

THE RIGHT TO WATER, SOCIAL RIGHTS AND THE BRAZILIAN CONSTITUTION

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ABSTRACT

This study provides a comprehensive exploration of the Right to Water, encompassing its historical significance, international perspectives, and potential constitutional integration. Water's pivotal role in human civilization, geopolitical advantages, and hydrological organization are scrutinized. Several nations, including Uruguay, South Africa, Mexico, and Bolivia, have explicitly recognized the right to water, reflecting a global commitment to this fundamental human right. The study delves into the complexities of defining the right to water, its global recognition since the mid-20th century, and its indispensable role beyond consumption in sanitation, infrastructure, socio-economic progress, and public health. Shifting focus to the Brazilian context, the study navigates through Basic Sanitation Law, highlighting its recent amendments and meticulous definitions of sanitation rights. The Brazilian Constitution of 1988 serves as the foundation for public policies, and the study examines the infrequent substantive changes despite numerous amendments, emphasizing the complexities of the amendment process outlined in Article 60. A specific focus is placed on Proposed Constitutional Amendment (PEC) 6/2021, advocating for the inclusion of potable water as a fundamental right. The study acknowledges potential considerations such as privatization and tariffs in the context of providing water as a public service. In conclusion, the research underscores the significance of balancing the recognition of fundamental rights with effective water resource management, emphasizing the need for careful consideration in constitutional amendments.

Keywords: Right to Water, Basic Sanitation Law, Brazilian Constitution, Constitutional Amendments, Water Governance.

O DIREITO À ÁGUA, DIREITOS SOCIAIS E A CONSTITUIÇÃO BRASILEIRA

RESUMO

Este estudo oferece uma exploração abrangente do Direito à Água, abarcando sua significância histórica, perspectivas internacionais e potencial integração constitucional. São examinados o papel crucial da água na civilização humana, as vantagens geopolíticas e a organização hidropolítica. Diversas nações, incluindo Uruguai, África do Sul, México e Bolívia, explicitamente reconheceram o direito à água, refletindo um compromisso global com este direito humano fundamental. O estudo adentra nas complexidades de definir o direito à água, seu reconhecimento global desde meados do século XX e seu papel indispensável além do consumo em saneamento, infraestrutura, progresso socioeconômico e saúde pública. Mudando o foco para o contexto brasileiro, o estudo

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percorre a Lei do Saneamento Básico, destacando suas emendas recentes e definições meticulosas dos direitos sanitários. A Constituição Brasileira de 1988 serve como base para políticas públicas, e o estudo examina as mudanças substanciais pouco frequentes apesar de numerosas emendas, enfatizando as complexidades do processo de emenda delineado no Artigo 60. Um enfoque específico é dado à Proposta de Emenda Constitucional (PEC) 6/2021, advogando pela inclusão da água potável como um direito fundamental. O estudo reconhece considerações potenciais, como privatização e tarifas, no contexto de fornecer água como serviço público. Em conclusão, a pesquisa destaca a importância de equilibrar o reconhecimento de direitos fundamentais com uma gestão eficaz dos recursos hídricos, enfatizando a necessidade de cuidado nas emendas constitucionais.

Palavras-chave: Direito à Água, Lei do Saneamento Básico, Constituição Brasileira, Emendas Constitucionais, Governança da Água.

1 THE RIGHT TO WATER

Water, as a natural resource, has been essential since early human civilization, with communities developing around water sources. Strategic use of water provided geopolitical advantages to states in strategically located areas. The need for hydropolitical organization, considering water as a crucial element, emerged (JEULAND, 2020).

Regarding international actions, some countries, like Uruguay, have explicitly included the right to water in their constitutional content. Additionally, various African and American countries, such as South Africa, Mexico, Slovenia, Egypt, Morocco, Bolivia, and Ecuador, have constitutionalized water access as a fundamental human right (WAGNER, 2021).

The concept of the right to water faces challenges in its definition. The difference in interpreting the minimum requirement for water consumption raises questions about enforceability and potential overconsumption. Despite these challenges, the right to water has gained significant recognition in legal instruments since the mid-20th century (JEFFORDS, 2011).

