

Chapter 4

The Opportunity of Recognition of the Right to Water as a Fundamental Human Right

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Abstract Although the issues relating to human rights and liberties are one of the oldest, they remain one of the most researched themes in the contemporary period, the research being conducted by diverse scientists and scholars, especially by those pertaining to jurisprudence. The increased attention human rights are granted is due to the fact that these rights are established in numerous and various sources of law, which often are stated in an evasive language to the reader. We can conclude that one of the main priorities of the scholars of legal sciences is to interpret and make known to each individual the correct meaning of these rights.

Keywords Human rights • Constitutionalism • Water rights • Right to water

The conceptualization of fundamental rights resides in the fact that these rights are subjective, representing a faculty of a person to do or not to do something, privilege bestowed on to him by law, pursuant to this the holder of the right can carry out a certain conduit, can claim protection of his right against third parties in order to capitalize a legitimate interest. An important particularity of fundamental rights is that these rights are established in the supreme law of a state, as is a constitution, evidence that states the essential character of these rights and their abundant protection.

Although contemporary international law as well as national law is gifted with a large variety of human rights, doctrine and jurisprudence is signaling a reanimation process for human rights. An eloquent example of the evolution of the legal institution of human rights is the establishment of the right to water as a new fundamental right, an indispensable component of life and human dignity.

Nevertheless, in order to ensure the complete and effective achievement of the human right to water and to establish clear and compulsory obligations to

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governments to satisfy minimal quantities of water, this right has to be acknowledged explicitly and clearly defined. International normative regulations in the matter of water resources have found their purpose in the declaration of the right to water as a fundamental right. The solemnity was instrumented by the United Nations Organization by means of Resolution A/RES/64/292 on the human right to water and sanitation [1].

Simultaneously, it is necessary to nominate regulation that oriented the legal evolution of the human right to water as is the 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, which substantiate water as a heritage which requires protection and needs to be treated as such and not as a commercial asset. The aforementioned directive fortifies the normative content assembled by the General Commentary nr.15 of the Covenant on economic, social and cultural rights established by the UN Committee on economic, social and cultural rights. The general commentary tends to clarify the content of the rights incorporated into the Covenant, of potential breaches of those rights as well as obligations of signatory states.

The fundamental right to water is an integral part of international law. The supremacy of international law to that of the national is uncontested; this reality is proven by the provisions of article 8 of the Constitution of the Republic of Moldova which establishes the state obligation to respect the UN Charter and signed treaties, to establish relations with other states conducting by unanimously accepted principles and norms of international law [2]. Therewith, as there are no international authorities who have the responsibility to ensure the proper application of rights relating to water resources, states, individually have to ensure the respect of such rights [3]. In our point of view a mean to incorporate the right to water in a national legal order is to root it by constitutional means. It is known that one of the concerns of national constitutionalism is the legal institution of human rights. In the national constitutional system, this institution has been established in a modern conception far later than the constitutional practices of other states. This circumstance does not serve as a detriment to the state of the Republic of Moldova; on the contrary the constituent legislator of 1994 has included in the Constitution the whole spectrum of human rights and liberties which by that time were proclaimed by international documents, referential to this domain. Moreover, according to article 4 of the Constitution, provisions on human rights and liberties will be interpreted in accordance with the Universal Declaration of Human Rights of 1948; with covenants and other treaties of which Moldova is part of. If a certain discrepancy between covenants, treaties of which Moldova is part of and regard fundamental human rights and national law arise, international sources will have priority [4].

Viewing the right to water by contemporary constitutional means, it is relevant to observe the fact that the effectiveness of its application is conditioned by the efforts of both the international community and national legislature. In recent cases, direct applicable law, which ensures the implementation of any international treaty, is the national law. In this jurisdiction, the legislative process as well as the

law hierarchy is established by constitutional arrangements. Traditionally, national law of a state may include normative provisions regarding the legal regime of water (as an example: pollution control or licensing activity). These provisions, excluding the formal legal framework, contain regulation on water rights [3].

