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The Legal Dilemmas of the Drinking Water Supply in the Republic of Slovenia

ABSTRACT: *Slovenia is one of the few European countries where the right to drinking water is explicitly recognised by the highest legal act. It was included in the Constitution of the Republic of Slovenia in 2016 (Article 70a), but it was constitutionally protected even before that (under the right to life, personal dignity, and the right to a healthy living environment). Although the explicit recognition of this right at the highest level is important, it raised many dilemmas that have not yet been (fully) resolved. Specifically, the constitutional law has excluded the possibility of providing drinking water in the private sector, i.e. through concessions, while the sectoral legislation governing water concessions has not (yet) been amended, which creates an anomaly in the legal order. In this respect, the question of the permissibility of (retroactive) interference with already granted concessions may also arise. Furthermore, the constitutional law has interfered with the (original) competences of municipalities by stipulating that drinking water supply shall be provided by the state, through self-governing local communities, directly and on a non-profit basis. This implies that the provision of drinking water is no longer the original competence of the municipalities, but of the state. However, it is not clear on what legal basis the municipalities shall provide it or how its financing shall be organised. In addition, defining the provision of drinking water as 'non-profit' may raise questions as to the nature of this activity (economic or non-economic public service) and its compliance with EU law. Notwithstanding all the above, the legislator has still not aligned (all) legislation with the new Article 70a, despite the 18-month deadline set by the constitutional law. All this shows that the inclusion of this right in the Constitution has more of a political than a legal nature.*

KEYWORDS: *Drinking Water, Constitutional Rights, Slovenian law, Concessions, Privatisation.*

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http://doi.org/10.62733/2024.1.49-66

1. Introduction

The supply of drinking water is a public service[1] which – because of its importance – is specially protected at both international and national levels. In Slovenian law its protection is guaranteed by the highest legal act – i.e. in the Constitution of the Republic of Slovenia (hereafter the Constitution[2]) – which defines drinking water as a fundamental human right.[3] It was included following a constitutional initiative in 2016 that resulted in the adoption of the Constitutional Law on the Amendment of Chapter III of the Constitution on Social and Economic Relations,[4] incorporating the right to drinking water into Art. 70a. In addition to the Constitution, drinking water is also regulated by many (complementary) sectoral laws, which are supplemented by by-laws of the state and self-governing local communities (municipalities).[5] The legal framework for drinking water supply in Slovenian law is therefore quite complex and opaque.

Even though the explicit inclusion of the right to drinking water in the Constitution has elevated its importance, the constitutional amendment has led to many ambiguities and legal dilemmas. Namely, the legislator has still not harmonised the relevant sectoral laws with the constitutional law, even though the latter set an 18-month deadline for the adoption of implementing legislation.[6] As a result, Slovenia currently has a regime in force that is not in line with the Constitution, and – due to the nature of the right to drinking water – its direct implementation under the Constitution is not (fully) possible.

This paper aims to present these inconsistencies. The first part of the paper presents the *ratio* for the adoption of art. 70a of the Constitution and places the right to drinking water in its theoretical, international, and comparative legal context. The second part of the paper analyses the content of Article 70a and its (in)compatibility

1 Smets, 2006, p. 43.
2 Official Gazette of the Republic of Slovenia, No. 33/91-I as amended.
3 Although the provision on the right to drinking water is included in the chapter on economic and social relations, it has the status of a human right and fundamental freedom. Namely, per the constitutional case law, legal protection under the constitutional complaint (which is designed to protect human rights and fundamental freedoms) is also guaranteed for rights that are not regulated in the chapter on fundamental human rights and freedoms. See the Constitutional Court Decision, No. Up 41/94 of 22 December 1994.
4 Official Gazette of the Republic of Slovenia, No. 75/16.
5 Zobavnik, 2015, pp. 5–6.
6 Between the submission and publication of this paper, a draft law on public utility services for drinking water supply and wastewater management was proposed, addressing some legal issues related to drinking water. However, since it has not yet been adopted, it is not analysed in this paper.

with relevant (sectoral) laws. The final part of the paper presents the key findings and conclusions on the examined topic.

The hypothesis underlying this study is that the explicit inclusion of the right to drinking water in the Constitution was useful, but not strictly necessary.

