

HUMAN RIGHT TO WATER: BETWEEN THE CONSTITUTION AND MARKET INTERESTS *

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Abstract. *Given the importance of water for the survival of humankind and the entire living world, and considering that many parts of the world are running out of water, the human right to water has gradually become an issue of considerable concern worldwide. We should also bear in mind that water has an economic value. It is often figuratively called “the blue gold” or “the oil of the 21st century”, which makes it a precious commodity and an object of market exchange. In such circumstances, it is necessary to make a strong turn and establish the human right to water in the highest legal documents. In this paper, the author points to the importance of incorporating the right to water in the constitutionally guaranteed rights. The constitutional regulation and protection of this human right would create conditions to protect the general public interest, which should prevail over the individual commercial interests in water privatization. The starting point for this analysis will be the existing normative framework which has been established at the international level, involving the key role of the UN. Exercising the right to water will also be explored from the perspective of the ECtHR jurisprudence. The paper will also point to the examples of constitutional provisions in the countries which have recognized this right.*

Key words: *human rights, right to water, constitution, water as an economic good*

1. INTRODUCTION

The importance of water and its role in the life of every human being has been recognized since ancient times¹. The digital age and the changes it has brought to all spheres of our lives have added even more value to water. The development of civilization,

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¹ The right to water is believed to be dating back to 6,000 BC. Archaeologists found evidence of water storage sites as early as the 4th millennium B.C.E. (See: Beail-Farkas, 2013: 771).

population growth and rapid technological development have led to increased need for water; on the other hand, they have produced a very negative effect on this resource, in terms of its pollution and scarcity. This supports the prediction of the United Nations that, within 30 years, one of four inhabitants of our planet will live in a country with chronic or occasional shortages of drinking water (Arden, 2016: 772). Considering that water could cost more than oil in near future, it is not surprising that water is increasingly called “the blue gold” or “the oil of the 21st century”. This clearly indicates its economic value, which makes it a commodity and an object of market exchange. The frightening predictions, which we do not want to believe, speak of water wars in the near future.

The basic question is what we can do at the normative level now in order to prevent such developments. Is it time to talk about the right to water as a human right, which should find its place in the Constitution? By regulating this right and its adequate protection in the Constitution, can we create conditions where the essential citizens’ interest for the preservation of this natural resource will prevail over its economic dimension and the accompanying market interests?

The starting point for such an analysis will be the existing normative framework, established at the international level, in which the UN has played a key role. The exercise of the right to water will be evaluated from the European perspective and the jurisprudence of the European Court of Human Rights. Special attention will be paid to constitutional solutions in comparative law. Then, we will analyze the economic dimension of water and how to maintain a balance between these two components.

2. THE HUMAN RIGHT TO WATER

In the context of human rights discourse, the right to water can be viewed from two angles: we can talk about the right to water as a derivative right, or recognize the right to water as an independent, autonomous right. The right to water understood as a derivative right is a right that has no independent existence, but is derived from the existing rights. It is of an accessory nature, and this right can be invoked only in connection with the enjoyment of one of the guaranteed rights and freedoms. The human right to water has traditionally been constructed as a necessary condition for exercising other human rights, such as the right to life or the right to health; it can also be observed in the context of environmental rights. The full exercise of the right to life requires the recognition of basic living conditions. Water is, indisputably, its essential component. The right to water observed in connection with the right to health implies the provision of adequate hygiene, which implies the obligation of the state to prevent threats to health arising from unsafe and toxic water conditions. Thus, the right to health includes not only access to clean and safe drinking water but also water in terms of waste cleaning and protection against pollution (Bluemel, 2004: 969). The main disadvantage of such regulations is that the protection of the right to water is exercised casually rather than as the ultimate priority. The scope of protection of the right to water depends on the extent to which water scarcity affects the fundamental right. Recognition of the right to water as an independent right is of a more recent date. Confirmation of such an attitude can be found in numerous international and constitutional documents worldwide.

2.1. International legal guarantees on the right to water

Insight into the relevant international law documents tells us that the right to water was first implicitly recognized in the context of exercising other human rights. The Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) do not contain explicit guarantees on the right to water. However, the importance of this right is recognized in the context of the right to life, the right to dignity, the right to an adequate standard of living, and the right to health. The right to water is mentioned in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979) in the context of the State Parties' obligation to adopt appropriate measures to eliminate discrimination against women in rural areas.² We also find corresponding provision in the Convention on the Rights of the Child (1989), which obliges the contracting parties to recognize the right of the child to enjoy the highest attainable standard of health and to facilitate for the treatment of illness and rehabilitation of health (Article 24 CRC).

