

Vasilka SANCIN* – Miha JUHART**
The Right to Safe Drinking Water in International Law and
in Slovenia’s legal framework and implementation***

Abstract

According to the United Nations Office of the High Commissioner for Human Rights, a total of 2.1 billion people globally lack access to safe, readily available water at home. Given the rapid population growth, demand for water has been consistently on the rise, while its available quantity has been decreasing due to its unsustainable use. Despite widespread international support for the recognition of the right to safe drinking water, which was also demonstrated by the adoption of the UN General Assembly Resolution on the Human Right to Water and Sanitation in 2010, progress achieved at international and national levels reveals significant remaining challenges, including huge inequalities between and within countries in accessing basic water services. In Slovenia, drinking water supply, for which data on water quality are available, is provided to almost 90% of the population, and in 2016, Slovenia amended its Constitution and explicitly included the universal right to drinking water (Article 70a). This article discusses the existence and normative content of the right to safe drinking water, both in international and Slovene legal contexts. Furthermore, it critically assessed the adequacy of legal protection of access to safe drinking water and analysed Slovenia’s obligations in relation to this right. Hence, in addition to looking into the normative content of the right, it also discusses whether the desired effects are already recognizable in practice, particularly focusing on the situation in Slovenia. The article also includes some de lege ferenda proposals, which competent authorities might wish to consider when further developing a normative framework or concrete policy measures.

Keywords: right to safe drinking water, international law, Slovenia’s legislation, Constitution of the Republic of Slovenia, UN General Assembly Resolution on the human right to water and sanitation, UN Special Rapporteur on the human rights to safe drinking water and sanitation.

“Access to safe water is a fundamental human need and, therefore, a basic human right. Contaminated water jeopardizes both the physical and social health of all people. It is an affront to human dignity.”¹

1. Introduction

The United Nations Office of the High Commissioner for Human Rights (hereinafter OHCHR) reports that 2.1 billion people worldwide lack access to safe,

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* dr. jur., full professor, Department of International Law, University of Ljubljana, Faculty of Law, email: vasilka.sancin@pf.uni-lj.si, ORCID: 0000-0002-1623-7278

** dr. jur., full professor, Department of Civil Law, University of Ljubljana, Faculty of Law, email: miha.juhart@pf.uni-lj.si, ORCID: 0000-0001-6730-4904

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¹ Message of the UN Secretary-General Kofi Annan on World Water Day, 12 March 2001.



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readily available water at home.² Water is one of the elementary natural resources that must be managed in the most sustainable way to ensure its availability not only for the present but also for future generations; given the rapid population growth, the water demand has been consistently on the rise, while its available quantity has been decreasing due to its unsustainable use.

Numerous international instruments emphasise the importance of access to water, and the 2030 Agenda for Sustainable Development,³ adopted at the United Nations Sustainable Development Summit on 25 September 2015, presenting the 17 Sustainable Development Goals (SDGs), cannot be achieved without ensuring safe drinking water (SDG 6.1 and 6.2) – a necessary element for the survival of the humankind that satisfies the social and human elements of sustainable development.⁴ The implementation of SDG 6 requires a paradigm shift; namely, water is regarded not just as a natural resource to be managed and used, but the access to safe, affordable, and reliable drinking water must be understood as a fundamental human right to that all people are entitled without discrimination, as it is indispensable to sustain healthy livelihoods and maintain people's dignity, which is an essential precondition for eradicating poverty and building peaceful and prosperous societies.⁵ Thus, drinking water supply has become an increasingly burning global issue, including the context of securing world peace.⁶

The idea of the human right to water first emerged at international environmental conferences in response to global water justice struggles.⁷ However, over the years, the international community has begun to consider access to safe drinking water within a human rights framework. Evidence of such developments includes explicit references to access to water in the Convention on the Rights of the Child (monitored by the Committee on the Rights of the Child, hereinafter CRC), the Convention on the Elimination of All Forms of Discrimination against Women (monitored by the Committee on the Elimination of Discrimination against Women, hereinafter CEDAW), and the Convention on the Rights of Persons with Disabilities (monitored by the Committee on the Rights of Persons with Disabilities, hereinafter CRPD). Furthermore, in 2002, the UN Committee on Economic, Social, and Cultural Rights (CESCR) adopted its general comment No. 15 on the right to water (GC 15).⁸ In 2016, the United Nations Sub-Commission on the Promotion and Protection of Human Rights adopted Guidelines for the realization of the Right to Drinking Water and Sanitation.⁹

² See OHCHR and the right to water and sanitation.

³ Resolution adopted by the General Assembly on 25 September 2015: Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1.

⁴ The UN 2023 Water Conference will be the first United Nations conference on water since 1977 and will be held at the UN HQ from 22–24 March 2023. It is expected to be a watershed moment for the sustainable development community as a whole and is about uniting the world in accelerating action towards achieving SDG 6: water and sanitation for all by 2030.

⁵ See also Sancin & Kovič Dine 2016, 95–108.

⁶ An entirely new discipline of Water Diplomacy has been developed for these purposes.

⁷ Murthy 2013, 90.

⁸ General Comment No. 15 (2002), The Right to Water, UN Doc. E/C.12/2002/11.

⁹ Guidelines were adopted in Resolution 2006/10, Promotion of the Realization of the Right to Drinking Water and Sanitation, Report of the Sub-Commission on the Promotion and Protection of Human Rights, Fifty-eighth session, UN Doc. A/HRC/Sub.1/58/L.11 (2006), 41.

