

# IMPROVING THE RIGHT TO WATER IN THE NETHERLANDS

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## 1. Introduction

A right to water contemplates a given quantity of drinking water per individual, often combined with a right to sanitation. The amount in question is a very limited quantity (50 litres per day, although 25 litres is also mentioned) of clean drinking water or water for domestic use.<sup>1037</sup> This is only just enough to survive. The right to water is increasingly being recognized in international conventions, but not to such an extent that a binding human right to water exists.<sup>1038</sup> A broader scope of the right to water includes the protection of safety against flooding, sufficient, clean water for domestic use, food production, energy supply, sanitation, recreation and, last but certainly not least, the protection of ecosystems. However, in this contribution on the right to water in the Netherlands, I will focus on the classical right to water with regard to drinking water and the use of water for domestic use as well as the right to sanitation.<sup>1039</sup> This contribution aims to find missing gaps in the protection of the right to water and sanitation in Dutch law and to provide ideas for legal improvements to guarantee the right to water in the Netherlands. Most of the literature on the right to water in the Netherlands is published in Dutch, but will be mentioned anyway because it includes a good analysis and suggestions for improvement.<sup>1040</sup>

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<sup>1037</sup> World Health organization, *Minimum water quantity needed for domestic use in emergencies*, draft revised: 7.1.05, Technical Note N°9. WHO Technical Notes for Emergencies (2005).

<sup>1038</sup> For example, in the International Covenant on Economic, Social and Cultural Rights (1966) and as a fundamental right recognized by the General Assembly of the United Nations (A/RES/54/175) and defined in General Comment N°15 on the Right to Water, adopted in 2002 by the Committee of Economic, Social and Cultural Rights (UN Doc. E/C.12/2002/11).

<sup>1039</sup> This contribution is based on earlier publications – H.F.M.W. van Rijswijk and A.M. Keessen, *Legal Protection of the Right to Water in the European Union*, in: Sultana, F. and Loftus, A. (eds.), *The Right to Water: Politics, Governance and Social Struggles*, Earthscan, London, 2011 (forthcoming); A.M. Keessen and H.F.M.W. van Rijswijk, *The right to sanitation in the Netherlands*, in: H. Smets (ed.), *Le droit à l'assainissement, un droit fondamental, The right to sanitation in national laws*, Académie de l'Eau, Éditions Johanet, Paris, 2010, p. 299-306. ISBN 978-2-9000-8688-9, also available at: [www.academie-eau.org](http://www.academie-eau.org); H.F.M.W. van Rijswijk en H.J.M. Havekes, *Waterrecht in Nederland*, Kluwer, Deventer, 2010; and on the work of Maikel Looijs, Faiq Karim, Jessica Pereboom, Manon van der Velden and Ernst-Jan van den Boogaart, students participating in the 2011 master's degree in Water Law at Utrecht University.

<sup>1040</sup> J. Verschuuren, *Het recht op water*, in: Th.G. Drupsteen, H.J.M. Havekes and H.F.M.W. van Rijswijk, *Weids Water, opstellen over waterrecht*, SDU Uitgevers, Den Haag, 2006, p. 427-440; C.M. Brölmán, *Mensenrecht op water biedt bescherming tegen afsluiting*, *Nederlands Juristenblad*, 2008/41, p. 2584; C.M. Brölmán, *Internationaal waterrecht en het mensenrecht op water*, in: *Het waterrecht in perspectief, Actuele ontwikkelingen en doorwerking naar het milieurecht en ruimtelijk ordeningsrecht*, Centrum voor Milieurecht, Universiteit van Amsterdam, Groningen, Europa Law Publishing, 2008; C.M. Brölmán, *Relativering van het recht op water*, *Nederlands Juristenblad*, 2010, 1652; H.F.M.W. van Rijswijk en H.J.M. Havekes, *Waterrecht in Nederland*, Kluwer, Deventer, 2010; P. Memenlink, *Een sluitende regeling voor schoon water*, *Nederlands Tijdschrift voor Burgerlijk Recht*, 2011/16; D. Dankers-Hagenaars, *Drinkwater en de overheid als derde, De overeenkomst tot levering van drinkwater en de rol van de overheid als derde bij dit contract*, in: B. Reinhartz, A. Oderkerk, T. Bos and D. Dankers-Hagenaars (eds.), *Belangen van derden*, Boom Juridische Uitgevers, Den Haag, 2008.

## 2. The Netherlands as an EU Member State

It should be noted that the right to water as it is elaborated in the Netherlands is mainly based on obligations following from EU environmental law. The European approach to the protection of the right to water is a combination of a human rights approach and integrated water resource management.<sup>1041</sup> For an overview see the chapter ‘Searching for the right to water in the legislation and the case law of the European Union’. Before we discuss the way in which the Netherlands protects the right to water in more detail, some remarks on the system of EU law are provided to ensure a proper understanding of the legal regime and the way public participation and access to justice – necessary elements to legally enforce the right to water - are arranged.

The EU is neither a regular international organization nor a federal state. It is a supranational organization made up of 27 Member States and this has consequences for its organization and legal order. The EU legal order can be characterized as an integrated legal order.<sup>1042</sup> In the field of water law and policy, this means that the Member States, i.e., France, Germany, Italy, Belgium, Luxembourg, the Netherlands (the six founding states of the European Community in 1951), Denmark, Ireland, the United Kingdom (accession in 1973), Greece (1980), Portugal, Spain (1986), Austria, Finland, Sweden (1995), Estonia, Latvia, Lithuania, Poland, Czech Republic, Hungary, Slovakia, Slovenia, Cyprus, Malta (2005), Roumania and Bulgaria (2007), share their responsibility with the EU. The European Union has the power to adopt binding legislation for all Member States and the authority to enter into international agreements. When the EU is a party to an international agreement – for example, a Treaty or Convention in which the right to water is acknowledged – and it fulfills its international obligations by means of European legislation, international obligations become binding obligations for each Member State.

The EU regulates only what is absolutely necessary, which is based on the subsidiarity principle and the proportionality principle.<sup>1043</sup> In environmental policies, the most frequently used legal instrument is the directive, a piece of EU legislation that has to be implemented in the national legal orders of the different Member States in a way that guarantees that the objectives of the legislation are fully attained, while the choice of the means to realize them is to a large extent left to the Member States.<sup>1044</sup> The Member States are accountable to the European Commission for compliance with their European obligations and can be brought before – and even sanctioned by – the European Court of Justice in case of non-compliance.

Because EU environmental directives should be transposed into national law by the Member States, legal protection is based on the national legal systems of the Member States. This follows from the principle of procedural autonomy. The boundary of this procedural autonomy lies in the obligation that legal protection has to be effective, which means that the

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<sup>1041</sup> M.R. Anderson, Human Rights Approaches to Environmental Protection: an overview, in: M.R. Anderson and A.E. Byle, *Human Rights approaches to environmental protection*, Oxford, Clarendon press, 1996; A. Epiney, *Sustainable use of fresh water resources, Recht und Volkenrecht*, 2003; E. Filmer-Wilson, *The human right-based approach to development: the right to water, Netherlands Quarterly of human rights*, 2005 (2), p. 213-241.

<sup>1042</sup> J.H. Jans, R. de Lange, S. Prechal and R.J.G.M. Widdershoven, *Europeanisation of public law*, Europa Law Publishing, Groningen, 2009.

<sup>1043</sup> J.H. Jans, R. de Lange, S. Prechal and R.J.G.M. Widdershoven, *Europeanisation of public law*, Europa Law Publishing, Groningen, 2009.

