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INTRODUCTION: A MULTIFACETED HUMAN RIGHT

1. The environmental, social and economic issues of water accessibility

2020 marks an important anniversary for the recognition of the human right to water. In fact, ten years have passed since, in 2010, it was recognised by two relevant resolutions of the UN General Assembly[1] and of the UN Human Rights Council[2]. Furthermore, 2020 marks the passage of the first five years from the affirmation of the Sustainable Development Goals[3], and in particular of the sixth Goal, «*Ensure access to water and sanitation for all*» by 2030.

Even though the Sustainable Development Goals will be subject of analysis in the third paragraph of the first chapter, it is necessary to underline the importance of this objective, which represents the point of arrival of the evolution that has regarded water law during of the twentieth and the twenty-first century. It differs indeed clearly from the previous conception of water, seen as a pure means of production to be exploited for

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[1] UN General Assembly A/RES/64/292, *The human right to water and sanitation*, 3 August 2010.

[2] UN Human Rights Council A/HRC/RES/15/9, *Human rights and access to safe drinking water and sanitation*, 6 October 2010.

[3] Adopted with resolution A/RES/70/1 of the UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015.

the sole purpose of economic efficiency, according to the *a priori* belief that the water resource would be infinite and not susceptible to issues of scarcity, if not in the short term period (Boscolo 2012, XV, XXIX). Since the sixties and seventies of the last century, however, there has been a radical change in this trend, in which water started to be understood as a «*multifunctional environmental matrix*» (*Ibidem*), to be protected as a fundamental element both for the ecosystem and for human beings, who must therefore have the right to access and benefit from it, in a logic of inseparability between environmental and distributive needs. In fact, though these needs must also be considered, balancing water uses towards giving priority to those related to human consumption and utilisation, it is not possible to ignore the essentiality of the environmental component. In other words, the manifold value of the water resource is clearly recognised, understanding its essentiality and its being an intrinsic element of every manifestation of life, human and otherwise (*Ibidem*, 6 ff., 149 ff.).

It can be understood, therefore, how the sixth Sustainable Development Goal represents a very important point of arrival of this evolution of water law and of the way in which water must be protected as a central natural resource. But what point has been reached in the realisation of this fundamental objective?

According to data from the United Nations and the World Health Organization[4], although there has been significant progress compared to the past, with accessibility at least to basic water services for almost 90% of the world population, significant criticalities remain, in particular for the less developed areas of the planet.

Indeed, 785 million people still lack access to a basic drinking-water service, and more than two billion people live in countries subject to high levels of water stress. According to recent estimates, 31 countries are

[4] Available at www.un.org and www.unwater.org, and at www.who.int.

subject to water stress between 25% (percentage defined as the minimum water stress threshold) and 70%, while 22 other countries are above 70%, with severe water stress[5]. In particular, an estimated four billion people, nearly two-thirds of the world's population, are subject to severe water shortages for at least one month a year[6].

The presence of constant water shortages, which intensifies at certain times of the year, makes it possible to identify a first, fundamental obstacle that arises in the concrete realisation of a universal right to access drinking water.

This in fact cannot be carried out in any way, as will also be emphasised in more detail during the course of the discussion, without adequate care of the water resource *per se* (Sancin & Dine 2016, 103 ff.). Water resources which, however, are constantly put at risk by its intensive exploitation and its pollution caused by agriculture and industry, in particular precisely in the south of the world, where the exploitation of resources, first of all mining and oil, cause damage of extreme gravity to water basins and to resident populations (Boelens, Vos & Perreault 2018).

In addition to the pollution of water basins and aquifers, which therefore involves direct damage to the water resource and consequently reduces its accessibility, water resources are endangered by the consequences of world pollution as a whole and by climate change provoked by it. Climate change, in fact, causing extreme weather events such as droughts and floods, leads to extreme water shortages such as those mentioned above, and to devastating floods, which pollute the drinking water reservoirs (Birkenholtz 2016, 26; Salvemini 2019, 5 ff.). Problems that put a strain on

[5] United Nations, *Sustainable Development Goal 6: Synthesis Report 2018 on Water and Sanitation*.

[6] United Nations, World Water Development Report 2019, *Leaving no one behind*.

all the countries of the world, but which mostly affect developing countries, due to the lack of economic means or knowledge to face these phenomena (Jackson *et alii* 2016).

A further, fundamental problem that affects the whole world, even more strongly felt in countries lacking sufficient economic and financial resources, is the presence of parts of the population that cannot access water due to lack of means, or for their belonging to particular minorities or population groups. In other words, even where the issues of water shortage are not particularly pressing, and individuals generally may enjoy a good quality water service, access to this service is often limited by the presence of strong inequalities in access, and therefore by issues of social justice and discrimination (Briganti 2017; Koff & Maganda 2016, 93).

Problems, social and economic ones, which are certainly well present also in industrialised countries, and concern in particular ethnic minorities, the elderly, the disabled, migrants and refugees, detainees, inhabitants of rural or disadvantaged areas, victims of natural disasters (Casanova Mendes Borba 2017, 20). As an example of how these issues affect developed and non-developed countries alike, the data from the Universal Periodic Review can be mentioned, issued by the UN Human Rights Council in order to evaluate the performance of the different UN Member States in the field of human rights[7]. In fact, these data clearly show that different EU Member States present problems of accessibility to water services, in particular regarding minorities such as Roma, or the Sami in Northern Europe, to migrants and refugees, and prisoners in prison overcrowding conditions (Casanova Mendes Borba 2017, 52 ff.). Consequently, contrary to what is claimed by some Authors (Lugaresi 2011b, 56-57), the right to water cannot and must not be considered as a right to be realised only in the most disadvantaged areas of the world, but

[7] Available at www.ohchr.org.

everywhere, in a universal way.

It is precisely in this sense that the human right to water has to be considered, and as such it will be considered in the course of this analysis: as a universal and absolute right to access water in sufficient quantity and quality by every human being, by virtue of the aforementioned character of water as foundation of life and all existence. Only if understood from this perspective is it possible to comprehend the central value covered by the human right to water, as a social right necessary in order to allow a dignified life. Since it is in this sense that the right to water will be understood, it is worth pointing out that it is always in these very same terms that the analysis will use the term "access" regarding water, meaning that accessibility is one of the essential components of the right to water (as will be seen in the course of the second chapter), and not in the sense of access as a fulfilment of the need for water. As underlined by authoritative doctrine (Briganti 2012, 32; Louvin 2018, 224), the use of this latter meaning is increasingly frequent, with reference to access to water as a simple need, thus depriving it of the prescriptive value that instead has a human right, which unlike a need allows its holders to claim certain benefits from the State. It is therefore reiterated that access can only be considered as a component of the human right to water as a human right that allows the individual to fully live his or her life in dignity, being able to access and enjoy freely and without obstacles or exclusions the water resource (Rifkin 2000, 317-318).

2. The need for an integrated and holistic approach

If it is clear that the human right to water depends directly, for its realisation, on the correct protection of the environment and water resources, it is equally essential that the social and economic demands, which prevent universal accessibility to water, are solved, both for the

most disadvantaged countries and for the weakest parts of the population, all over the world (Bernal 2015, 278-279; De Albuquerque & Roaf 2012, 28 ff.).

This makes it possible to affirm the need, for the correct recognition and full realisation of the human right to water, for a holistic approach, encompassing all the aforementioned requirements with a fully sustainable approach, from an environmental, economic and social point of view (De Albuquerque & Roaf 2012, 213 ff.; Lugaresi 2011a, 39-41; Winkler 2012, 214 ff.).

Not by chance D'Aloia (2016b, 697 ff.) and Caporale (2017, 401) regard the right to water as a multi-faceted or polymorphic right, which assumes relevance under many aspects, while Thielbörger (2014) speaks of "rights" to water. The right to water is configured in fact as a basic right, necessary to realise fundamental rights such as the human rights to life or health, but it is also, as just mentioned, a social right, in particular due to its function of realising the equality of all human beings. In this respect it is also a collective right, local and global, which includes the environmental, social and economic interests of both small communities and all of humanity[8]. Finally, it is an intergenerational right, to be universally protected for present and future generations (Louvin 2017, 537 ff.).

The need for such a holistic and multilevel approach has influenced the method and the objectives followed in the elaboration of the present research work, and its consequent structure, which will now be presented.

Before this exposition, it is however opportune to specify that, for the purposes of the present analysis, the human right to water will be

[8] There are in fact various theses aimed at recognising water as a common heritage of humanity. For further details, see Bruno (2012, 212 ff.), Di Lieto (2004, 757-758) and Palombino (2017, 77 ff.).

considered as an independent and autonomous right, in particular separating it from the right to sanitation. In fact, despite having been the two human rights associated for a long time, and been often considered as a single human right, they present themselves today as distinct human rights from one another. This distinction was indeed affirmed as much by international evolution[9] and from the doctrinal one (Caporale 2017, 420; Feris 2015, 18 ff.; Louvin 2018, 192; Winkler 2016, 44). Although access to sanitation shares different aspects with access to water, particularly since both are connected to the dimension of human dignity and the satisfaction of basic needs, sanitation is in fact linked to water only in the case in which it is water-borne. In such cases is it of course necessary that the disposal of the waste water takes place correctly, without polluting the water resources. Beyond these cases, however, the right to sanitation presents needs and requirements in its own right, distinct from those of the right to water (Winkler 2016, 46 ff.).

Furthermore, another aspect that will not be considered the central object of the analysis is represented by the theme of the management and allocation methods of the water service, limiting the discussion of the topic of privatisation of water services in the final part of the second chapter.

It is however necessary to specify, from this introduction, the reasons that justify this choice. As is well known, the debate on the privatisation of water service has represented and still represents one of the main starting points and stimuli for discussion in relation to the human right to water and the need for its recognition. Indeed, the negative effects privatisation has had in various parts of the world are well known, linked both to the disproportionate increase in water tariffs, in particular to the

[9] In particular, as will be seen at the end of the first chapter, by General Assembly Resolution A/RES/67/291 of 2013, and by Resolution of the Human Rights Council A/HRC/RES/33/10 of 2016.

detriment of the poorest parts of the population, and to the non-transparent modalities with which such privatisations have been introduced[10]. As other issues relating to the human right to water, privatisation concerns both developing countries and industrialised countries alike, and in particular European ones. If in fact the event of water services' privatisation in Bolivia represent an emblematic case, being the cause of the so-called "*water wars*" of Cochabamba and La Paz (Brunner *et alii* 2015, 430 ff.; Rotondaro 2015, 97-98), there are significant cases of reaction and fight against privatisation even outside South America. Indeed, both the contexts examined in this work, the German and the Italian ones, present examples in this sense: the first for the case, dating back to 1999, of the privatisation of the *Berliner Wasserbetriebe* in Berlin, and the second for the public referendum of 2011, related the management methods of the water service.

Summarising the two cases, the German one concerned in particular the transformation of the *Wasserbetriebe* into an almost entirely private holding, which deprived the municipality of Berlin of any effective management power, based on non-transparent agreements (Laskowski 2010, 796 ff.), which allowed the private operator both to increase the tariffs for the water service and to significantly reduce the capital invested for its improvement (Laskowski 2012b, 175 ff.). Popular protests aimed at reaffirming the control of the citizens and the municipality over water services, which started in 2009, led to a referendum in 2011 which decreed its re-municipalisation (Laskowski 2010, 830 ff.). The Italian referendum

[10] For a deeper analysis related to the issues connected to the privatisation of the water sector see, among the several Authors who dealt with this topic: Feldman 2017, 40 ff.; Gupta, Hildering & Misiedjan 2014, 26 ff. (who in particular focus on the issues of environmental damage and lack of consideration towards indigenous populations); Moosdorf 2007, 86-87; Murthy 2013, 118 ff.; Williams 2007, 500 ff.

of the same year was instead motivated not by a particular privatisation case, similar to the German one, but by the introduction, in Article 23 *bis* of the law decree n. 112 of 2008, which provided for a clear favour towards opening up the market for local public services, including water services, started almost ten years earlier with legislative decree no. 267 of 2000 (Testella 2011, 91 ff.). In particular, Article 23 *bis* provided that in-house reliance on the public sector could be admitted only in the presence of exceptional circumstances that did not allow relying on the free market. It was in particular the privatisation of water services that aroused the fear of various associations and non-governmental organisations, among which the "*Italian Forum of movements for water*" stood out and promoted the referendum campaign to protect "public water"[11], which ended with the 2011 referendum and the repeal of Article 23 *bis*.

As mentioned above, both cases are considered emblematic and undoubtedly had the merit of having stimulated public debate and scientific discussion both on the issues of privatisation of water services (and public services as a whole) and of the human right to water and its implementation.

Nonetheless, as will be reiterated in the second chapter, it must be considered that the question of how the water service is managed does not necessarily play a central role in guaranteeing the universal right to water. In fact, it must necessarily be guaranteed regardless of the type of

[11] This, however, as pointed out by Lugaresi (2011b, 45) and Staiano (2011, 21), highlighted a clear confusion on the subject of the referendum, which only concerned the management of water services, and not the recognition of the publicity of the water asset, clearly declared by law no. 36 of 1994 (Testella 2011, 51) and not questioned by the law decree subject of the referendum. For further details on the 2011 referendum and its follow-up, please refer to Aru (2019a, 1-7, 47 ff.), Bersani (2016, 21 ff.), Guarini (2019, 9 ff.), Guella (2017, 6), Quarta & Mattei (2016) and Sileoni (2016, 18 ff.).

management, public or private, of water services. The political decision-maker, from local to national according to the context and to the division of competences in one country, must be considered free to rely on a private management, provided that the latter is bound to respect all the conditions of protection and guarantee that the human right entails, as dictated by the same political decision maker. In other words, referring to the observations of Lugaresi (2011a, 63, 70) and Williams (2007, 502), the public sector may be able to manage the water service in compliance with these conditions, or it may deem more appropriate or convenient to refer to a private operator, to which it imposes the same conditions. If none of these alternatives are feasible, and therefore the right to water cannot be guaranteed, this would be a clear indication of profound system imbalances, which obviously go beyond the decision to let private enterprises manage water services, or to keep them under public management.

3. Research methods and objectives

Having concluded these premises, it is possible to introduce the research methods and objectives.

As regards the former, as above mentioned, the research is inspired by the need for a holistic and multilevel approach for the realisation of the human right to water, which takes into account the different aspects that compose it and the different contexts in which it must be realised.

The research therefore focused on the analysis of three different levels of recognition and implementation of the human right to water, observing in particular the international, European and finally the national context, specifically German and Italian. The research was characterised by the analysis of the main normative and jurisprudential sources in each of the analysed contexts, first of all looking for the legal basis of the human right to water, taking into account, as aforementioned, both the environmental

aspects and those more pertinent to the social and economic spheres. In the analysis of the normative sources, in particular, a temperate positivistic interpretative approach (Coinu 2012, 233; or "*logic*": Betzu 2012, 66) has been followed, thus pursuing the goal of overcoming an approach of their mere acknowledgment, aiming on the contrary to approach their preceptive value to social reality and necessities. Such approach follows the consideration of rights well defined by Dogliani (1993, 534), according to which human rights represent the juridification of substantially and continuously advanced social questions, and which therefore requires that the law does not remain immune to the demands of social reality (Coinu 2012, 12). This analysis was naturally supported by the examination of the most relevant doctrine on the subject, also considering the evolution from the oldest to the most recent sources.

As regards the research goals, the main objective of this analysis is the understanding of the current level of protection achieved for the human right to water in all the contexts examined, in the light of the regulatory and doctrinal evolution covered by the discussion, assessing their effectiveness and criticality still present.

Furthermore, given the absence of an explicit recognition of the human right to water in European and national contexts, a further objective and central element of the analysis, also representing the reason for the comparative analysis between Germany and Italy, is the reconstruction of the mechanisms of multi-level protection of human rights, considering in particular how the influence between different levels of protection may or may not contribute to the realisation of the human right to water.

4. Structure of the dissertation

Considering instead the structure of the dissertation, it is divided into four chapters, each one dedicated to one of the examined contexts,

with the exception of the second, dedicated to the analysis of the normative content of the human right to water.

The first chapter will in fact examine the legal basis of the human right and its evolution in the international context, considering both the normative sources that allow to derive it from binding instruments such as the International Bill of Rights or the sources of international law limited *ratione personae* or *materiae*. It will also include the analysis of the international sources regarding the recognition of the protection needs of both the water resource and the right to water, contained in most cases in non-binding sources, although of great importance, among which the General Comment No. 15 of 2003 stands out for its precise definition of the human right to water.

Once the analysis of the international context has been concluded, the second chapter will indeed be dedicated, as mentioned, to the examination of the human right to water and its regulatory content as defined by General Comment No. 15 and subsequent evolutions, mainly of doctrinal origin. In particular, it will analyse the elements of availability, quality and accessibility described by the General Comment, as well as the obligations to implement the right to water and the consequent duties of the States for this purpose.

The third chapter will focus instead on the European level, considering the sources of primary and secondary EU law, and in particular the so-called Water Directives, as well as the provisions of the European Convention on Human Rights and the relative jurisprudence of the Court of Strasbourg. As in the international context, the elements of environmental protection and natural resources, in particular water resources, will be examined, as well as those more closely related to the protection of human rights, seeking in the European context legal basis analogous to those identified in the international context. As mentioned, a key element of the European context examined in the third chapter will be also represented by the understanding of the link between the sources of

international law and those of EU law, in the light of the provisions contained in the EU Treaties and in the EU Charter of Fundamental Rights.

Finally, the fourth chapter will be devoted to the examination of the German and Italian national contexts.

Similarly to the analysis of the previous contexts, the fourth chapter will also include an analysis of the most relevant sources of national law in both countries, focusing in particular on the profiles of constitutional law, in order to identify the legal basis of the human right to water, as well as of the protection of the environment and natural resources. As aforementioned, a key point of the analysis will be represented by the comparison between the two different interpretative criteria that German and Italian constitutional law have developed in relation to international and European law. Finally, a further element of comparison between the two examined national contexts will result from the analysis of their local levels, considering how their differences strongly influence the water service management methods in both countries, and in particular the role of local communities.

Having thus concluded the necessary premises for this work, and having presented the followed methodologies, its objectives and structure, it is possible to proceed with its development, starting from the analysis of the legal basis of the human right to water in the international context, and in particular from the International Bill of Rights as a primary point of reference.

CHAPTER I
THE LEGAL BASIS OF THE HUMAN RIGHT TO WATER AND ITS EVOLUTION IN INTERNATIONAL LAW

1. The International Bill of Rights as main source

In order to comprehend the legal basis of the human right to water, the first step to take is without doubt represented by the analysis of the relevant Articles within the International Bill of Rights, composed by the Universal Declaration of Human Rights (UDHR)[12] of 1948 and by the Covenants on civil and political rights (ICCPR)[13] and on economic, social and cultural rights (ICESCR)[14], both of 1966.

Since no Article within the Bill of Rights includes an express recognition and protection of the rights to water, it is necessary to give an extensive interpretation of the rights included in the above mentioned law sources.

In particular, the following paragraphs will be dedicated to the rights to life (Articles 3 UDHR and 6 ICCPR) and health (Article 12 ICESCR), as

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[12] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, Resolution 217 A (III).

[13] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966.

[14] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966.

the rights that show a very strict bond with the right to water, since it is needed for their full implementation, as well as the right to an adequate standard of living (Articles 25 UDHR and 11 ICESCR), also not realisable without a proper access to water, and considered, due to its wide formulation within the UDHR and the ICESCR, the main starting point for the recognition of the right to water through means of interpretation.

1.1 The Universal Declaration of Human Rights

The Universal Declaration represents without doubt the mandatory starting point in the analysis of the legal sources of every human right. Adopted in 1948 by the UN General Assembly, the Declaration represents indeed the first recognition of the inviolability of human dignity, and the fundamental importance of human rights' protection as a common goal for the international community as a whole, thus representing a clear distinction from the past and the second world conflict[15].

As already stated, like in the other sources of the Bill of Rights, the UDHR does not include an express recognition of the human right to water. The hypothesis justifying such legal vacuum are essentially two: on the one hand, part of the literature believes that it has to be connected to the lack of worries regarding water crisis and environmental issues, which rose up only in the seventies (Schreiber 2008, 439); on the other, other retain the lack of inclusion of the right to water justified by the obvious need of protecting access to clean water, that had therefore to be

[15] Indeed the Declaration, as the UN Charter, already in its preamble shows the clear intent to detach itself from the past, and from the barbaric acts of war and genocide («[…] *disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind* […]»), as to indicate them as direct consequences of the lack of respect towards human dignity and fundamental rights (Watson 2016).

considered included within other human rights (Gleick 1998, 489 ff.)[16]. Moreover, other scholars believe that at that time water issues did actually not represent an issue at all, at least within the developed countries that led the negotiations[17].

Nevertheless, the Universal Declaration includes several rights that may represent the legal basis of the human right to water within international law.

However, before analysing the relevant Articles, it is necessary to solve a preliminary matter, related to the binding nature of the Declaration towards the UN Member States. On this regard, it should be remembered that, since it has been approved through a General Assembly's resolution, the Declaration does not represent *per se* a binding document[18], and therefore could not provide a solid basis for the recognition of the right to

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[16] The Author in particular notices how the UDHR includes rights that may be considered less fundamental in comparison to the right to access water, such as the protection from unemployment, the right to work and the right to rest and leisure (Articles 23 and 24 UDHR).

[17] On this regard De Albuquerque & Roaf (2012, 25 ff.) believe that it has to be connected to several factors, such as remnants of the colonial domination, and the consequent lesser importance given to the representatives from developing countries, mostly former colonies. Another relevant factor was also represented by the lack of relevant urban areas (also in developed countries), and therefore the lack of complications for the management of water resources. Penkalla (2016, 18) observes however how, already in the forties and fifties, issues related to severe droughts were very well known, not only in developing but in developed countries as well.

[18] In fact, Articles 10 and 14 of the UN Charter establish clearly how the General Assembly may only issue binding recommendations related to issues regarding the Charter itself, or the resolution of disputes among member States

water.

Such issue may however be solved, observing first how the Declaration represent a clearer definition of the human rights that the UN Charter placed in 1945 as main goal: the Charter indeed aims to the promotion and the protection of human rights and liberties within and among all member States and the international community. It does not, however, give them a description or explanation, limiting itself in stating that they should be enjoyed «*without distinction as to race, sex, language, or religion*» (Article 55, c). This occurred instead with the Universal Declaration, drafted with the precise goal of defining such rights and liberties (Hardberger 2005, 19; Humphrey 1979, 32; Winkler 2012, 71). Having such aim, the Declaration represents therefore, according to some scholars, a constitutive document of the United Nations, and as such it cannot have but binding value (Beail-Farkas 2013, 768; Kearns 1998, 231-232).

Moreover, part of the literature and of the international jurisprudence retain the discussed issue resolved, due to the inclusion of the Universal Declaration as part of international customary law, and therefore as a binding source not only for UN Member States, but for the international community as a whole (Bates 2010, 288-289; Hannum 1996, 289; Hardberger 2006, 565; Humphrey 1979, 30; Kearns 1998, 232; Laskowski 2010, 154; Meron 1989, 108, 113). According to this theory, the customary nature of the Declaration should be attributed not only to its described role of necessary and authoritative specification of the UN Charter, but also to the fact that not only the following international human rights law, but several national constitutions and laws refer themselves to the UDHR as their foundation. There is also no lack of decisions in international and national jurisprudence referring to the Declaration as legal source, which further supports the forming of a customary rule (De Vido 2012a, 524; Hannum 1996, 319, 322 ff., 337 ff.)[19]. Such continuous

[19] It has to be noticed, however, how Hannum (1996, 340 ff., 348, 349), as well as

and reiterated referrals, based on the conviction of the binding force of the Universal Declaration, allow to affirm the presence of the elements of *diuturnitas* and *opinion iuris ac necessitatis,* both needed in order to recognise consuetudinary norms.

It may therefore be stated that, even though the Universal Declaration lacked a formal binding power at its origin, such power arose both thanks to its role as necessary document to define the rights and liberties within the UN Charter, and to its nature of customary law reached through the reiterated practice and conviction of its binding effect.

Having solved the issue of its binding power, it may be proceeded with the analysis of the relevant Articles and human rights within the Universal Declaration founding the legal basis for the recognition of the human right to water. These are represented without doubt by the right to

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other Authors (McCaffrey 1992, 8; Winkler 2012, 75), also rose some doubts regarding the achievement of the customary status for all the rights included in the Declaration, in particular excluding social, economic and cultural rights. This due to the primary role traditionally attributed to civil and political rights, social rights were indeed seen as mere programmatic norms, rather than actually prescriptive (Kenner 2003, 1 ff.), which led to their lesser implementation and justiciability (Saul, Kinley & Mowbray 2014, 163 ff.). This traditional interpretation has been however overcome, due to the equal consideration that all human rights must receive, recognised by the Vienna Declaration of 1993, adopted by consensus after the World Conference on Human Rights of the same year (Dorfmann 2006, 71 ff.). As paragraph 5 of the first part of the Declaration indeed states, «*all human rights are universal, indivisible and interdependent and interrelated*». This leads to the conclusion that economic, social and cultural rights clearly pose on all States the same obligations of implementation and justiciability as civil and political rights (Krennerich 2006; Scheinin 2005). Therefore, due to the overcoming of the distinction between the two categories of human rights, it may be also affirmed that social rights within the UDHR have reached the same status of customary rights as the civil and political ones.

life, established in Article 3, stating that «*everyone has the right to life, liberty and security of person*», as well as the right to an adequate standard of living, expressed in Article 25, that is 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 and necessary social services* […]».

As regards the protection of the right to life in Article 3 UDHR, it surely represents a first and clear basis for the recognition of the human right to water, since access to sufficient quantities of water is a fundamental prerequisite for life itself. However, how it will be analysed in the following analysis of Article 6 ICCPR and its similar (albeit broader) formulation of the right to life, the right to life may not be considered the legal basis for the right to water as a whole, but rather to access the minimum quantity of water needed for survival[20].

It is therefore the right to an adequate standard of living that represents the main legal basis within the Universal Declaration. Above all, as underlined by numerous Authors (Alvarez 2003, 3; Hall, Van Koppen & Van Houweling 2014, 852-853; McCaffrey 2005, 95 ff.; Nicotra 2016, 4-5), such interpretation is allowed by the usage of the term «*including*» in Article 25 UDHR. Indeed, this term enables to interpret the catalogue of rights listed in it as non-exhaustive, but on the contrary including other human rights as well, such as the right to water[21]. This

[20] That is a quantity of water even inferior to the quantity considered as minimum quantity in order to fulfil basic human needs, as will be seen in the analysis of the normative content of the right to water.

[21] Article 25 UDHR includes a referral to the right to health as well, which represents a further legal basis for the right to water and will be analysed in the paragraph dedicated to the ICESCR. Indeed, Krennerich (2013, 203 ff.) notices how the formulation of Article 25 recalls the preamble of the Constitution of the

interpretation appears evident by understanding the significance and content of the right to an adequate standard of living, which Copp (1992, 248, 252 ff.) defined as the right to be put into the condition to satisfy one's own basic needs without being forced to relinquish other needs or sustain forced decision in order to do so. This concept is therefore clearly broader than the "basic" right to life, being connected to the fundamental value and human right to human dignity. It is indeed the right to conduct a life in dignity, free from needs, which has necessarily (and logically) to include the access to clean water.

Moreover, returning briefly to the role of the Universal Declaration as further definition of the human rights included within the UN Charter, it must be noticed how Article 55 of the latter includes the promotion of «*higher standards of living, full employment, and conditions of economic and social progress and development*». A goal that clearly could not be realised without a proper implementation of a right to water (Bates 2010, 288-289; Teton 2009, 4). Moreover, the inclusion of such goal in the Charter represents further argument in favour of the binding force of the Universal Declaration, in particular as regards the full realisation of the right to an adequate standard of living.

The Universal Declaration therefore, though not including an express recognition and protection of the human right to water, surely represents a first legal basis for its implicit recognition.

1.2 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights, adopted by the UN General Assembly in 1966, represents the second document within the International Bill of Rights after the Universal Declaration, and represents indeed a specification of the civil and political rights included in

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World Health Organisation, which defines the right to the highest attainable status of health as realisation of physical, spiritual and social well-being.

it, in order to include them in a binding document. In fact, due to its nature of multi-lateral agreement, the ICCPR does not present any problem on the profile of its binding power towards Member States.

Considering the potential legal basis included within the ICCPR, as the Universal Declaration, also the Covenant protects the right to life, stating in its Article 6 that «*every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life*»[22].

As noticed in the previous paragraph, the right to life apparently represents a clear legal basis for the recognition of the right to water, due to the logical necessity to have access to water in order to protect human life[23]. However, before claiming such recognition, it is necessary to

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[22] Other Authors (Brunner *et alii* 2015, 10) also recall the prohibition of torture and inhuman and degrading treatments on prisoners (Articles 7 and 10 ICCPR) as potential legal basis for the right to water. This is allowed, according to these scholars, by the Standard Minimum Rules for the Treatment of Prisoners of 1957, which Article 20 states that «*drinking water shall be available to every prisoner whenever he needs it*». However, even though this relevant Article, it is not possible to consider the prohibitions of torture and inhuman and degrading treatment as legal basis for the right to water. As observed by Bourquain (2008, 134-135), these do indeed only pose a prohibition of treatments, conducts or omissions that may be considered torture or inhuman or degrading treatment, which certainly do include intentional water deprivation, but may not, on the contrary, include an obligation to grant the right to water as a whole.