It is natural that Moldova has viable legislation on water. Such legislation is: the Water Code [5], Law on the protection of water in zones, strips, rivers and water basins [6], Law on hydrometeorological activity [7] and Law on drinking water [8]. One of the most important legislative instruments on the matter of water was established by the ratification of the Protocol on water and health of the 1992 Convention on the protection and use of Transboundary Watercourses and International Lakes, signed on the 10th of March 2000 [9]. Currently the legal framework on water is composed of 24 documents, 14 of which were adopted in the past decade. It is with regret that we conclude that water legislation of Moldova is limited as opposed to the EU legal framework which consists of 682 documents [10].

The high disparity can be considered a hindrance in the fulfillment of the assumed commitment of Moldova to the European Union and specifically the achievement of compatibility of national legislation with the European one, by means of harmonization.

Moreover, it is important to mention that the scientific community strives to enrich and improve national legislation in matters regarding sustainable development, water resource management and access to safe drinking water, implementation of modern wastewater treatment, discharge and reutilization technologies and irrigation as well. An example of such actions is the State Program “Research and Management of Water Quality”. Under the state program, actions were undertaken to create a legal framework for the proper management, protection and use of water in Moldova, based upon evaluation, planning and participative decision making process. Other goals of the program is to establish the right to use water and to promote investments in water infrastructure; establish mechanisms of protection of water quality, prevention of water degradation, protection and restoration of water resources, convergence with international measures of water management; establishment of a legal framework for the bilateral and multilateral cooperation on matters related to water resources.

One of the essential features of constitutionalism in Moldova is the promotion of the concept of rule of law (article 1 of the Constitution). This concept implies the supremacy of law and enforcement of certain rigors in regulation of social relations. The constitution becomes the primary source of law in the national law system, thus most important values and attributes are regulated by this source. It is to note that one of the primary functions of the Constitution of the Republic of Moldova is to enshrine rights, liberties and fundamental duties of the citizens, directing relations between them, between citizens and public authorities. Therewith, the legal framework subordinate to the Constitution is created in respect of the basic law and is uniform. Considering this, the legal framework becomes the extension of the constitutional provisions. The relevance of the aforementioned is based on the fundamental principle of lawmaking and general mandatory

conditions pertaining to a legal act, which establish that a legal act has to conform to the provisions of international treaties of which Moldova is part of, unanimously acknowledged principles and norms of international law. The legal document must conform to **constitutional provisions** and be in accordance with existing legal documents, with the codification and unification systems. The protection of **rights, liberties, legitimate interest of citizens**, equality and social equity, compatibility with EU legislation is a compulsory condition of any legal document [11]. From these provisions we can foresee the Europe-oriented direction of Moldova, the tendency to enshrine European values in the national legal framework.

In order to constitutionalize this right water it is necessary to create a conceptual rationale of this right. Thus, appealing to the General Commentary Nr.15 of the UN Committee on economic, social and cultural rights, articles 11 and 12, we subtract fundamental provisions on the right to water [12].

The primary element of the right to water is the correlation between access to water and sufficient quantity necessary for life, human dignity and health. This characteristic cannot be interpreted in a restrictive manner, due to the simple reference to volumetric quantities and applied technology. Water should be treated, primarily, as a social and cultural asset and not as economic one. The realization of rights relating to water should be sustainable, ensuring future generation use.

As aforementioned, the Protocol on water and health of the Convention on the protection and use Transboundary Watercourses and International Lakes, signed by Moldova in 2000 is extremely important [9].

We should recognize the effort of Moldova to fulfill the assumed commitments in order to improve water quality. Starting from august 2009, by means of the Implementation Facility Mechanism of the Protocol on water and health, created near the Mixt Secretariat of the Protocol WHO/EEC UN, Moldova is the beneficiary of financial and methodological support for the drafting, in accordance to article 6 and 7 of the Protocol, of target indicators and of implementation plans of the Protocol in Moldova. Currently, with support from the Government of Switzerland through the Swiss Agency for Development and International Cooperation and some international experts, national target indicators are being drafted for the implementation of the Protocol. After the drafting process is finished, these indices will be publicly discussed with all actors, including civil society. After their enactment, these indices will be achieved gradually, in concordance with national deadlines. Concurrent, in order to coordinate this activity a Coordination Group has been established, comprised of interested parties, approved by a joint ordinance of the ministers of health and environment [13].

