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Waiting for the rainy season: towards a democratic management of water commons under international and EU law?

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1. Introduction

"*Water, water everywhere, but not a single drop to drink*", sighs Coleridge's Ancient Mariner[1], thus metaphorically sketching the situation of the world's freshwater resources. Actually, the planet's overall water mass amounts to approximately 1400 million kms^3, but a huge percentage (97.2%) of such an abundant quantity is represented by salt water, concentrated in seas and oceans.

The most relevant part of freshwater is frozen in polar caps and glaciers (about 2.15%). The next step of this descending scale is represented by underground basins that collect about 0.65% of the entire

* Peer reviewed. The introduction and the conclusions are the outcomes of the authors' joint work. Paragraph 2 is authored by Francesca Varvello, while the section on the European dimension must be attributed to Stefano Montaldo.

[1] S. T. COLERIDGE, *La ballata del vecchio marinaio*, Rizzoli, Milan, 1985, p. 17.

water reserves[2]. Lastly, rivers and lakes gather no more than a 0.020%, an evidently slight quantity immediately available for the satisfaction of most water-related human, agricultural and industrial needs[3]. The situation grows more and more alarming if we consider the distribution of freshwater resources from a geographical point of view. As a matter of fact, about just nine nations own more than the 60% of the viable freshwater supplies, while extensive areas are walking on a fine thread, between daily scarcity and periodical droughts[4].

Such "natural oligopoly" in the territorial control of these resources is accompanied by the high costs of access to freshwater, which often imposes to turn to expensive technologies, especially for underground basins. As far as rivers and lakes are concerned, many of them are in a state of hydro-stress, often due to over-consumption, pollution and unsustainable utilization. For instance, during the last twenty years the lake Aral – once one of the largest in the world – has more than halved its surface[5]. Also, the Rio Grande – in the past listed among the twenty longest rivers on the planet – almost exhausts its flow before reaching the Atlantic Ocean.

The demographic growth influences this trend: as the Food and Agriculture Organisation (FAO) World Resources Institute has repeatedly pointed out, the global consumption of water resources has proportionally increased more during the last thirty-five years than in the previous three centuries, thanks to an annual average rise, which can be calculated between 4 and 8%[6]. Every year, nearly 3240 kms^3 of freshwater is collected and used, mainly for agricultural purposes (69%), and for industrial exploitation (23%), while domestic and alimentary needs cover the remaining 8%[7]. The percentage related to agricultural uses, moreover, is increasingly rising, because of the parallel widening of the areas devoted to these activities. Moreover, this often occurs in countries where irrigation techniques and infrastructures are frequently obsolete and inefficient[8]. Nonetheless, the perspective will completely reverse if we consider the daily consumption for domestic uses: in this field, the average registered in

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[2] K. MECHLEM, *International groundwater law: towards closing the gaps?*, in *Ybook int. env. law*, 2003, pp. 47-79.

[3] S. POSTEL, *Acqua dolce, tesoro da custodire*, in *Worldwatch Institute, State of the World 2006*, Milan, 2006, pp. 101-130.

[4] J. SIRONNEAU, *L'eau. Nouvel enjeux stratégique mondiale*, Paris, 1997, p. 15. The list of the richest countries in water includes: Brazil (4570 kms^3), Russia (3904), China (2880), Canada (2850), Indonesia (2350), USA (2478), India (1550), Colombia (1112) and Congo (1020). Besides about 50 % of lake waters are comprised in Canadian territory.

[5] W. S. ELLIS, *A soviet sea lies dying*, in *National Geographic*, February 1990.

[6] E. RATHGEBER, *Dry taps…gender and poverty in water resources management*, FAO, Rome, 2003.

[7] V. SHIVA, *Water wars*, South end Press, New York, 2003. Modern industrial processing of wood for paper production is rather unsustainable and polluting: wood pulp processing entails from 60000 to 190000 gallons each ton; the subsequent whitening requires from 48000 to 72000 gallons each ton. Peas and peaches packaging for long-distances transports requires from 17000 to 34800 gallons each ton. A gallon is equivalent to about 4,5 litres.

[8] E. ROOSE, *Introduction à la gestion conservatoire de l'eau, de la biomasse et de la fertilité des sols*, in *Bulletin pédagogique de la FAO* n.*70/1994*, Rome.

economically developed countries is more than triple in comparison to the percentage of less developed States[9].

In such context of current and future scarcity, the strategic relevance of freshwaters becomes a fundamental topic. As the former Vice-President of the World Bank Ismail Serageldin foresaw in 1995, the control over freshwater basins, the blue gold, will cause turmoil throughout the planet[10].

A common problem urges shared strategies and common solutions, especially in case various stakeholders with opposing interests are involved. From a legal point of view, the challenge has been taken up by international and regional organizations, which have been trying to set up a comprehensive framework of institutional arrangements, governance mechanisms and principles to cope with this problem.

On the one hand, the efforts of the international community to tackle the freshwater crisis brought to the first concrete outcome during the seventies, soon embracing environmental, geopolitical, social and economic perspectives. The activity of international organizations led to the adoption of several texts, most of which are nevertheless limited to the formulation of general principles, thus being devoid of binding legal effect[11]. However, a recent trend of common approach seems to have come to light. International Organisations are working to provide a proper arena where the heterogeneous (and always more numerous) stakeholders can meet each other, while International Human Rights Law and International Investment Law supply the legal content.

On the other hand, from a regional perspective, since the beginning of the new millennium, the European Union (EU) has been trying to promote a "European way" towards the sustainable

[9] United Nations Development Programme (UNDP), *Human Development Report 2006. Beyond scarcity: power, poverty and the global water crisis*, UNDP Publications, New York, 2006. This is a clear evidence of the current remoteness of the concept of rational and sustainable utilization of freshwaters from millions of people's daily practices and widespread wastes.

[10] I. SERAGELDIN, *Towards sustainable management of water resources*, World Bank Reports, 1995.

[11] *Inter alia*, the ILA Rules on the uses of the waters of international rivers (1966). The ILA rules were approved in Helsinki by the International Law Association. They apply to all drainage basis that cross national boundaries and summarize several fundamental principles deriving from customary usages of such resource. Therefore, despite lacking formal legal status, the Helsinki rules have played an important role in the development of more comprehensive legal instruments at international level, such as the UN Convention on non-navigational uses of watercourses (2004). See M.A. SALMAN, *The Helsinki rules, the UN watercourses convention and the Berlin rules: perspectives on international water law*, in *Water Resources Development*, 2007, p. 625. See also S. BOGDANOVIC, *International Law of Water Resources. The Contribution of the International Law Association*, The Hague, 2001. The Stockholm Declaration on Human Environment (1972), UN Doc. A/CONF.48/14/Rev. 1, sec. 1 (1972). The Plan of Action launched on the occasion of the international Conference held in Mar de la Plata in 1977, Report of the Conference Mar de la Plata, 14-25 March 1977, UN Doc. E/CONF.70/29. The guiding Principles of the international Decade of freshwater supply and sanitation (1980-1990) and, especially, Agenda 21, the main fruit of the United Nations Global Summit and Environment and Development held in Rio de Janeiro in 1992, UN Doc. A/CONF.151/26 (Vol. I). L. CAMPIGLIO – L. PINESCHI – D. SINISCALCO – T. TREVES, *The environment after Rio. International law and economics*, Boston-London, 1994; L. PINESCHI, *La Conferenza di Rio su ambiente e sviluppo*, in *Riv. giur. ambiente*, vol.3/1992.

exploitation of freshwater. Likewise, the 2000 Water Framework Directive established a comprehensive model of governance of European basins, either transboundary or confined in the territory of a Member State, thereby clarifying the principles and duties that public authorities are bound by. However, the profound economic roots of the European integration process have greatly influenced – and still influence – the EU freshwaters policies and their implications for the national legal orders, even if non-commercial concerns are increasingly important in defining the regime of water services.

In this entangled and multilevel context, the paper tries to highlight a panorama of the main international and supranational legal aspects of the management of freshwater. The analysis is functional to further consideration on the role that democracy is playing – or in some instances should play – in this field as a means for a metaphoric rainy season, i.e. the individual's right to have access to adequate quality and quantity of water resources.

2. International dimension

International law deals with water management from three different perspectives: environment, fundamental rights and economy. This trio reflects the multiple nature of water good. First of all it is a *natural resource* that can be used and shared by States. At the same time, human life and *wellness* directly depend on the access to this same resource. Finally, it presents a "*monetary" value*, as it can be the object of an industrial service that citizens have to pay or the object of an economic transaction when it is manufactured and sold, both on the large scale and to individual consumers. The following paragraphs aim to examine in depth all these three dimensions, stressing recent progresses and looking for a "democratic" *file rouge* that could account for the variety of frameworks and the multiplicity of actors involved in water management.

2.1. Water as a resource: the emergence of common concerns?

The first involvement of International law on the water issue has to do with the management of trans-boundary resources: rivers, lakes and aquifers. This *corpus* of norms forms the so-called "international water law" (IWL). Since its origin, IWL consists in a (more or less intensive) limitation of States' sovereignty in favour of a cooperative use of transboundary watercourses, which promise the co-riparians an equitable and optimal use of the resource they have to share. The resulting international normative production is highly fragmented, because States usually choose bilateral and/or *ad hoc* multilateral agreements to regulate the use and management of trans-boundary watercourses. Nevertheless, a new trend of *common* and *rational* management can be found between the lines of the two most recently adopted conventions (1.). Beside these international instruments, specifically and explicitly consecrated to water management, environmental agreements represent an equally important

reference in the water issue. Even if only indirectly, water management benefits from the progress achieved in international environmental law, which promotes cooperation and a sustainable use of the resource in question (2.).

2.1.1. The explicit protection of the "international water law"

A wise and joint activity of some of the most prominent international actors has leaded to the elaboration of two different international agreements: the *Helsinki Convention* of 1992 and the *New York Convention* of 1997. The first instrument was adopted into the context of the United Nations Economic Commission for Europe (UN-ECE), which promoted a "Eurocentric" approach mainly based on environmental preoccupations instead of on the preservation of an insufficient resource. The second convention was adopted under the aegis of the United Nations and has the merit to prepare the ground for additional negotiations on the same topic[12]. Its entry into force was long and controversial, but it finally occured in 2014[13]. Just a year before, the Helsinki convention had been amended as to embrace a universal vocation[14]. Hence, the international community is now provided with two complementary instruments that, when read together, clearly show the tendency towards a *common management* of watercourses[15].

The three pillars around which the international water law is based are: the *equitable and rational use of water*; the *prohibition to cause significant harm to watercourse States*; the *duty to cooperate*. Both the conventions codify and pursue these objectives, even if from a quite different approach[16]. While the Helsinki Convention focuses more on the obligation to harm prevention and on the duty to cooperate, the New York Convention concentrates on the equitable and reasonable use of international watercourses. Nevertheless, it is the ECE Convention that paves the way to the "human dimension" of this discipline. Indeed, it contains some "*integral obligations*" «[…] aim[ing] to protect the common interest of the community of its Parties in the preservation of the environment [and in so doing] they create a set

[12] Promoted with the support of the UN Development Programme (UNDP) and the World Bank (WB) for what concerns, for example, *The Revised Protocol on Shared Watercourses in Southern African Development Community (SADC)* or the draft cooperative framework agreement Nile Basin State.

[13] M. ARCARI, *Sviluppi nel diritto internazionale in materia di uso e protezione delle risorse idriche: la Convenzione di New York sui corsi d'acqua internazionali*, in *Rivista giuridica dell'ambiente*, n.15 vol.6/2000, pp. 1057-1076; A. TANZI – M. ARCARI, *The United Nations Convention on the Law of International Watercourses. A Framework for Sharing*, Haarlem, 2001; M. ARCARI, *Les interactions entre la régionalisation et l'universalisme dans le droit international des ressources en eau*, in S. DOUMBE-BILLE (a cura di), *La régionalisation du droit international*, Bruxelles, 2012, pp. 347-360.

[14] The amendment of articles 25 and 26 entered into force in 2013.

[15] This tendency looks even more consolidates when considering the Draft articles on the Law of Transboundary Aquifers elaborated by the International Law Commission (ILC) in 2008: indeed, the ILC pays specific attention to the consequences that water management produces on the ecosystems this resource belongs to.

