

# GOVERNING THE RIGHT TO WATER

MATTHEW P. MOSCHELL\*

I.	INTRODUCTION .....	199
II.	WHAT IS WATER GOVERNANCE? .....	201
	A. <i>The Stakeholders</i> .....	203
	1. Governments .....	204
	2. Private Actors .....	205
	3. Civil Society .....	206
	B. <i>Water Crisis</i> .....	208
III.	IS THERE A HUMAN RIGHT TO WATER? .....	209
	A. <i>Domestic Law</i> .....	210
	B. <i>International Agreements</i> .....	213
	C. <i>Customary International Law</i> .....	216
IV.	GETTING IT RIGHT .....	218
	A. <i>Water as a Human Right</i> .....	218
	B. <i>Defining the Parameters</i> .....	220
	C. <i>Pluralistic Partnership</i> .....	222
V.	CONCLUSION .....	223

## I. INTRODUCTION

“[W]ithout water, other human rights become meaningless.”<sup>1</sup> Water is arguably the most important resource in the world, as evidenced by humankind’s enormous water footprint. For instance, the average person living in the United States uses eighty to one hundred gallons of water per day.<sup>2</sup> The World Health Organization estimates the average person needs fifty to one-hundred liters of water per day to ensure that most basic needs are met.<sup>3</sup> However, despite water covering over seventy percent of the Earth’s surface, only three percent of that water is fresh, and less than half of a

---

\* Attorney specializing in international law.

1. Stephen C. McCaffrey, *The Human Right to Water*, in FRESH WATER AND INTERNATIONAL ECONOMIC LAW 94, 95 (Edith Brown Weiss et al. eds., 2005).

2. U.S. GEOLOGICAL SURVEY, Water Q&A: How Much Water Do I Use at Home Each Day?, (last visited Dec. 2016), <https://water.usgs.gov/edu/qa-home-percapita.html> [hereinafter U.S. Geological Survey].

3. U.N. Office of the High Commissioner for Human Rights, *The Right to Water: Fact Sheet No. 35*, 1, 8 (Aug. 2010), [hereinafter UN Fact Sheet].

percent is available to humans.<sup>4</sup> Water is a finite resource, and by 2025 two-thirds of the world's population is expected to face water scarcity.<sup>5</sup>

Since the beginning of human civilization, water has governed our development. Humans have settled close to it, moved when there was too little of it, and even fought others to keep it. As such, good governance is integral to the collection, sanitation, and distribution of water. While governance is typically thought of as being exclusive to the state, a more inclusive approach, including private actors and individual citizens, is likely better equipped to address water governing issues. Those affected by water governance schemes range from nongovernmental organizations to international bodies, small businesses to transnational corporations, and local governments to individual citizens. No matter how small or large, everyone is a beneficiary of the effective governance of Earth's most precious resource.

All stakeholders should bear the responsibility of providing effective water governance. The United Nations Committee on Economic, Social, and Cultural Rights compels the respect, protection, and fulfillment of the right to water.<sup>6</sup> Under a more stakeholder-inclusive approach to water governance, these obligations should not be thought of as only applying to nations but to all stakeholders, such as governments, private actors, and civil society. A stakeholder-inclusive approach would likely cure the lack of engagement afflicting many water governing structures.<sup>7</sup> After all, it is society as a whole that will bear the burden of water insecurity caused by any disconnection among stakeholders.<sup>8</sup> Solving one of society's most pressing issues requires us to radically reconsider the importance of Earth's most precious resource.

Water's universal importance requires that it be considered a human right, such that all may enjoy it. The United Nations and World Health Organization (WHO) have begun to recognize water

---

4. WATER FACTS – WORLDWIDE SUPPLY, BUREAU OF RECLAMATION (last updated Apr. 10, 2017), <https://www.usbr.gov/mp/arwec/water-facts-ww-water-sup.html>.

5. United Nations Department of Economic and Social Affairs, WATER SCARCITY (last updated Nov. 24, 2018), <http://www.un.org/waterforlifedecade/scarcity.shtml>.

6. See generally Office of the High Comm'r for Human Rights, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, E/C.12/2002/11 (Jan. 20, 2003) [hereinafter UN Comment No. 15].