The United Nations Development Programme (UNDP) promotes the human-rights-based approach¹⁰ and underlines that the starting point and unifying principle for public action in water and sanitation is the recognition that water is a basic human right. In 2008, the Human Rights Council (HRC) created the mandate of the *“independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation”* to help clarify the scope and content of these obligations¹¹ and so far, three mandate holders have been appointed.¹²

However, the right to water, along with the right to sanitation, has been globally recognised within the human rights legal framework, and widespread international support for the recognition of the right to safe drinking water was demonstrated only by the adoption of the UN General Assembly (UNGA) Resolution on the Human Right to Water and Sanitation in 2010.¹³ This resolution explicitly recognised water and sanitation as human rights and acknowledged that both are essential for the implementation of all human rights. In the same resolution, the UNGA called on Member States to provide financial and technical resources to scale up efforts to provide safe, clean, accessible, and affordable drinking water and sanitation for all. Although several commitments have fallen short and challenges yet need to be overcome, the resolution has had a remarkable influence on putting in motion further commitments by the international community. It is important to note that in September 2010, the UN Human Rights Council (HRC) passed a new resolution,¹⁴ affirming recognition by the UNGA and clarifying that the rights to water and sanitation are derived from the right to an adequate standard of living, which is considered a legally binding human right in almost all states. Furthermore, in May 2011, the World Health Organization (WHO) also embraced water and sanitation as a human right through its Resolution 64/24,¹⁵ calling on Member States *“to ensure that national health strategies contribute to the realisation of water- and sanitation-related Millennium Development Goals while supporting the progressive realisation of the human right to water and sanitation.”*

Further development occurred in December 2015, when the UNGA passed a resolution of 70/169,¹⁶ acknowledging that the rights to safe drinking water and sanitation are two distinct human rights that warrant separate treatment to address the specific challenges in their implementation and to avoid sanitation being neglected as secondary human rights.

¹⁰ See Human Rights Based Approach and Governance.

¹¹ The HRC extended the mandate on water and sanitation in March 2011 and changed its title to Special Rapporteur on the human rights to safe drinking water and sanitation (SR). See more on the mandate and work of the SR.

¹² Catarina de Albuquerque (Portugal) served between 2008-2014; Léo Heller (Brazil) served between 2014-2020; Pedro Arrojo-Agudo (Spain) serves since 2020.

¹³ Resolution adopted by the General Assembly on 28 July 2010: The human right to water and sanitation, A/RES/64/292.

¹⁴ Resolution adopted by the Human Rights Council: Human rights and access to safe drinking water and sanitation, A/HRC/RES/15/9.

¹⁵ Sixty-Fourth World Health Assembly, Drinking-Water, Sanitation and Health, WHA64.24.

¹⁶ Resolution adopted by the General Assembly on 17 December 2015: The human rights to safe drinking water and sanitation, A/RES/70/169.

Since 2010, several countries have updated their legal frameworks to reflect water and sanitation as human rights.¹⁷ For example, Costa Rica, Egypt, Fiji, Kenya, Mexico, Morocco, Niger, and Slovenia – which is the focus of analysis in this article – Somalia, Tunisia, and Zimbabwe have new constitutional provisions recognising the human right to water, sanitation, or both since 2010, and many states have passed legislation in this regard (e.g. Australia, Nepal, and Togo), joining many other states that already recognised those rights in their national legislation.¹⁸

Furthermore, the right to safe drinking water has also been recognised by domestic courts that have issued decisions reflecting the 2010 UNGA resolution (e.g. a court of appeal in Botswana, referring to UNGA resolution 64/292, affirmed that water is a human right strongly linked to the rights to health and life¹⁹). It is also important to mention that an increasing number of civil society organisations and grassroots movements have adopted the language of the human right to water in their formulations, analyses, and struggles on behalf of the most disadvantaged populations and have increasingly organised themselves to monitor their governments' actions in relation to water and to promote public participation in decision-making processes.²⁰

Undoubtedly, national implementation requires not only adequate legislation and jurisprudence, but also autonomous regulatory bodies ensuring that water services are provided in compliance with the human rights framework, both through a monitoring and enforcement role and by promoting policy changes in line with human rights.²¹

¹⁷ In 2013, the National Human Rights Institutions (NHRI) Water Initiative was launched to enhance the role of National Human Rights Institutions (NHRIs) in monitoring water governance, providing training services on the advancement, promotion and protection of the right to water and related human rights.

¹⁸ Examples include Argentina, Bangladesh, Belgium, Burkina Faso, Colombia, Costa Rica, Dominican Republic, Ghana, Guatemala, Guinea, Indonesia, Namibia, Nigeria, Panama, Peru, Sri Lanka, Ukraine, and Zambia as Member States recognizing the rights to water and sanitation in their national legislation, and Democratic Republic of the Congo, Ecuador, Maldives, Mexico, Nicaragua, Solomon Islands, South Africa, Uganda, United States of America (at state level), and Uruguay having such a provision in their constitutions even before 2010. See Statement by the Special Rapporteur on the human rights to safe drinking water and sanitation, Léo Heller, on 28 July 2020 (hereinafter SR Heller's statement 2020) at <https://www.ohchr.org/en/statements/2020/07/10th-anniversary-recognition-water-and-sanitation-human-right-general-assembly> (Accessed: 30 August 2022).

¹⁹ *Mosetlhanyane and others v. Attorney General of Botswana*.

²⁰ *Ibid.*

²¹ Such regulators exist in a number of countries (e.g. Bolivia established an Authority for Social Oversight and Supervision of Drinking Water and Basic Sanitation in 2009, Poland created an independent regulator in 2018 and the creation of new independent regulatory bodies was (in 2020) underway, among others, in New Zealand, Qatar and Punjab, India. See SR Heller's statement 2020 (cited above). Several manuals have been elaborated to guide practitioners in their work on the issue, such as Bos et al. 2016.

This article critically assesses relevant global developments in terms of legislation and implementation of the right to safe drinking water, reflecting on accepted obligations in Slovenia, demonstrating that much remains to be done to fully implement the commitments made. Although relevant and significant, given the space limitations, this article does not address regional normative developments, even though in Europe, the Council of Europe has, for example, already at the 2001 meeting of the Committee of Ministers to Member States on the European Charter of Water Resources, relying on the recognition of the fundamental right to safe drinking water by international human rights documents, confirmed that everyone has the right to a sufficient quantity of water that meets their basic needs.²² Furthermore, there undoubtedly exists an impressive development within the European Union centred around the Drinking Water Directive.

