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Prohibition of cross-border water transport in the conditions of the Slovak Republic and its legal consequences**

Abstract

The Slovak Republic decided to protect its water resources by prohibiting cross-border water transport. The ban was incorporated into the Constitution of the Slovak Republic. As an administrative regulation, this constitutional norm was subsequently detailed in ordinary legislation, namely the Water Act. The adoption of this ban has raised doubts about its compatibility with the European Union (EU) law, in particular, regarding the quantitative restrictions on exports and imports of goods between the member states. This constitutional prohibition and the subsequent administrative regulation have caused interpretative and applicative confusion. Therefore, in this paper, the author assesses the limits of possible restrictions on water transport across the Slovak Republic borders, taking into account the limits resulting from the EU law. This study aims to analyze and assess the manner and consequences of the constitutional ban on water transport across the Slovak Republic's national borders.

Keywords: Prohibition of transport of water across national borders, protection of water, quantitative restrictions landfill

1. Introduction

On December 1, 2014, the Constitutional Act No. 306/2014 Coll., supplementing the Constitution of the Slovak Republic Act No. 460/1992 Coll., as amended, entered into force in the Slovak Republic; this constitutional act supplemented Art. 4(2) of the Constitution of the Slovak Republic (hereinafter, referred to as the 'Constitution'). According to this provision, *"the transport of water taken from water entity located in the territory of the Slovak Republic across the borders of the Slovak Republic, utilizing transport or pipelines, is prohibited; the ban does not apply to water for personal consumption, drinking water packaged in consumer packaging in the territory of the Slovak Republic, and natural mineral water packaged in consumer packaging in the territory of the Slovak Republic and to the provision of humanitarian aid and assistance in emergencies. Details of the conditions for transporting water for personal consumption and water for the provision of humanitarian aid and emergency aid shall be laid down by law."*[1]

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[1] See also Drgonec 2019, 1792; Orosz et al. 2021, 892.

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The above-mentioned provision of the Constitution clarifies the general prohibition on cross-border water transport out of the Slovak Republic through different means of transport, such as pipelines. According to the explanatory memorandum regarding the draft of the amendment of the Constitution, water entities in the Slovak Republic include all the water sources, namely groundwater, natural mineral resources, natural healing resources, geothermal waters, and surface waters (i.e., water flows, reservoirs, canals, and lakes). In other words, the constitutional provision applies to all the relevant categories of water entities in the Slovak Republic.

Art. 4(2) lays down the detailed conditions regarding relevant details on water for personal consumption, humanitarian aid, and emergency assistance in the form of executive legislation. These conditions are detailed in Art. 17a of Act no. 364/2004 Coll. on waters and in the amendment of the Act of the Slovak National Council no. '372/1990 Coll.' on offenses, as amended (hereinafter referred to as the 'Water Act').

Concerning commercial drinking water packaging and natural mineral water packaging in the Slovak Republic, a total exemption from the prohibition of cross-border transport is provided. This exception is provided in Art. 34 and 35 of the Treaty on the Functioning of the European Union (TFEU). It applies to private and commercial water transport.[2]

It must be noted that the adoption of the aforementioned ban was a political decision of the government. It was a way to prevent mineral water processors from the neighboring states from extracting and transporting water out of the Slovak Republic's territories through pipelines or tanks. Taking into consideration the speed and rigor of the measures taken by the Slovak government, reasonable doubts about the legality of the implemented measures arose. Specifically, questions were raised about the extent to which a member state of the European Union (EU) can autonomously impose restrictions on the free movement of goods, which, in certain circumstances, includes water. In fact, proceedings were initiated against the Slovak Republic for violation of the EU[3] law, and an international arbitration procedure for investment protection was initiated by a mineral water processor from Poland.[4]

This study aims to examine the meaning of Art. 4(2) of the Constitution and related legislation and assess the possible limits of such regulation, taking the EU law into account. In addition, it will analyze and assess the manner and the consequences of the constitutional ban as an administrative legislation. This research hypothesizes that the political context of the adopted amendment to the Constitution may have had an impact on its compliance with the EU law. It also hypothesizes that the conditions of this constitutional regulation may have inconsistencies with the conditions of subsequent administrative regulations.

[2] In this regard, I refer to the paper: Kral 2016, 137–147.