The right to water was first explicitly mentioned at the United Nations Conference on Water (Mer de la Plata, 1977), whose goals were to assess the state of water resources, to ensure an adequate supply of quality water to meet the socio-economic needs of the planet, to increase water use efficiency, and to promote national and international resolve to avoid a global water crisis before the end of the 20th century.

A huge step forward was made by the adoption of General Comment no. 15 (2002): The Right to Water, which was issued by the UN Committee on Economic, Social and Cultural Rights. This document emphasizes that water is a limited natural resource and a public good of fundamental importance for human life and health. Regarding the normative content of the right to water, it emphasizes that the right to water contains both freedoms and entitlements.

The right to water falls into the category of guarantees which ensure an adequate standard of living. Water and water supply must be available to all, without discrimination, within the jurisdiction of the Member State. Although it is a soft law instrument, great progress has been made in regulating the right to water at the international level. It covers four main aspects of the right to water: quality, availability, accessibility, and allocation of water resources. The quality dimension does not imply access to unlimited amounts of water, but only to those that are necessary for basic needs. It refers to clean and safe water. Regarding the accessibility criteria, it is emphasized that water must be available to everyone and located in the immediate vicinity. Accessibility means that the right to water is at disposal to all communities, that water bills are in line with one's financial situation, and that no one can be deprived of water for basic needs. The right to water must be available to all under equal conditions, without any restrictions; special protection is provided for marginalized groups, such as women, children, minorities, refugees, asylum seekers, internally displaced persons, migrant workers and detainees.

General Comment No. 15 on the right to water adopted by the UN Committee on Economic, Social and Cultural Rights recognized the normative content of the right to

² Article 14.2. CEDAW: reads: "State Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right : (...) (h) to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications."

water. It refers to availability, quality and accessibility (physical accessibility, economic accessibility, economic accessibility, non-discrimination and availability of information). It also reaffirmed the obligations of the Contracting States, which include the obligation to respect the right to water, the obligation to protect it, and the obligation to ensure the implementation of this right.³

Referring to the General Comment and other relevant acts, the UN General Assembly adopted the Resolution on the Human Right to Water and Sanitation (2010).⁴ The right to safe drinking water and sanitation is recognized as a human right that is essential for the exercise the right to life and other human rights. This Resolution was the first document that recognized the right to water and sanitation as an autonomous human right. It called on states and international organizations to provide resources, build capacities and ensure technology transfer, through international assistance and cooperation, especially in developing countries, in order to scale up efforts to provide safe, clean and affordable drinking water, and sanitation for all. The UN Human Rights Council took a step further by adopting the HRC Resolution 18/1 of 28 September 2011,⁵ which reaffirmed the primary responsibility of States to take steps to ensure the implementation of the right to safe drinking water and sanitation by all appropriate measures.⁶

When it comes to the regulation of the right to water in the regional documents, we will refer to the European Convention on Human Rights (ECHR) and jurisprudence of the ECtHR. The ECHR does not provide explicit guarantees on the right to water. Yet, given that the ECtHR interpreted this Convention as a living instrument, and in line with the doctrine of effective implementation, the ECHR provides indirect protection of the right to a healthy environment and the right to water. The applicants most frequently invoke the right to life (Art. 2), which the Court accepts as indirect protection of the environment (Davinić, Krstić, 2012: 423). In addition, the ECtHR deals with environmental issues as a component of the right to respect for family and private life (Art. 8), freedom of expression (Art. 10), property rights (Art.1 P-1), and procedural guarantees, such as the right to a fair trial (Art.6) and the right to an effective remedy (Art. 13). In the case of *Zander vs. Sweden*, the Court rejected the state's argument that the provision of domestic law dealing with compensation for damage to property from environmentally hazardous activities was a matter of public law rather than a "civil right". The Court noted that the applicants' claim directly concerned their ability to use the water from their drinking well, which was one aspect of their right as owners of the land on which they were located.⁷ Following this

³ In particular, *the obligation to respect* implies that states do not interfere and do not violate the enjoyment of the right to water. States are obliged not to relocate water resources in a manner that violates this right. This obligation is of negative nature and should prevent obstruction of access to water when such a right is exercised. The state must not stop water supply in an underdeveloped area with poorer population, in order to improve water supply in a rich area. *The obligation to protect* refers to taking the necessary measures, including legislative ones, to prevent non-compliance with the right to water. It implies an effective system of legal remedies, as well compensation in case of human rights' violations. The obligation to ensure the implementation of this right refers to taking basic measures so that people can enjoy the right to water. Once water is fairly distributed for personal and household use, the state can determine the use of water resources for other purposes, such as agricultural or industrial needs.