Water, being indispensable to all forms of life, is inseparable from life itself. Potable water is crucial for human consumption and food preparation. Basic sanitation is essential infrastructure for improving quality of life and socio-economic development. It is also a critical aspect of global public health, given that a significant portion of diseases and mortality worldwide results from poor water quality or inadequate sanitation (BARROSO, 2002). These rights are directly correlated with others, such as the right to human dignity, right to decent housing, energy, public transportation, and lighting, among others (KLAUS; PONS, 2021).

2 HISTORICAL OVERVIEW AND BASIC NOTIONS OF SANITATION

When talking about "basic sanitation," it refers to various services. In Brazil, the Law 11.445/2007 (Basic Sanitation Law), recently amended by Law 14.026/2020, was the first to define the right mentioned in the 1988 Federal Constitution. This law identifies public services of basic sanitation as: (a) potable water supply; (b) sewage system; (c) urban cleaning and solid waste management; and (d) urban drainage and stormwater management (art. 3, I) (FREIRE, 2017).

Freire (2017) explains each service defined by the law. Starting with potable water supply, it involves maintaining water infrastructure, from water capture to household connections. Water, being essential to life, nature, and humans, often carries impurities in its natural state, requiring treatment for safe consumption. Therefore, providing potable water prevents health risks (FREIRE, 2017).

The government's role is to ensure potable water supply, including capture, treatment, and distribution. The issue of sewage system follows the same dimension as it deals with changes in water characteristics due to usage, leading to potential environmental issues. The law also addresses urban cleaning, solid waste management, and drainage (FREIRE, 2017).

These activities involve various tasks and infrastructure for street cleaning, waste collection, drainage, and stormwater treatment. Sustainability considerations have evolved over time, emphasizing the need to care for and protect water. International conventions and declarations have highlighted this, recognizing the right to water for future generations (HÜLSE; PASOLD, 2018).

3 THE BRAZILIAN CONSTITUTION

The law, as described by Miguel Reale, is a social phenomenon inseparable from society, serving to regulate social relations and address human needs. It emerges as a product of social life, aiming to ensure order, economic regulation, and collective survival (REALE, 2011; FREIBERGER. SIQUEIRA, 2018).

The dynamic nature of society, as explained by Balera (2020), necessitates flexible constitutions to avoid disconnecting from the evolving reality of individuals. Law, a social creation, functions under the framework established by politically organized societies, regulating actions based on normative rules (FERRIANI, 2015).

Law and legal science are interconnected, with legal principles evolving to adapt to societal changes. The law's foundation lies in promoting peace within a social context, addressing human relationships and ensuring justice (CARVALHO, 2011). Legislation, whether domestic or international, aims to establish order and cooperation, as exemplified by treaties in the post-World War II era (REZEK, 2022; SILVA, 2011).

Justice, a fundamental goal of legislation, aligns with Plato's perspective that virtuous and just behavior contributes to societal progress and stability (PAVLICH, 2011). Modern constitutionalism, rooted in limiting state powers and ensuring individual rights, reflects the historical shift toward democratic governance (PÉREZ LUÑO, 2004).

Constitutions, such as the Brazilian Constitution of 1988, lay the foundation for public policies, emphasizing social interests and democracy (MOURA, 2014; ANDRADE, 2019). A State Social of Law, emerging post-dictatorship in Brazil, signifies the state's responsibility for public services (AVRITZER, FILGUEIRAS, 2011). The constitution, atop the legal hierarchy, is a dynamic document that endures through societal adherence, embodying constitutional sentiment (HORTA, 1992; BIELSCHOWSKY, 2020).

Constitutional sentiment is a psychological and social phenomenon, vital for sustaining constitutional longevity. It may wane, leading to constitutional erosion and devaluation. Understanding the historical and conceptual aspects of constitutionalism provides context for exploring constitutional reforms and effectiveness (HORTA, 1992; BIELSCHOWSKY, 2020).

4 CONSTITUTIONAL AMENDMENTS AND PROPOSED CONSTITUTIONAL AMENDMENT

In the realm of constitutional amendments, Richard (2018) explains that they can be either corrective or elaborative, serving to better achieve the purpose of the existing constitution. Emphasizing the need to prevent constitutional obsolescence, permanent evaluation of the law is crucial, as Aristotle suggests, "knowing yourself is the beginning of all wisdom" (JARDIM, 2018). Tarabar and Young (2021) inquire why some constitutions undergo frequent amendments, linking it to cultural attitudes regarding individualism and uncertainty avoidance.