[23] Cahill-Ripley (2005, 397) notices in particular how the two human rights (to life and to water) indeed show a clear bond, which however may not be considered as mutual, since if it is true that it is impossible to realise the right to life without realising the right to water, the same cannot be said for the inverted situation.

understand the effective scope of the right to life under Article 6 ICCPR, and if it may or not include the access to sufficient quantities of clean water.

In order to do so, the traditional and restrictive interpretation of Article 6 has to be overcome, since it may not be seen as a mere negative right, prohibiting unjust life deprivations. As observed by the Human Rights Committee (HRC) in § 5 of its General Comment No. 6[24], the right to life has indeed a wider content, which poses on Member States positive obligations whenever the enjoyment of the right is put in danger, in particular regarding the goals to «*reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics*» (Bourquain 2008, 125; Thielbörger 2014, 116; Scheinin 2001, 40 ff.)[25].

Such interpretation is also supported by Article 2 ICCPR, which expressly states the Member States' obligation to realise all the rights included in the Covenant without discrimination. Nevertheless, this does not allow a excessively broad interpretation of the right to life that may include also obligations towards the guarantee of minimum life standards[26]. Such interpretation may in fact lead to a collision not only to the already existing right to an adequate life standard, but also with the

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[24] UN Human Rights Committee (HRC), *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982, § 5.

[25] It is interesting to notice how, under this aspect, all the cases that the HRC mentioned in the General Comment show a strong connection with the right to water, since access to clean water in sufficient quantity and quality plays a vital role in preventing mortality and sickness, in particular towards children. This aspect will be analysed in the paragraphs dedicated to the normative content of the right to water.

[26] Like the interpretation given by Alvarez (2003, 72, 74).

State obligation of realising this second right in a progressive way, even though granting in every case the realisation of its minimum core (Kiefer & Brölmann 2005, 189; McCaffrey 1992, 10-11; Winkler 2012, 53).

Therefore, due to this limitation, the effective relationship between the right to life and the right to water needs to be clarified. As mentioned in the analysis of Article 3 UDHR, and as underlined by the majority of the literature (Cahill-Ripley 2005, 391-397; Karbach 2016, 100, 53; Kiefer & Brölmann 2005, 190; Winkler 2012), the right to life may indeed represent the legal basis for the protection of access to water only within the limits of survival, and not also for the full realisation of the human right as a whole[27]. This allows to exclude that the ICCPR and the right to life may represent a sufficient legal basis for the right to water, beyond the needs of survival, which also determines a lesser amount of responsibilities for States, which are bound to intervene only in those cases

[27] There are, however, a few court cases in which the Courts recognised the right to water with the sole basis of the right to life. To recall the most relevant ones, the first is represented by the Indian case *Peoples Union for Civil Liberties (PUCL) v. Union of India & Ors. W.P. (Civil) No. 196/2001*, where the Supreme Court extended the interpretation of Article 21 of the Constitution, already used to recognise the right to health and to an healthy environment, to include the right to water. A second case is the so-called decision "*Street Children*" (*Case of the 'Street Children' (Villagrán-Morales et al.) v. Guatemala, 1999*), decided by the Interamerican Court of Human Rights, which interpreted Article 4 of the American Convention on Human Rights as including the guarantee of the minimal conditions to lead a dignified life, including access to water. Such recognition may however be justified by the absence, both in the Indian Constitution and in the American Convention, of other human rights that could better represent a legal basis for the right to water (Kothari 2009; Krsticevic & Griffey 2016, 350).

where bad water quality or water scarcity may seriously put the population's life in danger (Bourquain 2008, 125 ff.).

1.3 International Covenant on Economic, Social and Cultural Rights

The third and latter document of the International Bill of Rights is represented by the International Covenant on Economic, Social and Cultural Rights, adopted as the ICCPR in 1966 and sharing with it the goal of concretising the rights included in the Universal Declaration through a multilateral treaty, focusing on economic, social and cultural ones. Therefore, as the ICCPR, the ICESCR does not present any issue related to its binding power.

The most relevant Articles within the ICESCR from the perspective of the right to water are without doubt Articles 11 and 12, dedicated respectively to 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*» and to the «*right of everyone to the enjoyment of the highest attainable standard of physical and mental health*».

Indeed, starting from General Comment No. 15 of the UN Committee on Economic, Social and Cultural Rights (CESCR)[28], which for the first time recognised the human right to water, its legal basis and normative content, as well as State duties for its implementation, all

[28] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003. The General Comment will be analysed both as a turning point in the evolution of the right to water in the international context and, in the second chapter, as most relevant source for the definition of the normative content of the right.

recognitions within international law referred to this Articles as main legal basis.

Moreover, a referral to these Articles, in connection with the human right to water, may also be found in previous General Comments of the CESCR, in particular in Comments No. 4, 6 and 14, dedicated respectively to the right to adequate housing[29], to economic, social and cultural rights of older persons[30] to the right to the highest attainable standard of health[31] (Brunner *et alii* 2015, 419; Engbruch 2011, 188 ff.; Laskowski 2010, 164; Kiefer & Brölmann 2005, 196; Krennerich 2005, 203 ff.; Odello & Seatzu 2013, 231 ff.):

1. As regards the right to adequate housing, § 11, b) of General Comment No. 4 states that every household should provide health, security, comfort and nutrition, including access to drinking water;

2. In General Comment No. 6, §§ 5 e 32 recognise the right of older persons to have access to adequate food, water, shelter, clothing and health care, in order to realise their life to an adequate life standard;

3. Finally, § 11 of General Comment No. 14 includes access to water and sanitation as necessary elements of the right to the highest attainable standard of health, as recognised by Article 12 ICESCR.

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[29] CESCR, General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), 13 December 1991.

[30] CESCR, General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons, 8 December 1995.

[31] CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), 11 August 2000.

Deferring the analysis of the binding power of General Comments to the paragraph dedicated to General Comment No. 15, and examining in detail the two ICESCR Articles, a first observation to be made is that the right to an adequate life standard included in Article 11 should be considered as having the same content and value of Article 25 of the Universal Declaration.

Just as observed in Article 25 UDHR, the literature indeed agrees in considering the list of rights included within Article 11 (access to adequate food, clothing and housing, and continuous improvement of living conditions) as non-exhaustive, and allowing on the contrary an extensive interpretation, which includes access to drinking water. Also similarly to the Universal Declaration, the lack of an express inclusion of the right to water is considered justified both by the necessity of water in order to realise the listed human rights, and by the lack of consideration and/or knowledge regarding water issues[32].

Several comments on Article 11 ICESCR also recall, as for Article 25 UDHR, the necessary connection between the right to an adequate life standard and the realisation of human dignity. Using Eide's words (Eide 2001, 133), the right to an adequate life standard may indeed be considered concretised only as far as each individual is put in condition «*without shame and without unreasonable obstacles, to be a full participant in ordinary, everyday interaction with other people. This means, inter alia, that they shall be able to enjoy their basic needs under conditions of dignity. No one shall have to live under conditions whereby the only way to satisfy their needs is by degrading or depriving themselves of their basic freedoms*».

[32] See, among the others: Bates (2010, 289); Beail-Farkas (2013, 775-776); Eide (2001, 133); Engbruch (2011, 20-22), who also notices how the open formulation of Article 11 represents a strong point for the Covenant as a whole, allowing its extensive interpretation; Murthy (2013, 92); Obani & Gupta (2015).

This allows therefore to affirm that the human right to water, due to its fundamental role in satisfying basic human needs, has to be considered as an integral part of the content of Article 11 ICESCR.

Moving on to consider the content of the right to health as defined by Article 12 ICESCR, as already mentioned during the analysis of the Universal Declaration, this human right also represents a relevant normative basis for the recognition of the human right to water, considering the indissoluble bond between the adequate quantity and quality of water needed by every human being, and health conditions.

As it is expressed in Article 12 of the Covenant, the right to health does not just include the right to receive healthcare and/or to access medical services, but rather all measures and interventions necessary to realise the achievement of the «*highest attainable standard of physical and mental health*». And this has to include, as observed in the aforementioned General Comment No. 14[33], an adequate access to clean water in sufficient quantity and quality, as well as sanitation services.

Therefore, due to their content and formulation, both Articles certainly represent the main legal basis in the international context for the recognition of the human right to water.

2. The recognition of the human right to water in international treaties limited ratione personae or materiae

Having concluded the analysis of the International Bill of Rights, the next sources that need to be examined, in order to found a recognition

[33] CESCR *General Comment No. 14*, §§ 12 a), b), d) and 15. Moreover, §§ 34 and 36 include the State obligation to guarantee the health of water bodies, preventing their pollution.

of the human right to water within international law, are represented by several Conventions limited *ratione personae* or *materiae*. These are, in particular, the Conventions *on the Elimination of All Forms of Discrimination Against Women* (CEDAW)[34], *on the Rights of the Child* (CRC)[35] e *on the Rights of Persons with Disabilities* (CRPD)[36], as well as the *United Nations Declaration on the Rights of Indigenous People* (UNDRIP)[37], though it does not represent a binding source. Other sources come also from International Humanitarian Law, regarding the treatment of prisoners and civilians during war time.

The main difference between these sources, in comparison to the previously analysed ones, is that they address State duties rather than explicitly defining a human right and its content (McCaffrey 1992, 98; McCaffrey 2016, 226)[38], as well as their apparent inability to found an universal right to water, being limited *ratione personae* or *materiae*, and therefore being able to establish a legal basis just for the individuals to which the respective Treaties are dedicated (Thielbörger 2014, 58).

In fact, however, such limitation is indeed apparent, as it does not take

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[34] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979.

[35] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989.

[36] UN General Assembly, Convention on the Rights of Persons with Disabilities, 24 January 2007.

[37] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, Resolution A/RES/61/295.

[38] An exception is however represented by the UNDRIP, which Articles 25 and 26 expressly state the rights of indigenous communities to access and use the natural resources (including water) of their territories.

into account the actual relevance of these sources. This stems not only from the number of States adhering to the Conventions, but also and above all from the common principles underlying all of them, that is the fundamental principle of non-discrimination and the protection of marginalised and vulnerable groups or individuals[39]. The principle of non-discrimination indeed allows these sources to be a part of the legal basis for the universal recognition of the human right to water (Winkler 2012, 60, 221 ff.), as it requires to put a particular emphasis towards those individuals that, due to their vulnerability and physical, economic or social conditions, may face a discriminatory treatment in the enjoyment of human rights. Human rights belonging to every individual, but that necessitate *ad hoc* interventions for these particular categories of individuals, in order to remove the discrimination causes (*Ibidem*).

To put in other terms, the recognition of particular obligations or rights toward particular groups or individuals, such in these cases concerning the human right to water, does not exclude the existence of the same right on a broader scale. On the contrary, it affirms such existence, underlining the necessity of particular protection towards these groups or individuals due to their peculiar conditions of disadvantage.

A condition and a situation of disadvantage that, as should be remembered, is even more aggravated in the presence of environmental adversities, especially those caused by climate change, which, although involving the whole planet, have naturally more significant and harmful effects on developing countries and particularly on those sections of the population without the means to face them effectively, thus facing further obstacles that hinder the realisation of their rights, including the human right to water, which would allow them to live a dignified life.

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[39] A principle clearly emerging in all documents of the International Bill of Rights, in particular in the preamble and in Articles 1 and 2 of the Universal Declaration, and in Articles 2 and 3 of both Covenants.

2.1. International Humanitarian Law

As just mentioned, among the legal basis limited *ratione personae*, the first documents that have to be recalled are represented by several sources of International Humanitarian Law. These are the third and fourth Geneva Conventions of 1949, dedicated to the treatment of war prisoners and to the protection of civilians during war time[40], and the additional Protocols of 1977 on the protection of victims of international and non-international armed conflicts[41].

The importance of humanitarian law in the context of water resources and in the realisation of the right to water derives in particular from the danger of their control, contamination or deprivation from the enemy forces, or, in other words, the utilisation of water and water resources as an instrument of war (Hardberger 2006, 550).

For this reason, the Conventions and the Protocols not only do include the obligation, for the conflicting parties, to grant prisoners and civilians enough water for food and sanitation purposes, but also the express prohibition to attack, destroy or damage water infrastructures as war

[40] International Committee of the Red Cross, Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949.

[41] International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977

strategy[42].

In this respect, international humanitarian law shows a clear resemblance to the other conventions limited *ratione personae*, since it recognises the particular condition of these categories of subjects and the difficulties they face, in the scenario of an armed conflict, of seeing fully or even partially realised their human right to water. And it is for these reasons, together with its origins, shared with human rights law, that international humanitarian law therefore represents an important source for the recognition of the human right to water, allowing a broader interpretation of its original provisions, extending the protection they recognise to war prisoners, civilians and victims of armed conflicts to all human beings (Winkler 2012, 58 ff.). On this regard, Giacca (2014, 327-328) noticed how General Comment No. 15, already mentioned as the main source for defining the right to water, largely shapes its content on the examined sources of humanitarian law.

2.2. Convention on the Elimination of all Forms of Discrimination Against Women

After the Geneva Conventions and their Additional Protocols, the Convention on the Elimination of all Forms of Discrimination Against Women represents the following relevant basis for the recognition of the right to water.

The importance of protecting access to water towards women is justified not only by their condition of vulnerability, but also by the traditional role that they play, above all in rural areas or developing countries, in water

[42] III Geneva Convention, Articles 20, 26, 29 and 46; IV Geneva Convention, Articles 85, 89 and 127; Protocol I, Article 54; Protocol II, Articles 5 and 12. See, on this regard: Aguilar Cavallo (2012), Bourquain (2008, 124-125) and Urbinati (2015).

supply and management in the household[43], as well as the particularly high hydration necessities during pregnancy and lactation[44].

Analysing the Convention, Article 14 states, at letter h), that all Member States should grant to women in rural areas the enjoyment of «*adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications*».

The formulation of this provision shows therefore a further link between the access to water and the realisation of the right to an adequate standard of living (Bourquain 2008, 122 ff.), and as it has been already observed, it does not expressly lay down a right to access water, limiting itself to impose water and sanitation services as necessary measures to grant such human right.

Moreover, Authors like Ellis & Feris (2014, 616) have underlined how the distinction between water and sanitation represents a clear proof of their distinct nature as human rights, as described in the introduction.

Nevertheless, the same Authors, as well as Bourquain (2008, 122-123) deemed the provision excessively limited, as it only addresses States' obligations towards women in rural areas, rather than women as a whole.

Such observation may however be easily overcome in light of the above consideration regarding all conventions and treaties limited *ratione personae*. Indeed, the provision of particular means of protection toward certain categories, such women in rural areas, does not exclude that a

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[43] As underlined in the 3rd Principle of the so-called Dublin Principles (International Conference on Water and the Environment, *Dublin Statement on Water and Sustainable Development*, 31 January 1992), which will be analysed as part of the evolution of the right to water. On this regard see Murthy (2013, 93).

[44] In fact, during pregnancy the necessary daily water intake rises by approximately 30 millilitres, and reaches almost a litre during the first six months of lactation (Howard & Bartram 2002, 5-6).

peculiar level of protection does not exist towards other categories, but only underlines how that particular category of individuals faces discrimination or is disadvantaged, and deserves therefore more considerations. In fact, it cannot be denied that women in less developed areas suffer the most disadvantages coming from the lack of water, as well as adequate sanitation services, in particular due to the further problems that they cause (Feldman 2017, 28). It may be remembered, for instance, how many girls and young women in underdeveloped areas have to renounce to their right to receive an adequate education, both for the time they employ in gathering water far away from their household[45], and for the lack of separate bathrooms for men and women (Neves-Silva & Heller 2016, 1866).

Moreover, the original content of the Convention has been extended through several General Recommendations of the UN Committee on the Elimination of Discrimination Against Women. In fact, not only Article 14 has been interpreted as including other categories of women, such as migrant workers and older women[46], but also, in the recommendation regarding the right to health, access to clean water, as well as to the other goods and services included in Article 14 CEDAW, has been underlined as fundamental not only for women in rural areas, but for women as a whole[47].

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[45] Which also exposes them to risks for their safety.

[46] UN Committee on the Elimination of Discrimination Against Women, General recommendation No. 26 on women migrant workers, 2009, § 17, and General Recommendation No. 27 on older women and protection of their human rights, 2010, § 49. See, on this regard, Brunner (2015, 419 ff.).

[47] UN Committee on the Elimination of Discrimination Against Women, *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, 1999, § 7. See, on this regard, Aguilar Cavallo (2012, 140 ff.).

2.3. Convention on the Rights of the Child

Just like women, children too have to be considered as a particularly vulnerable category and deserving therefore particular consideration and protection in realising their right to water, due to their higher needs of hydration[48] and to the higher rate of water-borne diseases in children, especially in developing countries (Howard & Bartram 2012, 8, 12 ff.).

It is therefore not by chance that, precisely in order to realise the highest standard of health in children[49], the Convention on the Rights of the Child states, in § 2 of Article 24, that all Member States should undertake the necessary measures «*to combat disease and malnutrition*, […] *through the provision of adequate nutritious foods and clean drinking-water* […]».

Like the CEDAW, the CRC as well is referred by some Authors (Ellis & Feris 2014, 617) as a foundation for the distinction between the right to water and the right to sanitation: while State duties regarding access to water are included in letter c) of Article 24, access to sanitation[50] is indeed included in the following letter e). The same Authors also observe the usage of the term «*environmental sanitation*», which could be interpreted as having a broader meaning than basic sanitation, which include environmental protection considerations.

This distinction, as well as the necessity of granting the right to water for children as mean to realise their right to health, has been then underlined

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[48] A child loses daily around the 15% of its weight in liquids, while adults lose around the 4% (Howard & Bartram 2012, 5).

[49] In fact, how noticed by Ellis & Feris (2014, 617), Article 24 CRC recalls the content of Article 12 ICESCR.

[50] Or rather to information, education and support in basic knowledge on the advantages of correct sanitation for health.

again in the Vienna Declaration of 1993[51] and by the Committee on the Rights of the Child in General Comment No. 7, dedicated to children in early childhood[52].

Due to the considerations in the previous paragraphs, and taking into account the high number of States which are part of the Convention[53], it is therefore possible to state that it also has to be considered as legal basis for the recognition of the right to water, towards children and every human being, in particular considering it as a necessary prerequisite for properly ensuring their right to health (Winkler 2012, 62).

2.4. Convention on the Rights of Persons with Disabilities

The final Convention limited *ratione personae*, which needs to be mentioned in the analysis of the legal basis of the right to water, is represented by the Convention on the Rights of Persons with Disabilities.

Disabled persons are indeed a category of individuals deserving higher standards of protection in the enjoyment of their rights, including the right to water and related rights such the right to an adequate standard of living and to social security, and above all for the realisation of the non-discrimination principle. As noticed by Aguilar Cavallo (2012, 140 ff.), disabled persons do in fact often face various types of discrimination, in

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[51] UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, § 47

[52] UN Committee on the Rights of the Child, General comment No. 7 (2005): Implementing Child Rights in Early Childhood, 2006, § 27

[53] Currently there are indeed 196 States parties of the treaty, including every member of the United Nations (apart from the United States), plus the Cook Islands, Niue, the State of Palestine, and the Holy See.

particular for economic reasons, which mainly affect mentally disabled individuals (Hunt & Mesquita 2006, 332, 348).

Therefore, in order to protect disabled persons and realise such rights, § 2 of Article 28 CRPD poses on Member States the obligation di ensure «*equal access by persons with disabilities to clean water services*», thus allowing to include this Convention as part of the legal basis for the universal recognition of the human right to water.

2.5. United Nations Declaration on the Rights of Indigenous People

Before proceeding in the analysis of the international evolution of the right to water in the following paragraphs, a last document that is worth mentioning is represented by the UN Declaration on the Rights of Indigenous People, even though, since it was adopted through a resolution of the UN General Assembly, it differentiates itself from the previous Conventions due to its lack of binding power[54].

Nevertheless, indigenous people share with the previously analysed categories of individuals the need of particular means of protection. Due to their relationship with the natural resources present in their territories, they do indeed present the necessity of a stronger protection regarding their rights to enjoy such resources and to manage them according to their cultural heritage, as underlined by the Human Rights Committee as well[55]. Among these resources, water in particular is

[54] Some Authors (Ananya 2005; Getches 2005) consider however the principles included in the Declaration as reflection of customary law, even though, as observed by Winkler (2012, 190 ff.), they may not yet be deemed as undisputed provisions.

[55] UN Human Rights Committee (HRC), CCPR General Comment No. 23: Article 27 (Rights of Minorities), 8 April 1994, § 3.2.

considered as foundation for the survival of these populations and of their form of life, depending on water for agriculture, fishing and hunting as means of subsistence (Gupta 2014, 27 ff.; Winkler 2012, 190 ff.).

A stronger protection is particularly justified by the historic condition of vulnerability of indigenous populations, caused above all by the exploitation of their resources by private entrepreneurs (often foreign or multinational companies), resulting in a limited access to water resources or in their damaging (Brunner *et alii* 2015, 421, 424).

In order to protect their rights, Article 26 UNDRIP states that indigenous populations have the right to their ancestral lands, to own them and to utilise the local resources according to traditional customs, while Article 29 grants the protection of the environment and of the productive capacity of these lands and resources[56].

Even though the lack of binding power of the Declaration does not allow to consider it *per se* as a valid legal basis for the right to water, it represents without doubt a clear sign of support from the international community towards the recognition of the rights of indigenous population (and all human beings) to access their natural resources including, of course, water.

3. The evolution of the human right to water in the international context

After having analysed the legal sources representing the legal basis of the human right to water, the following paragraphs will be dedicated to its evolution and recognition in international law in several

[56] Similar principles are included in Article 15 of the *Indigenous and Tribal Peoples Convention*, adopted by the International Labour Organization (ILO) in 1989 (Brunner *et alii* 2015, 420).

documents, which have contributed to it and defined its normative content, which will be thoroughly examined in the next chapter.

The common trait of the majority of the sources that will be examined is their complete lack of binding power, and therefore their inability, *per se*, to represent a definitive and binding recognition of the right to water within international law.

These documents can be therefore considered as *soft law*, representing in most cases a political declaration of intents. This, however, cannot and must not lead to their underestimation, as these sources anyway constitute platforms in which States and other international actors declared their intention and will to contribute, on the one hand, to the protection of water (and other natural resources as well) and, on the other, to realise the human right to water, increasing the awareness regarding both matters (Gleick 1998, 493; Karbach 2016, 227-228; Lugaresi 2011a, 21; Testella 2011, 2-3; Thielbörger 2014, 59). All these documents are therefore to be considered as elements of fundamental importance in the evolution of the right to water.

3.1. The protection of water as a natural resource: the human right to water in international water and environmental law

Having concluded these premises, the first relevant documents belong to the field of international water and environmental law, rather than to human rights law. As such, they are mostly relevant for the purposes of protecting water as a resource, rather than the right to access it. These two element are however inextricably linked, as a full realisation of the right to water would be absolutely unthinkable (or rather impossible) in the absence of an adequate protection of water resources, which would inevitably affect accessibility both in its qualitative and quantitative aspects, other than having a significant impact in its sustainability (Murolo 2007, 4; Testella 2011, 2-3).

3.1.1. International water law: the UN Watercourses Convention and the Protocol on Water and Health

Considering the most relevant sources of water law, which several Authors deem as further foundation of the right to water (Aguilar Cavallo 2012, 144-145; Arcari 2000, 1058, 1061 ff.; Bulto 2011, 312-313; Gleick 1998, 495), these are without doubt the Convention on the Law of Non-Navigational Uses of International Watercourses (UN Watercourses Convention)[57] and the Protocol on Water and Health (also known as London Protocol)[58] to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (UNECE Water Convention)[59].

As regards the UN Watercourses Convention, already its first Article expresses its scope of «*protection, preservation and management related to the uses of* [international] *watercourses and their waters*», thus characterising it as the first treaty of this kind, as previous water law treaties were limited to watercourses within certain countries and/or to particular watercourses, due to their relevance for two or more countries (Arcari 2000, 1058).

The Convention includes several principles of great relevance, in particular regarding the equitable and reasonable usage of international

[57] UN General Assembly, Convention on the Law of Non-Navigational Uses of International Watercourses, 21 May 1997.

[58] United Nations Economic Commission for Europe (UNECE), *Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, 17 June 1999.

[59] United Nations Economic Commission for Europe (UNECE), Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 17 March 1992.

watercourses, according to the sustainability principle (Articles 5 and 6), and as a whole concerning the protection of the environment and of water resources through prevention (Part IV)[60].

Another relevant element, in particular in order to identify arguments relevant for the recognition of the right to water, is represented by the referral, in § 2 of Article 10, to the «*vital human needs*»[61], which shall always be given paramount importance, should conflicts arise regarding utilisation rights over cross-border watercourses (Aguilar Cavallo 2012, 144-145; Gleick 1998, 495).

The Protocol on Water and Health is also considered of great relevance, due to its inclusion of several elements belonging to the protection of the right to water, which easily allow to draw parallels with the sources of human rights law that contributed to its recognition, above all with General Comment No. 15 (Tanzi & Iapichino 2012, 163 ff.). Such parallels may indeed be seen in § 2, letter a) of Article 4, stating that Member States shall guarantee the supply of water in sufficient quantity and quality and, to this purpose, that water resources aimed for human consumption should receive particular protection. Another parallel is then found in Articles 5 and 6, posing the obligation to create the conditions for universal access to water, including transparency, information and participation of local communities, as well as particular consideration

[60] See, on this regard, Arcari (2000, 1061 ff., 1068 ff.), who also notices (1073 ff.) how the principles of sustainability and prevention are actually little more than outlined, even though it may be justified with the intent of the promoters to realise a treaty having a universal scope, which led them to introduce in it only the already accepted principles of environmental law.

[61] On this regard Bulto (2011, 312-313) argues that the vital needs are nothing other than the minimum core of the right to water.

toward individuals who are more vulnerable to water-related diseases (Tanzi & Iapichino 2012, 163 ff.).

Some Authors (Scovazzi 2011, 172 ff.) do however criticise the Protocol for its excessively imprecise provisions, not sufficient in order to identify a true and proper human right, as well as for the obligations of Member States, pointed out more as exhortations (by using the term «*shall*») rather than actual duties.

Nevertheless, as pointed out in the previous paragraphs, imprecise provisions should not be considered as an insurmountable obstacle, as open formulations, like the ones used in defining the right to an adequate life standard, do actually allow to recognise a broader protection than intended in the original provision. Furthermore, pointing out the States' duties with the term "shall", as well as the non-stringent provisions, may have been a valid instrument for the Protocol's promoters, who perhaps would not have been successful if they had proposed the inclusion of well-defined and binding obligations towards the realisation of the human right to water, including them within such sources of international water law.

Therefore, even though not belonging to human rights law, both documents include several elements that actually contribute to the protection of the right to water, in particular under the aspect of the preservation of water resources and the prioritisation of human consumption over other utilisations.

3.1.2. International environmental law: the protection of water resources from the Stockholm Declaration to the Sustainable Development Goals

As mentioned in the previous paragraphs, the human right to water could not be truly and fully realised without considering environmental and sustainability measures, aimed in particular to protect water resources. It is therefore of utmost importance to examine such considerations and measures within international environmental law,

which from the very beginning to the most recent documents always dedicated particular care in protecting water as a fundamental and vital element, both for all ecosystems and for human consumption.

3.1.2.1. The Stockholm Declaration

The importance of preserving water resources emerged in fact already with the Stockholm Declaration, adopted at the end of the UN Conference on the Human Environment in 1972, which started the international process of protection of the environment and natural resources, also introducing its most relevant principles, that is the principles of prevention, precaution and shared responsibility between and within generations.

These principles do indeed represent the basis of environmental protection and sustainable development, as underlined in the documents and declarations that followed the Stockholm Declaration and preceded the next UN Environmental Conference, held in Rio in 1992[62]. These are, in particular:

- the World Charter for Nature of 1982[63], which also affirmed the principle of reutilisation and reduction of waste of water resources (Article 10, c);

- the Declaration on the Right to Development of 1986[64], which Article 8 states the principle of «*equality of opportunity for all in their access to basic resources*», including water (Gleick 1998, 494);

[62] United Nations Conference on Environment and Development (UNCED), Rio de Janeiro, 3-14 June 1992.

[63] UN General Assembly, *World Charter for Nature*, 28 October 1982, Resolution A/RES/37/7.

– finally, the Report *Our Common Future* (or Brundtland Report) of 1987[65], which based the balance between economic development, environmental protection and the rights of future generations on the equitable allocation of environmental costs and economic advantages among all countries; principles that are also essential in order to realise water sustainability (Testella 2011, 5).

Going back to the Stockholm Declaration, water is expressly mentioned in two occasions, firstly observing, in its third Proclaim, how water pollution, as other forms of pollution, does represent a clear evidence of how human activities have led not only to progress and to an improvement of life quality, but also to severe damages both for the environment and for human life itself[66]. A further and more relevant mention of water is also included in the second Principle of the Declaration, which imposes the protection of natural resources, including water, «*for the benefit of present and future generations through careful planning or management, as appropriate*», thus applying to water resources the above mentioned principles of sustainability and shared responsibility between and within generations (Bulto 2011, 308; Lugaresi 2011a, 23; Zuchold 2009, 9 ff.).