<sup>1044</sup> J.H. Jans and H.D. Vedder, *European Environmental Law*, Europa Law Publishing, Groningen, 2008.

national legal system has to guarantee that citizens can enjoy the full protection that EU law offers them. This means that when a European directive offers rights to citizens, these rights have to be implemented in binding legislation and it must be assured that citizens can enforce their rights before the national Courts.<sup>1045</sup> This approach makes EU law more powerful than international law.

### **3. The right to water in the international context and the position of the Netherlands**

The right to water can be inferred from various conventions:

- Article 14(2) of the 1979 Convention on the Elimination of All Forms of Discrimination against Women compels states to ensure ‘adequate living conditions, particularly in relation to ...water supply’ for women.
- The 1989 Convention on the Rights of the Child compels states to combat disease and malnutrition ‘through the provision of adequate nutritious food and clean drinking water’ (Art. 24(2)).
- The UN’s International Covenant on Economic, Social and Cultural Rights (ICESCR) is based on the Universal Declaration of Human Rights. The ICESCR contains the basis for the right to water in Articles 11 and 12. Under Article 12(1) ICESCR everyone has the right to the enjoyment of the highest attainable standard of physical and mental health. Article 12(2) ICESCR stipulates that States Parties to the Covenant must improve all aspects of environmental and industrial hygiene and take steps to achieve the healthy development of the child. According to the General Comment (N°14) of the UN Committee of the ICESCR, Article 12 ICESCR refers not only to health care, but also to all other factors that determine the enjoyment of good health, such as access to clean drinking water, personal hygiene requirements, an adequate supply of safe food, and housing. Article 11(1) ICESCR – the right to an adequate standard of living – also covers the availability of water.

A definition of the right to water can be found in General Comment N°15 on the Right to Water, adopted in 2002 by the Committee of Economic, Social and Cultural Rights:

*“The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements”.*

In 2006 the UN Human Rights Council requested the High Commissioner on Human Rights to research ‘*the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments.*’<sup>1046</sup>

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<sup>1045</sup> J.H. Jans, R. de Lange, S. Prechal and R.J.G.M. Widdershoven, *Europeanisation of public law*, Europa Law Publishing, Groningen, 2009.

<sup>1046</sup> Human rights Council, Decision 2/104.

In this report it was suggested to assign access to water as a human right.<sup>1047</sup>

The Dutch government recognized the right to water during the session of the UN Human Rights Council in 2008, at which the Minister for Foreign Affairs recognized the right to water as a human right:

*'I am proud to announce here today that the Netherlands will join the group of countries who have recognised the right to water as a human right. [...] Merely recognising the right to water as a human right will not solve this pressing issue, but I am certain that it is a powerful incentive to increase access to water for the poor. I hope the Human Rights Council will reach a clear consensus that the right to water is indeed a human right, so that we can all make visible progress on this important issue.'*<sup>1048</sup>

The Dutch government is of the opinion that the right to water has specific political significance and no legal consequences, because the right to water is already contained in rights previously codified and recognized by the Netherlands, e.g. Articles 11 and 12 ICESCR.<sup>25</sup>

In Resolution A/HRC/15/L14 of the UN Human Rights Council, States are requested:

- a) *To develop appropriate tools and mechanisms, which may encompass legislation, comprehensive plans and strategies for the sector, including financial ones, to achieve progressively the full realization of human rights obligations related to access to safe drinking water and sanitation, including in currently unserved and underserved areas;*
- b) *To ensure full transparency of the planning and implementation process in the provision of safe drinking water and sanitation and the active, free and meaningful participation of the concerned local communities and relevant stakeholders therein;*
- c) *To pay particular attention to persons belonging to vulnerable and marginalized groups.*<sup>1049</sup>

This Resolution has a broader scope than General Comment 15: it requests States to take a more proactive attitude and to take all appropriate measures for an adequate supply of drinking water by way of practical measures, planning and legislation.

Bolivia's draft resolution on the formal recognition of the right to water was adopted by the General Assembly on August, 3, 2010:

*'Acknowledging the importance of equitable access to safe and clean drinking water and sanitation as an integral component of the realization of all human rights'*.<sup>1050</sup>

<sup>1047</sup> Annual report of the United Nations High Commissioner for human rights and the reports of the office of the United Nations High Commissioner for human rights and the Secretary-General, p. 26, N°66 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/136/55/PDF/G0713655.pdf?OpenElement>.

<sup>1048</sup> [www.rijksoverheid.nl/documenten-en-publicaties/toespraken/2010/02/10/statement-by-maxime-verhagen-at-the-7th-session-of-the-human-rights-council-geneva-3-march-2008.html](http://www.rijksoverheid.nl/documenten-en-publicaties/toespraken/2010/02/10/statement-by-maxime-verhagen-at-the-7th-session-of-the-human-rights-council-geneva-3-march-2008.html).

<sup>1049</sup> VN GA A/HRC/15/L.14, (2010) p. 3.

<sup>1050</sup> VN, Resolutie 64/292.

No States voted against the resolution, but there were those which abstained from voting. One of these States was the Netherlands:

*‘... although his country recognized the right to clean water and good sanitation, as reflected in its assistance promoting access for 50 million people by 2015.<sup>1051</sup> However, the text placed insufficient responsibility on national Governments, upon which citizens must be able to rely and from which they must obtain redress. In addition, it would make reports of the Human Rights Council’s independent expert counter-productive, he said, adding that he was also not happy with the General Assembly’s “ad hoc” declaration of the right since the resolution had unnecessary political implications.’<sup>1052</sup>*

The UN Nations Human Rights Council adopted a specific Resolution on October 6, 2010:

*‘Reaffirming the fact that international human rights law instruments, including the International Covenant on Economic, Social and Cultural Rights<sup>1053</sup>, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities entail obligations for States parties in relation to access to safe drinking water and sanitation.’<sup>1054</sup>*

The Netherlands ratified the ICESCR on 11 December 1978 and is obliged to fulfill the obligations following from the Convention. The Dutch Courts do not generally confer direct effect on provisions of the ICESCR,<sup>1055</sup> which has resulted in an admonition directed at the Netherlands insofar as the Committee recommended that the Netherlands

*‘...reassess the extent to which the provisions of the Covenant [ICESCR] might be considered to be directly applicable. It urges the State Party to ensure that the provisions of the Covenant are given effect by its domestic Courts, as defined in the Committee’s General Comment 3, and that it promotes the use of the Covenant as a domestic source of law.’<sup>1056</sup>*

The UN resolution of October 2010 also makes clear that the UN Human Rights Council considers the Right to water to be an enforceable human right:

*‘Affirms that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity.’*

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<sup>1051</sup> As a contribution to attain the Millennium Development Goals.

<sup>1052</sup> [www.un.org/News/Press/docs/2010/ga10967.doc.htm](http://www.un.org/News/Press/docs/2010/ga10967.doc.htm).

<sup>1053</sup> *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966.

<sup>1054</sup> Human Rights Council, A/HRC/RES/15/9.

<sup>1055</sup> P.A. Nollkaemper, Kern van het Internationaal Publiekrecht, Boom Juridische Uitgevers, Den Haag, 2007, p. 241–244.

<sup>1056</sup> UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Netherlands, 24 November 2006, UN Doc. E/C.12/NLD/CO/3, subdivision 19.

The Independent Expert Catarina de Albuquerque shares the same opinion:

*‘The right to water and sanitation is a human right, equal to all other human rights, which implies that it is justiciable and enforceable’*,<sup>1057</sup>

This leads to the conclusion that also the Netherlands is obliged to respect the right to water as an enforceable human right.

