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Water Tenure Reform and Public Access to Water as a Basic Need*

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Abstract

Water is a basic human need. It is essential for domestic, industrial and agricultural use. Despite water being essential for human survival, over one billion people today lack access to safe drinking water. More than double that number lack access to sanitary facilities. Water scarcity is becoming a major problem in many countries and is closely related to poverty, rapid population growth and urbanization. It has also led to many conflicts in developing countries. While traditionally governments have been at the forefront in providing water to the public, several tenure systems as well as legal principles have developed over the years in relation to the appropriation of water. The management of water resources has become a controversial issue in recent years due to the privatization efforts of the World Bank. Several countries have experienced hardship in the form of increased tariff with some countries, such as Bolivia canceling the privatization agreement as a result of public protests. It is amidst this activity that the UN Committee on Economic, Social and Cultural Rights declared water as a human right through General Comment No 15. Two case studies chosen to highlight two diametrically opposing approaches to the management of water – Water Policy of Quebec adopted in 2002 and Water privatization in Cochabamba, Bolivia – are discussed. Two trends in water supply and management can be identified – regarding water as a res communes or a collective heritage of people and the recognition of water as a human right; and privatization of water resources and management. These two trends need not be mutually exclusive and the challenge is to ensure that every person has access to water on the basis of non-discrimination at an affordable price and that privatization efforts are undertaken with the participation of all stakeholders.

Introduction

Water is a basic human need. It is essential for domestic, industrial and agricultural use. Without water humans cannot survive. This has led many to argue that it is a fundamental right. While the International Covenant on Economic, Social and Cultural Rights does not specifically mention access to water as a human right, it does embody the right of people 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."¹ This right cannot be realized if people lack access to clean water and basic sanitation.

Despite water being essential for human survival, over 1 billion people today lack access to clean drinking water.² More than double that number lack access to sanitary facilities.³ Scarcity of water is becoming a major problem in many countries, particularly developing countries and is closely related to poverty,⁴ rapid population growth, and urbanization. It has also led to many conflicts in developing countries.

Furthermore, with privatization efforts, due in part to pressure from institutions such as the World Bank, water has become a commodity which, like any other commodity, can be traded in the open market. This has led to some situations in which high tariffs are charged, which poor people cannot afford. Faced with higher tariffs and less water, people resort to unhealthy practices, resulting in water-borne diseases (sometimes even death⁵) which, in turn, has had a huge impact on public health expenditure. Thus, what are the true costs of privatization?

With globalization, increased attention has been paid to the involvement of the private sector in areas traditionally regulated by public bodies, such as water and sanitation. This has led to the "commodification" of water. Whether water should be treated as a social good or an economic good has become a hotly debated issue.

This article discusses the main issues in water tenure systems and the legal characterization of water in common law and civil law systems as well as the arguments made in favor of privatization of water management. It also discusses the General Comment No 15 on Human Right to Water and relevant international instruments and institutions. It discusses what the progressive realization of the human right to water means and its implications for States. The article then identifies two case studies chosen to highlight two diametrically opposing approaches to management of water. It concludes by discussing options for future legal developments in the field of freshwater management and human rights law. The relationship between water supply and the General Agreement on Trade in Services (GATS) is beyond the scope of this article.

¹ Article 11 of the International Covenant on Economic, Social and Cultural Rights, 1966.

² See, World Health Organization, Global Water Supply and Sanitation Assessment 2000 Report, available at http://www.who.int/water_sanitation_health/Globalassessment/GlobalTOC.htm, visited on 10/3/02.

³ *Ibid.* It is estimated that about 1.1 billion people in the world lack access to fresh water while 2.4 billion lack adequate sanitation. See, Ismail Serageldin, "Beating the Water Crisis," *Our Planet*, October 1996, available at <http://www.ourplanet.com/imgversn/83/serag.html>, visited on 10/3/02.

⁴ See "Water Resources Management for Poverty Alleviation," IUCN Background Document for the IUCN WSSD meeting in Dakar, Senegal.

⁵ About five million people, mostly children, die each year as a result of water borne diseases, see *infra*.

Main Issues in Water Tenure Systems

Property over water

While traditionally governments have been at the forefront in providing water to the public, several tenure systems as well as legal principles have developed over the years in relation to the appropriation of water. These systems and principles are inextricably linked to water management systems. The water tenure systems differ somewhat under civil law, common law and customary law. The main principles that have evolved over the years are the *absolute ownership doctrine* which is common to the traditional common law,⁶ and the concept of *res communes* which is often present in the civil law.⁷ Many customary approaches to water have also regarded water as a common property not susceptible for individual ownership.⁸ While it is difficult to generalize as each tribe or community had their own practices and tenure systems regarding water and water management, “ownership of water sources was usually invested in the local community rather than the household.”⁹ Even then, water was rarely “owned” by these groups. Access by others was often allowed, and a distinction was made between different water uses – domestic use and water for cattle.¹⁰ Among highly mobile societies agreements over water use were particularly important.¹¹

According to Claire Skrinda, “traditionally, in both civil and common law, the law relating to water resources classified water according to the form, location, and the movement of water.”¹² She notes that issues relating to water law arose around two topics: landowners’ rights with regard to water on his property or flowing through his property, and public rights regarding water used for navigation and later, power. It is noted, however, that the law relating to groundwater resources remained troublesome both under common law and civil law.¹³

After an analysis of leading common law cases regarding water, Skrinda concludes that while a court may declare that a person has a right to use a water resource, rarely does this right extend to a right in the water itself and that “to a large extent, water in the common law has not lost its essential characteristic of *res communis*.”¹⁴ In addition, the earlier common law approach has been replaced by a “reasonable use” principle. It is noted that the basic features of usufructuary rights have been formulated under two common law doctrines – the riparian doctrine and the prior appropriation doctrine, both of which exist in Canadian jurisprudence. While the former relies on the concept of reasonable use to allocate water amongst competing users, the latter uses a more “first come, first serve” approach. In the final analysis Skrinda concludes that water is *res communes*, irrespective of origin or destination.¹⁵ In other words, water cannot be subject to private ownership.