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[64] UN General Assembly, *Declaration on the Right to Development*, 4 December 1986, Resolution A/RES/41/128.

[65] World Commission on Environment and Development, *Our Common Future*, Oxford; New York 1987.

[66] The third Proclaim also points out the damages underlined by «major and undesirable disturbances to the ecological balance of the biosphere; destruction and depletion of irreplaceable resources; and gross deficiencies, harmful to the physical, mental and social health of man, in the man-made environment, particularly in the living and working environment».

Finally, the importance of the Stockholm Declaration emerges from a further aspect, concerning its binding power. Even though, as already mentioned, international declarations regarding environmental law do not represent binding law sources, due to the relevance of the Stockholm Declaration and its follow-up in the field of environmental protection, some Authors (Altea 1997, 429-443; Bulto 2011, 310; Handl 1992, 3) believe indeed that it has now reached the status of customary law, thus binding the whole international community to cooperate in order to preserve water and all other natural resources.

3.1.2.2. The Rio Declaration and Agenda 21

The second world conference dedicated to the environment was the UN Conference on Environment and Development (UNCED or Rio Conference), held in Rio in 1992. Like in the Stockholm Declaration, the preservation of water resources plays a fundamental role in the plan of action adopted to realise the objectives established by the Conference, the so-called Agenda 21, while the Conference's Final Declaration limits itself to reaffirm the principles already established in Stockholm (Gleick 1998, 495)[67]. It is nonetheless worth observing how Principles from 20 to 24 of the Declaration are dedicated to peculiar forms of protection towards women, young people, indigenous populations and people under oppression, domination and occupation, and do also mention the duty of States to preserve the environment even during armed conflicts. These principles do in fact recall the observations made in the previous

[67] The Declaration recalls in particular the principles of sustainable exploitation of natural resources and equitable allocation of environmental and economic costs within the international community, as well as the obligation of all States to cooperate to realise environmental protection and sustainability (Principles 2, 3 and 4, and 5, 6 and 7).

paragraphs regarding the necessity to offer stronger means of protection for the most vulnerable and disadvantaged parts of the population.

As regards Agenda 21, it dedicates to water and its protection the entire Chapter 18, underlining not only the importance of water for every aspect of human life, but also its constituent role in every ecosystem, and the consequent necessity to balance human necessities with proper plans and programs aimed to realise a sustainable exploitation of water resources.

In order to reach this goal, Chapter 18 foresees seven program areas, among which particularly stands out the point d), dedicated to «*Drinking-water supply and sanitation*»[68]. Even though it does not recognise a human right to water, point d) underlines the relevance of water access for human health, also recalling the principles established in the previous Conferences of Mar del Plata[69] and New Delhi[70], which will be analysed in the following paragraphs. Furthermore, point d) underlines State duties regarding the improvement of water infrastructures, in granting enough information and participation (above all towards women, young people

[68] The other program areas are: a) Integrated water resources development and management; b) Water resources assessment; c) Protection of water resources, water quality and aquatic ecosystems; e) Water and sustainable urban development; f) Water for sustainable food production and rural development; g) Impacts of climate change on water resources.

[69] *United Nations Water Conference*, Mar del Plata 14–25 March 1977.

[70] Global Consultation on Safe Water and Sanitation for the 1990s, New Delhi 10-14 September 1990.

and local communities), supplementing local and national planning and cooperating with the international community[71].

3.1.2.3. The landing to a human rights approach: the Sustainable Development Goals

During the nineties, a greater consensus and attention toward water issues arose in the international context, including their protection and water access in the Environmental Conferences after 1992.

The principles expressed in the Stockholm Declaration and in Agenda 21 were indeed reaffirmed in the Programme of Action following the UN International Conference on Population and Development of 1994[72], which Principle 2 recognise to all human beings, as «*centre of concerns for sustainable development*» and «*most important and valuable resource of any nation*», the right to an adequate life standard, including access to water and sanitation. In a similar way, the Habitat Agenda, following the UN Conference on Human Settlements of 1996[73], states at § 10 that, in order to «*sustain our global environment and improve the quality of living in our human settlements*», the international community is committed to grant the provision of sufficient safe water.

Such consensus, however, did not held in the following decade. In fact, as noticed by Winkler (2012, 82), within the Johannesburg Declaration on

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[71] For a deeper analysis of Agenda 21 see: Bourquain (2008, 13); Bruno (2012, 209 ff.); Karbach (2016, 218 ff.); Laskowski (2010, 71-74); Lugaresi (2011a, 26 ff.); Winkler (2012, 82 ff.).

[72] United Nations International Conference on Population and Development (ICPD), Cairo, 5-13 September 1994.

[73] United Nations Conference on Human Settlements (Habitat II), Istanbul 3-14 June 1996.

Sustainable Development of 2002[74] water is mentioned generically as an endangered resource, needing protection in order to realise a sustainable development, while the Plan of Implementation of the World Summit limits itself to confirm the Millennium Development Goals (MDGs)[75] of 2000. The same could be said for "*The Future we Want*", the final document of the Conference on Sustainable Development of 2012 (also known as Rio+20)[76], which just reaffirms the relevance of water in every ecosystem and the necessity to improve international commitment to reduce pollution and improve water quality (Karbach 2016, 224).

The MDGs are indeed the source that mostly expresses the intent of solving the issues related to water (and sanitation), in particular by including, in its seventh Goal, "*Ensure Environmental Sustainability*", the target to halve by 2015 the proportion of the population without sustainable access to safe drinking water and basic sanitation[77]. However, as noticed by several scholars (Gawel & Bretschneider 2016, 23-24; Neves-Silva & Heller 2016, 1867; Saul, Kinley & Mowbray 2014), as well

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[74] Which follows the *World Summit on Sustainable Development*, Johannesburg 26 August - 4 September 2002.

[75] Adopted at the end of the *United Nations Millennium Summit*, New York 6-8 September 2000.

[76] United Nations Conference on Sustainable Development, Rio de Janeiro 13-22 June 2012.

[77] Target reached before time in 2010 (UNICEF/WHO, *Millennium Development Goal drinking water target met - Sanitation target still lagging far behind*, Joint news release 6 March 2012), as regards access to water, and yet not realised for sanitation, since almost the 68% of the world population (around 5 billion people) still lack access to basic sanitation, and 2.3 billion are lacking even that (UNICEF/WHO, *Progress on drinking water, sanitation and hygiene: 2017 update and SDG baselines*, 12 June 2017).

as by the former Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque[78], deemed the MDGs insufficient and lacking from many points of view. This not only considering the missing inclusion of sustainability matters, but also and above all the lack of a human rights-based approach, which would have contributed significantly both for the realisation of MDG 7 and the implementation of the right to water.

A human rights-based approach would have had indeed the function of highlighting the link existing between climate change and the protection of human rights, recognising that climate change is the greatest threat to the enjoyment of human rights in the twenty-first century (Corcione 2019, 199- 200), as recently recognised also by the Human Rights Committee in its General Comment No. 36[79]. Moreover, such an approach allows to fully understand the reasons for social injustice, understanding that this is closely linked to the ecological one, and that therefore it is necessary to understand human rights as priority for the full realisation of a sustainable development (Fisher 2014, 3- 4; Lewis 2014, 249 ff.).

Moreover, as has been observed by Gawel and Bretschneider (2016, 39 ff.), the MDGs posed the issue of implementing access to water and sanitation on binary terms, that is as an issue that could or could not be solved, thus furtherly limiting the possibilities of realising the goal of realising both human rights.

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[78] UN Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque, *Report: Integrating non-discrimination and equality into the post-2015 development agenda for water, sanitation and hygiene*, 8 August 2012.

[79] UN Human Rights Committee (HRC), *General comment no. 36, Article 6 (Right to Life)*, 3 September 2019.

For these reasons, aiming to realise a proper and better follow-up to the MDGs after 2015, the approach based on human rights realisation and sustainability played a fundamental role in defining the Sustainable Development Goals for 2030 (SDGs, or UN Agenda 2030)[80], in particular regarding Goal No. 6: «*Ensure availability and sustainable management of water and sanitation for all*», which full implementation, as noticed by several Authors (Batty 2015; Laskowski 2017, 65; Neves-Silva & Heller 2016, 1867), plays a fundamental role for the realisation of all other SDGs[81].

Goal No. 6 is then concretised in eight areas of intervention, including: access to water and sanitation without discrimination, in particular towards women and vulnerable individuals (6.1 and 6.2), improvement of water resources' quality and management (6.3 and 6.4), preservation of water-related ecosystems (6.6) and realisation of both international cooperation (6.5 and 6.a) and local participation (6.b).

By reaching such human rights- and sustainability-based approach, the UN Agenda 2030 thus represents a milestone for the protection of water resources, both for the protection of the environment and natural resources and for the sustainable realisation of the human right

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[80] Adopted with resolution A/RES/70/1 of the UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015.

[81] Gawel and Bretschneider (2016a, 13 ff., 26 ff.; 2016b, 191) notice however how Goal No. 6 still shows some gaps and poorly defined elements, in particular in defining the implications of universal access to water and sanitation. These critiques may nevertheless be overcome, observing how the normative content of both rights has already been clearly defined by General Comment No. 15 in 2003, as it will be seen in the coming paragraphs and in the next chapter, thus reducing the severity of these gaps.

to water, underlining the necessity of a holistic and integrated approach in order to realise both goals.

3.2. The international water conferences

After the analysis of the most relevant documents within international water and environmental law, a further step in the evolution of the protection of water resources, in particular in order to grant access to clean water, is represented by the three UN Water Conferences. These are the already mentioned Conferences of Mar del Plata and New Delhi, and the International Conference on Water and the Environment of 1992, better known as the Dublin Conference[82].

3.2.1. The Mar del Plata United Nations Water Conference

As regards the first Water Conference, held in Mar del Plata, Argentina, in 1977, this was focused on the consequences on human health of insufficient water and sanitation access, and on the necessity to prioritise the efforts of all countries towards vulnerable parts of the population and in water-scarce areas. The Conference plays therefore a key role for the evolution of the human right to water, representing the first basis for its express recognition in its second resolution, which states, in recital a), that «*All peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs*»[83].

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[82] International Conference on Water and the Environment, Dublin 26-31 January 1992.

[83] Even though Winkler (2012, 81, 82) notices how this recognition cannot be considered as a proper recognition of the human right to water, since by using the plural "peoples" rather than "people" it seems to be referred to an individual right. It must be however observed how the following recital states that water is

Furthermore, the relevance of the Plan of Action emerges from the fact that it includes all issues related to water resources, which were then recognised by the following documents and conventions related to the environment and to water resources, as well as the principles to address them, which remain valid to this day. These include, for instance, the necessity of reliable data on the quantity and quality of the available resources (recommendation A, resolution I) and the necessity of international and multi-level cooperation (recommendations G and H, resolution VI) (Lugaresi 2011a, 34 ff.). Moreover, the Plan of Action already emphasised the necessity, most recently underlined by the SDGs, of an holistic approach, considering the central role of water for the environment as a whole and the consequent need to preserve water resources, encouraging their rational consumption, both seen as prerequisites for the realisation of the human right to water (Gawel & Bretschneider 2016b, 194; Testella 2011, 6-8) and the rights that are related to it[84].

The Plan of Action finally established (recommendation B, § 15) the decade 1980-1990 as *International Decade for Clean Drinking Water*, aimed at realising the goals determined by the second aforementioned resolution, i.e. access to water and sanitation for all peoples. Such an ambitious goal, however, could have not be reached, in particular due to the underestimation of the resources needed for reaching it (Lugaresi 2011a, 34 ff.), which has been also criticised for focusing only on quantitative and qualitative matters, ignoring the fundamental elements of

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essential for life and for the development of every human being, «*both as an individual and as an integral part of society*».

[84] Kothari (2009, 49 ff.) argues indeed that the Plan of Action underlines the central role of water resources and of their accessibility as preconditions for realising the rights to food, health and development.

environmental and economic sustainability in water and sanitation supply (Gawel & Bretschneider 2016a, 36 ff.).

Nevertheless, as noticed by Laskowski (2010, 65), during the first water decade it was still possible to witness an increase in water access by 1,6 billion people, and by 750 million regarding sanitation. Apart from these results, the greatest achievement of the Mar del Plata Conference and its Plan of Action has been their capacity to start a serious dialogue and confrontation regarding water issues within the international community, thus stimulating the future developments in the international context.

3.2.2. The New Delhi Global Consultation on Safe Water and Sanitation

The Global Consultation on Safe Water and Sanitation, held in New Delhi in 1990, resumed the principles and concepts developed in Mar del Plata, reiterating in particular the necessity of a shared effort by the international community, which also involved local communities (Bruno 2012, 208 ff.).

The perceived failure of the first Water Decade brought however to a downsizing of the goals established during the Consultation. The introduction of its final Statement indeed expressly observed how the ambitious goals of the previous Action Plan were not realisable, at least in absence of an improved efficiency in the management of water resources, combined with increased investments and international cooperation. Therefore, without establishing a second Water Decade[85], the New Delhi Statement points out these preconditions as necessary in order to realise a universal access to water and sanitation within year 2000.

[85] Which was then launched in 2003 with resolution A/RES/58/217 of the UN General Assembly, *International Decade for Action, "Water for Life", 2005-2015*, aimed to give further support for the realisation of the seventh MDG.

The Statement also furtherly specifies these requirements by identifying four basic principles, regarding:

1. Protection of the environment and the safeguarding of health through the integrated management of water resources and liquid and solid wastes;

2. Institutional reforms promoting an integrated approach, including changes in procedures, attitudes and behaviour, and the full participation of women at all levels in sector institutions;

3. Community management of services, backed by measures to strengthen local institutions in implementing and sustaining water and sanitation programmes;

4. Sound financial practices, achieved through better management of existing assets, and widespread use of appropriate technologies[86].

The New Delhi Global Consultation had therefore a minor impact in comparison with the previous Water Conference, though keeping its main aspects and pursuing its main goals. It has however to be observed how the Consultation introduced a relevant novelty, represented by economic considerations that underlined the necessity to reduce water waste and to improve water management, also from a financial point of view (Lugaresi 2011a, 36-38). These principles, as aforementioned, are indeed fundamental in order to realise an economic and environmental sustainability, and were furtherly underlined by the following Water Conference.

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[86] The fourth principle of the New Delhi Declaration seems therefore to anticipate, as will be seen briefly, the fourth principle of the subsequent Dublin Declarations, emphasising the need, in the protection of water resources and by reflection in the realisation of the human right to water, of particular attention to the involved economic profiles.

3.2.3. The Dublin International Conference on Water and the Environment

The Dublin Conference, held in 1992 as a preparatory meeting for the incoming Rio Conference, represents the last international conference expressly dedicated to water issues[87]. The most relevant outcome of this Conference is surely represented by the four principles included in the conclusive Statement, which are deemed as the most significant political declarations regarding the management of water resources (Winkler 2012, 82). These are:

1. Fresh water is a finite and vulnerable resource, essential to sustain life, development and the environment;

2. Water development and management should be based on a participatory approach, involving users, planners and policy-makers at all levels;

3. Women play a central part in the provision, management and safeguarding of water;

4. Water has an economic value in all its competing uses and should be recognised as an economic good.

As mentioned in the analysis of the New Delhi Consultation, the Dublin Statement is essentially based on considerations related to economic and environmental sustainability of water resources

[87] Excluding the *International Conference on Freshwater*, held in Bonn in 2001 as preparatory conference for the incoming *World Summit on Sustainable Development* of 2002. The Bonn Conference does however not present any relevant elements, as the Recommendations for Action adopted at the end of the Conference lack any reference to water access as a human right, nor innovation of any kind were introduced (Winkler 2012, 83-84).

management, necessary for its efficiency and for reducing waste.

In particular, as regards economic sustainability, the recognition of an economic value in the fourth principle must not be seen as a denial of the right to water, in favour of a mere economic evaluation of water accessibility, or as an opening to a privatised and profit-oriented management of water resources, as it has often been interpreted (Murthy 2013, 93). Indeed, the fourth Principle also affirms that «*it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price*»[88].

Therefore, even if the acknowledgment of the economic value of the water resource is affirmed before the acknowledgment of the human right to water, this must not be misunderstood as supporting pure market and profit logics related to water services, given that on the contrary the fourth principle recognises in essence that access to water, as a fundamental human right, must necessarily be realised at reasonable prices, and it is in this sense that the affirmation of the economic value of water and the economic qualification of water as an economic good must

[88] It may also be noticed how privatisation and liberalisation processes of public services (including water ones) were taking hold throughout the world in the same period, which could easily lead to (erroneously) believe that the fourth Dublin Principle supported these phenomena. A support to privatisation and liberalisation could instead by found in the several World Water Fora, starting from the first one, held in Marrakesh in 1997. The Fora, organised every three year by the International NGO *World Water Council*, even though aiming to increase consensus and dialogue on water issues, have indeed often a more than open support for private management, seen as best (if not unique) solution, in particular in developing countries. This led, starting from 2003, to the organisation of parallel *Alternative World Water Fora*, pursuing the opposite goal to realise a public and shared management of water resources. On this regard, see Lugaresi (2011a, 42 ff.), Testella (2011, 8 ff.) and Winkler (2012, 83 ff.).

be understood (Winkler 2012, 82 ff.). In other words, it wants to represent a balance between the realisation of the human right to water and the protection of water as a natural resource, which must necessarily be considered as "finite and vulnerable resource", which must be managed with particular attention, in reason in particular the consideration of the costs, economic but also and above all environmental, which must be addressed to ensure that water is actually usable for the population (Castellucci 2015, 5).

It must be therefore recognised that the Dublin Statement had the great merit of having introduced, in advance of the subsequent international documents, the issues relating to the balance between the protection of the water resource and the realisation of a right of universal access it, promoting and supporting management strategies that respect the principles of environmental sustainability and social equity, before those of economic efficiency (Gawel & Bretschneider 2016a, 36 ff.; Laskowski 2010, 68; Lugaresi 2011a, 49-41; Murthy 2013, 93).

3.3 The turning point: CESCR General Comment No. 15

3.3.1. The Committee on Economic, Social and Cultural Rights and the role of General Comments

Unlike the UN Human Rights Committee (HRC), directly introduced within the ICCPR in its Article 28 as a tool for supervising the respect and the correct implementation of the Covenant, the Committee on Economic, Social and Cultural Rights was introduced only in 1985, through a resolution of the UN Economic and Social Council (ECOSOC)[89]. As the HRC, the CESCR has the role of monitoring Member

[89] ECOSOC Resolution 1985/71, Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental

States and their actions, in order to verify the proper realisation of all ICESCR provision and, in order to realise its tasks, it may publish General Comments, which give a better definition of the rights of the Covenant and their implementation. Even though not binding, General Comments do therefore represent the principal mean of interpretation and understanding of the ICESCR and of the human rights it guarantees (Arden 2016, 972; Bluemel 2004, 972, McCaffrey 2005, 102 ff.; Winkler 2012, 38 ff.)[90].

As aforementioned during the analysis of the ICESCR, the Committee had the chance to present several observations regarding the correct implementation of the human right to water, mentioning it in General Comments related to the rights to adequate housing, the economic, social and cultural rights of older persons and the right to the highest attainable standard of health, including the right to water as necessary precondition for the realisation of such rights.

3.3.2. The General Comment No. 15 and the definition of the human right to water

Following-up to its previous Comments, and strongly influenced by the UN Millennium Declaration (Thielbörger 2014, 64), with its General Comment No. 15 of 2003 the Committee dedicated itself

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Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 25 May 1985.

[90] Moreover, as argued by Di Marco (2018, 59), with the optional Protocol of 2008 (UN General Assembly, resolution A/RES/63/117) the Committee has gained an «*almost judiciary*» position, thus reaching an ever more important role in the evaluation of the correct implementation of the Covenant. In particular, the Protocol recognises its competence to receive and consider individual communications on Covenant's severe violations, and, if they are particularly serious and systematic, the Committee has the power to require the State to cease the violation and to set up temporary committees of enquiry.

expressly to the right to water, starting with its definition at §2 as the entitlement of everyone «*to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses*». As mentioned during the analysis of the legal basis of the human right to water, the Comment includes it as part of those rights that Article 11 ICESCR deems as necessary in order to realise an adequate standard of living, linking it as well as necessary precondition for the right to health, as expressed by Article 12 ICESCR (§3 of the Comment).

General Comment No. 15 represents therefore a fundamental turning point in the evolution of the human right to water, not only since it represents its first express recognition within human rights law (De Vido 2012a, 427), but above all due to the detailed definition of the human right and of its normative content, described in the second part of the Comment.

After establishing that all elements of the right to water should be «*adequate for human dignity, life and health*», accordingly to Articles 11 and 12 ICESCR (§ 11 of the Comment), the General Comment defines the normative content of the right by following the criteria, introduced in the previous General Comment No. 12[91], of availability, quality and accessibility, furtherly dividing the latter into physical and economic accessibility, non-discrimination and information accessibility.

Since the normative content of the human right to water and the enounced criteria will be analysed in the next chapter, it is possible to briefly affirm that General Comment No. 15 established that the human right to water consists in the access to sufficient water for personal and domestic utilisation, of sufficient quality to not represent a risk for health, to be realised without discrimination within or in the immediate proximity

[91] CESCR, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999, § 6 ff. On this regard see Engbruch (2011, 164).

to one's household or working place, at a fair price, and in a context of transparent information and participation (Brunner *et alii* 2015, 419 ff.; De Albuquerque & Roaf 2012, 33 ff.; Neves-Silva & Heller 2016, 1865 ff.; Obani & Gupta 2015, 35 ff.).

With such a definition of the human right to water, the Committee has therefore underlined the necessity to prioritise water utilisation for human consumption (Karbach 2016; Murthy 2013, 112 ff.; Winkler 2012, 148), considering water as a social and cultural good, rather than economic, even though not ignoring or excluding the necessary considerations of economic and environmental sustainability, introduced in the aforementioned conferences and declarations (Moosdorf 2007, 93).

A further element characterising General Comment No. 15, and making it extremely relevant in the evolution of the human right to water, is then the definition of the three States' obligations of respect, protect and fulfil[92], which will also be analysed in the next chapter, as well as nine core obligations. The latter are aimed to grant an equitable and safe access to the minimum quantities of water in order to prevent disease (above all water-related), in particular towards vulnerable or marginalised groups[93]. This implies to set up programmes granting water access to all the population, according to the principles of affordability, transparency and

[92] These three States' obligations were originally introduced by the former UN Special Rapporteur on the Right to Adequate Food as a Human Right, Asbjorn Eide, in its *Report on the right to adequate food as a human right*, July 7 1987.

[93] As established in its previous General Comment No. 3, core obligations do in fact imply the duty of each Member State to grant the enjoyment of at least the minimum levels of the rights included in the Covenant, regardless of the duty of progressive implementation established in Article 2 of the Covenant.

participation, and including a monitoring of the correct implementation of the right to water[94].

3.3.3. The critiques on the competences of the CESCR and on the content of General Comment No. 15

Even though its importance, there is however no lack of criticisms regarding several aspects of General Comment No. 15.

A first series of critiques is related to the incompetence of the CESCR in recognising a "new" human right, not expressly mentioned in

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[94] More in detail, the core obligations, listed in § 37 of General Comment No. 15, consist in the obligations «(a) To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease. (b) To ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups. (c) To ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household. (d) To ensure personal security is not threatened when having to physically access to water. (e)To ensure equitable distribution of all available water facilities and services. (f) To adopt and implement a national water strategy and plan of action addressing the whole population; the strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process; it should include methods, such as right to water indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalized groups. (g) To monitor the extent of the realisation, or the non-realisation, of the right to water. (h) To adopt relatively low-cost targeted water programmes to protect vulnerable and marginalised groups. (i) To take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation».

the original text of the Covenant, even considering the term "including" in Article 11, which cannot be interpreted in such way. Even if it were possible, the critiques also deem it redundant, as the express protection of the rights to health, food and health covers the essential elements of the right to water, which therefore does not need any further recognition and protection (Moosdorf, 92; Tully 2005, 35 ff.; Zuchold 2009). It must be however remembered how, even if the CESCR surely does not have the power to create new rights, it has the aforementioned role of interpreting the Covenant, granting its correct implementation. Therefore, by recognising the right to water, rather than creating it, the Committee defined a human right which was already implicitly included in Article 11 ICESCR, and already recognised in the Conventions and the international sources analysed in the previous paragraphs (Bulto 2011, 303; Thielbörger 2014, 64 ff.)[95].

Other Authors (Bulto 2011, 304; Cahill-Ripley 2005, 293 ff.; Karbach 2016, 170-17) criticise instead how the Comment did not explain correctly the relationships between the human right to water and other connected human rights, in particular the rights to life, human dignity, health and food[96], as it did not allow to understand the nature of the human right to water as an independent human right, or rather as a component of these human rights, as well as it did not define how it contributes to their full

[95] On this regard, Murthy (2013, 101-102) also notices how the General Comment, like the UN resolutions of 2010, the very utilisation of the term «*recognise*» does imply the pre-existence of the human right.

[96] In particular, as regards the right to food, Schreiber (2008, 443) considers the lack of analysis on the quantities of water connected to utilisations different from the ones connected to personal and domestic ones, such as in agriculture, which would have contributed to the realisation of the right to food. This particular aspect will be analysed in the next chapter, in the paragraph regarding the quantitative aspects of water accessibility.

realisation. However, the Comment clearly declares (in its §3) how the right to water is «*inextricably related*» and «*in conjunction*» with all these human rights, as necessary precondition for their full implementation. Moreover, the recognition of the independence of the human right to water in the comment has been affirmed by several Authors (Bluemel 2004, 972; Chuffart & Viñales 2014, 290; McCaffrey & Neville 2009, 21; Schreiber 2008, 438), even though the lack of more precise indications on the relationships with the other human rights. This could be however attributed to the will, expressed in § 6 of the Comment, to focus on the human right to water in itself and on the prioritisation of personal and domestic utilisation.

Having solved these critiques[97], it may be therefore be stated once more that General Comment No. 15 represents, still today, one of the most complete and important sources for the recognition and the understanding

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[97] It should be however recalled how some Authors (Karbach 2016, 170-171; Murthy 2013, 101, 102) also underline an insufficient care towards environmental protection and sustainability, even though the Comment clearly recognises (in its § 1) water as a limited natural resource, even before defining the right to water. Furthermore, the lack of more precise elements of environmental protection may also be connected to the express will to focus on the goal of increasing water accessibility for personal and domestic usage.
Cahill-Ripley (2005, 405; 2011, 179) also considers insufficient the referrals to sanitation, seen by the Author as essential part of the right to water. On this regard, please refer to the argumentations in the Introduction.

Finally, other critiques (Cahill-Ripley 2011; De Vido 2012b, 527; McCaffrey 2005, 109 ff.; Topçu 2009-2011, 27) regard the high number of core obligations expressed by the General Comment, and the lack of an express definition of the human rights' minimum core, which would not allow a priority among the different core obligations. This particular issue will be analysed in the next chapter.

of the human right to water, if not the most important one (Trigueros 2012, 20). It was indeed the document that allowed all further documents in the last decade, stimulating the following discussions, and making advance regulations and jurisprudence both in the international and in the national context (Bulto 2011, 302; Gawel & Bretschneider 2016a, 36 ff.; McCaffrey 2005, 114-115).

3.4 Further and final developments: the UN General Assembly and Human Rights Committee Resolutions

The relevance of General Comment No. 15 was furtherly confirmed by two resolutions, of the UN General Assembly[98] and the Human Rights Council[99], both adopted in 2010, which some Authors (Hall, Van Koppen & Van Houweling 2014, 851 ff.) considered the conclusion of the path started with the Mar del Plata Conference of 1977.

As regards the General Assembly resolution, it indeed recalls the previous evolution and the importance of properly accessing water and sanitation in order to realise the right to an adequate standard of living, and recognises it as human right fundamental for the full concretisation of all human rights, which therefore needs the highest efforts for its implementation from the whole international community (§§ 1-2 of the resolution).

It may be noted (Murthy 2013, 104; Neves-Silva & Heller 2016, 1865; Winkler 2012, 78), in particular, how the resolution, like General Comment No. 15, specifically utilises the term «*recognise*», thus expressing the belief of the pre-existence of the human right to water in the

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[98] UN General Assembly A/RES/64/292, *The human right to water and sanitation*, 3 August 2010.

[99] UN Human Rights Council A/HRC/RES/15/9, Human rights and access to safe drinking water and sanitation, 6 October 2010.

international context. A second point of relevance, which distinguishes it from the General Comment, introducing a further element to the right to water, is the clear recognition of its constitutive nature in relationship of all other human rights, which allows to affirm its independence as human right (De Vido 2012a, 528, and 2012b, 222).

The following HRC resolution, however, differentiates itself on this very profiles. It indeed does not express any recognition of the human right to water, limiting itself to a recall of the General Assembly resolution and, most importantly, states in its §3 that the human right is «*derived from the right to an adequate standard of living*», thus not considering it as an independent right. This point in particular is the cause of the hardest critiques on the resolution, deemed as a step backwards not only in relation to the one of the General Assembly, but also and foremost to General Comment No. 15 (Di Lieto 2013, 330; Winkler 2012, 81).