2.
Drinking Water as a Human Right

2.1. Definition of the Right to Drinking Water

The right to drinking water is recognised in a number of international legal documents, but the most precise definition is provided in General Comment No. 15 on the right to drinking water to the International Covenant on Economic, Social and Cultural Rights (hereafter General Comment No. 15).[7] It states that the right to safe drinking water ensures that everyone has access to sufficient, safe, acceptable, physically, and affordably available water for personal and domestic use.[8] The main elements that define the right to drinking water are therefore the following:[9]

a) *Availability*: Everyone should have regular access to sufficient water for drinking, washing, laundering, cooking, personal hygiene, and household cleaning.
b) *Quality*: Water for personal and domestic use must be safe and acceptable. It must be free from microbes and parasites, chemical or radioactive substances that pose a risk to human health, and must be of an appropriate colour, odour, and taste.
c) *Physical accessibility*: Water must be physically accessible and at least at a safe distance, adapted to the needs of different groups.
d) *Affordability:* Water must be affordable for all. The cost of water to households should not be a disproportionate burden and, in particular, no individual should be denied access to safe drinking water on the grounds of non-payment.[10]

2.2. International Acts on the Right to Drinking Water

The right to drinking water has only in recent decades been established as a separate human right, following the realisation that water resources are limited. The first

7 General Comment No. 15, The Right to Water, E/C.12/2002/11, 20 January 2003.
8 Ibid., para. 2.
9 Ibid., para. 12.
10 WHO, UN Human Rights, 2010, pp. 7–11.

binding international acts that explicitly mentioned the right to safe drinking water are the 1979 Convention on the Elimination of All Forms of Discrimination against Women[11] and the 1989 Convention on the Rights of the Child.[12] However, these acts only refer to specific groups of individuals (women, children).[13] The Universal Declaration of Human Rights (UDHR[14]) – adopted in 1945 and now legally binding as customary international law – also contributed to the development of the right to drinking water, since it has been the basis for a number of international treaties regulating the right to water,[15] such as the International Covenant on Civil and Political Rights (ICCPR[16]) and the International Covenant on Economic, Social and Cultural Rights (ICESCR[17]), adopted in 1966. However, the right to drinking water is defined in both instruments primarily as a socio-economic right.[18]

The most important role in the development of this right at the international level can be attributed to General Comment No. 15, adopted in 2002.[19] The latter is not in itself legally binding but gives an authoritative interpretation. It states that the right to drinking water is not new, but an existing right under the ICESCR, deriving from the right to an adequate standard of living and the right to the enjoyment of the highest attainable standard of health – and is also inextricably linked to the right to life and human dignity enshrined in the ICCPR and the UDHR.[20]

On the other hand, the right to drinking water is not included in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR[21]), nor in the protocols adopted subsequently. However, the European Court of Human Rights (ECtHR) has on several occasions dealt with water-related cases under the existing provisions, especially under the right to privacy and family life (Art. 8 of the

11 Convention on the Elimination of All Forms of Discrimination against Women, UN General Assembly, 18 December 1979, Official Gazette of the Republic of Slovenia - International Treaties, No 9/92.
12 Convention on the Rights of the Child, UN General Assembly, 20 November 1989, Official Gazette of the Republic of Slovenia - International Treaties No 9/92.
13 Thielbörger, 2014, p. 57.
14 Universal Declaration of Human Rights, UN General Assembly, 10 September 1948, 217 A (III).
15 Ahačič et al., 2016, p. 15.
16 International Covenant on Civil and Political Rights, UN General Assembly, 16 December 1966, 2200 A (XXI), Official Gazette of the Republic of Slovenia, No 35/92 - International Treaties, No 9/92.
17 International Covenant on Economic, Social and Cultural Rights, UN General Assembly, 16 December 1966, 2200 A (XXI), Official Gazette of the Republic of Slovenia, No 35/92 - International Treaties, No 9/92.
18 Thielbörger, 2014, p. 117.
19 Smets, 2006, p. 31.
20 Thielbörger, 2014, p. 64–66
21 European Convention of Human Rights, as amended by Protocols 3, 5, and 8 and supplemented by Protocol 2, and its Protocols 1, 4, 6, 7, 9, 10, and 11, Official Gazette of the Republic of Slovenia - International Treaties, No 7/94.

ECHR).[22] The European Social Charter (ESC[23]) also does not explicitly mention the right to drinking water, but the European Committee of Social Rights (ECSR) – in its consideration of the collective complaint European Roma Rights Centre v Italy[24] – recognised the right to drinking water as part of the right to housing under Art. 31 of the ESC.[25]

In EU law, the right to drinking water can be derived from certain provisions of the Charter of Fundamental Rights[26] and is also classified as a service of general economic interest.[27] These are "economic activities for which Member States, for reasons of general interest, impose specific public service obligations."[28] In the national (Slovenian law) context, they are understood as economic public services.[29] However, EU law does not determine the form in which these public services must be organised (the principle of neutrality), leaving this to the member states.[30] It does, on the other hand, lay down so-called public service obligations, which include the obligation to provide a public service (drinking water supply) on a regular (continuous) basis, of the prescribed quality and at an affordable price, for the benefit of all users throughout the territory under equal conditions, with special protection for users and consumers. As drinking water supply is an economic activity, it is subject to EU rules on the internal market, competition, and state aid.[31] Protection of drinking water is also addressed by the Water Framework Directive,[32] the Drinking Water Directive,[33] and the Urban Waste Water Treatment Directive.[34]