⁴ Resolution A/RES/64/292 of the United Nations General Assembly, July 2010

⁵ Resolution A/HRC/RES/18/1 of the Human Rights Council, 28 September 2011

⁶ The Human Rights Council expressed its concern that approximately 884 million people lacked access to improved water sources and more than 2.6 billion people did not have access to improved sanitation (Preamble, para.10).

⁷ Case of *Zander vs. Sweden* (application no 14282/88), para. 27

judgment, the Court demonstrated that the guarantees of the rights contained in the ECHR can also apply to cases where the right to clean water has been called into question.⁸

We will pay special attention to the most recent case, the case of *Hudorovič and others v. Slovenia*.⁹ The applicants alleged that the State had failed to provide them with access to basic public services, such as drinking water and sanitation, contrary to the requirements of Articles 3 and 8 of the Convention. The question of what constitutes adequate access to drinking water was the key issue examined by the Court. The Court made it clear that access to safe drinking water is not, as such, a right protected by Article 8 of the Convention.¹⁰ However, the fact is that we cannot survive without water and that access to safe drinking water is of key importance for health and human dignity which are at the core of private life and home enjoyment, protected by Article 8. The Court was fully aware of the fact that “the level of access to water and sanitation largely depends on complex and country-specific assessments of various needs and priorities for which funds should be provided”. The Court confirmed that the states should have wide discretion in evaluating those priorities and legislative choices they make.¹¹

The issue of access to drinking water has aroused great interest among citizens, who are aware of the importance of this resource and the necessity of its preservation. We should mention the European Citizens’ Initiative (ECI) “Right2water”, which collected 1.9 million signatures (online) in support of improving access to safe drinking water for all Europeans. This is the first European citizens’ initiative that called for implementing the EU legislation and policies envisaged by the European Parliament and the Council.¹²

On 16 December 2020, the European Parliament adopted the revised Drinking Water Directive¹³, which entered into force on 12 January 2021. Some of its key features are: increasing water quality standards, combating emerging pollutants, introducing measures to ensure better access to water, especially for vulnerable and marginalized groups, measures to encourage tap water, measures to reduce water leakages and enhance transparency in this sector. The Directive introduces a preventive approach to reduce pollution at source by presenting the “risk-based approach”, which is based on the analysis of the whole water cycle, from source to distribution (EC, 2021b).¹⁴

2.2. Human right to water: constitutional guarantees

The catalog of human rights established in the first written constitutions has gradually expanded over time by adding new rights, in keeping with the changes that have taken place in the society. This shows that human rights are not established once for all but they are flexible enough to respond to new challenges.

⁸ Case of *Dubetska and Others* (appl.no. 30499/03); case of *Dzemyuk v. Ukraine* (appl.no. 42488/02).

⁹ Case of *Hudorovič and other v. Slovenia* (appl.no. 24816/14, 25140/14)

¹⁰ Para. 166 of the ECtHR Judgment in *Hudorovič and other v. Slovenia*, Strasbourg, 10 March 2020

¹¹ Para. 144 of the ECtHR Judgment in *Hudorovič and other v. Slovenia*, Strasbourg, 10 March 2020

¹² The ECI initiative was formally presented to the Commission in December 2013 with the following request: Water is a public good, not a commodity. The EU institutions and Member States are obliged to ensure that all people enjoy the right to water and sanitation and have universal access to these public goods. Water supply and water management should not be subject to internal market rules, and water supply services should be exempt from liberalization. EC(202a): Drinking Water; https://ec.europa.eu/environment/water/water-drink/information_en.html

¹³ Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31998L0083>

¹⁴ EC (2021b): Revised Drinking Water Directive 2020; https://ec.europa.eu/environment/water/water-drink/review_en.html

The constitutional guarantees on the right to water have developed hand in hand with the development of international regulation on this matter. The right to water was initially recognized as a derivative right, in the context of other related rights already in place. In the next phase, the right to water was recognized as an independent right. Introducing new rights in the existing constitutional catalogue of human rights is never easy. This process may be accompanied by conflicting views and heated debates over whether this is necessary and how it will affect existing human rights. The right to water has not been an exemption.