Reflecting on the Brazilian context, Melo (2013) notes that despite a significant number of amendments, substantive changes to the constitution have been rare. The amendment process, outlined in Article 60, involves a special and restrictive legislative procedure, requiring three-fifths majority votes in both houses of the National Congress (SILVA, 2016).

Constitutional amendments, unlike mutations, entail actual changes to the text and are subject to limitations outlined in Article 60, such as not abolishing basic constitutional principles. The bicameral principle dictates that both houses of the National Congress jointly deliberate on proposed constitutional changes. Jurisprudential insights highlight the complexity of the amendment process, with alterations to the proposed text requiring approval from the originating legislative house (LENZA, 2020).

The Brazilian Constitution has been amended several times, excluding alterations to entrenched clauses and during states of defense or siege (ROSA, 2007). A recent example is the Proposed Constitutional Amendment (PEC) 6/2021, advocating for the inclusion of potable water as a fundamental right. The PEC, proposed by Senator Jorge Viana and approved in the Senate, aligns with other proposals aiming to recognize water-related rights (PEC..., 2022). Deputies consider issues of privatization and tariffs in the context of providing water as a public service (XAVIER, 2020).

5 CONCLUSION

This study emphasizes the importance of adding the Right to Water to the Constitution, highlighting both the process of constitutional change and the paths leading to such alterations. The discussion covers general aspects of law, the state, and the constitution.

In the text, we explain the untouchability of the Constitution, constitutional sentiment, and constitutional disregard, followed by the types of constitutional changes, constitutional mutation, ways of change in Brazil, Constitutional Amendments, Proposals for Constitutional Amendments, and their processing. The text also addresses the current water situation nationally and internationally, presenting the issue of a water crisis.

The PEC No. 6/2021 is seen as an opportunity to meet Brazilian interests in promoting access to water within the country. The proposed amendment follows the bicameral system, meaning it will be reviewed by the Chamber of Deputies. If there are no changes, it will move on to presidential approval or veto to become part of Brazilian law. If the president doesn't promulgate it within the legal timeframe, the president of the National Congress will act on behalf of the people.

It's important to note that if there are substantial changes to the amendment proposal, it must return to the Senate for reevaluation. In cases of ambiguity or gaps, the proposal must go through parliamentary committees again to ensure legal security during approval and promulgation.

Additionally, there's a lack of material on the specific topic of PEC 06/2021, resulting in a lack of visibility of scientific debates on the subject. This contrasts with the situation in comparative law.

While advocating for the inclusion of water as a human right in the constitution appears commendable, there are potential drawbacks that warrant consideration. Incorporating such specific rights might inadvertently create legal ambiguities and challenges in implementation, leading to unintended consequences. Constitutional amendments require careful drafting to avoid conflicting with existing legal frameworks, and the inclusion of the right to water may open the door to legal disputes regarding resource allocation and prioritization.

Furthermore, countries like Canada, which do not explicitly outline the right to water in their constitution, have been successful in managing and providing access to water resources. This suggests that effective water governance can be achieved through legislative and regulatory mechanisms without the need for constitutional amendments. Therefore, it is crucial to weigh the potential risks and benefits, ensuring that constitutional changes do not inadvertently impede efficient water resource management systems that are already functioning effectively in some nations.

The research for this study revealed aspects that need discussion to enhance and enforce the guarantee of fundamental and individual rights to water access as a human right. This could lead to its inclusion in the Federal Constitution, aligning with international law, especially the UN's 2030 agenda.

The right to water should be universal and equal in actions and services necessary for its promotion, protection, and rehabilitation. The international order gradually contributes to pressuring the government, mentioning the Sustainable Development Goals and universal access to water for human consumption.

Therefore, if the government is responsible for resource distribution and ensuring effective services, it must guarantee rights, uphold the principles of human dignity and material equality, and prioritize the needs of the entire community.

Future researchers are recommended to delve deeper into specific aspects of national codes, focusing on the necessity and effectiveness of fundamental rights after their codification, with a particular emphasis on the right to water in the Brazilian context.

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