2. The international regulation of the right to safe drinking water

The right to safe drinking water, although not explicitly recognised as a self-standing human right in international treaties, has already been recognised as an inherent part of the legal framework of human rights, which obliges states to work towards achieving universal access to water for all, without any discrimination, while prioritising those most in need. The key elements of the right to water are its availability, accessibility, affordability, quality, safety, and acceptability.²³ Not only academic literature²⁴ but also contemporary practice demonstrates an increasing recognition of the multiple links between the human right to water and other human rights. Interdependency exists with, for example, the rights to life, dignity, health, work, education, housing and food, women's rights, and public participation. SR Heller²⁵ specifically emphasised that the particular impact and challenges of the human right to water among certain persons and groups have been increasingly acknowledged in the last decade (e.g. accessibility of facilities for persons with disabilities, facilities for persons in homelessness, or the importance of safe, available, and culturally acceptable services).

In academic literature, the right to water is sometimes defined as a subjective human right with direct applicability, meaning that individuals or groups can demand that the states guarantee their right to safe drinking water and have access to judicial and extrajudicial protection from the corresponding authorities.²⁶

International human rights law thus entails specific obligations related to access to safe drinking water, which require states to ensure everyone's access to a sufficient amount of safe drinking water for personal and domestic uses, defined as water for drinking, personal sanitation, washing clothes, food preparation, and personal and household hygiene. These obligations also require states to protect the quality of drinking water supplies and resources.

²² Recommendation Rec (2001)14 of the Committee of Ministers to Member States on the European Charter on Water Resources, 17 October 2001, para. 5.

²³ More on various aspects of the right and relevant materials.

²⁴ See, for example, Rodríguez 2011; Ahačič et al. and Sancin et al. 2015, Nehaluddin 2020.

²⁵ SR Heller's statement 2020.

²⁶ See, e.g. Sereno 2022.

There is also no doubt that access to safe drinking water is an element of social development, as confirmed by the implicit recognition of water as a fundamental human right with the adoption of Article 11 of the International Covenant on Economic, Social, and Cultural Rights²⁷ (ICESCR) in 1966.

The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions.

While Article 11 does not explicitly address the right to water, the CESCR confirmed in 2002 with the acceptance of GC 15 that the right to an adequate standard of living also includes the right to water, which played a key role in the development of the human right to safe drinking water. The majority of states that have ratified ICESCR have confirmed in their political declarations that the right to an adequate standard of living necessarily includes the right to safe drinking water.²⁸ Adoption of GC 15 also recognized the access to safe drinking water as a social right, as before its adoption, it was strongly considered only as an economic commodity, like it was considered that the management of water as an economic good would provide the background for its optimal utilisation and ensure equitable use.²⁹ Unfortunately, this had the opposite effect, leading to the privatisation of water resources and prices being too high for the impoverished and marginalised communities to afford.³⁰ This consequence was the main driver for the adoption of GC 15, which was confirmed in its para. 11, where it is specifically stated that water should be treated as a social good and not primarily as an economic one, calling for the recognition that the right to water must be realised in a sustainable manner, available for current and future generations.³¹ The GC 15 has also put forward three main criteria for satisfying the right to access to safe drinking water:³² availability of water for sufficient and continuous use for personal and domestic needs of each person, quality of water that is *“free from micro-organisms, chemical substances, and radiological hazards that constitute a threat to a person's health”*,³³ and the water needs to be physically and economically accessible to every person. These criteria further confirm that access to water is generally treated as an element of social development in any society and should never be used as an instrument of political and economic pressure. Furthermore, GC 15 claims that the right to safe drinking water should also be derived from Article 12 of the ICESCR that recognises *“the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”*. Therefore, GC 15 clearly identifies the nine core obligations for states parties arising from the ICESCR with regard to the implementation of this right,³⁴ which are (a) access to the minimum essential amount of water, (b) ensuring the right and water facilities on a non-discriminatory basis, c) ensuring physical access to water facilities or services with sufficient amount of safe and drinking water; (d) ensuring that personal security is not

²⁷ United Nations, Treaty Series, vol. 993, 3.

²⁸ The right to water and sanitation, International Timeline.

²⁹ Scheuring 2009, 147–148.

³⁰ Ibid.

³¹ GC 15, para. 11.

³² GC 15, para. 12.

³³ GC 15, para. 12(b).

³⁴ GC 15, para. 37.

threatened when having physical access to water, (e) ensuring equitable distribution, (f) adopting and implementing a national water strategy and plan of action for the whole population with periodical reviews, (g) monitoring the realisation of the right to water; (h) adopting low-cost water programs targeted to protect the vulnerable and marginalised groups, and (i) taking measures to prevent treatment and control diseases linked to water. Each of these core obligations has an element of sustainability, as without fulfilment, sustainable development cannot be achieved.

In addition to the ICESCR, several other human rights documents implicitly address the right to water. It has already been argued³⁵ that Article 6 of the International Covenant on Civil and Political Rights³⁶ (hereinafter ICCPR) on the right to life can also be considered to cover the right to water, as water is indispensable for life and essential for the health of each individual. Lack of water, especially safe drinking water, leads to diseases among the population that can be the cause of death. The Human Rights Committee (CCPR), established under the ICCPR, in its General Comment 36³⁷ (GC 36) in relation to the duty to protect life, which implies that state parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life of dignity, explicitly stated in para. 26 that *“The measures called for to address adequate conditions for protecting the right to life include, where necessary, measures designed to ensure access without delay by individuals to essential goods and services such as food, water, shelter, health care, electricity, and sanitation.”* Furthermore, in a landmark decision on climate change impacts on the right to life published in 2020, deciding on a petition brought by Mr Teitiota against New Zealand,³⁸ the CCPR had an opportunity to reflect on the petitioner's access to ‘potable water’ in Kiribati. In para. 9.8, it decided that *“The Committee also notes the author’s claims before the domestic authorities that he would be seriously harmed by the lack of access to potable water on Tarawa, as freshwater lenses had been depleted due to saltwater contamination produced by sea level rise.”* In that regard, the Committee notes that according to the report and testimony of climate change researcher John Corcoran, 60 per cent of the residents of South Tarawa obtained fresh water from rationed supplies provided by the public utilities board. The Committee notes the findings of the domestic authorities that there was no evidence that the author would lack access to potable water in Kiribati. While recognizing the hardship that may be caused by water rationing, the Committee notes that the author has not provided sufficient information indicating that the supply of fresh water is inaccessible, insufficient or unsafe so as to produce a reasonably foreseeable threat of a health risk that would impair his right to enjoy a life with dignity or cause his unnatural or premature death. In her dissenting opinion,³⁹ one Committee member expressed concern that the notion of ‘potable water’ was used interchangeably with ‘safe drinking water’ in both domestic jurisdictions deciding on the case as well as by the majority of the CCPR. She emphasised

³⁵ Winkler 2012. *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation*. Oxford and Portland: Hart Publishing, p. 49.