⁶ Claire Skrinda, “Le Statut juridique de l’eau dans les autres provinces canadiennes,” *Le Statut Juridique de l’eau en droit quebecois* Madeleine Cnatin Cumyn, Micheele Cumyn et Claire Skrinda, *Memoire A la Commission sur la gestion de l’eau au Quebec* (consultation publique tenue A Montreal entre les 23 et 30 Novembre, 1999) a la p 37 Annexe III, en ligne: BAPE (summary in English).

⁷ *Ibid*

⁸ Christopher Higgins, “Rural Water Tenure in East Africa, final draft May 2000.

⁹ *Ibid*.

¹⁰ *Id*.

¹¹ *Id*.

¹² *Supra* note 6.

¹³ *Ibid*.

¹⁴ *Id*.

¹⁵ *Id*.

Closely related to the *res communes* concept is the public trust doctrine. According to the public trust doctrine, common property is vested in the State for the benefit of the public. Although the public trust doctrine originally applied to navigable waters in the United States,¹⁶ other jurisdictions have now extended this to all natural resources. Thus, in *M.C. Mehta v. Kamal Nath and Others*, the Supreme Court of India held that under the public trust doctrine, “the Government is the trustee of all natural resources which are by nature meant for public use and enjoyment.”¹⁷ The Court reviewed cases from the US and noted that under English common law, this doctrine extended only to traditional uses such as navigation, commerce and fishing and said that now the doctrine has been extended to all ecologically important lands, including freshwater, wetlands and riparian forests.¹⁸

Coupled with the concept of sustainable development,¹⁹ the public trust doctrine means that the state is under an obligation to hold natural resources for the benefit of the present generation as well as future generations. The Supreme Court of Sri Lanka took this one step forward by stressing that the “principle of shared responsibility” should be applied in relation to natural resources, just like their ancestors did.²⁰ The case dealt with the legal challenge to a proposed leasing of a phosphate mine to a multinational company bypassing the environmental law of the country. The Court stressed the need to conserve natural resources for the benefit of future generations and stressed the responsibility of everybody in exploiting natural resources, not just that of the State, which the public trust doctrine implies. In other words, the principle of shared responsibility is wider in scope than the public trust doctrine. These principles/concepts have important ramifications for designing any legal regime for freshwater.

The California Supreme Court laid down several principles in relation to the public trust doctrine in the *National Audubon Case*.

1. There is an “affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible..... [U]nnecessary and unjustified harm to trust interests” should be avoided.
2. The state has the power and the affirmative duty to exercise continuing supervision over the taking of appropriated water, even when allocation decisions were made after consideration of their effects on the public trust.”²¹

This case lays down an important principle, namely that public authorities have an affirmative duty to take the public trust into account in the allocation of water resources as well as the duty to exercise continuing supervision over appropriated water.²² In another case the California Supreme Court

¹⁶ See Jan S. Stevens, Current Developments in the Public Trust Doctrine and Other Instream Protection Measures,” in WATER LAW: TRENDS, POLICIES AND PRACTICE 141 (Kathleen Carr and James Crammon, eds, 1995).

¹⁷ *MC Mehta v. Kamal Nath and others*, Supreme Court of India, (1997) 1 Supreme Court Cases 388, excerpts in COMPENDIUM OF SUMMARIES OF JUDICIAL DECISIONS IN ENVIRONMENT RELATED CASES 15 (1997) (SACEP, UNEP & NORAD).

¹⁸ *Ibid* (emphasis added).

¹⁹ A classic definition of sustainable development was put forward by the World Commission on Environment and Development in 1987: “Development that meets the needs of the present without compromising the ability of future generations to meet their own needs,” OUR COMMON FUTURE, REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT 43 (1987).

²⁰ *Bulankulame and others v. The Secretary, Ministry of Industrial Development and others*, SC Application No 884/99 (FR), SC Minutes 6.2.2000.

²¹ *Supra* note 16, 142.

²² Jan Stevens points out that “in California the State Water Resources Control Board has continuing supervisory powers over water uses both under the public trust and the state constitution,” Current Developments in the Public Trust Doctrine and Other Instream Protection Measures in WATER LAW, TRENDS, POLICIES AND PRACTICE 147 (Kathleen Marion Carr and James D. Crammond eds., 1995).

reiterated that “running waters of the state of California are public property.”²³ Any person who wishes to “obstruct” them has to do so under permission of the state, subject to any conditions that the state may impose.²⁴ Such conditions do not interfere with private property. Although the case dealt with the issue of fisheries, the principle therein can be equally applied to appropriation of water. In another case the Appellate Court has held that “[a]ll water right, including appropriative, are subject to the overriding constitutional limitation that water use must be reasonable[and] all permits.... are subject to the continuing authority of the Board to prevent unreasonable use.²⁵ It thus seems that reasonable use is an established principle in Californian law and resonates well with the concept of sustainable development.

Both civil law and common law systems as well as customary practices indicate that water should be governed as a common property, rather than vesting individuals with proprietary rights. This approach resonates well with the public trust doctrine and is probably the only way to ensure that 1 billion people without access to potable water in the world today get some relief.