[3] Decision No. 20154225 of 10.12.2015 (Rules concerning export of water). The European Commission (EC) has sent a letter of formal notice to the Slovak Republic pursuant to Article 258 of the TFEU concerning infringements of the rules on the export of water. However, the EC has not brought the matter before the Court of Justice of the European Union.

[4] Spółdzielnia Pracy Muszynianka v. Slovak Republic, PCA Case No. 2017-08/AA629

Fundamental research methods, a standard for the legal sciences, have been applied. More specifically, analytical and synthetic methods were used to examine the legislation, the related literature, and the results of the decision-making activity of judicial authorities. Explanations, interpretations, and analogies concerning institutes were used.

In conclusion, it must be noted that the issue appears to be a matter of national Slovakian law. However, its implications go beyond the republic's borders. In the context of the climate crisis, more states would try to protect their water resources. Therefore, the Slovak Republic's manner of solving the problem could be a basis for other states. Furthermore, it is worth emphasizing that water entities rarely belong in just one state borders. Therefore, the aforementioned regulation has a cross-border effect.

2. Constitutional protection of waters and its limits in the context of the EU law

The enactment of a cross-border water transport ban must be examined against the EU law since the Slovak Republic is a member state of the EU.[5] This involves two considerations, namely (i) whether and to what extent a member state can protect its interests to ensure water resources protection for its population within its territory; and (ii) whether the prohibition of cross-border water transport undermines the member states' principles of free movement of goods. In examining this issue, it is necessary to consider the principles and exceptions regarding the respect for the EU member states' national identity[6] and free movement of goods[7].

2.1. National identity of the member states

In light of the foregoing, it is necessary to consider whether the prohibition of cross-border water transport is a matter of national identity for the Slovak Republic, which the EU must respect. The concept of national identity is derived from Art. 4(2) of the Treaty on European Union (TEU). According to the provision, *"the Union shall respect the equality of the Member States before the Treaties, as well as their national identity, inherent in their fundamental political and constitutional systems, including regional and local self-government. It respects their essential state functions, in particular, ensuring the state's territorial integrity, maintaining public order, and ensuring national security. In particular, national security remains the sole responsibility of each Member State."*

The principle of respect for national identity has existed since the Treaty of Maastricht in the conditions of the EU's primary law. However, it gained popularity after the Treaty of Lisbon was adopted. In this regard, Elko Cloots states that *"it was the Treaty of Lisbon that highlighted the visibility and clarity of this provision."* The pre-Lisbon version of the Treaty stated that *"the Union shall respect the national identities of the Member States."* However, the Treaty of Lisbon supplemented the provision by saying that *"the Union shall respect the equality of the Member States before the Treaties, as well as their national identity, embodied in their*

[5] The Hungarian water law regulation. See more: Marinkás 2019, 96–129; Szilágyi 2019, 255–298.
[6] See also Bonelli 2021, 537-557; Cloots 2015, 5; Kovacs 2022, 170–190; Matusescu 2014, 447–452.
[7] See also Woods 2012, 340–367.

fundamental political and constitutional systems, including regional and local self-government."[8] In addition, certain constitutional courts of the member states have begun to use the concept of the so-called constitutional identity, which defines the so-called core material of the Constitution, which must not be affected by EU law.[9] The German and Polish constitutional courts, in particular, unambiguously link their identity doctrine to the Union's obligation to respect the national identities of the member states, as enshrined in Art. 4(2) of the TEU.[10] The same shall apply in Hungary.[11]

Even if the prohibition on cross-border water transport out of the Slovak Republic is considered a matter of national identity, it is questionable whether it is necessary in terms of national security. In this context, B. Balog states, *"The constitutional value which is protected by Art. 4(2) of the Constitution of the Slovak Republic is the security of its inhabitants. From that point of view, I consider the modification in Art. 4(2) of the Constitution of the Slovak Republic as original and yet, but perhaps not forever, as unique and, therefore, perhaps groundbreaking from the point of view of the traditional definition and understanding of the subject matter of constitutional regulation... In its constitution, the Slovak Republic has declared itself to protect water as a constitutional value. It is a regulation that is unprecedented, but at the same time I believe that it is a regulation that is right and necessary because [of] the challenges facing the world; I am thinking of the challenges of climate change, which will force the state to respond to it sooner or later... I, therefore, consider Art. 4(2) of the Constitution of the Slovak Republic and [the] constitutional protection of water as part of the material core of the Constitution. It protects a value that is essential to human life, namely water... I consider this [modification] to be one [on which] the national constitutionalist has the status [to authorize] to regulate its sovereignly [and] precisely what [it] considers most important for [it] and the community whose life [it] regulates by the constitution given by [it]. I consider this right to be stronger than the obligations arising from [its] current membership in different international organizations."*[12]

