The problem of thirst: The right to equality and the unlawful privatization of water

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Abstract

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The problem of thirst is a massive one, and a child dies every 15 seconds from disease related to lack of access to safe, clean water. Privatization is touted as the solution to water injustice, despite evidence that privatization of water services only increases water deprivation for the poorest citizens. This paper examines whether a privatized for-profit system of water access for personal use infringes the human right to water, and whether states have a legal responsibility to protect their citizens from any and all third party business interests in water. The problem of thirst is considered from the perspective of the right to equality, rather than the more traditional framework of the right to life.

The right to water is protected at international law. International human rights law establishes that states have a non-derogable obligation to ensure that no person is deprived of the minimum level of water essential to prevent disease, in any circumstance, and that the right to equality means that everyone has equal access to adequate water. Despite the arguments that water privatization will improve access for the world’s poor because it curbs wasteful consumption and distribution, efficiently allocates what’s left of a scarce resource, bypasses government corruption, and has greater capacity than the public sector, water corporations exist to generate profit, not to satisfy human rights or protect human dignity. Corporations only meet human needs insofar as those needs generate profit; unprofitable human needs cannot, by definition, be a valid corporate concern.

As a number of case studies demonstrate, private water provision is antithetical to the equal right to water, and therefore states have a legal obligation to keep water in the public commons in order to respect, protect and fulfill the equal right to adequate water. This paper ultimately argues that the public push towards water privatization, by major international institutions as well as by individual states, is in fact illegal under international law.
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Introduction: The Problem of Thirst\textsuperscript{1,2}

Despite the pollution, the lack of adequate sewage systems, the corporate cover-ups and murky water politics, one thing is clear – water, our life blood, is inequitably distributed across the world’s population, and far too many people do not have access to clean, safe, adequate water for their consumption and basic hygiene needs. When we think about human rights, we often think about prisoners tortured, journalists arrested, children trained as soldiers, entire races “ethnically cleansed”. But what could be more basic to our human dignity and more fundamental to true equality than an equitable distribution, or equitable access, to water adequate to satisfy thirst and prevent disease? Our images of the problem of thirst are often linked inextricably to climate; children with bloated bellies below sweltering suns on dusty barren plains. Yet, in this era of human control over the environment, thirst is tragically linked to human hierarchies, so that the poorest and most marginalized people often get the least access to water for their most basic needs and pay most dearly for the smallest trickle.

Whether there is enough water in the world for everyone is a matter of some controversy, and plays a key role in the debate over water privatization.\textsuperscript{3}

\footnotetext[1]{The research for this paper was completed entirely on the basis of the available literature. One of the problems I encountered in undertaking the research for this paper was the inaccessibility of the actual agreements between government, international institutions (like the World Bank) and the private water corporations. Many of these agreements are kept confidential, and are therefore not accessible to the public, including those citizens directly impacted. In addition, some tribunal proceedings concerning water corporations are held \textit{in camera}.}

\footnotetext[2]{The author would like to thank Professor Margaret Bedggood for her invaluable feedback on an earlier version of this paper, which was submitted as a Master’s dissertation to the International Human Rights Law program at the University of Oxford.}

\footnotetext[3]{For different perspectives on this debate:}

See Barlow, Maude. \textit{Blue Covenant: The Global Water Crisis and the Coming Battle for the...
Unfortunately, it is water scarcity that also provides the primary incentive for private interest in water; where there is scarcity, there is money to be made.\(^4\)

While the nature and degree of scarcity remains hotly contested, it is indisputable that some people use much more than is necessary to meet their basic water needs, while many people have much less than what is required for drinking, food preparation, toileting and bathing. In fact, the country with the highest water consumption level is the United States, where 2002 statistics show that the average consumption rate per citizen is 557 litres per day; by contrast, Mozambique is one of the most water deprived nations where residents use on average 10 litres per day.\(^5\)

Every report on the state of water insecurity in the world begins with the depressing statistics. This paper won’t be any different, if only to shock readers into listening harder, feeling more, thinking deeper about the water injustice that so many people around the world face on a daily basis. Unfortunately, there are far too many to choose from, and the following statistics only begin the process of setting the elementary problems of thirst and toilets into their very complex context:

- Between 1990 and 2000, diarrhea from water-borne disease killed

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\(^5\) Supra note 3, UNDP 2006, at 36
more children (mostly under 5) than all those lost to armed conflict since the Second World War.

- In 1998 alone, 308,000 people died from war in Africa, but more than 2 million (six times as many) died of diarrheal disease.
- The death toll from diarrhea among children far exceeds that for HIV/AIDS among children.\(^6\)
- In rural Africa, the typical proportion of household time spent on collecting water is 26%, a task that falls predominantly to women and children.\(^7\)

Access to clean, safe water that is adequate for both drinking and basic hygiene is a human right, both normatively and legally. The right to water is protected at international law, indirectly in instruments such as the International Covenant on Economic, Social and Cultural Rights and directly in instruments such as General Assembly Resolution 64/292 and the Convention on the Elimination of all forms of Discrimination Against Women. Treaty body general comments and domestic constitutions have breathed life into these general legal protections, although implementation and enforcement is often still considered a lofty and perhaps unattainable goal. The “right to water” is largely accepted as encompassing the necessities of life – that is, for drinking, food preparation, basic hygiene and sanitation – although it also has broad implications for other rights associated with standard of living issues, such as housing, health, food,


\(^7\) Department for International Development. \textit{Addressing the water crisis: healthier and more productive lives for poor people. Strategies for achieving the international development targets}. United Kingdom Department for International Development: London, 2001 at 23.

work, education and culture. Moreover, access to water and sanitation are key indicators of the fulfillment of these other rights.\(^8\)

This paper will examine whether a privatized for-profit system of water access for personal use infringes the human right to water around the world, and whether states have a legal responsibility to protect their citizens from any and all third party business interests in water. The first chapter will establish that there is in fact a legal right to water under international human rights law, and will provide an overview of the content of that right. The second chapter will examine the public push towards privatization, including tools implemented (and justifications offered) by international institutions in imposing public private partnerships on developing nations. The third chapter will explore examples of privatization, and argue that such an approach to the provision of water for personal use has an inequitable impact on the world’s most vulnerable people, particularly women and indigenous peoples. The fourth chapter will conclude by positing that, based on the legal requirements and the impact of privatization, states have a legal responsibility to protect the public provision of water.

The paper will ultimately argue that a for-profit system of global water access for personal use infringes the human right to water, particularly for those who are already made vulnerable through sex, race and other human hierarchies. Individual states and international multi-state institutions have a legal responsibility to protect citizens, especially the most vulnerable, from the

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impact of third party business interests in water for personal use because water privatization will inevitably infringe the human right of equal access to water. In other words, the current promotion of water privatization by major international institutions such as the World Bank and the United Nations, as well as by individual states, is in fact illegal under international law.

This discussion of the impact of water privatization will be limited to the use of water for drinking, food preparation, basic hygiene and sanitation; that is, water for personal use. The use of water for agricultural, industrial and commercial purposes is beyond the scope of this paper. The environmental aspects of the right to water are also beyond the scope of this paper; while there is an argument to be made that there is a human right to a clean environment insofar as water pollution is concerned, I will not be making that argument here. This paper will focus primarily on inequitable access to adequate water, rather than water quality or global availability per se.

In this paper, I will focus on an equality analysis of the right to water, rather than a more traditional right to life perspective. An equality analysis is more focused on human dignity and inherent human rights. A right to life perspective poses the danger of boxing human rights into a capitalist paradigm – our entitlements are only to the necessities of life, which still allows for great inequalities between the haves and have-nots. An equality analysis breaks

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9 Pooja Parmar describes this issues as the difference between characterizing the entitlement to water as a need instead of a right: “I suggest that tying the right to water exclusively to ‘basic needs’ reflects yet again a marginalization of lived experiences, and limits the potential of the right in significant ways. In being so tied together, rights and needs can be used interchangeably leading to the dilution of the language of rights.” Parmar, Pooja. “Revisiting the Human Right to Water” 28 Austl. Feminist L.J. 77 (2008) at 87.
down this paradigm and aims at a purer ideal of water justice, as well as highlighting how we can – and why we must – take responsibility for adequate provision for everyone, without simply writing water deprivation off as the result of global shortages. Many countries and regions have certain populations that experience mass water deprivation, while the region itself is water rich; key examples are Canada (where there is inadequate water on many rural Indian reserves) and Latin America, which could have one of the highest per capita allocations of water if it did not suffer from the triple threat of pollution, class inequality and privatization. An equality analysis of the right to water reveals the injustice in these situations. While both approaches aim to address the massive health problems and fatalities that result from lack of access to adequate water, the ideological distinction is significant because the two approaches diverge in their ultimate goals.

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10 Supra note 3, Barlow 2007, at 103.
Chapter 1: The laws of thirst

Indian writer and activist, Vandana Shiva, argues that the human right to water, and the community’s exercise of that right, is an essential aspect of democracy:

Democracy is not merely an electoral ritual but the power of the people to shape their destiny, determine how their natural resources are owned and utilized, how their thirst is quenched, how their food is produced and distributed, and what health and educations systems they have.¹¹

Locating the right to water in the context of democracy highlights the participatory nature of the right, which in turn helps frame the right to water within the overarching right to equality (as discussed in further detail below).¹² Including access to adequate water as an aspect of democracy also helps frame the right to water as a legal right enforceable through the rule of law.

Broadly speaking, there are two ways to conceptualize the legal nature of water rights. *Usufructuary rights*, that is that water can be used but not owned,¹³ is the basis for establishing a legal right to water. The common law system of riparian rights was originally based on a usufructuary model, in other words, “a

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¹² For example, “As stated by the Coordinadora de Defensa del Agua y de la Vida (Coalition for the Defence of Water and Life – the Coordinadora), the organisation that emerged to coordinate the protests during the Cochabamba water protests in 2000, the struggle for water is connected with the broader fight for popular control over natural resources: “[T]he fundamental problem is who decides about the present and future of the population, natural resources, work and living conditions. In relation to water, we want to decide for ourselves: this is what we call Democracy” (cited in Crespo Flores 2006b, 4; all Spanish translations by the authors),” Spronk, Susan, Carlos Crespo and Marcela Olivera. “Struggles for water justice in Latin America: Public and ‘social-public’ alternatives” in McDonald, David A and Greg Ruiters, eds. *Alternatives to Privatization: Public Options for Essential Services in the Global South*. Cape Town: HRSC Press, 2012 at 421:

right to consume so long as the river was not diminished”. This concept of water as part of the global commons was illustrated in Uruguay, where 60% of voters in a 2004 national referendum agreed that “water is a natural resource essential to life” and that access to piped water and sanitation services are “fundamental human rights”. It was only later in the development of common law that riparian rights became closely connected to concepts of private property, and universal rights to water became restricted based on competition, personal need and individual gain.

In juxtaposition to the idea of water as belonging to no one and open to everyone, proprietary rights are the idea that water is a commodity that can be owned, bought and sold. In support of this concept of water, law professor and writer Robert Glennon argues that delivering water without charging for the water itself is absurd: “Water rights, with rare exceptions, do not include a commodity charge for the water. The water itself is free! To illustrate the absurdity of this, imagine Texaco charging a customer at the pump only the cost of the electricity to pump the gas.”

This debate between water as a commons (a social good) and water as a commodity (an economic good) is the backdrop to the development of a legal right to water. In 1992, representatives attended the International Conference on

15 Supra note 4, Bakker, at 199.
16 Supra note 11, Shiva, at 22.
Water and the Environment from 100 countries and 80 international,
intergovernmental and non-governmental organizations. The product of the
conference was The Dublin Statement on Water and Sustainable Development,
which developed key principles for action on water access, including:

Principle No. 4 - Water has an economic value in all its competing uses
and should be recognized as an economic good: Within this principle, it is
vital to recognize first the basic right of all human beings to have access to
clean water and sanitation at an affordable price. Past failure to recognize
the economic value of water has led to wasteful and environmentally
damaging uses of the resource. Managing water as an economic good is
an important way of achieving efficient and equitable use, and of
encouraging conservation and protection of water resources.18

In contrast, the Committee on Economic, Social and Cultural Rights has
admonished that “water should be treated as a social and cultural good, and not
primarily as an economic good”.19 Water as an economic good associates water
with human need and development, and divorces it from concepts of entitlement
and human dignity. As a human right, access to water gains the currency of
participation, accountability and empowerment, which are all vital elements of the
international human rights framework.20

The resistance to rights language in the water context was a common
theme until recently.21 At the 2009 World Water Forum, 168 ministerial delegates

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released a Declaration defining water as a human need rather than a human right.\textsuperscript{22}

This is not a mere semantic distinction, for it has very real implications in law.