The derivative nature of the right to water has been recognized in numerous constitutions. Assuming that water is necessary for human life, it is understandable why this right is often seen as an element of the right to life. The right to life is the oldest human right and ranks among the highest-priority human rights. People have the right to life and resources that keep them alive, primarily the right to water. Due to the absolute necessity of water for human life, this right is treated as a natural right, which derives from human nature but also from historical conditions, basic needs or notions of justice (Beail-Farkas, 2019: 772). Human rights and human environment are inseparable. In order to live, people must have air (to breathe), water (to drink), food (to eat) and a place to live. If any of these elements are contaminated or destroyed, human existence is also endangered. The interdependence of the right to life and a healthy living environment means that these two rights influence each other as a necessary condition for enjoying these rights. A healthy environment is a condition for human life and, consequently, for the right to life (Orlović, 2014: 169).

The right to water can be observed in the context of environmental rights, i.e. the right to a healthy environment. Thus, *the Constitution of Belgium*¹⁵ determines that everyone has the right to lead a life in keeping with human dignity, which *inter alia* includes the right to the protection of a healthy environment (Art. 23). *The Constitution of Norway*¹⁶ stipulates that “every person has a right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources should be managed on the basis of comprehensive long-term considerations which will safeguard this right future generations as well. In order to safeguard their rights, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out” (Art. 112). *The Constitution of Slovakia*¹⁷ recognizes the right to protect the environment and foster cultural heritage. It determines that every person has the right to favourable environment but, at the same time, each person has to protect and improve the environment. The state is responsible for the economic use of natural resources, for ecological balance and the efficient environmental policy (Art. 44). Similarly, *the Spanish Constitution*¹⁸ stipulates that everyone has the right to enjoy an environment suitable for personal development, as well as the duty to preserve it. The public authorities should protect the rational use of all-natural resources in order to protect and improve the quality of life and to preserve and restore the environment, relying on essential collective solidarity. Criminal or administrative sanctions will be imposed on those who violate these provisions, as well as the obligation to compensate for the damage

¹⁵ Article 23, the Constitution of Belgium, https://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/GrondwetUK.pdf

¹⁶ Section 112, the Constitution of Norway; https://lovdata.no/dokument/NLE/lov/1814-05-17?q=grunnloven#KAPITTEL_5

¹⁷ Article 44, the Constitution of Slovakia; https://www.constituteproject.org/constitution/Slovakia_2014.pdf

¹⁸ Article 45, the Constitution of Spain; <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf>

(Art. 45). Bearing in mind its responsibility to future generations, the *German Constitution*¹⁹ establishes that “the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by the executive and judicial action, all within the framework of the constitutional order (Art. 20). In the Republic of Croatia, the human right to water derives from the right to a healthy life and state obligation to ensure conditions for a healthy environment, as well as from social clause guaranteeing the right to assistance to the weak, helpless, poor and others, aimed at providing for their basic living needs due to unemployment or inability to work (Sarvan, 2017:59).

Taking into account that the future and the very existence of humanity are inextricably linked to the natural environment, France went a step further by amending the Constitution in 2005 and incorporating the 2004 Environmental Charter. *The Charter for the Environment*²⁰ declares that every person has the right to live in an environment which is balanced and respectful of health. Every person is obliged to participate in preserving and improving the environment, to preclude any damage that may be caused to the environment, to limit or rectify the consequences of such damage (Articles, 1, 2, 3, 4). Every person has the right of access to the environment information in possession of public authorities, and to participate in the public decision-making process that are likely to affect the environment, under the conditions and to the extent prescribed by law (Article 7). The Charter also lays down the groundwork for public policies that promote sustainable development and alignment of environment protection and enhancement mechanisms with economic development and social progress (Article 6).