For this and other critical aspects, some Authors (Gawel & Bretschneider 2016a, 34 ff.; Howard 2011, 130-131; Murthy 2013, 115-116; Thielbörger 2014, 75 ff.)[100] deem both resolutions as a minimal progress in the evolution of the human right to water, thus allowing to consider the General Comment No. 15 as the most relevant source from this perspective, as mentioned above. A perspective that can be surely supported, due to its breadth and the importance of its definition of the normative content of the right to water.

Nevertheless, it cannot be denied that both UN resolutions still contributed to the evolution of the right to water and to its recognition, due to the follow-up they both received in some national contexts (Neves-Silva

[100] In particular Howard and Thielbörger criticise the lack of dialogue in the approval of the General Assembly resolution, which could have led to a higher consensus and on a more precise definition of its content. Murthy furtherly observes how both resolutions limit themselves by referring to «*safe drinking water*», thus excluding (at least apparently) every other water utilisation.

& Heller 2016, 1865 ff.), and above all thanks to the strong support that they received for their approval. It may indeed be noted how the General Assembly resolution did not receive any votes against it, while the Human Right Council approved its resolution without a voting, which clearly showed the support of the international community towards the recognition of the human right to water[101].

After the 2010 resolutions, both the General Assembly and the Human Rights Council adopted five more resolutions on the right to water, which received a similar consensus and were approved without requiring a vote[102].

These resolutions, however, did not represent relevant steps forward in the evolution of the human right to water and in its protection, limiting themselves to recall the content of the 2010 resolutions, or inviting the Member States to devote more attention to certain aspects, such as sustainability[103], accessibility to proper remedies and information[104], and

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[101] An element of great importance, in particular as regards the current status of the right to water and the issue of its binding nature, which will be discussed in the Conclusions. Nevertheless, as observed by Thielbörger (2014, 75 ff.), it has to be recalled how the majority of States supporting the General Assembly resolution were developing countries, while the States which abstained from voting were very influent ones such as the United States or the United Kingdom; furthermore, as regards the unanimous approval of the Human Rights Council resolution, it has to be remembered how it is composed by just 47 members, around one third of the total Member States in the United Nations.

[102] With the exception of the UN Human Rights Council Resolution A/HRC/RES/33/10, *The human rights to safe drinking water and sanitation*, 5 October 2016, approved with four abstentions.

[103] UN Human Rights Council Resolution A/HRC/RES/24/18, *The human right to safe drinking water and sanitation*, 8 October 2013, § 13, a-c.

the lack of discrimination, in particular if gender-based, in accessing and managing water resources[105].

The following evolutions, like the examined UN resolutions, even though providing a strong stimulus from a political point of view and increasing awareness and consensus on water issues (Sultana & Loftus 2015, 98 ff.), did therefore introduce very little innovations compared to General Comment No. 15, which is still the main source for the definition of the human right to water.

Such lack of innovation and improvement in the international context allows therefore to underline the necessity, for the future, of significantly more concrete and detailed interventions, in order to give the human right to water a proper and effective recognition and implementation, as well as, as has been pointed out on several occasions, to contribute to the achievement of the objectives imposed by the Sustainable Development Goals for 2030, for which it is not possible to ignore a full cohesion between the protection of human rights and natural resources, as particularly evident in the context of the human right to water and the protection of water resources.

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[104] UN Human Rights Council Resolution A/HRC/RES/27/7, *The human right to safe drinking water and sanitation*, 2 October 2014, §11, c-f. it may also be noticed how the resolution, though still referring to the human right to water as «*derived*» from the right to an adequate living standard, confirmed its constitutive nature, affirming in its §1 that it «*is essential for the full enjoyment of life and to all human rights*».

[105] Resolution A/HRC/RES/33/10, § 9. As already observed in the introduction, this last resolution had also the merit, like the General Assembly Resolution A/RES/67/291 of 2013, of distinguishing the human right to water from the right to sanitation.

CHAPTER II
THE NORMATIVE CONTENT OF THE HUMAN RIGHT TO WATER AND ITS IMPLEMENTATION

Introduction

Having concluded, in the previous chapter, the analysis of the most relevant sources for the legal basis and the evolution of the human right to water, this chapter will provide a review of its normative content.

As aforementioned, the first complete definition of the normative content of the right to water has been thoroughly defined by General Comment No. 15, which distinguished the three elements of availability, quality and accessibility, dividing the latter in physical and economical accessibility, non-discrimination and information accessibility. The following analysis will therefore adhere to such approach, with General Comment No. 15 as primary source for the definition of each element of the right to water.

It should be however recalled how some Authors (Gawel & Bretschneider 2016a, 13, 16 ff. and 2016b, 197 ff.; Howard & Bartram 2003, 24-25), due to the complexity and consequent relevance of the element of accessibility, deem such element as the most relevant, in order to understand the obstacles for the realisation of the right to water. These Authors argue indeed that, to reach this goal and solve such obstacles, the major focus should not regard the quantitative aspects of the right[106], but

[106] Howard & Bartram underline in fact how the gradual improvement of the conditions of accessibility determines an equal improvement in the available

instead the reason that do not allow or are limiting access possibilities[107].

It will be therefore given relevance to this approach, even though following the one of General Comment No. 15. The following paragraphs will be therefore dedicated, in this order, to the quantitative and qualitative requirements of water resources, to the principle of non-discrimination and the requirement of affordability, and finally to the relevance of information and participation for the full realisation of the human right to water.

After the analysis of the normative content of the human right to water, the concluding paragraph of this chapter will be dedicated to its implementation and to the corresponding duties of States and of the international community, as well as the issues related to the involvement of private actors in the management of water services.

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quantities of water. It is therefore necessary to improve the efficiency and equity of the distribution of water resources, prioritising those intended for human consumption rather than other utilisations (e.g. food production), how already stated in General Comment No. 15 in its § 6. On the particular issue of prioritisation of water utilisation for human consumption see also Murthy (2013, 115) and Winkler (2012, 31 ff., 35).

[107] Gawel & Bretschneider (Gawel & Bretschneider 2016a, 13, 16 ff.), in particular, utilise an approach based on the «*hurdles*» to access. According to such approach, the different elements of the normative content affirmed in General Comment No. 15 should be reinterpreted as hurdles, or obstacles, to be solved from a spatial/temporal perspective (i.e. physical accessibility), a qualitative one and a pecuniary one (i.e. affordability), to which the principle of non-discrimination in access should be added. As an example, the Authors describe a subject who needs to leave his home (spatial and temporal hurdle) in order to access water in sufficient quantity and quality (qualitative hurdle), and decides therefore to pay for a connection to the water service (pecuniary hurdle).

1. Availabilty and Quality: the necessary connection to environmental protection

After the premises related to the contents of this chapter, it may be proceeded with the analysis of the quantitative and qualitative elements of the right to water, and their inextricable bond with the protection of water resources.

The human right to water is indeed the human right that shows one of the strongest mutual relationships with the protection of the environment and natural resources, and with the sustainability principle (Van Rijswick 2015)[108], a relationship particularly evident, among the normative elements of the right, in its quantitative and qualitative requirements. If without a proper environmental protection, the availability of enough water of sufficient quality would be clearly unthinkable, it is in fact also true that the realisation of the right to water may not consist in the unlimited access to water for any utilisation, which would lead to an overexploitation and damage of water resources (Gleick 1998, 494 ff.; Larson 2013, 2220 ff., 2230 ff.)[109].

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[108] Even though, as noticed by Winkler (2012, 196), this may be observed in other rights, above all with the right to live in a healthy environment, which is also connected to the right to water. On this regard, see also: Bourquain (2008, 67 ff.); Karbach (2016, 58); Testella (2011, 2-3); Trigueros (2012, 600, 605), who also observes the risks of environmental damage in case of an unsustainable implementation of the right to water.

[109] Larson in particular underlines the economic and managing issues of an unlimited access to water, which would certainly lead to an inefficient and of poor quality, representing a burden for the whole economic system.

Furthermore, the link between the protection of natural (water) resources and the quantitative and qualitative elements of the right to water emerges also from the necessity of prioritising human consumption over other concurrent utilisation of water resources, mainly agricultural and industrial ones, which do indeed represent the main exploiters of water resources. In fact, whereas personal and domestic utilisations cover around the 10% of the total, agriculture and industry exploit respectively the 70 and 20% (Laskowski 2010, 18-20; Winkler 2012, 27 ff.).

Moreover, apart from exploiting most of water resources, both the agricultural and the industrial sector may pose a serious threat for the health of water ecosystems. For instance, in case water used for industrial cooling is directly returned to the water stream without decreasing its temperature and/or without filtering it from chemicals and other harmful substances (Winkler 2012, 27 ff.), or in the agricultural sector, if harmful fertilisers or pesticides are used, these may pour into nearby watercourses and –basins or leak into underground bodies of water, polluting them (Laskowski 2012, 689-692; Schoumans *et alii* 2014, 1256).

It is therefore of utmost importance to identify the water quantities and utilisations that could be covered by the right to water.

1.1. Quantitative limits and the water uses covered by the right to water

As regards the water uses covered by the right to water, General Comment No. 15 affirms, in §12, letter a), that the individual water supply should be «*sufficient and continuous for personal and domestic uses*», which cover not only drinking water, but also water needed for personal hygiene, for cleaning clothes and the household, and for preparing food, as well as sanitation uses.

Therefore, since the availability is limited to the quantities of water needed for personal and domestic uses, it may be excluded the possibility, suggested by some Authors (Hall, Van Koppen & Van Houweling 2014,

857 ff.), that the right to water could (and should) have a broader scope, including water uses necessary for irrigation in subsistence farming (or small productive activities), in order to support poor and rural areas, even if these utilisation should not limit the quantities needed for human consumption (Williams 2007, 481).

This would indeed represent an excessive expansion of the quantitative content of the right to water, inadmissible for several reasons. Above all, since agricultural water utilisations, even for subsistence farming, are covered by the human right to food, and secondly, similar interpretations could lead to extending water accessibility for any agricultural use, thus ignoring the necessity of prioritising human consumption. Finally, as qualitative requirements for human consumption and irrigation water are deeply different, this would lead to a further issue regarding the qualitative requirements (Murthy 2013, 116; Winkler 2012, 129-131)[110].

Nevertheless, even though such definition of the quantitative content of the human right to water, General Comment No. 15 does not give a precise indication of the precise water quantities needed for the mentioned uses, nor outlines a hierarchy among them[111].

There is however, in § 12 of the General Comment, a direct referral to the guidelines of the World Health Organisation (WHO) (Howard & Bartram 2003), which precisely outline the amounts needed for each and every personal and domestic water utilisation, expressed in litres per capita per day (l/c/d or lpcd), and considering how these indications should be

[110] Murthy, in particular, also notices how such water utilisations are not even mentioned in General Comment No. 12, expressly dedicated to the right to food.

[111] Which, as aforementioned, is one of the critiques regarding General Comment No. 15 and its lack of definition of the minimum core content of the right to water (Cahill-Ripley 2011, 53; De Vido 2012a, 527; McCaffrey 2005, 109 ff.; Topçu 2009-2011, 27).

adequate to each individual's conditions, such his health or his living or working environment.

Proceeding with the analysis of the WHO guidelines, these are efficiently summarised in a table including four different levels of service, and illustrating for each one of them the access measures, the needs met and the relative concerns for health:

Service Level	Access Measure	Needs Met	Level of health concern
No access (quantity collected often below 5 l/c/d)	More than 1000m or 30 minutes total collection time	Consumption: cannot be assured Hygiene: not possible (unless practised at source)	Very high
Basic access (average quantity: unlikely to exceed 20 l/c/d)	Between 100 and 1000m or 5 to 30 minutes total collection time	Consumption: should be assured Hygiene: handwashing and basic food hygiene possible Laundry/bathing difficult to assure unless carried out at source	High

Intermediate access (average quantity: about 50 l/c/d)	Water delivered through one tap on plot (or within 100m or 5 minutes total collection time	Consumption: assured Hygiene: all basic personal and food hygiene assured Laundry and bathing should also be assured	Low
Optimal access (average quantity: 100 l/c/d and above)	Water supplied through multiple taps continuously	Consumption: all needs met Hygiene: all needs should be met	Very low

According to these WHO guidelines it can be therefore affirmed that the minimum quantity of water needed, in order to realise at least the minimum content of the right to water (i.e. water for drinking and basic hygiene), amounts to 20 l/c/d, while the higher amounts of 50 and 100 l/c/d are the targets that should be met in order to completely fulfil the quantitative requirements of the right.

The same guidelines however (Howard & Bartram 2003, 5 ff.) underlined how these optimal quantities should always be considered as subject to variables (e.g. climate conditions), and should therefore be adapted to the local or the individual context, in particular as concerns vulnerable categories such as pregnant or lactating women, children,

elderly and sick people. This allows to furtherly affirm the importance of the principle of non-discrimination in water accessibility[112].

It must be finally underlined how there is not a unanimous consensus concerning the WHO guidelines and the water quantities they outline, even though they should still be considered as the most relevant ones. Gleick (1998, 496) argues, for instance, that the basic water requirement, which should be adopted by international organisations and water suppliers, should instead correspond to 50 l/c/d rather than 20, which the Author furtherly divides into «*a standard of 5 l of clean water per person per day for drinking water and 20 lpcd for sanitation and hygiene*, […] *of 25 lpcd to meet the most basic of human needs with an additional 15 lpcd for bathing and 10 lpcd for cooking*». On the contrary, other sources, like the so-called *Sphere Standards* or the "Free Basic Water Policy" implemented in South Africa, do instead decrease the minimum quantities of available water, fixing them on amounts ranging from 15 to 25 l/c/d (Winkler 2012, 131 ff.).

1.2. Quality as a key element for life and health preservation

If accessing water in sufficient quantity plays a key role for the satisfaction of one's basic needs, it is equally true that any amount of accessible water would be completely useless, if it were not healthy and of adequate quality.

For this reason, §12, letter b) of General Comment No. 15 states that water should also necessarily be «*safe, therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health*».

As done for the quantitative element, also for the qualitative one the

[112] And to anticipate it as well, since it will receive a more in-depth analysis in the following paragraphs.

CESCR did not specify any quality standards, referring again to the WHO and to its *Guidelines for drinking water quality*[113].

Among the normative contents of the human right to water, the qualitative one is surely the one that allows to draw a strong connection between the right to water and the rights to life and health, as previously underlined in the first chapter.

The consumption and utilisation of not-healthy water does indeed represent one of the main causes of the so-called water-borne diseases, which are caused by contaminated or insufficient water[114], and water-related ones, caused instead by water sources hosting harmful organisms or insects carrying various diseases (Howard & Bartram 2003, 8; Newton 2016, 103). Among the water-borne diseases, the ones that stand out the most are in particular all the diarrhoeal diseases, since they represent one of the principal causes of mortality in the world, particularly affecting children: these cause indeed around 2.3 million deaths every year, with 2.1 being children under the fourth year of age (Mauser 2007, 169). Other severe water-borne diseases are then represented by tropical fevers such as

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[113] General Comment No. 15 in particular refers to the second edition of the Guidelines, dating back to 1993. However, since the Guidelines are periodically updated (with the last and fourth edition being published in 2011, with an addendum in 2017), State Parties should actually refer to their most recent version, in order to reach the best possible implementation of the right to water. Such interpretation appears to be confirmed by § 18 of the General Comment, affirming that States «*have a constant and continuing duty under the Covenant to move as expeditiously and effectively as possible towards the full realisation of the right to water*».

[114] It should in fact be remembered how the majority of diseases, even if not caused by water *per se*, are always aggravated by the lack of sufficient amount of clean water (Howard & Bartram, 2003, 1 ff.; Mauser 2007, 168; Neves-Silva & Heller 2016, 1866).

malaria, dengue, chikungunya and zika (Neves-Silva & Heller 2016, 1866).

It is therefore due to this consideration that is necessary to ensure that water for human consumption and utilisation is healthy and safe, both for realising the human right to water and also the connected rights to life and health.

Concluding on the qualitative aspect of water accessibility, it may be finally observed how water-borne and –related diseases have also a major impact on other human rights, in particular the rights to education and work (Mauser 2007, 168; Winkler 2012, 170 ff.), and do also heavily impact on the necessary costs and expenses of the whole healthcare system. It has been indeed noticed (Bluemel 2004, 1003, 1004) how the expenses related to such diseases outweigh by almost two-thirds the costs of realising an efficient and safe water supply system (at least in urban areas), which would also determine an actual economic return, amounting four times the invested capitals. This in particular taking into account the improvement in productivity deriving from lesser medical expenses and the increase of attendance at school and in working places (Winkler 2012, 8).

Such considerations lead therefore to affirm the fundamental importance of correct and aimed investments for the full realisation of the right to water, which will be shown and analysed in the following paragraph.

2. Non-discriminated access to water, affordability, and the necessity of social, economic and environmental sustainability

After defining the quantitative and qualitative requirements of the human right to water, General Comment No. 15 defines, at § 12, letter c), its third requisite, that is «*accessibility of everyone without discrimination to all water facilities and services*».

As observed in the introduction to this chapter, as well as in the previous

one, the General Comment furtherly divides this requirement into the different dimensions of physical and economic accessibility (also known as affordability), of non-discrimination and access to information (and participation).

While the last aspect will be analysed in the next paragraph, the following pages will be focused on the key aspect of universal and equitable access, as well as the necessary bond that must be considered between the requisite of affordability and the need of balancing environmental, social and economic requirements.

2.1. Universal accessibility and non-discrimination of vulnerable people

The content of physical accessibility is defined by General Comment No. 15, in § 12, letter c), i), as the access to «*water, and adequate water facilities and services* […] *within safe physical reach for all sections of the population*». Moreover, furtherly remarking the necessity to respect the quantitative and qualitative requirements, it also affirms that «*sufficient, safe and acceptable water must be accessible within, or in the immediate vicinity, of each household, educational institution and workplace*».

A first element emerging from such definition is surely the fact that physical accessibility must not necessarily consist in the existence of a connection to the water grid in each household, school or working place, since this particular requirement is considered satisfied as far as water services are accessible within a reasonable time and distance. The reasonableness of time and distance is, however, a particularly complex matter, due to the absence of common criteria to determine it, in particular taking into account the costs of water services as well (Smets 2009, 60). However, through the aforementioned approach of "access hurdles" (Gawel & Bretschneider 2016a, 199, 208 ff.), it may be intended as the possibility to access to sufficient water quantities without facing an excessive "hurdle" for one's human dignity, and without relinquishing

other human rights. In other words, personal and domestic necessities should be satisfied without representing an excessive burden for each individual, in particular considering his or her working or education necessities[115].

Secondly, by specifying that access should be realised for «*all sections of the population*», General Comment No. 15 underlines the necessary universality of access, which thus must include «*the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination*» (§ 12, letter c) iii).

The relevance of the cross-cutting principle of non-discrimination is furtherly underlined in the following paragraphs of the General Comment (§§ 13-16), in particular affirming, in § 16, that State Parties should pay particular attention to the most vulnerable groups of society, which traditionally have faced and still face major issues in accessing water and water services, as well as accessing information and actively participating for the protection of their own rights (Winkler 2012, 221 ff.). This confirms what has been affirmed in the previous chapter during the analysis concerning non-discrimination and the Conventions and Declarations related to women (CEDAW), children (CRC), disabled persons (CRPD) and indigenous populations (UNDRIP). That is that, although the universal recognition of water accessibility as a human right, certain parts of the population still need a further recognition of their peculiar needs and conditions, which deserve specific means of protection.

In particular, according to § 16 of the General Comment, among the categories of individuals that should be considered as vulnerable,

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[115] Which is particularly relevant, as mentioned in the previous analysis of the CEDAW, for women in poor and/or rural areas, traditionally having the role of water bearers and thus sacrificing time (and, in some cases, putting themselves in danger). Time that they could instead dedicate to study or work activities. On this regard, see Winkler (2012, 135-136) and Brunner *et alii* (2015, 414 ff.).

particular attention must be given to women, children, minority groups, indigenous peoples, refugees, asylum-seekers, internally displaced persons, migrant workers, prisoners and detainees.

2.2 Affordability and the balancing between social, economic and environmental sustainability

It can be noticed how, in the mentioned list of vulnerable categories of individuals, the General Comment does not include the broad category of people experiencing poverty, which could therefore face extreme difficulties in accessing water services due to their economic difficulties, or are not able at all to do so.

This omission is however justified by the express inclusion, in § 12, letter c) ii), of a specific economic dimension of accessibility, definable as affordability. This indeed requires water and water services to be affordable for all, with access costs that should not hinder or limit the realisation of other human rights and liberties, and therefore the possibility to lead a dignified life. A definition that, how has been observed through the analysis of the International Bill of Rights, fully reflects the meaning of an adequate standard of living, as defined by Copp (1992, 248, 252 ff.) and Eide (2001, 133).

In other words, as affirmed also in § 11 of General Comment No. 15, water prices must necessarily be socially sustainable, considering the social and cultural dimensions of water, and not primarily its economic one.

Nevertheless, the economic aspect of water and water services cannot be ignored, and the affordability content of the human right to water must not be intended as an unlimited access to free water, but rather as the proportionality and equity of water charges in comparison to the economic condition of each individual (De Jesùs Becerra Ramírez & Salas Benítez 2016, 138-139; Larson 2013, 2220 ff.). The free supply of water is indeed recognised by § 27 as a mean to realise affordability, but only insofar as it

regards particularly economically disadvantaged individuals, and/or if only a limited free amount is granted, in the context of a tiered rate system.

As underlined in the aforementioned Dublin Principles, the right to water must in fact be realised under the condition of economic sustainability, in particular and above all with the goal of applying the principle of cost recovery, thus supporting the costs for maintenance and innovation of water infrastructures (Gawel & Bretschneider 2016a, 203 ff.). It must be indeed remembered that a human rights based approach does not necessarily exclude the recovery of the costs of water services, as far as this does not hinder accessibility of disadvantaged individuals, who also benefit greatly from an economic-efficient system (Sultana & Loftus 2011, 127 ff., 132-133).

Furthermore, water charges have the fundamental function of limiting excessive and irrational water consumption, which would ultimately lead to an environmental damage. From this perspective, they have therefore the role of realising environmental sustainability, thus contributing to the implementation of Sustainability Development Goal No. 6, representing a connection, as aforementioned, between a human rights based approach and sustainability (Gawel & Bretschneider 2016a, 200, 203; Lugaresi 2011a, 64 ff., Testella 2011, 6).

In summary, for the correct implementation of the human right to water, it is necessary to reach an adequate balancing between the three dimensions of sustainability (environmental, economic, social), in order to harmonise the necessities of economic efficiency and environmental protection, without underestimating the goal of meeting the basic needs of all human beings. It is precisely on this aspect that the definition of the human right to water as a social human right resides, that is to say as an instrument of guarantee in particular and above all for the rights of the weakest and most vulnerable parts of the population, in every context, becoming a fundamental tool for their full realisation as human beings. This even more, as has already been pointed out, in the current context of

climate change and environmental crisis, which aggravate the pre-existing situations of disadvantage and also cause further ones, deserving particular protection.

Returning to the topic of water charges, the aforementioned § 27 of General Comment No. 15 does not offer detailed solutions toward the realisation of this goal, though outlining some of the possible paths that State Parties may follow, such as «*(a) use of a range of appropriate low-cost techniques and technologies; (b) appropriate pricing policies such as free or low-cost water; and (c) income supplements*», underlining as well that water charges should always follow the criteria of equity and proportionality.

According to UN sources[116], to meet these criteria water charges should not represent more than 3% of the total domestic expenditures, while other Authors (Obani & Gupta 2015, 35; Camdessus & Winpenny 2003, 19) deem also the 5 or 6% of expenditures as appropriate. Nevertheless, even if these percentages may be considered adequate, it should be observed how in several cases even the lowest percentage of one's income may represent an excessive burden, limiting or even preventing access to other goods or services, and thus not giving proper implementation to the affordability requisite (Castellucci 2015, 7 ff.). The percentage criterion should be therefore paired to other methods aimed to grant universal and equitable access to water.

Among them, a particular relevance is given to the introduction of charging methods based on consumption blocks and increasing tiered charges (Von Hirschhausen *et alii* 2017), which include a basis covering the basic water quantities at a very low price, or even free from charge (Lugaresi 2011a, 68). There are however Authors (Smets 2012, 7), who

[116] In particular, the UN Development Programme Report 2006, *Beyond scarcity: Power, poverty and the global water crisis*, 97.

consider these methods particularly problematic, in particular if applied to entire households hosting large families.

It is therefore appropriate to correct tiered systems in order to adapt them to such situations, for instance by introducing an individual-based tiered system, by enlarging the low-price or free basic water quantity according to family components, or by introducing subsidies for the poorest households (Smets 2012, 7; De Albuquerque & Roaf 2012, 75 ff.; Dubreil 2006, 32 ff.). Dubreil (*Ibidem*) notices however a critical point in subsidies, represented by their applicability only to households with a regular grid connection, which would be difficult to realise in certain poor and/or rural areas. In such areas a regular connection to water services is indeed often impossible to realise, and would therefore deprive all the residents of the chance to benefit from subsidies. In other terms, a system of subsidies would therefore translate, even with the satisfaction of all the other requirements for the realisation of the human right to water, in a system which would ensure economic sustainability only to the regular users of water services, thus excluding all those not belonging to this category, which are the most vulnerable ones and are therefore in need, more than anyone else, of economic support.

3. Access to information and participation: citizens' accountability toward the realisation of their right to water

The final element of accessibility described by General Comment No. 15 is represented by the right to be informed on every issue related to water (§ 12, letter c) iv)), which could be paired to the right to take part to all decision and managing processes regarding water resources (§ 48).

The necessity to include information and participation rights does indeed represent a great contribution towards the realisation of every human right (Hardberger 2006, 568; Winkler 2012, 218), and its necessity for implementing the human right to water has been underlined by Sustainable

Development Goal No. 6 in its Target B (Gawel & Bretschneider 2016a, 23-24). In fact, both information and participation are fundamental instruments for the subjects responsible of water services, in particular on the regional and local level (Baer & Gerlak 2015, 1540; Beail-Farkas 2013, 801; Molaschi 2015, 159 ff.).

Indeed, even considering the necessity of common guidelines and strategies from the higher levels of governance, in order to harmonise the local ones (Lugaresi 2011a, 77; McCaffrey & Neville 2009, 9), a system granting access to information and participation does represent a successful mean of implementing these very national regulations (De Jesùs Becerra Ramírez & Salas Benítez 2016, 140). On the contrary, the lack of such instruments may determine their failure, which will affect negatively the most vulnerable parts of the population (Bakker *et alii* 2008, 1894).

In other words, the presence of well-structured instruments of information and participation allow to understand and solve more efficiently the existing issues, thanks to the direct involvement of the interested subjects, as well as to give them more responsibilities, according to the empowerment coming from their information and participation rights.

3.1. Information and participation as empowerment for vulnerable people

Information and public participation do indeed represent a fundamental instrument for the realisation of the human right to water, first of all since correct information and active participation do represent a mean for all interested subjects to truly understand to which extent their right is (or is not) realised, and how it can be improved, if necessary.

In order to assume this function, however, it is necessary that information and participation instruments are implemented in a context where institutions grant their openness, the transparency and free access to information, as well as the effectiveness and substantiality of participation, that is its effective empowerment of the individuals (European

Environment Agency 2014, 13).

Participation may then assume different forms, involving individuals as such or only in associated forms, involving them in decisional processes alone or in each step of the management of water resources, which may then consist in a mere consultation or in an actual shared community management (Duret 2015, 38), involving in particular the employees of water services (Kürschner-Pelkmann 2005).

The importance of information and participation further plays a fundamental role towards vulnerable categories of individuals, representing a mean to combat their discrimination. Indeed, the CEDAW (Articles 7, 13 and 14.2), the CRC (Article 12) and the CRPD (Article 29) all recognise the importance of involving women, children and disabled persons in decisional processes (Winkler 2012, 219).

Moreover, the same involvement should also be granted to ethnic minorities and indigenous population, not only due to discrimination issues and in order to promote their integration, but also to ensure the respect of cultural and traditional practices related to water utilisation (Bourquain 2008, 163 ff.; Gupta, Hildering & Misiedjan 2014, 30-31; Russo & Smith 2013, 46).

It is therefore possible to emphasize how an approach based on human rights, correctly implementing information and participation instruments, would represent a fundamental mean of empowerment not only of all individuals as a whole, but in particular of the most vulnerable members of the community, thus making those instruments a further mean of concretising the principles of equity and non-discrimination (Bourquain 2008, 56 ff.; De Albuqueque & Roaf 2012, 28 ff.).

3.2. Information and participation as instruments for enhancing citizens' accountability

The correct realisation of the human right to water, involving information and participation, does therefore represent a fundamental

instrument for empowering individuals, but it is also important to underline how, as aforementioned, an approach based on human rights necessarily leads to the emergence, on the same right bearers, of responsibilities (Hardberger 2006, 567-568; Lugaresi 2011a, 61). This is indeed one of the fundamental elements allowing distinguishing between the simple water supply and the correct implementation of the human right to water (Winkler 2012, 217).