[16] For a deep and complete analysis of the nature of two conventions see A. TANZI, *The Economic Commission for Europe Water Convention and the United Nations Watercourses Convention – An analysis of their Harmonized contribution to international water law*, New York and Geneva, 2015.

of indivisible corresponding rights for the community of the Parties»[17]. Furthermore, in 1999 the Convention was supported by a specific Protocol on Water and Health (entered in force in 2005), which provides a tool for the enforcement and protection of the human right to safe drinking water and sanitation[18].

A significant number of instruments adopted in the context of environmental protection or natural resources management, helped the consolidation of these main (and "community-oriented") values[19]. Giving an example, Agenda 21 has recalled the water management issue, together with some deeper conclusions on its implication for the environment. Indeed, it underlines that water is «[…] an integral part of the ecosystem […]»[20]. This awareness, together with the opinion that water is both «[…] a natural resource and a social and economic good […]»[21], constitute the bases of what some scholars define "the *integrated* management" of water resources[22]. Such an approach, as explicitly recalled by both the Helsinki and the New York conventions[23], asks for a combination of «[…] the satisfaction of *basic*

[17] UNECE, 2013. *Guidelines to implement the Water Convention*, New York and Geneva, para. 85, available at: http://www.unece.org:8080/fileadmin/DAM/env/water/publications/WAT_Guide_to_implementing_Convention/ECE_MP.WAT_39_Guide_to_implementing_water_convention_small_size_ENG.pdf.

[18] The progresses accomplished in this branch of international law remain always completely separated from the development of Human Rights Law on the same topic.

[19] As we will see, also the European Union adopted a similarly extensive approach.

[20] UN Conference on Environment & Development, *Agenda 21*, Rio de Janeiro, 1992, para. 18.8.

[21] *Ibidem*.

[22] As recently recalled by Pr. Tanzi, « […] the ECE has been the forefront in promoting a shift from the traditional focus on equitable apportionment in the international regulation of transboundary waterways to an *integrated* approach to water management and protection at both the transboundary and the domestic level». A. TANZI, *An analysis of their harmonized contribution to water international law*. UN-ECE, Water Series n.6/2015, New York and Geneva, p. 17. Available at: http://www.unwater.org/fileadmin/user_upload/unwater_new/docs/ece_mp.wat_42_eng_web.pdf.
Indeed, since the '60s the Commission adopted several declarations and recommendations underlining the relation between water management and other environmental concerns. The adoption of the Helsinki Convention led to an even more integrated approach that included some basic human rights (such as the right to health or to an adequate standard of living) amongst such a "complementary" concerns.

[23] The Helsinki Convention addresses this approach in its article 3.
The New York Convention, from its side, refers to the integrated approach in articles 24, 20 and, in a way, 5. Nevertheless such a reference was quite debated during negotiations. The *travaux préparatoires* show that, after a first "open mind" approach that led to the adoption of 4 articles explicitly related to environmental protection of watercourses, some delegations objected to the inclusion in the Convention of such a reference. Although, as Professor Tanzi underlines, first negotiations demonstrate that «[…] the Commission was quite willing to link its work on the topic with environmental principles and concepts that were being developed within the Rio Conference process at the time [and as a result] the environmental standards that were ultimately established in the Convention after painstaking negotiations can be considered to represent the minimum standards below which any subjective interpretation of application of an equitable regime for watercourse utilization would be open to a legitimate claim of illegality». *Ibid.*, pp. 19-20.
Other references to the integrated approach can be found into the GA resolution, *The future we want*, A/RES/66/28, para. 4; article 7 of the Berlin Rules; UNEP decision No. 27/3, UNEP/GC.27/17; Targets 11 and 14 of the Convention on Biological Diversity.

needs and the *safeguarding of ecosystems*»[24], concluding that water «[…] is at the core of sustainable development […]»[25].

On the contrary, according to the recent position of some prominent scholars, the two conventions contribute to the consolidation of the on-going customary law process in this field. Indeed, they would function in *de lege ferenda* terms, «[…] enhancing spontaneous respect for their standards even by States that are not parties to them»[26].

In such a framework, case-law intervenes underlining the importance of an "*optimum and rational utilization*" of water. In one of its most well-known judgments, the International Court of Justice (ICJ) states that «[…] the attainment of optimum and rational utilization requires a *balance* between the Parties' rights and needs to use the river for economic and commercial activities on the one hand, and the obligation to protect it from any damage to the environment that may be caused by such activities […]»[27]. Such a balance, has to be «[…] consistent with the objective of sustainable development»[28]. The Court is also convinced that the management of watercourses affects the protection of the ecosystem as a whole: «[…] the negative impact of human activities on the waters of the river may affect other components of the ecosystem of the watercourse such as its flora, fauna, and soil. The obligation to co-ordinate […] the adoption of the necessary measures […] assumes […] a central role in the overall system of protection of the [r]iver […]»[29]. On the same points, the Permanent Court of Arbitration (PCA) affirms that «[e]nvironmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm»[30]. Hence, environmental preoccupations – to which water issue belongs to – do not relate only to the affected States, but they involve the "essential interest" of the international community as a whole. Indeed, the ICJ underlines «[…] the great significance that it attaches to the respect for the environment, not only for States but also for the *whole mankind*»[31]. We are then faced with a common interest that becomes the

[24] UN Conference on Environment & Development, *Agenda* 21, Rio de Janeiro, 1992, para. 18.8.
[25] UNEP decision n. 27/3, UNEP/GC.27/17.
[26] A. TANZI, *The Economic Commission for Europe Water Convention and the United Nations Watercourses Convention – An analysis of their Harmonized contribution to international water law*, 2015, *loc. cit.*, p. 83.
[27] ICJ, *Case concerning Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, 20th April 2010, para. 175.
[28] *Ibid.* para. 177.
[29] *Ibid.* para. 188.
[30] PCA, *The Kingdom of Belgium v. The Kingdom of the Netherlands*, 24 May 2005.
[31] ICJ, *Case concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, 25 September, para. 53. Just an year before, the same Court has had the opportunity to specify that «[…] the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of

basis of common legal rights, as the Permanent Court of International Justice has already underlined in its *Case Related to the Territorial Jurisdiction of the International Commission of the River Oder*[32]. The fundamental contribution of IWL in promoting and consolidating this common interest is evident since the ICJ, in its judgment *Gabcikovo-Nagymaros*, explicitly referred to the New York Convention even if it was not yet in force[33]. Nevertheless, international judges have missed the opportunity to specify the content of the obligation to use watercourses in an "optimum and rational" way[34]. The ICJ approach becomes even more cautious (or not?) in its last judgment of 2015, *Nicaragua v. Costa Rica*: the Court abstains totally, here, from mentioning the principle of equitable/optimum and reasonable utilisation. However, according to the very recent commentaries, this judgment signs the consecration of the link connecting water management and environmental preoccupations: the water dimension is, indeed, anchored to the more solid and strengthened category of general international law[35].

2.1.2. The incidental protection of multilateral environmental agreements: strengthening the duty to cooperate thanks to the multiplicity of actors involved in water management issues

Assuming that the protection of water is essential for the preservation of ecosystems, multilateral environmental agreements (MEAs) become an additional normative reference in considering trans-boundary water management. They usually do not explicitly refer to water management or, more generally, to "water security", but indirect consequences on water dimension are anyway remarkable. The list of relevant instruments is substantial: we can mention the 1971 *Convention on Wetland of International Importance Especially as Waterfowl Habitat (Ramsar Convention)*; the 1992 *Convention on Biological Diversity* (CBD); the 1994 *Convention to Combat Desertification* (UNCCD); the *UN Framework Convention on Climate Change* (UNFCCC) and its *Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries* (UN-REDD); the 2001 *Stockholm Convention on Persistent Organic Pollutants*; etc. In all these contexts a two-way relationship is seen: the protection that the specific instrument assures to the ecosystem produces indirect consequences to the benefit of water

international law relating to the environment», ICJ, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 8th July 1996, para. 29.

32 Permanent Court of International Justice, *Case Related to the Territorial Jurisdiction of the International Commission of the River Oder*, 10th September 1929. Series A. – No. 23, p. 27.

33 ICJ, *Case concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, 25th September 1997. p. 56.

34 Occasion that, on the contrary, the ILC did not let escape. In its *Draft articles* the Commission specifies that «[…] equitable and reasonable utilization of aquifers should result in equitable allocation of benefits among the States sharing the aquifer […]», ILC, 2008. *Draft articles on the Law of Trasboundary Aquifers, with commentaries*. New York:United Nations. Art. 4. On the contrary a «[…] "reasonable utilization" is often defined as "sustainable utilization" or "optimum utilization"», that is taking all the measures necessary to keep the resource in perpetuity, *Ibidem*.

35 ICJ, *Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua)* and *Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, 16th December 2015, paras. 101-105.

management; in the meantime these good effects facilitate the preservation of the concerned ecosystem.

The majority of multilateral environmental agreements affecting water dimension has been elaborated into the context of the United Nations and present a quasi-universal membership. Consequently their contribution to water security is significant. Furthermore, almost all of them have created *comprehensive institutional mechanisms* always more aimed towards water management. Hence, the Conferences of the Parties, which are the decision-making bodies of multilateral environmental agreements, «[…] fill the void that is due to the absence of a global institutional mechanism addressing water issues»[36].

Beside environmental preoccupations, the *duty to cooperate* represents the third "pillar" of the international water law; the one that facilitates the compliance of the other basic principles. In this regard, MEAs promote the cooperation between States Parties and, more notably, between different international environmental agreements systems. Indeed, recently secretariat and expert groups communicate to each other so as to coordinate their actions, organizing joint activities or working programmes, supporting the collaboration among the reciprocal scientific subsidiary bodies[37]. This mutual cooperation also enforces a reciprocal influence between MEAs, supporting the exchange of inputs and contributing to the evolution of the legal framework.

Additionally, still considering cooperation in the water management issue, the complementary role of a different and variegated multitude of actors involved should not be neglected.

First of all, Intergovernmental organisations (IOs): on the one hand, provide the institutional framework necessary to support the implementation of conventions and protocols (of MEAs too); on the other hand, they facilitate and promote the negotiation of these instruments[38]. IOs also provide means and spaces to coordinate the various programmes and initiatives. The most fertile context for inter-States cooperation is undoubtedly the United Nations: indeed, the UN have created numerous and different collection of conferences, commissions and councils more or less involved in water issues. *Inter alia*, the *Stockholm Conference* of 1972; the *Rio Conference* and the *Conference of Dublin*, both in 1992; the *Rio +20 Conference*. These conferences have adopted, in turns, some notable and useful

[36] L. BOISSON DE CHAZOURNES – L. LEB – M. TIGNINO, *Environmental protection and access to water: the challenges ahead*, in M. VAN DER VALK – P. KEENAN (a cura di), *The Right to Water and Water Rights in a Changing World*, ed. 2011, Paris, p. 20.

[37] An example of these partnerships is the one that the Biodiversity Convention, the Climate Change Convention and the Convention to Combat Drought and Desertification have established.

[38] The UN-ECE is a good example in this sense: the Helsinki Convention is implemented by a secretariat that supports the meeting of the parties and the establishment of working groups, *ad-hoc* experts groups and legal boards which provide technical support to member States. The *Task force on water and climate*, as one of the Convention bodies, produced in 2009 a *Guidance on Water and Adaptation to Climate Change* both used by the governments of States parties as a reference in the implementation of the 1992 Convention and by other riparian States in other regions as a model of sharing of trans-boundary water systems. For further information visit http://www.unece.org/env/water/water_and_climate.html.

instruments, as for example the already mentioned *Agenda 21* (adopted in the context of the Rio Conference) or the *Dublin Principles* (adopted in 1992 in the context of the Dublin Conference). Beside, the same conferences have supported the creation of further areas of cooperation, as for example the *UN Commission on Sustainable Development* (CSD), created under the aegis of the Rio Conference as well. The UN have also supported the establishment of both regional (as the already mentioned UN-ECE) and multi-stakeholders frameworks of cooperation (as the 1990 *Water Supply and Sanitation Collaborative Council* – WSSCC) in this field. Furthermore, the UN cooperate with several specialized agencies and subsidiary organisations, which in turn are involved in water security and, in so doing, they have created programmes and platforms favouring intergovernmental cooperation. The *UNEP World Water Assessment Programme* or the *UNESCO International Hydrological Programme* (IHP) are distinguished examples. Moreover, the same UNESCO, together with other international institutions (as the World Health Organisation (WHO) or FAO), autonomously work to globally improve water security.