Thus, in the opinion of Balog, the constitutional protection of water under Art. 4(2) of the Constitution is part of its core material. If we accept this conclusion, this form of water protection could be considered a matter of the national identity of the Slovak Republic, which the EU should respect. However, it is questionable whether the core material of the Constitution should not be defined through the fundamental principles of constitutionalism, typical to the democratic states, based on the rule of law. I. Palúš considers the principle of democracy, pluralism, guarantee and protection of human and civil rights, the rule of law, republican parliamentarianism, separation of powers, unitary state, compliance of international and national law, and self-government as the essential principles of Slovakian constitutionalism.[13] The protection of waters in the form of a constitutional ban is not derived from the stated principles of Slovakian constitutionalism. To ensure such protection, such adoption did not seem necessary. The same objective could have been achieved through ordinary legislation. It seems to be driven by political interests rather than legal necessity.

[8] Cloots 2015.
[9] Avbejl 2011, 818.
[10] Cloots 2015, 5.
[11] Hungarian regimes Szilágyi 2019, 255–298 and Szilágyi 2019(a), 188–214; Marinkás 2019, 96–112.
[12] Balog 2016, 100–118.
[13] Palúš 1999, 11.

Therefore, I do not agree that the constitutional protection of water must be a fundamental principle of Slovakian constitutionalism or that it is a core material of the Constitution or its constitutional identity. Hence, I do not see this regulation as a matter of the national identity of the Slovak Republic.

2.2. Exceptions to the free movement of goods

The free movement of goods, capital, and persons is among the essential freedoms fundamental to the functioning of the EU. Art. 34 and 35 of the TFEU explicitly provide for the quantitative restrictions on imports and exports between the member states and any measures having an equivalent effect. An exception to this rule is provided in Art. 36 of the TFEU.

According to the provision, *"The provisions of Art. 34 and 35 shall not preclude prohibitions or restrictions on imports, exports, or goods in transit justified on the grounds of public morality, public policy, or public security; the protection of health and life of humans, animals, or plants; the protection of national treasures possessing artistic, historic, or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."*

In the explanatory memorandum on the amendment to the Constitution, the Slovak Republic justifies the conformity of the prohibition on water transport to the cited Art. 36 of the TFEU, namely the need to protect public security and the health and life of humans and animals. These arguments are contained in the explanatory memorandum to the Constitutional Act No. 306/2014 Coll. It can be inferred from the explanatory memorandum that water, as a vital environmental component, is an irreplaceable raw material and natural asset, which is of strategic importance for the state's security, and the scarcity of which may cause a threat to the life and health of the population or jeopardize the state's fulfillment of its basic functions. It emphasizes the state's crucial role: ensuring water sustainability through measures to protect water resources located in the Slovak Republic, including their effective use to meet the needs of society. Taking into account other arguments in the explanatory memorandum, the Slovak Republic seeks to justify the prohibition on cross-border water transport for these reasons. Thus, such regulation will not be covered by Art. 34 and 35 of the TFEU.

The Slovak Republic justified the adoption of this constitutional prohibition as an exception to the free movement of goods, according to Art. 36 of the TFEU, based on public policy, public security, and the need to protect human and animal health. It is, therefore, necessary to assess the content of the exceptions, taking into account the previous decision-making activity of the Court of Justice of the EU.

Public policy is one of the so-called legal concepts, which does not and cannot have an unambiguous definition since its meaning varies depending on the situation, place, and time. At the same time, it is a concept of the EU law and a part of the national legal orders and international law.[14] As Valdhans points out, despite the public policy

[14] For example: Convention on the Recognition and Enforcement of Maintenance Decisions (Decree of the Minister of Foreign Affairs No. 132/1976 Coll.) or the Convention on the Recognition and Enforcement of Foreign Arbitration Decisions (Decree of the Minister of Foreign Affairs No. 74/1959 Coll.).

