmental damages (in accordance with Directive 2004/35).<sup>30</sup>

#### IV. Concluding remarks

As demonstrated above, the implementation of directives aiming to protect the waters could be regarded as a success story from a purely technical, merely legislative perspective. However, during the decades of the adoption of directives shaping the common water policy of the fragmented and (in hydrobiological respect) diverse continent was a “slippery slope”. For the sake of demonstrating the hard task of the former composition of the EU (the “old 15” in comparison with the “new 12” or “new 13” with Croatia) and its predecessors, we may state that “upstream and downstream users of the same river basin may well have different views about the best strategy to be employed. Ten member states receive more than half of their water resources from neighbouring countries, so trans-boundary issues are a serious concern.”<sup>31</sup> Now, the situation is much more difficult than at the time the previous quote was conceived, prior to the accession of 10 new countries in 2004 (*inter alia*, Hungary) and later, 2 further countries (them Croatia); since nowadays the water quality and quantity issue is a somewhat different and more complicated topic. This is also due to the fact that the property of water facilities (in Central and Eastern Europe, the former communist countries) has undergone dramatic changes because of the transition process taking place in the last 15 years.

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29 Cf. A. RAISZ, Magyarország felszín alatti vizei a nemzetközi jog újabb megközelítésében: Kincs, ami nincs? [Groundwaters in Hungary in the New Approach of International Law. Treasure that Does not Exist?], in A. RAISZ (Ed), *A nemzetközi környezetjog aktuális kihívásai* [Current Challenges of International Environmental Law], Miskolc, Miskolci Egyetem, 2012, pp. 149-160.

30 As for liability issues, the main amendments involved numerous new definitions, new forms of exemptions from liability and access to information.

31 See PAGE & KAIKA, 2003, p. 13. The pair of authors rightly laid down, that many Member State governments feel that not only their economic interests, but also their national sovereignty and freedom, are hampered by European environmental legislation.

The case study of Hungary – being a member of the “new 12” – showed that a Member State is interested in enacting at least similar, but more often than not even stricter rules on water protection than the Western Member States, i.e. the majority of the “old 15”. The water issue is and will remain a hot topic in Hungary, as it is demonstrated by the wording of the new *Hungarian Fundamental Law* (with its paragraphs on water) and some new acts and government decrees (e.g. the *Act CCIX of 2011* on water public utilities), and due to the long history of the cultural attitude attached to water in landlocked Hungary.

## Appendix

Cited provisions of

### **The Fundamental Law of Hungary**

*(25 April 2011)*

#### *NATIONAL COMMITMENT AND BELIEF*

“[...] We pledge to treasure and preserve our heritage: our unique language, the Hungarian culture, the languages and cultural heritage of ethnic groups living in Hungary, and the man-made and natural riches of the Carpathian Basin. We bear responsibility for our descendants; we shall therefore strive to use our material, intellectual and natural resources prudently so as to protect the living conditions of future generations.

[...]

Our Fundamental Law shall be the basis of our legal system. It shall serve as an alliance of Hungarians of the past, present and the future. It is a living embodiment of the nation’s will, an expression of the ideals by which we collectively aspire to live. [...]”

#### *Article P*

(1) Natural resources, particularly arable land, forests and water resources, as well as biological diversity, in particular native plant and animal species and cultural values shall comprise the nation’s common heritage; responsibility to protect and preserve them for future generations lies with the State and every individual.

(2) The regulations relating to the acquisition of ownership of arable land and forests, including the limits and conditions of their use for achieving the objectives set out under Paragraph (1), and the rules concerning the organization of integrated agricultural production and on family farms and other agricultural holdings shall be laid down in an implementing act.

#### *Article Q*

(1) In order to establish and maintain peace and security, and to ensure the sustainable development of humanity, Hungary shall endeavour to live in harmony with all the peoples and countries of the world.

(2) Hungary shall ensure that Hungarian law is in conformity with international law in order to comply with its obligations under international law.

(3) Hungary shall accept the generally recognized rules of international law. Other sources of international law shall be incorporated into Hungarian law upon their promulgation by laws.

*Article XX*

(1) Everyone shall have the right to physical and mental health.

(2) Hungary shall facilitate the enforcement of the right referred to in Paragraph (1) by ascertaining that the agricultural sector is free of all genetically modified organisms, by providing access to healthy foodstuffs and potable water, by the protection of occupational health, by health care institutions and medical care, by supporting sports and regular physical exercise, as well as by ensuring the protection of the man-made and natural environment.

*Article XXI*

(1) Hungary shall recognize and implement the right of all to a healthy environment.

(2) Any environmental damage shall as a priority be rectified at source in accordance with the relevant legislation and the principle that the polluter shall pay.

(3) It is prohibited to import waste to Hungary for the purpose of disposal.

*Article 38*

(1) The property of the Hungarian State and of municipal governments shall be considered national assets. National assets shall be managed and protected for the purpose of serving the public interest, satisfying common needs and preserving natural resources, taking also into account the needs of future generations. The requirements for safeguarding and protecting national assets, and for the prudent management thereof, shall be laid down in an implementing act.

(2) The scope of exclusive ownership and economic activity deemed to be the sole domain of the State, as well as the limits and conditions for the alienation of national

assets of special import for national economy considerations shall be defined by an implementing act with regard to the objectives referred to in Paragraph (1).

(3) National assets may be transferred only for purposes specified by law, with the exceptions defined by law, taking costs and benefits into account.

(4) Contracts for the transfer or utilization of national assets may only be concluded with an organization that is able to satisfy the requirement of transparency in terms of ownership structure, organization, and the activities relating to the management of the alienated or utilized national assets.

(5) Economic operators owned by the State or municipal governments shall conduct business prudently and independently, in accordance with the relevant legislation, under the requirements of legality, efficiency and effectiveness.