In addition to the work of these organisations, the role of financial institutions and international financial mechanisms cannot be neglected. Indeed, they put into practice multi-sectorial programmes for environmental projects, inevitably also related to the water dimension. The most praiseworthy is the *Global Environmental Facility* (GEF): it is dedicated to multiple environmental instruments such as the BDC, the UNCCD, UNFCCC or the Stockholm Convention and it funds a large variety of different projects among which the numerous water related ones.

The role of both private and public non-State actors is equally worthy of attention. The need to coordinate water-related activities of all concerned State and non-State actors as well as the activities of intergovernmental organisations leads to the birth of institutions with a multiple composition, as the *World Water Council* or the *Global Water Partnership*, which come up beside the already mentioned UN-WSSCC.

2.2. Water as a human right: an emerging trend with a difficult enforcement?

The protection of water as a natural resource cannot be perfected without the preservation of individual interests equally related to water. According to the doctrine «[…] *il y a* […] *complémentarité entre droit* de *et droit* à *l'eau. Le premier appartient aux Etats; le second à l'individu. Mais* […] *le premier s'exerce au bénéfice du second*»[39].

Originally the IWL had focused exclusively on the economic interests of co-riparian States. Economic priorities have been lately coupled by basic human needs, together with environmental concerns. This

[39] P.M. DUPUY, *Le droit à l'eau, un droit international?*, in *EUI Working Papers Law*, n.06/2006, p. 12; A. TANZI, *The Economic Commission for Europe Water Convention and the United Nations Watercourses Convention* – […], 2015, *loc. cit.*. See also the references Pr. Tanzi reports in footnotes n. 308.

has led to the adoption of a number of soft law instruments considering that «[…] priority has to be given to the satisfaction of basic needs […]»[40] and to the inclusion of such a preoccupation into the two main IWL instruments. Even if the ECE Water Convention does not explicitly refer to human needs, the subsequent adoption of the Protocol on Water and Health proves a certain interest for this topic. Moreover, the New York Convention states, in art. 10, that «[i]n the event of a conflict between uses of an international watercourse, it shall be resolved with reference to articles 5 to 7, *with special regard being given to the requirements of vital human needs*» (§2)[41].

However, as recently underlined by Pr. Tanzi, the IWL operates at an inter-State transboundary level, while human rights (HRs) usually belong to the vertical dimension "State-individuals"[42]. That is why, in the field of water related basic human needs, IWL and HRs Law follow a parallel and separated way.

According to the most recent trend, case-law underlines the collective importance that the respect for water resources, as an element of the natural environment, assumes for the whole mankind (*supra* section A, §1). Being more explicit, the ICJ recognizes that «[…] *cutting communities off from their land and water without other means of subsistence* [Israel] *impede*[s] *the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child*»[43].

Nevertheless, despite an evident positive development, the existence of an autonomous right to water is still up for discussion[44]. Once again, wishing to examine the phenomenon in its entirety, it is necessary to consider the contribution of international actors, IOs in the frontline. As we will see, the methodology is double. With regards to the universal dimension, the UN system proves itself to be the most appropriate arena for an explicit support of a democratic and inclusive approach, but it lacks "hard" enforcing power (1.). On the contrary, the regional dimension reaches a more effective enforcement, but only sacrificing the autonomy of the right to water (2.).

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[40] UN Conference on Environment & Development, *Agenda 21*, Rio de Janeiro, 1992, para. 18.8.

[41] Pr. Tanzi recalls that, most importantly, the commentary to draft article 10 underlines that human needs deserve "special attention" and are to be considered an integral part of "the social and economic needs of the watercourse State concerned". *Ibid.* p. 69.

[42] A. TANZI, *The Economic Commission for Europe Water Convention and the United Nations Watercourses Convention* – […], 2015, *loc. cit.* pp. 67-68.

[43] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, para. 134.

[44] M.A. SALMAN, *The Human Right to Water – Challenges of Implementation*, in *Proceedings of the Annual Meeting (American Society of International Law)*, n.16/2012, pp. 44-46; T. KIEFER – C. BROLMANN, *Beyond State Sovereignty: The Human Right to Water*, in *Non-State Actors and International Law*, n.5/2005, pp. 183-208. Furthermore, International Human Rights Law and International Water Law remained on two parallel tracks: the progressive inclusion of an "ecosystem approach" in both dimensions did not result from a mutual influence but comes from a separate and independent evolution. In this sense, A. TANZI, *The Economic Commission for Europe Water Convention and the United Nations Watercourses Convention* […], 2015, *loc. cit.*, p. 68.

2.2.1. A Soft explicit protection: the UN Committee on Economic, Social and Cultural Rights opens a window that the UN General Assembly is trying to keep accessible

The first explicit recognition of a "human right to water and sanitation" in a universal dimension dates back to the *Action Plan* prepared in 1977 by the UN Water Conference, when it was declared that «[a]ll peoples, whatever their stage of development and social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs» (Mar de Plata UN Water Conference). Whereupon the progress is characterized by an alternation of *declarative* (so, non-binding) *instruments* expressly dedicated to the recognition of such a right and *conventional agreements* (so, binding) incidentally addressed to the right to water and sanitation.

Amongst the latest category we can mention article 14, § 2, (h) of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW); article 24, § 2 of the *Convention on the Rights of the Child*; article 28 of the *Convention on the Rights of Persons with Disabilities*. The merit of these conventions is undoubtedly the explicit recognition of a right to water supply. Nevertheless, this recognition is at the exclusive benefit of a particular category of persons (women, children, persons with disabilities).

An explicit and universal recognition of a "right to water" comes from, on the contrary, from the activity of the UN GA and the UN Treaty bodies. Following the progressive activity of some conferences on the issues of development and environment, the General Assembly adopts its first resolution explicitly affirming that «[…] [t]he rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative both for national Governments and for the international community» (A/Res/54/175, art. 12). It was 1999 and it took ten years to have an equal explicit recognition of the same organ. In the mean time, the UN Committee on Economic, Social and Cultural Rights (UN CESCR), then, allowed this incentive. In 2002 it adopted the *General Comment (GC) No. 15* on *The Right to Water*. In recognizing the right to water in international law, the Committee frames it within article 11 (the right to an adequate standard of living) and article 12 (the right to the highest attainable standard of health) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The GC recognizes that the right to water operates as «[…] a prerequisite for the realization of other human rights». Subsequently, the Human Right Council (HRC), subsidiary organ of the GA, asked for a detailed study on the scope and content of the relevant human rights related to the equitable access to safe drinking water and sanitation (decision 2/104) and it appointed an independent expert on the issue (Res. 7/22). Following the HRC decision, the UN High Commissioner for Human Rights manifested its position recognizing that it was «[…] time to consider access to safe drinking water and sanitation as a human right, defined as the right to equal and non-discriminatory access to a sufficient amount of safe drinking water for personal and domestic use» (*Report on the scope and content of*

the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments, August 2007).

According to some doctrine, all these activities testify the gradual enfranchisement of the right to water: from a right dependent on other fundamental rights, and an autonomous and independent one[45]. In 2010 the UN GA recognized «[…] the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights» (A/Res/64/292, § 1). It asked, then, States and international organisations to provide the essential support (financial resources, capacity-building and technology transfer) in order to assure the provision of «[…] safe, clean, accessible and affordable drinking water and sanitation for all» (*Ibid.*, § 2). Following this resolution, the HRC explicitly recognized the "human right to water" as part of the existing and *binding* international law (A/HRC/RES/15/9).

The final position of the international community seems then quite clear and explicit. Nevertheless, it was not unanimous. The adoption of resolution 64/292 was the result of an expressed vote with a considerable number of abstentions (41/122 votes). Having a look on the declarations of States during the adoption process it becomes obvious that the opinion is controversial: abstaining States – such as the United States and the United Kingdom – declared that «[…] the right to water and sanitation [does] not reflec[t] in existing international law»; but even when voting in favour, some States – such as Liechtenstein or Egypt – do not welcome the creation of a new right, being on the contrary inclined to the necessity to look at existing international law. Beside, other favourable States underlined that the right to water does not belong to the existing positive international right, but is the result of the progressive development of human rights law[46].

The content of the human right to water is the result of the various activities of all these international institutions, which in turn are supported by a multiplicity of both public and private actors. A part of the doctrine considers that the same claim to this right directly follows the emergence of new

[45] L. BOISSON DE CHAZOURNES, *Le droit à l'eau et la satisfaction des besoins humains : notion de justice*, in D. ALLAND – V. CHETAIL – O. DE FROUILLE – J. VINUALES (a cura di), *Unité et diversité du droit international : écrits en l'honneur du Professeur Pierre-Marie Dupuy*, Leiden, 2014, pp. 967-981.

[46] States commentaries are available at http://www.un.org/press/en/2010/ga10967.doc.htm. The doctrine is divided too. *Inter alia*: C. CINELLI, *Gli obblighi positivi degli Stati in materia di investimenti stranieri e la privatizzazione del nuovo diritto umano all'acqua*, in A. DI STEFANO – R. SAPIENZA (a cura di), *La tutela dei diritti umani e il diritto internazionale*, Napoli, 2011, pp. 481-502 and G. AGUILAR CAVALLO, *The Human Right to Water and Sanitation: Going Beyond Corporate Social Responsibility*, in *Utrecht Journal of International and European Law*, n.29 vol.7/2013, pp. 39-64 are in favour; E. BROWN WEISS, *The Evolution of International Water Law*, in *Recoueil de Cours*, n.331/2007, pp. 163-404; MC INTIRE, *The Human Right to Water as a Creature of Global Administrative Law*, in *Water International*, 2012, pp. 654-669; S. SALMAN, *Evolution and Context of International Water Resources Law*, in L. BOISSON DE CHAZOURNES – S. SALMAN (a cura di), *Les ressources en eau*, Leiden, 2005, pp. 62 and ff. are unfavourable; F. MARRELLA, *On the Changing Structure of International Investment Law: The Human Right to Water and ICSID Arbitration*, in *International Community Law Review*, n.12 vol.3/2010, pp. 335-359, B.H. Jr., *Water as a Public Commodity*, in *Marquette Law Review*, n.95 vol.1/2011, pp. 17-52 are open to both conclusions.

international actors asking for a "*global governance of water*", as to achieve the *common interest* that derives from this (global public?) good[47]. The HRC decisions, the reports of the Special Rapporteur (former Independent Expert) and the General Comment of the UN CESCR contribute to the legitimisation of such a right as well as to the delineation of the obligations it creates[48]. According to the Committee, the normative content of the right to water consists in: a sufficient and continuous water supply for personal and domestic use (*Availability*). This supply must be "safe" from everything that could constitute a threat to a person's health (*Quality*) and it has to be physically, economically and indiscriminately accessible to everyone (*Accessibility*)[49].