³⁶ United Nations, Treaty Series, vol. 999, p. 171 and vol. 1057, p. 407.

³⁷ Human Rights Committee, General comment No. 36, Article 6: right to life, CCPR/C/GC/36.

³⁸ Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016, CCPR/C/127/D/2728/2016.

³⁹ Annex II, Individual opinion of Committee member Vasilka Sancin (dissenting).

that “water can be designated as potable, while containing microorganisms dangerous for health, particularly for children (all three of the author’s dependent children were born in New Zealand and were thus never exposed to water conditions in Kiribati)” and would have thus found a violation of Article 6 in that particular case.

Access to safe drinking water is generally the most limited for marginalised groups such as children, women, and disabled and indigenous peoples.⁴⁰ Hence, all international documents addressing the needs of these marginalised groups recognise their right to access safe and drinking water. For example, the 1989 Convention on the Rights of a Child⁴¹ recognises the right to access safe drinking water in Articles 24 and 27. Article 24 grants each child the right to achieve the highest possible health level, which cannot be attained without access to an adequate amount of food and water with satisfactory standards for health, meaning that this right depends on the realisation of the right to a sufficient standard of living entailed in Article 27 of the Convention. The call for improvement of the standard of living, including providing access to safe drinking water, is included in the Convention on Elimination of all Forms of Racial Discrimination Against Women⁴² from 1979, where the right of access to safe drinking water is expressed as part of the right to non-discrimination of women in Article 14, which also expressly recognises the developmental dimension of the right. States have an obligation to ensure women’s participation in the development processes by ensuring the right to a sufficient standard of living, especially by ensuring boarding, sufficient hygienic conditions, access to electrical energy, transportation routes and connections, and access to safe drinking water. Article 14 is one of the most direct expressions of the connection between access to water and sustainable development in an international document.

While international monitoring mechanisms, such as treaty bodies or special procedures, do provide the opportunity to assess states’ efforts to realise the human right to water, the HRC’s Universal Periodic Review has shown that this right is rarely at the forefront of the human rights concerns of governments (after 2010, the recommendations in this respect grew from 1 to 2 per cent of all recommendations).⁴³

3. The right to safe drinking water in Slovenia’s legal framework and practice

3.1. Legal regulation of the right to drinking water in Slovenia

The core of the Constitution of the Republic of Slovenia⁴⁴ includes a chapter on fundamental human rights and freedoms (Chapter II, Articles 14–63); however, the right

⁴⁰ The CCPR tackled the lack of access to safe drinking water, for example, in its Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2751/2016 (Norma Portillo Cáceres *et al.* v Paraguay).

⁴¹ United Nations, Treaty Series, vol. 1577, 3.

⁴² United Nations, Treaty Series, vol. 1249, 13.

⁴³ See, for example, Bueno de Mesquita 2019.

⁴⁴ The Constitution of the Republic of Slovenia (Official Gazette of the Republic of Slovenia, Nos. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99, 75/16 – UZ70a and 92/21 – UZ62a).

to drinking water [*pravica do pitne vode*] codified in Article 70a, features, together with the right to healthy living environment (Article 72), in Chapter III on economic and social relations. Article 70a was added to the Constitution in 2016,⁴⁵ and states the following: *“Everyone has the right to drinking water. Water resources shall be a public good managed by the state. As a priority and in a sustainable manner, water resources shall be used to supply the population with drinking water and water for household use, and in this respect, shall not be a market commodity. The supply of drinking water and water for household use shall be ensured by the state directly through self-governing local communities and on a not-for-profit basis.”*

Establishing the right to safe drinking water as a fundamental human right in the constitution is important on a symbolic level, but it needs to be fully implemented in practice to have an impact on individuals' lives.

The Constitutional Court of Slovenia adopted several decisions concerning drinking water; however, these predated the adoption of Article 70a.⁴⁶ After its adoption, the Constitutional Court tackled water issues in the decision U-I-164/14 of 16 November 2017,⁴⁷ where, regarding the provision of the local public service of drinking water supply, the applicant complained that the laws in question do not allow for the provision of substantively adequate minimum information and its assessment of the potential and actual impacts and risks of the planned spatial developments of national significance on the municipal source of drinking water. Although the Court adopted this decision after entry into force of Article 70a, this article was not explicitly mentioned. A separate concurring opinion of Judge Accetto stated that the position of the Court was, after all, confirmed by a constitutional provision not mentioned in the decision – the new Article 70a of the Constitution on the right to drinking water, which was added to the Constitution by a constitutional law in November 2016. The fact that the decision in the present case does not mention this article, on the one hand, understandable because the disputed conduct dates back to 2012 and 2013, and the 18-month deadline for the harmonisation of the laws substantively related to Article 70a was not expired at the time. Judge Accetto, however, opined that it was difficult to understand this provision in any other way, underlining further the importance of water resources as a constitutionally protected public good, which must now be given even greater weight in such cases of balancing. Furthermore, in U-I-223/16⁴⁸ of 23 April 2020, the Court reminded that the Constitution does not expressly provide for the exclusive competences of local self-government, except for the provision of drinking water and domestic water supply (Article 70a(4) of the Constitution). Finally, it is relevant to mention the decision, dated before the mentioned change of the Constitution, U-I-226/04⁴⁹ of 1 December 2005, where the petitioners challenged the provisions of the Water Act, which regulate the supply of water in areas where it is not provided by the public water supply network.