Daniel Reifsnyder, U.S. deputy assistant secretary of state for environment and sustainable development and leader of the U.S. Delegation to the 2009 World Water Forum, illustrates the significance of this distinction:

The United States does not oppose any government adopting a national right to water or sanitation as part of its own domestic policy. We do, however, have concerns with a statement that would require all countries to adopt a national right to water or sanitation or would establish an international right to water or sanitation. [...] \textbf{Establishing an international right to anything raises a number of complicated issues regarding the nature of that right, how that right would be enforced, and which parties would bear responsibility for ensuring these rights are met.} To date, there have been no formal intergovernmental discussions on these issues. It would therefore be premature to agree to such a right.\textsuperscript{23} [Emphasis added]

As explained by sociologist Lyla Mehta, “The key difference between human needs and human rights is that the latter entail an element of entitlement.”\textsuperscript{24} The language of rights grounds human need in law, and creates justiciable standards for their fulfilment.

\textbf{International human rights law}

In 2010, the UN General Assembly finally passed a resolution recognizing the human right to water. While the resolution does not mention the debate


between public and private provision of water services, it does call on states and international organizations to “provide financial resources, capacity-building and technology transfer, through international assistance and cooperation, in particular to developing countries, in order to scale up efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all.”25 Shortly after, the Human Right Council followed suit with their own Resolution, calling on state parties to “To ensure financing to the maximum of available resources in order to implement all the necessary measures to ensure that water and sanitation systems are sustainable and that services are affordable for everyone.”26 The latter resolution firmly roots the international human right to water within the right to life and an adequate standard of living.

This explicit recognition of the right to water in international law is new. The International Covenant on Economic, Social and Cultural Rights (ICESCR) does not explicitly protect the right to water. In fact, it is only in the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the Convention on the Rights of Persons with Disabilities (CRPD) that access to water is mentioned within the human rights treaty framework. The first two of these are widely ratified, while the latter has only 132 state parties (at the time of writing). CEDAW offers specific protections for women living in rural areas, including the right to enjoy

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adequate living conditions in relation to, *inter alia*, water supply.\textsuperscript{27} In the context of the right to health, the CRC requires state parties to take appropriate measures to combat disease and malnutrition, through, *inter alia*, the provision of clean drinking water.\textsuperscript{28} Finally, the CRPD mandates state parties to ensure equal access by persons with disabilities to clean water services.\textsuperscript{29}

Despite the failure of the ICESCR to explicitly mention water, the Committee on Economic, Social and Cultural Rights (CESCR) has noted that this right is implicit in the standard of living provision, Art.11(1), which reads:

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

In General Comments 6\textsuperscript{30} and 15\textsuperscript{31}, the CESCR recognizes that the list of conditions for an adequate standard of living is non-exhaustive, and water is an analogous and necessary element. General Comment 15 also locates the right to water in Art.12 of the ICESCR, which recognizes the right to the highest attainable standard of health and requires state parties to take those steps necessary for the


\textsuperscript{31} *Supra* note 19, GC15.
improvement of all aspects of environmental and industrial hygiene. Pursuant to these provisions, the Committee states that a failure to act in good faith to take all necessary and feasible steps to realize the right to water amounts to a violation of international human rights law.32

However, General Comment 15 provides important information and commentary on the content of the right to water. In order to satisfy the legal right, “the elements of the right to water must be adequate for human dignity, life and health”, and adequacy can be broken down into three interconnected factors: availability, quality and accessibility. Accessibility itself includes four overlapping dimensions, including physical accessibility, informational accessibility, economic accessibility and non-discrimination. The latter two characteristics have particular relevance to this paper: read together, this means that water services must be affordable for all, without discrimination and with particular regard to the most vulnerable persons. Special Rapporteur Catarina de Albuquerque confirms that the right to water does not require that all water for personal use is free of charge, but rather that it is affordable – and in some cases, this will require free services.33

The Committee makes repeated references to the state obligation to protect against third party interference with water accessibility. Investments in water services should not ‘disproportionately favour’ services that will only be

32 Supra note 19, GC15, at para.40.

33 De Albuquerque, Catarina, United Nations Special Rapporteur on the human right to safe drinking water and sanitation. “On the Right Track: Good practices in realizing the rights to water and sanitation”. Office of the High Commissioner of Human Rights, March 2012 at 91. Unfortunately, the Special Rapporteur includes some private sector involvement in her review of best practices, arguing that third parties are bound by the same human rights responsibilities as states.
accessible to the privileged elite.\textsuperscript{34} State parties must effectively regulate third parties to ensure that equal access to water is not denied, and to inhibit inequitable extraction and pollution of natural sources; a failure to do so will be a violation of the legal right to water.\textsuperscript{35} Such a regulatory scheme must include “independent monitoring, genuine public participation and imposition of penalties for non-compliance”.\textsuperscript{36} International financial institutions must take the right to water into account in lending policies and credit agreements, and states will be in violation of the law if they fail to account for the right when entering into bi-lateral, multilateral or third party agreements.\textsuperscript{37}

The international human rights law trilogy of state duties to ‘respect, protect and fulfill’ clearly encompasses the duty to protect against third party interference in the realization of rights. Bolstering both General Resolution 64/292 and the ICESCR Committee’s commitment to this aspect of the right to water, there are a number of non-binding instruments designed to improve the human rights compliance of corporate entities. The controversy about whether responsibility for protecting human rights against potential threats by private business interests ultimately lies with the state or private body has informed the legal and normative developments in this area.

In 1999, the UN Secretary General proposed nine principles for business practices, and called on the business leaders of the world to sign on. The original

\textsuperscript{34} Supra note 19, GC15, at para.14
\textsuperscript{35} Supra note 19, GC15, at paras.23 and 44(b).
\textsuperscript{36} Supra note 19, GC15, at para.24.
\textsuperscript{37} Supra note 19, GC15, at para.36 and 44(c).
nine principles of the Global Compact, as it is known, deal with human rights, environmental sustainability and labour standards; a tenth principle relating to corruption was added on later.\footnote{38} While none of these standards explicitly pertain to water, the first principle promotes respect for ‘internationally proclaimed human rights’, and the second principle admonishes businesses not to be complicit in human rights abuses.\footnote{39} While both the UN encouragement of human rights compliance within the business community and the voluntary allegiance of companies to these ideals may be admirable, it is important to note that these standards are voluntary and are not enforceable, and may often be used as a marketing tactic rather than to represent an ideological commitment.

In 2003, the Sub-Commission on the Promotion and Protection of Human Rights approved the \textit{Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights}.\footnote{40} Although they were never adopted by the General Assembly, these Norms were an important step in the international community’s thinking on these issues. In addition to the state obligation to protect, the Norms ascribed direct legal responsibilities to businesses to respect and protect human rights “within their respective spheres


of activity and influence”.41

There was a great deal of resistance to this model, and the UN Commission on Human Rights appointed a Special Rapporteur, John Ruggie, to further investigate existing standards and develop recommendations on how to effectively regulate business impacts on human rights. Ruggie responded with a three part framework: (1) the state duty to protect against human rights violations by businesses through regulation and judicial and non-judicial remedies; (2) the corporate responsibility to respect human rights through due diligence; and (3) greater access to remedies for victims of human rights abuses.42

According to Ruggie, “Markets can be highly efficient means for allocating scarce resources, and powerful forces for promoting social objectives ranging from poverty alleviation to the rule of law”, if appropriately governed.43 This is consistent with the optional standards for businesses that have been created, such as the UN Global Compact and the CEO Water Mandate (a subsection of the Global Compact that is “designed to assist companies in the development, implementation and disclosure of water sustainability policies and practices”44), both of which are optional guidelines that depend on business buy-in for success. Optional standards such as these subscribe to the power of the market to do

41 Supra note 40, Norms, at 1.
43 Supra note 42, Ruggie, at para.7.
social good (as consistent with Ruggie’s reasoning), which is in reality and in theory fundamentally at odds with the profit generating rationale of the corporate identity, as will be critiqued more fulsomely below. The CESC’s General Comment 15 relies more on the obligation of the state to protect against the inequalities of the market, than faith in the market itself.

Despite these developments in international thought on the human rights responsibilities of private enterprise, as it currently stands, the international human rights obligations of states to protect citizens’ right to water cannot be delegated to private corporations, both because of jurisdictional concerns and because of the very nature of public and private actors. The legal right to water (as contained in the human rights treaties and resolutions mentioned above) binds state signatories, not private actors – the only international instruments regulating corporate impacts on human rights are entirely optional (e.g. through the Global Compact) and can be critiqued as more of a marketing ploy than a legal duty. In order for states to fulfil their legal obligations, they must protect citizens from corporations who are, by definition, self-interested in the generation of profits, which fundamentally undermines the ability of such corporations to alleviate the water deprivation of those living in poverty or to equalize water access.

Within the state’s obligation to fulfill the right to water, the state must ensure the affordability of water services, and ensure that payment schemes are based on the ‘principle of equity’.\textsuperscript{45} Coupled with art.2 of the ICESCR, the

\begin{footnote}
45 Supra note 19, GC15, at para.27.
\end{footnote}
equality provision of the Convention, water pricing must promote both fairness and equality. Further, the Committee is concerned that poorer households are not ‘disproportionately burdened’ with water related expenses, in comparison to wealthier households; by logical extension, it appears therefore that water cannot be provided on a fee-for-services basis to those who cannot afford it, and states must work to regulate informal systems of water provision to ensure that the poor are not paying more for less.

While obligations under the ICESCR are to be progressively realized subject to available resources, there are some rights (and aspects of rights) contained therein that are subject to immediate realization. In fact, if the ICESCR were to be read as not requiring a minimum core of state obligation, it would be deprived of its raison d’être. Minimum core obligations “entail a definition of the absolute minimum needed, without which the right would be unrecognizable or meaningless”. While the Committee has previously stated that failures to provide for minimum core obligations will be merely prima facie violations of the ICESCR to be assessed according to the state’s available resources, in General Comment 15, the Committee notes that the minimum core content of the right to water is non-derogable and state parties cannot justify non-compliance.

The Committee is emphatic: “under no circumstances shall an individual be

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48 Supra note 46, GC3, at para.10

49 Supra note 19, GC15, at para.40.
deprived of the minimum essential level of water”, defined as the amount that is sufficient and safe to prevent disease.\textsuperscript{50}

Chief among these immediate obligations is the right to equality and non-discrimination.\textsuperscript{51} The Committee takes note of particularly vulnerable populations, and states that the disproportionate burden of water deprivation borne by women should be alleviated.\textsuperscript{52} The Committee also focuses on the rights of indigenous peoples to access water resources, and mandates the state to provide resources for indigenous peoples to ‘design, deliver and control’ their own water supply.\textsuperscript{53} The equality/non-discrimination provisions in General Comment 15 are supported by comprehensive equality guarantees throughout international human rights instruments. Equality in this context refers to substantive rather than formal equality; that is, \textit{de jure} and \textit{de facto} equality through an enabling and empowering environment aimed at equality of result rather than only opportunity.\textsuperscript{54} This definition of equality mandates a systemic

\textsuperscript{50} Supra note 19, GC15, at para.56 and 37(a)
\textsuperscript{51} Supra note 19, GC15, at para.17.
\textsuperscript{52} Supra note 19, GC15, at para.16(a).

See also Fall, Yassine. “The Cost of the Commoditization of Food and Water for Women”, Chapter 9 in Jain, Devaki and Diane Elson, eds. \textit{Harvesting Feminist Knowledge for Public Policy: Rebuilding Progress}. New Delhi: Sage Publishing and Ottawa: International Development Research Centre, 2011. Fall explains: “Gender analysis of food and water policies provides a good entry point for examining public policies and understanding the way market forces function matters a great deal for women’s economic empowerment and sustainable livelihoods.” In other words, equality provides a useful framework for understanding the right to water and its relationship to water privatization. Since women bear the burden of gathering and maintaining water supplies for their families, privatization, subsequent reduced access to water supplies, and caring for those with water borne diseases detrimentally and disproportionately impacts women living in poverty.

\textsuperscript{53} Supra note 19, GC15, at para.16(d).


Committee on the Elimination of all forms of Discrimination Against Women. \textit{General
analysis of both historic discrimination and current access to power and resources; it is not merely a formal reapportionment of opportunities.

Article 2(2) of the ICESCR requires that all Covenant rights be realized on the basis of equality and non-discrimination. While the ICESCR does not contain a freestanding equality right, Art.26 of the International Covenant on Civil and Political Rights (ICCPR) provides for equality generally, beyond the other rights in the International Bill of Rights. There are, of course, a number of other equality provisions in various treaties in the context of, inter alia, sex, race, age and disability. Aside from these textual guarantees, there is a strong argument to be made that equality has in fact become jus cogens. The right to equality means both that the right to water must be realized on an equal basis within countries and across borders and oceans, and that equality in general requires the realization of the right to water (and an adequate standard of living more broadly) for all.