7. Peter Rogers & Alan Hall, *Effective Water Governance*, GLOBAL WATER PARTNERSHIP 36–37 (2002), <http://citeseerx.ist.psu.edu/viewdoc/download?sessionid=6FE034EGF447D73B00C8BC7DB4749F91?doi=10.1.1.130.2714&rep=rep1&type=pdf> (noting dysfunction due to lack of engagement in the water governing schemes of Chile, Mexico, and Western Europe).

8. UN Fact Sheet, *supra* note 3, at 17, 18.

as a human right.<sup>9</sup> The unanimous realization of this right has the potential to curb the exploitation and pollution of water by any stakeholder. This realization will also necessitate that stakeholders innovate and experiment on varying forms of water governance, tailored to satisfy the basic water needs of individual societies. Most importantly, this realization will require that all stakeholders, including the individual, have influence in the creation and maintenance of effective water governing schemes. Access to clean water has not officially been recognized as a self-standing human right in broadly accepted international treaties. However, the recognition of several other rights coupled with emerging legal norms, form the penumbra of the human right to water.

I propose that recognizing a human right to water under customary international law will cure the dysfunctions associated with current water governance schemes and ultimately assist in solving the world's water crisis. In Part I, this Comment will examine the premise of water governance and the actors involved. It will look at challenges associated with water governance, such as dwindling water resources, nefarious actors, and the need for better governing schemes. In Part II, this Comment will study the legal support behind considering water as a human right. This Part explores the current failures of the international community to provide a right to water juxtaposed against the legal norms that support such a finding. Finally, Part III will draw conclusions on what finding water as a human right will mean to current water governance structures. It will also attempt to define reasonable parameters to be applied to all governing stakeholders.

## II. WHAT IS WATER GOVERNANCE?

Water governance encompasses a range of political, social, economic, and administrative systems that are specifically in place to manage and deliver water throughout society.<sup>10</sup> While governance, let alone water governance, has no agreed upon definition there are common features that help shape our current

---

9. UN Comment No. 15, *supra* note 6; G.A. Res. 64/292, at 2 (July 28, 2010) [hereinafter UNGA Res. 64/292]; see also Håkan Tropp, *Water Governance: Trends and Needs for New Capacity Development*, 9 WATER POLICY 19, 21–23 (2007).

10. See generally *Effective Water Governance: Action through Partnership in Central Eastern Europe*, GLOBAL WATER PARTNERSHIP, [https://www.gwp.org/globalassets/global/gwp-cee\\_files/regional/governance-2003.pdf](https://www.gwp.org/globalassets/global/gwp-cee_files/regional/governance-2003.pdf).

perspective.<sup>11</sup> In general, water governing structures are judged based on their transparency, accountability, and inclusive decision making.<sup>12</sup>

Through centuries of practice at the domestic and international level the rough edges of *effective* water governance have begun to take shape.<sup>13</sup> To illustrate this point it is important to briefly look at the different forms of water governance that have occurred throughout human history. Seven thousand years ago, Egyptians constructed irrigation systems along the Nile, Euphrates, Indus, and Yellow rivers in an effort to manage flood plains.<sup>14</sup> At the same time, and in the Cradle of Civilization, ancient Mesopotamians were constructing reservoirs to ensure a sufficient water supply in times of drought.<sup>15</sup> Six thousand years ago, early settlers to China began to use dams and dikes to facilitate farming.<sup>16</sup> Four thousand years ago, natives to India developed distillation methods to improve water quality.<sup>17</sup> The development and adoption of these water management methods were largely supported by governments, merchants, farmers, and citizens—the stakeholders of the day.<sup>18</sup>

Today, water governors must navigate through allocative and regulatory politics which are normally prerequisites for the management of water.<sup>19</sup> Moreover, the goals of each water governor may be different from the next. For instance, a private water utility company may feel restrained by regulations, while at the same time, a government may be pressured to maintain regulations by civil society. Invariably, the distinct set of actors involved in the water governing process will have diverse and often contradictory understandings of governance.<sup>20</sup> These diverse sets of ideas are only exacerbated by the ranging ensemble of water governing structures throughout the world. From state to state or city to municipality, water governing structures can, and often,

11. Asit K. Biswas & Cecilia Tortajada, *Future Water Governance: Problems and Perspectives*, 26 INTERNATIONAL JOURNAL OF WATER RESOURCES DEVELOPMENT 129, 132 (June 2010).

12. *Id.* at 132.