⁴⁵ Constitutional Act Amending Chapter III of the Constitution of the Republic of Slovenia, which was adopted on 25 November 2016 and entered into force on 25 November 2016 (Official Gazette of the Republic of Slovenia No. 75/16).

⁴⁶ See for example decisions U-I-3/92 of 17 September 1992, U-I-32/95 of 30 June 1995, U-I-221/95 of 3 July 1997 and U-I-344/96 of 1 April 1999.

⁴⁷ Official Gazette of the Republic of Slovenia, No. 75/17.

⁴⁸ Official Gazette of the Republic of Slovenia, No. 65/20 and OdlUS XXV, 7.

⁴⁹ ODLUS XIV, 89.

The Constitutional Court stated that Article 70 of the Constitution does not guarantee the petitioners the right to the general use of water for the supply of their households and that the Waters Act does not exclude the general use of water but, based on Article 70(1), it limits it by determining special rights for its use to achieve environmental protection goals. It stressed that to achieve these goals, payment for the use of natural resources is envisaged. In addition, the emphasised public nature of water law is also reflected in that it is not possible to acquire the right to property on water. It, therefore, concluded that the petitioners' position that they are the owners of water resources or that these resources are in the ownership of everyone is unsubstantiated.

A rather limited engagement of the Constitutional Court with the right to water embodied in Article 70a might be consequential to the fact that, so far, the implementing regulations have not changed significantly. On the one hand, this might demonstrate that even before the amendment to the Constitution, the Slovenian regulations ensured a high level of drinking water supply through a system of local economic public services.⁵⁰ On the other hand, it is evident that the legislative and executive authorities failed to respond to some well-known examples from practice, which has shown that the situation in this area is far from desired. In any case, including the right to drinking water in the catalogue of fundamental human rights undoubtedly provides new and more straightforward grounds for the constitutional review of the constitutionality of regulations and adjudication of a constitutional complaint. Undoubtedly, more pertinent jurisprudence is expected from the Constitutional Court in the future.

According to the new Slovenian Environmental Protection Act⁵¹ (ZVO-2), adopted after the amendment of the Constitution with the right to drinking water, the basic provision regarding the drinking water supply remains the same. The supply of drinking water is a mandatory local public economic service.⁵² This means that ensuring a drinking water supply is the task of the municipality or city municipality in its entire territory. Such an arrangement is consistent with Article 70a (4) of the Constitution, which stipulates that the supply of drinking water and water for household use shall be ensured by the state directly through self-governing local communities and on a not-for-profit basis. A special bylaw, the Decree on Drinking Water Supply, was adopted at the national level.⁵³ The Decree was adopted before the amendment of the Constitution and under the old Environmental Protection Act, but it remained in force even after the ZVO-2 adoption. The Decree regulates the way of performing the economic public service of the drinking water supply, which also includes the way and conditions for connecting to the public drinking water supply network and the requirements for a downtime of the supply.

The weakness of the current regulation is that it has a very narrow legal provision. Most of the general provisions regarding drinking water supply are in the Decree on Drinking Water Supply, which is a by-law. Simultaneously, local communities have the authority to regulate methods and conditions for drinking water supply through municipal ordinances. Municipal ordinances are also considered general by-law acts,

⁵⁰ Ude 2017, 11.

⁵¹ ZVO-2 – Official Gazette of the Republic of Slovenia, No. 44/22.

⁵² Article 233 (1) of ZVO-2.

⁵³ Official Gazette of the Republic of Slovenia, Nos. 88/12 and 44/22 – ZVO-2.

which must be in accordance with the Constitution and laws but not with other by-law acts. This allows municipalities to regulate certain issues in this area differently.

As it is a compulsory economic public service, the water supply must be carried out in one of the prescribed ways, as stipulated by the Services of the General Economic Interest Act. These forms vary, but most municipalities provide them through public companies. A public company has the legal status of an economic company, and its sole owners are municipalities and the state.⁵⁴

Article 108 (2) of the Water Act⁵⁵ stipulates that drinking water supply should have priority over use for other purposes. The same is specified in Article 15 (1) of the Decree on the Drinking Water Supply. Thus, Article 70a (3) of the Constitution, which determines the priority drinking water supply to the population, raised the established regulation to the level of constitutional provision. However, even with regard to this seemingly simple rule, very serious questions may arise. In the summer of 2022, there was a severe drought in a large part of Slovenia, which affected the sources of the drinking water supply and, in some places, caused a severe shortage of drinking water. One of the possible solutions proposed by the City of Koper to solve the drinking water supply problem is to dry the Rižana riverbed. Fishermen and some environmentalists strongly opposed the announced measures, while the mayor of the City of Koper noted that people's lives and health should be prioritised over animals and plants. The Koper fishing organisation stated that such a decision means ecological damage and permanent long-term damage to people from the source to the outfall. Fortunately, the situation improved and there was no need to resort to such extreme measures. However, the presented situation clearly illustrates the conflict between two constitutional rights belonging to the same category: the right to a healthy living environment and the right to drinking water. The problem is that there is no completely clear way to decide on such a measure, which can have irreversible consequences. This is mainly because such an emergency measure must be taken quickly, making it impossible to carry out lengthy procedures in which interested persons can file requests for judicial protection.

The next subsection discusses two of the most prominent issues in ensuring drinking water supply: the connection to the public water supply network and the interruption of supply due to non-payment of bills for supplied water.

3.2. Connection to the public water network

When connecting to a public water network, two situations must be considered. The first situation occurs when a specific facility is in the area of a public water-supply system. Facilities in the public water supply area must be connected to the public water supply.⁵⁶ This also applies to cases in which the land on which the facility stands has its own source of drinking water. In such cases, the supply of drinking water from one's own source is prohibited.⁵⁷ The connection of a new building to the public water-supply

⁵⁴ Article 25 of the ZGJS.