[56] While there are many legal protections for the right to water, both in binding and persuasive international law instruments, there is also talk of the creation of a new, explicit and comprehensive document to protect the right to water: a convention on the right to water. In her role as Special Advisor to the Secretary General on the Right to Water, Maude Barlow argues for the need for such a convention (Barlow, Maude. “A UN Convention on the Right to Water – An Idea Whose Time Has Come”. November 2006. Online: http://www.blueplanetproject.net/documents/UN_Convention_RTW_MBarlow_Nov06_000.pdf (Accessed July 22, 2013)). Others advocate for a new water convention, but do so with an eye to legally entrenching a “right” to privatization. For example, Green Cross International, led by Mikhail Gorbachev, is promoting the creation of just such a tool (Supra note 3, Barlow 2007, at 52). While a new tool detailing the right to water may provide a useful elaboration on the existing legal protections, it is unnecessary to establish the basic right to water, the state’s duty to protect against third party infringements and the right to equality, all of which are already entrenched in
Constitutional law

There are also a number of domestic constitutional protections for the right to water. There are three ways in which domestic constitutions protect the right to water. Direct protections are those that explicitly identify access to water as a right, even if such a right is subject to available resources or other limitations; South Africa contains such a direct protection, as do more than 90 constitutions worldwide.57 Similarly, there are direct protections for other aspects of the right to water; for example, more than 100 constitutions throughout the world guarantee the right to a clean environment, impose duties to protect the environment or otherwise protect environmental integrity.58 However, even in the context of direct protections, constitutional litigation is still required to determine the extent of such protections where fulfillment of those rights requires the expenditure of state resources; the case of Mazibuko v. City of Johannesburg59 deals with this issue in the context of the South African constitutional right to water and is discussed below.

Semi-direct protections are those that are contained in non-binding portions of the constitution. For example, in India the right to water is contained in the non-binding Directive Principles of State Policy part of their constitutional text, and is only used in the interpretation of the binding constitutional provisions.

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57 Supra note 3, UNDP 2006, at 63.


such as the right to life. For example, in the case of *Olga Tellis v Bombay Municipality Corporation*, the Indian Supreme Court found that the constitutional right to life protected a group of pavement dwellers from eviction without adequate procedural fairness. The Directive Principles of State Policy were used to guide the Court’s expansive interpretation of the right to life as protecting claims to shelter and livelihood.

Indirect protections are general rights provisions that can be interpreted to extend to the right to water. For example, although the Canadian Constitution does not contain any explicit references to economic and social rights, and the Supreme Court of Canada has thus far resisted any arguments that such rights should be read in to the rights to life, security of the person and equality, the Court has left the door open to such determinations in the future, particularly in the case of *Gosselin v. Québec (Attorney General)*. In that case, while the Court found that there was insufficient evidence to show that an age limitation on the provision of social assistance infringed the claimant’s equality or security of the person rights, more egregious facts may lead the Court to conclude that those constitutional protections do extend to economic rights. To bolster the application of indirect protections, in General Comment 15, the Committee states that the right to life in the International Bill of Rights contains an implicit right to water.

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62 *Gosselin v. Québec (Attorney General)*, 2002 SCC 84 [*“Gosselin”*].
63 Supra note 19, GC15, at para.3.
In addition, many states have constitutional protections and fiduciary obligations towards their most vulnerable citizens and populations, the very people who face disproportionate water deprivation. In the Canadian example, there are constitutional protections for Aboriginal people, in the form of protecting their rights and title and the treaty obligations to which the government bound itself during colonial times. One aspect of Canada’s constitutional obligation towards its indigenous peoples is grounded in the ‘honour of the Crown’, and includes a duty to meaningfully consult with First Nations communities where conduct has been contemplated that may impact on any potential Aboriginal rights or title claim, such as the granting of a commercial licence for resource exploitation (e.g. building a dam).64 While third party corporations are not bound by the same degree of legal obligation, the government, in contracting with such third parties, must ensure that it has fulfilled the duty to consult and the honour of the Crown.65 Such fiduciary obligations may be used to impose an obligation on government to protect the water rights of indigenous peoples, in part through consultation where such rights might be impacted by industrial projects.

All of these legal protections, from the CESCR’s General Comment 15 to indirect domestic constitutional protections, cumulatively protect the right of everyone, on an equal basis, to access the water necessary and adequate to prevent disease. The ultimate responsibility for the protection of this right rests with the state alone and states acting in cooperation with each other. The

64 Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511 at para.27.
65 Ibid. at para.53.
purpose at the heart of this legal protection is two-fold: both the pragmatic goal of protecting human life, and its corollary objective of promoting human dignity.
Chapter 2: PPPs: The Public Push to Privatization

In this Chapter, I will establish the factual basis for the assertion that the world’s water is being commodified and sold to corporate interests. Wealthy states and international organizations with state membership often encourage the privatization of water as a means to address water inequality and water deprivation. While this push is primarily addressed towards developing nations, it is also addressed to water deprived populations within developed nations, such as First Nations people in North America. Water deprivation, and water injustice, is an issue that touches all regions; unfortunately, in an increasingly globalized world in which the gap between the rich and the poor grows wider, people living in poverty often have more in common with people living in poverty in other countries than their fellow citizens.\(^{66}\)

Water privatization ranges in form from street vendors with water trucks to multi-year concessions to the world’s biggest corporations to privatize everything from municipal pipe systems to rainwater barrels. On one side of the spectrum, water privatization can take the form of an informal system of water vendors, a source used heavily by urban slum residents who are off the municipal water distribution grid and do not have access to water holes or wells. Use of water vendors raises the cost of water exponentially, so that the poorest city residents pay the most for their water supply:

\[\text{It is a sad irony that it is often the poor who receive the lowest levels and least reliability of service and water of inferior quality, who pay most per litre for their water – for example, from water vendors in the street. According to one recent estimate, the poor pay on average 12 times more} \]

\(^{66}\) Supra note 3, Barlow 2007, at 42.
per litre of water than their counterparts with a municipal supply.\textsuperscript{67} For example, in Israel, discrimination in the law, both de jure and de facto, result in a "complete lack of parity in the living conditions" of Palestinian and Jewish citizens.\textsuperscript{68} Zoning legislation that creates licensing requirements for housing has disproportionately impacted Palestinian citizens, so that both Palestinian and Bedouin people live disproportionately in 'unrecognized' villages and neighbourhoods, including historic communities. Because the housing is not licensed, and is therefore illegal, residents do not have access to basic services such as water and sanitation. Residents are forced to travel long distances to fetch water, and as a result, water consumption often falls below levels necessary for basic health and wellbeing. Water is collected from unclean, insecure sources, and the cost of water is increased to ten times that of piped water that is brought into homes on the water grid. Worldwide, insecure and informal housing is often linked to water deprivation and citizens are increasingly forced to rely on ad hoc private vendors for their water supply.

On the other end of the spectrum, water privatization is big business, at least where it is 'successful'. For example, in 2006 alone, Dow Chemical's Dow Water Solutions earned USD $450 million.\textsuperscript{69} Between 1993 and 2003, the three largest water corporations, France's Suez and Vivendi and Germany's RWE-AG, grew from providing water delivery and wastewater services to 51 million people in 12 countries to 300 million people in 100 countries.\textsuperscript{70} All three were in the top

\textsuperscript{67} Supra note 6, WHO 2003, at 16.


\textsuperscript{69} Supra note 3, Barlow 2007, at 71.

\textsuperscript{70} Barlow, Maude. "The World's Water: A Human Right or a Corporate Good?" in supra note
100 corporations in the world. The World Bank estimates that the water market has a potential worth of $1 trillion.\textsuperscript{71} However, while the private sector has projected huge potential profits in water, such profits are often not borne out, which is part of the problem for private business in fulfilling their contractual obligations.\textsuperscript{72,73}

The phenomenon of water privatization has not been a revolution – a rising up of water corporations against the tyranny of public rule. Instead, the public and private sectors have chosen this road together, arm in arm, partners and allies in securing the profits of water. However, it is important to note that this partnership has often been between wealthy governments in the developed world and water corporations, and has been forced upon the governments of developing nations or held like a carrot to determine the direction of development. Both individual governments and international organizations have taken it upon themselves to impose private sector participation in water provision through loan conditionalities, in particular from international financial institutions.\textsuperscript{73,74} The process by which private corporations have gained public currency speaks both to the power of the corporation and the participation of governments in endowing the corporations with such authority and influence.

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3, McDonald & Jehl [“Barlow, 2003”] at 29.

71 Supra note 11, Shiva, at 88.


73 Supra note 8, Roaf et al., at 29.

74 While an important element of the global movement towards privatization is pressure from the World Trade Organization (WTO) in liberalizing trade practices and the “free” flow of goods such as water, this topic is beyond the scope of this paper.
The whys and whynots of water insecurity: the World According to McWater

As we turn to examining the nature and manifestations of this public push towards privatization of consumable water, it is important first to understand the pro-private sector explanation of why so many people live without adequate access to water. In order to advance the argument that water privatization is in fact antithetical to water justice and therefore contrary to law, we must first test the validity of the private sector’s own justifications for privatization. While critics may point to the discriminatory and water depriving impact of water privatization as one of the key causes of water injustice, water corporations and their supporters (such as the World Bank) allege other causes of this growing thirst.

Wasteful Consumption

Positing that water overuse is one of the keys to global water deprivation, the private sector argues that fee-for-service water provision is necessary to prevent the wasteful consumption of water. The logic is that, “[u]nderpricing (or zero pricing in some cases) has sustained overuse: if markets delivered Porsche cars at give-away prices, they too would be in short supply.”

Robert Glennon describes biologist Garret Hardin’s concept of the ‘tragedy of the commons’: “In the case of resources not owned by individuals, such as air, water, oceans and wildlife, consumers who seek to maximize their individual welfare will simultaneously reduce social welfare”. This concept is rooted in the notions that human nature is inherently selfish, and that private property and the

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75 Supra note 3, UNDP 2006, at 14.
76 Supra note 17, Glennon, at 18-19.
legal prohibition on trespass are the only ways to protect one’s interests against the encroachment of others’ self-interest. While critiquing some aspects of the private water market, Glennon assumes that at least such a market “would certainly encourage more efficient use of water”. At its heart, the ‘tragedy of the commons’ is based on an assumption that competition is the driving force of human action. A Samoan ambassador has a different perspective: “The strongest human instinct is not greed… []It is survival and we will not allow some to barter our homelands, our people, and our cultures for short-term economic interest.”

Glennon also argues: “The first step toward more efficient water use is to quantify the rights of existing users and make those rights transferable. If they can be transferred, they become valuable”. This philosophy is inherently at odds with an ethic of human rights; according to this logic, the fact that human rights are inalienable lessens their value, whereas human rights advocates would argue that markets are the devaluing force and it is in fact the inalienable rights to equality and dignity that have inherent and ultimate value. As argued by Shiva,

In communities where water is sacred, the worth of water rests on its role and function as a life force for animals, plants, and ecosystem. However, commodification of water reduces its value only to its commercial value…The proposal to give market values to all resources as a solution to the ecological crisis is like offering the disease as the cure.

The pro-privatization argument is that the market is the only effective route to conservation, and that if water was named as a human right, it must be clearly

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77 Supra note 17, Glennon, at 21.
78 Slade, A. Tuiloma Neroni as cited in supra note 11, Shiva, at 42.
79 Supra note 17, Glennon, at 22.
80 Supra note 11, Shiva, at 137.
circumscribed to prevent overuse. This ignores the fundamental premise of human rights; that there is no race to the bottom, but that, since every human being has the same rights of opportunity and access by virtue of being human, the subject matter of rights (such as water) must be conserved over the long term in order to provide equally to everyone. This also ignores the counter argument that in fact it is the market that pays no heed to natural limits on consumption, as described by Shiva, "Market assumptions are blind to the ecological limits set by the water cycle and the economic limits set by poverty."\(^81\)

If indeed water waste were one of the causes of global water inequality, it would seem that that waste comes from those populations with the greatest access to water rather than the least. It is difficult to fathom how the most deprived populations should suffer, by design, from the extravagance of the rich. As will be established below, it is those who are the most marginalized by poverty and discrimination who suffer most from water deprivation; the argument that tying the cost of water to consumption, rather than paying for water collection and distribution through taxation, will prevent waste is difficult to understand in the context of poverty.

**Wasteful Distribution**

One of the causes that even pro-government commentators agree on is that of waste in distribution. Leaky infrastructure is a major problem, and a major obstacle, especially in developing countries, to the adequate distribution of water. In fact, more than 50 percent of the municipal water supply in the global South is

\(^{81}\) Supra note 11, Shiva, at 15.
lost to leaky piping systems.\footnote{Supra note 3, Barlow 2007, at 31.} The phenomenon is not limited to the South; in London, the privatized city water system utilized old pipes that leaked close to a billion litres of purified water every day.\footnote{Supra note 3, Barlow 2007, at 74.}

However, corporations and their supporters also argue that waste in distribution includes those people who essentially “steal” water from the water system; that is, use water without paying full price for it. Both types of water loss are included in the definition of “non-revenue water” (NRW): the difference between the amount of water put into the distribution system and the amount of water billed to consumers. In the developing world, private sector estimates of NRW amount to the loss of approximately $14 billion, which is 45 million cubic meters of water daily or 1/3 of the total NRW globally.\footnote{Kingdom, Bill, Roland Liemberger and Philippe Marin. “The Challenge of Reducing Non-Revenue Water (NRW) in Developing Countries. How the Private Sector Can Help: A Look at Performance-Based Service Contracting.” World Bank: Water Supply and Sanitation Sector Board Discussion: Paper No.8. Dec.2006 at v.} Reducing just half the current level of NRW in the developing world would mean that an additional ninety million people could gain access to the water supply without increasing demand on water sources. This statistic belies the explanation that water deprivation is linked to water overuse, or global water shortages.