13. Cecilia Tortajada, *Water Governance: Some Critical Issues*, INT'L J. OF WATER RESOURCES DEV. 297, 307 (2010) (positing that the definition of water governance is made up by varying international governments and organizations, and domestic policy).

14. Fekri Hassan, *Water History of Our Times*, 2 UNITED NATIONS EDUC., SCI. & CULTURAL ORG. 22, 25 (2011).

16. *Id.* at 28.

16. *Id.* at 28.

17. *Id.* at 39.

18. *Id.* at 39–40.

19. Rogers & Hall, *supra* note 7, at 7.

20. Jose E. Castro, *Water Governance in the Twenty-First Century*, 10 AMBIENT & SOCIEDADE 97, 98–99 (July 2007).

differ.<sup>21</sup> Ideally, meaningful participation by each actor will give rise to a particularized governing structure for each community based on the community's specific needs.<sup>22</sup>

The ultimate goal of water governors is to provide a sufficient amount of safe and potable water throughout society. While this goal may seem simple, water governors must make determinations on who and for what purpose to allocate water.<sup>23</sup> In times of water scarcity this often requires water governors to make trade-offs on the allocation of benefits and the cost to others.<sup>24</sup> The inclusion of all stakeholders becomes even more crucial when water governors are required to make these trade-offs.<sup>25</sup> Under a stakeholder-inclusive approach, water governors will be able to rely on information provided by stakeholders in order to take appropriate action, and potentially less harmful action, when trade-offs are necessary. If the ideal governing structure requires that all stakeholders work together to achieve a common goal, the question becomes, what is the impetus that can necessitate meaningful participation?

### A. The Stakeholders

Water governance, when done effectively, has the distinct ability to touch and concern all areas of society. For the purposes of this article, stakeholders may be considered as those who are associated with the benefits and responsibilities of water governance. Broadly, this translates into three distinct categories: government, private actors, and civil society

Despite their ubiquitous involvement in the water governing process, governments are considered only the second-largest stakeholder.<sup>26</sup> Under the common hierarchical approach, governments generally set policy concerning water at both the domestic and international levels.<sup>27</sup> Thus, in general, governments bear some benefit and/or responsibility at nearly all levels of the water governance process. Private actors, such as Thames Water and Zephyrhills, are the smallest stakeholders, providing less than ten percent of the world's water.<sup>28</sup> However, in recent years

---

21. *Id.* at 102–103; Biswas & Tortajada, *supra* note 11, at 137.

22. Castro, *supra* note 20, at 104.

23. *See generally* Tropp, *supra* note 9, at 20–21.

24. *Id.* at 20.

25. *Id.* at 21.

26. Rogers & Hall, *supra* note 7, at 32.

27. *Id.* at 11.

28. Tropp, *supra* note 9, at 27.

scholars have called for governments to pursue a more *laissez-faire* approach so that private actors may help solve the social and environmental problems associated with water governance.<sup>29</sup> Finally, civil society, consisting of individual citizens and groups, is by far the largest stakeholder. Every human requires water on a daily basis to meet their most basic needs, yet most either lack interest in water governance,<sup>30</sup> or are not given an opportunity to have their voice heard.<sup>31</sup> However, no matter the size of the stakeholder, each has a crucial part to play in the development and execution of effective water governance.

### 1. Governments

Governments play an integral role in the regulation, enforcement, and infrastructural development of water policy. Globally, over ninety percent of domestic water and wastewater services are provided by governments.<sup>32</sup> Through its regulatory authority, traditional governments are tasked with administering laws on how the collection, sanitation, and facilitation of water is to be accomplished. These regulations occur at all levels of government in an effort to refine the best policy for each individual community. Government is also tasked with enforcing water policy and punishing those who defy regulations. Particularly, the government plays a very big role in enforcing property rights to water, and without this enforcement mechanism, it is likely that this set of rights may never have advanced beyond behavior backed by force.<sup>33</sup> Additionally, governments have the responsibility to invest in infrastructure to ensure that the preservation, sanitation, and distribution of water is accomplished.