⁵⁵ ZV-1 – Official Gazette of the Republic of Slovenia, Nos. 67/02, 2/04 – ZZdrI-A, 41/04 – ZVO-1, 57/08, 57/12, 100/13, 40/14, 56/15 and 65/20.

⁵⁶ Article 10 (1) of the Decree on Drinking Water Supply.

⁵⁷ Article 12 (1) of the Decree on Drinking Water Supply.

system has already been foreseen in issuing a building permit. Consent for the connection of a new building to the public water-supply system is a condition for issuing a building permit.

After the construction of the building is completed, the owner of the building enters into a water supply contract with the local public company that provides the water supply in the area of this municipality. Slovenian contract law has a special institution of mandatory contract conclusion.⁵⁸ A mandatory contract conclusion means that one of the contracting parties is obliged by law to conclude a contract with anyone who requests it. It is a substantial interference with the parties' autonomy, as the person bound by this obligation has no choice regarding the other contracting party. Even if the other party is unreliable and there is fear that it will not perform, it must conclude a contract with it. The law stipulates such an obligation primarily for goods suppliers and service providers necessary for individuals' lives and for the functioning of legal entities.⁵⁹ If the obligation to enter into a contract is specifically prescribed, then Article 17 (1) of the Slovenian Obligations Code applies. The latter stipulates that if a person must conclude a contract by law, a person with legitimate interest may demand that such a contract be concluded immediately. It is clear from this provision that a person with legitimate interest (customer) has a legally protected claim. If the obligee (supplier) does not want to conclude the contract, a person with legitimate interest can request the court to decide on the contract conclusion. A court ruling can replace the contract conclusion, and from the effective date of the judgment, the contract should be considered concluded. At the latest, a person with legitimate interests acquires the status of a contractual party and demands the performance of contractual obligations. Although this is not explicitly specified, an unjustified refusal to enter into a contract may be considered an inadmissible harmful event, and a person with legitimate interest may also request compensation for the damage caused. Almost no disputes have arisen from the violation of this obligation, which proves that it is an effective form of legal protection. Suppliers of goods and service providers bound by such an obligation have an interest in the largest possible volume of business and have no interest in rejecting customers. The technique of general contractual conditions prepared by the supplier is most often used when concluding such contracts. To protect the interests of customers, it is often stipulated that the local community body gives consent to general contractual conditions.⁶⁰ In such cases, the supplier's legal interests are protected by the fact that the supplier can withdraw from the contract if its obligations are not fulfilled.

The described method for provisioning is mostly effective. Problems and ambiguities arise in the following two cases. The first is the issue of so-called illegal buildings, or buildings for which a building permit was not obtained or which were not built per building permit. It is worth noting the provisions of Article 107 of the Building Act.⁶¹ In the case of illegal buildings, the building inspector shall issue a decision prohibiting the connection of such a building to economic public infrastructure, which also includes the public water supply. The use of such facilities is legally prohibited.

⁵⁸ In German terminology Kontrahierungszwang.

⁵⁹ Article 16 of the ZGJS.

⁶⁰ See, in detail, Kranjc 2004, 217.

⁶¹ GZ-1 – Official Gazette of the Republic of Slovenia, Nos. 199/21 and 105/22 – ZZNSPP.

Nevertheless, people sometimes live in such buildings, and such residences can be permanent. This is especially true for marginalised groups. The case of Hudorovič and others against Slovenia before the European Court of Human Rights (ECtHR) is well known.⁶² In 2014, two Roma families approached the ECtHR, claiming that they did not have access to drinking water and sanitary facilities and, therefore, their right to respect for private and family life according to Article 8 of the European Convention on Human Rights (ECHR) and, in connection with this, the prohibition of discrimination (under Article 14 of the ECHR) and the prohibition of torture or inhuman or degrading treatment (per Article 3 of the ECHR) were infringed. The Roma settlement Goriča vas in Ribnica, where the two applicants live, is legally unregulated, built mostly of wooden shacks and without a water supply and sewage. Because the settlement was not legalised, they could not arrange a connection to the water supply. The municipality installed a water tank in the settlement, which was regularly filled with firefighters. The second case concerns a family of 14 who lived in the Roma settlement, Dobruška vas, in Škocjan. A common tap was provided there in 2011, but the applicants did not connect to it due to the neighbours' opposition. Later, due to problems with their neighbours, they moved to a nearby forest where they built a wooden shack. They must drive to obtain water. The ECtHR considered that the authorities ensured that the applicants had access to safe drinking water through concrete measures (which would otherwise be regarded as temporary rather than permanent solutions).

Another example is areas where there is no public water supply. The right to drinking water as a constitutional right imposes a duty on the state and municipalities to provide everyone with drinking water. In this regard, the Decree on Drinking Water Supply stipulates that public water supply must be provided in the area of settlement with 50 or more permanent residents and a settlement density greater than five permanent residents per hectare.⁶³ In smaller settlement areas, however, public water supply must be provided if there is no possibility of self-supply in this area. There is no possibility of self-supply if more than 50 inhabitants are supplied from the source, and the annual average capacity of the source is less than 10 m³ of drinking water per day.⁶⁴ The question that the regulations fail to answer is what options individuals have if the local community does not fulfil this duty.

A well-known case was dealt with by Ombudsman.⁶⁵ The Ombudsman petitioned a resident of a small hamlet in the Municipality of Ribnica, who has been trying unsuccessfully for 23 years to gain access to safe drinking water. According to her, there are currently 11 houses in the hamlet where 25 people, aged 6 to 80. Residents use their own water collectors or cisterns for households, and the quality of water is further reduced by the unkempt macadam road, from which dust rises in the summer owing to the use of tractors, construction machines, and other heavy vehicles. Therefore, the locals must obtain drinking water from forest springs up to 15 km away. Based on this, Ombudsman addressed several enquiries in the municipality. The municipality replied

⁶² ECHR Application Nos. 24816/14 and 25140/14 of 10 March 2020, ECLI:CE:ECHR:2020:0310JUD002481614.

⁶³ Article 9 (1) of the Decree on Drinking Water Supply.