While NRW is recognized in the private sector as a serious problem in water delivery, both the problem and potential solutions are dictated by financial concerns, rather than water supply or water need:

In practice, these potential benefits [of reducing NRW] should be considered on a case-by-case basis against the actual cost of implementing a water losses reduction program. In the case of commercial
losses, the execution of a loss reduction program is likely to be financially beneficial, with short payback periods. In the case of physical loss reduction, the key issue is deciding on the appropriate level of loss reduction and its related investment. In developing-country utilities, with high levels of physical losses, there will be a good financial case for initial loss reduction by picking many of the “low-hanging fruit,” which can provide short payback periods. As these low-hanging fruit disappear, the cost of reducing physical losses will rise.\textsuperscript{85}

Thus, corporate interests in reducing water waste only extend as far as is profitable.

\textbf{The well is dry}

This argument reflects back to the environmental concerns that underlie much of the water rights discussion. Pro-privatization critics argue that the “free” water provision that is currently promoted within the public model has resulted in mass wastefulness, and has led to our current water crisis, a view which is based on the somewhat controversial assertion that the world is running out of renewable water. As described above, the logic is that if we each had to pay for water, we would not use as much, and there would be less waste and overconsumption. Ultimately, proponents of this argument say that because the well is running dry, the market is needed to conserve what little is left. This approach often fails to account both for the difference between charging for the necessary service level to ensure health and hygiene and charging for the watering of grass lawns, as well as for the massive amount of water that is inadvertently lost through leaks in municipal water systems.

As Naomi Klein argues in her book “Shock Doctrine”, ‘environmental’

\textsuperscript{85} \textit{Ibid.} at 5.
disaster (environmental is in single quotation marks here because this includes human-made disasters that wreak havoc on people and earth alike) has been co-opted by capitalist forces to inspire market loyalty. She describes Milton Friedman’s reaction to the floods in New Orleans, when the Nobel Prize winning economist suggested that the disaster provided a unique opportunity for change. He suggested that the education system should be reformed by providing families with vouchers to attend private schools, many of which run on a for-profit model, instead of spending the reconstruction money on rebuilding and improving the public school system. Friedman’s suggestion was picked up, and tens of millions of public dollars were invested in the private school system, such that the public school board’s formerly 123 schools dwindled to four. Supporters hailed this education reform as an accomplishment of the Katrina storm, and lauded the opportunities for social reform created by this ‘natural’ disaster. 

In regard to water provision, what Klein describes as “the shock doctrine”, that is, the “treatment of disasters as exciting market opportunities” can be seen in private sector use of the environmental disaster created by global water shortages. Using the argument, ‘the well is dry’, the private sector generates profit by creating piping projects, desalination plants and other means of bringing water from the (dwindling) source to the people. While not detracting from the scientific and environmental importance of the debate over whether the world is

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87 Ibid. at 5-6.
88 Ibid. at 6.
running out of water, it is important to recognize the economic incentive for such apocalyptic prophecies: shortages create opportunity for profit.

**Government corruption**

Barlow describes the pro-privatization world-view of the “global ruling class” on the cause of water insecurity:

Their consensus: debt and poverty are not the problem. The main problem with degraded water services in the Third World is inefficient and corrupt governments whose failure to protect water, so as to reflect its true cost, has led to a culture of wastefulness among the masses. The poor lack access to water because of their irresponsible governments, goes the refrain: the World Bank and its private sector colleagues are simply on an ethical mission of poverty alleviation, ecological sustainability and social justice.\(^9\)

The so-called Washington Consensus, that apparent ‘consensus’ based on the worship of market ideology that emerged from the Thatcher/Reagan era, was based on the idea that the poor kept themselves poor through corrupt and mismanaged government, which essentially exempted the rich from taking any responsibility for global economic inequality.\(^10\) Privatization, it is argued, will result in greater transparency and accountability.\(^91\) According to corporate refrains, government inefficiency includes the efforts of poor governments to resist pressures from the twin forces of rich governments and private water entities, such as by cancelling contracts that have been breached by the private

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\(^9\) *Supra* note 3, Barlow 2007, at 43.


party and by seeking to enforce their contractual rights through litigation.

For example, when Tanzania decided to overhaul the water and sewage infrastructure of Dar es Salaam, the World Bank funding they required came with strings attached, and they were required to award the contract to a private corporation. Biwater, a British water company, was awarded the contract, although when it failed to comply with its contractual promises, Tanzania withdrew from the contract and deported a number of Biwater executives. As a result of the contractual dispute, the government of Tanzania and Biwater engaged in protracted arbitration; the International Centre for Settlement of Investment Disputes (ICSID) found that Tanzania had breached its legal obligations under the contract, but declined to order damages because it found that Biwater had not incurred loss. In its response to the ICSID decision, Biwater argued that the government had let down the Tanzanian people by squandering millions of dollars on unsuccessful lawsuits.

This anti-government ideology creates a moral imperative for privatization beyond the practical motivations such as risk management (outlined below). Through focus on governmental corruption, private enterprise becomes the knight in shining armour (or water-man superhero); this analysis fails to take into account the origins of government corruption, which in many parts of the world stem from

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93 *Ibid*.

colonial mismanagement and, though stubbornly persistent, is not inevitable.

**Public sector incapacity**

Following on these allegations of corruption, the private sector also points out that developing nations do not have the resources in the public sector to meet the demand and water needs of their population. In its response to the decision of the ICSID finding liability but no damages against Tanzania, Biwater argued that it is “inconceivable that the Millennium Development goals for water and sanitation can be met without the participation of the private sector” because the “the skills and capacity simply do not exist in sufficient volume within the state and community sectors.”

This argument is circular: if governments and international institutions invest in the private sector instead of public resources, the private sector can attract highly trained professionals and can accumulate better resources. If the investment flowed towards public entities, the reverse would be true. This argument, then, is a self-fulfilling prophesy – public money flows to the private sector, so private sector resources are better than public sector resources, which is used as a justification to attract further investment in the private sector.

**Manufacturing Consent**

As obvious as it may seem, it is important to remind ourselves that corporations are merely human creations. In order to gain the power they have, they require our consent, which is generated through a number of different

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means. This manufacturing of consent is an important element to complete the picture of the reality of water privatization, and to understand why corporations cannot be responsible for satisfying the right to water despite their glossy promises.

Noam Chomsky, who made famous the phrase “manufacturing consent”, describes the “genius of democratic systems of thought control, which differ markedly from totalitarian practice”:

[In a democratic system], it is necessary to control not only what people do, but also what they think. Since the state lacks the capacity to ensure obedience by force, thought can lead to action and therefore the threat to order must be excised at the source. It is necessary to establish a framework for possible thought that is constrained within the principles of the state religion. These need not be asserted: it is better that they be presupposed, as the unstated framework for thinkable thought… To achieve respectability, to be admitted to the debate, [critics] must accept without question or inquiry the fundamental doctrine that the state is benevolent, governed by the loftiest intentions, adopting a defensive stance, not an actor in world affairs but only reacting to the crimes of others, sometimes unwisely because of personal failures, naiveté, the complexity of history or an inability to comprehend the evil nature of our enemies.96

Substituting corporations for governments, the process of manufacturing consent on water privatization works in remarkably similar ways.97


97 For example, the private water industry also makes its appearance in the form of bottled water, and marketing techniques generate public consent even in the face of glaringly contradictory scientific evidence. In a 1999 study of 103 bottle water companies, the Natural Resources Defence Council (NRDC) found that bottled water was not any more safe or clean than tap water (Natural Resources Defence Council. “Bottled Water: Pure Drink or Pure Hype?” March 1999. Online: http://www.nrdc.org/water/drinking/bw/exesum.asp. (Accessed July 22, 2013.).) Problems with the quality of bottled water are numerous and widespread, including containing measures of arsenic, E. coli and other bacteria. A quarter of the brands in the NRDC study were merely bottling tap water. In addition, three litres of water are required for the “production” of one litre of water, generating additional water waste from the public concern over pollution and fear about the scarcity of clean water (Pacific Institute. “Bottled Water and Energy:
The Public Face of Privatization

The manufacturing of consent is generated through the public face of privatization. The foundation of this public image is the normative framework that has been created in order to enable private participation in water supply; the moral imperative discussed earlier. Private water suppliers argue that they are necessary in order to provide water to the poor, and powerful states and key international institutions have allowed themselves to be convinced.

The United Nations purports to remain neutral on the public/private debate on water services. The Office of the High Commission on Human Rights says: “The approach of United Nations treaty bodies and special procedures has been to stress that the human rights framework does not dictate a particular form of service delivery and leaves it to States to determine the best ways to implement their human rights obligations.”\textsuperscript{98} Yet the UN is one of the key organizers behind the World Water Forums, which highlight and encourage privatization of water supply. The influence of corporate water interests within the UN shows up in a number of rather insidious ways including:\textsuperscript{99}

- Water corporations Suez and Veolia funded a UNESCO conference in 2002 on water law, which culminated in a report carrying the logo of both

\textsuperscript{98} Report of the United Nations High Commissioner for Human Rights on 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. UN Doc. A/HRC/6/3 (16 August 2007) at 22.

\textsuperscript{99} Supra note 3, Barlow 2007, at 44-45, 49, 50, unless otherwise cited.
the UN and the water corporations;

- In 2002, Suez gave US$400,000 to UNESCO’s water research institute in Delft, in part to fund a chair on public/private partnerships;
- Suez contributes to the financing of the UNESCO Chair for Integrated Water Resource Management in Casablanca, Morocco;
- Former Suez Water CEO Gerard Payen is a member of the UN Advisory Board on Water and Sanitation;
- The Global Water Partnership, a powerful water institution created in 1996 by the World Bank, the UN Development Program (UNDP) and the Swedish International Development Cooperation Agency, published the 2003 report *Financing Water for All*, which advocates using public money to support private water operations. Margaret Catley-Carlson, the chair of the Global Water Partnership, argues that “water systems will run better if people pay in their capacity as water users rather than as taxpayers, although some may well require subsidies to meet their water, sanitation and livelihood needs.”[^100];
- The World Water Council is a pro-privatization think-tank, sponsored in part by the UN, whose 300 plus members are predominantly from the private sector, and whose president and vice-president are senior directors of major water corporations. This is the entity that sponsors the World Water Forums.

There have now been six World Water Forums, held every three years in different cities around the world. According its website, the “World Water Forum mobilises creativity, innovation, competence and know-how in favour of water. It gathers all stakeholders around today’s local, regional and global issues that cannot be undertaken without all stakeholders into a common framework of goals and concrete targets to reach.” At the second Forum, no civil society group was given voice, formally or otherwise; although this changed somewhat in later forums, by the fourth Forum public dissent to the World Bank’s pro-privatization policies had grown to such an extent that protestors were kept at bay by a wall of armed guards, and registrants were charged US$600 per person to attend. The fourth Forum was sponsored in part by Coca Cola. At the fifth Forum, civil society groups reported that Turkish police fired rubber bullets, water cannons and gas at peaceful protesters, and many were arrested.