In a study conducted on water rights under civil law and common law systems (comparing United States with Venezuela), Franco Garcia concludes that water rights follows a climatic pattern – where there is a water surplus, the private ownership doctrine is generally accepted, while in arid and semi-arid zones, waters are generally considered to be public property.²⁶ He refers to the *common law rule of absolute ownership*,²⁷ the *rule of unlimited use* in England and the *doctrine of land ownership* in the United States. By contrast, the *rule of reasonable use* while recognizing the ownership of groundwater by the owner of the land, limits his right of use of the water. A variation of this rule is the *doctrine of correlative rights* according to which the owner of the land is entitled to his reasonable share of the water, if there is not enough water to supply the needs of all.

The *doctrine of public property*, on the other hand, vests groundwater in the public and as a result, governments have a duty to ensure that groundwater rights are under administrative control. According to the *doctrine of prior appropriation*, the person who has beneficially used groundwater for a certain period of time is considered the rightful owner of the water. This is used in several countries in Africa and the Middle East. Misuse of the water would result in the loss of the water rights and leads to the *doctrine of prescriptive rights* where owners of the land have not been using the groundwater for a certain period of time. These principles offer different options to policy makers with regard to water management. With the advent of the principles of sustainable use and exploitation of resources, the rights of an owner of land to the groundwater are no longer unlimited.

The management of water resources has become a controversial issue in the recent years, particularly due to the privatization efforts at the behest of the World Bank. If water resources (and for that matter, all natural resources) are vested in the State as a result of the public trust doctrine, then there is a duty on the State to manage this resource for the benefit of the public, not only the present generation, but the generations to come. This, in turn, leads to good governance issues of transparency and accountability as well as giving the opportunity to those who are affected by a decision to participate in the decision making process. Thus, participatory rights of people, particularly indigenous and marginalized groups, become important here. If a government is corrupt, this will reflect adversely in relation to water management issues as well. The principle of shared

²³ Schaezlein v. Cabaniss, 135 Cal. 673, 470-71 (1902), referred to in Jan Steven, *ibid*.

²⁴ *Ibid*.

²⁵ *Ibid*.

²⁶ Jose Maria Franco Garcia, Water Rights under Civil Law and Common Law Systems (Venezuela and the United States as a case Study)(1985).

²⁷ This doctrine recognizes ownership of ground water by the owner of overlying land. It places no restrictions on the owner's right of the use of water.

responsibility also has much potential, as it stresses the duty of every person, not just that of the State, to manage natural resources in a sustainable manner.

Privatization of water supply and management

If water is to be regarded as *res communis*, then privatization of water supply and management would be contrary to this concept. It is also true that governments no longer have the necessary funds to invest in public service areas which were traditionally not subject to privatization. With the involvement of the World Bank, this traditional approach to public services often seems superseded by a market based approach to water management.

The supply of safe drinking water, water resources management and wastewater treatment are priority areas for the World Bank and figure high on its agenda. It has supported many water-related projects with varying degrees of success. According to the World Bank Operational Manual, the "Bank involvement in water resource management entails support for providing potable water, sanitation facilities, flood control, and water for productive activities in a manner that is economically viable, environmentally sustainable, and socially equitable."²⁸

A report of the Bank on Water Resources Management proposes a new approach to managing water resources by the adoption of a comprehensive policy framework and the treatment of water as an economic good.²⁹ It further proposes the decentralization of management and delivery structures, greater reliance on pricing, and fuller participation of stakeholders. With regard to water policy objectives, the report provides that one of the goals should be the greater involvement of the private sector, non-governmental organizations and user groups in relation to water supply and sanitation. The Bank's overarching objective is to reduce poverty by supporting efforts to promote sustainable development. The Bank gives priority to countries where water is scarce or where problems of water allocation or environmental degradation are serious.³⁰

The report further provides that the reform of water resource management policies will have implications for the institutions that deal with water resources. Toward this end, the Bank assists governments in establishing a strong legal and regulatory framework for dealing with pricing, monopoly organizations, environmental protection and other aspects of water management.³¹

The Bank strongly supports decentralization of water resources management. The report provides that "because of their limited financial and administrative resources, governments need to be selective in the responsibilities they assume for water resources."³² The Bank supports governmental efforts to decentralize responsibilities to local governments and to transfer service delivery functions to the private sector: "The privatization of public water service agencies, or their transformation into financially autonomous entities, and the use of management contracts for service delivery will be encouraged."³³

It thus appears that the main thrust of the Bank's involvement in the water resource management sector has been to encourage the privatization of water service agencies, thereby ending the government monopoly in this service sector. The Bank further provides that while public sector

²⁸ The World Bank Operational Manual (February 2000), OP 4.07 on Water Resources Management.

²⁹ Water Resources Management, the World Bank, August 1995 (3rd print), Executive Summary, available at <http://www.worldbank.org>, visited on 9/27/02.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* (emphasis added).

programs have been carried out in relation to accessing water and sanitation services, they have fallen short of their objectives. As a result, they note, more and more governments are turning to the private sector for help: “Lessons from experience show that private sector involvement can improve service delivery at the same time that it reduces the burden on constrained public finances.”³⁴

Designed properly with the involvement of all the stakeholders, particularly the public, there is no doubt that privatization of water management and supply can reap real benefits to the public. Unfortunately, this has failed in many instances, as the experiences of various countries have shown. Privatization can result in high tariffs to the public, who in developing countries can barely sustain themselves above the poverty line. Now that water is accepted a basic human right, governments have a duty to ensure that this right is respected.