#### **4. The scope of the right to water**

When we take a closer look at the right to water the following elements are relevant and will be used as the analytical framework to investigate the way in which the Netherlands ensures the right to water:

1. Availability: the supply of water for each individual must be adequate and continuous for personal and general use, e.g. drinking, sanitation, washing clothing, preparing food and personal and household hygiene.
2. Quality: the water for personal and general use must be safe, and therefore free from micro-organisms, chemical substances and radiological hazards that are a danger to health. The color, odour and taste of water must also be acceptable.
3. Accessibility: water and water facilities must be accessible to everyone, without discrimination. Accessibility comprises:
  - physical accessibility: water and water facilities must be located within a safe physical reach for all sections of the population. Sufficient, safe and acceptable water must be accessible within each household, school and workplace.
  - economic accessibility: water must be affordable for everyone.
  - equal accessibility: water must be accessible to all, including the most vulnerable and marginalized sections of society, with no conditions or penalties attached.
  - information accessibility: accessibility also covers the right to seek and receive independent information on water issues.

An important aspect of accessibility is economic accessibility. General Comment N°15 does not require water to be free, but financial obstacles must not be such that they restrict accessibility: *‘Any payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.’*

The General Comment is not binding on the States Parties, although it is regularly referred to. For the actual protection of water rights it is necessary to rely on the right to water as far as it is included in a treaty or agreement from which a right to water can be derived.<sup>1058</sup>

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<sup>1057</sup> [www.un.org/apps/news/story.asp?NewsID=36308](http://www.un.org/apps/news/story.asp?NewsID=36308).

<sup>1058</sup> See for the literature on the right to water amongst others: M. Boylan, Clean water, *International Public health and policy and Ethics*, 2008; P.B. Anand, Right to water and access to water: an assessment, *Journal of International Development*, 19, 2007; H. Smets, *The right to water as a human right*, *Environmental Policy and Law*, 2009, 30/5; Chowdhury, Mustu, St. Dennis and yap, *The human right to water and the responsibilities of business: an analysis of legal issues*, SOAS School of Law Legal Studies Research Papers Series, N°03/2011.

## 5. No right to water in the Dutch Constitution

The Netherlands does not have an explicit right to water in its Constitution (*Grondwet (GW)*) either. The right to water can be implied from Article 21 of the Constitution: "It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment".<sup>1059</sup> It can further be assumed that the right to water also constitutes part of the government's task to promote the health of the population (Art. 22 *GW*),<sup>1060</sup> and it may even be possible to link it to the inviolability of the physical person (Art. 11 *GW*). The Dutch right to water falls in particular under the umbrella of social fundamental rights, which should be seen as a duty of care on the part of the authorities, and they are intended as a task for the government to enact legislation to that effect. As the Dutch Courts are prohibited from reviewing Acts of Parliament for their conformity with the Constitution (Art. 120 *GW*), fundamental rights mainly play a symbolic part in water law. This prohibition on any constitutional review is of particular significance for classic fundamental rights. Social fundamental rights are more on the same footing as principles. National fundamental rights can acquire greater significance in two ways. The first possibility is when international treaties that have been ratified by the Netherlands and have come into force contain provisions that have direct effect, on which Dutch citizens can rely before the Courts. That is the case when these provisions are unconditional and sufficiently clear. At present, there are as yet no such provisions with regard to an explicit human right to water, but recent case law may be considered to be promising.

## 6. The effect of the internationally recognized right to water on Dutch case law

The underlying fundamental rights in international treaties and Conventions can amount to the right to water in the Dutch legal order, as described above. In an important decision by the Maastricht district Court the right to water was recognized for the first time. The Court found as follows:

*'In this case the defendant cannot bypass WML, the regional monopolist, to invoke his right to water. This right is embodied in rights that have been codified and recognized by the Netherlands for some time now, especially the right to an adequate standard of living and the right to health (Articles 11 and 12 respectively of the International Covenant on Economic, Social and Cultural Rights). Recognition of the right to water and sanitation is therefore an explicitation of this element of existing rights. Moreover, at the seventh session of the Human Rights Council in Geneva (3–28 March 2008) the Netherlands recognized the right to water and sanitation as a human right. The remedy sought is, moreover, disproportionate to the sum of arrears, so that the interests of the defendant in the continued delivery of water prevail over the interests of the claimant.'*<sup>1061</sup>

The Court referred to the recognition of the right to water by the Dutch government during the session of the UN Human Rights Council in 2008, at which the Minister for Foreign Affairs recognized the right to water as a human right. The Dutch government is of the opinion that the right to water has specific political significance and no legal

<sup>1059</sup> J. Verschuuren, *Recht op water*, in Th.G. Drupsteen, H.J.M. Havekes and H.F.M.W. van Rijswijk, *Weids Water*, SDU Uitgevers, The Hague, 2006, pp. 427-440.

<sup>1060</sup> *Parliamentary Proceedings II* 2005/06, 21 501–30, N°137, p. 3.

<sup>1061</sup> District Court of Maastricht, subdistrict section (Heerlen), 25 June 2008, N°294698 CV EXPL 08-4233, *LJN* BD5759, *NJCM-bulletin* 2009, pp. 249–255 with note by Coomans.

consequences, because the right to water is already contained in rights previously codified and recognized by the Netherlands, e.g. Articles 11 and 12 ICESCR.<sup>1062</sup> However, as already mentioned above, in July 2010 the Netherlands abstained from a resolution of the United Nations General Assembly in which “safe, clean drinking water and sanitation” were elevated to the status of human rights.

In a later ruling by the Court of appeal of Den Bosch the right to water was likewise in dispute.<sup>1063</sup> Again it was a case involving the Limburg water company WML and a private citizen, in which the water bill had not been paid and the water company wanted to cut off the water supply until the bill was settled. The Court found as follows:

*‘Contrary to the subdistrict Court, the appeal Court is of the opinion that it is not possible to infer an absolute right to water – even without monetary consideration – either from Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights (ICESC), or from other covenants or international sources of law recognized by the Netherlands. WML rightly pointed out that pursuant to ‘General Comment 15 on the Right to Water’ of the Committee for Economic Social & Cultural Rights of 26 November 2002 a right to have access to water must be inferred from these Covenant provisions:*

*‘The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable (the Court’s emphasis) water for personal and domestic uses’ and*

*‘Economic accessibility*

*Water, and water facilities and services must be affordable for all. The direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the Covenant rights.’*

*‘It follows from this alone that the (human) right to have access to water does not mean that a claim for the provision of water at no cost can be made. Leaving aside the fact of whether Articles 11 and 12 ICESCR are provisions binding on everyone in the meaning of Article 93 of the Constitution, the right to suspend delivery vested in WML is therefore not of itself in conflict with the right (inferred from the aforesaid Covenant provisions) to have access to water. Neither Section 3p of the Water Supply Act nor the Drinking Water Act (still to take effect) gives rise to a duty to supply water free of charge, either. The ground for appeal therefore succeeds.’*

Contrary to the district Court of Maastricht, the appeal Court directly reviewed not only conformity with Articles 11 and 12 ICESCR, but also with General Comment N°15. The appeal Court offered no opinion on whether Articles 11 and 12 ICESCR should be made directly effective. It can be inferred from the ruling that a person can rely on the right to water before the Dutch Courts, but that this right does not mean that water should also be free of charge. The price of drinking water should fall within the criteria of General Comment N°15. The average price for 1,000 litres of drinking water in the Netherlands is € 1.50, which can be

<sup>1062</sup> *Parliamentary Proceedings II* 2007/08, 31 250, N°15, Policy statement on development cooperation.

<sup>1063</sup> Court of appeal of Den Bosch, 5 March 2010, LJN BL 6583.

deemed to be a reasonable price that does not exclude even vulnerable groups from the supply of drinking water.<sup>1064</sup> It should be noted that in the Netherlands the costs for sanitation (collection and treatment of waste water) is not included in the price for drinking water. At the same time it should be recalled that the right to water is not so extensive that around 130 litres of drinking water per person (the average use of drinking water for drinking, domestic and other uses in the Netherlands) per day must be available at a reasonable price.