22 See, for example *Elci and Others v Turkey*, Application Nos 23145/93 and 25091/94, judgment of 13 November 2003; *Ostrovar v Moldova*, Application No 35207/03, judgment of 13 September 2005; *Zander v Sweden*, Application No 14282/88, judgment of 25 November 1993, *Tătar v Romania*, Application No 67021/01, judgment of 27 January 2009, and *Dzemyuk v Ukraine*, Application No 42488/02, judgment of 4 September 2014.
23 European Social Charter, Official Gazette of the RS - International Treaties, No 7/99.
24 *European Roma Rights Centre v. Italy*, complaint No 27/2004, decision of 7 December 2005.
25 Adamič, 2012, p. 22.
26 In particular, the right to human dignity (Art. 1), the right to life (Art. 2, para. 1), the right to bodily integrity (Art. 3, para. 1), the right to social security (Art. 34) and the right to health (Art. 35), as set out in the EU Charter of Fundamental Rights, OJ C 83/389, 30. March 2010.
27 Pečarič, 2019, p. 423; Pečarič and Bugarič, 2011, p. 166.
28 Art. 14 and 106 of the Treaty on the Functioning of the European Union, OJ C 326/47, 26 October 2012, pp. 47–390, and Protocol No 26 on Services of General Interest.
29 Pečarič, 2019, p. 299.
30 Ahačič et al., 2016, p. 51.
31 Pečarič, 2019, p. 425–426. See also Nikolić, 2015, pp. 22 et seq.
32 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 32, 22 December 200, p. 0001–0073.
33 Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption, OJ 330, 5 December 1998, pp. 32–54.
34 Council Directive of 21 May 1991 concerning urban waste-water treatment (91/271/EGS), OJ 135, 30 May 991 pp. 0040–0052.

Following the first European Citizens' Initiative,[35] the water sector was excluded by the European Commission from the application of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (hereafter Directive 2014/23/EU[36]), stating that "Concessions in the water sector are often subject to specific and complex regimes that need to be carefully considered, as water is a public good of fundamental importance for all citizens of the Union. The specific nature of these arrangements justifies excluding the water sector from the scope of this Directive."[37] The 'controversial' proposal for a directive provided that member states which had already partially privatised or were planning to privatise their water supply should, as a general rule, tender for the award of a concession at a European level.[38]

2.3. A Comparative Law Review of the Right to Drinking Water

In most countries the right to drinking water is protected by legislation and is rarely included among human rights and freedoms. Exceptions are Uruguay, South Africa and Slovakia, where the right to drinking water is a constitutional category.[39] At the global level, Uruguay is the first country that has included the right to drinking water in its constitution and established the exclusive jurisdiction of the state over water. The inclusion of this right in the Constitution was achieved through a referendum in 2004, due to the high cost, poor quality of services, and the negative consequences of privatisation.[40] The right to adequate food and water is also explicitly recognised in the Constitution of the Republic of South Africa and specified at the legislative level.[41]

In Europe, the human right to water is explicitly recognised in the legal order in Belgium, Finland, France, Russia, Spain, Sweden, Ukraine, and the United Kingdom. Social tariffs for the less well-off exist in Austria, Bulgaria, Greece, Hungary, Luxembourg, Malta, Portugal, the Netherlands, and the United Kingdom, as well as in Belgium.[42] However, this does not mean that these countries have already fully implemented the right to safe drinking water, nor does it mean that in other countries the right to safe drinking water does not exist in practice. The privatisation of

35 The Slovenian government was among those that supported the proposal, while some countries (Austria, France, Belgium, Czech Republic, Germany, Italy, Poland, Spain, United Kingdom) expressed reservations on the substance.
36 OJ L 94, 28 March 2014, p. 1–64
37 Recital 40 of the Directive 2014/23/EU.
38 Pekolj, 2014, pp. 11–13.
39 Centre of Housing Rights and Eviction, 2008, pp. 58–225
40 Art. 47 of the Constitution of the Republic of Urugvay.
41 Art. 27 of the Constitution of the South Africa Republic.
42 Thielbörger, 2014, p. 17.

drinking water varies widely across the EU, with mixed models prevailing where both public and private providers supply drinking water. In the Netherlands, it is legally established that the private sector is not allowed to participate in the supply of drinking water, while in Belgium, Finland, France, Germany, Greece, Italy, and Spain, the public and private sectors provide drinking water in varying proportions. In England and Wales, on the other hand, there has been full privatisation of the water supply with strong regulation.[43]

However, the only EU member state other than Slovenia that has a constitutional framework for (drinking) water is Slovakia. The right to drinking water was enshrined in the Constitution of the Republic of Slovakia in 2014 and is regulated by Art. 4, which provides in its first paragraph that groundwater and watercourses are also the property of the state, which must protect and care for natural resources on behalf of its citizens and future generations. The second paragraph provides for a prohibition on the export of water out of the country, including through the water supply network. The only exceptions are water intended for personal use, bottled water, and water for humanitarian purposes, further specified in the Water Act (*Vodní zákon*[44]).[45]

Other EU countries do not have such an explicit provision in their constitutions, but this does not mean that this right does not exist, as it can be guaranteed through case law or other legal institutions.[46]

43 Presad, 2007, p. 219.
44 Act No. 254/2001 Coll., the Water Act and Amendments to Certain Acts (Water Act).
45 Zobavnik, 2015, pp. 17–18.
46 Ibid., p. 24.