The constitutionalization of the right to water is a new phenomenon in modern constitutionality, which has become relevant in recent years. *The Constitutional Act Amending Chapter III of the Constitution of the Republic of Slovenia*,²¹ which was adopted on 17 November 2016 and entered into force on 25 November 2016, introduced the right to drinking water, stating that everyone has the right to drink water and that water resources shall be a public good, managed by the state. The primary function of water resources is to supply the population with drinking water and water for household use, which shall not be a market commodity (Article 70a). Hence, water resources cannot be sold. This seems to have been one of the main motives for the constitutional regulation of the right to water (Vučić, 2017:527).

Here, we will pay special attention to African and Latin American countries which have been facing the lack of water as well as the consequences arising from the participation of private capital in the management of water services. In Africa, the pioneer of constitutional regulation of the right the water is *the Constitution of the Republic of South Africa* (1996). It stipulates that everyone has the right to access sufficient food and water. The state must take reasonable legislative or other measures, within its available resources, to achieve the progressive realisation of each of these rights. Notably, South Africa is a country facing major water supply problems, Due to the lack of water, many parts of the country are facing severe droughts; in addition, one of the negative legacies of the Apartheid is the extremely uneven distribution of water supply. Thus, the Constitution does not impose an absolute obligation of the state to provide minimum amounts of water to all but calls upon the state

¹⁹ Article 45, Basic Law of the Federal Republic of Germany; <https://www.btg-bestellservice.de/pdf/80201000.pdf>

²⁰ Articles 1-7, the French Charter for the Environment; https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/charter_environment.pdf

²¹ Article 70a, the Constitutional Act Amending Chapter III of the Constitution of the Republic of Slovenia, *Official Gazette of the Republic of Slovenia* No. 75/16.

to act reasonably with its resources (Arden, 2016:776). It is worth mentioning that South Africa has made progress in water policy and expanded the water infrastructure. Over a period of ten years, since the constitutional recognition of the right to water, access to water has been provided for about 10 million people (Beail-Farkas, 2013:79).

On the African continent, the right to water has also been recognized by the Constitutions of Uganda, Ethiopia and the Gambia. *The Constitution of the Federal Democratic Republic of Ethiopia* (1994)²² recognizes the right to water in Article 90 (titled “social objectives”). It stipulates that, to the extent the country’s resources permit, policies should aim to provide all Ethiopians access to public health and educations, clean water, housing, food and social security (Art. 90). *The Constitution of Uganda* (1995) recognizes the importance of clean and safe water. It determines that the state takes all practical measures to promote a good water management system at all levels (Art. 21)²³. *The Constitution of Gambia* (1997) affirms the role of the state in facilitating equal access to clean and safe water, as one of the social goals (Art. 216)²⁴.

In Latin America, the right to water is closely linked to water management and the protection of human rights. Some countries have amended their constitutions to explicitly recognize the right to water: Mexico (2012), Bolivia (2009), Ecuador (2008), and Uruguay (2004). Notably, the recognition of the right to water in the *Constitution of Bolivia* followed as a result of a strong and determined struggle of citizens against the commercial exploitation of water resources by private corporations.²⁵ Today, more than 9.7 million people have access to water²⁶, as the Constitution stipulates that every person has the right to water and food (Art. 16).

Since the number of constitutions recognizing the right to water is not large at the moment, it is difficult to talk about standards in the constitutionalization of this matter. But, certainly, it can be noted that the guarantees of this right are accompanied by corresponding states’ obligations and insisting on the public ownership of water sources. The process of envisaging the right to water as an independent right is generally perceived as a significant step forward in the field of human rights. Constitutional recognition of this right implies being aware of new values and taking into account new threats to human life. The inclusion of the right to water in the corpus of constitutionally guaranteed rights makes this right judicially protected, which can have positive consequences both from the standpoint of ensuring the exercise of the basic human needs and in terms of the living environment. The constitutionalization of the human right to water actualizes the principle of the rule of law in social relations pertaining to the supply of drinking water and sanitary needs, and emphasizes the responsibility of the state to respect, protect and ensure the implementation of the human right to water as fundamental social values (Sarvan, 2017: 65).

²² Article 90, the Constitution of the Federal Democratic Republic of Ethiopia; <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/41544/63844/F-300752700/ETH41544%202.pdf>

²³ Article 21, the Constitution of Uganda; <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/44038/90491/F206329993/UGA44038.pdf>

²⁴ article 216, the Constitution of Gambia; <https://www.aripo.org/wp-content/uploads/2018/12/ConstitutionofGambia.pdf>

²⁵ In the city of Cochabamba in central Bolivia, the management of a private consortium increased the price of water by more than 200%, which generated strong opposition and mass mobilization of the indigenous population, known as “Cochabamba wars for water”. Consequently, the high water tariffs were suspended, which marked a victory against the commodification and exploitation of Bolivia’s water resources. (See: Palević, Rapajić, 2016:39).