Even if the consensus is wider, the concerned instruments belong to the category of soft-law. And when they have a "harder" nature, as for example the ICESCR, their enforcement is anyway complicated. Some doctrine underlines, once again, the potentiality of the same IOs implicated in the environmental concerns related to water management[50]. Indeed, both the protection of human health and the preservation of the environment as well as the realisation of a sustainable development (also) depend on a "human-centric" water management. Hence, the numerous international organisations focusing on such an objective can directly contribute, with their activities, to the reaffirmation of the right in question and to the clarification of its content. Furthermore, the contribution is mutual: as efficiently exemplified, «[…] *la satisfaction des Objectifs du Millénaire bénéficie de la promotion des droits de l'homme et ces derniers profitent de l'impulsion donnée par l'Assemblée générale en 2000 pour satisfaire les Objectifs à atteindre en 2015*»[51]. A part of the doctrine goes beyond, underlying that the indirect protection that the human right to water derives from the instruments (and activities) concerning the protection of the environment, health or sustainable development benefits from the "duty to cooperate" that such instruments encourage (and that, on the contrary, is not acknowledged in human rights law)[52]. Furthermore, programmes and initiatives coming from the mentioned institutions are usually based on the concept of *public participation*, that means, for water issue too, that «[a]ll those concerned must be

[47] F. COULEE, *Rapport général du droit international de l'eau à la reconnaissance internationale d'un droit à l'eau: les enjeux*, in SFDI, *L'eau en droit international*, Paris, 2011, pp. 9-40, p. 37.
[48] L. BOISSON DE CHAZOURNES, *loc. cit.*, 2014, p. 972.
[49] UN Economic and Social Council, *General Comment No. 15*, E/C.12/2002/11, 2003, para. 12.
[50] L. BOISSON DE CHAZOURNES, *loc. cit.*, 2014, p. 976 and J. CHENOWETH – R. MALCOLM – S. PEDLEY – T. KAIME – HOUSEHOLD, *Water Security and the Human Right to Water and Sanitation*, in B. LANKFORD – K. BAKKER – M. ZEITOUN – D. CONWAY (a cura di), *Water Security: Principles, Perspectives, and Practices*, London, 2013, pp. 307-318.
[51] L. BOISSON DE CHAZOURNES, *loc. cit.*, 2014, p. 977.
[52] A. TANZI, *Reducing the Gap Between International Water Law and Human Rights Law: the UNECE Protocol to Water and Health*, in *International Community Law Review*, n.12 vol.3/2010, pp. 267-285 and C. LEB – P. WOUTERS, *The Water Security Paradox and International Law – Securisation as an Obstacle to Achieving Water Security and the Role of Law in Desecuritising the World's Most Precious Resource*, in B. LANKFORD – K. BAKKER – M. ZEITOUN – D. CONWAY (a cura di), *op. cit.*, 2013, p. 40.

enabled to participate throughout the process and to monitor, evaluate and report on possible human rights abuses. Participation has to be active, free and meaningful and allow for a genuine opportunity to influence decision-making […]»[53]. The HRC Independent expert welcomes the participation of the various stakeholders involved in water management, amongst which the private sector plays not entirely a negligible role. Nevertheless, it underlines the crucial role of States: their obligations and the responsibilities of non-State actors are *complementary*, and States must monitor that the standards of the human right to water and sanitation are met. Even the decision to delegate or not delegate service provision of water «must be taken in a *democratic* and participatory process»[54].

A second essential element of a democratic participation consists in the access to justice in case of violation. Individuals, as owners of the human right to water and sanitation, should be able to react when this right is not assured. The only place where such a guarantee is (indirectly) effective is the regional dimension, where the right to water knows a different degree of acknowledgment.

2.2.2. A harder indirect protection: regional Courts evocate complementary human rights using the "*par ricochet*" stratagem

As well known, human rights regional instruments – such as the European Convention on Human Rights (ECHR), the African Charter of human and peoples rights (ACHPR) and the American Convention on Human Rights (ACHR) – allow a more effective (read, "*justiciable*") protection to fundamental individual rights. The more or less extensive direct accessibility of the correspondent international Courts, permits a more successful safeguard of the rights included in such instruments, *per se* binding for member States.

Nevertheless, none of these instruments directly mention the right to water and sanitation. The only explicit reference may be found in the 1990 *African Charter on the Right and Welfare of the Child*, that, in art. 14, insists on States obligation to provide children with nutrition and *safe drinking water*.

The protection allows the right to water in regional contexts and takes the form of the so-called protection "*par ricochet*"[55], deriving from certain rights explicitly included in the concerned human rights instruments. Having a look at the case-law of the three main Courts – the European Court of Human Rights (ECtHR); the African Court of Human and People Rights (ACtHPR) and the Inter-American

[53] OHCHR, *Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Alburquerque*. A/HRC/15/31, 29 June 2010, para. 63, (c).
[54] *Ibid.*
[55] H. MACHINSKA, *Council of Europe in the Debate about Environmental Protection and Climate Change. Facing a Democratic Challenge in the 21st Century*, in *Yearbook of Polish European Studies*, n.16/2013, pp. 235-246; D.G.S. JOSE, *Environmental protection and the European Convention on Human Rights*, Strasbourg, 2005; F. SUDRE, *La Protection des droits sociaux par la Cour Européenne des droits de l'homme : un exercice de "jurisprudence fiction"*, in *Revue trimestrelle de droits de l'homme*, n.55/2003, p. 760 and ff.

Court of Human Rights (IACtHR) – the correlation between the very fundamental rights of an individual and the right to access to water and sanitation is clear and evident[56]. According to the ECtHR, failing to provide access to water and sanitation may constitute a violation of art. 3 of the ECHR, that is to say the prohibition of torture[57]. The great majority of cases that the European Court has had to judge until now pertains to this kind of violation: the Court considers, then, that the access to water and sanitation represents one of the minimum standard of a dignified life. Besides that, a protection "*par ricochet*" is given to the human right to water through the right to respect for private and family life (art. 8 of the ECHR). The Court considers, for example, that «[f]ailing to protect individuals from immediate environmental pollution resulting from industrial activities, which impacts on drinking water quality, amounts to a violation of the right to respect for private and family life under the European Convention on Human Rights»[58]. Similarly, it can constitute a violation of art. 6 of the Convention, that is the right to a fair trial, whenever the Member State does not succeed in furnishing a judicial remedy against any unfair obstacle to the access to water and sanitation[59]. The African Court and Commission of Human and People Rights, as far as they are concerned, connect the right to water and sanitation to both the right to human dignity (art. 5 of the ACHPR)[60] and the right to health (art. 16 of the ACHPR)[61]. On the contrary, the Inter-American system underlines the connection of such a

[56] "Universal" case law plays an important role too, in recognizing the connection between HRs protection and water management. Indeed, in its separate opinion, judge Weeramantry unerlines that « […] damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments», separate opinion in the *Case concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, cit., p. 92.

[57] «Restricting access of a detainee to the toilet and drinking water to only twice a day constitutes degrading treatment in violation of art. 3 of the European Convention on Human Rights», ECtHR, *Tadevosyan v. Armenia*, App. No. 41698/04, 2 December 2008; «Detaining asylum seekers for over ten days and failing to provide them with food, drink and facilities to take a shower or wash their clothes constitutes inhuman and degrading treatment in violation of the European Convention on Human Rights», ECtHR, *Riad and Idiab v. Belgium*, App. No. 29787/03 and 29810/03, 24 January 2008 as well as ECtHR, *MSS v. Belgium and Greece*, App. No. 30696/09, 21 January 2011; «Detaining prisoners without respect for material conditions of detention, inlcuding adequate sanitation, constitutes inhuman or degrading treatment […]», ECtHR, *Eugen Gabriel Radu v. Romania*, App. No. 3036/04, 13 October 2003 as well as ECtHR, *Marian Stoicescu v. Romania*, App. No. 12934/02, 16 July 2009; ECtHR, *Fedotov v. Russia*, App. No. 5140/02, 25 October 2005; ECtHR, *Kadikis v. Latvia*, App. No. 62393/00, 4 May 2006; ECtHR, *Melnik v. Ukraine*, App. No. 72286/2001, 28 march 2006.

[58] ECtHR, *Dubetska and Others v. Ukraine*, App. No. 30499/03, 10 February 2011.

[59] ECtHR, *Zander v. Sweden*, App. No. 14282/88, 25 November 1993; ECtHR, *Butan and Dragomir v. Romania*, App. No. 40067/2006, 14 February 2008.

[60] ACommissionHPR, *Institute for Human Rights and Development in Africa v. Angola*, Communications No. 292/04, 2008.

[61] According to the African Commission of Human and People Rights, the right to health, as recently developed in current international law «[…] include[s] the obligations to ensure that third parties do not infringe on the enjoyment of the right, to refrain from unlawfully polluting water and soil during armed conflicts, to ensure third parties do not limit people's access to health-related information and services, and to enact or enforce laws to prevent the pollution of water», ACommissionHPR, *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions v. Sudan*, Communications No. 279/03 and 296/05, 2009, paras. 209-210. Similarly,

right with the right to life, and more in particular with the right of the members of an indigenous community to live a *decent* life[62].

Thanks to the "*par ricochet*" stratagem, the right to access water and sanitation obtains, in regional dimensions, an indirect legal protection that aims to equalize it to the other human rights explicitly listed in the hard law human rights instruments. Nevertheless, an unequivocal recognition of its independency and individuality can only be detected between the lines. A part of the doctrine considers that, even when explicitly recognized (by, for example, national constitutions), the right to water and sanitation hardly has an effective and successful implementation[63]. Practical examples support this conclusion[64]. Nevertheless, when looking on the bright side, we cannot ignore that the international community more frequently focuses on water related problems. In doing that, the involvement of International Organisations and non-State actors is more and more active and it promotes a comprehensive and multifaceted approach that puts into relation different areas (and different actors) of international law. Indeed, international water law becomes complementary to environmental law (*supra* section A, §1) as well as to human rights law. It is a two-way relationship: the IWL contributes stimulating cooperation and providing institutional frameworks for that, while, on the other sense, human rights law fills up States' obligations with content and purpose. Furthermore, non-State actors take part in the jurisdictional enforcement of water management, intervening (for example, as *amicus curiae*) on behalf of public interest directly affecting the civil society.

2.3. Water as an economic good: a silent emergence of social concerns?

Concluding our analysis on the international approach on the water issue, a third and last step is required: the evaluation of the economic dimension of water. Indeed, water assumes the guise of an economic good anytime that it is sold, worked and provided as the object of an industrial service[65]. The

ACommissionHPR, *Free Legal Assistance Group and Others v. Zaire*, Communications No. 25/89, 56/91, 100/93, 2000.

62 IACtHR, *Xakmok Kasek Indigenous Community v. Paraguay*, Series C No. 21,25 August 2010; IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, Series C No. 146, 26 March 2006; IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, Series C, No. 125, 17 June 2005.

63 J. CHENOWETH – R. MALCOLM – S. PEDLEY – T. KAIME, *loc. cit.*, 2013; F. COULEE, 2011, *loc. cit.* According to the former author, «[...] *la consécration d'un droit international de l'homme à l'eau ne constituera pas à elle seule une reponse suffisante pour assurer l'accès à l'eau*» (p. 38). Indeed, «[l]*e droit à l'alimentation qui relève du droit international positif mais qui est si peu effectif pour certains a, de ce point de vue, valeur d'exemple*» (footnote No. 125).

64 See, for example, the case of South Africa, Kenya or Ethiopia as illustrated by J. CHENOWETH – R. MALCOLM – S. PEDLEY – T. KAIME, 2013, *loc. cit.*, pp. 310 and ff.

65 «Water has an economic value in all its competing uses and should be recognized as an economic good», The Dublin Statement on Water and Sustainable Development, adopted by the International Conference on Water and the Environment in January 1992, Principle No. 4. For a comprehensive overview M. TIGNINO – D. YARED, *La commercialisation et la privatisation de l'eau dans le cadre de l'Organisation Mondiale du Commerce*, in *Revue Québéquoise de Droit international*, n.19 vol.2/2011, pp. 159-195.

provision of water and sanitation depends on the realisation of specific infrastructures and hence on the investment means of States that have to provide it. As water is now the world's third largest industry after oil and energy power, economic globalisation is affecting this sector, producing an incredible increase of direct foreign investments in water and sanitary systems (1.). These investments fall into the framework of specific Bilateral Investments Treaties (BITs) concluded between two States and representing the legal reference in case of disagreement. The main concern, here, relates to the compliance of such provisions with the other dimensions of water, with specific regard to the one regarding human rights[66] (2.).

2.3.1. The privatization of water supply services and human rights obligations

The Committee on Economic, Social and Cultural Rights states that «[w]ater should be treated as a social and cultural good, and not primarily as an economic good» (GC No. 15, § 11). Nevertheless, even the Committee cannot neglect the multiple nature of this good. Water and sanitation are the objects of a service provision that the providing State can obviously subject to a payment. But, according to the Committee, «[a]ny payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups» (GC, § 27). When individuals are not able to pay such a service, the concerned State has the "core obligation" to «adopt relatively low-cost targeted water programmes to protect vulnerable and marginalized groups» (§ 37, (h)). Hence, the Committee recognizes that every State has a "*margin of discretion in assessing which measures are most suitable*" to grant their citizens' the right to water, but it has to «take positive measures to assist individuals and communities to enjoy the right» (§25)[67].