102 Supra note 3, Barlow 2007, at 53 and 57.
103 For info on fourth world water forum, see “Access to Water”, supra note 23.
See also Focus on the Global South. “Turkish police charges protesters blocking WWF’s entrance”. Online: http://focusweb.org/node/1470 (accessed July 24, 2013);
See also Coalition Against Water Privatization (CAWP). “Turkish Police Shoot on Protestors
While much of the public push towards privatization is not evident on the public face of the debate (for example, many of the agreements between public and private entities are ‘encouraged’ or forced by the IMF and the World Bank through confidential agreements, the terms of which never make it into the public eye), the World Bank pro-privatization policies are no secret. Maude Barlow explains:

Water privatization also became a key component of the World Bank’s Poverty Reduction Strategy Papers (PRSPs), the primary strategic and implementation vehicle used to reach the UN Millennium Development Goals and the framework agreements through which developing countries receive international aid. Poor countries must complete a PRSP to receive debt relief through the Heavily Indebted Poor Country Initiative, which usually takes the form of agreeing to adopt neo-liberal market reforms and promising not to use the aid money for poverty reduction or public services such as healthcare, education or water delivery. Through PRSPs, countries agree instead to promote economic growth through macroeconomic policies and infusions of foreign direct investment as well as the selld of state-owned enterprises and utilities. The World Development Movement studied the fifty PRSPs signed off by the World Bank in the first half of 2005 and found that 90 percent of the countries promised more privatization in general and 62 percent promised water privatization specifically. ¹⁰⁵

The International Consortium of Investigative Journalists released a study in 2003 concluding that the majority of the World Bank loans in the last five years required the privatization of the public water supply, with a steep increase in latter years. ¹⁰⁶ In fact, it is widely accepted that the World Bank is likely the

¹⁰⁵ Supra note 3, Barlow 2007, at 41.

most important player in the global water sector.\textsuperscript{107}

**Collective Amnesia**

Noam Chomsky notes that one of the essential elements of manufacturing consent is the process of collective amnesia, that is, the subtle method of indoctrination through the rewriting of history, which prevents people from looking at true causes of present situations, thereby denying the possibility of learning from the past.\textsuperscript{108}

One of the most striking contradictions in the portrayal of privatization as the solution to the problem of thirst is that the history of the developed world teaches exactly the opposite. In the Europe of the 1820s, the average life expectancy was 40 years old. The single most important contributing factor in the raising of this life expectancy to current levels was the basic process of separating human excrement and water supply.\textsuperscript{109} The municipalization of the water supply was the main factor in the breakthrough of curbing infectious disease at the start of the 20\textsuperscript{th} century.\textsuperscript{110} In fact, most of the developed nations that are the driving forces behind the World Bank policies still hold on to their public water providers yet impose privatization conditions on loans to poor countries in the name of development.\textsuperscript{111} For example, about 70% of European water systems remain


\textsuperscript{108} *Supra* note 96, Chomsky, at 134.

\textsuperscript{109} *Supra* note 3, UNDP 2006, at 28.

\textsuperscript{110} *Supra* note 3, UNDP 2006, at 32.

\textsuperscript{111} *Supra* note 3, Barlow 2007, at 41-42.
publicly owned and operated,\textsuperscript{112} and while Japan is one of the most powerful decision makers at the World Bank it also has one of the strongest public water systems in the world.\textsuperscript{113}

Even the World Bank admits this contradiction to a limited extent:

Yet today’s industrial countries relied on the old, vertically integrated model to develop good infrastructure and have only recently pursued unbundling. So why should developing and transition economies take this new approach? This question is especially relevant given that the new model poses significant risks if not accompanied by appropriate structural and regulatory safeguards. The simple answer is that the new model, implemented correctly, offers benefits too big to ignore—for governments, operators, and consumers. And there is enough experience to guide its implementation. Still, it should not be pursued in a specific country or industry without carefully assessing its institutional and structural prerequisites and without explicit attention to the concerns it raises.\textsuperscript{114}

The answer provided fails to recognize, however, that developed countries still pursue the public model in many instances, and therefore the benefits mentioned here are somehow not appreciated by the domestic policies of many developed nations. Even more importantly, the public model helped make developed nations what they are today, with the quality and standard of living that is now taken for granted by many in the developed world. The contradiction therefore lies primarily in the method used during development, rather than after infrastructure and systemic efficiency has been developed. It is only by ignoring the past successes of public provision of water and sanitation services that the

\textsuperscript{112} Supra note 3, Barlow 2007, at 66.

\textsuperscript{113} Supra note 3, Barlow 2007, at 38 and 129.

private model generates consent.

**Risk Management**

Proponents of private water enterprise posit that private corporations are better able to take on risks than public authorities. However, it is clear that international institutions and structures enable private companies to pass on this risk to the public.¹¹⁵ For example, in Chile, the World Bank has imposed a loan condition to guarantee a 33% profit margin for the private water supplier, in that case France’s Suez.¹¹⁶ Further, the Multilateral Investment Guarantee Agency, part of the World Bank, encourages private investment in water in developing countries in part by insuring them against risk, including the risk of political or public resistance.¹¹⁷

Governments also often assume the risk of private enterprise themselves, by providing public subsidies to ensure that private enterprise has profitable

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¹¹⁵ When the London public private partnership for maintenance and upgrade of their underground transport system collapsed, the UK House of Commons Transport Committee reported that “The Government should remember the failure of Metronet before it considers entering into any similar arrangement again. It should remember that the private sector will never wittingly expose itself to substantial risk without ensuring that it is proportionally, if not generously rewarded. Ultimately, the taxpayer pays the price. [...] Whether or not the Metronet failure was primarily the fault of the particular companies involved, we are inclined to the view that the model itself was flawed and probably inferior to traditional public-sector management. We can be more confident in this conclusion now that the potential for inefficiency and failure in the private sector has been so clearly demonstrated. In comparison, whatever the potential inefficiencies of the public sector, proper public scrutiny and the opportunity of meaningful control is likely to provide superior value for money. Crucially, it also offers protection from catastrophic failure. It is worth remembering that when private companies fail to deliver on large public projects they can walk away—the taxpayer is inevitably forced to pick up the pieces.” Transport Committee, Commons Select Committee, United Kingdom Parliament. “Select Committee on Transport Second Report ” Online: [http://www.publications.parliament.uk/pa/cm200708/cmselect/cmtran/45/4509.htm](http://www.publications.parliament.uk/pa/cm200708/cmselect/cmtran/45/4509.htm) (Accessed July 25, 2013)

¹¹⁶ *Supra* note 11, Shiva, at 91.

¹¹⁷ *Supra* note 3, Barlow 2007, at 40.
incentives to provide services to the poor.\textsuperscript{118} For example, in Dar es Salaam, when City Water (a subsidiary of the UK water giant Biwater) contracted with Tanzania to manage the water provision in the city for ten years starting in 2003, the investment was split unevenly between the public, private and international contributors. While Tanzania financed $145 million, the World Bank provided $98 million and the African Development Bank provided $47 million towards the project, City Water only actually invested $6 million.\textsuperscript{119} Such contracts are typical in the water sector, where the private entity actually assumes little, if any, risk.

An important element of risk management is insulation from judicial remedies. Obstacles to the justiciability of claims against water companies, especially claims based on human rights, are numerous: choice of forum (which includes problems created by transnational corporate structures); the questionable justiciability of economic rights claims; the lack of explicitly enforceable guarantees of the right to water; and biases within existing tribunal or judicial structures.

Barlow describes the International Centre for Settlement of Investment Disputes (ICSID) as “an arbitration court used by water companies to sue governments who try to break their contracts”, and cites an April 2007 report for the following statistic: “nearly 70 percent of ICSID cases are settled in favor of the investor, with compensation awarded against the country where the

\textsuperscript{118}\textit{Supra} note 3, Barlow 2007, at 58.

\textsuperscript{119}Barrett, Damon and Vinodh Jaichand. “The right to water, privatised water and access to justice: tackling United Kingdom water companies’ practices in developing countries”. 2007 SAJHR 543 at 548.
investment failed. In at least seven cases, the investors’ revenues exceeded the gross domestic product of the country they were challenging.”

It is not only governments who break contracts, however; it is also private corporations who have decided that a particular contract poses more risk than the company is willing to assume, and breaking the contract is simply the cost of doing business insofar as the financial benefit of a breach of contract or law outweighs a regulatory penalty. While companies are better able to manage risk in this way than governments, because they are able to walk away from unprofitable situations if the penalty is less than the profit loss, this type of risk management is hardly an incentive for privatization since water consumers bear the brunt of this tactic. The example of Suez breaking its contract with Argentina is described below.

The Cost of Satiation

The bottom line of private participation in the water sector is, undoubtedly, the justification of cost. The corporate model of water delivery is based on the cost recovery principle, despite the fact that the actual cost of water services is beyond the means of much of the world’s population living in poverty. The problem of thirst is huge: with a child dying every 15 seconds from disease related to inadequate drinking water and sanitation; and with the world population growing by hundreds of thousands per day, it is easy for politicians

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120 Supra note 3, Barlow 2007, at 40.


and activists alike to feel hopeless. In 2006, the UNDP reported that while 1.1 billion people have access to less than 5 litres a day of unsafe water, an additional 1.8 billion people average about 20 litres per day (while the amount of water needed to meet one’s most basic personal needs averages 20 litres per day, the actual amount varies according to activity level, occupation and climate).

Even the Millennium Development Goal set in 2000 to halve the proportion of people who are unable to access or afford safe drinking water by 2015 seems unachievable, and it is tempting to turn to the shiny promises of the private sector for relief.

Yet, a recent UNDP report puts this cost into perspective:

The $10 billion price tag for the Millennium Development Goal seems a large sum – but it has to be put in context. It represents less than five days’ worth of global military spending and less than half what rich countries spend each year on mineral water. This is a small price to pay for an investment that can save millions of young lives, unlock wasted education potential, free people from diseases that rob them of their health and generate an economic return that will boost prosperity. Cost is clearly not prohibitive for the public sector, given the spending on other areas such as military. Instead it is a matter of public prioritization, and the perpetuation of the myth that the private sector is better equipped to deal with the costs of providing water to the poor. Yet, the purpose of the corporate enterprise must be borne in mind. Corporations exist to make profits, not to meet the

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123 Supra note 3, UNDP 2006, at 33-35.
124 Supra note 3, UNDP 2006, at 5.
125 The goal of halving the proportion of people who do not have access to basic sanitation by 2015 was added to the Goal in 2002.
126 Supra note 3, UNDP 2006, at 8.
interests of the public, and the latter purpose is only served where it benefits the former. Corporate involvement in water provision can only mean one thing: there are profits to be reaped.

A tireless champion of the corporate model, economist Milton Friedman notes that genuine attempts at corporate morality, otherwise known as corporate social responsibility (CSR), are in fact immoral. The purpose of the corporation is to serve its shareholders, and it cannot and should not spend any money on social responsibility that is not connected to generating profit.\textsuperscript{127} On the other end of the ideological spectrum, Noam Chomsky echoes that corporations must “be concerned only for their stockholders and...not the community or the workforce or whatever.”\textsuperscript{128} In the context of water corporations, economist and UN Special Adviser on the Millennium Development Goals Jeffrey Sachs explained that while the perception is that the market has failed where private water providers have not met the water needs of the poor or remedied water injustice, in fact this is not a \textit{market} failure. Markets, he says, are designed to serve people with money, not people without.\textsuperscript{129}

Stripping away market pressures and market logic, and stepping back to the perspective of the millennium goals, Sachs says:

\textbf{Less than one percent of the income of the rich world could enable the impoverished world to achieve the millennium development goals...} [I]t takes a reasonable amount of money but not a lot of money compared to the vast wealth of the rich world. This for me is the deepest truth of our common fate on the planet.\textsuperscript{130}

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\textsuperscript{127} \textit{Supra} note 121, Bakan, at 34-35.
\textsuperscript{128} Noam Chomsky in interview with Joel Bakan, as cited in \textit{supra} note 121, Bakan, at 35.
\textsuperscript{129} \textit{Supra} note 90, Sachs in interview.
\textsuperscript{130} \textit{Supra} note 90, Sachs in interview.
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Chapter 3: The inequitable impact of water privatization

The numbers reveal a stark reality. 2.2 million people in developing countries, primarily children, die every year from diseases associated with lack of safe drinking water and inadequate sanitation. In fact, 5000 children die every day from water related illnesses (almost more than any other cause), with children in poor households facing three to four times greater risk of death than children in wealthy households. Of those without access to an improved water source, 743 million are rural dwellers, while 141 are urban residents. The only area not to show any statistical improvement since the Millennium Goals were agreed upon is Oceania (with more half of the 9.6 million people in that region relying on unimproved water sources), and progress in Sub-Saharan Africa is slow, home to a third of those worldwide without access to an improved water source. Approximately half of all those relying on an unimproved water source live in Asia. Globally, women bear the primary responsibility for the collection of water; in 72% of households, women and girls are the primary water collectors. Problems are always more nuanced than their corresponding statistics may show, but there is no escaping the impact of these numbers and

131 Supra note 6, WHO 2000, at p.5
132 Supra note 3, UNDP 2006, at 23.
133 According to the WHO-UNICEF Joint Monitoring Programme’s 2008 Report, “improved water source” is defined as sources “that, by nature of their construction or through active intervention, are protected from outside contamination, particularly faecal matter.” Such sources include piped water in a dwelling, plot or yard and public taps or standpipes, tube wells or boreholes, protected dug wells, protected springs or rainwater collection. Supra note 122, WHO-UNICEF 2008 at 22.
134 Supra note 6, WHO-UNICEF 2010 at 18.
135 Supra note 122, WHO-UNICEF 2008 at 24; Supra note 6, WHO-UNICEF 2010 at 52.
136 Supra note 6, WHO-UNICEF 2010 at 29.
the inequalities they reveal. In an era in which a great deal of our human potential is being poured into tailoring the achievements of technology to our every anticipated need and want, such inequality, such *injustice*, in meeting the most basic of human needs cannot be acceptable.