## 7. Protection of the right to water in the Netherlands by normal legislation

The role of water rights as fundamental rights can – and must – be augmented in the Dutch legal system primarily by legislation enacted by the government in order to effectively substantiate water rights and the related interests which the government is required to protect. That is the second way in which to give legal meaning to social fundamental rights: the way in which the right to water is elaborated in the Dutch Constitution. These rights involve, in particular, protection against flooding and water nuisance, the provision of sufficient, clean water, clean and healthy drinking water and ensuring that water systems are able to perform their societal functions.

The right to water is elaborated in Dutch legislation in particular in the Water Act in combination with environmental quality standards based on the Environmental Management Act and the Drinking Water Act. The Water Act provides for the protection of sources of potable water and of water treatment. In addition to the Water Act, protective provisions can be found in the Environmental Management Act (*Wm*), the Spatial Planning Act (*Wro*) and the Soil Protection Act (*Wbb*). The obligation to supply drinking water at a reasonable price as incorporated in the Drinking Water Act can be seen as an elaboration of the right to water/drinking water. But supplying drinking water free of charge is not mandatory.<sup>1065</sup> The duty to supply applies in particular to owners, tenants and legal users. For example, the owners of premises occupied by squatters are not required to provide a drinking-water connection, and neither are they required to permit squatters to arrange for one to be installed.<sup>1066</sup>

Besides the substantive component, which fleshes out the scope of the right to water, there is also the procedural component, which ensures that citizens are involved in planning and decision-making, and that they can also rely on their water rights in the Courts. These procedural rights can be found in the international Aarhus Convention and its implementation in European law (Report in this book on the right to water in the European Union). Article 14 of the Water Framework Directive contains specific obligations with regard to public participation, which, according to the Court of Justice, must be implemented in the national law of the member states.<sup>1067</sup> These obligations relate in particular to informing and consulting the public at large. The normal EU and national legal provisions should provide a basis for the protection of these rights.

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<sup>1064</sup> In the Netherlands, in 2008, the average price paid by a household of 4 consists of the price for drinking water (around 120 €), the price for the collection of domestic waste water (around 160 €) and for the treatment of waste water (around 190 €), the price for water quality and water quantity management (around 50 €) and the price for the protection against flooding (around 30 €).

<sup>1065</sup> Court of appeal of Den Bosch, 5 March 2010, *LJN* BL 6583 and *Verschuuren* 2006, 435.

<sup>1066</sup> District Court of Groningen, 19 February 2010, *LJN* BL4579.

<sup>1067</sup> ECJ Case 32/05, *Commission v. Luxembourg*.

However, in Dutch law one can see a tendency towards further restricting the legal protection possibilities of private citizens. For example, consideration is being given to the introduction of a relativity-related requirement in Dutch administrative law, something which has already occurred in the Crisis and Recovery Act (*Crisis- en herstelwet*).

## **8. Responsibility for the supply of drinking water**

The task of ensuring the supply of drinking water has two components:

In the first place, the drinking water resources, namely groundwater and surface water, must be protected. Adequate protection of the quality of water resources reduces the necessity for further purification treatment of groundwater and surface water in order for the water to be used for consumption. The amount of water to be used for the supply of drinking water is also of importance. Freshwater is scarce, so the sustainable management of freshwater resources is necessary. Despite the fact that the Netherlands, compared to other countries, has a large amount of freshwater, the use of the available water must be economical and sustainable. The drinking water supply occupies an important place in the distribution of freshwater and in the Netherlands it is regarded as a public task. The protection of drinking water resources forms an integral part of the protection of water in general, which is regulated at the European level under the Water Framework Directive (WFD) and its subsidiary directives, and in the Netherlands primarily under the Water Act (Ww) with additional protection provided under the Spatial Planning Act (Wro), the Environmental Act (Wm) and the Soil Protection Act (Wbb).

Besides the protection and distribution of freshwater, in the second place, drinking water as such is also regulated at the European and national level. In the Netherlands, around 1.1 billion m<sup>3</sup> of drinking water is consumed every year. This drinking water must be guaranteed to be healthy and safe. The Drinking Water Directive (Directive 98/83/EC) establishes certain requirements for drinking water. In the Netherlands, the quality of drinking water is currently regulated by the Water Supply Act ("*Waterleidingwet*") and secondary legislation. In 2009, however, the new Drinking Water Act ("*Drinkwaterwet*") was officially published.<sup>1068</sup> Although the Drinking Water Act has not yet entered into force, the Regulation of drinking water will be discussed in the light of the new Drinking Water Act.

The drinking water supply is considered to be part of the water chain, which consists of the supply of drinking water and the collection, transportation and treatment of waste water. This water chain aims at collaboration between different responsible parties, such as drinking water companies, municipal councils, Water Boards and central government.

## **9. Protection of drinking water resources in the Netherlands**

In the Netherlands, water intended for human consumption is abstracted from surface water (38%), groundwater (60%), natural dune water (1%) and through river bank infiltration. In 2007, the price of drinking water was € 1.32 per m<sup>3</sup>, taxes excluded (23.7%). This includes drinking water as well as water used in the food industry. For the sake of brevity, I will refer to drinking water. In the Netherlands, drinking water is abstracted from the IJsselmeer, the Afgedamde Maas, the Biesbosch, the Lek Canal and the Drenthse Aa. All these sites meet the standards which applied under Directive 75/440/EEC.

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<sup>1068</sup> *Stb.* 2009, 370.

In the Netherlands, the system for the protection of drinking water resources is implemented in the Water Act (Ww) and Sections 11 and 12 of the Decree on quality requirements and monitoring of water of 2009 (BKMW 2009). The bodies of surface water and bodies of groundwater in which water abstraction locations are situated are identified in their entirety as protected areas and are included in the register of protected areas (as required under the Water Framework Directive). However, the quality standards apply only to water abstraction locations where water is actually abstracted. The water abstraction locations are included in the management plan for national waters or the regional water plan, depending on whether national or regional waters are concerned.

Furthermore, environmental by-laws at the level of the Provinces identify groundwater protection areas, where certain activities are subject to restrictions. These areas are referred to as water abstraction areas (subsection 2 of Section 1.2 of the Environmental Management Act). A safeguard zone within the meaning of Article 7 WFD is thereby created for the protection of drinking water resources. There is no provision requiring such safeguard zones to be established for surface water.

### ***9.1. Provisions in the Water Act***

In the Netherlands the Water Act came into force in December 2009. One of the reasons for the revision of Dutch water law was to improve the implementation of European water law in the national legal order and to enable integrated water management by setting integrated legal rules. The integrated approach can be recognized in the purposes of the Act in Section 2.1:

1. The purpose of this Act shall be to:

- a) prevent and, where necessary, limit flooding, swamping and water shortage; while simultaneously
- b) protecting and improving the chemical and ecological status of water systems; and
- c) allowing water systems to fulfill societal functions.

As well as preventing water shortages, the protection of water quality (sub. b) as the fulfillment of societal functions is elements of the right to water. One of the most important societal functions is water as a resource for drinking water.

Section 2.8 provides certain standards by which to assure an appropriate storage so as to ensure the necessary amount of freshwater and conveyance capacity.

Section 2.9 is of specific importance for the right to water as it states that the priority of social and ecological needs that shall determine the distribution of available surface water in the event or threat of a water shortage shall be laid down by an administrative order. In this administrative order (Waterbesluit) drinking water as part of a public service is ranked in second place. In the Netherlands, being a delta which for a great part lies beneath sea level, the protection of dikes is considered to be the most important. Since a severe shortage of drinking water in the Netherlands is not to be expected, this may be regarded as a logical choice.