Under the profile of information, individuals should indeed utilise correctly their right to be informed, being aware and conscious not only of their right to access water, but also of its limitations and, more importantly for this section, of their duties in order to contribute to its implementation and protection (Alvarez 2003, 10).

As regards the profile of participation, individuals should be required to directly contribute to the concretisation of their own rights, actively supporting the correct management water resources and services, thus pursuing what is, in effect, their own direct interest. In particular, drawing a connection on the matter of empowerment of vulnerable individuals, Dubreil (2006, 29 ff.) underlines how correct forms of participation realise a sense of shared ownership of the resource, thus furtherly contributing to eliminate discrimination within society.

4. The implementation of the right to water: State, international, and private obligations

Having concluded the definition of the elements composing the normative content of the human right to water, understanding the rights (and duties) of individuals regarding water accessibility, the concluding paragraphs of this chapter will be dedicated to another fundamental aspect of a human rights based approach, that is the identification of the subject(s) legally bound to implement the analysed normative content (Bluemel 2004, 972).

This analysis will start analysing the role of States, traditionally responsible for the realisation and protection of human rights (Brunner *et alii* 2015, 423 ff.; Hardberger 2006, 542 ff.; Moyo 2015, 699 ff.; Winkler 2012, 217-218)[117], though considering the necessary role that must be played by the international community and by non-state actors.

4.1. State obligations: respect, protect, fulfil

As regards State duties towards the realisation of all social rights[118], including the right to water, these are divided into the three obligations of respect, protect and fulfil[119], which is also utilised by General Comment No. 15 in its paragraphs from 20 to 29.

Considering the obligation to respect, this implies, on a broader scale, that the State should restrain its interventions limiting the enjoyment of pre-existing human rights. In the specific case of the human right to water, this obligation poses the duty to avoid any interference in the access to water resources by all individuals, for instance by limiting or

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[117] Brunner *et alii* particularly underline how both national and international case law confirm the traditional State duties towards the implementation of human rights, above all in eliminating discrimination and inequalities in their universal access.

[118] Even though Krennerich (2007, 103 ff.) argues that the following partition should be observed for civil and political rights as well.

[119] This partition of State obligations originates from the initial distinction operated by Shue (1982, 52, 55 ff.), consisting in avoiding deprivation, protecting from deprivation and aiding the deprived. The current formulation of respect, protect and fulfil was then developed, as mentioned above, by Eide (2001, 65), who also defined the further specification of the obligation to fulfil in the duties to facilitate, ensure and provide.

interrupting their supply and/or distribution, or by polluting them (Krennerich 2007, 274 ff.; Winkler 2012, 107 ff.).

Since State duties may not consist in a mere passive attitude, the following obligation to protect implies its active intervention, which encompasses above all the introduction of effectively implemented legislation (*Ibidem*), aimed for instance to avoid restrains in the enjoyment of the right to water operated by third parties. This is particularly relevant in case of an excessive exploitation or pollution of water resources caused by a private entrepreneur (Bourquain 2008, 148) or, as it will be analysed in the final paragraph, in the case of privatisation.

The duty to fulfil, finally, compels the State to enact all possible measures allowing the full enjoyment of human rights, which, for the right to water, primarily consist in the creation of adequate infrastructures in order to ensure the universal and equitable supply of clean water within the national territory (Krennerich 2007, 274 ff.; Winkler 2012, 107 ff.). As mentioned above, the obligation to fulfil is furtherly divided into the obligations to facilitate, promote and provide, aimed to grant a truly universal and non-discriminatory access to water.

The duty to facilitate is indeed the obligation to assist individuals and communities in enjoying their right to water, while promoting mainly regards State duties in granting access to information and education on the correct utilisation and exploitation of water resources. Finally, the obligation to provide consists in supporting and realising water accessibility for all individuals, in particular focusing on those subjects or groups who are unable to realise it with their own means (Odello & Seatzu 2013, 231 ff.)[120].

[120] It should be also recalled how General Comment No. 15 also includes, in its § 37, nine core obligations, which imply the obligation to grant at least the minimum levels of the right to water (Cahill-Ripley 2011, 53; De Vido 2012a,

4.2. The necessity of international cooperation

As mentioned in the introduction of the present section, even though the traditional approach still considers State as main and principle responsible for the protection of human rights, an international and cooperative approach towards their realisation is nowadays always necessary.

This is also clearly underlined in Articles 1.3 and 56 of the UN Charter, in the Preamble of the Universal Declaration, as well as in the Covenants of 1966, respectively in Article 2.1 ICESCR and 1.2 ICCPR. The latter is particularly relevant, underlining how resources' exploitation shall not affect the very principles of cooperation and mutual benefit among States (Di Lieto 2004, 761; Zuchold 2009, 17)

The necessity of an international approach is even more true for the right to water, which implementation would indeed not be possible without introducing proper international instruments, above all efficient and independent monitoring systems, verifying if and how the right is protected within each State (De Albuquerque & Roaf 2012, 179 ff.; Dubreil 2006, 38 ff.; Thielbörger 2014, 135 ff.).

But, even more importantly, the international approach should focus on the mutual assistance and cooperation among States, in particular in the case of neighbouring countries (Hardberger 2006, 542 ff.), and other international subjects as well (Karbach 2016, 224 ff.).

The necessity of such cooperative approach derives, above all, from the fact the majority of water systems in the world are interconnected and shared among different countries: as noticed by McCaffrey (2016, 222) there are more than 260 shared water basins in the world, shared

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527; McCaffrey 2005, 109 ff.; Odello & Seatzu 2011, 231 ff.; Topçu 2009-2011, 27). Please also refer to the analysis of General Comment No. 15 in the dedicated paragraph of the previous chapter.

among around 145 countries.

Therefore, any significant change in the condition of these water resources, being it caused by natural events, by human action, or both, inevitably would impact all countries exploiting and depending from the same water system. This particular aspect also allows to underline, in light of the several times mentioned issues related to climate change, how these represent a further element that must necessarily be included in these considerations, as a source of joint duties and responsibilities of all the States of the world , in proportion to their capacities (Lewis 2014, 246 ff.), in the protection of the environment and natural resources from the damage caused by climate change, which in particular concern the water resource and its accessibility, to the detriment of the human right to water and other related rights. The extreme weather events resulting from climate change, indeed, not only entail an extreme fluctuation in the availability of drinking water, but also their pollution due to the infiltration of contaminated or salt water, as well as the damage to water treatment plants, thus also influencing the available water quality (Jodoin & Lofts 2013, 65 ff.). Which, it is worth repeating, increasingly affects developing countries and the weaker parts of the population, allowing to underline the need for greater efforts to protect the human right to water also in this respect.

Consequently, even though the solutions of such issues does primarily belong to international water law, these have direct effects on the accessibility to sufficient quantities of safe water in all involved countries, and are inextricably connected to the full realisation of the human right to water (McCaffrey 2016, 222)[121].

For these reasons, §§ 30-36 and 38 of General Comment No. 15, as well

[121] For the most relevant sources of International Water Law regarding the right to water, please refer to their analysis in the previous chapter.

as the following UN General Assembly and Human Rights Council resolutions of 2010[122], state the necessity of an international approach. These consist in State obligations, consisting not only in restraining from interfering in water accessibility in other States, but also and more importantly in supporting the realisation of such accessibility, as well as promoting the implementation of the right to water in bi- and multilateral agreements (Cahill-Ripley 2011, 65 ff.; Hardberger 2006, 546).

Therefore, reaffirming the relevance of international cooperation for the realisation of every human right, the importance of mutual assistance and cooperation among States for the realisation of the human right to water should be particularly underlined, above all for its equitable and universal implementation.

Such approach, which in particular should concretise itself in mutual economic support and in the exchange of knowledge and technologies, would in fact benefit above all developing countries, or countries facing particular difficulties (even temporary, e.g. in case of natural disasters) in giving the right to water a proper implementation[123].

4.3. Brief remarks on privatisation

Finally, a few last observations should be dedicated to the issue regarding the cases in which water supply is not managed, in whole or in part, by the State.

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[122] UN General Assembly A/RES/64/292, § 2; UN Human Rights Council A/HRC/RES/15/9, § 10.

[123] Which even led some Authors (Hardberger 2006, 542 ff.) to argue the existence of a right to international support belonging to such countries.

This refers, in particular, to the various forms of privations of water services[124], or if these take forms of a public-private partnerships, as it happens in most cases[125]. As has already been highlighted in the introductions of this work, and as will be repeated in the course of the paragraph, while being well aware of the importance of the role that privatisation processes have had in stimulating the discussion relating to the protection of the human right to water, this paragraph will not be focused on the specific issue of the management methods of the water service, and on the advantages and disadvantages of public or private management, but rather on the implementation duties and the role that private subjects must play in the case that the management of water services is actually entrusted to them.

Privatisation processes have been indeed often subject to strong critiques, which are primarily connected to the consideration that the entrepreneur, aiming to gain the best possible return on its investments, would ignore the necessity to balance such economic profile with the environmental and

[124] Without analysing the issue of direct responsibilities affecting private suppliers coming from human rights law, which would go beyond the purpose of this work. On this regard, for an analysis of such issues, please refer to: Brunner *et alii* (2015, 423 ff.); Cavallo (2013); Letnar (2011, 337), who in particular focuses on the applicability of the obligations to respect, protect and fulfil to private entrepreneurs; Moyo (2015, 702-705, 722-725); Murthy (2013, 143 ff.); Ramasastry (2015).

[125] In fact, as observed by Moyo (2015, 695 ff.), such mixed forms of management are indeed the most frequent ones, in particular due to the fact that rarely water infrastructures belong or are transferred to private actors, which necessary gives to the public management a certain degree of involvement.

social ones, mentioned above (Letnar 2011, 316-317)[126].

Moreover, in order to maximise profits, private entrepreneurs would also increase water charges without a corresponding increase in the efficiency and quality of the service (Santucci, Simonati & Cortese 2011, 56 ff.).

A second critique, often moved to privatised or semi-privatised forms of water management, does regard their insufficient or total lack of information and participation instruments, which are often connected to the lack of transparency regarding the very means of private entrusting of water services (Feldman 2017, 40 ff.; Moyo 2015, 695 ff.).

A lack of transparency, information and participation which, according to what has been aforementioned, would negatively impact the most on vulnerable groups and individuals, above all on minorities and indigenous populations (Gupta, Hildering & Misiedjan 2014, 26).

Furthermore, such issues, though affecting States throughout the world, do primarily affect developing countries, which water services are indeed often managed by transnational cooperatives.

However, precisely regarding these countries, as observed by Moyo (2015, 699 ff.), private management could represent not only an issue, but also an instrument, if not the only mean, to properly finance and improve water services, if the State is unable to do it efficiently. The same Author observes, though, that such support would only affect the economic profile, and not the environmental one, and could on the opposite represent a further risk for environmental goals, if a State lowers the relative

[126] Nevertheless, Murthy (2013, 127 ss.) observed how a profit-oriented management does not represent *per se* a critical element under a human rights based approach, which could indeed allow to gain profit from the activities connected to the realisation of the human right to water. This, of course, as far as all of its normative contents are respected and access to water is still granted universally.

standards in order to facilitate the entry of private operators within its market.

Therefore, even though the issues and risks of private management of water services should necessarily be taken into account, at the same time private operators may be considered as a potential resource and instrument for the full realisation of the human right to water, thus overcoming an absolutely critical perspective (Howard 2011, 136; Paust 2002, 825).

Moreover, Authors like Feldman (2017, 43) have furtherly observed how, in most cases, the issues deriving from privatisation do not actually arise from private management *per se*, but rather from the lack of sufficient means of human rights protection within the interested country, which substantially allows private operators to act without restrictions or conditions. Such issues, as observed by Lugaresi (2011a, 63, 70) and Williams (2007, 502), may also reflect severe issues rooted within a country's society or legal system, like for instance persistent corruption, which would allow neither an efficient public management of water supply, nor its regulation in case of private management.

The arising issue is, therefore, to find a proper balance between the elements of risk and the positive outcomes of privatisation, in order to involve private operators in the improvement of water resources and in their accessibility, rather than merely preventing them to compromise it.

An issue that could and should find a viable solution in future legal and binding instruments related to the implementation of the right to water, which clearly define the respective obligations on all levels of governance, from international to local, including non-state actors (Penkalla 2016, 13 ff.).

CHAPTER III
THE HUMAN RIGHT TO WATER IN THE EUROPEAN CONTEXT

Introduction

Having analysed the human right to water in the context of International law, considering its legal basis, evolution and definition of its normative content according to the documents discussed in the first two chapters, the present one will instead focus on the most relevant sources in the European context.

The main factor differentiating these contexts, in addition to the evident narrower scope of European Union law sources, limited to its State Members, is their complete lack of recognition of the human right to water, not only within binding documents and sources, but also in the jurisprudence or in instruments of soft law.

In fact, neither EU Primary law, represented by the EU Treaties and the EU Charter of Fundamental Rights, nor Secondary law, and in particular the Directives dedicated to water resources and their protection, do include such recognition, though including, in particular within the EU Charter, elements that may allow it through means of interpretation.

Nevertheless, even though such possibility has been constantly argued by several scholars, as it will be discussed, it has been never put into practice

by any of the Institutions and Bodies of the European Union, in particular in the interpretation of the European Court of Justice[127].

Either an express recognition of the human right to water and of its implication for EU Member States has been included in soft law instruments, as the existence of the right has only been mentioned in a Parliamentary Resolution in 2003[128], and in a declaration of the former High Representative of the EU, Catherine Ashton, in 2010[129]. These stated, respectively, that «*access to drinking water in a sufficient quantity*

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[127] As recalled by De Vido (2014, 807 ff.; 2017, 191 ff.) the European Court of Justice did indeed miss, in many occasions, the opportunity to expressly recognise the human right to water in its jurisprudence, or even to mention it as such, in particular in the case *Diversion of the River Acheloos* (C-43/10), dating back 2012. The case, indeed, concerned the implementation of the Council Directive no. 92/43 on the conservation of natural habitats and of wild fauna and flora (or Habitats Directive), and the balancing of the related obligations with the right to water and the necessities of water supply. The case did in fact involve the issue of diverting a river belonging to protected areas, in order to provide not only to the irrigation needs of the Thessalian region in Greece, but also and more importantly, to its water supply necessities, in particular in urban areas. Nevertheless, though being given the occasion of recognising the right to water, as well as to define the necessity of its sustainable implementation, the Court limited itself to stating that water supply plays an important role for health (§126 of the decision), and that it may justify the deviation of water courses belonging to protected areas (§ 128).

[128] European Parliament, Resolution on the Commission communication on water management in developing countries and priorities for EU development cooperation, September 4th 2003, Article 1.

[129] *Declaration by EU HR Ashton to commemorate World Water Day*, available on http://eu-un.europa.eu/declaration-by-eu-hr-ashton-to-commemorate-world-water-day/.

and of adequate quality is a basic human right», and that «*the European Union reaffirms that all States bear human rights obligations regarding access to safe drinking water*».

A clear and certain sign of support, which nevertheless may not be considered as an act capable of affecting future policy developments and practices within the European Union and its Member States (De Vido 2012c, 203-206; McCaffrey 2005, 98-99; Van Rijswick 2012, 125 ff.).

Due to this lack of signs of recognition of the right to water within EU sources, a fundamental role is therefore played by the relationships between EU law and the sources of the International context, analysed in the previous chapters (Di Marco 2018, 105 ff.). In particular, it will be discussed how the latter may influence human rights protection in the European Context and the interpretation of the EU Charter of Fundamental Rights, according to Articles 52 and 53 of the Charter, regarding scope and level of protection of the guaranteed rights.

On this regard, a paramount role among International sources is given by the same Articles to the European Convention on Human Rights (ECHR)[130], which opens further perspectives for the interpretation of EU law sources towards the recognition of the human right to water. Indeed, as will be analysed in the dedicated paragraphs, the European Court of Human Rights did rule on several cases related to water and its accessibility through an extended interpretation of the rights of the Convention, though never giving the human right to water an express recognition, nor mentioning it.

Nevertheless, even though the relevance of such decisions of the Court of Strasbourg, neither of them included an express recognition of the right to water, which therefore still lacks of such recognition in the European

[130] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, , 4 November 1950.

context.

A gap which led, in 2012, to the first successful European Citizens Initiative (ECI), *Right2Water*, which, together with its recent follow-up, will be the subject of analysis of the last paragraph of the chapter.

In light of these premises, it is now possible to proceed with the analysis of the legal bases of the right to water in primary EU law, starting from the relevance that the founding Treaties attribute to the protection of the environment and natural resources, and of human rights.

1. The legal basis of the human Right to water in the TEU and in the TFEU: the protection of the environment and of human rights as key and cross-cutting goals of all EU laws and policies

Despite the absence of an explicit recognition of the human right to water in the sources of primary Community law, it is however possible, as mentioned above, to identify useful elements that represent its legal basis, in a similar way to what can be done with the sources of international law analysed in the previous chapters.

A first basis, in this regard, is certainly represented by the objectives of environmental protection and natural resources, clearly expressed in various Articles both of the Treaty on European Union (TEU) and of the Treaty on the Functioning of the European Union (TFEU). These indeed represent, in consideration of the previous observations on the need to protect water resources, a first logical requirement to correctly and fully implement the human right to water.

Starting from the relevant Articles within the TEU, already its preamble states the determination of the EU and its Member States towards the promotion of economic and social progress «*taking into account the principle of sustainable development and within the context of*

the accomplishment of the internal market and of reinforced cohesion and environmental protection».

More precisely, Article 3.3 states the aim to balance, in the creation of the EU internal market, between the necessities of economic growth and social protection, as well as of sustainable development and protection and improvement of the quality of the environment. Moreover these goals, as affirmed in Article 3.5, shall also be sustained in the relationship between the EU and the rest of the international community.

On this particular regard, which will be furtherly emphasized below, the TEU clearly states its international support (Article 21.2) towards the sustainable economic, social and environmental development of developing countries (letter d), and in the development of international measures preserving and improving the environment and the sustainable management of global natural resources (letter f).

Therefore, although representing wide-ranging declarations, these Articles of the TEU already clearly show the sensitivity of the European Union towards the realisation of the objectives of environmental protection and natural resources in a multi-level perspective, thus reflecting the objectives outlined in the context of international environmental law.

Proceeding with the analysis of the TFUE, regarding in particular the aspect of a multi-level approach, also its preamble states both the determination to ensure the harmonious development between all regions and the solidarity between Europe and the less developed countries.

Considering instead the goal of environmental protection, Article 11 clearly affirms its cross-cutting value, stating that these objectives «*must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development*».

Moreover, the TFUE devotes its entire Title XX to the Environment, stating in particular in Article 191.1 the goals that shall be pursued in all EU policies. These concern the objectives of preserving, protecting and

improving the quality of the environment, protecting human health, the prudent and rational utilization of natural resources, and finally the promotion of measures to deal with regional or worldwide environmental problems, and in particular combating climate change.

As regards, in particular, the protection of water resources and their accessibility, it is also worthy of note the further statement of Article 192.2, letter b), which recognises to the Council particular powers in this context. The Council may indeed, through a special legislative procedure and after consulting the EU Parliament, as well as the Economic and Social Committee and the Committee of the Regions, act unanimously, adopting «*measures affecting quantitative management of water resources or affecting, directly or indirectly, the availability of those resources*».

A procedure that, as underlined by Thielbörger (2014, 32 ff.), represents a unicum with respect to the ordinary legislative procedure of EU law, and which highlights the particular importance attributed by the EU, among natural resources, to water resources, as well as to their availability for the needs of the population.

If it is therefore evident that both the TEU and the TFEU show a clear intent to protect the environment and natural resources, with particular attention to water, the same can be also observed regarding the protection of human rights, not only within the European Union, but also in its international relations.

These protection objectives, which emerge naturally with greater evidence from the EU Charter of Fundamental Rights, which relevant content will be examined in the following paragraph, are in fact already clearly expressed within the TEU.

Already in its preamble, respect for human rights and fundamental freedoms is indeed asserted, together with the principles of freedom and democracy, while Article 2 specifies that the Union is founded, as well as on these values, on human dignity, on the human rights of persons belonging to minorities and on the principle of non-discrimination.

Articles which, according to Dupré (2014, 7), therefore place human dignity and the protection of human rights as the real basis of all EU law.

Article 3.5 TEU furthermore, already mentioned with regard to the Union objective of spreading the principle of sustainable development internationally, also provides the same obligation towards human rights, in particular in order to contribute to the «*development of international law, with respect to the principles of the United Nations Charter*».

Finally, in order to understand the role of the protection of fundamental rights in the context of EU law, Article 6 TEU is of key importance, given that it recognizes the Charter of Fundamental Rights as having the same legal value as treaties. The same Article also provides, in paragraphs two and three, the intention of the EU to access the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as that the fundamental rights guaranteed by the Convention, together with those emerging from the constitutional traditions of the Member States, are part of the general principles of EU law.

A principle that, as will be seen, has a content that recalls the one of Articles 52 and 53 of the EU Charter of Rights, of great importance for the purposes of this analysis.

It can therefore be affirmed, in the light of the analysis of the TEU and the TFEU, that both represent a clear expression of the evolution of EU law towards the protection of human rights and the environment. Both values that, after the Lisbon Treaty, not only found direct expression in primary law, but have been put as the very foundation of EU law as a whole (Banaszak 2016, 103; Van Rijswick 2012, 124-125)[131].

[131] Furthermore, as highlighted in several of the examined Articles, the EU has the objective of promoting respect for these values not only in its internal policies, but also in its international relations, in particular with developing

This allows, therefore, to consider the European Union as one of the most important actors for their protection, both in the international context and in that of the individual Member States, thus placing high expectations on it for the future developments in the recognition and implementation of the right to water.

2. The EU Charter of Fundamental Rights as legal basis

As mentioned in the previous paragraph, the main source for the recognition and protection of human rights in the context of EU law is certainly represented by the Charter of Fundamental Rights, in particular following its inclusion among the sources of EU primary law by means of Article 6 TEU.

Therefore, the Charter constitutes the main source in seeking a legal basis for the human right to water, in a similar way to what has been pointed out in the analysis of the international context, as it includes several human rights allowing a similar interpretation as the international one.

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countries. This allows to mention, before analysing the EU Charter of Fundamental Rights, how the EU is one of the main (if not the main) supporters on a global level in the development of water services (Koff & Maganda 2016, 101-102; De Vido 2012c, 206-207). However, it must also be emphasized that this support has been repeatedly criticised, not only for the absence of well-defined projections aimed at achieving long-term results (Shibata Imana 2016, 181), but also and foremost for the absence of a founded approach on human rights (De Vido 2017, 202 ff.). This in particular favoured the establishment of private companies with low efficiency and little attention to sustainability objectives, leading several countries, mainly in South America, to withdraw from negotiations with the EU (Koff & Maganda 2016, 102-105).

2.1. The protection of Human Dignity, Life and Physical and Mental Integrity

A first foundation in this sense is undoubtedly represented by Article 1 of the Charter, which states that «*Human dignity is inviolable. It must be respected and protected*».

As stated by Frenz (2009, 249) and Heyde (2006, 23 ff.), human dignity actually represents the founding principle of the entire Charter and of all the rights contained therein, which must therefore be considered as direct manifestations of such principle. For this reason, it also performs a subsidiary function, allowing both to underline aspects not mentioned within the rights contained in the Charter, and to recognize new rights, which the Charter does not include (Dupré 2014, 7).

This therefore makes it possible to consider human dignity as the first legal basis for the recognition of a human right to water in EU law, despite the breadth and vagueness of this principle (Gennusa & Violini 2013, 361 ff.).

A second Article capable of representing a potential legal basis for the right to water, in addition to Article 2, dedicated to the right to life[132], is Article 3, which states the «*right* [of everyone] *to his or her physical and mental integrity*».

This right in fact, although referring mainly to medical practices and their respect for ethics (Michalowski 2014), can be interpreted in the sense of imposing a sort of "respect obligation" upon Member States, imposing a prohibition to interfere water accessibility, and the duty of limiting such interference by third parties, as acts suitable to damage the safety of the individual protected by the Article (Karbach 2016, 124).

[132] Regarding the suitability of the right to life to represent a legal basis for the human right to water, please refer to the considerations made in the first chapter in the analysis of the UDHR and the ICCPR.

2.2. The Solidarity Rights: from the entitlement to social security to environmental protection

A further potential legal basis, in addition to the first three Articles of the EU Charter, can then be traced back to various rights recognized in Chapter IV of the Charter, dedicated to Solidarity rights.

Among them, a particular relevance can be given to: Article 34, dedicated to the entitlement to social security benefits and social services and assistance, in particular (Article 34.3) in order to counter social exclusion and poverty; Article 35, concerning the right to access to medical care and health protection as an EU objective; Article 36, concerning access to general economic interest services; and, finally, to Article 37, which aims to achieve a high level of environmental protection.

Proceeding with the analysis of the individual Articles and the rights they recognise, it must first of all be observed how these Articles, in most cases, do not define actual human rights, but rather long-term objectives of the EU, the realisation of which is substantially referred to the Member States, in compliance with the principle of subsidiarity (Bartone 2013, 1141).

This is certainly the case of Article 34, which has also been referred to as the basis for the potential recognition of the human right to water in EU law (Karbach 2016, 124-125;). Indeed, even if acknowledging and respecting «*the entitlement to social security benefits and social services*», this must be in fact be interpreted as a mere ambition to combat poverty and social injustice (White 2014), and therefore as a purely programmatic provision (Crescenzi 2014, 146).

It should also be noted that, even assuming that the Article can be interpreted in the sense of guaranteeing the right to access the social benefits necessary to lead a dignified life, thus including accessibility to water, the second paragraph of the Article would anyway strongly limit its reach. In fact, it establishes that such benefits are recognised, in addition to respecting national law and practice, only to individuals «*residing and*

moving legally within the European Union» (Giorgis 2010, 210-211).

Therefore, even admitting an extremely broad interpretation of the Article, which includes the right to access water in the event of economic hardship or other difficult situations, Article 34 would not in any case allow for the recognition of universal and equitable access to water and water services[133].

Similar considerations apply to Article 35. While recognising (as such) a right to «*access to preventive health care and the right to benefit from medical treatment*», the same Article indeed conditions its enjoyment under the conditions established at national level. Furthermore, as noted by Riedel (2011, 483), according to the wording of Article 35, the enjoyment of this right should be limited to medical care, and not extended to the right to attain the highest degree of mental and physical health, thus including the most important factors of a good status of health: food and nutrition, housing and, above all, access to water[134].

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[133] On the basis of the same considerations, moreover, it can be excluded that Article 38 of the Charter, dedicated to the guarantee of a high level of consumer protection within EU policies, could represent a valid legal basis for the human right to water. In fact, even if Authors like Staiano (2011, 12-13) do include this Article among its potential legal bases, it must first of all be excluded that this provision includes something more than a mere programmatic formulation, as its wording is not suitable to found an actual human right (Zinzani & Santarelli 2013, 1219). But above all, even assuming that Article 38 recognises a right within which access to water can be encompassed, such accessibility would still be limited to consumers, or regular users of the water service. This would therefore exclude different categories of individuals, thus not allowing the human right to water to be based on Article 38.

[134] As happens, instead, in Article 12 ICESCR, with which it is therefore not possible, according to the Author, to draw any parallel. For the analysis of Article

However, in consideration of the objective, stated in the same Article, of achieving a high level of health protection throughout the EU context, it would still be possible to interpret Article 35 in the sense of including the guarantee to all preventive interventions, not only of medical nature, therein, including access to water in sufficient quantity and quality (Karbach 125, ff.). As it has been argued in the course of the previous chapters, in fact, it represents a key element in the prevention of risks for health, individual and collective, an objective that clearly falls within the scope of the Article in question (Cappuccini 2013, 734).

Although it is also limited by its application in the law and practice of Member States, access to services of general economic interest (SGEI), guaranteed by Article 36 of the Charter, represents a further potential legal basis for the recognition of the right to water (Shibata Imana 2016, 122).

First of all, as observed by Szyszcak (2014, 970), access to SGEI, which naturally include water services (Karbach 2016, 128-129), is directly connected to the realisation of human dignity as granted by Article 1 of the Charter (Peers 2014), and can be a particularly effective tool in removing discrimination in access to all services, particularly to the detriment of disadvantaged and marginalised individuals or groups[135], thus guaranteeing such services in a universal way. Furthermore, as highlighted by Bartone (2013, 1162), Article 36 has a highly innovative content, setting a limit to the principles of competition and free market, imposing respect for other principles and values as well, including solidarity and

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12 ICESCR as part of the legal basis of the human right to water, please refer to its analysis in the first chapter.

[135] Szyszcak (2014, 970) refers, for instance, to the position of the communities Roma in the EU, and how often these communities and individuals within them are subject to discriminatory treatment, in particular in accessing public services of general interest and welfare benefits.

environmental protection[136].

An element of fundamental importance is then represented by the fact that, although there is no precise definition of this right, not even in Protocol No. 26 to the Treaty of Lisbon[137] (Szyszcak 2014, 972, 974-975; Zemanek 2016, 200)[138], precisely this latter source has nevertheless identified many traits common to all SGEI. In particular, among these traits, one of their shared values is, according to Article 1 of the Protocol, «*their high level quality, safety and affordability, equal treatment and promotion of universal access and user rights*». A language that therefore very closely recalls that of «*availability, quality and accessibility*», used in the international context by General Comment No. 15.