being a traditional institute, the definition of its content cannot be easily determined.[15] Thus, even if it is stated as a standard (traditional) term, it does not have to mean the same thing in every country. If that were the case (i.e., the legal orders are the same), it would not be necessary to use it as a type of safety measure. This is, currently, a safety valve that protects the domestic legal order from the penetration of fundamentally unacceptable effects of foreign law or activity.[16] It is difficult to define it; its description or its classification is terminologically inconsistent due to its historical development and, in particular, due to its diverse [meanings] from the point of view of different legal orders.[17]

The Court of Justice of the EU has held[18] that it is not for it to define the content of states' public policy. Rather it is for it to control the limits within which the court may use that term.[19] To identify the public policy in a particular case, it requires a genuine and sufficiently serious threat to the fundamental interest of the society. Notably, the Community/EU law does not provide for a uniform range of values for the member states when assessing their behaviors, which may be detrimental to public policy. [20]

Therefore, public policy is interpreted strictly by the Court of Justice and has rarely been a successful ground for an exception under Art. 36 of the TFEU. For example, it will not succeed if it is intended as a general protection clause or serves only for protectionist economic purposes. Where an alternative exception is applied under Art. 36 of the TFEU, the Court shall, as a general rule, use the alternative reasoning or the reasoning on the grounds of public policy in conjunction with other possible justifications.[21] The justification on the grounds of public policy was recognized only in such cases where a member state restricted the import and export of collectible gold coins. The Court held that this was justified based on public policy because it resulted from the need to protect the right to mint coins, which is normally presumed to include the state's essential interests.[22]

The concept of public security is a legal concept. However, it is not the task of the Court of Justice of the EU to define this. Rather, it is their task to define the boundaries and limits of its use as an exception to the free movement of goods. For example, it has accepted the application of the exception for protecting public security in cases involving

[15] Valdhans et al. 2015, 155.
[16] Bystrický 1955, 63.
[17] Štefanková & Sumková 2017, 132.
[18] Judgment of the Court of Justice of the EU in Krombach v. André Bamberski, C-7/98, m.m.; ECLI:EU:C:2000:164;
[19] Poništ 2019, 37–56.
[20] The judgment of the Court of Justice of the EU in the joined cases of Rezguia Adoui v Belgiska and the City of Liège; respectively Dominique Cornuaille v Belgium, 115 and 116/81, ECLI:EU:C:1982:183.
[21] E.g., the judgment of the Court of Justice of the EU Finland against Jan-Erik Anders Ahokainen and Mati Leppik. C-434/04, ECLI:EU:C:2006:609, p. I-9171, paragraph 28.
[22] Judgment of the Court of Justice of the EU in Regina v Ernest George Thompson, Brian Albert Johnson and Colin Alex Norman Woodiwis. C-7/78 ECLI:EU:C:1978:209 [1978] ECR 1978, 2247.

strategically sensitive and dual-use goods[23] since *"... the risk of serious disruption of foreign relations or the peaceful coexistence of peoples may affect the security of a Member State."* In these cases, the Court found that the scope of Art. 36 of the TFEU covers both internal (e.g., the detection and prevention of crime and traffic regulation) and external security.[24]

The need to protect public health may justify the application of an exception to the free movement of goods. In this context, the Court of Justice of the EU has ruled that *"the health and life of people come first, and it is up to the Member States, in light of the limits imposed by the Treaty, to decide what level of protection they wish to ensure and, in particular, how stringent the controls to be carried out should be."*[25] However, it further stated that the *"national rules or practices do not fall under the exceptions..., if the health and life of human beings can be effectively protected by measures, which do not [restrict] intra-EU trade in such a way."*

Several conditions can be inferred from the case law of the judicial authority, which must be fulfilled to apply the exception for the protection of public health. However, health protection cannot be invoked if the real reason for the measure is the protection of the domestic market. In addition, this shall apply in the absence of harmonization when the member states to decide the level of protection. Furthermore, the measures taken must be proportionate and limited to what is necessary to achieve the legitimate objective of protecting public health. The contested measures must be well justified—the member state must provide relevant evidence, data (technical, scientific, statistical, and nutritional), and all other relevant information to demonstrate the justification for applying the exception.[26]

It must be mentioned that the free movement of goods may be restricted for reasons other than those referred to in Art. 36, namely, based on so-called categorical requirements.[27] The categorical requirements have been developed by the case law of the Court of Justice of the EU as an overriding social interest leading to further restrictions on the free movement of goods beyond the provision of Art. 36.[28] The Court has included environmental protection among the scope of categorical requirements (e.g., C-302/86 Commission v. Denmark).[29]