⁶⁴ Article 9 (2) of the Decree on Drinking Water Supply.

⁶⁵ Ombudsperson's opinion 18.1-3/2018.

that it was in the middle of building the regional public water supply system, and that only after its completion would it start with smaller projects to ensure the supply of drinking water where it was not yet guaranteed. The municipality stated that activities were underway to prepare rules for subsidising drinking water transportation costs. These factors should precisely determine the financing of drinking water transportation. One of the key arguments as to why the provision of water in the area where the petitioner lives is not yet guaranteed is that her property is located in an area that is defined in the Decree on the Municipal Spatial Plan of the Municipality of Ribnica as an area with more specific use of holiday homes, so it was not intended for permanent settlement. The municipality's response did not convince Ombudsman. He warned the municipality that it had failed to adopt an act that would properly regulate the issue in more than a year and three months since the last notification to the Ombudsman. Despite the inclusion of the right to drinking water in the Constitution of the Republic of Slovenia, the municipality failed to prepare the rules with sufficient diligence. By doing so, the municipality violated the principles of good governance. Thus, the petition was justified.

Interestingly, the Ombudsman was successful in another case. The petitioners informed the Ombudsman about the problems with the Municipality of Rogoševci regarding their connection to the public water supply network. Their property was only a few meters away from the connection, yet they could not connect to the water supply. Their own water supply at their homes would not be possible, as the groundwater is mineral water, and thus unsuitable for supply. The Ombudsman turned to the municipality with several questions, and the municipality clarified the process of implementing the public water supply project. The project, completed in 2015, did not enable connections among all households. The Municipality stated that it was planning a project to upgrade the water supply, but it proceeded slowly owing to a lack of financial resources. The Municipality's responses were not convincing for Ombudsman. If the Municipality's funds are insufficient, or if the municipality assumes that construction will not be possible in a reasonable time due to limited funds, it is expected to do everything it can promptly, so that the residents do not suffer the burden of unsuccessful negotiations and misunderstandings between various authorities. Thus, residents do not influence the implementation of investment. They are the only ones directly affected by the long-term actions of authorities. The Municipality initially did not accept Ombudsman's opinion, but it later announced that it had found a solution for the petitioners and connected them to the public water supply on 6 December 2019. Ombudsman considers the Municipality's behaviour to be appropriate, even though the solution was only achieved through its intervention. Thus, the petition was justified. Ombudsman concluded that the Municipality violated the principle of good governance.

3.3. Suspension of drinking water supply due to non-payment

Ensuring the supply of drinking water is the state's duty and the individual's right; however, it is not disputed that an individual's drinking water supply may cease. The Decree on Drinking Water Supply at the national level regulates cases when the supply may be interrupted due to maintenance work, force majeure, and similar. In the

event of an interruption in the drinking water supply for more than 24 h, the operator of the public water supply system must provide users with drinking water for the necessary volume of consumption in an appropriate manner.⁶⁶ It is also stipulated that the drinking water supply can be interrupted if the user's behaviour endangers an uninterrupted and safe drinking water supply to other users. However, if customers fail to pay their financial obligations, there is nothing to interrupt the drinking water supply. The drinking water supply is onerous, and each customer is obliged to pay for the consumption of the supplied drinking water.

The Constitutional Court ruled on the question of interruption of the drinking water supply even before the right to drinking water was enshrined in the Constitution. The Court ruled that the interruption of the drinking water supply due to non-payment of obligations was a permissible measure. *“The interruption of water supply is a means by which the recovery of the bill for water supplied but not paid for is protected. Given that the water supplier is obligated to conclude a contract, this tool serves to balance the position of the contracting parties. With these means, the water supplier also guarantees a relatively regular flow of funds necessary for carrying out activities. If a significant proportion of the people who are guaranteed drinking water supply do not regularly pay the resulting debt, this could make it impossible for the supply to function smoothly. The conduct of forced judicial collection procedures means a delay in payment and the unpredictability of the inflow of income. Ensuring an uninterrupted supply of drinking water, for which the interruption of the water supply serves, is a constitutionally permissible goal. The measure used in the present case to achieve this objective was appropriate. Owing to these drastic consequences, it can be expected that the debt will settle. However, this does not increase. The necessity of the measure cannot be contested either; that is to say, it could be replaced by an equally effective but milder measure.”*⁶⁷

The regulation of this issue is left to the local communities. For example, in the City of Ljubljana, the capital, with the largest population in Slovenia, the drinking water supply is provided by VO-KA d.o.o. Ljubljana, which is exclusively owned by the city municipality and some neighbouring municipalities. The conditions of water supply are regulated by the Decree on drinking water supply in the City of Ljubljana.⁶⁸ The Decree stipulates that the company may interrupt the drinking water supply to the customer if the latter fails to pay the bill within 15 days of receiving the reminder before the interruption of the drinking water supply. In summary, the customer must pay all bills for the supplied drinking water on time, and as soon as payment is delayed, the company can send a notice to perform before interrupting the delivery, in which it sets an additional deadline for payment of no shorter than 15 days. If the bill is still unpaid, the company can interrupt the drinking water supply and disconnect the customer from the network. The legal regulation of interruption of the drinking water supply is very strict and does not allow for any exceptional circumstances on the customer's side. It is true that, in practice, the company does not act in such a way and reminds the non-payer several times before issuing the last warning before disconnection.

Such an arrangement for interrupting the supply of drinking water is highly inappropriate, not taking into account, what is the reason for no payment. Especially, if we consider that it is the exercise of a right that was explicitly enshrined in the

⁶⁶ Article 23 (5) of the Decree on Drinking Water Supply.

⁶⁷ Up-156/98 of 18 June 1998.

⁶⁸ Official Gazette of the Republic of Slovenia, No. 59/14.