Therefore, even though it does not in itself represent a sufficient instrument to establish individual claims, in particular for their breadth and for the lack of definition (Szyszcak 2014, 981; Zemanek 2016, 202, 206), the right of access to SGEI, in particular according to the conditions defined by Protocol No. 26 to the Lisbon Treaty, undoubtedly represents a valid interpretative tool, in particular if used to assess the correctness of national provisions regulating such services, necessarily including water ones.

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[136] Also due to the consideration, made by Frenz (2009, 1280) that SGEI regard services of fundamental importance for the community as a whole, and cannot therefore just involve mere private interests, but collective ones as well.

[137] Which is expressly dedicated to services of general interest, in order to emphasise their importance.

[138] Justified, argues Szyszcak (2014, 975), perhaps from the necessarily evolutionary consideration of services of general economic interest, which list and number naturally tends to change with the evolution of technology and society.

Finally, as stated above, Article 37 of the Charter sets the objective of protecting the environment and improving its quality, to be integrated into all EU policies in accordance with the principle of sustainable development.

Like the other Solidarity rights examined so far, the content of the Article refers to a principle, and not to an actual individual right to a healthy environment (Frenz 2009, 377). Which, as observed by Morgera & Marìn Duràn (2014, 995 ff., 1002), despite having undoubtedly represented a missed opportunity to insert this right in the Charter, must not however lead to interpreting the provision as merely programmatic, but as a source of a specific duty to protect the environment and natural resources (Frenz 2009, 1298)[139], attributable both to the European Union and to the individual Member States[140].

This allows therefore to reiterate what has been stated above regarding the fundamental value attributed to this objective within the TEU and the TFEU[141], and how it represents a fundamental prerequisite for the realisation of the human right to water, in the form of the protection of water resources.

In the light of these considerations, while taking into account the problems related to the individual rights guaranteed by the EU Charter of Rights, it

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[139] A duty including in particular, according to the Author, compliance with the principles of sustainability and intergenerational responsibility.

[140] See *contra* Lucarelli (2010, 230), which instead argues that Article 37 represents only one objective of Community policies, although certainly relevant and of great importance.

[141] In this regard, it can be observed that in fact Article 37 of the Charter uses a language very similar to that of Article 11 TFEU, while differing from it in establishing a high level of protection and improvement of the environment in the context of a human rights Charter (Morgera & Marìn Duràn 2014, 992-993).

can therefore be argued that it nevertheless offers, in a similar way to the sources of the International Bill of Rights, various legal bases allowing to recognise the human right to water in the European context by means of interpretation (Nicotra 2016, 8; Van Rijswick 2012, 125 ff.; Urbinati 2015, 574 ff.).

2.3. The connection to International Human Rights Law in the EU Charter of Fundamental Rights

In addition to the rights expressly recognized by the EU Charter, analysed in the previous paragraphs, it is also of fundamental importance, for the purposes of this analysis, to understand the existing relationships between the sources of human rights law in the contexts of EU and international law.

These are disciplined, as mentioned, in Articles 52 and 53 of the EU Charter.

In particular Article 52, dedicated to the *Scope of guaranteed rights*, states in its third paragraph that all the rights of the Charter, having content corresponding to the rights guaranteed by the European Convention on Human Rights, must be understood as having the same meaning and scope as the rights of the Convention.

A provision that, therefore, gives ECHR a fundamental importance for understanding the rights within the EU Charter (Bruno 2014, 99), as well as for identifying elements useful for the recognition of the human right to water, as will be seen in the next paragraph.

Thus postponing the analysis of the most relevant Articles of the ECHR, as well as their interpretation by the Strasbourg Court, it can be observed that Article 53, dedicated to the *Level of protection*, establishes that all the human rights guaranteed by the Charter cannot be interpreted restrictively, with respect to the content of rights and their interpretation deriving from international treaties, including the ECHR, to which the EU or all the Member States are party.

The purpose of the Article, which clearly aims to make the EU Charter of Fundamental Rights an additional tool towards the protection and realisation of human rights, both in the international and in the national contexts (Cartabia 2010, 336, 339; De Witte 2014, 1525; Traudt 2017)[142], is of fundamental importance for the present analysis. This in particular in light of the consideration, that all EU Member States are also part of the ICESCR.

Consequently, representing the ICESCR as it was said, the main normative basis for the recognition of the human right to water in the international context, thanks in particular to its interpretation through the General Comment No. 15, clearly shows that this source must necessarily be taken into account in the interpretation of the human rights within the EU Charter (Laskowski 2012, 177).

3. The European Convention on Human Rights as a legal basis within EU law

Having concluded the examination of the main sources of EU primary law, considering its objectives of environmental protection and human rights, on which the examined EU Charter is focused, as well as the importance of international law for their correct interpretation, this paragraph will be focused on the particular source of international law represented by the European Convention on Human Rights.

The ECHR constitutes indeed, as has been pointed out in the course of

[142] Traudt (2017, 3 ff.) in particular observes how this Article establishes a constitutional obligation to conform the interpretation of the EU Charter to international law, which the Author deems as very similar to the principle of *Völkerrechtsfreundlichkeit* expressed in the German Fundamental Law, which will be analysed in the next chapter.

the previous paragraphs, one of the most important sources for the protection of human rights in the European context, and, specifically, could also represent a key development factor for the recognition of the human right to water.

This not only due to the intent, expressed in Article 6.2 TEU, to realise the access of the Union to the Convention[143], but above all to the value that the same Article 6 TEU (third paragraph) and Articles 52 and 53 of the EU Charter attribute to the ECHR and to the rights guaranteed in it. These indeed not only represent general principles of Union's law (Article 6.3 TEU), but also determine the minimum content of the rights with the same purpose and content of the rights guaranteed by the EU Charter (Articles 52 and 53 of the Charter).

[143] A goal that, once implemented, will certainly bring new and interesting developments for the protection of human rights in the context of EU law, in particular by allowing the judicial review of the European Court of Human Rights on EU legislation (Kratimenous 2016, 10-11). Such ambitious objective is, however, still awaiting concrete developments, particularly following the negative opinion of the European Court of Justice (Opinion 2/13 of the Court (Full Court), 18 December 2014) regarding the compatibility of the Draft agreement with the EU treaties. This negative opinion was motivated in particular by the violation of the autonomy and power of judicial review of the same Court of Justice, undermined by the European Court of Human Rights, and for the absence of a clear definition of the relations between the Courts, their jurisdictions and the Member States. For more details on the issue of the EU Access to the ECHR, please refer to Butler (2015, 104 ff.), Horsley (2015, 109 ff.) and Kratimenous (2016).

3.1. The early recognition of the human right to water: the European Water Charter and the European Charter on Water Resources

Given these premises, and before proceeding to the analysis of the ECHR Articles relevant to the recognition of the human right to water, it should be furtherly remembered that the Council of Europe has clearly expressed support and concern for water issues, both under the environmental profile than under the protection of fundamental rights.

It must be indeed remembered that, already in 1968, the Committee of Ministers of the Council of Europe adopted the European Water Charter[144], expressly dedicated to these matters. Although it is not a binding document, this Charter in fact includes twelve principles recognising water as a finite and vulnerable resource, as well as treasure and heritage for humanity, whose management is human balance and environmental necessities. It is therefore particularly interesting to note how this document, although lacking a human rights based approach, is well over 9 years prior to the Mar del Plata Conference of 1977, and also clearly anticipates the several future documents that contributed to the development of the concept of environmental sustainability, in particular in the context of water resources (De Vido 2017, 180 ff.; Testella 2011, 24 ff.)[145].

Confirming such observation, it must be noted that the Committee of Ministers adopted, in 2001, the European Charter on Water

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[144] Committee of Ministers of the Council of Europe, European Water Charter, adopted in Strasbourg, 6 May 1968.

[145] For the analysis of the Mar del Plata Conference, as well as of the other international Conferences on the environment and protection of water resources, please refer to their analysis in the first chapter.

Resources[146], updating the previous one, and further anticipating the future recognition of the human right to water (Brunner *et alii* 2015, 420; De Vido 2017, 180 ff.).

In fact, after recalling the principles already set out in 1968[147], relating to the necessary shared responsibility for protecting water resources and aquatic ecosystems, Article 5 of the Charter expressly proclaims that «*Everyone has the right to a sufficient quantity of water for his or her basic needs*».

This recognition, therefore, anticipates by two years the recognition of General Comment No. 15, also highlighting the need for an integrated and cooperative approach (Articles 6 and 7) at each level of governance (Articles 13-15), respectful of the principles of environmental protection of prevention, precaution and correction at source (Article 8)[148], in order to prioritise the needs of human consumption over agricultural and industrial ones (Articles 9 and 12), guaranteeing as well a sufficient public access to information, participation, and to justice remedies (Articles 16-18).

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[146] Committee of Ministers of the Council of Europe, Recommendation Rec(2001)14 on the European Charter on Water Resources, adopted in Strasbourg, 17 October 2001.

[147] As well as the further developments of international environmental and water law, such as the Agenda 21 adopted after the Rio Convention, or the London Protocol on Water and Health, both analysed in the first chapter.

[148] And, in Article 19, the need to support the economic and environmental costs of water services through their pricing, in order to achieve the sustainable implementation of the human right to water. In this sense, Article 19 of the Charter clearly reflects both the need to consider the economic and environmental value of water, well expressed in the Dublin Principles, examined in the first chapter, as well as the normative content of affordability, examined in the second one.

These two documents therefore represent, despite their soft law nature, a clear sign of recognition of the human right to water and its implications in the context of the Council of Europe and the ECHR.

Support that is reflected, as will be seen in the next paragraph, in the interpretation of the Strasbourg Court of the fundamental rights within the ECHR.

3.2. The protection of water accessibility in the jurisprudence of the Court of Strasbourg

Proceeding with the analysis of the jurisprudence of the Court of Strasbourg on the European Convention on Human Rights, a first element to underline is how this, unlike the International Bill of Rights and the EU Charter of Fundamental Rights, does not include in any way social rights, which, as has been observed, represent the logical legal basis of the human right to water, but only civil and political rights.

In fact, within the Council of Europe, social and economic rights are guaranteed by the (Revised) European Social Charter, adopted in 1996[149]. In particular, the Charter includes various human rights with a content and meaning similar to those of the International Bill of Rights or the EU Charter, such as the right to the highest standard of health (Article 11) or the right to social welfare services (Article 14), and ensure in particular the enjoyment of the social rights of disabled, young persons, migrants and elderly persons (respectively Articles 15, 17, 19 and 23).

Nevertheless, neither of these or other human rights within the Charter has led to the formation of a relevant case law of the European Committee

[149] Council of Europe, European Social Charter (Revised), 3 May 1996.

on Social Rights, responsible for monitoring the implementation of the Charter[150].

These decisions have instead emerged, as mentioned, in the jurisprudence of the Court of Strasbourg, in particular due to the extensive interpretation of the right to life and the right to respect of private and family life, granted respectively by Articles 2 and 8 ECHR (Beyerlin & Marauhn 2011, 399 ff.)[151], as well as, in certain cases, of the prohibition of torture and inhuman and degrading treatments (Article 3)[152] and the right to a fair trial (Article 6).

As observed in fact by Braig (2018, 1 ff.), Articles 2 and 8 represented the basis for the ECtHR jurisprudence in environmental matters, as well as

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[150] It must be furtherly observed that, how underlined by Lukas (2014, 232), a significant difference between the European Court of Human Rights and the European Committee on Social Rights is that the latter cannot receive individual claims, but only appeals presented by organisations or committees, other than the communications of Member States. Such significant difference determines indeed that any eventual complaint regarding the violation of the right to water should in any case regard a gross violation, involving a group of individuals, rather than a single one.

[151] An element of particular interest, highlighted by the Authors, which emerges already in the case of López Ostra v. Spain (Case No. 16798/90, 9 December 1994), is represented by the suitability of pollution to constitute a violation of the rights of the individual even if this does not suffer any damage to his or her health, given that pollution damages in any case his or her wellbeing, guaranteed by Article 8 ECHR.

[152] Like in the Cases Tadevosyan v. Armenia, No. 41698/04, 2 December 2008, and Fedotov v. Russia, No. 5140/02, 25 October 2005, where the Court ruled that the lack of sufficient access to water, toilet facilities, and, in Fedotov, also food, clearly represents an inhuman and degrading treatment under Article 3 of the Convention. On this regard, see Best, Davis & Cook (2017, 186).

the foundation for the decisions concerning the human right to water, even though these do not expressly recognise it. In fact, as mentioned in the introduction of this chapter, the Court has never explicitly recognised the right to water, but has indirectly guaranteed its protection according to criteria of environmental protection and access to water resources[153].

This reasoning is in fact present from the first pilot judgment, Zander v. Sweden (1993)[154], in which the Court recognized an injury to the right to use a domestic well, due to pollution caused by the activities of a landfill near the applicant's home (Braig 2018, 6 ff.; Camerlengo 2017, 27 ff.).

Similar arguments where then followed in the future decisions Tătar v. Romania (2009)[155], Băcilă v. Romania (2010)[156], Dubetska and others v. Ukraine (2010)[157] and Dzemyuk v. Ukraine (2014)[158], all related to the pollution of water resources caused by public works or services or by

[153] Which furtherly highlights what has already been stated above, namely the necessary connection between environmental protection and accessibility to water.

[154] European Court of Human Rights, Case of Zander v. Sweden, No. 14282/88, 25 November 1993.

[155] European Court of Human Rights, Case of Tătar v. Romania, No. 67021/01, 27 January 2009.

[156] European Court of Human Rights, Case of Băcilă v. Romania, No. 19234/04, 30 March 2010.

[157] European Court of Human Rights, Case of Dubetska and Others v. Ukraine, No. 30499/03, 10 February 2011.

[158] European Court of Human Rights, Case of Dzemyuk v. Ukraine, No. 42488/02, 4 September 2014.

mining activities in the vicinity of the applicants' homes.

These judgments represent therefore not only an important evolution in the context of the ECtHR environmental case law[159], but have also affirmed that the impossibility of accessing one's own water resources represents a violation of the ECHR, specifically of the right to private and family life guaranteed by Article 8.

It should be noted, however, that this important case law, which could have led in the future to a clearer recognition of the human right to water in the context of ECHR, and consequently of EU law, was interrupted with the judgment Otgon v. the Republic of Moldova (2016)[160]. The case, which concerned the unfairness of the compensation awarded to the applicant, following a period of illness caused by contaminated tap water, ended with a favourable judgment for the applicant but, as clearly emerges in the dissenting opinion of judge Lemmens, this decision was not sufficiently argued (Palombino 2017, 44 ff.).

In fact, as observed in the dissenting opinion, although it has been well established that Article 8 can, as noted, encompass the protection against disturbances deriving from pollution damage, in particular regarding water supplies, it is however necessary that this invests the person in his or her private life. In other words, while acknowledging the seriousness of the applicant's health injuries, judge Lemmens ruled out that these could not

[159] Braig (2018, 6 ff., 11) stresses in particular that in Tătar v. Romania the Court has for the first time used the principle of precaution, while in Băcilă v. Romania has come to highlight the necessary reversal of the burden of proof regarding pollution damages, which can hardly be demonstrated by the single damaged citizen.

[160] European Court of Human Rights, Case of Otgon v. the Republic of Moldova, No. 22743/07, 25 October 2016.

per se justify such a wide interpretation of Article 8 ECHR.

A criticism that, as noted by Palombino (2017, 44 ff.) Could have perhaps been solved by basing the argument on the right to water, and on the previous jurisprudence of the Court, stating that the violation of this right determines in itself a disturbance of the individual's wellbeing, thus falling within the scope of Article 8.

Nevertheless, although taking into consideration this recent development, it is undeniable that the jurisprudence of the Court of Strasbourg has provided significant case law regarding the implementation of the right to water, highlighting in particular how the protection of water resources represents a necessary prerequisite for the purpose of its realisation.

There is therefore no doubt that the Court's future decisions could still represent an important element for the further development of the human right to water in the European context, and in particular for EU law.

4. The protection of the environment and of water resources in Secundary Law

4.1. The so-called "Water Directives"

Having completed the analysis of the sources of primary EU law and of the European Convention on Human Rights, it is possible to proceed with the analysis of the most relevant EU secondary law sources.

As mentioned, similarly to the Treaties and to the EU Charter on Fundamental Rights, secondary law also does not allow to identify an express recognition or definition of the human right to water within the EU context, even if though including different elements of its regulatory content, particularly in terms of protection of the environment and water resources.

The main source of secondary law is in fact represented by a set of Directives, known as "*Water Directives*". Developed as sporadic and very sectorial interventions in the regulation of water resources starting from the seventies and eighties, this set of Directives did indeed mainly focus on protecting waters from the dangers deriving from pollution. Later, starting from the nineties, the dispositions of these Directives have then started to consider more the necessities related to human consumption, thus arriving at Directive 60/2000/EC[161], also known as Water Framework Directive (WFD) (Gratani 2000, 135 ff.).

Referring to the next paragraph the analysis of the WFD, which represented (and still represents) the main source in the protection of water resources in the EU context, we can briefly mention the most relevant Water Directives. These include, in particular: Directive 91/271/EEC[162], regarding urban waste and water treatment, which was most recently updated with Directive 98/15/EC[163]; Directive 91/676/EEC[164], which regards water protection against nitrates-pollution in agriculture, and was

[161] Directive 2000/60/EC of the European Parliament and the Council of 23 October 2000 establishing a framework for community action in the field of water policy.

[162] Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment.

[163] Commission Directive 98/15/EC of 27 February 1998 amending Council Directive 91/271/EEC.

[164] Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources.

updated several times[165]; Directive 98/83/EC[166] on the quality of water intended for human consumption, known as the *Drinking Water Directive*, also updated several times; Directive 2006/118/EC[167] on the protection of groundwater against pollution and deterioration; Directive 2008/105/EC[168] on environmental quality standards in the field of water policy, which amended several of the previous Directives, including the WFD[169].

As can be seen from the subjects covered by each of these Directives, these represent highly sectorial and specific interventions, regarding the protection of water from damage deriving from the improper treatment of waste water (Directive 91/271/EEC) and from nitrate pollution in agriculture, one of the main sources of water pollution (Directive 91/676/EEC), and imposing well-defined quality requirements both for water intended for human consumption (Directive 98/83/EC) and for every water body (Directive 2008/105/EC). The Water Directives do clearly constitute fundamental sources for the protection of water resources and thus contributing to the implementation of the human right to water, in

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[165] In particular, in addition to the actual amendments, in the 2016-2019 period alone, eight derogations can be counted in the application of the Directive in several Member States.

[166] Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption.

[167] Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater against pollution and deterioration.

[168] Directive 2008/105/EC of the European Parliament and of the Council of 16 December 2008 on environmental quality standards in the field of water policy.

[169] For an in-depth analysis on the content of the Water Directives see Berramdane (2015) and Van Rijswick (2012, 127 ff.).

particular through binding Member States, for the achievement of these objectives, to obligations of prevention, correction and sanction (Berramdane 2015, 25-27). Despite the number and importance of these interventions, however, these have not produced significant results, due to their lack of or incomplete implementation in the Member States. This represents a very frequent issue for the EU environmental legislation as a whole (Gratani 2000, 143), which was caused, in the particular context of Water Directives, by the poor acceptance by the recipients, of inconsistencies between the different contents and the difficulty of understanding and realising the synergy existing between all the Directives (Boeuf & Fritsch 2016, 2).

A problem of not little account, given the importance of harmoniously protecting water resources throughout the Union, which has therefore highlighted the need for a broader and more integrated approach, capable not only of incorporating the previous evolution of Water Directives, but to fully achieve their objectives (Voulvolis, Arpon & Giakoumis 2017, 359).

4.2. The holistic approach of the Water Framework Directive

The need for such a systematic reform intervention found satisfaction in the aforementioned Water Framework Directive, which aimed precisely at introducing a systematic and holistic approach into the existing water legislation in EU law, which incorporated all the elements that emerged up to that point, considering water «*not* [as] *a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such*»[170], for which an all-encompassing perspective is needed (Scheuer 2000, 1102; Voulvoulis, Arpon, Giakoumis 2017, 359 ff.).

[170] Water Framework Directive, Recital 1.

In particular, as noted by Boeuf & Fritsch (2016) and Van Rijswick (2012, 135 ff.), the main elements of innovation consist in both substantial and procedural tools. These include: the consideration of water systems as open systems to coordinate, not confined to individual realities (Article 3); the introduction of planning and monitoring programs on the management of water basins; the necessity of sufficient forms of information and public participation (Article 14); the introduction of elements of assessments on the economic and environmental costs of water management (Article 9); the integration of water policies in all related subjects, such as forestry or agriculture.

All elements aimed at achieving the main purpose of the Directive, namely to reach a «*good status*» of all water bodies by 2015 (Article 4), defining in its Annex V the quality requirements that must be met in the different ecosystems for this purpose.

An extremely ambitious goal therefore, that, however, has not yet been realised, given that the implementation of the Directive in the Member States has encountered considerable difficulties, similarly, if not superior, to the previous Water Directives. In fact, the water surfaces that have reached the “good status" do not exceed 53%, consequently representing a paltry improvement compared to the year 2000 (Voulvoulis, Arpon & Giakoumis 2017, 359)[171].

[171] As regards in particular the German and Italian situation, Laskowski (2018, 374 ff.) observed that the current status of the waters in the German context is not at all good, as evidenced also by the EU Environmental Implementation Review 2019 relating to Germany. As shown on page 18 of the Review, 65% of river water bodies in Germany are indeed polluted due to agriculture, and only 10% of surface water bodies can be considered in good condition, according to the standards of the Water Framework Directive. The same can be said of the Italian context, given that the related Environmental Implementation Review shows, on page 24, several shortcomings in the implementation of Water Directives as a

In particular, among the main causes of the missing implementation, one of the most relevant is represented by the lack of commitment by the Member States to substantially reform the national legislation, above all by delaying the necessary national reforms (Berramdane 2015, 27), as well as maintaining the existing provisions unchanged, if deemed from the single State sufficient for the achievement of the objectives of the WFD (Voulvolis, Arpon & Giakoumis 2017, 361).

Moreover, in most cases the national implementations ignored or underestimated of a systematic and multilevel approach, both in the involvement of local levels (Kastens & Newig 2007) and in the cooperation between the different Member States (Moss 2004, 85 ff.)[172].

These problems therefore highlight, in order to achieve the objectives of the Directive, how its objectives and overall goals must be further defined, in particular emphasising, as a key element, the need for Member States to adopt a more systematic approach (Voulvolis, Arpon & Giakoumis 2017, 363-364).

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whole. In particular, these regard the Drinking Water Directive, both for serious arsenic and fluoride pollution problems, as well as for serious leakage issues, mostly affecting southern cities (with the city of Cagliari reaching that highest national water leakage rate, in 2012, of 58.5%). For further details, both Environmental Implementations Reviews are available at ec.europa.eu/environment.

[172] Because of these factors, the Water Framework Directive presents therefore an extremely high number of infringement procedures, both for the delay and the gaps in its implementation (Berramdane 2015, 27-28). On this regard Onida (2005, 1140, 1142) observes how Italy is, among the Member States, the one with the highest number of infringement procedures for environmental directives, which largely concern the transposition of the WFD.

4.3. The normative content of the human right to water in the Water Directives

From the analysis of Water Directives, and in particular of the Water Framework Directive, the intent of the EU secondary law to effectively protect water resources, though with the aforementioned difficulties in implementation, clearly emerges. It must be understood, however, whether these also allow to identify, even partially, the elements of the normative content of the human right to water, as defined by General Comment No. 15.

From this point of view, in light of the objective, pursued by all the Directives under consideration, of protecting water as a fundamental natural resource, it can certainly be affirmed that Water Directives offer sufficient elements in order to at least protect the qualitative profiles of the human right to water, considering the aforementioned inextricable bond between their realisation and an adequate level of environmental protection.

Moreover, according to Van Rijswick (2012, 155) and Shibata Imana (2016, 87-88), the contents of accessibility, availability, and affordability may derive in whole or in part from the purposes of the Directive, expressed in its Article 1 and, as regards the affordability requirement, from Article 9, which allows, argues the Author, to deem the normative framework as satisfactory, as regards these requirements[173].

[173] It must however be emphasised that the Author interprets in a very broad sense the provisions of the WFD. For instance, in relation to the element of affordability, the Author (like Testella 2011, 35) considers the provisions contained in Article 9 of the WFD, dedicated to the principle of cost recovery, to be sufficient. However, as underlined in the analysis of the normative element of Affordability, it represents a link between the elements of environmental, economic and social sustainability. It balances indeed between the considerations

Van Rijswick (2012, 156-158), notes however that, although the possible broad interpretation of the Water Directives, and in particular of the WFD, allowing to partially include these normative contents of the human right to water, the same sources completely lack of elements for the purpose of identifying a full protection of universal accessibility.

The Directives in particular do not contain any reference to particularly vulnerable categories of individuals needing, as illustrated in the previous chapters, specific protection provisions and tools for the realisation of their human right to water, thus ignoring the social aspects of water accessibility (Caporale 2017, 338). The procedural guarantees provided by the Directives are equally insufficient, especially in terms of information and participation, both because these instruments must be implemented by Member States, thus facing the aforementioned difficulties, and because this complex regulatory framework is in any case too difficult to understand for the common citizen, who therefore encounters considerable difficulties in accessing information and participatory tools (where they exist).

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on the economic value of water and the need to recover the economic and environmental costs of its management, though considering that costs for accessing water must not be excessive, which would exclude from accessibility the most vulnerable parts of society. Article 9 WFD, however, only establishes that «*Member States* may [...] *have regard to the social, environmental and economic effects of the recovery as well as the geographic and climatic conditions of the region or regions affected*», thus placing the considerations related to affordability as a choice given to the individual States. Although it can undoubtedly be argued that this provision should be interpreted in full compliance with the international law sources that defined the right to water, according to what has been said in the analysis of Article 53 of the EU Charter, the absence of a definite obligation strongly limits the full implementation of all the elements of the normative content of the right to water.

It must therefore be concluded that the provisions contained in the Water Directives, although partially allowing to identify some of the elements of the normative content of the human right to water, do not currently represent a sufficient source to define it within the secondary EU law (Thielbörger 2014, 32 ff.), thus emphasising the need of its reform not only for the purposes, already highlighted, of environmental protection and water resources, but above all to introduce in them a human rights approach, based on the explicit recognition of the right to water.

5. Signs of change in the EU context: the Right2Water initiative and its follow-up

5.1. The European Citizens' Initiative *Right2Water*

As mentioned in the introduction of this chapter, due to the absence of a proper recognition (even through interpretation) of the right to water within EU law, the goal of filling such gap has been pursued by a European Citizens' Initiative (ECI) called "*Water and sanitation are a human right! Water is a public good, not a commodity*!", also known as Right2Water, presented by its organisers on December 20, 2013.

The initiative in particular invited the Commission «*to propose legislation implementing the human right to water and sanitation, as recognized by the United Nations, and promoting the provision of water and sanitation as essential public services for all*», and urging that:

- «The EU institutions and Member States be obliged to ensure that all inhabitants enjoy the right to water and sanitation;

- Water supply and management of water resources not be subject to 'internal market rules' and that water services be excluded from liberalization;[174]
- The EU increases its efforts to achieve universal access to water and sanitation».

Introduced by the Lisbon Treaty in Articles 10.4 TEU and 24 TFEU in order to increase democratic participation in the European Union, and then regulated by Regulation 211/2011/EU[175], the ECI instrument allows one million EU citizens, belonging to at least seven Member States, to request legislative intervention from the EU Commission.

The Right2Water initiative, in particular, represented the first ever ECI to be successfully submitted to the Commission, having met the requirements, and still represents the most successful ECI, out of all the fifty presented since the introduction of this instrument[176]. The initiative

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[174] In this respect, Bieler (2017, 306-307, 318) observes that the ECI Right2Water mainly represents a reaction against the processes of liberalisation and privatisation of water services.

[175] Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative.

[176] On this regard, it can also be noted that to this date, only other three initiatives managed to meet the requirements set by Regulation No. 211/2011, while the others were either not accepted or recalled by their organisers. The second successful ECI was *One of Us*, regarding the recognition of human dignity to human embryos in order to introduce the prohibition of research on embryos and staminal cells, followed by *Stop Vivisection*, which has been however considered not sufficiently sustained by the promoters. More recently, in 2018, the initiative *Ban Glyphosate and protect people and the environment from toxic pesticides*, received a response from the Commission, which however was completely negative regarding its main objective, that is the total prohibition of Glyphosate. All information regarding these ECIs, as well as their follow-ups, may be found

has in fact collected almost 1.9 million signatures in thirteen countries[177], with the support, both financial and contributing to publicising it, of various organisations and associations, in particular the European Public Service Unions (EPSU), the European Environmental Bureau and the European Anti-Poverty Network and Social Platform (Bieler 2017, 305, 309).

However, despite this clear support, the Commission's response[178] was not satisfactory, even though it recognised the importance of the right to water and its protection (Bieler 2017, 312; Castellucci 2015, 13; Faval 2016, 114 ff.). On the one hand, the Commission did indeed acknowledge the recognition of the right to water by the UN General Assembly in 2010, and recalled the different sources of law EU that can represent a legal basis of the law in the EU context, which have been analysed throughout this chapter.