Section 2.10 provides standards for the chemical and ecological status of water systems and these shall be laid down on the basis of Chapter 5 of the Environmental Management Act in accordance with the system of environmental objectives listed in Section 4 of the Water Framework Directive. The monitoring of water quality is compulsory.

In the planning system based on chapter 4 of the Water Act, it is required that all national and regional water plans indicate which societal functions waters have, including water as a resource for drinking water.

Any activity in the water system needs a license, which can only be granted if there is no risk that the purposes or goals of the Water Act will not be achieved (Art. 6.21). This means that activities that may harm drinking water resources are forbidden or should be restricted by provisions in the water license. The competent authorities are the Ministry of Infrastructure and the Environment or the regional water boards. The competent authorities for groundwater abstractions for the purpose of supplying drinking water are the provinces.

## **9.2. *Relation with spatial planning and land use***

Developments in spatial planning can also influence the quality of water intended for the abstraction of drinking water. So far, the “water test” – an instrument in Dutch planning law that makes it obligatory to take the effects of land use and spatial planning decisions on water systems into account - has not had much influence on decision-making with regard to spatial planning which may affect water quality interests. However, it appears from a ruling of the Administrative Jurisdiction Division of the Council of State in 2006 that developments in spatial planning must also take into account the consequences for the quality of water, particularly when water intended for the abstraction of drinking water is concerned.<sup>1069</sup>

Since many different activities can threaten the quality of drinking water resources and these activities are regulated by various authorities in a number of different policy areas, a proposal was made to draw up so-called *area dossiers*. These will set out the various threats to the quality of drinking water, in order to determine the risks concerned and to take the necessary measures to protect drinking water resources. It is expected that the obligation to draw up area dossiers will be incorporated in the Drinking Water Decree (*Drinkwaterbesluit*). The Provinces are responsible for drawing up the area dossiers, since they have the competence to grant permits for the abstraction of drinking water and play a coordinating role within environmental law in general. Currently, drinking water companies have already started drawing up area dossiers.

## **10. The drinking water supply in the Netherlands**

### **10.1. *The Drinking Water Act***

Directive 98/83/EC was implemented in the Netherlands by the Water Supply Act (“Waterleidingwet”) of 2000, the Decree implementing the Waterleidingwet (“Waterleidingbesluit”) and the Commodities Act (“Warenwet”). The Drinking Water Act, which will replace the Water Supply Act, provides rules for the production and distribution of drinking water by drinking water companies. Furthermore, requirements are set out for securing the supply of drinking water (Part IV), the quality of the drinking water to be distributed (Part III) and the functional performance of the water companies (Part V). The

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<sup>1069</sup> ABRvS (Council of State) 1 March 2006, N°2005502013/1.

scope of the Drinking Water Act thus extends from resources to the taps. The supply of drinking water in the Netherlands is controlled by ten drinking water companies which ensure the treatment, production and distribution of drinking water to the consumer.

### **10.2. *Drinking water companies: private companies with a public task***

Drinking water companies are private companies, whose shares must be held by authorized legal entities, which, under the Drinking Water Act, must be legal entities, governed by public law (they are actually provinces and municipalities). The Drinking Water Act sets limits to the control over drinking water companies, in order to ensure that only authorized legal entities are in charge of the supply of drinking water (Paragraphs 4 and 5). Water companies have the competence but also the obligation to supply drinking water in specific distribution areas, as appointed by the Minister for Infrastructure and the Environment, under reasonable, transparent and non-discriminatory conditions (Sections 2, 5, 8 and 11). Cutting off consumers must be prevented (Art. 9). In a ministerial Regulation it will be regulated how cutting off households should be prevented and, in case cutting off is unavoidable - whenever that may be, how this should be organized. The regulation will be prepared by the government in close cooperation with the drinking water companies, consumer organizations and debt counselling organizations.<sup>1070</sup> Cutting off the supply of drinking water is forbidden if a physician has declared that disconnecting the water supply will result in severe health risks.<sup>1071</sup> There is an obligation for a user of drinking water who is not able to pay his/her water bill to ask for debt counselling.<sup>1072</sup> Even before the entry into force of the Drinking Water Act, it was stated in a Court ruling that being cut off from the supply of drinking water cannot easily be considered to be lawful.<sup>1073</sup>

### **10.3. *Responsibility of administrative authorities for drinking water***

Notwithstanding the existence of privately organized drinking water companies, the supply of drinking water is a public task. Section 2, subsection 1 of the Drinking Water Act provides that administrative authorities shall assure the sustainable availability of the supply of public drinking water. In the exercise of their powers and the application of legal provisions, this assurance by the administrative authorities of the sustainable availability of the supply of drinking water is considered to be overriding reason of great public interest (subsection 2 of Section 2). Thus, this public interest must be taken into account in the exercise of powers and the application of legal provisions by (all) administrative authorities. This means that:

- the drinking water supply forms one of the few grounds for exceptions to the application of the provisions of the Birds and/or Habitats Directive;
- in the balancing of interests, for instance with regard to housing, the assurance of the availability of the supply of drinking water will prevail;
- the assurance of the sustainable availability of the supply of drinking water has now been accorded the same level of priority as protection against flooding.

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<sup>1070</sup> Parliamentary Papers (II), 2007-2008, 30 895, N°47, p. 1-2 and N°20.

<sup>1071</sup> Parliamentary Papers (II), 2007-2008, 30 895, N°47, p. 1-2 and Parliamentary Papers (I), 2008-2009, 30 895, D, pp. 24-25.

<sup>1072</sup> Parliamentary Papers (I), 2008-2009, 40, p. 1889 and pp. 1891-1893 as well as Parliamentary Papers (I), 2009-2010, 30 895, N°H (Annex).

<sup>1073</sup> District Court of Maastricht, subdistrict section (Heerlen), 25 June 2008, N°294698 CV EXPL 08-4233, *LJN* BD5759, *NJCM-bulletin* 2009, pp. 249–255 with note by Coomans.

Once every six years, the Minister for Infrastructure and the Environment must draw up a policy document regarding the public supply of drinking water (Section 6).

#### **10.4. *Tasks of a drinking water undertaking***

The tasks of drinking water companies are described in Section 7. These are: establishing and maintaining a sustainable and functional supply of drinking water and the necessary infrastructure, the distribution of drinking water and safeguarding the quality and sustainability of the production and distribution process. The infrastructure is considered to be a public work or a work of public interest.

Another important task of drinking water companies is to contribute to the protection of drinking water resources and to the responsible use of drinking water by owners, consumers and other customers (Section 7(2)). Section 7 provides that the owner of a water company is under the obligation to “establish and maintain a sustainable public drinking water supply”. This is considered to be a due care responsibility without competences, similar to the due care responsibilities of citizens. The implementation of this duty of care largely depends on the area in which the drinking water company operates. This section refers in particular to the subsidiary activities of drinking water companies in the field of nature and environmental management in infiltration and abstraction areas. Drinking water companies are deemed to play a proactive role in indicating trends and developments regarding the quality of surface water which is abstracted and in communicating this knowledge to the water authority.

#### **10.5. *Quality standards for drinking water***

The EU quality standards for drinking water primarily focus on the drinking water companies. However, it is the Netherlands as a Member State that is ultimately responsible for ensuring compliance with these standards. Standards have been included in the Annexes to the Drinking Water Decree. Furthermore, the quality standards set in the 2009 Decree on quality requirements and monitoring of water (“BKMW 2009”, based on the Environmental Management Act) are relevant; and for a number of production locations the standards contained in the Infiltration Decree (*Infiltratiebesluit*, based on the Soil Protection Act) are relevant. Surface water which is infiltrated after preliminary treatment must comply with the requirements set out in the Infiltration Decision.