Are the concepts of *res communes* and privatization of water mutually contradictory? In adopting General Comment No 15 on Right to Water, the UN Committee on Economic, Social and Cultural Rights emphasized that “Water should be treated as a social and cultural good, and not primarily as an economic commodity.”³⁵ The General Comment further provides that:

State parties should ensure that the allocation of water resources, and investments in water, facilitate access to water for all members of society. Inappropriate resource allocation can lead to discrimination that may not be overt. For example, investments should not disproportionately favour expensive water supply services and facilities that are often accessible only to a small, privileged fraction of the population, rather than investing in services and facilities that benefit a far larger part of the population.³⁶

While the General Comment does not prohibit privatization *per se*, it does warn of the possible consequences of expensive water supply services and facilities which can result in discriminating against marginalized groups.

Water figured high on the agenda of the World Summit on Sustainable Development concluded in 2002. Under the Plan of Implementation adopted at the Summit, the parties have agreed to achieve the Millennium Development Goal on safe drinking water and access to basic sanitation.³⁷ The parties have also undertaken to develop “integrated water resources management and water efficiency plans by 2005”³⁸ to, *inter alia*, facilitate the establishment of public-private partnerships and other forms of partnerships that give priority to the needs of the poor. It also requires respecting local conditions, involving all concerned stakeholders, and monitoring performance and improving accountability of public institutions and private companies.³⁹ Hence, despite severe opposition to privatization by developing countries, privatization of water has been included as a possible option in the documents of the WSSD. Experience thus far does not point to positive results of privatization projects in developing countries where high prices have resulted in the further marginalization of the poor. Indeed, as is clear from the work of Professor Madeleine Cantin-Cumyn, many developed countries have debated about the advisability of privatization of sub-soil water resources.⁴⁰ While privatization may be seen to improve efficiency, rising costs of water have negatively impacted on the

³⁴ "Private Sector Providers in CWSS, <http://www.worldbank.org/watsan/topics/psproviders.html> , visited on 9/24/02.

³⁵ General Comment No 15.

³⁶ General Comments, paragraph 16.

³⁷ WSSD, Plan of Implementation (2002). The UN Millennium Declaration urges states to take steps to halve by the year 2015, the proportion of the people who are unable to reach or to afford safe drinking water, <http://www.un.org/millennium/declaration/ares552e.htm>, visited on 10/7/02.

³⁸ WSSD, Draft Plan of Implementation.

³⁹ *Id.*

⁴⁰ *Supra* note 6.

poor. However, in many instances, the public sector is no longer in a position to provide basic facilities and services to its people, either. A solution to this dilemma must be found soon.

The problems associated with lack of access to safe drinking water and sanitation facilities are clear enough. Governments are spending more and more money on public health problems caused by water-borne diseases which are rampant in developing countries, most of which are preventable. More than 5 million people, most of them children, die every year from water-related illnesses.⁴¹

The main argument against water privatization is the resulting higher costs to the poor people. As private companies are driven by the force of profit and are unaccountable to the government or the people, privatization of such an essential resource as water is viewed with suspicion and alarm by many, particularly those in developing countries. It is often claimed that the World Bank and the IMF are forcing governments to privatize the water supply which is one of the conditions of supplying aid.⁴²

Another criticism is that these policies are formulated behind closed doors without giving those who are most likely to be affected - the poor and the vulnerable - any opportunity to be heard. It often seems that governments in developing countries do not have any choice but to accept these conditions which could exacerbate existing conditions of the poor. As one writer points out:

“The goal is to render water a private commodity, sold and traded on the open market, and guaranteed for use by private capital through global trade and investment agreements. These companies do not view water as a social resource necessary for all life, but an economic resource to be managed by market forces - like any other commodity.

A closer and well-documented examination of their [transnational water companies] practices tells a very different story: higher customer rates, dramatic corporate profits, corruption and bribery, lower water quality standards, and overuse of the resource for profit. While the companies argue that the privatization of water services is socially beneficial, the consequences of corporate control is that social and environmental concerns come second to the economic imperative of maximum profits for the shareholders.”⁴³

The UNDP Human Development Report 2003 identifies several reasons why governments often finance and provide basic social services, such as health care and water: such services are public goods and their market price alone does not capture their intrinsic value and social benefits; to ensure that basic social services are available equitably; as access to basic social services is a fundamental human right, governments have an obligation to ensure that these services are provided to the people.⁴⁴ The Report, however, notes that the public provision of social services is not always the best solution, particularly where institutions are weak and accountability for the use of public resources is low, which is often the case in developing countries.⁴⁵ The Report identifies several reasons why the private sector is playing a growing role in developing countries in relation to social services: lack of government resources, low quality public provision and pressure to liberalize the economy. Despite the recent push towards privatization, “only about 5% of the world’s people

⁴¹ Sara Grusky, "IMF Forces Water Privatization on Poor Countries," <http://www.waternunc.com/gb/ProblemofWater.htm> visited on 10/2/02.

⁴² *Id.*

⁴³ Maude Barlow, "Water as Commodity - The Wrong Prescription," <http://www.foodfirst.org/pubs/backgrdrs/2001/s01v7n3.html>, visited on 10.2.02.

⁴⁴ UNDP, Human Development Report: Millennium Development Goals: A Compact Among Nations to End Poverty, (New York: Oxford University Press, 2003) online: UNDP <<http://hdr.undp.org/reports/global/2003/>.

⁴⁵ *Ibid.*

(about 300 million) receive their water from private companies.”⁴⁶ The majority of such privatization of water and sanitation services has occurred through public-private partnerships in urban areas. Yet the Report notes that private companies are unlikely to provide water services in rural areas in low-income countries, as they are generally considered unprofitable.⁴⁷

A Human Right to Water?⁴⁸

As noted above, international human rights instruments do not specifically mention water as a human right, although reference is made to an adequate standard of living, including adequate food, clothing and housing as well as right to health. The lacuna in the law was rectified in late 2002 when the UN Committee on Economic, Social and Cultural Rights adopted General Comment No 15 declaring water as a human right: “Water is fundamental for life and health. The human right to water is indispensable for leading a healthy life in human dignity. It is a pre-requisite to the realization of all other human rights.”⁴⁹ The Committee was of the opinion that the right to water is clearly implicit in the rights contained in the Covenant.