On the other, however, the Commission has limited itself to recalling the EU commitment in protecting water resources through the Water Directives, illustrating the progresses already made in that direction, and committing itself to improve the existing provisions. Without, therefore, including a concrete recognition of the right to water or even ensuring the introduction of a more human rights based approach in the future Directives.

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on the official ECI website: ec.europa.eu/citizens-initiative/public/initiatives/successful.

[177] Austria, Belgium, Finland, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, the Netherlands, Slovakia, Slovenia. In particular, Germany was the main supporter, with almost 1.2 million signatures collected.

[178] European Commission, Communication COM (2014) 177 final, on the European Citizens' Initiative "Water and sanitation are a human right! Water is a public good, not a commodity! ", Brussels, 19 March 2014.

This lack of concrete responses by the Commission towards the realisation of the objectives of the Initiative has spawned the reaction of two other EU institutions, namely the European Economic and Social Committee (EESC)[179] and the European Parliament[180], which adopted their own conclusions regarding ECI *Right2Water*, in direct response to the Commission.

Both the Parliament and the EESC have particularly strongly criticised the Commission's reaction to the ECI, considering it to be inadequate and unambitious in achieving a goal of this importance, supported by a popular initiative so widely supported (Parliament Resolution, § 6; EESC Opinion, § 4.4)[181]. Both opinions also invited the Commission to introduce an express recognition of the human right to water in EU law, in particular by amending the Water Framework Directive (Parliament Resolution, § 10; EESC Opinion, § 1.8). Moreover, the Parliament also supported (Parliament Resolution, § 10), as also argued by Van Rijswick (2012, 158 ff.), the possibility to include such recognition in the EU Charter of Fundamental Rights as well.

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[179] European Economic and Social Committee, Opinion on the Commission Communication in response to the Right2Water initiative, Plenary session meeting on 15 October 2014.

[180] European Parliament, Resolution (2014/2239 (INI)) on the follow-up to the European Citizens' Right2Water Initiative, 8 September 2015.

[181] The Parliament also underlined, in § 11 of its Resolution, how the lack of a concrete commitment to give a proper follow-up to an ECI with such great support presents the strong risk of undermining the trust of EU citizens, both in relation to the EU institutions and in the usefulness of the ECI instrument as an effective means of democratic participation. On this regard, see also Faval (2016, 111 ff.).

5.2. The legislative follow-up: the reform proposal of the Drinking Water Directive

Despite these interventions of the EU Parliament and the European Economic and Social Committee, the EU regulatory framework has however remained unchanged to this day. It still presents in fact neither an explicit recognition of the human right to water, nor the introduction, in the already existing Directives, of a more human rights based approach that could impose an interpretation more oriented to the realisation of the right.

Observing the legislative actions undertaken as a follow-up to the Right2Water initiative, it can indeed be noted that the only reform that has been adopted so far is represented by a partial modification intervention on the Drinking Water Directive[182]. The reform, enacted in 2015, has in fact amended the Annexes II and III of the Directive, with the aim of increasing the processes of monitoring the status of water, as well as of adapting the quality standards required by the Directive to those indicated by the guidelines of the World Health Organisation.

An intervention that certainly contributed to further implementing the qualitative and information requirements (through the monitoring programs) that are part of the normative content of the human right to water, but which does however not represent a significant step forward compared to the pre-existing provisions.

More recently, the Commission has presented, as part of the initiatives aimed to give a legislative follow-up to the Right2Water

[182] Commission Directive (EU) 2015/1787 of 6 October 2015 amending Annexes II and III to Council Directive 98/83/EC on the quality of water intended for human consumption.

Initiative, a further proposal to reform the Directive on drinking water[183]. This proposal, still under discussion, has been examined and amended by the Parliament on 28 March 2019[184], clearly distinguishes itself from the previous intervention by clearly showing an approach based on the protection of water in its human right dimension (Salvemini 2019, 14).

In fact, by examining the text of the Proposal, numerous and repeated references, mostly introduced by Parliament's amendments, were made to the need to guarantee universal access to water in a human rights perspective.

First of all, the Proposal, as amended by the Parliament, clearly stated its intent to achieve the goal of «*provide universal access to* [...] *water for all in the Union*»[185], also referring to the recognition of Human right to water by the General Assembly in 2010, which requires that «*access to clean, potable water should not be restricted due to unaffordability by the end user*»[186]. Under this particular aspect, Recital 17 and Article 13.1 of the also provided that, even considering the principle of cost recovery for environmental protection purposes[187], the necessity to «*have regard to the*

[183] European Commission, Proposal COM(2017) 753 final, for a Directive of the European Parliament and of the Council on the quality of water intended for human consumption (recast), Brussels, 1 February 2018.

[184] European Parliament, Legislative resolution of 28 March 2019 on the proposal for a directive of the European Parliament and of the Council on the quality of water intended for human consumption (recast), Strasbourg, 28 March 2019.

[185] Recital 1 and Article 1, as amended by the Parliament.

[186] Recital 2a, introduced by the Parliament.

[187] Under this aspect, the Recitals 4, 4a and 4b (respectively amended and introduced by the Parliament) make reference to the need to implement the Sustainable Development Goal No. 6 with an approach that integrates

economic and social conditions of the population and therefore adopt social tariffs or having measures safeguarding populations at a socio-economic disadvantage». Recital 18 also provided, together with Article 13.2, that, in order to protect minorities such as Roma and disadvantaged individuals such as migrants, refugees and homeless, that all Member States must provide for the introduction of appropriate measures to guarantee access to water for such groups.

Finally, Recitals 19 and 20, together with Article 14, established that, in order to make users of water services more aware of the importance of water resources, and making them responsible for their sustainable use, information tools that exploit new technologies must be introduced, providing in a simple and more accessible way the data relevant to the user, listed in Annex IV of the Proposal.

Therefore, while not including an express recognition of the human right to water as defined and described in General Comment No. 15, the Directive Proposal, especially following the amendments introduced by the EU Parliament, was configured as a significant evolution of EU law, taking it in the right direction towards the realisation of the human right to water in the European context. In fact, the Proposal presented and included most of the normative elements of the human right, which the previous Water Directives had ignored, above all, as has been shown, in terms of the protection of the most vulnerable and disadvantaged parts of the population, which represents the fulcrum of the human right to water as social human right.

This reform proposal, however, representing an element of strong innovation in the context examined so far, especially with a view to its

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environmental protection and human rights. The same Recitals also recall how the EU Parliament has already supported the recognition of the right to water, most recently in the aforementioned follow-up to the ECI Right2Water.

future implementations in the Member States, has subsequently seen part of this innovative aspect overturned, in particular for the removal of several references regarding the protection of social rights and disadvantaged situations.

In the latest version of the text, dating back to 24 February 2020[188], these references are indeed much more limited, if not only briefly mentioned.

The first of them, contained in the fourth Recital of the Proposal, is represented by the recognition of the importance of the ECI Right2Water and the need to implement the commitment under the sixth Sustainable Development Goal of the UN Agenda 2030[189], especially for the most vulnerable and marginalised parts of the population, and in particular, as highlighted by Recital 31, to «*refugees, nomadic communities, homeless people and minority cultures such as Rome and Travelers, whether sedentary or not*». Also for this purpose, Article 16 of the current text of the Proposal, entitled «*Access to water intended for human consumption*», provides that Member States shall:

a) identify people without access, or with limited access, to water intended for human consumption, including vulnerable and marginalized groups, and reasons for lack of access;

b) assess possibilities to improve access for those people;

c) inform those people about possibilities of connecting to the distribution network or about alternative means to have access to such water;

[188] Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on the quality of water intended for human consumption (recast) - Political agreement, Brussels, 24 February 2020

[189] Also recalled in the following Recitals 29 and 30

d) take measures that they consider necessary and appropriate to ensure access to water for vulnerable and marginalized groups.

The current text of the Proposal to reform the Directive on water intended for human consumption, therefore, while not completely losing its capacity for innovation, especially in comparison with the current EU legislation, nevertheless presents itself as an intervention of lesser impact than that envisaged by its previous versions.

In the event of definitive approval of the current text, it will nevertheless be of extreme importance and interest to observe its scope and implementation in the Member States, in order to evaluate its effectiveness in order to give full realisation, in the European context, the human right to water.

CHAPTER IV
THE IMPLEMENTATION OF THE HUMAN RIGHT TO WATER IN THE NATIONAL CONTEXT: ITALY AND GERMANY IN COMPARISON

Introduction

The last context of analysis, after the international and European ones, subject of the previous chapters, is represented by national law, and in particular by the comparison between Germany and Italy in the implementation of the human right to water.

With regard to these countries, it must first be stated that, like most of the developed, western Countries (Bernal 2015, 278-279), an explicit recognition of the right to water is completely absent, in particular at the constitutional level[190].

The right to water within national constitutions tends indeed to be considered as implicit within the constitutional text, deductible from the already existing provisions, even in the lack of an express jurisprudence in this sense (Louvin 2016, 129 ff.). Moreover, in particularly in Italy and Germany, there is a strong tendency to consider the right to water as part of the environmental macro-area only (Armeni 2008, 2; Palombino 2017,

[190] As instead is the case in a large number of developing countries, particularly in South America. On this point Sileoni (2016, 4) notes, however, that the provisions of these Constitutions, while recognising the right or imposing that the State must ensure access to water, turned out to be largely purely programmatic, without having produced any significant result. For an in-depth analysis of the protection of the right to water in the South American context please refer to D'Aloia (2016a), Iacometti (2017) and Louvin (2018, 224).

8-9). Factors that both have contributed to the lack of proper recognition of the right to access water in most countries (Louvin 2017, 521; Randazzo 2017, 25 ff.), including Germany and Italy.

While considering these premises, it is nevertheless appropriate to examine the constitutional text of both countries, to which the first paragraph of the chapter will be dedicated. In particular, the bill of rights within both constitutions will be examined, in order to identify within them which, among the human rights guaranteed, may represent a legal basis for the right to water, in a similar way to what was done in the supranational context.

In particular, as regards the German context, it will be evaluated whether the recognition in Article 20a of the *Grundgesetz* of the protection of the *Lebensgrundlagen*[191] could represent a suitable basis for the purpose of such recognition, and whether a similar principle can be found within the Italian constitutional context, also considering its jurisprudence.

Furthermore, among the *Grundrechte* present in the German context, the right to an existential minimum, in particular in the light of its most recent jurisprudential developments, assumes considerable importance for the purposes of the analysis of this chapter. The second paragraph will therefore focus on this particular fundamental right, and on its ability to represent a valid foundation for the right to access to water, especially in light of the shortcomings of the welfare legislation, which also allow to operate a parallel with the Italian context.

However, since both contexts do not present an explicit recognition of the right to water, as aforementioned, nor has it has been derived through jurisprudential interpretation, a key aspect is to understand, as has been done with the European context, whether this recognition may or not

[191] Which could be translated literally as "*natural foundations of life*".

be based on supranational law sources.

This profile, representing the subject of the third paragraph, reveals one of the substantial differences between the two constitutional systems, namely the different intensity with which international law influences the national one. While on the one hand Italy presents a substantially dualistic system, which does not allow for an extensive interpretation of the international treaty law in the sense of giving it direct effect at the national level, on the other the German context embraces the opposite approach.

The principle of the *Völkerrechtsfreundlichkeit*, incorporated in the German Basic Law, imposes indeed an interpretation conforming with the obligations of international law, which allows, as will be seen, to derive from this interpretation specific duties towards the realisation of the right to water.

Of course, a common requirement for both countries is the implementation of European Union law, which furtherly highlights the importance of greater implementation of the right to water in the EU context.

The last paragraph of the chapter will instead be devoted to brief remarks to the sub-State level that, like the supranational one, allows to identify relevant differences between the two countries. These differences, though mainly regarding the role of local authorities and the management of water services, do indeed indirectly impact on the concrete implementation of the human right to water, in particular under the profiles of information and participation at the local level.

Having outlined the topics that will be examined in relation to the German and Italian national contexts, it is therefore possible to proceed with the first part of the analysis, relating to the bill of rights within both Constitutions.

1. The legal basis within the bill of rights of the Italian and German Constitutions

1.1. The protection of human dignity, life and health

Examining the bill of rights of both constitutions it is possible to identify different principles and human rights that can undoubtedly constitute a first basis for the protection of the human right to water in both constitutional contexts, even though they have never represented, as aforementioned, the foundation of its concrete recognition.

In this regard, the protection of human dignity naturally assumes a considerable importance. Starting from the German context, human dignity is recognised as a fundamental value by Article 1 of the *Grundgesetz*, which also considers all fundamental human rights as inviolable and inalienable. In this way, the concept of *Menschenwürde* represents the interpretative basis of all the constitutional charter, while the protection of human rights becomes a main goal of every law and policy (Böckenförde 1991, 159 ff.; Denninger 1998, 14). It is at the same time an absolute value[192] and «*supreme objective of all power and law*» (Bartolomei 2000, 8), and expresses, like Article 2 of the Italian Constitution, the concept of human being as owner of intangible rights belonging to his or her society[193]. This is an evident stance token by the German Constitution, aimed at clearly differentiating itself completely from the totalitarian era, replacing the dictatorship with an order based on the values of freedom, democracy and equality (Bartolomei 2000, 7 ff.).

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[192] As declared several times by the *Bundesverfassungsgericht* (BVerfGe). See in particular the Judgments No. 27, 1, No. 6, 32 and No. 52, 168.

[193] BVerfGe, Judgment No. 12, 51.

In connection to the value of human dignity, the first paragraph of Article 20 of the *Grundgesetz* is also of central importance. Alongside with the principles of democracy, the rule of law and federalism, it indeed lays down the principle of the welfare state, which requires the legislator to «*settle social conflicts in order to achieve a correct social order*»[194]. This principle, interpreted jointly with the protection of *Menschenwürde*, has indeed allowed the constitutional jurisprudence to elaborate the human right to an *Existenzminium* or "existential minimum", which will be analysed in the following paragraph.

Finally, among the fundamental rights guaranteed by the *Grundgesetz*, the right to life and integrity of the person, guaranteed by Article 2.2 of the Basic Law, could be considered as a potential normative basis of the human right to water in the German context. In fact, even considering the limits of a recognition solely based on the right to life[195], it was nonetheless considered by the literature (Laskowski 2010, 905; Mager 2018, 62; Thielbörger 2014, 10) as a valid basis for the recognition of the right to access to water, even if limited to the minimum quantities necessary for one's own existence.

Considering instead the Italian context, it also recognises a fundamental value to the protection of human dignity and of human rights assumes, in the light of the recognition of «*the inviolable rights of the person, as an individual and in the social groups where human personality is expressed*» in Article 2, paired with the recognition of «*equal social dignity»* of all citizens in Article 3.

From the combined provisions of these Articles, in fact, an essential and indissoluble link emerges between the guarantee of fundamental rights and

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[194] BVerfGe, Judgment No. 22, 180.

[195] Please refer, on this regard, to the analysis made in the first chapter of the UDHR and of the ICCPR.

freedoms, the full development of the person and the realisation of equality between all human beings, representing the basis of solidarity and democratic society. In other words, all the freedoms guaranteed by the Italian Constitution must necessarily be understood as a tool for the improvement of the human person, in a context where the welfare state promotes the realisation of each individual (Poggi 2019, 179, 182).

For these reasons, Articles 2 and 3 of the Italian Constitution are in fact considered by several Authors (Crismani 2016, 11; Frosini 2010, 862; Nicotra 2016, 17 ff.; Staiano 2011, 2) as the main foundation of the human right to water. This in particular due to the "open" nature of Article 2, which allowed the recognition of new human rights, further than those expressly protected by the Constitutional Charter (Barbera 2004, 21 ff.)[196], and could therefore represent the basis for the future recognition of the human right to water. Furthermore, as the second paragraph of Article 3 states the duty of the Republic to remove any obstacle to the «*full development of the human person*», Authors like Vimercati (2017, 243) argue that this duty cannot be considered fully fulfilled if access to primary or fundamental assets for the development of the person, such as water, is not guaranteed.

Moreover, the aforementioned Authors (Crismani 2016, 11; Frosini 2010, 862; Nicotra 2016, 17 ff.; Staiano 2011, 2) also identify a possible basis of recognition in the protection of the environment and natural resources[197], which will be examined in the following section, as well as in the human right to health, which Article 32 of the Constitution recognises as

[196] Starting from Judgment No. 561 of 1987 of the Italian Constitutional Court, related to the right of sexual freedom.

[197] Thus confirming what observed in the introduction of this chapter.

fundamental[198]. In particular, the right to health necessarily includes the individual claim to living conditions that do not jeopardise the psychological physical well-being of the individual[199], although, as noted by Modugno (1995, 41, 56), the right to health is not in itself a subjective right that can be directly activated.

However, as mentioned, despite these potential legal bases, also supported by various Authors, there has never been an explicit recognition of the right to water on the basis of the aforementioned Articles, neither in Germany nor in Italy.

In the light of this lack of recognition, it must therefore be understood whether at the constitutional level at least a sufficient protection of natural resources can be found, and whether this may or may not represent a basis for the recognition of the human right to water in the German and/or Italian context.

1.2. The protection of the environment: two "first generation" Constitutions

From the perspective of the protection of the environment and of natural resources, a first, necessary observation is that the German *Grundgesetz*, at least in its original text[200], and the Italian *Costituzione*

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[198] There are also Authors such as Giorgis & Dealessi (2010, 6) who identify a further source in Article 41 of the Italian Constitution, which imposes that economic activities cannot take place in contrast with human dignity and general utility. Therefore, according to the Authors, this would impose an approach based on human rights and on the respect of dignity, even in the case of entirely private water managements.

[199] Italian Constitutional Court, Judgment No. 218 of 1994.

[200] However, it is interesting to note that already in 1974, with a clear advance compared to many other constitutions, the constitution of the German Democratic

both represent a classic example of the so-called "first generation" Constitutions (Nespor & Caravita di Toritto 2009, 104). That is a constitutional text that does not mention in any way the environment or its protection between the tasks of the State or local authorities.

This will happen only with the "third generation" Constitutions, adopted after the 1970s, undoubtedly under the influence of developments in environmental law, starting with the 1972 Stockholm Conference. In these Constitutions the environment is expressly foreseen and protected, albeit in different forms: as an obligation of the State to protect it, as a real individual or collective right or, finally, as an integral part of human rights in general[201].

However, in the adaptation process to the international and European environmental protection developments, both countries have recognised at the constitutional level the protection of the environment and natural resources, through jurisprudence or an express modification of the constitutional charter.

The interpretative solution was in particular adopted in the Italian context, where the doctrine and the constitutional jurisprudence extended the protection recognised by Articles 9, paragraph 2, and 32, paragraph 1, of the Constitution, related respectively to the «*protection of the*

Republic provided in the second paragraph of Article 15 that «*In the interest of the well-being of citizens, the State and society are concerned to protect the nature. The cleaning of water and air, as well as the protection of fauna and flora and landscape beauty of the homeland, must be guaranteed by the competent bodies, as property of every citizen*».

[201] It is interesting to note in this regard how the third-generation Constitutions can be related to the so-called "third-generation human rights", which include the principles of protecting natural resources, inter-generational equity and sustainable development. On this regard, see Vasak (1977, 2).

landscape» and, as mentioned above, of «*health as a fundamental right of the individual and as collective interest*».

As regards the protection of landscape, its original meaning was to be understood as a protection of the "natural beauty" of the landscape itself, from a purely aesthetic point of view, following the approach of the pre-republican legislator (Cecchetti 2006, 218; Nespor & Caravita di Toritto 2009, 105).

The overcoming of this initial interpretation, operated by the Italian Constitutional Court, took place starting from the seventies and eighties, hand in hand with the developments made in the context of environmental law in international and European law[202]. If previously the Court had indeed followed the "historical" interpretation of landscape protection[203], starting from the eighties this protection was extended to the territory as such, as a fundamental interest of the community[204].

It was instead the United Sections of the Court of Cassation, with Judgment No. 5172 of 1979, to provide the first interpretation of the right to health as a right to a healthy environment. The Court indeed overcome the previous conception of health, understood as simple physical health

[202] To the point that, in the first decisions of the *Corte Costituzionale* on environmental matters, the same principles elaborated by the international community may be found, thus following the Stockholm Conference, as well as the European community and its first environmental action programs. On this regard please refer to Cecchetti (2000, 9 ff.).

[203] It may be recalled, in this regard, the Judgment No. 141 of 1972, which follows the setting of the previous No. 65 of 1959, No. 59 of 1965 and No. 50 of 1967 (Cecchetti 2000, 9 ff.).

[204] In particular starting from Judgments No. 239 of 1982 and No. 151 of 1986.

and absence of disease[205], considering also the social aspects of the human right to health. The United Sections acknowledged, in fact, that this must necessarily consider the participation of human beings in social life and in the various communities to which they belong (family, work, study, etc.). Consequently, the activities carried out in all these contexts must be carried out in a way that is not detrimental but rather conducive to health: namely, a healthy environment[206]. By accepting this evolution, the *Corte Costituzionale* came then to affirm, with its Judgment No. 210 of 1987, the current unitary concept of environmental protection, that is to say, the understanding that all the elements that make up the environment must be protected not only by themselves, but also jointly, precisely as components of a complex system where each natural resource is capable of influencing the other, and whose preservation and improvement are linked together (Pozzo 2004, 12 ff.).

Thanks to this jurisprudential evolution, it can therefore be affirmed with certainty that environmental protection fully falls within the values and objectives included in the Italian Constitution. As pointed out by Briganti (2017, 378) this undoubtedly also includes the protection of natural resources, as they are essential both for human life and health, and for the objectives of environmental protection as a whole (Frosini 2010, 862). However, concerns remain about the effectiveness of this protection (Briganti 2017, 379-380), in particular in consideration of the fact that the right to health does not take shape in itself as a subjective right, and cannot be directly activated, as already observed. In other words, the protection of the environment and natural resources is mostly a collective interest,

[205] As it was understood also in some of the rulings of the Constitutional Court, in particular in Judgments No. 116 of 1967 and No. 112 of 1975.

[206] For a more detailed analysis, please see Simoncini & Longo (2006, 661 ff.) and Nespor & Caravita di Toritto (2009, 107 ff.).

although it is of course possible to take legal action to obtain compensation, or preventive or inhibitory measures, if the environmental risk also constitutes a serious health risk (Modugno 1994, 56).

Despite these observations, it must nevertheless be remembered that the Italian Constitutional Court, in addition to recognising the fundamental importance of protecting the environment and natural resources as a whole, has also paid particular attention to the water resource. While not recognising, as has been said, a universal right to water, the Court has in fact clearly affirmed the need to protect water (Camerlengo 2017, 36; Sileoni 2016, 14 ff.), considering it as a scarce resource to preserve in the interest of the community[207], representing a «*primary good for human life*»[208] and a «*good belonging to everybody*»[209].

Therefore, even in consideration of the aforementioned limits, that do not allow to found a human right to water, it is undeniable that the protection of natural resources, and in particular of water, are among the primary interests of constitutional protection in the Italian context.

1.3. The protection of the *Lebensgrundlagen* in the German *Grundgesetz*

Considering instead the German context, the substantial difference with the Italian one is represented by the inclusion, in the German Basic Law, of Article 20a, which was added in 1994 and is related to the express protection of the *Natürliche Lebensgrundlagen*, translatable as "*natural foundations of life*" (instead of a simpler "*natural resources*").

[207] Judgment No. 419 of 1996.

[208] Judgment No. 259 of 1996.

[209] Judgment No. 273 of 2010.

The Article in particular states that:

> «*The State protects, thereby assuming its responsibility towards future generations, the natural resources of life through the exercise of legislative power, within the framework of the constitutional order, and of the executive and judicial powers, in accordance with the law*»

This duty of protection has assumed such a fundamental role among the main tasks of the State, to the point that, to enhance its centrality, Murswiek (1995, 31) has placed it at the very basis of its legitimacy, stating that «*The legitimation of the State depends on from the fact that it carries out its task* [of environmental protection and natural resources] *in an adequate manner*».

As can be seen from the text of the Article, this duty of protection takes on a transversal value, involving all the powers of the State at every level, thus entailing long-term obligations and programmatic evaluations, also for the purpose, explicitly stated in the Article, of protecting the interests of future generations. This therefore requires particular attention in the exploitation of resources, not only for non-renewable resources, of which parsimonious use is required, but also for renewable ones, for which the regenerative period must be taken into account (Laskowski 2010, 440 ff., 694). The latter is indeed the case of water, which, despite being a renewable resource, is subject to long regeneration times and tends to be scarce, which entails consequent obligations of careful surveillance by the State.

If therefore it is evident that the protection of natural resources has a central role, it is possible to assess whether this protection can be extended to the point of including the right to access these resources, including water. This also in consideration of the fact that in the main source of water law in the German context, the *Gesetz zur Ordnung des Wasserhaushalts*, better known as *Wasserhaushaltsgesetz* or WHG,

following its substantial reform of 2010, expressly includes water among the *Lebensgrundlagen* of human beings in its § 1, considering it as such as one of the objectives of protection of the whole law, together with water resources as an integral part of the natural balance, living space for animals and plants, and as a consumer good[210].

However, even though this relevant acknowledgment, the answer to the question, whether this may include access to water as a human right, is necessarily negative.

First, Article 20a does not concern an individual's right, but a duty of the State (and of all public bodies) to protect the *Lebensgrundlagen* (Meyerholt 2010, 38, 32; Murswiek 1996a, 223; Murswiek 1996b, 656). This also in consideration of the importance that this duty assumes, which must not be considered as a merely programmatic norm, but immediately binding law for the legislator (Gassner 2011, 321, 322; Murswiek 1996b, 656).

Furthermore, although the protection of water resources is deemed as necessary for their protection, the *Lebensgrundlagen* do not have a univocal conception, and do not include individual natural resources *per se*, but are rather considered as a whole as a foundation for human life (Blasberg 2008, 49). A further problem is then represented by the absence of indications on the limits and on the modalities of the realisation of such obligations, which would not in any case allow to invoke it in case of their violation, if not in case of acts that are manifestly contrary to the environmental protectiongoals (Blasberg 2008, 52, 56; Laskowski 2011a, 110 ff.). To confirm this, Hartwig (2008, 63-65) notes that Article 20a has received, from its introduction, a sporadic application, and has rarely been used by the BVerfGe as a judgment parameter.

Therefore, even considering the great relevance of Article 20a of the

[210] For a more detailed analysis of the *Wasserhaushaltsgesetz*, please refer to: Laskowski 2010, 741 ff ; Tiroch & Krischner 2012, 1.5

Grundgesetz, similarly to the Italian context also the German one does not allow to derive a human right to water from the protection of natural resources, thus highlighting the need to identify other possible sources.

2. The human right to an Existenzminimum and the insufficiency of social legislation

In particular, in light of the impossibility of using Article 20a *Grundgesetz* as the normative basis for the human right to water, for the purpose of identifying the norms of the Basic Law that can establish such recognition, the human right to the existential minimum, or *Existenzminimum*, is particularly interesting.

Developed by a well-established jurisprudence of the *Bundesverfassungsgerich*t, as has been mentioned it finds its basis in the two concepts of human dignity and of the welfare state, expressed respectively in Article 1, paragraph 1 and Article 20, paragraph 1 of the *Grundgesetz*, and is also strictly related to the concept of *Daseinsvorsorge*[211].

The human right to an *Existenzminimum* consists precisely, using the

[211] The concept of *Daseinsvorsorge*, which represents a German *unicum* among the industrialised countries (Neu 2009, 9-10), where terms such as public service or service general interest are more used, was developed in the late 1920s without any juridical value, even though it was considered one of the factors of legitimisation of the State (Kersten 2009, 24). Its affinity to the right to an *Existenzminimum* can be in particular derived from its original definition (Forsthoff 1938, 7, 12, 42 ff.), which in fact includes in the *Daseinsvorsorge* the supply of all the services necessary for life, including the supply of water, gas and electricity, but also post services, telecommunications and public transportation.

words of the BVerfGE[212], in guaranteeing «*to every person in need all the material requirements indispensable for his physical existence, and for the least participation in social, cultural and political life*». Particularly interesting, regarding this judgment, is the reference in paragraph 135 of the sentence, to social relations as a necessary part for a dignified existence of the individual, and to the consequent need to guarantee an existential minimum not only from a material, but also from a social perspective (Delledonne 2010; Seiler 2010, 501 ff.). In other words, the individual must be in a position where she or he is able to access all the goods and services that allow to conduct a dignified life, which must necessarily include access to sufficient quantities of water[213].

One of the most relevant applications of this peculiar human right, for the theme of water accessibility, is in particular represented by a ruling by the High Administrative Court (*Oberverwaltungsgericht*) of Bremen[214], concerning the inadequacy of unemployment benefits to guarantee the *Existenzminimum*, and in particular the supply of drinking water. In this judgment, the Administrative Court indeed imposed to the social services the payment, to a family nucleus, of the sums necessary for the payment of the water service bills. Sums that the family was not able to correspond, precisely because of the insufficiency of the subsidy[215], thus

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[212] Judgment No. 1-3-4, 9.