Constitution. Interestingly, the interruption in the supply of some other essential goods is fundamentally different. For example, let us consider the supply of electrical energy. The first fundamental difference is that the conditions of the electric energy supply are not left to the by-laws. Electricity supply is regulated by the Special Electricity Supply Act.⁶⁹ Legal regulation undoubtedly implies a higher level of legal protection, which is guaranteed in the same way for the entire country. The procedure for the interruption of supply was similar under basic conditions. The electricity supplier may interrupt supply to those customers who have not paid their financial obligations. The supplier must send a notice to the customer before disconnection and set a deadline for payment. The electricity supply may be disconnected if the bill is not paid even within this additional period. The supplier must inform the household customer about the disconnection for at least 10 days. The law recognises a special category of vulnerable customers. A vulnerable customer is a household customer who, due to their financial situation, the share of energy expenditure from disposable income and other social circumstances and living conditions, cannot secure another source of energy for household use that would cause them the same or lower costs for essential household use.⁷⁰ The supplier shall not disconnect electricity from a vulnerable customer, which is absolutely necessary, depending on the circumstances (time of year, temperature conditions, place of residence, state of health, and other similar circumstances), so as not to endanger the life and health of the customer and the people who live with him. Undoubtedly, a legally comparable provision would also be necessary in Slovenia in the drinking water supply field.

For Slovenia, it is utterly unacceptable that the level of protection for vulnerable water customers is not equal to the regulations that apply to electricity. The practices in the water supply field are different. In the well-known case, the Ombudsman received a letter from a single mother with two children asking for intervention due to an allegedly unjustified disconnection of water. The company explained that the disconnection occurred due to the non-payment of water supply. The petitioner did not deny the debt but complained that she had not received an appropriate notification about the disconnection. For the sake of her children, she asked for reconnection and the possibility of repaying the owed amount in instalments, which the operator had refused. Ombudsman concluded that the disconnection of the drinking water supply due to non-payment of costs is legally permissible in principle. The company also failed to find any violations of the law. However, in this specific case, it could not be overlooked that the petitioner was a single mother with small children who was denied the vital right to a water supply. It is also necessary to consider that winter circumstances and social distress further complicate the situation of the family. On this basis, the Ombudsman, aware that it was an act of a voluntary nature, suggested that the company reconsider the circumstances of the case and the implemented measure of disconnection of the drinking water supply. Ombudsman suggested that, in a specific case, the proportionality of action in the difficult living circumstances of the family with small children should be assessed,

⁶⁹ ZOEE – Official Gazette of the Republic of Slovenia, No. 172/21.

⁷⁰ The provision of Article 33 of the ZOEE is the implementation of Article 28 of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU.

and the petitioner should be allowed to repay the amount owed in instalments or find another suitable solution that would allow for the establishment of a drinking water supply as soon as possible. Poverty and the lack of basic goods mean a severe encroachment on human dignity, the consequences of which and social stigmatisation are especially felt by children. The company responded to the Ombudsman's initiative with understanding and informed them that they would allow the petitioner to reconnect, agreeing that children should not suffer the consequences of the circumstances in which their parents find themselves. In particular, children need special care and protection, which is the social duty of each of us. Ombudsman assessed the conduct of the company Vodovod-Kanalizacija d.o.o. Ljubljana as an example of good practice and reiterated the necessity to include the right to water as a fundamental human right in the legal order of the Republic of Slovenia.⁷¹

4. Conclusions

The survival of the human population also depends on sufficient access to safe drinking water. Despite all of the important international and domestic efforts and progress achieved in the last decades, too many people around the world (one in three) still desire access to safe drinking water, and the negative effects of climate change⁷² exacerbate the current situation. Lack of access to safe drinking water causes an excessive and unacceptable number of deaths and diseases every year, clearly demonstrating that progress has been far too slow and the commitment to achieve universal and equitable access to safe and affordable drinking water for all by 2030 is far from accomplished.

Although the number of states recognising access to safe drinking water as a human right has grown in the last decades, too many still lack such recognition, making it difficult for this right to be justiciable in national courts. Without such legal protection, access to safe drinking water risks being treated merely as a commodity, meaning that families can cut off the service provision for not being able to pay the bills, tariffs can become unaffordable for those in poverty, and national water policy risks, leaving behind members of already vulnerable groups, such as migrants, minorities, and people living in informal settlements or in rural and remote areas.

Experience with the coronavirus pandemic has clearly exposed the critical importance of availability, accessibility, and affordability of water in efforts for global health, simultaneously demonstrating that too many of the poor living in informal settlements continue to lack access to clean water, and measures taken for the emergency provision of water during the pandemic have been insufficient.

There are a great diversity of obstacles in realising the right to safe drinking water. In addition to the lack of resources, as the economic value of safe drinking water is increasing, thus strengthening the pressure to treat it as a free market good and not as a public good, there is a myriad of political and legal factors that jeopardise people's enjoyment of this right, often related to the discrimination of those who do not have a say in public decision making. In 2020, SR Heller warned that in developed countries, undocumented migrants are often excluded from public services because of their

⁷¹ The Ombudsperson's opinion 8.1-20/2015.

⁷² See also Szvedo 2021.

irregular status and live in inhumane conditions unimaginable for citizens of those countries, and that in many places around the world, human rights defenders working on water and sanitation are persecuted, arrested, and even tortured and executed as a result of their work, especially when it affects large economic interests.⁷³

States often fail to protect affected communities and instead give priority to short-term economic considerations. While informal settlements continue to grow quickly around the world, governments too often exclude their inhabitants from water services, ignoring the fact that the enjoyment of human rights cannot be conditioned by the legal status of tenure.

The current legislative framework and practice in Slovenia demonstrate that, although the commendable inclusion of the right to drinking water in the Constitution took place in 2016, the subsequent development remains insufficient to realise this right in practice. Equally, if not more important, constitutional regulation is the creation of corresponding implementing rules. Until such rules, which are harmonised with internationally and constitutionally recognised rights, are adopted and implemented in concrete cases, even the codification of the right to drinking water as a fundamental constitutional right remains only a declaratory aspiration lacking any discernible effect. Hopefully, the *de lege ferenda* proposals of this article will be timely considered by competent Slovene authorities, leading to an improved normative framework and efficient policy measures.

⁷³ SR Heller's statement 2020.

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