3. Drinking Water Supply from the Perspective of Slovenian Law

3.1. Constitutional Framework

Before the 2016 constitutional reform, the Constitution did not explicitly define the right to drinking water, but the latter (implicitly) derived from certain other rights that cannot be guaranteed without access to water. These include (among others) the right to life,[47] the right to personal dignity and security,[48] and the right to a healthy living environment.[49] In addition, drinking water was protected as a public good by the provision on public goods and natural resources in Art. 70 of the Constitution.

However, it was accepted that the prior constitutional regime on water supply was quite liberal, leaving the legislator and the executive a wide margin of discretion in granting concessions and leaving the provision of drinking water to private operators. In light of the above, demands for more specific constitutional protection of water resources and access to the right to drinking water have begun to emerge.[50] To constitutionally establish water as a universal and fundamental human right, to prevent the privatisation of water resources and the treatment of water as a marketable commodity, and to ensure that the provision of drinking water is a non-profit public service, members of the National Assembly have submitted a proposal to amend the Constitution based on Art. 168. This initiative followed the (successful) European citizens' initiative to exclude the water sector from the scope of the Directive on the award of concession contracts, which originally regulated the possibility of (cross-border) concessions also for drinking water supply. Moreover, by exempting water from the free market and enshrining the right to drinking water in the Constitution, the chances of realising the aim that water remains the property of the people – and that it is the state that distributes this right – is increased.[51]

On 17 November 2016, the National Assembly adopted the constitutional law which added a new Art. 70a to the Constitution, regulating the right to drinking water. It stipulates that everyone has the right to drinking water; water resources are a public good managed by the state; they serve as a priority and sustainable supply of drinking water and domestic water to the population and in this respect are not a

47 Art. 17 of the Constitution.
48 Art. 34 of the Constitution.
49 Art. 72 of the Constitution.
50 National Assembly of the Republic of Slovenia, 2014, p. 2 et seq.
51 National Assembly of the Republic of Slovenia, 2015, pp. 7–8.

marketable commodity; and that the supply of drinking water and domestic water to the population is provided by the state, through self-governing local communities, on a direct and non-profit basis. The second paragraph of the constitutional law provides that the laws regulating the subjects referred to in the new Art. 70a of the Constitution must be harmonised with this constitutional law within eighteen months of its entry into force.

The constitutional provision will be analysed in more detail below.

a) "Everyone has the right to drinking water":
   This provision imposes an obligation on the state to provide, within its means, adequate drinking water in terms of quantity and hygiene for each individual. However, the state is not obliged to provide water in areas where only self-supply is appropriate, nor on properties that do not meet the legal conditions for obtaining a water supply connection. This provision therefore does not impose an obligation to provide a compulsory public service of supplying drinking water from public water supply systems to all inhabitants in the territory of Slovenia.[52] With self-supply, the population assumes the obligation of the municipalities and the state to provide drinking water, which has the effect of relieving the burden of heavy investments in the construction of public water supply networks in certain, more sparsely populated areas. However, even in this case the state and municipalities are obliged to provide assistance to self-supplying water connections in the form of part of the investment funds, by ensuring water quality control, and by training waterworks operators. Where this is not possible, they at least should provide cisterns with drinking water.[53] This also applies to those living in illegal housing without connections to communal infrastructure (e.g. Roma settlements).[54] The concept of 'drinking water' further implies that water must also be medically safe, otherwise, it is not drinkable.[55] However, it is not clear from the constitutional provision what quantities individuals are entitled to based on the right to drinking water, nor what the price of drinking water should be; indirectly, it is only possible to infer that it must be calculated in a cost-based manner.[56] Moreover, it does not regulate the position of those who cannot afford even the most basic quantities of drinking water.