As a result of the General Comment, an authoritative statement of the interpretation of the provisions of the Covenant, the right to water has been elevated to the status of a stand alone protected right, on par with other rights recognized in the Covenant. The Committee notes that the legal basis for the right to water as follows:

The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.⁵⁰

The Committee noted that the word “including” in Article 11 indicated that the catalogue of rights there was not exhaustive and that “right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.”⁵¹ It is also inextricably linked to the right to health.

The Committee also noted that the right to water contains both *freedoms* and *entitlements*. The freedoms include the right to maintain access to existing water supplies and the right to be free from interference. Entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water. It further notes that “water should be treated as a social and cultural good, and not primarily as an economic good.”⁵²

While the adequacy of water may vary according to different conditions, the Committee identifies three factors that must be satisfied in all circumstances: availability, quality and accessibility. The latter has four overlapping dimensions: physical accessibility, economic accessibility, non-discrimination and information accessibility.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ For a comprehensive discussion of legal provisions relating to water, see, *Legal Resources for the Right to Water: International and National Standards* (Geneva: COHRE, January 2004).

⁴⁹ UN Committee on Economic, Social and Cultural Rights, <http://ens-news.com/ens/dec2002/2002-12-04-01.asp>, visited on 1/28/2003.

⁵⁰ General Comment No 15, paragraph 2.

⁵¹ General Comment No 15, paragraph 3.

⁵² General Comment No 15, paragraph 12.

Like all other human rights, the right to water must be guaranteed on the basis of non discrimination and equality. Similarly, it imposes three types of obligations on States parties – obligations to respect (refraining from interfering directly or indirectly with the enjoyment of the right to water); obligations to protect (preventing third parties from interfering with the enjoyment of the right to water) and the obligations to fulfill (taking positive measures to assist individuals and communities to enjoy the right, ensuring appropriate education regarding hygienic use of water, protection of water sources and methods to minimize water wastage).

In addition, the UN Committee on Economic, Social and Cultural Rights recognized the importance of water in 2000, when it adopted the general comment on health.⁵³ It noted that health is an inclusive right and extends to factors that determine good health, including access to safe drinking water and adequate sanitation, food, nutrition and housing and healthy environmental conditions. This is a clear recognition of the link between health and access to water.⁵⁴ It further noted that functioning health and health-care facilities, goods and services and programs have to be available to the people. This includes the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities.⁵⁵

What is the significance of the recognition of water as a human right? In addition to the discussion above regarding the obligation of states to progressively realize this right on a basis of equality and non-discrimination, it also means that access to water is a *legal entitlement*, not a commodity or service provided on a charitable basis.⁵⁶ It also means that state parties will have to report to the Committee on the progressive realization of this right. Furthermore, the mechanisms available in the UN human rights system will be used to monitor the progress of states in realizing this right and hold governments accountable where violations have taken place. Since it is not considered a human right, access to water cannot be denied if people do not have the means to pay.

However, not everybody views this development in a positive light. While not denying that water is a basic human need, some argue that treating it as a stand alone right would lead to a legal obligation to physically provide water to people in order to satisfy this basic human need. Canada, in particular, is alarmed at the prospect of being under a legal obligation to export water to places that face a scarcity of water.⁵⁷

Other International Instruments

Several human rights as well as environmental instruments recognize the importance of water for survival. The Convention on the Rights of the Child, for example, refers to the provision of adequate nutritious food and clean drinking water in the context of realizing the right to health.⁵⁸ The Convention on the Elimination of All forms of Discrimination Against Women refers to the right of women, *inter alia*, to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply.⁵⁹

⁵³ UN Committee on Economic, Social and Cultural Rights, “General Comment No 14: The Right to the Highest Attainable Standard of Health,” Article 12 of the International Covenant on Economic, Social and Cultral Rights, 22nd Sess. Agenda Item 3, UN Doc. E/C. 12/2000/4, at para 11 (2000).

⁵⁴ Ibid.

⁵⁵ Id, para 12(a).

⁵⁶ See WHO, The Right to Water, Health and Human Rights Publication Series No 3 (Geneva: WHO, 2003) online http://www.who.int/water_sanitation_health/en/rwrev.pdf.

⁵⁷ Discussion with Canadian Officials at the CSD meeting, April 2004, New York.

⁵⁸ Article 24, Convention on the Rights of the Child, 1989.

⁵⁹ Article 14(2), Convention on the Elimination of All Forms of Discrimination Against Women, 1979.