During the '90s, following the boost of some financial institutions, such as the International Monetary Fund (IMF) and the World Bank (WB), various States – particularly the developing ones – decided to adopt a large privatisation policy, which included water and sanitation services. Actually, economists believe that the commercialization of water and the inclusion of the private sector in delivering water

[66] For a general analysis, P. MAYER, *Les arbitrages CIRDI en matière d'eau*, in SFDI, *L'eau en droit international*, 2011, *op. cit.*, pp. 163-183.

[67] The Italian doctrine is quite prolific on this issue. The campaign for a public management of water services culminated, in 2011, in a referendum on the "Water as a common good" that had the merit of opening a discussion on the normative classification of water services and on the management models they are susceptible to. On the 20th of April 2016 the *Camera dei deputati* approved a draft on water management, which provides, at its art. 2, that «[l]*'acqua è un bene naturale e un diritto umano universal. Il diritto all'acqua potabile di qualità nonce ai servizi igienico-sanitari è un diritto umano essenziale al pieno godimento della vita e di tutti I diritti umani, come sancito dalla risoluzione dell'Assemblea Generale delle Nazioni Unite A/64/L.63/Rev. 1 del 26 luglio 2010*». At the moment the draft is under the evaluation of the *Senato della Repubblica*.

For a deep analysis of theoretical development of this topic U. MATTEI, A. QUARTA, *L'acqua e il suo diritto*, 2014; U. MATTEI, *L'acqua e i beni comuni*, 2011; M.R. MARRELLA, *Oltre il pubblico e il private. Per un diritto dei beni comuni*, 2012.

services allow the maintenance of water resources, bringing new capital to the sector[68]. Trying to attract foreign private investments as much as possible, these States have allowed private companies to apply quite high costs to water and sanitation services, clearly neglecting the HRs' obligations. Subsequently, under the pressure of public opinion and oppressed by the citizens' request for a step back towards the management of water as a public good, the concerned States adopted administrative measures aimed at limiting market freedom of private companies. In deciding how to balance human rights' concerns and private investors' interests, States decided to reverse course trying to restore the public monopoly of water and sanitation services. Private companies, according to their point of view, denounced a violation of the respective BITs and submitted the question to international arbitrators. Setting aside, for the moment, the investor/State disputes and the conclusions of the jurisdictional organs, the interesting issue, here, is the compatibility of the human rights obligations with the privatisation of water supply. Assuming that the private sector involvement is explicitly admitted by the same CESCR, do private investors have to fulfil the same obligations as States have to be committed to?

General Comment No. 15 does not explicitly refer to private non-State actors' obligations[69], but it states that States parties to the Covenant have to «[…] prevent third parties from interfering in any way with the enjoyment of the right to water [that includes the] adop[tion of] the necessary and effective legislative and other measures to restrain […] third parties from denying equal access to adequate water […]». Accordingly, third parties include «[…] individuals, groups, *corporations* and other entities […]» (GC, § 23). Beside, in 2008 the UN Secretary-General (UN SG) adopted a "special initiative" named *CEO Water Mandate*, which «[…] seeks to make positive impact with respect to the emerging global water crisis by mobilizing a critical mass of business leaders to advance water sustainability solutions»[70]. With this initiative, the UN tried to lead private companies involved in water and sanitation supply in adopting a more *democratic* and sustainable approach, that does not forget individual and social concerns. In this context, the UN SG appointed a *Special Representative for Business and Human Rights*, with

[68] For an in-depth analysis, F. MARRELLA, 2010, *loc. cit.*, p. 336; A. BAESHU, *Privatisation in an economy in transition: the case of Moldova*, in *Euro-In-Library*, 1995; J. MOYO KHULEKANI, *Privatisation of the Commons: Water as a Right; Water as a Commodity*, in *Stellenbosch Law Review*, n.22 vol.3/2011, pp. 804-822; H. ELVER, *The Emerging Global Freshwater Crisis and the Privatisation of Global Leadership*, in S. GILL (a cura di), *Global Crises and the Crisis of Global Leadership*, Cambridge, 2012; N. MCMURRY, *Water Privatisation: Diminished Accountability*, in *Human Rights & International Legal Discourse*, n.5 vol.2/2011, pp. 233-263; O. MACINTYRE, *Water Services Privatisation and Recognition of the Human Right to Water in International Investment Law - Finding Fertile Ground in Unlikely Places*, in D. FRENCH (a cura di), *Global Justice and Sustainable Development*, Leiden, 2010; A. OLLETA, *The World Bank's Influence on Water Privatisation in Argentina: the Experience of the City of Buenos Aires*, in P. CULLET (a cura di), *Water Governance in Motion: towards socially and environmentally Sustainable Water Laws*, 2010; N. PRASAD, *Privatisation of Water: a Historical Perspective*, in *LEAD: Law, Environment & Development Journal*, n.3 vol.2/2007, pp. 217-233.

[69] It just mentions IOs obligation, GC, para. 60.

[70] *Constitution of the CEO Water Mandate*, Mission, available at http://ceowatermandate.org/files/Constitution_CEO_Water_Mandate.pdf.

the task to elaborate a sort of "guidelines" clarifying corporate responsibility for human rights violation[71]. In its report the Special Representative reaffirms States' duty to *protect* individuals from HRs abuses (also) by business corporations and to allow effective *remedies* in case of abuses involving companies, but it identifies also a company's duty to *respect* HRs in making their investments.

In any case, non-State actors such as business corporations are not required to replace international obligations of States: «[p]rivatisation of essential goods and services does not amount to privatizing international responsibility»[72]. The State remains, hence, the principal and natural responsible of the respect of HRs. But, how are these international obligations with the ones deriving from Bilateral Investment Treaties conciliated? Are States legitimated to act in violation of such treaties when public interest is in the running? Do international arbitrators have to consider HRs violation in reaching their conclusions on investment disputes[73]?

2.3.2. Dripping water hollows out stone: looking for a new place for human rights (to water) in investment disputes resolution

In order to provide an answer to all those questions, a look on investment disputes on water issue is necessarily required. As a consequence of the widespread privatisation policies of the '90s, ICSID arbitrators have had to deal with water questions in several cases they were asked to settle. The main question was whether the adoption of a State's measures are apt to interfere with the private management of water (mainly the denial to authorize an increase of water tariffs) were justified in a public interest perspective or, on the contrary, whether they amounted to a violation of international investment agreements. In other words, the tribunals were asked to give (or not) a good measure of the relevant human right(s) (to water). International practice shows us an evolving case-law, treasuring the experience of which some interesting reflections arise.

The necessity to include non-economic values in investment arbitrations was perceived since the beginning of the XXI century. The UN HCHR denounced, in 2003, a «[…] mounting concern that tribunals adjudicating investor-to-State disputes are increasingly interpreting expropriation provisions

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71 *Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General, John Ruggie*, U.N. GAOR, Human Rights Council, 8th Session, Agenda Item 3, U.N. Doc. A/HRC/8/5 (2008). See also F. MARRELLA, 2010, *loc. cit.*, p. 345.

72 *Ibid.*

73 The High Commissioner for Human Rights has presented its preoccupation in 2007, highlighting its «concerns regarding the relationship between the obligations of States under bilateral investment treaties and their human rights obligations in relation to access to safe drinking water and sanitation […] it remains unclear whether and how the obligations of Governments under international human rights instruments will be taken into account in ICSID judgments», UNHCHR, 2007. *Report of the UN HCHR on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments*, UN Doc. A/HRC/6/3, 16 August 2007, para. 63.

broadly in a way that could threaten States' ability and willingness to introduce new regulations to protect the environment and human rights». It invited, then, to safeguard «[…] the ability to introduce new measures to promote and protect human rights within interpretations of expropriation provisions»[74]. Actually, the most recent arbitrations on water issues show a progressive opening to human right to water: both respondent States and *amicus curiae* accord with this right an increasing role to which arbitrators seem more and more susceptible. The very first case concerning the privatisation of water management dates back to 2007 (registration in 1997, appeal refused in 2010). Nevertheless, the *Vivendi case*[75] does not include any reference to the human right to water: neither arbitrators nor the respondent State (Argentina) invoked such a right[76]. The turning point is represented by the *Suez case*[77]. In this case, Argentina quoted the General Comment No. 15 in invoking its international obligation to assure access to water in a non-discriminatory way. Beside, five non-governmental organisations (NGOs) field a request to be heard as *Amici Curiae*. Surprisingly the tribunal overturns the general prohibition to receive non-party to the proceeding, arguing that, even in the absence of the parties' agreed consent, the admission of *amici curiae* is a "procedural question" falling under article 44 of the *ICSID Convention Arbitration Rules*[78]. Then, it admitted the five NGOs to the proceeding. Their submissions focused on the relevance of the right to water in Argentine's decision to freeze water tariffs because of the severe financial crisis it was suffering. In deciding on the liability issue, the tribunal seemed to be influenced by the NGOs conclusions: the arbitrators underlined the importance of not to confuse the exercise of the State's policy power in the interest of public welfare with expropriation (*Decision on Liability*, § 139)[79]. Furthermore, the tribunal explicitly recognized that a State (Argentina in this case) is subject to both international obligations – as the human rights ones – and

[74] UNHCHR, 2003. *Report of the UN HCHR Human rights, trade and investment*, UN Doc. E/CN.4/Sub.2/2003/9, 2 July 2003, pp. 3-4.
[75] ICSID, *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, ICSID case No. ARB/97/3*.
[76] Argentina made only a faint reference to the State's responsibility to provide water for citizens. See the very complete commentary of R. GRECO, *The Impact of the Human Right to Water on Investment Disputes*, in *Rivista di diritto internazionale*, n.2/2015, pp. 463 and ff.
[77] ICSID, *Suez, Sociedad General de aguas de Barcelona, S.A. and Vivendi Universal S.A. v. Agertine Republic*, ICSID case No. ARB/03/19. The case is still pending (the Argentine Republic files a reply on the request to continue the stay of enforcement of the award on February 10, 2016).
[78] «Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question». For a commentary: R. GRECO, 2015, *loc. cit.*, pp. 467 and ff.; F. MARRELLA, 2010, *loc. cit.*, pp. 352 and ff.
[79] See also R. GRECO, 2015, *loc. cit.*, p. 471.

treaty obligations – such as the BITs ones. It has, then, to respect both of them. Since then, the *Amici curiae* hold this new role also in subsequent arbitrations, such as the *Biwater v. Tanzania case*[80].

Another progress towards a more explicit inclusion of non-economic value, in general, and human right(s) (to water) in particular was achieved with the *SAUR case*[81]. According to the tribunal «[…] *les droits de l'homme en général, et le droit à l'eau en particulier, constituent l'une des diverses sources que le Tribunal devra prendre en compte pour résoudre le différend car ces droits sont élevés au sein du système juridique argentin au rang de droits constitutionnels, et, de plus, ils font partie des principes généraux du droit international. L'accès à l'eau potable constitue du point de vue de l'Etat, un service public de première nécessité et, du point de vue de citoyens, un droit fondamental*» (Decision on Jurisdiction and Liability, § 330). Hence, the arbitrators explicitly recognize the fundamental nature of the right to water, identifying it as a *general principle of international law*. Nevertheless, according to them, this right has to be *counterbalanced* with investors' interests: State's measures to protect the right to access to water have to be consistent with State's obligations towards investors. Investors have, then, right to compensation[82].

Together with the explicit recognition of the HR to water, the attempt to find a proper equilibrium between HRs and investors' rights undoubtedly represents one of the most innovative achievements of this arbitration. These conclusions clearly show the progress the human right to water has reached in international investment law. Some doctrine even asserts that the progresses accomplished allow for further consideration on the need to introduce a "*human right audit*" in BITs' negotiations[83]. Such an approach would be transposed from voluntary regulation of social responsibility within corporations and financial institutions. In negotiating an investment treaty the parties should take into consideration any relevant domestic law implementing international obligations on economic and social rights, as well as all potential amendment that such norms could be subjected to. Thus, economic and social rights would be part of the body of applicable law. According to such a doctrine these days are full of promise: «[t]his pre-establishment strategy, focusing on foreign investment contract review and due diligence, could usefully complement the post-establishment entry of human rights treaty norms through investment treaty interpretation»[84].