52 Constitutional Commission of the National Assembly of the Republic of Slovenia, 2016, p. 21.
53 See Art. 9-12 of the Decree on Drinking Water Supply, Official Gazette of the Republic of Slovenia, No. 88/12 as amended.
54 *Hudorovič and others v. Slovenia*, Applications Nos 24816/14 and 25140/14, judgment 10 March 2020. Smets, 2006, p. 57, 65.
55 Constitutional Commission of the National Assembly of the Republic of Slovenia, 2016, p. 19.
56 Glavaš, 2019, p. 36.

b) "Water resources are a public good managed by the state"
The term 'water resources' is not defined in Slovenian law, but it is accepted in theory that it includes all sources of water from which drinking water is collected for the supply of the population, i.e. both surface water and groundwater, natural and man-made resources, including water intakes and reservoirs.57 The Constitution therefore confers the status of public good on (all) water resources but does not define it, even though it is also included in the prior article, Art. 70 of the Constitution. In addition, Art. 70a, para. 2, introduces a non-proprietary concept of public good. According to this, the state cannot acquire ownership of water resources (anymore), but can only manage them. Nor can another (public or private) entity acquire ownership of water resources. Such a regulation aims to prevent the (capital) privatisation of water resources.58

c) "Water resources serve as a priority and sustainable supply of drinking water to the population and water for domestic use and are not a tradable commodity in this respect"
The provision does not specify whether the establishment and recognition of a right to drinking water also implies free access to and use of drinking water. However, this cannot reasonably be expected of the state, since the proper maintenance of water supply installations, the costs of the infrastructure system, and the monitoring of water quality itself are not free and represent for the state certain costs.59 In light of this paragraph, the supply of water to the population takes permanent precedence over the economic exploitation of water resources60 and – if a water resource is not sufficiently abundant to meet the needs of a non-profit-making supply – it cannot be exploited for economic purposes. For this reason, the state has to monitor the quantity and quality of water resources and to protect their condition, which is particularly relevant when water resources are used for other purposes. The purpose of this provision is therefore to adequately protect the supply of drinking water to the population while not preventing its economic exploitation. Thus, companies will still be allowed to exploit water resources for economic purposes, but only to an extent that does not jeopardise the supply of the population, which has priority in this case. Only surplus water that is not primarily intended for the supply of the population will therefore be available on the free market.61

57 Kaučič, 2017, p. 61. See also Constitutional Commission of the National Assembly of the Republic of Slovenia, 2016, p. 19.
58 Ibid, p. 20.
59 Kaučič, 2017, p. 61.
60 Smets, 2006, pp. 40–41.
61 Kaučič, 2017, pp. 61–62.

d) "The supply of drinking water to the population and water for domestic use is provided directly and on a non-profit-making basis by the state through the self-governing local communities"
Drinking water supply is defined as the exclusive responsibility of the state, but is provided through self-governing local communities. However, it is not clear on what legal basis self-governing local communities provide this service. Art. 140 of the Constitution allows for the transfer of competences from the state to self-governing local communities if such transfer is provided for by law and the self-governing local community receives financial resources to carry out the tasks of the state, but according to the Explanatory Memorandum to the constitutional law, Art. 70a of the Constitution does not refer to such a transfer of competence from the state to the self-governing local communities, but rather to a sui generis competence.62 It follows that the provisions of Article 140 of the Constitution shall not (fully) apply to the supply of drinking water and - since Art. 70a does not address the financing of self-governing local communities - this aspect will have to be regulated by legislation.

Moreover, this (state) public service has to be provided 'directly', implying the public service provider shall be fully incorporated into the state or local administration system (e.g. a department within a ministry).[63] According to this, the supply of drinking water could be provided only in the form of a state-run overhead plant. However, such an interpretation would be problematic because in Slovenia the supply of drinking water is generally provided in the form of (municipal) public undertakings. In addition, it is clear from the explanatory memorandum of the constitutional law that it aimed to exempt the supply of drinking water to the population from market activities and the market rules of the EU's internal market. This indicates that the provision of public service through a public undertaking is still acceptable,[64] whereas granting a concession for drinking water supply is no longer possible (under the Constitution).

In addition, Slovenian law does not recognise the term non-profit public service, nor is it compatible with the nature of the drinking water supply, which is an economic public service where profit-making is subordinated to the provision of public goods but not prohibited. Art. 70a, para. 4 of the Constitution must therefore be interpreted as requiring that the price of drinking water shall be determined on a cost-oriented basis, and according to an appropriately controlled methodology. Any surplus revenue may only be used for investment in the improvement and development of the activity.[65] A different interpretation – i.e. that by making the service non-profit,

62 Constitutional Commission of the National Assembly of the Republic of Slovenia, 2016, p. 21.
63 Pečarič, 2019, p. 154.
64 Ahačič et al., 2016, pp. 13–14.
65 Rems, 2019.

the legislator intended to exclude it from the scope of EU law - could be problematic from the point of view of the relationship between national constitutional law and EU law, which has primacy.[66] As already explained, under EU law the provision of drinking water has the status of a service of general economic interest. A different regime is therefore inadmissible.

3.2. Legislative Framework

At the legislative level, drinking water supply is regulated by a number of laws, supplemented by state and municipal by-laws (defining for each municipality how the drinking water supply should be implemented within the organisation of the individual municipalities). The Slovenian legal system therefore does not have an umbrella law regulating the water sector, but its provisions are scattered in various regulations which must be applied in parallel. Some of the most important laws, also directly affected by the constitutional change (and therefore subject to future harmonisation), will be presented below.