The UN Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa,⁶⁰ requires parties, *inter alia* to adopt an integrated approach addressing physical, biological and socio-economic aspects of the processes of desertification and drought; and to promote cooperation among affected countries in the fields of environmental protection and the conservation of land and water resources as they relate to desertification and drought.⁶¹ This Convention is particularly important as it recognizes the crucial relationship between land and water as well as its impact on sustainable development:

“Mindful that desertification and drought affect sustainable development through their interrelationships with important social problems such as poverty, poor health and nutrition, lack of food security, and those arising from migration, displacement of persons and demographic dynamics...”⁶²

These Conventions are, of course, only binding on those states that have ratified them. In addition, several non binding instruments contain references to right to water.⁶³ Among them, Agenda 21 is significant. It devotes a chapter to the protection of freshwater resources and the adoption of an integrated approach to the development, management, and use of water resources.⁶⁴ It provides that the general objective is to ensure that adequate supplies of water of good quality are maintained for the entire population, while preserving the hydrological, biological and chemical functions of ecosystems. It also recognizes the adverse effects of pollution and the need to adopt an integrated approach to water. Agenda 21, however, regards water as both a social good and an economic good: “Integrated water resources management is based on the perception of water as an integral part of the ecosystem, a natural resource and a social and economic good, whose quantity and quality determine the nature of its utilization.”⁶⁵

The Indigenous Declaration on Water released at the Third World Water Forum held in Kyoto Japan in 2003 refers to water as sacred: “Our relationship with our lands, territories and water is the fundamental physical cultural and spiritual basis for our existence. This relationship to our Mother Earth requires us to conserve our freshwaters and oceans for the survival of present and future generations.” The Declaration further notes that water is being treated as a commodity and a property interest that can be bought, sold and traded in the global market. Through the right of self-determination, the Declaration notes, the indigenous peoples have the right to freely exercise full authority and control of natural resources including water. The Declaration warns that Indigenous Peoples will not accept any agreements on water privatization and liberalization and would fight against such agreements or proposals.

Similarly, the Abuja Ministerial Declaration on Water adopted in 2002,⁶⁶ notes that the need for adequate supplies of freshwater will remain a major national, regional and international priority in the years to come: “An adequate supply of freshwater is the most important prerequisite for sustaining human life, for maintaining ecosystems that support all life, and for achieving sustainable development.”⁶⁷

⁶⁰ 1954 UNTS 3, entered into force on 12/26/1996.

⁶¹ Article 4, General Obligations.

⁶² Preamble, UN Convention on Desertification.

⁶³ Agenda 21, Chapter 18, Principle 2, Stockholm Declaration.

⁶⁴ Chapter 18, Agenda 21.

⁶⁵ Agenda 21, p 167.

⁶⁶ The Abuja Declaration on Water: A Key to Sustainable Development in Africa, Abuja, Nigeria, April 2002.

⁶⁷ *Ibid.* The Declaration further notes that almost half the people of the African continent, particularly women and children suffer from water-related diseases. The economic and humanitarian implications of this need no emphasis.

Progressive realization of the human right to water

The right to water, like other ESC rights, is subject to progressive realization. However, several obligations toward achieving the full realization are of immediate effect: the guarantee that the right will be exercised without discrimination [Article 2(2)] as well as the obligation to take steps toward full realization of the rights in the Covenant. General Comment No 3 of the CESCR deals with the nature of State obligations and stresses that the undertaking in Article 2(1) “to take steps” is not qualified or limited:

“Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.”⁶⁸

The General Comment notes that Article 2 requires parties to take all appropriate means, including the adoption of legislative measures to give effect to the obligations under the Covenant. It stresses that “all appropriate means” must be given its full and natural meaning. Each state party must decide the means most appropriate with respect to each right and indicate in their reports not only the measures that have been taken, but also the basis on which they were considered appropriate. Measures that may be considered appropriate would include administrative, financial, educational and social measures, in addition to legislative measures.

The Comment further noted that the term progressive realization is used to describe the intent of Article 2. It “constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. It is on the one hand a necessary flexibility device and on the other, it must be read in the light of its overall objective of the Covenant which is to establish clear obligations for the full realization of the rights in question. “It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.”⁶⁹ Article 2(1) obligates states to take necessary steps “to the maximum of its available resources.” States must demonstrate that every effort was made to use all resources that are at its disposition to satisfy the minimum obligations in the Covenant. Even where available resources are totally inadequate, States must strive to ensure the widest possible enjoyment of the rights under the prevailing circumstances. This provision indicates that even with limited resources, states must strive to ensure the enjoyment of rights recognized in the Covenant.

General Comment No 1 which deals with Reporting by State Parties is also relevant here. It points out that “the Covenant attaches particular importance to the concept of “progressive realization” of the relevant rights and, for that reason, the Committee urges States parties to include in their periodic reports information which shows the progress over time, with respect to the effective realization of the relevant rights.”⁷⁰ Both qualitative and quantitative data are required to make an adequate assessment of the situation.

Case Studies

Two case studies have been identified for discussion here: the recent water policy in Quebec and the privatization of water supply service in Cochabamba in Bolivia. These two case studies have been

⁶⁸ Paragraph 2.

⁶⁹ General Comment 3, paragraph 9.

⁷⁰ General Comment No 1, Reporting by State Parties, paragraph 7 (1989).

selected in order to highlight two diametrically different approaches that have been taken with regard to the management of water resources.

*New Water policy in Quebec*⁷¹

In the Fall of 2002, the Quebec Government implemented its Water Policy with the following objectives: ensuring the protection of this unique resource; managing water with a view to sustainable development; and better protecting public health and ecosystems. It also affirmed that water is an integral part of the Quebecers' collective heritage. Both surface and groundwater is recognized in the Civil Code of Quebec as being common to all, subject to rights of use or limited appropriation rights. "This "common to all" status implies that all members of society have the right to access water and use it in a manner consistent with its nature, and that the government has a responsibility to regulate water use, establish priority uses and preserve its quality and quantity, while taking the public interest into account."⁷²

Similar to the approach taken by the Supreme Court of Sri Lanka when it advocated the principle of shared responsibility,⁷³ the Government of Quebec urges its citizens to become more involved in the management of this vital collective heritage and to play a larger role in water management.