However, the problem with many governing bodies is that their political economy causes them to be too inconsistent with efforts to improve water regulation, increase enforcement, and expand infrastructure. The political process plays a large role in the election or appointment of the many officials responsible for water regulation, which in turn may cause actions or inaction to be driven by short-term politics.<sup>34</sup> Further, these officials largely

---

29. Rogers & Hall, *supra* note 7, at 12.

30. Castro, *supra* note 20, at 104.

31. See UN Fact Sheet, *supra* note 3, at 17, 19 (illustrating examples of those in rural and impoverished communities having limited access to clean water with little opportunity for remedy or resource).

32. Rogers & Hall, *supra* note 7, at 32.

33. *Id.* at 18.

34. *Id.* at 8.

make unilateral decisions without relevant evidence or requisite experience.<sup>35</sup> Take for instance Mexico, whose water officials are politically appointed and likely to remain in their positions for only eighteen months, or India, whose water officials will probably have a tenure less than three years, or the United States, where many water officials are politically appointed and removed each election cycle.<sup>36</sup> Long-time employees of government agencies and commissions are also not immune from short-term politics, as many serve at the pleasure of a political office. It is unrealistic to expect that this revolving door policy will foster stability and substantiality.

## 2. Private Actors

Innovators, private utilities, corporations, and many more entities contribute to the vast network of private actors involved with water governance.<sup>37</sup> Starting in the 1990s there was a global initiative to privatize water, a resource that was generally under exclusive governmental control.<sup>38</sup> At the time, many claimed that privatization would improve water services in impoverished communities and expand services to those deprived of it.<sup>39</sup> While private enterprises have attempted to take over responsibility from many poorly funded public utilities, its success has been sporadic.<sup>40</sup> Currently, many private water suppliers are withdrawing services from developing countries where they have failed to turn a profit.<sup>41</sup> Part of the reason why private enterprises are unable to profit is due to the lack of regulation and enforcement mechanisms provided by governments; this in turn may cause consumer resistance to private enterprise, in light of political strife regarding the abdication of a historical government function.<sup>42</sup> Ultimately, private enterprises are required to walk a tight rope between a profit-driven mentality and the public's resistance to rate hikes.

---

35. Biswas & Tortajada, *supra* note 13, at 136–137.

36. *Id.* at 136–137 (arguing that in order to improve water governance officials must have experience in urban water systems, a tenure of at least six years, and appropriate checks on their performance).

37. UN Fact Sheet, *supra* note 3, at 28, 32.

38. Tropp, *supra* note 9, at 27.

39. *Id.*

40. *Id.* (citing to withdrawals by Saur Group, Suez Water, Veolia Water, and Thames Water from developing countries); Rogers & Hall, *supra* note 7, at 31–32.

41. *Id.*

42. *Id.*

This has caused many in private enterprise to withdraw from the water supply business in lesser developed countries and only focus on less risky markets in developed countries.<sup>43</sup>

However, even in developed countries, the privatization of water has raised concerns.<sup>44</sup> Most of these concerns are ideological,<sup>45</sup> however, some are practical. In the United States (U.S.), the affordability of basic water services provided by private enterprise is a major concern, especially for low-income communities.<sup>46</sup> This is due to deficiencies in regulating rate floors and ceilings, and degrading water infrastructure.<sup>47</sup> It is evident that governments must be more effective in facilitating the role of private actors.

The water sector has traditionally been driven by innovation and development of infrastructure, and this is particularly true for private actors. Private actors should not unilaterally control water resources, but they can be vested with the responsibility to maintain and develop them.<sup>48</sup> Private actors can also collectively come up with ideas on the best water governing practices. In this regard, private actors remain cognizant of the associated human rights issues as many businesses have developed policies on the matter.<sup>49</sup> Under a more pluralistic approach to water governance, there is a place for the private actor to be the innovator and developer so desperately needed.

### 3. Civil Society

Civil society can be thought of as the “third sector” of this equation; it is distinct from government and business, but encompasses both of them, along with the private citizen.<sup>50</sup> Civil society may be thought of as the overlap between the state, market, and individual citizen within society.<sup>51</sup> For our purposes, civil society will represent the individual person, independent from

---

43. *Id.*

44. Rogers & Hall, *supra* note 7, at 31–32.

45. WORLD BUSINESS COUNCIL FOR SUSTAINABLE DEVELOPMENT, WATER FOR THE POOR (2002), <https://docs.wbcsd.org/2002/08/WaterForThePoor.pdf> (noting that private enterprises should not be allowed to own or control fresh water supplies, but only facilitate with its management).