#### **10.6. *Security of supply and a supply plan***

One element in the security of supply is that a supply plan is to be drawn up, which takes into account the policy document for the public supply of drinking water (Sections 37 et seq.). The supply plan is to be approved by the appropriate inspector.<sup>1074</sup> The supply plan describes how to implement:

- the supply under normal (non-disturbed) circumstances;
- preparation for disturbed circumstances;
- operation under disturbed circumstances;
- after-care and evaluation in cases of disturbed circumstances.

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<sup>1074</sup> Following the WHO Guidelines for Drinking Water Quality (2004).

This must be based on a risk assessment of the entire production process, from the resource to the final point of supply. Such an assessment must take into account the possibility of serious threats such as burst water mains, emergencies regarding the quality of resources, and terrorist attacks against a drinking water company. The measures taken or that will be taken in order to limit these risks must be indicated. It is the task of the drinking water companies to provide the details of and for the implementation of the supply plan, and this will be reviewed by the Environment Inspectorate. The obligation to supply drinking water can be seen as an implementation of the right to (drinking) water. Drinking water must be supplied at a reasonable price. However, as described above, it is not necessary to supply drinking water free of charge. The obligation to supply is applicable in relation to owners, tenants and legal users. This means that owners of a dwelling that is occupied by squatters are not obliged to ensure a connection to the drinking water supply, nor to allow squatters to arrange for a connection to the drinking water supply.

#### **10.7. Performance comparisons, supervision and information supply**

For the supply of drinking water a benchmarking system has been established; the performance of the various drinking water companies is compared by reviewing their performance in the area of the quality of the water which is supplied, the environmental effects, customer satisfaction and cost efficiency (Sections 39 et seq.).

Dutch drinking water companies are supervised by the central government as far as the quality and security of the supply of drinking water are concerned. This is carried out by the Environment Inspectorate. The water companies are responsible for the quality of water which is abstracted for the preparation of drinking water, as well as for the quality of the resulting drinking water itself. In case of non-compliance with these standards, the Environment Inspectorate must be informed thereof without delay (Section 49). In accordance with Directive 98/83/EC the Member States are obliged to notify the European Commission of any non-compliance with the standards for drinking water. In order to ensure that this information is correctly notified, the Inspection guideline for the notification of non-compliance with the standards for drinking water quality (“Inspectierichtlijn voor de melding van normoverschrijdingen drinkwaterkwaliteit”, 2005) has been adopted. In this guideline, the Environment Inspectorate assumes that the water companies themselves have protocols in place which lay down adequate responses. Such protocols must set out how the identification and the rectification of the causes of non-compliance, as well as their communication to the Environment Inspectorate, are to be carried out.

Informing the public plays an important role in the supply of drinking water. In this context, the drinking water companies are to be transparent with regard to the quality of drinking water (Section 21), as well as how prices are set. The Drinking Water Act provides that the report on the performance comparison as well as the proposals by drinking water companies for improvements based on that report are to be sent to the Upper and Lower House (Section 43). Every year the Minister for Infrastructure and the Environment draws up a report on the quality of drinking water, which must also be sent to both Houses of Parliament, and published in the Netherlands Official Gazette (*Staatscourant*) and which is made available to the public for consultation.

## 11. The right to sanitation in the Netherlands<sup>1075</sup>

The right to sanitation has only recently been recognized in the Netherlands.<sup>1076</sup> Nevertheless, access to adequate sanitation facilities is taken for granted in the Netherlands. Indeed, the recognition of the right to sanitation occurred in the context of development assistance, after a call for action by Prince Willem Alexander on World Water Day 2008. The only recent problems relate to the treatment of domestic waste water and the discharge of domestic waste water from the public sewer system in case of excessive rainfall.

The Netherlands is a densely populated country. That makes it relatively easy to connect houses to the public sewage system. Therefore, an overwhelming majority of houses are connected to the public sewer system and thus to a waste water purification plant. Only a few houses are too far away from the public sewer system to be connectible and therefore have an autonomous system. It is remarkable how quickly adequate sanitation facilities have become ubiquitous. Only a hundred years ago, diseases such as cholera and dysentery were common in the Netherlands due to the lack of adequate sanitation. In the early 20<sup>th</sup> century, many Dutch city canals were filled in because their use as an open sewer resulted in many diseases. That is no longer required. Indeed, some of the city canals have been reopened.

### 11.1. Definition and legal sources of the right to sanitation

The right to sanitation includes the right to sanitation facilities at home and in public places as well as part of water collection, water transport and the treatment of domestic waste water.<sup>1077</sup>

The right to sanitation follows from the International Convention on Economic, Social and Political Rights, to which the Netherlands is a party. The Netherlands has recognized the right to sanitation as a human right.<sup>1078</sup>

European law does not explicitly contain a right to sanitation. Yet relevant European legislation does exist, i.e. the European Urban Waste Water Treatment Directive.<sup>1079</sup> The Netherlands has transposed this Directive into national legislation.<sup>1080</sup>

The right to sanitation finds a basis in Dutch national and local building legislation, which provides rules for the construction and the use of new and existing public and private buildings. In addition, the legislation that applies to bars and restaurants contains rules on sanitation facilities. The Environmental Management Act and the Water Act make the

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<sup>1075</sup> This section is an actualized version of A.M. Keessen and H.F.M.W. van Rijswick, The right to sanitation in the Netherlands, in: H. Smets (ed.), *Le droit à l'assainissement, un droit fondamental, The right to sanitation in national laws*, Académie de l'Eau, Éditions Johanet, Paris, 2010, p. 299-306. ISBN 978-2-9000-8688-9, also available at: [www.academie-eau.org](http://www.academie-eau.org).

<sup>1076</sup> TK 2007/2008 31250 N°15.

<sup>1077</sup> H.F.M.W. Van Rijswick, *Moving Water and the Law. On the Distribution of Water Rights and Water Duties within River Basins in European and Dutch Water Law*, Groningen: Europa Law Publishing 2008, p. 11.

<sup>1078</sup> Second Chamber of Parliament 2007/2008 31250 N°15.

<sup>1079</sup> Directive 91/271/EEC, 21 May 1991, concerning the collection, treatment and discharge of urban waste water and the treatment and discharge of waste water from certain industrial sectors (the Urban Waste water Directive), *OJ 1991 L135/40*, later amended.

<sup>1080</sup> See below for the implementing legislation.

municipalities responsible for the collection of domestic waste water and the district water boards for the treatment of waste water.<sup>1081</sup>

## 11.2. *Relevant provisions in national Dutch law*

### a) *The right to a toilet and corresponding obligations*

Every building<sup>1082</sup> – new or old – has to have sanitation facilities that prevent a situation that is dangerous to health from arising.<sup>1083</sup> In addition, the legislation that applies to bars and restaurants requires that two separate toilets are available for customers in the immediate vicinity of the locality.<sup>1084</sup> Meeting these requirements is a prerequisite for obtaining a licence to serve alcohol.