The policy also highlights the importance of water governance reform in order to achieve the objectives identified in the Policy. It notes that it is necessary to develop and enunciate a shared, comprehensive vision of water resources. It further highlights the need for increased participation by different users as well as accountability of water management players. In order to achieve this, the Policy identifies five courses of action:

- Revision of the legal framework pertaining to water;
- Implementation of watershed-based management;
- Acquisition of knowledge and information about water;
- Introduction of economic instruments for governance; and
- The strengthening of Quebec's partnerships and relations.

The Policy notes the need to revise the legal framework in order to implement the Policy, particularly to ensure that water is recognized as a collective heritage. It also seeks to establish mechanisms to implement the user pays and polluter pays principle as well as economic mechanisms (charges, taxes, permits etc) to support them. It stresses the importance of participating in international instruments in the area of water. While not advocating the privatization of water resources and supply per se, the Policy does seek to establish a framework for the delegation of *management functions* to the private sector. This seems to indicate that at least with regard to management aspects of water the private sector will play a significant role. If done with proper oversight by the Government, this should not be a cause for alarm. While the Policy is not very clear on how this will be done, the question arises whether this would be against the declared policy of the Government of Quebec that "water is an integral part of the Quebecers' collective heritage." Careful thought should be given as to how the government would get the private sector involved in the management of water.

⁷¹ This section draws from the information available at <http://www.menv.gouv.qc.ca/cau/politique/index-en.htm>, visited on 4/8/2004.

⁷² Ibid.

⁷³ Supra note 20.

The Preamble to the Act to Establish the Fonds National De L'Eau recognizes that water resources are essential to the environmental, economic and social well-being of Quebec and that "water resources, both surface water and groundwater, constitute a common heritage which is important to conserve to meet the needs of present and future generations.⁷⁴ It establishes a fund which "shall be dedicated to the financing of measures taken by the Minister of the Environment to ensure water governance and in particular, to the financing of measures conducive to the protection and development of water resources and to ensuring a sufficient quality and quantity of water in a perspective of sustainable development."⁷⁵

*Privatization of water in Cochabamba, Bolivia*⁷⁶

In stark contrast to the discussion on the reform of the water sector in Quebec which identified water as the collective heritage of the people of Quebec, one finds the privatization of water resources in Bolivia a story of violence and further marginalization of the poor.

Privatization was a key component of the Sanchez administration's (1993-97) economic policy. The World Bank and the IMF pushed the Bolivian government to sell many of its public enterprises to international investors in order to increase economic efficiency. Succumbing to pressure, the Bolivian government privatized the Cochabamba's – Bolivia's third largest city - water system in 1999.

Protests broke out in February and March 2000 when the price of water skyrocketed by 200-300% in many cases, just weeks after the city's water system was privatized. Protests led to violence and even death at the hands of the police and the military. Protests spread from Cochabamba to other parts of Bolivia with 50 people detained, dozens injured and six people dead. In April the President imposed martial law and a state of emergency severely curtailed people's civil rights. A teenage protestor was shot and killed by the police. Freedoms of association and of the press were also severely restricted. Finally, on April 10, the President announced the termination of the water contract with the private company and turned over the control of the city's water system to the protestors' organization – Coalition for the Defense of Water and Life. The company is now suing the Government for \$ 25 million in compensation.⁷⁷

This story, unfortunately, is not unique to Bolivia. Many countries have had similar experiences. India, South Africa, Ghana, Mozambique Philippines to name but a few of them, have faced parallel situations. These countries have experienced higher tariffs which people can ill afford. They have also experienced rises in water-borne diseases as people resort to unhealthy practices. In South Africa, for example, in late 2000 a cholera epidemic claimed several lives and infected at least 100,000 people because people were forced to drink untreated water as they could not afford pipe borne water. Since the implementation of the project to privatize water, access to water by poor communities depends on affordability - no money, no water. As a result many people have been cut off and denied access to water.

⁷⁴ Act to Establish the Fonds National De L'Eau, RSQ c. F-4.002, Preamble (2003).

⁷⁵ Ibid, s 1.

⁷⁶ This section draws from "Water Privatization Case Study: Cochabamba, Bolivia, Public Citizen, at www.citizen.org/cmep, visited in October 2002.

⁷⁷ "Bolivia: Cleaning Up the Bechtel Mess," *Defend the Global Commons*, Vol 1, No2 11(August 2002).

In recent times, even peaceful protests have been met with violence. In April 2002, when non-violent demonstrators marched to the Mayor's house protesting against evictions and cut-off of water and electricity due to unaffordability, the Mayor's bodyguard fired into the crowd, wounding two. The committee members were arrested; however, no action was taken against the bodyguard.

An independent network of community groups has been established in several Johannesburg townships as the Anti-Privatization Forum. Mass marches of workers and people are common as is the theft of water and electricity.⁷⁸ In addition, protests against privatization of water have been made in India, El Salvador, Zambia, Brazil, the Philippines and Costa Rica.⁷⁹

While privatization has definite benefits such as increased efficiency, it does pose considerable threats to poor communities. Increased prices is a major problem that these communities have to face. Lack of concern for environmental aspects, and lack of transparency and accountability are also major issues facing developing countries. Many argue that water being essential for human survival - as a social good - should not be placed at the hands of the private sector whose main concern is profit maximization. Others argue that being considered a "free good" has resulted in wasteful practices and the looming water crisis. Thus, they argue that water should be considered both a social good and an economic good.⁸⁰

In a study undertaken by the Pacific Institute, it is argued that privatization of water is not necessarily bad. However, certain safeguards have to be put in place to ensure that the process of privatization and its benefits actually trickle down to those who need it most - the poorer segments of society. They provide the following principles and standards for privatization of water supply systems and infrastructure:

1. Continue to manage water as a social good
 - (a) meet basic human needs for water;
 - (b) meet basic ecosystem needs for water
 - (c) basic water requirement for users should be provided at subsidized rates when necessary for reasons of poverty.
2. Use sound economics in water management
 - (a) water and water services should be provided at fair and reasonable rates;
 - (b) subsidies, if necessary, should be economically and socially sound
 - (c) private companies should show that new water supply projects are less expensive than projects to improve water conservation and efficiency
3. Maintain strong government regulation and oversight.
 - (a) Governments should retain or establish public ownership or control of water sources;
 - (b) Public agencies and water service providers should monitor water quality. Governments should define and enforce water quality laws
 - (c) Contracts should lay out the responsibilities of each partner
 - (d) Clear dispute resolution procedures should be developed prior to privatization
 - (e) Provide for independent technical assistance and contract review
 - (f) Negotiations over privatization contracts should be open, transparent, and include all affected stakeholders.⁸¹

These recommendations, however, presuppose that the government in question will be strong and that it will be in a position to exert pressure on the private sector. In many developing countries, this

⁷⁸ Defend the Global Commons, Vol 1, No 2, August 2002.

⁷⁹ *Id.*

⁸⁰ Peter Gleick, Gary Wolff, Elizabeth Chlecki & Rachel Reyes, "The New Economy of Water: The Risks and Benefits of Globalization and Privatization of Fresh Water," Pacific Institute (2002).

⁸¹ *Id.*

will remain unattainable. This is particularly challenging if private sector participants are multinational companies, and privatization was carried out with the assistance of the World Bank.

Another opponent of privatization argues for a rejection of economic globalization of water and calls for embracing a new water ethic by:

- Declaring that water belongs to the earth and all species and is sacred to all life on the planet.
- Declaring water as a basic human right;⁸²
- Declaring that water is a public trust to be guarded at all levels of government. "No one has the right to appropriate it at another's expense for profit. Water must not be privatized, commodified, traded, or exported for commercial gain."⁸³

Options for Future Legal Developments in the Field of Freshwater Management and Human Rights Law

As the above discussion revealed, two main trends can be identified with regard to water supply and management which seem mutually contradictory at least on the face of it. One trend is to regard water as a *res communes* or a collective heritage of people not subject to ownership rights except where law recognizes user rights and appropriation rights. This category recognizes the main responsibility of governments in ensuring equal access to water irrespective of the socio-economic conditions of people. It also highlights the responsibility of all peoples in protecting the water resources and adopting wise management strategies. The principles of public trust and shared responsibility as well as sustainable development play an important role here.

In stark contrast, the other trend highlights the need to privatize water resources and management. The World Bank has actively sought the increased participation of the private sector in the management of water in an effort to increase efficiency and minimize waste. Unfortunately, privatization efforts have led to higher tariffs in many parts of the world which has impacted adversely on the poor. If water is a *res communes* and a common heritage of people, is it correct to privatize this resource which is vital for human survival?

While being commendable, the recognition of water as a human right does not solve the main problem faced by many developing countries: lack of resources to ensure equal access to water, exacerbated by scarcity of water. It is primarily for this reason that governments have increasingly turned to the private sector. While General Comment No 15 does not explicitly prohibit privatization of water, privatization seems to be against the recognition of a human right to water in at least one respect. It discriminates against poor people as they cannot afford the higher tariffs which are invariably associated with privatization, thus, breaching the principles of equality and equal access as well as affordability.

However, privatization of management and supply of water and recognition of water as a human right does not have to be mutually exclusive or contradictory. While the recognition of water as a human right does accord states with specific obligations with regard to its implementation, there is nothing to stop States from involving the private sector in giving effects to its obligations. However, States must ensure that right to water is guaranteed on the basis of non-discrimination and must prevent third parties from interfering with this right.⁸⁴

⁸² As discussed, this has already been done.

⁸³ Maude Barlow, "Water as a Commodity - The Wrong Prescription," *Backgrounder*, <http://www.foodfirst.org/pubs/backgrdrs/2001/s01v7n3.html>, visited on 10/2/02.

⁸⁴ "Issue Focus: The Human Right to Water," *ESCR in Focus*, Volume 2, Issue 1, February 2003.

So what are the options for the future? Since water is now part of international human rights law, States have an obligation to progressively realize this right. They will have to ensure that this right is recognized in national legislation as a fundamental right and that it is afforded on the basis of equality and without discrimination. They must also ensure that redress, including legal redress is available at the national level in the event that this right is not available to people. If states resort to the option of privatization, they must ensure that this does not result in unequal access to water and the marginalization of the poor. States also have the obligation to ensure access to information and the participation of all stakeholders in the decision making process.⁸⁵ This means that privatization should not be a closed process; rather all potentially affected parties should be involved in the decision making process. As has been pointed out, public participation and transparency are essential if sustainable development is to be achieved.⁸⁶

⁸⁵ The right to information and the right to participate in the decision-making process are part of international human rights law which are now considered to be also applicable in relation to environmental issues. These rights were incorporated in an international environmental convention, albeit a regional one, in 1998 in the Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters, www.unece.org. This Convention is considered to have broken new ground in international environmental law and has integrated environmental norms with governance norms and given rise to environmental democracy. See, Elena Petkova & Peter Veit, *Environmental Accountability Beyond the Nation-State: The Implications of the Aarhus Convention*, WRI, <http://www.wri.org/governance/publications.html>, visited on 5/8/02, and Marie-Claire Cordonier Segger & Ashfaq Khalfan, SUSTAINABLE DEVELOPMENT LAW: PRINCIPLES, PRACTICES & PROSPECTS (2004).

⁸⁶ Supreme Court of Sri Lanka in *Gunaratne v. Homagama Pradeshiya Sabha*, 5 S. Asian Env'tl L. Rep. 151 (1994).