[23] Judgment of the Court of Justice of the EU in Grand Duchy of Luxembourg v Aimé Richardt and Les Accessoires Scientifiques SNC. C-367/89, ECLI:EU:C:1991:376 [1991] ECR 1991, s. I-4621.
[24] Judgment of the Court of Justice of the EU in Grand Duchy of Luxembourg v Aimé Richardt and Les Accessoires Scientifiques SNC. C-367/89, ECLI:EU:C:1991:376 [1991] ECR 1991, s. I-4621.
[25] Judgment of the Court of Justice of the EU in Adriaan de Peijper, directeur de la société Centrafarm BV. C-104/75, ECLI:EU:C:1976:67, Zb. 1976, 613.
[26] Judgment of the Court of Justice of the EU in Commission of the European Communities v Italian Republic. C-270/02, ECLI:EU:C:2004:78, [2004] ECR 1559; judgment of the Court of Justice of the EU in Commission of the European Communities v Federal Republic of Germany. C-319/05, ECLI:EU:C:2007:678 [2007] ECR 2007, s. I-9811.
[27] Poncelet 2013, 171–201.
[28] Tomášek et al. 2013, 218.
[29] Kral 2016, 144.

The International Court of Arbitration ruled on the aforementioned case, Spółdzielnia Pracy Muszynianka v. the Slovak Republic. Its conclusions were similar to those of the Slovak Republic,[30] justifying the need to adopt such a cross-border prohibition on water transport. The Court of Arbitration found that *"Environmental preservation, public health, and seeking to regulate the use of natural resources in an informed and optimal fashion all represent core State functions and, thus, legitimate policy objectives. Environmental protection is not the only public interest invoked. The regulation of the use of natural resources is a self-standing sovereign prerogative that is not necessarily correlated with the level of availability of the natural resource at issue. The same can be said of the protection of public health, which constitutes an independent State function. The Tribunal notes in this regard the Government's objective in seeking to situate the competence over water resource decisions within the central government, thereby, taking it away from the local and regional levels of government."*

A similar conclusion was presented by M. Maslen, who stated that *"A constitutional prohibition on the export of water by pipeline or tanker does not have the character of a trade rule laid down by a Member State, which would directly or indirectly, actually or potentially, hinder trade between [the] Member States. Union rules laying down requirements for water treatment, water care, water packaging, and distribution to the consumer have been transposed by the Slovak Republic. The Slovak constitutional law does not prohibit the export of water packaged in prepackages, as required by the Food Law Regulation and related Union directives. Moreover, from a systematic point of view, the Union treatment itself implicitly indicates that water should be treated as close as possible to the source of its occurrence. This fact is also confirmed by the World Health Organization and UN bodies in the framework of the promotion of the concept of the right to water and safe sanitary conditions of the environment. When exploiting water, it is necessary to take into account the quality and quantity of the water source and the stability of water conditions in the environment from which the water is taken. Therefore, water is a raw material and a natural resource, which becomes food and, therefore, a commodity only after exploitation and processing. The ban on water export must be justified, it must pursue a justified interest, and it cannot be merely general. Judicial case-law permits the enshrinement of instruments, such as restrictions and authorizations for the protection of public health and public policy, which pursue a legitimate aim and are not contrary to the [TFEU]. Even in the context of the interpretation of the freedoms of the internal market, the case-law of the Court of Justice of the [EU] itself emphasizes the requirement to take care of natural resources and natural values."*[31]

As mentioned above, from the point of view of ensuring the free movement of goods, the question is whether water is a commodity, from the point of view of EU law, or a raw material – a natural treasure that only becomes a commodity through its processing (packaging). In the latter case, raw – unprocessed water – would not fall under the free movement of goods regime.

The Court of Justice of the EU has long stated that, under EU law and EU Treaties[32], any item with an 'intrinsic commercial value' constitutes a 'good'. However, the intrinsic commercial value of an item is contingent on it being able to be

[30] Spółdzielnia Pracy Muszynianka v. Slovak Republic, PCA Case No. 2017-08/AA629 (rec. 550 and 551).
[31] Maslen 2017, 104–105.
[32] The judgment of the Court of Justice of the European Union in Commission of the European Communities v. Belgium, C-2/90, ECLI: ECLI:EU:C:1992:310.