²⁶ This number includes 86% of the population; 95% of the population in urban areas and 67% in rural areas have access to water. This is a significant improvement compared to the pre-2005 period when only 68% of the population had access to water in urban areas and 44% of the population in rural areas (See: Bluemel, 2004: 984).

Guaranteeing the right to water at the constitutional level should be accompanied by the existence of the necessary preconditions for its adequate and effective legal protection. The character of this right as a true subjective right enables each individual to demand that his/her right be respected and adequately protected. However, this does not necessarily lead to an adequate quality of protection. To be specific, the degree of protection of rights largely depends on the general level of human rights' protection, the institutional framework for the protection of rights, and the economic development of the state as a very important factor in ensuring human rights' protection. The economic strength of a country is one of the great advantages in solving environmental problems and can have multiple positive effects on the enjoyment of human rights. The right to water is the right of present generations, which is inherited from past generations and which should be passed on and preserved for future generations.

3. WATER AS AN ECONOMIC GOOD

Thus far, water has been observed as a human right, but we should also observe its economic dimension. As a fundamental natural resource and a source of life, water has long been treated as a common good, which should be available to all members of society. Therefore, public resources at the state or local level were in charge of managing water resources. However, as the need for water has increased over time with the development of the society and economy, its economic dimension has become increasingly prominent, particularly in current circumstances of limited water resources. Thus, the current emphasis is on water resources. The understanding of water as an economic good is encouraged by the intention to determine its economic values by reducing its misuse and contributing to its rational use. This has resulted in "the transformation of social relations pertaining to the use of water resources" (Nikolić, Midorović, 2016: 1083). It has generated various models of private partnership participation in the water supply industry, supported by the World Bank, the IMF and other important economic and financial organizations. The privatization of the water sector in many underdeveloped countries was a precondition for obtaining loans and assistance from the IMF and the World Bank (Sarvan, 2014:631). Given that the basic interest of a private company is profit, in this case it implies a full reimbursement of costs incurred by using water for various purposes. There are two ways to involve the private sector in the water supply system: a) full privatization, or b) public- private partnership, as a more desirable form because the public authority remains the owner with some kind of control (Fitzmaurice, 2007: 558). Public-Private Partnership (PPP) is the framework of joint action including the public sector and the private capital, whose primary goal is to secure the proper functioning of public services and the implementation of the public interest activities (Cvetković, 2016: 541). The involvement of the private sector in the economic activity of drinking water supply and wastewater disposal systems has a long-standing history. In the 19th century, private companies held 94% of the water services market while, in 2000, this share was only 15%; in 2014, only 10% of water services in the world were provided by private companies (Saravan, 2014:617). Private companies were primarily driven by making profit and they were not willing to invest capital in activities aimed at improving the quality of water supply services. For this reason, public suppliers prevail nowadays in the field of water supply..

Given that water has economic value, we may wonder whether this means that water is both a commodity and an object of exchange on the market? (Palević, Rapajić, 2016: 47). The perception of water as the economic good offered greater water supply opportunities in many areas but, in some cases, it resulted in gross discrimination of the population due to high water prices and negative consequences for the social order. So, if water supply is reduced to a public service, it may produce far-reaching negative consequences in the country.

There is a number of international documents where water is perceived as an economic good. The first such document is the *Dublin Statement on Water and Sustainable Development* (1992), which states that water has economic value in all its uses, and should be recognized as an economic good. Water management as an economic asset is seen as a significant way to achieve efficient and equitable use and protection of water resources. However, water supply can cost more than some poor communities can afford. In order to ensure an even distribution of water, the Dublin Statement declares that the concept of water as an economic good must be limited to the concept of water as a human good. Treating water as an economic good without restriction and full costs can lead to inequality (Blumel, 2004: 963).