As in many instances of inequality and injustice, water insecurity is both cause and effect of inequality. A girl who is taken out of school in order to fetch the daily water supply miles away from home cannot hope to become a doctor. A woman who spends at least a third of her waking hours planning and gathering enough water for the basic needs of her family, let alone meeting their other basic needs, cannot hope to become a political voice in her nation. An elder Aboriginal man who is repeatedly struck ill from consumption of unclean water cannot spend his days passing on to the younger generation his people’s hunting and gathering ways. And as in all human rights infringements, the advocacy undertaken in many parts of the world to fight for access to adequate water means that those passionate and dedicated advocates are not able to spend their time becoming educated, raising children, moving forward in their careers or their work. Human potential is tragically limited by water insecurity.

The limitation of human potential is only one means of assessing the impact of in-access to water for basic needs, and it measures that impact by human output. But there is another way to examine the impact, one that is less focused on development and more focused on human rights, less focused on output than human experience: the impact on human dignity by denying satisfaction of the most basic of human needs, based on arbitrary characteristics such as gender, race, class, age and region. What does a lack of water mean
for the preservation and promotion of human dignity?

Privatization will not, and in fact cannot, promote the equitable distribution of water to both rich and poor and protect the water rights of all. Not only does experience show this to be true, it is a logical and inevitable concept: corporations exist to create profit, and therefore it is impossible for them to take such a loss as providing access to the hundreds of millions of citizens worldwide who live on less than two dollars a day. Barlow explains:

The ultimate goal of private corporations is to make a profit, not to fulfil socially responsible objectives such as universal access to water [...] The only way that the private sector can stay competitive [in countries where most of the population earns less than two dollars a day] is to have access to public subsidies, the very thing they were supposedly brought in to relieve.

Even regulation of water corporations cannot overcome the legal construction of the corporate entity as one that exists to generate profit. Thus, private water cannot equally serve the people, even if governments were willing to exercise strong control over their behaviours.

Clearly, privatization does not serve people living in poverty as it serves the wealthy. While this is an equality concern in and of itself, it is also important to note who lives in poverty. Equality concerns do not end with economic discrimination, since women and other marginalized groups are over represented among those living in poverty. In 2001, the World Health Organization found that

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137 Supra note 121, Bakan, at 1-2
138 Supra note 3, Barlow 2007, at 58.
139 See Retherford, Kristin. “Regulating the Corporate Tap: Applying Global Administrative Law Principles to Achieve the Human Right to Water [notes]” 88 Ind. L.J. 811 (2013) at 822, who argues that the failures of transnational corporations to fulfil the human right to water lies in a lack of legal accountability through regulation. Retherford fails to address the inherent nature of the corporate structure itself.
women made up almost 70% of the 1.3 billion people living in *extreme* poverty.140 In many countries, minority ethnic groups are also disproportionately represented in the population of people living in poverty, and consequently have less access to adequate water. Further, indigenous communities around the world often reside in rural settings, and therefore have less access to established urban water piping and sewage systems.

Inequality does not end with access; it extends to pricing as well. The UNDP notes that water pricing “reflects a simple perverse principle: the poorer you are, the more you pay.”141 As illustrated in the examples below, this is often because of the unstable and informal housing that faces many of the world’s poor, since living in an informal settlement likely means being off the water grid. Municipal networks that pipe water directly to each household are the cheapest means of delivery. Those without access to the water grid must buy their water through intermediaries, which is an informal type of privatization: water sold through truckers, vendors and other urban water sellers.142

The interrelationship between gender inequality, global north/south inequalities, lack of education, food insecurity and water insecurity is complex. There is an enormous problem in certain parts of the world, particularly in Africa, in girls being pulled from school at puberty because of the lack of adequate and private toilets, and because they are needed at home to collect water. There is a direct, if not simple, relationship between lack of access to water and lack of

140 *Supra* note 6, WHO 2003, at 25.
141 *Supra* note 3, UNDP 2006, at 51-52.
142 *Supra* note 3, UNDP 2006, at 51-52.
education, and this relationship is a gendered one: one author tells the story of a village school teacher in Kenya who quit her position because she and her girl students had to travel so far to collect water for themselves and their families, and the installation of a village water pipe meant they could all return to the classroom.\textsuperscript{143} Without education, girls marry earlier and often have less reproductive freedom. Higher population rates lead to greater demands on water and food supply, the burdens of which fall disproportionately to women. And the cycle begins again.

**Locating Water Inequality: Examples by Country**

There are examples around the globe of the public push towards privatization, and the ways in which such privatization compounds and perpetuates inequality based on gender, race, class, region and so on. Below are but a few examples.

**Racial profiling in water privatization: dirty water on Canadian reservations**

The Canadian Constitution is primarily focused on civil and political rights, to the exclusion of economic, social and cultural rights. The rights to sustenance, including standard of living provisions, the right to water and the right to food, are not present in the *Canadian Charter of Rights and Freedoms*. While there is an argument to be made that such rights are covered by the right to life, liberty and security of the person provision (s.7) or the right to equality (s.15),\textsuperscript{144} as they have in other jurisdictions, such an argument has not so far been

\textsuperscript{143} *Supra* note 100, Catley-Carlson, at 69.

\textsuperscript{144} *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, ch.11 (U.K.) at ss.7 and 15.
accepted by the highest court in Canada.\(^{145}\)

Canada is one of the most developed countries in the world, and one of the most water-rich. Yet, even Canadian residents experience water deprivation and inequality: as of January 31, 2013, there were 113 First Nations communities in Canada that had boil-water or no-drink water advisories.\(^{146}\) In 2001, a government assessment of on-reserve water systems showed that almost three quarters of these systems across the country posed potential health risks to First Nations residents.\(^{147}\) By 2010, more than half of water systems still posed a medium to high risk to communities on reserve\(^{148}\). Water is contaminated through agriculture, mining and logging that has proceeded without adequate consideration of indigenous land use, Aboriginal rights and title claims, and sustainability concerns.\(^{149}\) In 2011, Canada’s Auditor General noted that “First Nations reserves may still be years away from having drinking water protection comparable to what exists off-reserve in Canada.”\(^{150}\)

Through their traditional and biological role as “life givers”, caretakers and

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\(^{145}\) See, for example, Gosselin, supra note 62.


\(^{150}\) Supra note 148, 2011 Status Report, at Chapter 4.
mothers, Aboriginal women bear a great weight of the burden of pollution.\textsuperscript{151} For example, contamination of waters in the Great Lakes Basin has shown up in the breast milk of indigenous women in that region who eat traditional foods gathered directly from the water or from plants and animals that rely on that water supply.\textsuperscript{152} In many indigenous Canadian cultures, it is women who have a traditional responsibility to protect the earth and water;\textsuperscript{153} as an Ojibwe woman activist in Ontario explains:

One of the first teachings I have heard about women came from an Elder in Minnesota whom I had the opportunity to visit and who said to those of us listening - \textit{“If you want to know what is happening to women, look to the earth because whatever is happening to the earth, is happening to the women”}. This understanding identifies most of all the belief that Indigenous Peoples have about the relationship that exists between the Earth and women and most importantly that their relationship is a significant one. [Emphasis in original] \textsuperscript{154}

The CEDAW Committee drew attention to the impact of dirty water on First Nations women in its 2008 concluding comments on Canada, noting with regret that Aboriginal women continue to live in impoverished conditions including lack of adequate access to clean water.\textsuperscript{155}

This apparent contradiction between Canada’s ability to provide adequate water for all and the water deprivation suffered by so many First Nations communities is rooted in inequality and the history of colonialism. Aboriginal


\textsuperscript{152} Supra note 149, Walkem, at 312.

\textsuperscript{153} Supra note 151, Annoquot, at paras.1, 7 and 9.


\textsuperscript{155} Committee on the Elimination of all forms of Discrimination Against Women. “Concluding Observations; Canada”. UN Doc. CEDAW-C-CAN-CO-7 (7 November 2008) at para.43
people in Canada overwhelmingly live in poverty and in rural communities, and together these factors have allowed water services on reserve to slip down the ladder of political priorities for the rest of Canada, and First Nations communities have suffered.

There are a number of specific causes to the poor water quality on many reserves. The Expert Panel on Safe Drinking Water for First Nations acknowledged that one of the most significant problems is chronic underfunding, and that the federal government has failed to provide sufficient funds to First Nations “to ensure that the quantity and quality of their water systems was comparable to that of off-reserve communities.” 156

Additionally, the Canadian federalist constitutional structure creates the danger of a jurisdictional vacuum on Indian reserves; in the case of water services, there is significant tension between provincial jurisdiction over all works and undertakings and all public lands and waters within their borders (excluding lands subject to Aboriginal title); federal jurisdiction over Indians and Indian lands; and First Nations movements towards self-government, Aboriginal title claims and Aboriginal rights claims.157 This jurisdictional confusion, and the attendant lack of


Supra note 156, Expert Panel, Vol. 2 at 1;

See also testimony of Debra Gillis, Director, Primary Health Care Division, Primary Health Care and Public Health Directorate, First Nations and Inuit Health Branch, Health Canada at the Proceedings of the Standing Senate Committee on Aboriginal Peoples Issue 3 - Evidence - Meeting of April 14, 2010. Online: http://www.parl.gc.ca/Content/SEN/Committee/403/abor/03evc-e.htm?Language=E&Parl=40&Ses=3&comm_id=1 (accessed July 26, 2013);

See also Duncan, Linda and Marie Ann Bowden. “A Legal Guide to Aboriginal Drinking
public investment in water on reserve, has created ideal circumstances for private involvement in water supply. One author explains:

As they run into concerted opposition in Canada’s cities, water companies like Terasen and EPCOR are increasingly targeting small rural and First Nations communities. These communities are more vulnerable, as they seek to meet provincial water-quality and certification standards. Privatization is sold as an easy answer.\(^{158}\)

In 2005, national attention finally turned to the water problem in Aboriginal communities when 1000 people were evacuated from the Kashechewan reserve in Ontario after the drinking water tested positive for high levels of the E. coli bacteria. Notably, the community’s water treatment plant was located immediately downstream from its sewage lagoon, and the community had been under a boil water advisory for two years prior to the evacuation.\(^{159}\) Privatization of water services on reserve is seen as a potential solution to the dire water situation. The Idle No More movement for indigenous rights in Canada has taken on this issue, organizing protests around water privatization in First Nations communities in Alberta\(^{160}\).

Despite ground level opposition, privatization of water supply for personal use is very much on the federal agenda in Canada. In 2007, the government created the Public Private Partnership Fund, and a Crown Corporation called PPP

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\(^{159}\) Supra note 147, Senate Committee.

Canada Inc. to administer the Fund. The mandate of PPP Canada is to “develop the Canadian market for public-private partnerships for the supply of public infrastructure in the public interest”, using public dollars. In stark contrast to the government’s investment in the Public Private Partnership fund, the new Safe Drinking Water for First Nations Act, which received royal assent in June 2013, does not impose any new funding obligations on the federal government despite allowing government to significantly increase obligations on First Nations. This has raised concern within First Nations communities and water activists that Bands will be forced to privatize their water supplies in order to meet the new legal requirements imposed through the Act. Moreover, the Act authorizes the government to delegate water management on reserve to private entities, easing the way for future private investors.

In the result, First Nations communities disproportionately facing water contamination issues in Canada also appear to be the primary focus of the water privatization movement. With the new legislative regime, the federal government

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162 Safe Drinking Water for First Nations Act, S.C. 2013, c. 21 [Safe Drinking Water for First Nations Act]


164 Supra note 162, Safe Drinking Water for First Nations Act, at s.5(1)(b).
has opened the door for such privatization to occur despite the newly minted international human right to water.

**How much is enough? Adjudicating South Africa’s constitutional right to water**

Unlike Canada, the South African Constitution guarantees the right to water. In fact, human rights activists internationally lauded the inclusion of this provision in the post-Apartheid Constitution. According to the Supreme Court of Appeals, the South African Constitution requires the progressive realization of water:

> It was in my view realised that there were people who had access to sufficient water and others who did not have such access and could not immediately be given such access. It is for the latter category of people that the Constitution requires the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right of access to sufficient water.  

However, the post-Apartheid country was undergoing an economic transition as well as a political one, and in the process of building water-delivery systems for the millions of people living in townships without access to running water, the South African government began to privatize water with the direction of the World Bank.  

In order to implement its new constitutional requirement, South Africa instituted its Free Basic Water policy (FBW), which provided 6000 litres of safe clean water per month per household, based on an estimate of eight people per household. The FBW was a policy of the Department for Water Affairs and

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166 Supra note 70, Barlow 2003, at 27.