### b) *Obligations on the part of the authorities concerning sanitation*

Municipalities are obliged to collect and transport waste water.<sup>1085</sup> However, if it is considered inefficient to extend the public sewer system, the municipality may not connect a house to the public sewer system.<sup>1086</sup> In that case, the owner has to install an individual purification plant. This applies in particular to isolated houses that are too far away from the public sewer system.<sup>1087</sup>

### c) *Financial provisions*

Individuals who are not connected to the public sewer system have to pay themselves for their personal waste water purification installation. Once the municipality constructs a public sewer system in the vicinity of their property, they also have to pay for their connection to the public sewer system.<sup>1088</sup> According to the competent Dutch Courts, the community is not obliged to pay compensation to those who are obliged to pay for their connection to the public sewer system.<sup>1089</sup> This is considered reasonable because the clear norms in the Dutch legislation ensure that connection to the public sewer system – and the costs involved - is foreseeable.<sup>1090</sup> Compensation for damages on the basis of the principle of *égalité devant les charges publique*<sup>1091</sup> is only possible if a comparison with other individuals who were forced to connect to the public sewer system reveals disproportionate costs on the part of the individual in question.<sup>1092</sup> Those who are connected to the public sewer system pay

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<sup>1081</sup> H.J.M. Havekes and H.F.M.W. van Rijswijk, *Waterrecht in Nederland*; H.F.M.W. van Rijswijk (ed.), *EG-Recht en de praktijk van het waterbeheer* (EC Law and water management), STOWA: Utrecht 2008, pp. 236-253.

<sup>1082</sup> Including houseboats, which are quite common in the Netherlands.

<sup>1083</sup> Arts. 3.31 to 3.40 *Bouwbesluit*.

<sup>1084</sup> Art. 7 *Besluit inrichtingen drank en horecawet*.

<sup>1085</sup> Art. 10.33 *Wet milieubeheer* (Environmental Management Act).

<sup>1086</sup> Second Chamber of Parliament 2005-2006, 30 578, N<sup>o</sup>3, p. 10.

<sup>1087</sup> See below.

<sup>1088</sup> Arts. 228a and 229 *Gemeentewet* (Municipalities Act).

<sup>1089</sup> ABRvS (Judicial Division of the Council of State) 22 December 1996 (woonboot Appingedam), AB 1996/250, m.nt PvB.

<sup>1090</sup> J. Robbe, *Aansluiting op de riolering en nadeelcompensatie* (Connection to the public sewage system and compensation), *Overheid en Aansprakelijkheid* 2003, p. 214.

<sup>1091</sup> Art. 3:4 *Algemene wet bestuursrecht*.

<sup>1092</sup> J.E. Hoitink, *Schadevergoeding in het omgevingsrecht: speurtocht naar verklarende principes* (Compensation in environmental law, a search for guiding principles), in: J. E. Hoitink, G.E. van Maanen, B.P.M. van Ravels & B. J. Schueler, *Schadevergoeding bij rechtmatige overheidsdaad* (preadviezen voor de VAR Vereniging voor bestuursrecht), The Hague: Boom juridische uitgevers, 2002, pp. 201-259.

waste water taxes to the municipality and the water board.<sup>1093</sup> These taxes cover the costs of maintenance and replacement of the sewer system and of the purification of waste water.

*d) Obligations on the part of persons concerning access to sanitation*

Dutch law does not oblige home owners to connect their house to the public sewer system. If a house is not connected to the public sewer system, it has to get rid of domestic waste water in another way. Dutch law forbids discharges into surface water, unless it is allowed under a discharge permit.<sup>1094</sup> Consequently, the owner of a house that is not connected to the public sewer system has to obtain permission from the public authorities. The duty to have a discharge permit can be abolished by a law that contains general requirements on the discharge in question and imposes a notification duty.<sup>1095</sup> This occurred in the area of sanitation. The first condition is that the distance to the public sewer is more than 40 metres and the second condition is that they discharge their waste water into surface water after purification in an individual waste water purification installation.<sup>1096</sup> Nevertheless, a permit remains necessary in case of special circumstances, in particular when the discharge is into surface water that requires additional protective measures or in the case of a direct discharge into groundwater.<sup>1097</sup>

House owners can be de facto obliged to connect to the public sewer system. This is because those who live within 40 metres from the public sewer are faced with a prohibition on discharging their waste water into surface water. This distance is calculated by taking the shortest distance to the public sewer system where the connection can be established without serious difficulties. If the owner of the house had only recently installed an individual purification plant, an exception may be made. In that case the owner has to apply for a permit which contains a time limit for the use of the individual purification plant.<sup>1098</sup> Another option for house owners who live within 40 metres of a public sewer system is to use the service of a tanker that regularly collects their waste water.

The rules on connection to the public sewer system are further elaborated in the Building Regulation (an Order in Council called in Dutch the ‘Bouwbesluit’) and the Municipal Building Regulation (a regulation by municipalities called the ‘gemeentelijke bouwverordening’), which both constitute legislation to implement the Housing Act (‘Woningwet’), respectively at national and at local level. The Building Regulation does not contain an obligation that new houses must be connected to the public sewer system. For existing houses it only requires that the facilities for the discharge of waste water are such that they do not give rise to a situation which is disadvantageous to public health. The explanatory memorandum of the Building Regulation states that this issue is left to the municipal building legislation, because it constitutes a regulation on the use of the building in question.

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<sup>1093</sup> Arts. 228a and 229 Gemeentewet and Art. 122d Waterschapswet (Act on the Water Boards).

<sup>1094</sup> Art. 6.2 Waterwet (Water Act).

<sup>1095</sup> Art. 6.6. Waterwet (Water Act).

<sup>1096</sup> Besluit lozing afvalwater huishoudens.

<sup>1097</sup> Art. 11 and 3 Besluit lozing afvalwater huishoudens.

<sup>1098</sup> Arts. 7 and 10 Besluit lozing afvalwater huishoudens.

Regulation by the municipalities could mean that the rules on connection to the public sewer system differ from municipality to municipality. That is not the case, because most municipalities adhere to the model building legislation of the Association of Dutch Municipalities ('Vereniging Nederlandse Gemeenten/VNG'). The model municipal building legislation requires that sanitation facilities are effectively connected to the public sewer system. This duty does not apply if no public sewer system is available or if the public sewer system is further than 40 metres away from the building in question. This is measured in the same way as under the Water Act.

*e) Aid to enable access to sanitation*

While connection to the public sewer system is generally not subsidized, people who have limited financial means can request a waiver from the waste water taxes of the municipality and the water board. Public toilets are not always free. They are often cleaned by a person in exchange for a small charge for use, e.g. 50 € cents, to be paid by users. In contrast, toilets in bars or restaurants are usually available free of charge to customers.

*f) Enforcement*

The water board is responsible for the enforcement of the Water Act, which means that it has to act against illegal discharges of waste water into surface waters. At the same time, the local government is responsible for the enforcement of discharges into the sewer systems or into the soil as well as for the enforcement of the (municipal) building legislation, which means that it has to act when a house owner does not connect the house to the public sewer system. In addition, if the lack of sanitation compromises public order, the mayor is competent to take enforcement action. This means that the water board and the municipal authorities have to cooperate to ensure effective enforcement. Only the water boards can order the halting of discharges into surface waters, while it is only the municipal authorities which can order connections to the public sewer system. If the offender does not cooperate, they have to assess who is going to take which enforcement action and how they will share the costs when the (full) recovery of those costs turns out to be impossible. It is also important that they coordinate their actions in order to prevent a situation where enforcement action against an illegal discharge from an illegally built or used house gives rise to the legitimate expectation that the building or the use of the building will be tolerated.<sup>1099</sup>

*g) International cooperation*

The Netherlands considers the attainment of the Millennium goals concerning sanitation to be a priority.<sup>1100</sup>

*h) Right to information and consultation. Right to judicial protection*

Users have a right to information about the essential aspects of sanitation and to participate when important decisions are being made that concern them. They can take action against non-compliance by filing a request for enforcement with the authorities. The taxes to

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<sup>1099</sup> J. Robbe, De verplichting tot aansluiting op de riolering (2), *Tijdschrift voor Omgevingsrecht* 2003, pp. 206-212.