The Environmental Protection Act (hereafter EPA[67]) defines drinking water supply as a compulsory municipal public service, meaning it has to be provided by the municipality in its territory. Only exceptionally, if the municipality fails to ensure its provision, does the state provides it in the municipality's territory and at the municipality's expense. However, this power has not yet been used in practice, which is mainly due to the lack of state supervision of the public service by municipalities. the constitutional law transferred the responsibility for the provision of drinking water from the municipalities to the state, thereby interfering with its original competences, without compensating it for the loss of revenue from the supply of drinking water. Namely, according to Art. 21 of the Local Self-Government Act,[68] the original tasks of a municipality include the regulation, management, and care of local public services, which are provided by the municipality either directly within the municipal administration, by establishing public institutions and undertakings or by granting concessions.

Moreover, the constitutional law has transferred to the state only the exclusive competence for the supply of drinking water, while other public services in the water sector – such as the discharge and treatment of municipal and precipitation wastewater, and the collection and treatment of certain types of municipal waste[69] – are still within the competence of the municipalities (compulsory municipal economic public services).

66 Art. 3.a of the Constitution.
67 Official Gazette of the Republic of Slovenia, No. 44/22 as amended.
68 Official Gazette of the Republic of Slovenia, No. 94/07 as amended.
69 Art. 233, para. 1 of the EPA.

In addition, water supply infrastructure is (still) owned by municipalities and not by the state.[70] This division of competences does not seem adequate.

On the other hand, the EPA does not specify the subject-matter of this public service but authorises the government to prescribe in more detail the standards for the provision of the public service and the pricing methodology. This is regulated by the Decree on Drinking Water Supply, under which municipalities are required to provide public water supply throughout their territory to operate a public service for the supply of drinking water. Every building must be connected to it unless the building does not have a sewage outlet. The decree also explicitly states that self-supply of drinking water is only allowed in areas and in the case of buildings where the municipality does not provide a public drinking water service. Furthermore, the Decree on the Methodology for Determining Prices of Obligatory Municipal Public Services for Environmental Protection[71] sets out the national guidelines for the pricing of drinking water, while the definition of drinking water and its quality standards are set out in the Rules on Drinking Water.[72] According to this, wholesome drinking water must not contain micro-organisms, parasites, and their developmental forms in such numbers as to constitute a danger to human health; it must not contain substances in concentrations which, alone or in combination with other substances, may constitute a danger to human health; and it must comply with the microbiological and chemical parameters laid down in the rules. The responsibility for its wholesomeness lies with the public drinking water service provider.

The theory argues that such a legal authorisation (as found in the EPA) is not in line with the principle of legality.[73] According to this the exercise of constitutional rights may be determined only by law (so-called reservation of law)[74] and not by lower legal acts (e.g. by-laws), meaning that it is inadmissible that essential aspects of the exercise of the right to drinking water are currently regulated at the sub-legislative level,[75] i.e. in the Decree of Drinking Water Supply, the Decree on the Methodology, and in municipal ordinances.

The concept of public good, which is also contained in the new constitutional provision, is defined in the Water Act (hereafter WA[76]). The act distinguishes between natural[77] and built[78] public goods. The former includes inland waters and water lands,

70 Art. 233, para. 2 of the EPA.
71 Official Gazette of the Republic of Slovenia, No. 87/12 as amended.
72 Official Gazette of the Republic of Slovenia, No. 19/04 as amended.
73 For more on the principle of legality, see Constitutional Court Decision, No. U-I-79/20 of 13 May 2021, point 69.
74 Art. 15, para. 2 of the Constitution.
75 Ahačič et al, 2015, p. 126.
76 Official Gazette of the Republic of Slovenia, No. 67/02 as amended.
77 Art. 5 of the WA.
78 Art. 17 in conjunction with Art. 18 of the WA.

while a built public good is conferred this status by a decision of the competent authority if it can be intended for general use.[79] According to the above, the status of public good cannot therefore apply to groundwater, as it is not generally accessible.[80] Nevertheless, the constitutional law grants the status of public good to all water resources. Since groundwater is the main source of drinking water, *de lege ferenda* public good status will also have to be granted to it. Water goods are subject to a special legal regime. Anyone can use them free of charge and without a special act, provided that this has only a minor impact on the quantity and quality of the water and does not infringe on the equal rights of others (general use).[81] However, any use that exceeds the limits of general use (special use) requires a water right to be obtained for a fee. The latter may be obtained by a water permit[82] granted in an administrative procedure by an administrative decision of the Slovenian Environment Agency (ARSO) for a maximum period of 30 years, or by a concession[83] granted by the government based on a public tender for a maximum period of 50 years. In this respect, special uses of water for the supply of drinking water have priority over uses of water for other purposes.[84] According to the Water Act, the supply of drinking water requires a water right that must be obtained by the municipality and therefore corresponds to a special use of a public good. The WA, contrary to the Constitution, establishes public ownership of water goods but prohibits legal transactions with them.[85]