"valued in money" and "capable, as such, of becoming a subject of commercial transactions."[33] As for mineral water, Slovakian law precludes private parties from purchasing or selling mineral water before bottling. Under the Act on Mineral Waters, the Slovak Republic transfers the ownership of water to an enterprise upon extraction according to an exploitation permit and payment.[34] To the extent that this transfer may be regarded as a commercial transaction, it would follow that Slovakian natural mineral water acquires the status of 'goods' under the EU law, at the earliest, upon being extracted further to an exploitation permit and payment, and latest, upon being bottled.

In this context, it is noted that the relevance of the national law in the determination of water commerciality is not disputed. Although the EU Water Framework Directive defines water as a 'commercial product', it adds that water is not a product *"like any other, but rather, a heritage, which must be protected, defended, and treated as such."*[35] The EU Commissioner for the Environment confirmed that while the EU Water Framework Directive *"cannot be interpreted as a limitation to the perception of water as a commodity,"* it *"falls within the powers of a member state to decide whether to treat water as a commercial product,[36] [under] non-discriminatory terms for third parties and following the rules of the internal market."*

Taking into account the ongoing climate change and the drinking water scarcity, which will intensify[37] over time, it can be concluded that the protection of public security requires or will require the protection of water resources on the territory of individual states. In any case, the need to protect the health and life of humans and animals is linked to this. Bearing in mind that the prohibition on cross-border water transport has exceptions, in particular, the prohibition does not apply to prepackaged drinking water and mineral water, that is, water which is under the 'goods' regime and not qualified as 'raw materials'. The application of the exception to the free movement of goods is proportionate to the objective pursued. Thus, it refers to water having the character of a raw material, not the character of a commodity.

3. Constitutional protection of waters and its administrative consequences

As mentioned above, the adoption of the constitutional amendment on the cross-border water transport ban was influenced by a political decision not preceded by a thorough legal analysis of the need for such legislation within the framework of the

[33] The judgment of the European Court of Justice in Commission of the European Communities v. Italy, C-7/68, ECLI: ECLI:EU:C:1968:51.

[34] According to Article 3 of the Act No. 538/2005 Coll. on Mineral Waters as amended *"Natural healing water and natural mineral water shall become the ownership of the natural person – entrepreneur or legal person that has extracted it from a natural healing source or natural mineral source based on mineral water exploitation permit issued, hereunder, and has made a payment for it."*

[35] Directive 2000/60/EC of the European Parliament and of the Council of October 23, 2000, establishing a framework for the Community action in the field of water policy, Recital 1 *("Water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such"*).

[36] Report from the bilateral meeting of the State Secretary of the Ministry of the Environment with the Cabinet of the Commissioner for the Environment, July 8, 2014.

[37] See also in detail Čechmánek 2015, 156–169.

Constitution. The absence of a prior rigorous legal assessment caused doubts about the conformity of this regulation with the EU law. However, implementing the legislation in the administrative legislation – the Water Act – suffered similar consequences. To implement the constitutional prohibition, Section 17a was incorporated into the Water Act, which was intended to detail the constitutional regulation. However, the result of this legal regulation is more restrictive than the one in the Constitution and suffers from several ambiguities that allow different interpretations.

Given that this contribution is intended for a wider international professional audience, we quote the provision of Section 17a of the Water Act. Art. 17a of the Water Act is as follows: (1) The use of water taken from water entities located on the territory of the Slovak Republic for transport, utilizing transport or pipelines, across the borders of the Slovak Republic is prohibited, except in the cases specified in Paragraphs 2–5. (2) The transport of water taken from water entities located on the territory of the Slovak Republic across the borders of the Slovak Republic is possible only for personal consumption and the provision of humanitarian aid and emergency assistance. (3) The transport of water taken from water entities located in the territory of the Slovak Republic across the borders of the Slovak Republic for personal consumption is possible for drinking purposes in the volume of no more than 20 liters per person. (4) The transport of water taken from water entities located on the territory of the Slovak Republic across the borders of the Slovak Republic for the provision of humanitarian aid and emergency assistance is possible only if the following conditions are met: (a) The choice of water entity for extraction must be made in the light of its condition, which must not be impaired by extraction. (b) Water extraction from the water entity for the residents' drinking water demands must be ensured and prioritized. (c) Water extraction from the water entity must not jeopardize the provision of the residents' current and future drinking water demand and others. (5) The provision of humanitarian aid and emergency assistance, as referred to in paragraph 4, shall be limited to the time necessary to provide them.