<sup>1100</sup> Second Chamber of Parliament 2007/2008 31250 N° 15.

be paid for sanitation are fixed by the municipalities, as they are responsible for the service.<sup>1101</sup>

The right to sanitation is respected in the Netherlands. Regulating the discharge of domestic waste water used to be a hot topic, but between 2000 and 2005 most people who were not yet connected to the public sewer system either became connected or obtained an individual purification plant. Currently, the main challenge is to prevent sewer overflows. This is necessary because it is a threat to water quality when heavy rainfall causes sewer overflows and more or less undiluted raw sewage is discharged into the environment. A possible solution is the creation of separate rain water and sewer systems. This is becoming general practice when new housing is being constructed.

## **12. Analysis of the right to water and sanitation in the Netherlands**

When we look at the relevant provisions of Dutch water law which are related to the right to water and sanitation, we can see that the right to water is not formally recognized in the Dutch Constitution, or in any other legislation for that matter. Still, the right to water and sanitation seems to be quite well protected. The right has been recognized by the Dutch government on several occasions, both by the Dutch Parliament and by the Courts. It should be noted, however, that there are still no decisions by the Supreme Court (either administrative or civil).

### **12.1. Substantive elements**

Altogether the set of legal provisions as laid down in the Water Act, the Drinking Water Act, the Environmental Management Act and the Housing Act seems to guarantee the substantive right to water rather well. The possible conflicts between the right to water and the sustainable protection of water as a natural resource which is also important for the protection of nature are not clearly dealt with in Dutch law. There is no formal ranking in the objectives as laid down in environmental or water legislation. In the case of scarcity, however, the drinking water supply is well protected, both in the Water Act as well as in the Drinking Water Act.

Most buildings are connected to a sewage system or do have an individual waste water treatment installation. The Building Act requires the presence of drinking taps as well as toilets and a connection to a sewage system.

The most urgent problems to be resolved in Dutch legislation and practice when it comes to the full protection of the substantive part of the right to water and sanitation are the provisions with regard to physical and equal accessibility for all and especially for socially disadvantaged groups like poorer households, homeless people and travelling persons as well as provisions with regard to price setting and the information thereon. Generally, it is difficult to find public toilets or public drinking water points like fountains. Buying bottled drinking water is extremely expensive compared to drinking water from the tap and this is also far from sustainable. Also the costs of sanitation services are quite high, although they are completely necessary to pay for the costs of collection and treatment of waste water. It must be noted that both municipalities and water boards have special provisions for poorer households. Most water boards have provisions in their tax regulations that those who cannot afford to pay their bills can request for exoneration of the tax bill. The same applies for

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<sup>1101</sup> Arts. 228a and 229 Gemeentewet.

municipalities when taxes for waste water collection cannot be paid. Drinking water companies have special obligations to ensure that people are not cut off from the supply of drinking water. This means that the Courts will only allow cutting off in specific circumstances as described above. Furthermore the Parliament requested special attention for those who have special needs due to specific vulnerability. In a forthcoming regulation based on the new Drinking Water Act, this shall also formally be regulated. A medical certificate will however be necessary.

**Table 15. SUBSTANTIVE PROVISIONS OF THE RIGHT TO WATER  
IN DUTCH WATER LAW**

	<i>Water Act Fresh water and waste water treatment</i>	<i>Drinking water Act Drinking water</i>	<i>Environmental Management Act Waste water collection Provisions on sanitation</i>
<b>Water quality</b>			
<i>Plans</i>	+	+	+
<i>Programmes</i>	+		
<i>Quality standards</i>	+	+	+
<i>Emissions control</i>	+		+
<i>Treatment</i>	+	+	
<i>Monitoring</i>	+	+	+
<i>Protected areas</i>			
<b>Sanitation</b>			
<i>Accessibility</i>			
<i>physical</i>	+		+
<i>equal</i>	+		+
<i>Availability</i>			
<i>sustainable</i>	+		+
<i>equitable use</i>	+		+
<i>Affordability</i>	+/-		+/-
<b>Drinking water</b>			
<i>Accessibility</i>			
<i>physical</i>		+/-	
<i>equal</i>		+/-	
<i>Availability</i>			
<i>sustainable</i>		+	
<i>equitable use</i>		+/-	
<i>Affordability</i>		+/-	
<p>+ = meets the requirements to fulfill this element of the right to water as described in par. 4.  +/- = does not fully meet the requirements to fulfill this element of the right to water as described in par.4.  - = no regulation provided and does not meet the requirements to fulfill this element of the right to water as described in par. 4.</p>			

## 12.2. Procedural elements

Access to justice, especially to cheap and easily accessible administrative Courts, has been increasingly reduced in the Netherlands. Access to the civil Courts remains possible, but that is considered a more difficult and certainly far more expensive way, which is not available to all. Formally, the provision of information seems sufficient, although certainly not perfect. The information on an equal and fair distribution of fresh water is difficult to recognize in the general water plans, either based on the Water Act or the sewage plan based on the Environmental Management Act (Table 15).

Participation in decision making is well organised in environmental and water law but it is hard to influence decision making with regard to drinking water. This is only possible in a very indirect way, by means of elections in municipalities and provinces, since they own the drinking water companies. Information on water and environmental issues is provided via the internet and by Parliament. The same applies to information on drinking water. Nevertheless, this information is not very accessible for vulnerable groups.

**Table 16. PROCEDURAL PROVISIONS FOR CONSUMER PROTECTION  
IN DUTCH WATER LAW**

	<i>Water Act</i>	<i>Drinking water Act</i>	<i>Environmental Management Act</i>
<b><i>Accessibility of information</i></b>			
<i>State and improvement of the environment</i>	+		+
<i>Drinking water quality</i>		+	
<i>Plans</i>	+	+	+
<i>Programmes (measures)</i>	+		
<i>Price setting</i>	+/-	+/-	+/-
<i>Availability</i>	+	+	+
<i>Fair distribution</i>	+/-	+	+/-
<i>Transparency</i>	+	+	+
<b><i>Participation in decision making</i></b>	+	+/-	+
<b><i>Accountability</i></b>	+	+/-	+
<b><i>Access to justice</i></b>	+/-	+/-	+/-

+ = meets the requirements to fulfill this element of the right to water as described in par. 4.

+/- = does not fully meet the requirements to fulfill this element of the right to water as described in par.4.

- = no regulation provided and does not meet the requirements to fulfill this element of the right to water as described in par. 4.

Procedural provisions like the right to information gain importance when individuals have easy and cheap access to the Courts to ensure their rights. Access to the Courts is only useful when the Courts have enough detailed information, based on plans and programmes, to determine if individuals are properly protected and if the right to water can be fully enjoyed (Table 16). Although Dutch legislation is not designed to guarantee the right to water and sanitation, the existing legislation seems to provide sufficient protection, but this can certainly be improved.

### **13. Possible improvements in the way the Netherlands can protect the right to water**

We have concluded that important elements of the right to water as discussed in Section 4 are quite sufficiently guaranteed in Dutch law. The physical and equal accessibility for all and especially for socially disadvantaged groups like poorer households, homeless people and travelling persons as well as provisions with regard to price setting are not adequate. This leads to the question of how the right to water can be improved in Dutch law and in practice.

First of all, the right to water can be included in the Constitution and could be more specifically elaborated in Dutch environmental law and the Drinking Water Act. The Netherlands has no water shortage and drinking water could easily be available for all. Nevertheless, the legislation has no provisions to guarantee the right to water to homeless or travelling people. There are regulations to financially help vulnerable and poor people, but there is no general provision which refers to the right to water or sanitation when it comes to economic affordability.

Secondly, practical measures, like public toilets and drinking water fountains could certainly be improved. A legal obligation for municipalities to take action would be advisable.

The EU approach to combining the right to water with the protection of water as a natural resource is followed and implemented in Dutch water law and this, in my opinion, is the right approach.