167 Supra note 24, Mehta, at 236
Forestry (DWAF), whose mission, in part, was to overcome the inequalities of the past.168

One of the key techniques used to deliver the basic minimum and satisfy the FBW has been the prepaid water meter. While a basic minimum is allowed free of charge per month, the problem with the prepaid meter is that township residents were told that their water supply would be cut off if they did not ‘consent’ to the installation of meters.169 Further, consumers may be cut off partway through the month without warning for non-payment for any additional water beyond the basic allotment that is required to provide for their large households.170 Families and communities often have to do without water until the next month’s allotment. The impacts on health have been drastic. When water and sanitation services were discontinued in KwaZulu-Natal province for non-payment, more than 120 000 people came down with cholera.171

In *Mazibuko*, the Court considered the constitutionality of its basic free minimum; the final decision from the Constitutional Court was released in October 2009, reversing the lower court decision. The Supreme Court of Appeals had concluded that the basic minimum guaranteed by the law is only the very base level, and the actual amount allocated must have consideration for the circumstances of the community. The Court of Appeals cites the White Paper issued by the DWAF in November 1994 entitled ‘Water Supply and Sanitation

168 Supra note 24, Mehta, at 236.
170 Ibid. at paras.99-105.
171 Supra note 70, Barlow 2003, at 27.
Policy:

Basic water supply is defined as 25 litres per person per day. This is considered to be the minimum required for direct consumption, for the preparation of food and for personal hygiene. It is not considered to be adequate for a full, healthy and productive life which is why it is considered as a minimum.\(^{172}\) [Emphasis added]

While the Court of Appeals concluded on the evidence that 42 litres is the necessary amount of water per day to ensure human dignity for the community before the Court, the Court also noted that the City authority is only obligated to ensure the progressive realization of this amount, subject to available resources. The Court observed, however, that the City’s argument in this case was not that it is lacking resources to provide this amount, but that it is not legally obligated to provide this amount for free. The Court found that the state and the City are obliged to provide the basic amount of water for free (in this case, 42 litres per person per day) to people who cannot afford to pay for that water in circumstances where it would be reasonable to expect the state or City to do so.\(^{173}\)

The Court of Appeals also found that prepaid meters shut off after the basic minimum was dispensed unless prepaid and that this amounted to discontinuation of services. The City by-laws regulated discontinuation of water services, including providing for notice and other indicators of procedural fairness, and the prepaid meters were being administered in a manner that violated those bylaws. The Court ordered that the meters be made lawful.

The Constitutional Court came to different conclusions on both key points.

\(^{172}\) Supra note 165, Mazibuko S.C.A., at para.19.

\(^{173}\) Supra note 165, Mazibuko S.C.A., at para.30.
The Court found that it could not force the government to adopt a particular standard for the fulfillment of the right to water (e.g. by fixing the basic amount of free water) for two reasons: firstly, because the requirement for the ‘progressive realization’ of the right to water is an implicit recognition that the right to ‘sufficient water’ cannot be achieved immediately;\(^{174}\) and secondly, because it is contrary to the appropriate division of powers for a court to determine the precise government action required to implement or fulfill any particular social and economic right.\(^{175}\) Further, the Constitutional Court found that the prepaid meters were lawful, in part because the lack of water following non-payment on a prepaid meter is better understood as a ‘temporary suspension in supply’ rather than a discontinuation, and therefore does not fall within the procedural fairness rules on discontinuations.\(^{176}\) Further, the rules around discontinuations were designed to ensure that indigent persons were not denied access to basic water services; since the prepaid meters only stop dispensing water after the 6 kilolitre basic water amount under the FBW, the Court found that no one is being denied basic water services.\(^{177}\) Finally, the Court found that despite the disproportionate impact of the prepaid water meters in Phiri on poor black Johannesburg residents, the government policy was not unfairly discriminatory because the harms of the prepaid system are not clear and because the purpose was to target a population of people who were disproportionately failing to pay for their


\(^{175}\) *Supra* note 59, *Mazibuko C.C.*, at para.61.

\(^{176}\) *Supra* note 59, *Mazibuko C.C.*, at para.120.

\(^{177}\) *Supra* note 59, *Mazibuko C.C.*, at para.121.
water services.\textsuperscript{178}

These reversals from the lower court decisions are discouraging, to say the least, and the Constitutional Court appears to have rendered the South African Constitutional guarantees to the right to water and equality nearly toothless. However, it is also important to recognize that the seeds of progress towards the judicial enforcement of the right to water were sown in the Court of Appeals decision, and may well form the basis of future developments in this area.

While this case does not concern the privatization of water services (the named defendant “Johannesburg Water” is a corporation with the City as its only shareholder), it is concerned with the constitutionality of a fee-for-service system for the basic water needed for life and human dignity, in a context of poverty and unstable housing. The South African context starkly illustrates the inequalities manifest in water deprivation and fee-for-service schemes. While Apartheid drew lines between racial communities in terms of their access to water, the ‘new’ South Africa retains many of the same water inequalities in the form of class distinctions.\textsuperscript{179}

\textbf{The public cost of privatization: Bolivia terminates water contract with Bechtel}

Prior to 1999, traditional methods of water distribution brought water to communities outside Cochabamba, Bolivia, while about half of residents of the city of Cochabamba obtained water through community cooperatives, wells or

\textsuperscript{178} Supra note 59, Mazibuko C.C., at para.154.

rainwater cisterns instead of connecting to the water grid. In 1999, following a World Bank recommendation, Bolivia contracted for the delivery of all water services in the city of Cochabamba with Aguas del Tunari, a subsidiary of Bechtel, one the world’s major water companies.

Bechtel and its investors put in less than $20,000 as start up capital, while the projected annual income was expected to reach 58 million dollars. The country contracted over vast powers over water supply, including the right to charge citizens for water from privately owned wells and rain barrels, and the company immediately raised the price of water beyond affordable rates for the vast majority of the population. In fact, the company raised water rates about 200% within weeks of beginning their contract. While minimum wage amounted to about $100 a month, monthly water bills rose to $20.

In response to the privatization scheme and the subsequent deprival of water for most citizens, the citizenry rose up in popular protest. The leader of the protest came under death threats and a 17 year old was killed (and many injured) in a confrontation between the military and the protestors. Despite these attempts to repress the uprising, a general strike including roadblocks shut down the city for days at a time, and in April 2000, Bechtel was forced out and the government repealed its privatization legislation. Water services are currently

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181 Supra note 3, McDonald & Jehl at 3-4.

182 Supra note 180, Lydersend & Woelfele-Erskine, at 75.

183 Supra note 11, Shiva, at 102.

184 Supra note 70, Barlow 2003, at 33-34.

185 Supra note 180, Lydersend & Woelfele-Erskine, at 75
controlled by a public municipal water supplier.

Bechtel sued Bolivia for breaking its contract.\textsuperscript{186} In 2001, the corporation filed a $50 million dollar claim at the ICSID against Bolivia for breach of contract. Bechtel successfully argued to keep all proceedings confidential, prohibiting the observation of media, community members or NGOs.\textsuperscript{187} The matter was eventually settled for a symbolic payment of less than a dollar from the Bolivian government.\textsuperscript{188} One source, however, notes that the three years of legal wrangling between the filing of the suit and the settlement cost the Bolivian government $1 million in legal fees.\textsuperscript{189} The Bolivian situation starkly illustrates the public cost of privatization, and the impact of water charging schemes on a country and its poorest citizens.

**The private cost of privatization: Suez terminates water contract in Argentina**

In Buenos Aires, Suez (through its subsidiary Aguas Argentinas) had one of the largest private water concessions in the world. Although the deal was for 30 years, the company terminated the contract in 2002 after just nine years because of the losses they were experiencing.\textsuperscript{190} While prices initially appeared to drop when the corporation took control, this was only because government rates had risen steeply just prior to the company’s take over; critics allege that

\textsuperscript{186} *Supra* note 11, Shiva, at 103.


\textsuperscript{190} *Supra* note 70, Barlow 2003, at 32.
the public rate hikes were designed to make privatization appear more appealing.\textsuperscript{191} During the course of the nine years, water rates rose by 88.2% despite promises that they would be reduced by 27%. Since the company also reneged on its contractual obligation to build a new sewage plant, more than 95% of the city’s raw sewage is being dumped into the Rio de la Plata.\textsuperscript{192} The poorest neighbourhoods live with open sewers and contaminated drinking water.\textsuperscript{193} The company’s failure to fulfill its promises of new infrastructure and rate reductions resulted in the retention of huge profits.\textsuperscript{194}

The contract between Aguas Argentinas and the state was subject to numerous modifications, including compromising the promised rate reductions. In the second year alone, the company was allowed to increase rates for consumption, disconnection and reconnection by 13.5%, and for new connections by 42%.\textsuperscript{195} The World Bank was heavily involved in supporting the concession, including the modifications:

[In the renegotiations of 1997], the WB even decided to send one of its senior water management authorities as a consultant for Aguas Argentinas. It is to be underlined that the WB Group by then had spent millions of dollars in loans to the company, had already invested more directly in it by the acquisition of a share and had put forth the particular contract as a privatisation success story.\textsuperscript{196}

The uncertainty created by continual modifications, and the powerful involvement of outside actors such as the World Bank, left little room for the participation of

\textsuperscript{191} Supra note 91, Olleta, at 7-8.
\textsuperscript{192} Supra note 70, Barlow 2003, at 32.
\textsuperscript{193} Supra note 3, Barlow 2007, at 105-106.
\textsuperscript{194} Supra note 91, Olleta, at 9.
\textsuperscript{195} Supra note 91, Olleta, at 9.
\textsuperscript{196} Supra note 91, Olleta, at 9.
the actual users of the water system, and ultimately decreased the role of
democracy and the rule of law in the administration of the water system:197 It is
the most vulnerable citizens who bear the brunt of unaccountable corporate
profit-making. The citizenry was rendered even more powerless when Suez,
after withdrawing from the contract, sued Argentina at the ICSID for “alleged
losses resulting from the country’s severe economic and financial crisis that
began in 1999 (and the Argentine government’s response to it).”198 One of the
three ICSID matters involved in this dispute has now been settled; the other two
remain pending.199

Water by any other name: Bottled drinks in India

The water problems in India are similarly rooted in inequality that is only
worsened by the impacts of various forms of corporate control over water supply.
While the country has 2.45% of the world’s landmass, and 4% of the world’s
water resources, the massive (and growing) population demands have stretched
the water resources into scarcity.200 Water shortages have disproportionately
impacted the country’s poor:

The ad hoc attempts by the state to introduce disincentives in order to curb
growth of population has a negative impact on the rights to water of poor
households. One instance is the recently enacted Maharashtra Water
Resources Regulatory Act 2005 which places an unconscionable
restriction on the availability of affordable water by linking the payment for
water to the size of the family. S.12 (11) of this law states:

197 Supra note 91, Olleta, at 13.

198 Kawharu, Amokura. “Public Participation and Transparency in International Investment

199 ICSID: International Centre for Settlement of Investment Disputes website. Online:
https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPen

Environmental Law Research Centre in Eibe Riedel & Peter Rothen eds., The Human Right to
‘Notwithstanding anything contained in this Act, a person having more than two children shall be required to pay one and half times the normal rates of water charges fixed...’ Such provisions which seek to punish a poor family by depriving its members, and particularly children, of their right to water are vulnerable to challenge on the ground of violation of the right to life, to health and equal access to common resources.\textsuperscript{201}

While the Indian Constitution protects the right to water in a number of different ways (for example, through the non-binding Directive Principles of State Policy and liberal judicial interpretation of the right to life guarantees), a number of legal battles around the right to water, fee-for-service delivery and the impact of corporate activity have complicated the application of these constitutional provisions and their ability to protect the public's access to adequate water.

While the problem of bottled water is by no means limited to India, it is a major obstacle to water justice in that country. Evian sells at $2 a litre in India, which is nearly double the hourly minimum wage.\textsuperscript{202} In 2001, the bottled water market in India was estimated at $104.4 million, and was expected to double every two years.\textsuperscript{203} President Narayan spoke about the inequality inherent in the bottled water industry in India in 1999: “The elite guzzle bottles of aerated drinks while the poor have to make do with a handful of muddied water.”\textsuperscript{204}

India is a good example of the complexity of water privatization processes. Water supply is not only impacted by governments directly contracting with private third parties to supply water or build infrastructure, but also through the bottling of water and soft drinks by private enterprise, thereby reducing the water

\textsuperscript{201} Ibid.
\textsuperscript{202} Supra note 11, Shiva, at 101.
\textsuperscript{203} Supra note 11, Shiva, at 101.
\textsuperscript{204} Supra note 11, Shiva, at 102.
available to the individual for personal use through the piped water system and transforming the only clean water sources into purchasable commodities.

Coca-Cola has been a major consumer and contaminator of water in India, apparently in contradiction of the constitutional guarantees of the right to water. In the case of the Plachimada Coca-Cola facility in Kerela, production at the plant consumed between 500,000 and 1,500,000 litres of water per day, while most of the surrounding residents, suffering from water shortages as a result of this high level of corporate consumption, could not afford to buy the bottled drinks that were produced. An adverse administrative decision shut down the plant in 2003, although in 2005 the High Court ordered the administrative body to reinstate the licence. This decision was appealed up to the Supreme Court, and while the decision is pending, a battle continues to wage between Coca Cola and the affected community.