3.1. The ordinary legal regulation is more restrictive than the regulation in the Constitution

As mentioned above, the prohibition of cross-border water transport is regulated by Art. 4(2) of the Constitution. In addition, this provision provides for an exception to this prohibition, namely that *"[it] does not apply to water for personal consumption, drinking water packaged in consumer packaging in the territory of the Slovak Republic, and natural mineral water packaged in consumer packaging in the territory of the Slovak Republic, and to the provision of humanitarian aid and [emergency assistance]. Details of the conditions for transporting water for personal consumption and water for the provision of humanitarian aid and emergency aid shall be laid down by law."*

In this regard, the Constitution refers to a legal regulation as a basis for the details of the conditions for transporting water for personal consumption and for the provision of humanitarian aid and emergency assistance. This provision is in Section 17a of the Water Act. According to Paragraph 1 of this provision, *"the use of water taken from water bodies located in the territory of the Slovak Republic for transport, utilizing transport or pipelines across the borders of the Slovak Republic shall be prohibited, except in the cases specified in Paragraphs 2–5."*

According to Paragraph 2, *"the transport of water taken from water entities located on the territory of the Slovak Republic across the borders of the Slovak Republic is possible only for personal consumption and for the provision of humanitarian aid and [emergency assistance]."*

The Water Act, in Section 17a, Paragraph 1, prohibits cross-border water transport, which is the same as Art. 4(2) of the Constitution. Paragraph 2 provides the exceptions to this prohibition, namely the use of water for personal consumption and the provision of humanitarian aid and emergency assistance. However, Section 17a does not provide an exception to the prohibition of transport, namely that the prohibition does not apply to drinking water and natural mineral water packaged in consumer packaging in the Slovak Republic. However, such an exception to the prohibition is provided for in Art. 4(2) of the Constitution. Hence, it can be concluded that the provision in Section 17a of the Water Act provides a smaller range of exceptions to the prohibition than the provision in Art. 4(2) of the Constitution. Thus, the provisions in Section 17a (Paragraphs 1 and 2) do not exactly coincide with Art. 4(2) of the Constitution and are more restrictive.

3.2. The legal regulation for the prohibition of water transport does not apply to all types of water

The question arises whether the legislation reflects constitutional regulation. In such a case, the prohibition must apply to all water entities and categories in the Slovak Republic. As mentioned, the implementing regulation is contained in Section 17a of the Water Act. To answer the question, Paragraph 3(5) of the Water Act must be taken into account. According to the provision, *"waters which are declared natural healing resources and natural resources of the mineral table under a special regulation and waters which are reserved minerals under a special regulation (hereinafter referred to as 'special waters'), shall be covered by this act only if it expressly provides for it."*

If Section 17a of the Water Act applies to the so-called special waters, it must be explicitly stated. However, it must be noted that the Water Act does not expressly provide (neither in Section 17a nor in any other provision) that the prohibition on water transport under Article 17a applies to special waters.

Hence, it can be inferred that the legislation is not identical to the constitutional regulation, even within the scope of the water categories to which the prohibition on cross-border transport is intended to apply. The legal regulation is narrower in this respect, not taking into account all water types. That is, it does not apply to so-called special waters. It is possible to eliminate this inconsistency by applying a constitutional-conforming interpretation under Art. 152(4) of the Constitution. Therefore, the principle of legal certainty would require that the legal norms are sufficiently clear and certain.

3.3. Insufficiently clear definition of the exception for water transport for personal consumption

According to Section 17a(3) of the Water Act, *"the transport of water taken from water entities located in the territory of the Slovak Republic across the borders of the Slovak Republic for personal consumption is possible for [drinking purposes] in a volume of not more than 20 liters per person."* However, several questions arise regarding the interpretation of this provision:

(1) does the set limit apply to each or all crossings; (2) if these apply to all crossings, then for what period; (3) is it appropriate to limit this exception to drinking purposes only; (4) how is it possible to control compliance with this provision; and (5) how will the violation of this exception be sanctioned.