The economic dimension of water was also recognized in the Report of the *UN Conference on Environment and Development (Agenda 21)*.²⁷ Given the importance of water in all aspects of life, the general goal is to ensure adequate water supplies of good quality, while preserving the hydrological, biological and chemical functions of the ecosystems. "Water resources management is based on the perception of water as an integral part of the ecosystem, a natural resource and a social and economic good, whose quality and quantity determine the nature of its use... In developing and using water resources, priority has to be given to satisfying the basic need and preserving ecosystems... Water users should be charged appropriately" (UNSD, 1992: 196-197).

The third international document in this series is the *Johannesburg Declaration on Sustainable Development* (2002), adopted at the World Summit on Sustainable Development (WSSD). The Declaration points out that the need to improve water resources and to promote their distribution among competitive needs in a way that gives priority to meeting the basic needs of people. It also included the demand for the preservation and restoration of ecosystems and their functioning, the preservation of quality of drinking water, and a balanced use of water in industry and agriculture. Regarding water as an economic good correlates international investment treaties with human rights and, *prima facie*, connects the incompatible elements (Muharemović, 2019:184). The impact of business (investment) can be observed in the following situations: when the company is involved in the water supply process; when the company is a water user, especially where water is a limited resource; and when the business competes with other users when business activities themselves affect sources water (e.g. when industry causes water pollution) (Guaghan, 2012: 53). Today, in the world of international law, it is impossible to view activities pertaining to investment, development, the private sector, the environment, political and social participation, and human rights as unrelated areas. Violations of the right to access to drinking water are increasingly being called into question before international investment arbitrations on account of the foreign investors' conduct. In the last decade, there have been twelve publicly available cases, ten against Argentina and the two against Bolivia and Tanzania (Muharemović, 2019:194).

²⁷ UN Sustainable Development/UNSD (1992) UN Conference on Environment & Development (UN CED *Agenda 21*), Rio de Janeiro, Brazil, 3-14 June 1992.

4. THE RIGHT TO WATER IN THE CONSTITUTIONAL SYSTEM OF SERBIA

In the Serbian constitutional system, the right to water is not recognized as an independent right, but it is derived from the right to the healthy environment. In line with the tradition of previous constitutions, *the Constitution of Serbia* (2006)²⁸ includes the right to healthy environment (clean air, clean water and clean land) in the catalogue of constitutional rights. Article 74 specifies: “Everyone shall have the right to healthy environment, and the right to be timely and fully informed about the state of the environment. Everyone, especially the Republic of Serbia and autonomous provinces, shall be accountable for the protection of the environment. Everyone is obliged to preserve and improve the environment.”

The constitutional rank of this right implies the application of basic principles established by the Constitution in the field of human and minority right. These principles are the direct implementation of guaranteed rights, the purpose of constitutional guarantees, the restriction of human and minority rights, and the prohibition of discrimination. The constitutional rank of the right to a healthy environment is particularly important from the aspect of the protection of this right. In that sense, the applicable provisions are contained in Article 22 of the Constitution, which stipulates that everyone whose human and minority rights guaranteed by the Constitution have been violated or denied has the right to judicial protection and the right to eliminate the consequences arising from the violation. The constitutional rank of this right also enables the protection of this right in the procedure instituted by filing a constitutional appeal.

It is worth noting that Serbia has more than 400 sources of healthy and drinking water of the highest quality, only 20% of which is exploited. Moreover, 286 types of mineral, thermal and thermo-mineral waters have been registered in Serbia. For this reason, the competent UN commission included Serbia among the first 50 countries in the world that have large reserves of healthy and drinking water. However, in the future, Serbia may have a problem with a lack of drinking water due to pollution and inadequate wastewater regulations. The lack of explicit constitutional recognition of the right to water has led to the predominance of its economic component. It may be best illustrated by the fact that foreign companies have been granted concessions to exploit our water resources. Almost 80% of bottled water produced in Serbia is in the hands of foreign companies. Thus, our country missed a great opportunity to turn the country into a strategically important and rich country by relying on the richest natural resource.

The right to water is particularly relevant in the context of preserving mountain rivers and contesting the construction of mini-hydropower plants. Citizens raised a legitimate request to be asked about things that directly affect their lives. Without instituting a prior public debate, the National Assembly adopted amendments to the Waters Act in July 2021, which included many harmful provisions and caused great dissatisfaction among citizens and ecological organizations. Thereupon, the President of the Republic vetoed and returned the law to the Assembly because it was not harmonized with the constitutional legal order of the Republic of Serbia.