[213] In this regard, this human right allows to draw an evident parallelism with the right to an adequate standard of living expressed by Article 25 UDHR and by Article 11 ICESCR, for whose discussion please refer to the first chapter.

[214] Judgment S2 B 157/07.

[215] The family consisted of the two parents, both unemployed, and five children under the age of 14. At the time of the facts the subsidies were calculated on the basis of percentages of the amount of € 345, due to the unemployed, and

exposing themselves to the imminent danger of service interruption and therefore to the serious risks for the health of the whole family, and in particular of the children.

Nevertheless, despite the relevance of the judgment, which has clearly highlighted the possibility of protecting the right to access to water through the right to an *Existenzminimum*, it remains an isolated case. Therefore, also in consideration of the persistence of similar critical situations, in particular regarding subsidies for refugees and the homeless (Laskowski 2012, 167 ff.), and in order to fully implement this human right, as well as the human right to water, there is a need for a regulatory intervention aimed at realising their effective guarantee (*Ibidem*).

Furthermore, these considerations on the inadequacy of subsidies for the most disadvantaged individuals also allow to draw a parallel with the Italian context. In fact, although it lacks the concepts of *Existenzminimum* and *Daseinsvorsorge*, social benefits and welfare measures for those in need are also present in Italian law, in particular for what concerns water services.

In this regard, a particularly recent innovation was introduced by Law No. 221 of 2015[216], which requires, in Articles 60 and 61, that the Authority for electricity, gas and the water system must guarantee to «*home users of the water service, which are in disadvantaged economic and social conditions, access, on favourable terms, to the supply of the quantity of water necessary to satisfy basic needs*», even in case of users' default.

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corresponding to 311 € (90%) for the spouse or partner, € 207 (60%) for children with less than 14 years, and € 276 (80%) for children over that age.

[216] Legge 28 dicembre 2015, n. 221, *Disposizioni in materia ambientale per promuovere misure di green economy e per il contenimento dell'uso eccessivo di risorse naturali*.

This innovation, although apparently positive, nevertheless presents several critical issues, the first of which is undoubtedly represented by the fact that the Italian legislator not only did renounce to recognise and define the human right to water, but has delegated entirely to an administrative authority the task of guaranteeing it with regard to individuals facing conditions of economic and social disadvantage, that is to say, as has already been stated on several occasions, those who must be considered as the first recipients of the human right to water. In other words, in doing so, the Italian legislator has basically "*abdicated*" from its function of giving full realisation and guarantee to the rights and freedoms enshrined in the constitutional provisions, in this case those pertaining to the human right to water.

Examining the text of the provision, it is also clear that statements such as those of Cauduro (2017, 838) claiming that this introduced the universal right to access water in the Italian context, are not acceptable. This is primarily because the guarantee of access, even if it concerns disadvantaged people, is recognised only to users of the water service, thus excluding anyone who does not have a regular connection, such as homeless or Roma people[217]. This, in fact, further confirms what has been observed in the second chapter, during the analysis dedicated to the affordability requirement of water accessibility. In fact, it was pointed out that the use of subsidies represents an extremely inefficient tool for guaranteeing the human right to water, precisely because of their ability to apply only to those who are included in the list of users registered for the water service, thus representing undoubtedly a benefit for those subject to economic hardship or in conditions of social disadvantage, but not for individuals facing far greater hardships and unable to see their right to

[217] In other words, the same reasons that have allowed to exclude that Articles 34 and 38 of the EU Charter of Fundamental Rights can represent *per se* a valid legal basis.

access water realised, for the plain circumstance of not being regular users (Dubreil 2006, 32 ff .).

Furthermore, the provision does not define what quantity of water is necessary to satisfy basic needs, nor what the «*favorable terms*» for their access are, both conditions which must in any case be defined in compliance with the general criteria for defining the water service tariffs, as indicated by the same Article 60.

Finally, access to these benefits, even if better defined, is however limited by the presence of two important factors, related to the lack of clarity on the conditions to access that concern all social policies (Urbinati 2012, 541 ff.), as well as on the access criterion, represented by the ISEE (Indicator of the Equivalised Economic Situation). As regards the latter, in fact, as observed by Arlotti (2016, 365), the ISEE criterion is highly inefficient, excluding many disadvantaged subjects from social benefits, particularly elderly people.

Therefore, in the absence of suitable solutions in the German and Italian domestic law, it is necessary to evaluate, in a similar way to what was done in the previous chapter for the European context, whether it is possible to directly derive the human right to water from the international law sources.

3. The influence and implementation of supranational law

3.1. The *Völkerrechtsfreundlichkeit* of the German Basic Law

Proceeding therefore to examine the influence of international law in the two different constitutional systems, a first and substantial difference between the Italian and the German system is the presence, in

the latter, of the principle of *Völkerrechtsfreundlichkeit*[218] of the *Grundgesetz*.

The principle finds its main foundation in Articles 25 and 59, second paragraph of the Basic Law (Kischel 2014, 267 ff.). The first requires that the general principles of international law form an integral part of federal law, and that these principles assume a privileged rank among the sources of law, even superior to the ordinary laws (Talmon 2012, 15 ff.). The latter requires instead that all «*provisions* [of executive agreements] *concerning the federal administration shall apply*».

The combined interpretation of both Articles, according to a well-established jurisprudence of the *Bundesverfassungsgericht*[219], imposes a particular consideration of the international obligations assumed by the Federal Republic to all the powers of the State, which requires them to interpret national laws in compliance with such obligations. All the powers and the organs of the State must therefore avoid violations of international law, interpreting the national norms accordingly, even if there is no internal implementation act (Payandeh 2013, 402; Wolf 2008, 311). Furthermore, as stated by the BVerfGe[220], this interpretative criterion presumes the integration of the German State into the international community, with the important consequence that not only the laws, but the Constitution itself[221] must be interpreted in accordance with supranational law (Lovric 2006, 81 ff.).

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[218] Meaning literally *cordiality* or *friendship towards international law*.

[219] Started in 1971 with Judgment No. 636, 68. On this regard, please refer to Payandeh (2009).

[220] Judgment No. 63, 343.

[221] BVerfGe, Judgment No. 74, 358.

3.2. The direct applicability of the international provisions on the human right to water

The existence of such an interpretative criterion, which therefore imposes an interpretation consistent with all the obligations assumed by Germany at the international level, has important consequences as regards the implementation of the human right to water in this national context.

On the basis of this criterion, authoritative doctrine (Laskowski 2010, 194; Mager 2018, 75; Stubenrauch 2010, 532) in fact considered that the right to water represents a human right that can be directly activated in the German context, precisely due to the related international obligations. This is in consideration of the commitments internationally assumed by Germany in order to protect water resources and to achieve the right to access them (Tiroch & Krischner 2012, 13 ff.)[222], as well as in direct application of the International Covenant on Economic, Social and Cultural Rights as interpreted by General Comment No. 15 and by the UN Resolutions of 2010, since Germany is one of the Covenant State Parties[223].

Therefore, although the aforementioned doctrine recognises this direct applicability of the human right to water to the sole hypothesis of serious violations by public authorities, such as an absolutely unmotivated interruption of water services, it is clear that international law has a strong

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[222] It can in fact be remembered that the Federal Republic of Germany has always assumed an active role in the promotion of international agreements aimed at protecting water resources, and was one of the main promoters of the 2010 UN resolutions.

[223] Which also makes it possible to refer to the observations made in the previous chapter by Traudt (2017, 3 ff.), who, as mentioned above, emphasised the similarity between the provisions of Article 53 of the EU Charter of Fundamental Rights and the here examined criterion of *Völkerrechtsfreundlichkeit*.

influence on the German domestic law, in particular in the context of the protection of human rights. And the importance of such influence can be particularly underlined by the consideration that such extensive interpretation is based on non-binding sources for Member States, such as a General Comment or the UN Resolutions[224].

It can therefore be stated with certainty, similarly to what was argued in the analysis of Article 53 of the EU Charter of Fundamental Rights, that the future and desirable developments of the human right to water in the international context will represent a fundamental key of interpretation for the legislator and for the jurisprudence in Germany.

3.3. The dualistic approach in the Italian constitutional order

If the German context presents therefore a fundamental interpretative tool for the implementation of the human right to water, at least partially, the same cannot be said for the Italian system, which in fact presents a substantially dualistic approach towards the implementation of international law.

This interpretation derives in particular from the Judgments No. 348 and 349 of 2007 of the Italian Constitutional Court, which have excluded the derivability of rules with direct effect from international treaties. These decisions were based in particular on the necessity to affirm the prevalence

[224] In this regard it is possible to refer to what was observed by Bleckmann (1996, 142), who argued that the interpretative criterion of the *Völkerrechtsfreundlichkeit* would impose the obligation of interpretation in conformity not only with the provisions of international treaties, but also with the sentences and decisions of international courts and organisations, as well as their relevant interventions. This would therefore lead to including, following this approach, also sources such as the General Comments, which, although not binding, undoubtedly represent an important interpretative tool, as observed in the first chapter.

of the Constitution over external sources (Sciarabba 2019, 201), in particular in consideration of the fact that the acts of international organisations are produced with atypical procedures, without the guarantees that are instead present in the creation of national legislation (Cannizzaro 2014, 484, 493).

For this reason, specific implementing measures are always necessary, and therefore the presence in the Italian system of a criterion similar to the *Völkerrechtsfreundlichkeit* can be excluded, even following the introduction of the duty, in Article 117 of the Constitution, to exercise the legislative function in compliance with international obligations (Baldini 2013, 2-3).

By virtue of this essentially dualistic approach, several Authors (Miccù & Palazzotto 2016, 7; Varano 2009, 509; Zolo 2005, 129) not only do not even consider the hypothesis of direct applicability of Article 11 ICESCR, but have also clearly stated that, in the absence of binding implementing provisions within national law, the provisions of international law relating to the human right to water have no value whatsoever[225].

It is necessary, however, to point out the possibility of a change in this interpretation trend, carried out by two recent decisions of the *Corte Costituzionale*, namely Judgments No. 120 and No. 194 of 2018. These decisions, relating to the European Social Charter, have in fact allowed the Italian constitutional judge to enhance the role of the Social Charter as a parameter of constitutional judgment, but also to explore the value of the decisions of the control bodies of international treaties without binding legal value, such as, in the case of the European Social Charter, the

[225] The only possible opening to international law, underlined by Crismani (2016, 11), it would be the presence of an express and binding recognition of the human right to water within conventions stipulated by Italy, which, while not allowing their direct applicability, would still increase the possibility of a jurisprudential recognition.

decisions of the European Committee of social rights. As highlighted by Russo (2019, 155 ff.), it was in particular the second of the two judgments to recognise value to the interpretations of the Committee of social rights, almost equating it to the one of the Court of Strasbourg's jurisprudence.

A clear signal, apparently, of a significant opening of the Italian context to international law and its direct influence in the national one, which could also find application for decisions of similar bodies (Russo 2019, 156), which could therefore apply to General Comments, and in particular for General Comment No. 15. However, it is necessary to specify that Judgment No. 194 of the *Corte Costituzionale* did not clearly define the reasons why this interpretative value should be attributed to the decisions of the European Committee of Social Rights (*Ibidem*, 172), and therefore, though representing, as has been said, a sign of opening, it is undoubtedly in need of further definition so that it may find effective application, also in order to represent, eventually, an instrument for the implementation of the human right to water as recognised by General Comment No. 15.

3.4. The fundamental importance of European law for both national contexts

The two constitutional systems therefore have a substantially different approach to the implementation of international law, with significant consequences also on the effective guarantee of human right to water, as has been seen.

However, despite this difference, both constitutional systems nevertheless present a fundamental common point, represented by the duty of conformity to European law, recognised by the constitutional text of both countries[226], as well as by well-established constitutional

[226] In particular, by Article 23 of the German Basic Law and Article 117 of the Italian Constitution.

jurisprudence of both national Constitutional Courts.

Such duty of conformity concerns both the EU law, whose primacy towards domestic law has been affirmed since the Judgment Costa v. Enel of 1964[227], as well as the jurisprudence of the Court of Strasbourg, which must be respected by national courts both in Germany and in Italy[228].

This profile therefore makes it possible to state, both for the German and for the Italian context, that the future realisation of the human right to water in both countries will depend heavily, at least in the absence of an acknowledgment expressed at national level, from future developments in the European context.

Recalling the conclusions of the previous chapter, it will therefore be extremely relevant and of great interest to observe future developments in EU law, the correct implementation of which will undoubtedly play a fundamental role for all Member States, including Germany and Italy. This in particular taking into account the described reform process of the Drinking Water Directive, which, as has been said, although having partially lost its original innovative scope, could represent a central development engine for the realisation of the human right to water.

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[227] European Court of Justice, Judgment of 15 July 1964, Flaminio Costa v E.N.E.L., Reference for a preliminary ruling: Conciliator judge of Milan - Italy. Case 6-64.

[228] Please refer, for further information about the influence of EU law and the ECtHR jurisprudence in the German and Italian law systems, to Baldini (2013, 2-3), Di Martino (2014, 120, 126), Mezzetti (2013, 301 ff., 315 ff.), Sciarabba (2019, 201), and Streinz (2009, 469 ff.).

4. Brief remarks on the local level and on the management of water services

4.1. The subdivision of competences between the *Bund* and the *Länder*, and the State and the *Regioni*

Before presenting the conclusions of the present research work, it is opportune to finish the analysis of the German and Italian national context with some brief observations relating to the sub-state level, concerning in particular the role played by the local authorities and in particular by the municipalities.

In terms of the division of competences between the *Bund* and the *Länder*, in Germany, and the State and *Regioni*, in Italy, there are in fact no particular differences, since both contexts recognise a central State competence in environmental matters.

This centralised competence, which also concerns the management of water resources, is justified in particular by the need to guarantee the same level of environmental protection, as well as the uniform implementation of EU legislation (Arnold 2007, 5 ff.; Aru 2019a; Aru 2019b; Cecchini 2017, 652 ff., Guella 2017, 8; Koch & Krohn 2006, 677 ff.)[229].

[229] In particular, as regards the German context, Arnold (2007) and Koch & Krohn (2006) observe how this division of competences was introduced with the so-called *Föderalismusreform* of the *Grundgesetz* in 2006, having among its main purposes precisely the reorganisation of the competences between the *Bund* and the *Länder*, in order to uniformly implement the supranational provisions on environmental matters. As also observed by Laskowski (2010, 417 ff.) and Meyerholt (2010, 269 ff.), this requirement was determined in particular by the limited competences previously recognised to the *Bund*, which could only dictate

4.2. The Italian local level: a highly centralised water management system

The main differences emerge instead, as aforementioned, on the local level and on the role played by the local authorities in the two national contexts.

Examining the Italian context, in fact, the absence of effective competences at the regional level has led to a consequent collapse of the role of local authorities within them. The regulation of the water service is in fact completely referred to the State, which introduced legislation clearly favourable to the uniqueness of management at the regional level, expressed in particular by Law No. 190 of 2014 (Aru 2019a, 7 ff.; Aru 2019b, 2), in particular in order to avoid the fragmentation of water service between multiple operators.

However, this management model, which is therefore highly centralised both at the State and at the regional level, has two critical aspects, which partly influence the realisation of the human right to water, relating to the public or private management of water services, and to the effective participation in their management by citizens/users.

From the first point of view, in fact, the Italian legislation has been characterised by a strong favour towards the opening to the market of water services, limiting the possibility of in-house providing to exceptional cases, based on presumed impositions of EU law (Aru 2019b , 39; Caruso 2019; Guarini 2019, 27 ff.; Toresini 2019)[230].

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a framework regulation that each *Land* implemented differently, thus creating an overly complex and fragmented picture.

[230] This clear favour for the private management of water services, as mentioned in the introduction, was one of the causes of the referendum initiative launched in 2011, with the aim of reintroducing a public water service management, and to prevent its pricing from being an instrument of profit. However, despite the great

Under the second aspect, the highly centralised management of the Italian model presents some critical aspects in terms of the effective possibility of control and participation of users in the management of the service itself. In fact, if information and participation tools are lacking in most EU Member States, as mentioned during the analysis of the European context, it is clear that these shortcomings are accentuated by an excessively centralised system. Such systems indeed do not allow the local realities to have an effective weight in the management of water services, and the individuals who live in such contexts lose all participation power, not being able to express themselves even through their democratically elected representatives.

This is in fact the picture that presents itself in the Italian context, particularly in regions such as Sardinia, which completely follow the unitary management model imposed by the State, and therefore have a strong democratic deficit in the management of the water service (Aru 2019a, 19 ff.; Corso 2019, 57 ff.)[231].

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success of the referendum initiative, the national legislator has shown little sensitivity to these issues, without therefore introducing any substantial regulatory changes. For further details on the 2011 referendum and its follow-up, please refer to Aru (2019a, 1-7, 47 ff.), Bersani (2016, 21 ff.), Guarini (2019, 9 ff.), Guella (2017, 6), Quarta & Mattei (2016) and Sileoni (2016, 18 ff.).

[231] See *contra* Amoroso (2017, 670-671), who considers instead sufficient the democratic participation in the Sardinian context. This in light of the presence, in the governing body of Sardinian waters, of 36 representatives elected among the mayors of the Sardinian municipalities. However, given the presence of 377 municipalities in Sardinia, the participation of less than one tenth of their representatives cannot in any way be considered satisfactory. Likewise unsatisfactory, as observed by Aru (2019a, 21), is the introduction of a Commission for the improvement of the control by the municipalities (so-called analogue control), which however sees the participation of only four members elected among the municipalities.

However, although this highly centralised model represents the norm in the Italian context, there are however important exceptions, represented by the cases of the Valle d'Aosta Region and the Autonomous Provinces of Trento and Bolzano, which enjoy a particular status of autonomy[232], in particular in the context of water resources management (Basile 2018, 7; Guella 2017, 8). In fact, these contexts differ profoundly from the others precisely because of the way in which the water service is managed, which is indeed divided between the various local authorities present in the territory (Aru 2019b, 19), thus granting them (and their citizens) a stronger control on their water resources and their management.

4.3. The diversity of the German system and the role of municipalities

Precisely this last particular Italian context, characterised by the presence of many managers of water services, makes it possible to draw a parallel with the German water service management system. This in fact stands out from the typical Italian one for its subdivision among a multitude of small service providers, who are not in competition with each other.

The water sector in Germany is characterised, in fact, by the almost total absence of competition: unlike sectors such as the supply of electricity or telecommunications, the water and wastewater disposal services are mostly organised at municipal level and decentralised by small monopolies. In Germany there are in fact around 6.500 companies for the distribution of drinking water, and almost 7.000 for the disposal of waste water, which are usually managed directly by public bodies, especially in the case of small communities (Kraemer, Pielen & De Roo 2007, 24; Wackerbauer

[232] Which is also recognised to the Region *Sardegna*, but it is not fully exploited as in the case of these other local realities, in particular in the field of water management.

2009, 4)[233].

As a point of comparison, it is interesting to observe the substantial difference between the already mentioned context of Sardinia, and that of Bavaria. If, in fact, Sardinia presents a single water service supplier, with a limited participation of local authorities, for a territory of around 24.000 km2, the German *Land* of Bavaria presents instead, on its 70.000 km2, more than 4000 operators among water supply and wastewater disposal services (Grambow 2013, 357). Compared to other countries, the German water service is therefore particularly fractionated and oriented towards local management, excluding the participation of large multinationals in the management.

In most cases, as already mentioned, the water service is managed directly by the municipal administrations, which offer a good quality service with (usually) socially acceptable prices, operating under a cost recovery system (Kraemer, Pielen & De Roo 2007, 23; Laskowski 2010, 350 ff.).

The main reason behind such direct management or control by the German municipalities lies in Article 28, paragraph 2 of the *Grundgesetz*. In fact, it provides the guarantee of *Selbstverwaltung* of the municipalities[234], which is linked to the concepts of popular management of local resources and "bottom-up democracy" (Laskowski 2010, 445 ff.), also recalled by the *Bundesverfassungsgericht*[235]. The German Municipalities are seen in particular as guarantors of the *Daseinsvorsorge*

[233] Private operators account for 39% of the total, although it should be noted that they supply around 50/60% of drinking water in Germany. On this regard please refer to Laskowski (2010, 836).

[234] Literally translatable as self-administration.

[235] In particular in Judgment No. 79, 149.

(Friedrich 2008), and therefore, as already mentioned, of the guarantee of the services necessary for the well-being of the population, making them directly responsible for their good performance even in the case of private management (Bogumil *et alii* 2010, 20 ff., Laskowski 2011b, 189-190).

Therefore, in the light of what has been previously observed, it is clear that the German context undoubtedly offers greater possibilities of collective control over the management of water services, albeit indirectly through the representatives within the different municipalities. Through the central role recognised to local authorities, the requirement of public participation delineated by international sources for the realisation of the human right to water is therefore implemented to a greater extent, albeit partial. A result that in the Italian context can hardly be achieved, if not in the autonomous realities mentioned above, and to which the Italian legislator should instead aspire in future regulatory interventions, to achieve a more democratic culture of water (and other natural and environmental resources) (D'Aloia 2016a, 23).

CONCLUSIONS: HOW FAR IS THE WELL?

In the light of the analysis carried out during the course of the present research work, the data that emerges from all the analysed levels, from the international to the national one, is that the human right to water is not sufficiently recognised in any of these contexts, considering in particular the realisation of its normative content as defined by General Comment No. 15 in 2002 and subsequent elaborations, mainly doctrinal.

In fact, as observed in the paragraphs dedicated to General Comment No. 15 and to the regulatory content of the right to water, even though all the requirements necessary for its full realisation have been well defined by the General Comment and subsequent interventions of the UN General Assembly and the UN Human Rights Council, there is still a serious lack of recognition and effective implementation.

A serious shortcoming, first of all, considering the importance that the human right to water has, above all in its meaning of social human right and therefore of fundamental instrument for the full realisation of the human being, allowing all individuals to lead a dignified life, a shortcoming that produces its negative effects in particular towards the weakest, both in developing countries that are not equipped with the tools to realise the right to water, as well in all contexts, present all over the world, where disadvantaged and vulnerable individuals are present. However, it is even more serious to observe how this lack of implementation persists, despite the evident need to adopt and fully implement an effective human rights-based approach to combat the environmental crises deriving from climate change, which make the realisation of the human right to water even more difficult, especially in contexts that are already struggling to do so.

This is first of all, as seen in the first chapter, in the international context. Indeed, despite the wide variety of sources that include the recognition of the right to water, it has been underlined that none of them represents a source of binding law, capable of constituting a subjective right concerning the access to drinking water. In this respect, the majority doctrine holds that the human right to water can be defined, in consideration of the support received at international level, as an international customary right *in statu nascendi*, which has therefore not sufficiently achieved the necessary requisites of *diuturnitas* and *opinio iuris ac necessitatis* (Aguilar Cavallo 2012, 190; De Vido 2012a, 564; Winkler 2012, 97)[236].

This allows to draw two first conclusions, which both concern the need for a more significant intervention by the international community, represented by a binding recognition of the right to water (Aguilar Cavallo 2012, 199; D'Aloia 2016b, 690; McCaffrey 2016, 232; Thielbörger 2009, 510). This due to the importance that future developments in constitutional law, both in regional areas such as the European one and in individual national contexts, might have in order to recognise a customary norm.

[236] Thielbörger (2014, 23) argues however that in reality the customary status of the right to water would already have been achieved, considering that States naturally protect water as a resource, that the United Nations have appointed a Special Rapporteur for the implementation of the right to water, and finally that access to water represents (or rather represented) one of the Millennium Development Goals. However, while recognising the importance of these considerations, in particular in the light of the sixth Sustainable Development Goal, centred as mentioned on the universal access to water, it should be noted that national practices are excessively heterogeneous to constitute a customary practice (Kirschner 2011, 465; Palombino 2017, 69).

The importance of this multi-level approach has emerged in particular in the European context, examined in the third chapter.

This is evident from the analysis of EU primary law, not only since it deems the respect for human rights and of the environment as primary objectives of the Union, but also and above all due to the interpretation of the rights guaranteed by the Charter of Fundamental Rights, which should respect the levels of protection resulting from international law. This obligation of conforming interpretation would in fact determine a significant consequence for EU law and that of its Member States, in particular in the presence of a desirable future explicit recognition of the human right to water in the context of international law. Equally relevant would also be a similar recognition within the Charter of Rights itself (Van Rijswick 2012, 158 ff.).

Not only because such recognition would necessarily imply its implementation in accordance with the normative content defined in the international context, but also and above all, as mentioned, for the importance of a similar recognition in the international context. Indeed, the inclusion of the right to water in a source of great importance such as the Charter of Rights would undoubtedly contribute to determine, given its binding nature, the recognition of a customary status to the right to water (De Vido 2012c, 206-207).

EU law also assumes a fundamental importance for the development and harmonisation of the domestic law of Member States, in particular through its Directives. However, as explained during the discussion of the so-called Water Directives, the current status of the EU Directives dedicated to water does not allow the recognition of a human right to access water, though protecting numerous elements of its normative content, especially as regards the qualitative requirements. It was noted in particular that one of the major shortcomings of secondary EU legislation is the absence of social considerations regarding water accessibility.

It was also observed that all these Directives, including the most relevant, the Water Framework Directive, failed to fully realise the ambitious goal of creating a model of holistic protection of all waters, due to a lack of implementation at the State level.

Both problems, that of lack of proper recognition and insufficient implementation at State level, which must therefore necessarily be addressed with greater attention by the EU legislator, in order to fully realise the human right to water in the European context (Urbinati 2015, 578 -579), in particular for the correct implementation, in the near future, of the reformed Drinking Water Directive. This even to greater reason due to the considerations made regarding the current text of the reform proposal, which, compared to its initial version, has lost part of its capacity for innovation, in particular from the fundamental point of view of protecting individuals in conditions of economic and social disadvantage.

The key role of the European context also emerges, as pointed out in the last chapter, in the national level and in particular in the analysed German and Italian contexts.

It was indeed shown that these, like most national realities, do not present sufficient elements to establish a full and concrete recognition of the human right to water, even by means of interpretation, neither at the constitutional level nor in ordinary legislation. This while clearly guaranteeing different human rights, within their constitutional bills of rights, related to it, and which could constitute a suitable basis for recognition through interpretation. Among them the right to an *Existenziminimum* in the German context particularly stands out, even though, as has been observed, it has not been to this date a sufficient instrument to fully protect the human right to water.

These considerations clearly highlight the need to introduce an express and effective recognition of the human right to water in both national contexts, as underlined by authoritative legal theory (Briganti 2012, 43 ff.; Mager 2018, 76-77; Nicotra 2016; Staiano 2011, 6; Urbinati

2015, 595-596; Winkler 2011, 22).

Moreover, this would also represent a step in the realisation of Sustainable Development Goal No. 6 and all the other objectives of the UN Agenda 2030, for which implementation in the sources of national law is necessary, first of all because States have the power to allocate the resources necessary for this purpose, to dialogue with civil society and other interested stakeholders, in order to ensure that the implementation of these objectives takes place correctly (Tawfiq Ladan 2016, 26), but also because it is the State that must be the main actor of change for the protection of social rights, as a mean of realisation of the human person, given that it is the State that constitutional charters attribute the role of guaranteeing all fundamental rights and freedoms (Poggi 2019, 223).

Such need for express recognition of the human right to water, at national as well as international and European level, should also not raise any doubts regarding the opportunity to create new human rights, by expanding the catalogue of existing ones. As has already been highlighted in the introductions of this research work, human rights must necessarily be understood as the response of the legal system to existing social problems, to which the law cannot remain indifferent (Coinu 2012, 12; Dogliani 1993, 534). In other words, new human rights must necessarily arise if the existing ones, and the regulatory apparatus that concerns them, is not able to sufficiently protect the situations that come to be determined with the development of law and society (Lewis 2014, 17 ff.).

Situations, that is to say, such as the current one of insufficient recognition of the human right to water, despite the presence of numerous cases in which this human right cannot be realised, especially for individuals belonging to the most vulnerable parts of society, considering as well how these hardships are and will be aggravated by the persisting occurrence of the issues related to climate change.

Furthermore, such a recognition could also contribute to the formation of the consensus necessary for the creation of a general principle

of international law (D'Aloia 2016b, 697), and imposes therefore the importance of understanding to what extent supranational law affects the national one.

Indeed, it is precisely this analysis that has allowed to determine the importance of EU law for the realisation of the human right to water within all EU Member States. In the absence of its recognition expressed in domestic law, or of a recognition in international law, which must be supported however by interpretative mechanisms such as that of the *Völkerrechtsfreundlichkeit*, at present EU law is configured as the only means capable of introducing, within all its Member States, an effective and justiciable right to water.

It can therefore be concluded that, in the persistent absence of significant steps towards the protection of the human right to water, the upcoming developments of EU law represent the direction in which to look for the future realisation of the human right to water in all contexts, in particular in the light of the process of reform of the Drinking Water Directive, while considering its critical points. A realisation following a truly holistic approach, which fully integrates the essential needs of protection of the environment and water resources, while tackling the social, economic and financial issues related to access to water.

In other words, to paraphrase Bates (2010) and De Albuquerque & Roaf (2012), looking for the right track for the road to the well, the European path will undoubtedly be the most interesting to follow in the coming years, to arrive, at last, to quench the thirst of human beings and the environment alike.

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