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[80] ICSID, *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID case No. ARB/05/22, award 24 July 2008.

[81] ICSID, *SAUR International v. Argentine Republic*, ICSID case No. ARB/04/4, award 22 May 2014.

[82] See also the commentary of R. GRECO, 2015, *loc. cit.*, pp. 475 and ff.

[83] K. SIMMA, *Foreign Investment Arbitration: A Place for Human Rights?*, in *International and Comparative Law Quarterly*, n.60 vol.3/2011, p. 794.

[84] *Ibidem*, p. 596. We cannot ignore opposing conclusions: «[t]o the extent that no hierarchy of values among competing normative systems is set, efforts to read investment treaties in a manner consistent to international human rights law are bound to fail each time an investment treaty provision is clear and cannot be read consistent with other customary or treaty rules or when all the conditions set out in Article 31 (3) (*c*) of the Vienna Convention are not met», R. GRECO, 2015, *loc. cit.*, p. 495.

3. Regional dimension: the European Union

3.1. Freshwater resources and democracy in the EU: introductory remarks

Despite its deep economic roots, the European integration process has been undertaking a significant evolution, until the Lisbon Treaty reform, in 2009. The new Treaty is particularly important for the political advances it fosters. Indeed, for the first time, the Member States agreed to profoundly redefine the list of general objectives the EU has to pursue. So far, the integration process had been primarily devoted to the establishment of the internal market, the original and main concern of the founding Member States. Now, in light of the wording of Article 3 TEU, the Union is first and foremost asked to establish an area of freedom, security and justice, where everyone's rights are protected. At a first glance, this sharp change may seem merely symbolic. However, it confirms the gradual evolution of the original market-oriented paradigm of the European integration process, towards ever ambitious goals[85].

This holds true also for the regime of water resources, which has been increasingly attracting the European institutions' attention since the seventies. For the purposes of this paper, we will consider the EU water policy from a twofold perspective. On the one hand, we will analyze the European way to the traditional problem of the management of freshwater. On the other hand, the economic regime of water resources will be considered, in particular as far as water-related services are concerned.

As a matter of fact, in both these domains economic priorities are inevitably intertwined with non-commercial values, as also confirmed by the Treaties. In fact, article 3 TEU expressly states that the growth of the European economy has to be oriented to the principle of sustainable development, which entails a high level of protection and improvement of the quality of the environment. Moreover, Article 11 TFEU and Article 192 TFEU confirm that the promotion of sustainable development and of the rational utilization of natural resources is a Union's general concern, which therefore affect any EU policy[86]. Accordingly, the wording of Article 39 TFEU, regarding the main goals of the common agricultural policy underlines that EU initiatives have to pursue the rational development of the factors of production and their optimum use, also taking into account the needs, peculiarities and cultural heritage of local communities.

The evolution of the values and purposes of the integration process must be coupled with the rise of the principle of democracy as a general principle of the EU legal order[87]. Such principle is enshrined in

[85] P. CRAIG, *Integration, Democracy and Legitimacy*, in P. CRAIG – G. DE BÚRCA (a cura di), *The Evolution of EU Law*, Oxford, 2010, p. 13.

[86] The principle of sustainable development and the need for environmental protection are also affirmed by Article 37 of the Charter of Fundamental Rights of the European Union. See the agendas set by the Commission in 2001, still nowadays at the core of EU strategies concerning sustainable development: Communication COM(2001)264 final of 15May 2001, A Sustainable Europe for a Better World: a European Union Strategy for a Sustainable Development.

[87] Court of Justice of the European Union, case C-138/79, *Roquette Frères v. Council*, EU:C:1980:249.

Article 10 TEU, which grounds the functioning of the EU on representative democracy[88]. The latter finds expression in the European Parliament, but also in the intergovernmental bodies, namely the European Council and the Council, whose representatives are accountable to national parliaments or directly to the citizens of their Member State. Therefore, the democratic accountability of the Union derives also from the Council, which is deemed to express the will of the peoples of the Member States through the positions supported by their national governments[89]. Article 10(3) further underlines that every EU citizen has the right to take active part in the democratic life of the Union. As we will see in the next paragraphs, this multifaceted implications of the principle of democracy find an interesting expression in the domain of freshwater management.

The aspects addressed by the present analysis clearly highlight the important role that democratic and participatory tools have been playing in this field. Indeed, since the launching of the common water policy, the Commission has underlined the close link between citizens' demands and expectations and common EU responses. Soon after the adoption of the first EU instruments - namely the Drinking Water and the Urban Waste-Water Treatment Directives[90] - the Commission took on a request from the environmental committee of the European Parliament for a new political season, aimed at addressing the increasing awareness of citizens and other involved parties for their water. In the view of the European Parliament, the new European water policy should have been developed in an open consultation method, involving all interested parties and then leaving the Member States free to implement EU legislation in accordance with national and local situations and peculiarities. Subsequently, the Commission put into act an extensive consultation mechanism, open to any interested party, including local and regional authorities. Interestingly, this process turned out to be one of the first concrete experiences of wide and participatory approach to decision-making in the EU, and became a milestone for the future shaping of the daily practice of the Commission. One of the main outcomes of the new season of the European water policy was represented by the 2000 Water Framework Directive[91], which still nowadays lays at the core of the management of freshwaters in the EU.

[88] K. LENAERTS, *The Principle of Democracy in the Case Law of the European Court of Justice*, in *International and Comparative Law Quarterly*, n.2/2013, p. 217.

[89] Court of Justice of the European Union, case C-280/11, *Council v. Access Info Europe*, EU:C:2013:671.

[90] Council Directive 98/93/EC of 3 November 1998 on the quality of water intended for human consumption, OJ L 330, 5.12.1998, p. 32; Council Directive 91/271/EEC of 21 May 1991 concerning urban water-water treatment, OJ L 135, 30.5.1991, p. 40.

[91] **Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, 22.12.2000, p. 1.**

3.2. The Water Framework Directive

3.2.1. The management of river basin districts

The Water Framework Directive (WFD) was designed to clearly reform the models of legal and political cooperation for the management of freshwater resources. One of the main goals of this act – soon followed by other instruments, such as the 2007 Flood Risk Directive[92] – was to bring about some new tools in EU water law, by setting the framework of legislative action[93].

To this purpose, the common denominator is the river basin approach, which follows from the international legal dimension and consists of an integrated protection of river basins on a national and transnational scale[94]. A second important element, closely linked to the previous one, is the creation of a governance system, through decision-making and consultation procedures, flexible mechanisms of cooperation and policy discretion for the Member States. Finally, the Directive, which is based on the Treaty provisions on environmental policy, indirectly addresses the issue of the sustainable use of water. In fact, it triggers an increased care for ecosystems, thanks to a close relationship with other policy fields, such as agriculture, national budget planning, industrial policy[95].

The Directive endorses three structural pillars of an Integrated Water Resources Management (IWRM). First of all, the river basin district, which is the planning unit for water management. The organization and government of each district depends on a river district plan adopted at local level. Lastly, the main decisions regarding the management of a river basin require wide consultations with and participation of water users, stakeholders and public authorities.

River basin districts are then the main planning cells for the management of waters: every State has to identify the river basins located in its territory and assign them to river basin districts[96]. In this context,

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92 Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks**,** OJ L 288, 6.11.2007, p, 27.

93 The Directive underlines the *shared responsibilities* of the riparian States, but at the same time lays down obligations for the Member States *individually*, whose authorities are bound by the duty to reach the objectives pursued by the Directive. The latter aspect is particularly important, as the provision of minimum common rules and targets by the WFD encourages harmonization of national legislations, whose different content is often a suppressing factor for transboundary cooperation. In this perspective, the role of EU law, on the one hand, aims at coordinating national legal orders and, on the other hand, manages to influence cooperation at a sub-national level.

94 For a deeper analysis see E. LOUKA, *Water Law and Policy: Governance Without Frontiers*, Oxford, 2008.

95 On the spillover implications of EU environmental policy see J. JANS – H.B. VEDDER, *European Environmental Law: After Lisbon*, Groningen, 2012, p. 52.

96 In addition to national river districts, the Directive provides for the compulsory establishment of international ones. Riparian States of transboundary rivers must ensure the implementation of the Directive in their respective leg, but taking into account the needs and policies of the other States, as well as developing shared environmental policies. International plans have been approved for important rivers such as the Danube, the Rhine and the Meuse. In certain cases, a specific supranational basin authority has been established, in order to ensure cooperation between the national ones. S. NILSSON – S. LANGAAS – F. HANNERZ, *International River Basin Districts under the EU Water Framework Directive: Identification and Planned Cooperation*, Official Publication

Member States are also asked to ensure appropriate administrative arrangements, including the creation of a competent authority. Whether a single authority or an authority for each river basin should be created was a source of contention in the implementing experience at national level. Fears arose about costs and difficulties of coordination and it was eventually decided that central authorities could themselves grant the management of local river districts[97]. From this point of view, the implementation of the WFD has been carried out on the basis of various models. In Germany, for instance, the establishment of a sole and centralized river basin authority would have diminished the power of the Lander. Therefore, the coordination of the various Lander involved in a river basin district was considered the preferred solution[98]. Instead, in the Netherlands, specialized authorities were added to original administrative ones, thus creating another administrative layer. A similar solution was upheld in Italy, where eight basin districts were identified, mainly taking into account the geographical peculiarities of the areas of the country[99]. The subsequent institutional arrangements represented the outcome of a wide debate between the proposal of a centralized body under the aegis of the Ministry of the environment and the establishment of an independent authority for each district. The latter solution eventually prevailed, in order to ensure a better monitoring of the territory. However, a Secretary General was established as well, tasked with the duty to foster cooperation and avoid administrative barriers among the districts.

3.2.2. The public consultation method

The planning processes and detailed rules and procedures of the Directive may give the impression that water management is a merely technical issue, better left to experts. However, the Directive adopts an open and participatory methodology of water management. In particular, it provides for spaces and opportunities of involvement in water management in favour of both stakeholders and the public[100]. On the one hand, the stakeholders are those who have a particular interest in the decisions made on water management. On the other hand, the public at large does not have a specifically defined interest, but is affected by water management decisions and is presumed to be concerned with the quality and

of the European Water Association, 2004, available at http://www.ewa-online.eu/tl_files/_media/content/documents_pdf/Publications/E-WAter/documents/71_2004_02h.pdf.

97 A.M. KEESSEN, *European River Basin Districts: Are They Swimming in the Same Implementation Pool?*, in *Journal of Environmental Law*, 2010, p. 197.

98 For a deeper analysis of the implementation of the Directive at national level see the reports periodically issued by the Commission, available at http://ec.europa.eu/environment/water/water-framework/impl_reports.htm.

99 D. BALZAROLO, *The Implementation of the Water Framework Directive in Italy*, in S. JUNIER (a cura di), *Dialogues on Mediterranean Water Challenges: Rational Water Use, Water Price versus Value and Lessons Learned from the European Water Framework Directive*, 2011, p. 157, available at http://ressources.ciheam.org/om/pdf/a98/00801477.pdf.

100 W. HOWARTH, *Aspirations and Realities under the Water Framework Directive: Proceduralization, Participation and Practicalities*, in *Journal of Environmental Law*, 2009, p. 415.

affordability of water. The rationale for this approach stems from the assumption that if those who are interested in water use can be involved in decision-making, they will both contribute to their adoption and support their implementation[101]. Effective decision-making procedures and full compliance with them avoid the costs of third party enforcement[102]. Therefore, for each river basin district, States must publish and make the timetable and work program for the issue of management plans available for comments. Citizens also have the right to free access to relevant documents, upon request[103]. The procedures related to public disclosure cover any phase of the river management, as a mandatory requirement.