Analyzing the national legal framework, the efficiency of water policy implementation and the research in these matters, it is necessary to realize that in lack of a constitutional provision on the right to water the development and sustainable management of natural resources as well as ensuring all citizens unconditional access to these resources is practically beyond reach, if we establish that water is indispensable to any form of life.

Arguments that support the aforementioned are related to various aspects, one of which is **poor water quality**. The necessity to strengthen the legal framework around the right to water in Moldova is conditioned by water quality. The quality aspect of water is vaguely regulated in national law, the accent being set on dominantly on commercial water use. Therewith, it is relevant to point out that the population of Moldova is supplied with drinking water mainly from local sources (wells, springs etc.). According to recent research, water quality from these sources year to year is degrading is maintaining at an under par level, manifesting a threat to population health. One study of the matter has shown that 58.9 % of all local sources of water indicate a high chemical value of nitrates [14].

From a regional, socio-economic point of view these indices vary in the spectrum of significantly high contamination, from a 51.6 % contamination in Chisinau to a 80.3 % contamination in Gagauzia.

As a result of monitoring of these indices, in recent years, a constant high pollution level is revealed in local water sources and those measures directed to pollution reduction and water quality improvement do not prove to be efficient.

Chemical pollution of water in local sources is dominant in the northern and central region.

According to results obtained in this study, it was established that the population exposed to the influence of pollutant factors from water is around 1.9 million people. The share of people using non-complying water sources is 72.7 % in the central and northern region, including Chisinau with 3.6 %.

One of the reasons behind water quality degradation as well as ineffectiveness of the measures undertaken is that the national legal framework does not establish clear responsibilities to authorities to ensure qualitative and quantitative access to water. Concurrently, it is relevant to strengthen user responsibility, to those groups of users who utilize water in commercial activities. These responsibilities need to be crystallized according to the unanimously acknowledged principle of international law – **the polluter pays**.

Our tentative to constitutionalize the right to water is empowered by the experience of other states in dealing with such issues. An example of an attempt to constitutionalize the right to water can be found in Belgium. Being a federal state, Belgium is divided into three parts: Flamandia, Wallonia and Brussels region. In all those regions, strong legislation on water is enforced and in order to achieve the Millennium Development Goals (MDG), on issues relating to poverty, public health, reduce mortality among women and children it is attempted to constitutionalize the fundamental right to water. This right, in a Belgian envisage, is an instrument to achieve proposed targets. In 2005, federal government has adopted a resolution stating that access to drinking water is a fundamental right of a person, which should be included in the constitution [15]. Some relevant rationale must be mentioned:

1. Water is indispensable for life and in small quantities it can affect the level of development of a state, thus access to water is a stringent problem for under-developed states.

2. Privatization of water objects will not produce positive effects and a strong possibility of tax increases is persistent. High taxes impose a threat on water accessibility and quality.

The text of the resolution also enables a primary role for international institutions, such as European Parliament, which has stated in favor of non-privatization of water objects. The resolution addresses water issues and proposes constitutional amendment by adding the right to water as a fundamental human right.

Concurrently, the importance of identification and respect for state guarantees and responsibility in achieving this right is also found in this resolution. Currently, according to MDG, Belgium is showing perfect indices on share of population using improved water sources and share of population using improved sanitation services [16].

In an ample view, the human right to water exists without any legal validation, in case we admit that water is vital for life and is the sole basis for the existence of human rights is the existence of human beings.

An eloquent example of combating water scarcity is the Constitution of South Africa. This document was enacted in 1996. Among essential elements, the constitution ensures the right to life and dignity, the right to a healthy environment and the right to water [17]. The South African constitutional framework has enabled government by means of the Department of Water Affairs and Forestry to draft and enact a series of normative documents and policies which strengthen constitutional order, a relevant example is the National Water Act, enacted on 20th of August 1998 [18]. A concurrent analysis of constitutional provisions and the aforementioned document can open up the view on the South-African legal framework which has necessary instruments to guarantee access to safe drinking water, to be responsible for the protection of this right as well as to initiate consistent reforms in order to implement a sustainable water policy in the benefit of society.