²⁸ The Constitution of the Republic of Serbia, *Official Gazette RS*, no. 98/2006; (Art. 74 Healthy Environment).

5. CONCLUDING REMARKS

For the benefit of all mankind, water must first be seen as a human right. The situation in which water supply is treated as a public service is inconsistent with its essence as the basic means of subsistence. To exercise the right to water, the main emphasis should be on strengthening, creating and maintaining a strong infrastructure that can supply water to a growing population. It is necessary to ensure the availability of water for both human needs and commercial use but to avoid friction between these two contradictory segments of water use (Tripathy, Mohapatra, 2009: 318).

In order to ensure the implementation of the right to water for all, there must be a compromise between the interests of the states, corporations, and individuals. In this context, a reminder of Rousseau and Locke's attitudes seems appropriate. Pursuant to Rousseau's concept of a social contract, people surrender some part of their human rights and freedoms to the government in order to ensure better protection of the rights that are viewed as a common good. Speaking about property in the Second Debate on Government, Locke mentioned water and emphasized that natural resources should belong to all people. Both Rousseau and Locke promoted the idea that each person should take as many resources as they need. Such an approach is especially important when it comes to the right to water. When water is scarce and many people do not have access to drinking water, states are responsible for enacting laws and procedures that will ensure safe drinking water for all, which will take precedence over other uses. Following Locke's suggestion, states can impose penalties on corporations, as well as on households, that consume excessive amounts of water in dry periods. These funds can then be used to supply drinking water to those members of society who do not have access to clean water (Watrous, 2011:124). This approach may establish a kind of balance between water needs.

In practice, private corporations may be more powerful than sovereign states. However, investors should be held accountable when their activities violate the right to healthy drinking water and sanitation. In such cases, the "public interest" argument may be the first step that allows states to hold private investors accountable in proceedings instituted before the competent dispute resolution body. Moreover, given that higher public interests are fully recognized by international norms, principles and standards, this argument may be used to reject the investor's request before the institution for resolving international disputes. By protecting the public interest, the arbitral tribunal may raise the issue of access to justice to a higher level. Investment agreements between private investors and the state should not be a "*carte blanche*" for investors; they have to take into account the general interest of the community and respect the basic principles. One of the greatest challenges is to strike the right balance between international investment treaties and environmental obligations. In this context, international arbitrations and companies cannot view water merely as a commercial commodity. Human rights are not a matter of philanthropy but legally binding norms, which make corporations accountable for any violation of the guaranteed rights and freedoms. The observance of human rights is not voluntary; it aims to ensure the welfare of the society but also so safeguard universally agreed and generally accepted human rights (Cavallo, 2013: 49-50). In the circumstances when this right is not sufficiently developed at the international level, its constitutional recognition could contribute to the general protection of water resources and their more efficient use. In that process, its constitutional valuation is expected to be above market interests.

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LJUDSKO PRAVO NA VODU: IZMEĐU USTAVA I TRŽIŠNIH INTERESA

Polazeći od značaja koji voda ima za čitav živi svet i za čovečanstvo, a imajući u vidu da u mnogim delovima sveta vode ponestaje, sve češće i sve više govorimo o ljudskom pravu na vodu. Voda istovremeno ima i ekonomsku vrednost. Ona se često figurativno označava kao „plavo zlato” ili „nafta 21. veka”, što je čini robom i predmetom razmene na tržištu. Stoga, u takvim uslovima, neophodno je napraviti snažana zaokret i garantovati pravo na vodu najvišim pravnim aktom. U radu, autor ukazuje na značaj uključivanja prava na vodu u korpus ustavom garantovanih prava. Ustavnim regulisanjem, a samim tim i ustavnom zaštitom ovog prava mogu se stvoriti uslovi da interes svih građana prevagne nad individualnim tržišnim interesima za privatizaciju vode. Polaznu osnovu za ovakvu analizu predstavljaće postojeći normativni okvir, koji je ustanovljen na međunarodnom planu, a koji obuhvata ključnu ulogu OUN. Ostvarivanje prava na vodu biće istraženo i iz ugla prakse Evropskog suda za ljudska prava. U radu se takođe ukazuje na primere ustavnih odredbi onih država u kojima je ovo pravo izričito priznato.

Ključne reči: ljudska prava, pravo na vodu, ustav, voda kao ekonomsko dobro