The public consultation method reflects the participatory approach of other environmental legal tools[104], but is rather new for the European scenario, where the traditional lobbying by interest groups often affects such kind of mechanisms. Even if the EU has tried to regulate it, lobbying is initiated by groups wishing to influence the policy-making process and is often done informally[105]. Instead, consultation consists of a formal invitation by a regulating agency to all interested parties to provide their opinions on proposal drafted by the river basin authority. Obviously, the practical influence of economic groups cannot be underestimated, but many countries have developed interesting experiences of involvement of local communities. In Italy, France and Belgium, for instance, district authorities draw up contracts concerning river management yearly. These contracts are mixed private-public acts, listing rights and duties of each party[106]. Local authorities share the decision-making processes with water users (mainly farmers) and regulate the daily management of the flow (exploitation, quantities for irrigation purposes, …) along with them or their associations. If anyone breaches a clause of the contract, he will undertake severe administrative pecuniary sanctions.

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101 The close link between democracy and compliance has been underlined by several authors. See for instance M. SHAPIRO – C. HACKER-CORDÒN (a cura di) *Democracy's Value*, Cambridge, 1999, p. 11.

102 Commission Communication COM(2015)215 final of 19 May 2015, Better Regulation for Better Results. An EU Agenda.

103 For what concerns the documents of the Parliament, the Council and the Commission, access is regulated by Regulation (EU) 1049/2001 of the European Parliament and the Council of 30 May 2001, in OJ L 145, 31.5.2001, p. 43.

104 See for instance the United Nations Economic Commission for Europe Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus, Denmark, on 25 June 1998, and implemented in the EU legal order through Regulation (EC) 1367/2006 of the European parliament and the Council of September 2006, on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, in OJ L 264, 25.9.2006, p. 13.

105 D. NAURIN, *Deliberation behind Closed Doors: Transparency and Lobbying in the European Union*, Colchester, 2007. The EU has set up an official transparency register, where the stakeholders have to be listed in order to be entitled to represent their interests in front of the EU institutions: http://ec.europa.eu/transparencyregister/public/homePage.do?redir=false&locale=en#en.

106 M.L. SCADUTO, *River Contracts and Integrated Water management in Europe*, London, 2016, p. 31 and ff.

3.3. Water as a tradable good or service under EU law

As already underlined, the EU cannot be considered as an entity only devoted to market integration anymore. Instead, it is a community where highly sensitive policy choices are made, with increasingly important consequences for the Member States and their citizens.

The advances of the European integration process also apply to water resources. Their economic exploitation has to be balanced with the non-commercial values inherent to such a natural resource. In the light of the general and extremely broad definition of "good" for the purposes of the establishment of the internal market[107], freshwater has been traditionally listed among the potentially tradable goods endowed with economic value[108]. This formal approach has been repeatedly confirmed also by the political institutions of the EU, but has not prevented the European Commission and the European Parliament from acknowledging the specific features of water markets, in particular as far as the provision of services is concerned. Indeed, despite the general regime of Article 56 TFEU, water services – such as the provision of drinking water – have been usually framed in the context of the services of general interest or the services of general economic interest[109].

In this context, claims and concerns for a more democratic management of water services have gradually fostered a sharp change of paradigm, which is still under way nowadays. The analysis identifies and briefly discusses some of the most recent and relevant examples. First, after the entry in to force of the Lisbon Treaty, the close link between the management of water services and the relevant local communities has been expressly stressed. Second, from an opposite perspective, the European citizens themselves, by the means of the post-Lisbon European citizens' initiative, have urged the European Parliament and the European Commission to discuss the potential adoption of a Directive on the fundamental right to water.

3.3.1. Water services and local communities in EU law

Services of general economic interest (SGEI) are granted a special protection under Articles 14 and 106, par. 2, TFEU. The Treaty does not provide a clear definition of these categories of services, but the case law of the European Court of Justice and several policy documents issued by the Commission clarify their main characteristics[110]. SGEIs have to be of a universal and obligatory character and have therefore to be provided for the common good, regardless of the financial ability of the beneficiaries. Due to the absence of a formal definition and to the wide variety of legal solutions at national level, the

[107] Court of Justice of the European Union, case 7/68, *Commission v. Italy*, EU:C:1968:51.
[108] For instance, the afore-mentioned Directive on drinking water actually considers water as a good.
[109] On the statute of services of general economic interest in the EU: C. WEHLANDER, *Services of General Economic Interest as a Constitutional Concept of EU Law*, London, 2016.
[110] Court of Justice of the European Union, case C-280/00, *Altmark*, EU:C:2003:415.

Member States enjoy a significant margin of discretion as to the scope of application of this notion, provided that the above mentioned features of a service are respected.

The inclusion of an activity amongst SGEIs entitles the national authorities to refrain from opening the relevant market to free competition. In fact, SGEIs are not considered an undue restriction of the ordinary regime of the internal market: instead, they embody some of the core values of the European welfare system and are therefore protected *per se* as an expression of deeply rooted general principles of the European Union and of its Member States[111].

In this regard, Article 1 of the Protocol no. 26 – which according to Article 51 TEU shares the same legal values as the Treaties – provides guidance on the interpretation of Article 14 TFEU. It underlines that "the shared values of the Union in respect of services of general economic interest […] include in particular […] the essential role and wide discretion of national, regional and local authorities in providing, commissioning and organizing services of general economic interest as closely as possible to the needs of the users". Even if it is deemed to add little substance to the existing legal scenario, the real implications of this Protocol still have to be carefully examined. In any case, the provision at hand is of a particular importance – at least from a policy point of view – since for the first time in the EU legal order it establishes a clear link between the provision of this kind of services and the local level[112]. This privileged relationship had already been addressed by the Council of Europe, with its 1985 Charter of local Self Government, ratified by the 28 Member States of the EU. However, that Charter is an external source devoid of legal authority in the European Union[113].

The acknowledged importance of local communities does not prevent EU law from enabling the privatization of water services[114]. Nor does it attract water services under the field of application of Article 4(2) TEU, according to which the EU is obliged to respect the national identity of the Member States and their administrative sub-national organization[115]. In fact, in the light of the recent case law of the CJEU, this provision has to be interpreted strictly and represents an autonomous notion of the EU legal order. Therefore, national authorities cannot invoke it as they wish in order to justify deviations

111 D. GALLO, *I servizi di interesse economico generale. Stato, mercato e welfare*, Milan, 2010, p. 372 ff.

112 B. KYNAST, *The Impact of Free Trade Agreements on Local Self-Government. The Provision of Drinking Water by Local Utilities in Germany as a Case Study*, in M. KRAJEWSKI (a cura di), *Services of General Interest beyond the Single Market. External and International Law Dimensions*, London, 2015, p. 351.

113 This has been confirmed following the abrupt rejection of the Draft Agreement of the accession of the EU to the European Convention of Human Rights: Court of Justice of the European Union, opinion 2/13, EU/C:2014:2454.

114 This is a key-issue in many national legal orders. The Italian case is particularly striking, as a referendum held in 2011 plainly showed the people's will to preserve the public essence of water services. On this wide debate and on the relationship between EU law and national constitutional principles see A. LUCARELLI, *I servizi pubblici locali verso il diritto pubblico europeo dell'economia*, in *Giurisprudenza costituzionale*, p. 261.

115 A. VON BOGDANDY – S. SCHILL, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, in *Common Market Law Review*, 2011, p. 1417.

from EU obligations[116]. Instead, this clause applies only to essential aspects of the historical, cultural and legal identity of a State such as the principle of equality and the choice for a democratic regime[117].

In any event, the newly established link is not deprived of any consequences and *de facto* confirms the social sensitivity of and on this domain. For instance, it has led the Commission to exclude water services from the scope of application of the proposal for a new Directive on concession contracts[118]. In particular, such exclusion was urged by some national parliaments, within the framework of their political control concerning the respect of the principle of subsidiarity[119]. In the light of the procedure set by Protocol 2 annexed to the Treaties, 11 opinions were addressed to the Commission, challenging its proposal for a Directive on the award of concession contracts[120], with a view to ensure an *ad hoc* approach to water services and to preserve local communities discretion in this sector[121]. Also, the water sector is not included in the negotiations of the TTIP and other trade agreements between the EU and third countries[122]. Moreover, the Commission was forced to reconsider its Reflection Paper on the reform of the common utility clause which traditionally characterizes the trade agreements concluded by the EU. In the light of this provision, public utilities at national or local level may be subject to public monopolies or to exclusive rights granted to private operators. Despite an initial attempt to open to liberalization, the Commission listed water production, distribution and waste handling among the sectors that could be reserved from market access and national treatment applicable to all levels of government.

Lastly, the close link between water management and local democracy is highlighted by the regional dimension of EU water policy. The EU has developed a number of financial and legal instruments aimed at ensuring regional economic growth and political cooperation at local level. Leaving aside the European regional policy and the question of structural funds, we will briefly concentrate on the European Grouping of Territorial Cooperation (EGTC), quite a new administrative experience ruled by Regulation (EU) 1082/2006 of the European Parliament and the Council, more recently amended by

116 G. VAN DER SCHYFF, *The Constitutional Relationship between the European Union and its Member States: the Role of National Identity in Article 4(2) TEU*, in *European Law Review*, 2013, p. 563.

117 Court of Justice of the European Union, case C-218/09, *Ilonka Sayn-Wittgenstein*, EU:C:2010:806.

118 The proposal led to the adoption of the Directive 2014/23/EU of the European Parliament and the Council of 26 February 2014, on the award concession contracts, OJ L 94, 28.3.2014, p. 1.

119 On the role played by national parliaments resorting to identity grounds within the framework of the *ex ante* political supervision on the principle of subsidiarity, B. GUASTAFERRO, *Coupling National Identity and Subsidiarity Concerns in National Parliaments' Reasoned Opinions*, in *The Maastricht Journal of European and Comparative Law*, 2014, p. 321.

120 Commission communication COM(2011) 897 of 20 December 2011.

121 P. DE LUCA, *Parlamenti nazionali e processo di costituzionalizzazione dell'Unione europea*, Turin, 2016, p. 274.

122 For instance, the agreement with Canada, which is in its way to the signature. See the Commission communication COM(2016)443 final, of 7 June 2016, Proposal for a Council Decision on the conclusion of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part.

Regulation (EU) 1302/2013[123]. The preamble of the latter Regulation underlines the need to reduce the difficulties encountered by regional and local authorities of the Member States in their efforts to cooperate at inter-State level. The fragmentation of national legal order turns out to be a stumbling block to cooperation and causes inefficiencies.

In order to overcome these difficulties, the Regulation provides for the optional creation of cooperative groupings with autonomous legal personality[124]. The establishment of an EGTC involves Member States, regional authorities, local authorities and/or other bodies governed by public law, with the aim of strengthening economic and social cohesion. EGTCs, therefore, are intended to facilitate (and to be responsible for) the implementation of territorial cooperation programmes co-financed by the EU and to enhance territorial cooperation initiatives launched at EU, national or local level[125].

Member States, as well as regional and local authorities, can be members of an EGTC. Therefore, also (public) water management authorities can take part in such cooperation structures. In order to fulfil its tasks, an EGCT has (national) legal personality and the most extensive legal capacity given to legal persons under national law. In particular, it may acquire or dispose of movable and immovable property and employ staff, and may be a party to legal proceedings. The members of an EGTC gather in an assembly, and a director represents the EGTC and acts on its behalf.

The members of the EGTC shall unanimously agree on a convention and a statute, the acts that govern the Group. *Inter alia*, the convention specifies the objectives and tasks of the Group. Specifically, these tasks shall be limited primarily to the implementation of territorial cooperation programmes or projects co-financed by the Community through specific European funding mechanisms. The EGTC, therefore, is a suitable cooperation structure to determine joint (or coordinated) policy on certain issues (such as water management) and to implement this policy. Some experiences have been launched at local level, also in the context of water services and water management. For instance, on 3 April 2009, the West Vlaanderen/Flandre-Dunkirk-Côte d'Opale EGTC was officially launched in Bruges, Belgium, listing water management among its main tasks[126]. Specific projects on freshwater resources management, water cultural heritage, scientific research are being developed in many EGCTs. The local administrative governments involved try to find shared solutions to common problems on freshwater

[123] Regulation (EC) 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC), OJ L 210, 31.7.2006, p. 19, amended by Regulation (EU) 1302/2013 of the European Parliament and of the Council of 17 December 2013 as regards the clarification, simplification and improvement of the establishment and functioning of such groupings, OJ L 347, 20.12.2013, p. 303. See A. MIGLIO, *Le groupement européen de coopération territoriale: un modèle européen uniforme?*, in S. DOUMBE BILLE – A. ODDENINO (eds), *La coopération transfrontalière en droit international et européen*, Naples, 2016, p. 55.