See also The Rights to Water and Sanitation website on “Case against Coca-Cola Kerala State: India” Online: http://www.righttowater.info/ways-to-influence/legal-approaches/case-against-coca-cola-kerala-state-india/ (Accessed July 24, 2013), which states: “For every 3.75 litres of water used by the [Coca-Cola] plant, it produced one litre of product and a large amount of waste water. […] In 2003, women from the Vijayanagaram Colony in the village of Plachimada, protested that their wells had dried up because of the over exploitation of groundwater resources by the Coca-cola plant. They complained that they now had to walk nearly five kilometres twice a day to fetch water. They also argued that the little which was left was undrinkable and when used for bathing the water burned their eyes and lead to skin complaints. Aside from these health issues, the depletion of groundwater resources also affected the ability of local residents to raise their crops of rice and coconuts.”

Supra note 200, Muralidhar.

See, for example, Indian Resource Centre Website. Online: http://www.indiaresource.org/index.html (Accessed July 22, 2013);

**So what? Benefits of an equality analysis**

While the right to water is clearly necessary for life, it is also necessary for equality. It is this equality analysis that sheds the most light on the importance of recognizing access to adequate water as a human right by focusing on human dignity. The distinction between conceptualizing the right to water as an aspect of the right to life or as an aspect of the right to equality has implications in outcome as well – if it is an element of the right to life, then the obligation ends when there is sufficient water for life (which in and of itself is a matter of debate – see for example the recent South African case law discussed above), whereas as an equality right, the right to water is not achieved until the scales of justice are balanced. The focus of the latter analysis is on easing the disparity between the rich and the poor, rather than on simply ensuring that the poor have the basic means of survival, without consideration of their human dignity or wasted human potential.

In each of the examples above, it is people living in poverty (a socio-economic condition usually borne of race, class and gender hierarchies) who bear the brunt of insufficient water, contaminated water and unaffordable water. Each of the examples illustrate that water deprivation does not impact everyone equally, and in fact is a great un-equalizer. Lack of water is both cause and effect of inequality, globally and within regions and countries. The South African Constitutional Court described the impact of such water injustice on human dignity, in the context of the South African Constitution:

“There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and
a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.” 208

208 Soobramoney v Minister of Health (Kwazulu-Natal) 1998 (1) SA 765 (CC) at para 8.
Chapter 4: The state’s responsibility to protect public water

The World Bank subscribes to a moral imperative argument for the privatization of water. It argues that privatization, and therefore fee-for-service water provision, will improve access for the world’s poor because it curbs wasteful consumption; reduces non-revenue water; efficiently allocates what’s left of a scarce and diminishing resource; bypasses government corruption; and brings to the table the necessary resources and capacity that the public sector lacks. In a recent report, even the UNDP allowed for the possible feasibility of fee-for-service water provision:

About a third of people without access to an improved water source live on less than $1 a day. Twice this share live on less than $2 a day. These figures imply that 660 million people lacking access to water have, at best, a limited capacity to pay more than a small amount for a connection to water service. 209 [Emphasis added]

While the UNDP report has a sophisticated equality analysis and is generally critical of the privatization approach to water provision, this quote reveals the hesitance of even those advocating for water justice to commit to an entirely pro-public no-fee-for-service stance. 210 Yet, this hesitation is puzzling; what leads the development sector, from the World Bank to the UNDP, to believe that those 660 million people living on less than $2 a day have any capacity whatsoever to pay anything for the water they require for personal use?

209 Supra note 3, UNDP 2006, at 49.

210 While clearly there is a cost to the provision of water for personal consumption, be it delivered publically or privately, fee for service is not the only means of cost recovery. The UNDP report seems to validate the idea that consumers be required to pay for the water they consume directly, rather than through progressive taxation.
Requiring payment for the basic amount of water necessary to satisfy thirst, prepare food, wash away excreta and keep clean is not only impractical in the face of poverty, but also illegal under international human rights law.

**Looking Jaws in the mouth: Do water rights have teeth?**

Water insecurity turns the normal paradigm about human rights infringements on its head. It poses a grave risk to human life and well-being, and often has greater implications for human life than war. While civil and political rights are usually understood as “black letter” rights that are judicially enforceable in part because of the concrete and measurable impact of their infringements (to torture or not to torture, for example, is considered an appropriate judicial question), economic rights become mired in the debate over justiciability in part because they are seen as unquantifiable; a line drawing exercise that is difficult to enforce in law. However, when we note the grave impacts of water insecurity on human life, the line drawing seems rather starker and is more clearly translatable to legal and justiciable standards.

A more ideological obstacle to the justiciability of these rights is of particular relevance to this paper. Some critics would argue that the enforcement of civil and political rights is commensurate with capitalism, but enforcement of economic rights requires a paradigm shift towards socialism. It is widely accepted that it is in fact this objection that has prevented the US from ratifying the ICESCR. As one author explains:

Neo-liberal traditions have viewed negative civil and political rights as essential to understanding what, for example, constitutes citizenship. But these traditions have been reluctant to award the same widespread attention to social and economic rights because such rights have strong
links to social justice and imply moving away from the neo-liberal notion that people’s socio-economic status is determined by the market […] In fact, the distinction between negative and positive rights is highly problematic because both involve state intervention and commitments for their protection. In terms of the way poor people experience rights, both are interrelated and indivisible.\textsuperscript{211}

This paper clearly attributes water inequality, at least in part, to market forces. However, the ideological alliances of civil and political rights to capitalism and economic, social and cultural rights to socialism are a matter of perspective rather than objective truth. Both require considerable state action and expenditure for fulfilment. Both sets of rights include three duties: avoid depriving someone of a necessity, protect them from deprivation and aid them when deprived (a.k.a. respect, protect and fulfill).\textsuperscript{212} The true distinction is not between different categories of rights, but between different types of duties necessary to further their protection. It is impossible for any right, no matter how ‘negative’ it may seem, to be fully guaranteed unless all three types of duties are fulfilled.\textsuperscript{213}

In fact, then, the different categories of rights are not accurately aligned to a particular economic ideology, as emphasized by the CESC in General Comment 3.\textsuperscript{214} Rather, the fulfilment of all rights requires considerable state involvement, control and expenditure. As a result, an economic right such as the right to water is as enforceable as a civil right such as the right to a fair trial, since both require the

\begin{footnotesize}
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\item \textsuperscript{211} Supra note 24, Mehta, at 237.
\item \textsuperscript{213} Ibid.
\item \textsuperscript{214} Supra note 46, GC3, at para.8
\end{itemize}
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same degree of state involvement and judicial oversight.

Much has been written on the justiciability of economic rights, and I do not intend to replicate the breadth of those arguments here. To some extent, the passage of the Optional Protocol to the ICESCR by the UN General Assembly in December 2008 marks a move beyond the debate over whether such rights are justiciable towards how to adjudicate such rights. The point here is simple and powerful: economic rights are too important to human life and dignity, particularly for those living in poverty, to take a back seat to civil and political rights any longer.

Moreover, economic and social rights are legally entrenched, and it is an elementary principle of law, as articulated in the Universal Declaration of Human Rights, that there can be no right without a remedy. Chapter 1 of this paper outlines the state’s legal obligation to protect the right to water entrenched in the ICESCR, CRC, CEDAW and CRPD. There are three important conclusions to draw from these documents, along with the CESCR’s General Comment 15 and General Assembly Resolution 64/292. Firstly, there is a right to water at international law. Secondly, the right to water has a minimum core that is non-derogable, and therefore states are obliged to ensure that no person is deprived of the minimum level of water essential to prevent disease, in any and all circumstances. Thirdly, the right to equality applies to the right to water, such that everyone must have equal access to adequate water. We can see from

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Chapters 2 and 3 that private corporate control over water means that the poorest and most marginalized people do not get the same access to water for personal use as the more privileged. The state responsibility to protect against third party infringement, entrenched in a number of soft and hard law instruments, requires the state to ensure that corporations are held to these same standards. All of these conclusions support not only the assertion that states have an enforceable responsibility to respect, protect and fulfill the right to water, but also that, as part of this responsibility, states have a duty to guard public water services against the forces of privatization.216

**In Conclusion: Water privatization vs. human rights**

As discussed in previous chapters, the purpose of a corporation – to produce financial profit – is fundamentally at odds with the recognition of water as a human right. Water corporations came into existence on the basis of the realization that there was a market in water, and money to be made. Their legitimate goal, through the lens of corporate law, is to generate profit, not to satisfy human dignity. Corporations only meet human needs insofar as those needs generate profit; unprofitable human needs – like a slum dweller’s need for a flush toilet – cannot, by definition, be a valid corporate concern.

Despite the many and varied justifications offered by private and public actors alike for corporate involvement in water services, the actual impact of water privatization, as illustrated in Chapter 3, is an unequal deprivation of

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216 As discussed above, regulation would be insufficient to overcome the profit oriented nature of corporate structure.
access to clean and adequate water across the globe. This inequality is
inevitably felt along the lines of existing human hierarchies. Women, indigenous
peoples, and other ethnic or racial minorities experience both the greatest
poverty and the greatest water deprivation across the globe.

International human rights law is clear that water for personal use must be
made available, in a positive rights sense, to everyone on an equal basis. This
means that the water needs of the poorest citizens must be as satisfied as the
water needs of the rich (as discussed above, paradoxically, the current reality is
that not only are the poor not getting equal access to water, but in fact often pay
more for less). Yet it is impossible for corporations to profit from serving the
poorest citizens, at least without massive public subsidies. As illustrated in
Bolivia, there are simply too many people without the ability to pay anything for
water to make the provision of piped water to the poor profitable. Without
economic incentive, corporations will not and cannot satisfy the equal right to
water. This reality further bolsters the responsibility of governments to do so.

States, both rich and poor, have an obligation to ensure that the corporate
drive for profit does not interfere with the provision of water for personal use, both
within their own borders and abroad.217 As detailed in Chapter 2, there is
evidence of strong ties between UN institutions and water corporations.
However, even taking the professed neutrality of the UN on the public/private
nature of water providers at face value, the UN’s stance enables major corporate
actors and international financial institutions to make financing for poor countries

217 Supra note 19, GC15, at paras. 23, 33 and 44(b).
contingent on water privatization. Since private water service providers cannot help but place human rights at a lower priority than profits, enabling water privatization through either direct or indirect support is an infringement of human rights law. Moreover, it is states, not private actors, who are bound to comply with international law, and therefore, the right to water can only be enforced if states retain control over the provision of water services.

Finally, corporations cannot be responsible for equal water provision because equality is often contrary to their financial interests. It is scarcity that makes water a potentially profitable enterprise, the idea being that scarcity drives up demand, which in turn drives up prices and profits. Generating profit from scarcity relies on the fact that some can afford the scarce resource, while others want it but cannot attain it. While a right to life analysis may reveal water privatization as an obfuscating but not insurmountable obstacle to water security, an equality analysis reveals that privatization is in fact antithetical to the provision of water to the poor. Market functioning relies on disparities between the haves and the have nots in order to generate competition for both commodities and consumers; without inequality, there would be no profits to be had. Remedying inequality then, or ensuring equal access to water, is contrary to the fundamental principles of market and corporation. States have a legal obligation to keep water in the public commons in order to respect, protect and fulfill the equal right to adequate water.

As Sachs has pointed out, it is a fundamental truth that the human race has the resources to meet the water needs of all, yet so many face the problem
of thirst on a daily basis. This is the truth that makes water deprivation an issue of injustice rather than simply scarcity. This is the truth, coupled with the limitation of human potential borne of water related diseases and thirst, that makes access to water an issue of human dignity. This is the truth, based as it is on privilege and disadvantage distributed according to arbitrary characteristics in human hierarchies such as sex, race and class, that makes the right to water an issue of equality. This is the truth that ultimately makes water privatization illegal under international human rights law: private entities, whose very reason for being is to generate profit, cannot ensure the just, dignified and equal distribution of this essential component of life to rich and poor alike.
Bibliography

Case Law

City of Johannesburg v L Mazibuko (489/08) [2009] ZASCA 20 (25 March 2009) (South Africa)

Gosselin v. Québec (Attorney General), 2002 SCC 84 (Canada).


Soobramoney v Minister of Health (Kwazulu-Natal) 1998 (1) SA 765 (CC) (South Africa).

Treaties and Constitutions


Other Sources


Barrett, Damon and Vinodh Jaichand. “The right to water, privatised water and access to justice: tackling United Kingdom water companies’ practices in developing countries”. 2007 SAHR 543.


Committee on the Elimination of all forms of Discrimination Against Women. General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination Against Women, on temporary special measures, UN Doc.
HRI/GEN/1/Rev.9 (Vol. II) (27 May 2008) at 365.

Committee on the Elimination of all forms of Discrimination Against Women. “Concluding Observations; Canada”. UN Doc. CEDAW-C-CAN-CO-7 (7 November 2008).


Safe Drinking Water for First Nations Act, S.C. 2013, c. 21