The provision of economic public (drinking water) services is governed by the Services of General Economic Interest Act (hereafter SGEIA[86]). According to this, public services can be provided in the form of overhead establishments, public economic institutions, public undertakings, or by granting concessions. In the field of drinking water supply, this implies that municipalities obtain a water right based on a water permit and then organise the provision of this public utility in the forms listed above, usually in public undertakings. The legislation therefore allows for both public and private provision of drinking water, which is a fundamental difference from the constitutional law, which *de facto* prohibits the private provision of this public service. This raises the question of the validity of already granted concessions with operators supplying drinking water, and concession agreements and water permits for the commercial exploitation of water resources. A change in the law is admissible under conditions of non-genuine retroactivity, i.e. where there are reasons of public interest

79 Art. 17, para. 1 of the WA.
80 Ude, 1994, p. 121.
81 Art. 105 of the WA.
82 Art. 125 of the WA.
83 Art. 136 of the WA.
84 Art. 108, paras. 1-2 of the WA.
85 Art. 21, para. 8 of the WA.
86 Official Gazette of the Republic of Slovenia, No. 32/93 as amended.

which override the principle of the protection of legitimate expectations. However, the legislator will have to provide for a transitional period and/or fair compensation for the prejudice to the legal position of the concessionaires.[87] Otherwise, the state's liability for damages could be established.

Moreover, the implicit prohibition on the granting of concessions for the supply of drinking water shows a clear misunderstanding of the process of privatisation of the provision of public services. Privatisation of provision implies that certain functions are transferred from the public sector to private sector entities (e.g. companies), in the specific case of supplying drinking water, while control (and responsibility) over the provision of this function remains with the public sector. Moreover, the private entity only manages the water infrastructure, while the municipality remains the owner. It does not therefore lead to a change of ownership (of water resources).[88] The problem is therefore not the privatisation of the provision of drinking water, but the private ownership of water resources (capital privatisation). Despite this, the constitutional law prevents any delegation of any tasks to a private entity. In addition, current legislation already allows for the restriction of specific uses of water and the imposition of specific obligations on the holder of a water right due to threats to drinking water supplies. Therefore, a prohibition on the granting of concessions was not necessary, but rather greater control over the operators of this public service.

Among the more important laws governing drinking water supply are the Act Regulating the Sanitary Suitability of Foodstuff, Products and Materials Coming into Contact with Foodstuffs,[89] which sets out the requirements for drinking water to protect human health; the Fire Protection Act,[90] and the Fire Service Act[91], which set out the requirements for the use of water from the public water supply network for fire safety purposes; and the Act on Protection against Natural and Other Disasters, which prescribes the obligation to draw up a protection and rescue plan for water supply systems following the Regulation on the Content and Drawing-up of Protection and Rescue Plans.

4.
Conclusion

Based on all the above, it is possible to conclude that the explicit inclusion of the right to drinking water in the Constitution was useful, but not strictly necessary, as its

87 Constitutional Court Decision, No. U-I-193/19-14 of 6 May 2021.
88 Božič, 2015. p.
89 Official Gazette of the Republic of Slovenia, No. 52/00 as amended.
90 Official Gazette of the Republic of Slovenia, No. 3/07 as amended.
91 Official Gazette of the Republic of Slovenia, No. 113/05 as amended.

(constitutional) protection was already guaranteed before the constitutional change through other constitutional rights. It therefore has a (merely) declaratory effect. Namely, according to officially published data, more than 94% of Slovenia's population has access to drinking water through public water supply,[92] and monitoring ensures that the water is of adequate quality, meaning that the existing (legislative) regime for the supply of drinking water is functioning.[93] The initial hypothesis can therefore be confirmed.

On the other hand, the constitutional law did not address other – more important – problms regarding drinking water supply, such as insufficient funds for the maintenance of public water supply systems, non-receipt of concession fees, difficulties in accessing drinking water in Roma settlements, and for socially weaker populations. In addition, it introduced some changes that are not in line with the (legally and theoretically) established concept of public services (and at least *prima facie* also not in line with EU law) — such as the non-profit provision of drinking water as a service of general economic interest, and the implicit prohibition against granting concessions for this purpose, although this form of providing a public service is (often) more (economically and professionally) efficient.

Therefore, without relevant changes to legislation – in particular to the laws presented in this paper – it will not be possible to implement the right to drinking water in a (constitutionally) compliant manner. However, given that the deadline for harmonisation has long since passed and that there is no sign of any (new) tendencies to (finally) implement the requirements of the constitutional law, it is evident that the constitutional amendment was more a political gesture without the will to make concrete legal changes.