All provisions of aforementioned laws are directed towards improving water quality. It is remarkable that by a joint effort of government and society to strengthen national legal framework has brought impressive results. According to MDG, share of population with access to improved water sources has risen from 83 % in 1990 to 91 % in 2011. Regarding sanitation, share of population which uses improved sanitation services has risen as well from 69 % in 1990 to 77 % in 2011 [16].

The experience of the African states, considering geographical positioning, is tied to water issues and progress has been encountered not only in South-Africa. Ethiopia, in its constitution, enacted in 1995, establishes in [Chap. 10](#) the title of principles and objective of national policies and consequently article 90 relating to social objectives mentions the following: policies, in the limit of natural resources, will be oriented towards ensuring all Ethiopians with access to education and public health, **safe drinking water**, shelter, food and social security [19]. After the constitutional referendum in Kenya on the 4th of August 2010 by a sweeping majority of 67 % has voted upon the enactment of a new constitution. This event is

relevant due to the fact that among all essential provisions the new Kenyan constitution establishes the right to water as a fundamental human right, incorporated into the category of social rights, guaranteed by state [20]. Thus, the constitutional guarantee of the right to water strengthens national legal framework and enables the possibility to prioritize water issues, which according to MDG are poor. Share of population to safe drinking water is 59 % [16].

We consider the experience of the African state meaningful and viable due to the fact that these states are always faced with water scarcity issues; this experience is beneficial both to the international community and Moldova. International efforts to improve water quality and combat water related issue are measured by the MDG, which at section 7, Ensuring environmental sustainability sets out target goals to cut by half by 2015 the share of population without access to safe drinking water and sanitation. Concurrently it is worthwhile to point out that the constitutional substantiation of the right to water in those states opened to such opportunity can facilitate these processes as well establish definite responsibilities to state authorities towards the people, the holder of sovereignty.

The impact of national water law on international law can be deduced by consulting national constitutional constructions as well as ratification instruments for the treaties the state is open to. One of the most viable instruments available is the Protocol on water and health of the Convention on the protection and use Transboundary Watercourses and International Lakes. In the absence of sources that will develop the fundamental right to water we can not converge to a state of involution of sustainable water management as well as partially guarantee access to drinking water, on the contrary it is necessary in all cases to develop national law on water both doctrine and practice.

Constitutional experience of states is an important component in the formation of international practices. Guarantee and protection of a fundamental right by means of the constitution represent an advantage towards the fulfillment of crucial objective such as establishing the rule of law or European integration.

The realization of the right to water cannot be perceived separately from the constitutional protection of life, physical and mental integrity, a sufficient reason for the extent of the development of the right to water as means of protection of a person's life and health. The connection between human and water is incontestable and is due to the connection of humans to the natural environment, their habitat. In a wider perspective, the right to water concerns man and natural elements which surround him to an extent that both form an inseparable whole. Concurrently, the right to water should be perceived as a qualitative right. Accesses to water resources enable the balanced development of the person.

The guarantee of the right to life, the right to physical and mental integrity can be affected or threatened or even become inoperative in situations such as pollution or accidents with devastating effects to water. As an example to this we can reference to events occurred in Hancesti, where devastating floods ravaged the region. Likewise, we can mention the drinking water issue in Mingir, where after the construction of an aqueduct, the quality of water has degraded to an extent that it became undrinkable.

The category of arbitrary ways to end life should include all actions and activities which as a consequence lead to environmental degradation, especially water. The responsibility to protect is persistent to all natural persons as well as to the state [21]. This responsibility is directed toward the respect of the right to life of another by interdiction of certain activities that may lead to environmental degradation, underlining the importance of water.

From our point of view the opportunity to constitutionalize the right to water would guarantee the respect of this right by means of other subordinate normative document. The constitutional existence of the right to water and its guarantee can have the most beneficial effects: strengthening of public responsibility to protect water resources, ensuring an efficient protection of subjective rights related to water, establishment of a solid legal framework for the sanctioning of infringements brought upon water resources.

Without a constitutional rationale upon this right, actions taken by authorities and society in order to solve key water issues are irrelevant.

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