It is possible to agree with the opinion of R. Kral that *"although water transfers of 20 liters per person may not seem dramatic, the legislator could have clarified these limits for the sake of clarity and comprehensibility. It is unclear whether the limit of 20 liters per person for drinking purposes applies to each or all border crossings. On the other hand, however, such an interpretation causes difficulties on the end of the control authorities – ensuring compliance. This issue is also related to the fact that the level of regular or permanent border checks at border crossing points has been significantly reduced in the Slovak Republic after it entered the Schengen area. Moreover, the current legislation is vague and, in practice, essentially unusable, not intended to fulfill its purpose and requires re-evaluation."*[38] In addition, control should be carried out by the state water authorities within the framework of the state water surveillance[39]; they would not be able to staff such control along the entire length of the national border.

In addition to the quantitative limit, the application of the exception requires that water is used exclusively for drinking purposes. I agree with R. Kral's view that *"[based on] the term water for personal consumption, which, in addition to the Water Act, is also used by the Constitution, the use of water for personal hygiene should be included [or implied], in addition to [drinking purposes]. Such wider [interpretation] of water for personal consumption can also be found in documents of international organizations, for example, the [UN]."*[40]

4. Conclusion

Water is a strategic raw material, and its importance will increase over time in light of climate change and the increasing scarcity of drinking water. Given these circumstances, the Slovak Republic attempted to protect its territorial water through a constitutional ban on cross-border water transport. This prohibition has been incorporated into Art. 4(2) of the Constitution. However, a justified controversy has arisen about its compliance with the EU law, in particular, regarding the restrictive measures on the import and export of goods between the member states (Art. 34 and 35 of the TFEU).

The Euro-conformity of a given provision of the Constitution must be considered in the context of Art. 4(2) of the TEU, according to which the Union respects the national identity of the member states and national security. In addition, Art. 36 of the TFEU must be taken into account, which states that the restrictive measures shall not apply in cases where public policy, public security, or the need to protect human and animal life and health are required.

Water protection through constitutional change cannot be considered a part of the Slovak national identity, which the Union must respect. Such constitutional protection of the waters is not one of the basic principles of Slovakian constitutionalism. Hence, it cannot be considered as a part of the core material of the Constitution.

[38] Král 2016, 140.
[39] More details on bodies of the state water administration in: Tekeli et al. 2017, 162–163.
[40] E.g., the United Nations Human Rights Council Resolution 15/9 of 2010.

It must be considered through the basic principles of constitutionalism. Furthermore, the objective does not require a constitutional change. A regulation in ordinary legislation is sufficient. Hence, the prohibition of cross-border water transport cannot be justified by the need to respect the national identity of the Slovak Republic.

However, it is true that the urgency of increased water protection is due to the impending scarcity and climate change. Therefore, an exception is provided regarding the quantitative restrictions on exports and imports between the member states to protect public policy, public security, and the life and health of humans and animals.

On December 1, 2014, the amendment to the Constitution was adopted, which regulated cross-border water transport with exceptions. This constitutional rule was subsequently detailed in ordinary legislation, namely, in Section 17a of the Water Act. However, the legislator has not been sufficiently consistent in adopting this legislation.

Section 17a of the Water Act does not provide all the exceptions to the ban compared to the Constitution (e.g., the prohibition shall not apply to drinking water and natural mineral water packaged in consumer packaging in the Slovak Republic). Therefore, ordinary regulation is more restrictive compared to constitutional regulation.

In addition, according to the constitutional regulation, the prohibition must apply to all water categories. When adopting the amendment to the Water Act (Section 17a), the legislature did not take into account Section 3(5) of the Water Act, according to which the Act applies to so-called special waters only if it expressly provides for it. However, it is not stated in Section 17a of the Act nor any other provision. Thus, by formal interpretation, the ordinary legislation on the prohibition of water transport does not apply to special waters. This inconsistency can only be reconciled by constitutionally-conforming interpretation.

Finally, the applicative problems are caused by the application of the exemption, which the legislature has defined to be up to 20 liters per person and for drinking purposes only. It is, therefore, disputed whether the quantitative limit applies to each or all crossings of the border. If it applies to all crossings, then the time period is unclear. In addition, the limitation of personal consumption for drinking purposes only is not appropriate. The possibility of controllability of compliance with these conditions is problematic due to the absence of permanent border controls. This shall apply especially when the control is carried out by state water authorities.

Thus, it can be concluded that the implementing legislation in the Water Act is not fully consistent with the conditions of the constitutional prohibition of cross-border water transport in the Slovak Republic.

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