92 ARSO, 2023.
93 See also Avbelj, 2016, p. 3.

Bibliography

- Adamič, G. (2012) 'Pravica do vode', Pravna praksa, 16/17, p. 22.
- Ahačič, J., Gril, M., Košir, T., Zupančič, S. (2016) 'Zapis pravice do čiste pitne vode v slovensko ustavo' Pravna praksa, 1, pp. 13–14.
- Avbelj, M. (2016) 'Pitna voda: ustavna prepoved in ne pravica', Pravna praksa, 45/46, p. 3.
- Božič, K. (2015) Pravica do vode: voda mora biti skupna, ne zasebna. Dnevnik, 18. julij 2015, [Online]. Available at: https://www.dnevnik.si/1042717008 (Accessed 5 November 2023).
- Centre of Housing Rights and Eviction (2008) Legal Resources for the right to water and sanitation, pp. 58–225 [Online]. Available at: http://www.worldwatercouncil.org/fileadmin/wwc/Programs/Right_to_Water/Pdf_doct/RWP-Legal_Res_1st_Draft_web.pdf (Accessed: 26 October 2023).
- Glavaš, M. (2019) Analiza 70.a člena Ustave Republike Slovenije: pravica do pitne vode: magistrska naloga. Ljubljana: Univerza v Ljubljani, Pravna fakulteta.
- Kaučič, I. (2017) Ustava Republike Slovenije z uvodnimi pojasnili. Ljubljana: GV Založba.
- Pečarič, M. (2019) Javne službe: Storitve splošnega pomena v službi javnosti. Ljubljana: Beletrina.
- Pečarič, M., Bugarič, B. (2001) Javne službe. Ljubljana: Fakulteta za upravo.
- Pekolj, N. (2014) 'Ko kozarec pitne vode določi meje notranjega trga EU', Pravna praksa, 26, pp. 11–13.
- Presad N. (2007) 'Privatisation of Water: A Historical Perspective', Law, Environment and Development Journal, 3/2, p. 217.
- Rems, L. (2019) Pravica do pitne vode v ustavi – izvedbenih predpisov (še) ni na vidiku? Mreža za prostor, 8. avgust 2019 [Online]. Available at: http://zagovorniki-okolja.si/2019/08/08/pravica-do-pitne-vode-v-ustavi-izvedbenih-predpisov-se-ni-na-vidiku/ (Accessed: 10 November 2023).
- Smets, H. (2006) The Right to Water in National Legislations. Agence Française de Développement Research Department [Online]. Available at: https://fr.ircwash.org/sites/default/files/Smets-2006-Right.pdf (Accessed: 12 November 2023).
- Thielbörger, P. (2014) The Right(s) to Water, The Multi-Level Governance of a Unique Human Right. Heidelberg: Springer.
- Ude, L. (1994) 'Javno dobro', Časopis za kritiko znanosti, domišljijo in novo antropologijo, XXII(168/169), pp. 121–134.
- WHO, UN Human Rights (2010) The right to water, Fact Sheet no. 35, pp. 7–11 [Online]. Available at: https://www.ohchr.org/Documents/Publications/FactSheet35en.pdf (Accessed: 17 October 2023).

• Zobavnik, I. (2015) Pitna voda: primerjalni pregled [Online]. Available at: https://fotogalerija.dz-rs.si/datoteke/Publikacije/Zborniki_RN/2015/Pitna_voda.pdf (Accessed: 18 October 2023).

Other Sources

• Agencija Republike Slovenije za okolje (ARSO) Kazalci okolja-vode: Dostop do pitne vode, 17 April 2023 [Online]. Available at: https://kazalci.arso.gov.si/sl/content/dostop-do-pitne-vode-2 (Accessed: 24 October 2023).
• Constitution of the Republic of Slovakia [Online]. Available at: https://www.prezident.sk/upload-files/46422.pdf (Accessed: 2 November 2023).
• Constitution of the Republic of Uruguay [Online]. Available at: https://www.constituteproject.org/constitution/Uruguay_2004.pdf?lang=en (Accessed: 2 November 2023).
• Constitution of the South African Republic [Online]. Available at: http://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf (Accessed: 2 November 2023).
• Constitutional Commission of the National Assembly of the Republic of Slovenia (2016) Report on the Preparation of the Draft Constitutional Law on the Amendment of Chapter III of the Constitution of the Republic of Slovenia and on the Preparation of the Draft Decree on the Promulgation of the Constitutional Law on the Amendment of Chapter III of the Constitution of the Republic of Slovenia, 3 November 2016.
• National Assembly of the Republic of Slovenia (2014) Proposal to initiate the process of amending the Constitution of the Republic of Slovenia with a draft Constitutional Act, EPA 1861 - VI, 20 March 2014.
• National Assembly of the Republic of Slovenia (2015) Proposal to initiate the process of amending the Constitution of the Republic of Slovenia with a draft Constitutional Act, EPA 463 - VII, 16 April 2015