[124] S. CARREA, *La disciplina del Gruppo europeo di cooperazione territoriale (GECT) tra diritto dell'Unione europea, autonomia statutaria e diritto internazionale privato: un tentativo di sintesi*, in *Diritto del commercio internazionale*, 2012, p. 615.

[125] From this point of view, M. VELLANO, *La cooperazione regionale nell'Unione europea*, Turin, 2014.

[126] See the official website: http://www.egts-gect.eu/fr/contact/dunkerque-grand-littoral-communaute-urbaine.

resources, such as the consequences of climate change on water supply, water pollution, the cost of water network services.

3.3.2. EU law and direct participatory tools: the European citizens' initiative and freshwater resources

The Treaty of Lisbon has tried to bridge the European democratic deficit, by introducing new opportunities for the European citizens' direct involvement in EU affairs. The attempt to overcome the enduring criticism also involved the legislative procedures of the EU. On the one hand, the normative power of the European Parliament was strengthened, thanks to the extension of the ordinary legislative procedure to several EU policies; on the other hand, the starting phase of the legislative procedures was opened to the contribution of the European citizens, via the European citizens' initiative[127]. According to Articles 11 TEU and 24 TFEU, the initiative takes the form of an invitation to the European Commission to propose legislation on matters where the EU has competence to legislate[128]. In particular, a citizens' initiative has to be backed by at least one million EU citizens, coming from at least 7 out of the 28 Member States**.** The detailed functioning of the system is ruled by Regulation (EU) 211/2011 of the Parliament and of the Council[129], which sets out the conditions upon which a committee of EU citizens can collect signatures and successfully submit them to the European Commission, in order to urge the exercise of its power to initiate legislation. Many initiatives have been opened to signatures so far, but only three of them have managed to meet the criteria required, in particular as far as the number of signatories per Member State is concerned[130]. The first in line was titled "*Water and sanitation are a human right! Water is a public good, not a commodity!*" and was primarily aimed at acknowledging the human right to water in the EU legal order. The initiative complained that commodification and commercialisation of water has induced inequalities and exclusion, has often led to high water-rate hikes, excessive leaks, water-service disruptions and unaccountable management. Therefore, it urged the recognition of the right to water, already acknowledged by the European

[127] On the democratic implications of this instrument, J. MENDES, *Participation and the Role of Law after Lisbon: a Legal View on Article 11*, in *Common Market Law Review*, 2011, p. 1846.

[128] This aspect is of particular importance, since the initiatives that do not respect such condition cannot be registered. This limit has been confirmed by the General Court, case T-450/12, *Agnostakis v. Commission*, EU:T:2015:739. Conversely, the Commission has an obligation to properly state reasons for the refusal to register a proposed initiative: General Court, case T-646/13, *Minority SafePack – One million signatures for diversity in Europe*, EU:T:2017:59, paras 15-18. In fact, the refusal to register impinges upon the very effectiveness of the right to submit a citizens' initiative

[129] Regulation (EU) 211/2011 of the European Parliament and the Council of 16 February 2011, on the citizens' initiative, OJ L 65, 11.3.2011, p. 1.

[130] The other initiatives regarded the phasing out of animal vivisection and the protection of human embryo from practices implying its destruction, in particular in the areas of research, development aid and public health.

Charter on Water Resources. According to this Charter, "international human rights instruments recognize the fundamental right of all human beings to be free from hunger and to an adequate standard of living for themselves and their families. It is quite clear that these two requirements include the right to a minimum quantity of water of satisfactory quality from the point of view of health and hygiene".

Therefore, the committee sought EU legislature to require national governments to provide all citizens with sufficient and clean drinking water and sanitation. In particular, the citizens' initiative intended to ban any form of privatization and to avoid the application of internal market rules to water supply and management. According to the proposal, the Union and the Member States shall take care that water services operate on the basis of economic and financial conditions enabling them to ensure access to adequate quantity and quality of water resources. Water services should then be regarded as services of general interest, provided in the public interest in spite of economic concerns. To sum up, the EU was asked to promote policies consistent with the statement introducing the Water Framework Directive: "Water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such".

The Commission, at first glance, decided to react positively to the initiative[131]. However, in practical terms, it did not take specific actions, rather merely reaffirmed its political commitment to this sector. According to the Commission, in fact, the unique nature of water and sanitation services in satisfying the basic needs of the population is already consistently acknowledged in EU legislation. Consequently, the Commission underlined its will to continue to respect Treaty rules requiring the EU to remain neutral on national decisions governing ownership of water undertakings[132]. In this perspective, no specific initiatives were deemed necessary, since water services already benefit from a specific regime, which is exempt from the application of the ordinary Treaty rules on the free provision of cross-border services[133].

In the meanwhile, the Commission identified a series of remaining gaps and areas where more efforts have to be made at EU or national level in order to address the concerns motivating the citizens' call for action. Firstly, it focused on the role of the Member States, planning a comprehensive control on the full implementation of the EU water legislation and calling for the active contribution of national and local authorities. Secondly, the Commission launched a EU-wide public consultation on the Drinking Water Directive, in order to assess the need for improvements and how they could be

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

132 In light of Article 345 TFEU, EU law has no influence on the national property regimes.

133 R. PALLADINO, *Iniziativa legislativa dei cittadini del'Unione europea e democrazia partecipativa: a proposito dell'iniziativa Right2Water*, in *Il diritto dell'Unione europea*, 2014, p. 493.

achieved. Thirdly, the response undertook to carry out efforts for a more transparent data management and dissemination concerning urban wastewater and drinking water, through a structured dialogue between stakeholders and the promotion of innovative and best practices. In this way, the Commission underlined the need to ensure the neutrality of the provision of water-related services and to strengthen public-private partnerships.

The reaction of the Commission was welcomed with reserve by the European Parliament, which criticized its unsatisfactory soft approach to the recognition of the right to water[134]. The Parliament urged the Commission to take action to recognize the importance of the human right to water and sanitation. Water should be considered a public good for the benefit of all EU citizens rather than a commodity. The Parliament underlined that, following the financial and economic crisis and the ensuing austerity policies, affordability of water services is becoming a matter of growing concern and urges a clear political orientation by the EU institutions. For instance, the EU should take any necessary step to avoid water cut-offs and enforced cutting-off of water supply in the Member States, in case these situations are due to socioeconomic factors in low-income households. Taking into account the neutrality of the European legal order as to the national and local institutional arrangements for water management, the Parliament has stressed that the Commission should by no means promote the privatization of water undertakings in the context of any policy field and in particular of the economic adjustment program. Given that these are services of general interest and are thus mainly in the public interest, the Parliament has called on the Commission to permanently exclude water and sanitation and wastewater disposal from internal market rules and from any trade agreement, in the meanwhile ensuring their economic affordability[135].

4. Conclusions

The described scenario leads to some concluding remarks, which range from the institutional background to the substantive issues posed by the close relationship between freshwaters management and democracy.

First, an overall analysis of the relevant legal sources sketches a vast panorama of hard law and soft law international instruments. The fragmentation of the legal scenario is partly due to the cross-border implications of water-related issues, which call into play different policies. During the last year, such

[134] European Parliament Resolution of 8 September 2015 on the follow-up to the European citizens' initiative Right2Water, P8-TA-PROV(2015)294.

[135] In this way, the Parliament took the situation of some Member States as an example of the raising awareness of the detrimental consequences of the loss of public ownership of water services. In countries such as Spain, Portugal, Greece, Ireland, Germany and Italy, re-municipalization processes have been launched, in order to re-establish the primary role of local public authorities in the management of water services.

fragmentation has been put back together by the impulse of a human right approach to the subject, as a common denominator of the various aspects of freshwaters legal regime. Irrespectively of the formal acknowledgement of a human right to water, the human rights perspective fills up this framework with a normative content. Despite the absence of a common understanding of the right to water, international legal sources are slowly converging towards core objectives, namely access to adequate quantity and quality of freshwaters. In this context, the human right to water seems to gain a more and more stable place in economic relations too. It sets the scene of new corporations' obligations, for the benefit of non-commercial values. Accordingly, the right to water is not expressly included in the Charter of the fundamental rights of the EU, but access to adequate quantity and quality of freshwater resources is a key-concern for the European institutions. The formal recognition of the right to water could derive from a legislative initiative resulting in a piece of secondary law or may even be the outcome of an evolving interpretation of the Charter itself. In the latter case, the Court of Justice would be the striker the European legal order is waiting for. However, this kind of interpretation would need for a coherent and clear legal background certifying the "new *status*" of the access to adequate quantity and quality of water resources. A feasible ground for such advance could be the joint reading of Articles 2 and 36 of the Charter. The former provides the right to life, while the latter states that the Union recognizes and respects access to services of general economic interest as provided for in national law and practices, in order to promote the social and territorial cohesion of the Union.

Besides formal legal definitions, both the International and European legal dimensions offer the stage on which several institutional and private actors play in light of the duty to cooperate. The duty to cooperate is coupled by a trend towards new forms of governance of water-related services. From this point of view, International and European law underline the key role of local authorities in the daily development of water policies. If we look at the recent past, this common trend shows how water policies have changed in very few years. Signals of the end of the season of top-down impositions (privatization) by international non-democratic organizations can be detected, leaving space to the awareness of the direct link between effectiveness of water policies and involvement of their recipients (municipalities, individuals, etc.). The debate on this subject is particularly wide from a policy perspective, but recent trends show the enactment of institutional arrangements and procedures established by the law, from a multilevel perspective. Law and its makers are gradually taking responsibility for a new season of water management and water services. As such, they are effective drivers for the strengthening of participatory tools.

A specific example of the remarkable potential legal solutions applied to participatory democracy in water governance is represented by the Right2Water initiative. However, the mechanism of the citizens' initiative could be improved, by the means of a more effective dialogue between the Commission, the

promoting citizens' committee and the other EU institutions. In fact, the procedure reflects the traditional balance of powers among EU institutions, where the Commission retains a wide discretionary power as the agenda setter of EU legislation. In light of Article 17 TEU, the Commission enjoys the almost exclusive power to initiate legislation, since it is deemed to act in the general interest of the EU. This further recalls the traditional functionalist approach, according to which the deepening of the integration process should be better left to technical institutions, insulated from politics. Nonetheless, the legal and political scenario has sharply evolved towards a new inter-institutional balance. The increased role of the European Parliament and the Council's acknowledged democratic accountability have gradually led to a new constitutional framework for the EU legislative power[136]. Despite the new narrative on the legislative process fostered by the Treaty of Lisbon, the Commission is still the master of the citizens' initiative. Even if it is obliged to state reason for the positions it adopts, the prominent role it plays is at odds with the importance attached to representative democracy and direct participatory tools.

Moreover, the positions taken by the EU institutions on the substance of the initiative reveal a certain degree of inconsistency. Despite the common awareness of the peculiarity of water management and water services, there is no clear-cut approach on the categories at stake, such as privatization, common goods, public property, monopoly, municipalization. This is probably due to the fact that the EU is bound by a non-interference clause on the property regimes of the Member States. However, the registration of any EU citizens' initiative is made conditional upon the fact that the proposed action falls under a domain of EU competence. Then, the European institutions should carefully handle the political debate on a citizens' initiative, in order to avoid implicit interferences with national policy choices and to pay due respect for the principle of conferral of competences. The absence clear dividing line between the actions the European institutions are entitled (and willing) to carry on and the mere "external" support to Member States' commitment in fields that do not fall under the competences conferred to the EU further harms the effectiveness of the mechanism.

[136] For instance, in practice, nowadays most of the proposals of secondary acts issued by the Commission are urged by either the Parliament or the Council.