46. Tamar Meshel, *Environmental Justice in The United States: The Human Right to Water*, 8 WASH. J. ENVTL. L. & POL'Y 264, 271 (2018).

47. *Id.* at 270–271.

48. Rogers & Hall, *supra* note 7, at 31–32.

49. UN Fact Sheet, *supra* note 3, at 32.

50. Michael Edwards, CIVIL SOCIETY 2 (3rd ed. 2014).

51. *Id.* at 2–3 (noting that there may be different definitions of civil society which should be assessed on the merits of the particular context in which it is being discussed).

his or her state or market obligations. Under this definition, civil society can still be thought of as the largest stakeholder and the main beneficiary of water. Paradoxically, the disturbing reality is that civil society is the stakeholder with the least known voice, and garners only nominal benefit relative to its size.

In 2017, the WHO estimated that 844 million people lacked access to basic drinking water services.<sup>52</sup> Globally, at least two billion people use a drinking water source contaminated with feces, ultimately accounting for an average of 500,000 deaths per year.<sup>53</sup> By 2025, half the world's population will be living in a water-scarce area, and lack access to basic drinking water services.<sup>54</sup> On the other hand, the U.S. bottled water industry had a revenue of \$16 billion in 2016.<sup>55</sup> And since 2010, the average U.S. household has experienced a sixty-three percent rate height in their water utilities.<sup>56</sup> These facts enforce the notion that government and private business have an unfair advantage when it comes to governing water resources.

The benefits of water governance should be for the majority and not for those currently holding the most influence over its operation. Generally, civil society is the largest stakeholder in any water governing scheme but holds the least clout.<sup>57</sup> This is in part caused by the lack of representation of civil society's interests. Thus, under our definition of civil society, advocacy groups and nongovernmental organizations (NGOs) bear a burden to represent the collective interests of the individual person and family. Where elected officials and fiduciaries fail to represent the interests of civil society, advocacy groups have stepped in to be a collective voice for progress. For instance, NGOs have been crucial in the creation and distribution of frameworks for better water governance and advocating for greater benefits to civil society.<sup>58</sup>

---

52. World Health Organization [WHO], *Drinking-water* (Feb. 7, 2018), <https://www.who.int/news-room/fact-sheets/detail/drinking-water> (defined basic drinking water service as "an improved drinking-water source within a round trip of 30 minutes to collect water).

53. *Id.*

54. *Id.*

55. *Bottled Water Market*, International Bottled Water Association, <https://www.bottledwater.org/economics/bottled-water-market>.

56. Brett Walton, *Price of Water 2018: Utilities Revise Household Water Rate Formulas*, CIRCLE OF BLUE (May 30, 2018), <https://www.circleofblue.org/2018/watermanagement/pricing/price-of-water-2018/> (rate increase was measured across the 30 largest metropolitan cities in the US).

57. See Tropp, *supra* note 9, at 25.

58. UN Fact Sheet, *supra* note 3, at 30–31.

Despite zealous advocacy on the behalf of civil society, a very large number of water governing structures fail to provide any benefit.<sup>59</sup>

### B. Water Crisis

Any water crisis is often precipitated by a crisis in governance.<sup>60</sup> During the past two decades, the world's "water crisis" has gained notoriety throughout popular media, as some leading public figures have gone so far as to claim that in the near future wars will be fought over water.<sup>61</sup> While it may be important to address the problem of water insecurity, based on all reliable data, the root of that problem is only partially due to water scarcity.<sup>62</sup> Water scarcity, seen in both developed and developing countries, can largely be attributed to poor governing structures.<sup>63</sup> For instance, it is widely accepted that agriculture accounts for roughly seventy percent of all water use, yet only few countries have realistic distribution and pricing policies.<sup>64</sup> In recent years, domestic and international energy systems have invested heavily and made great strides to ameliorate the distribution of resources; the same can, and should, be done to solve our water problems.

The international community has recognized the disarray associated with water resources and has attempted to lay the groundwork for effective governing strategies. At the 2000 World Water Forum in The Hague, ministers and participants echoed each other's sentiments: that water is everyone's business.<sup>65</sup> The Forum advocated that water resources not be monopolized by any one stakeholder, but rather treated as common property.<sup>66</sup> The United Nations (U.N.) Millennium Assembly emphasized that the only way to prevent a water resource crisis is to develop governance strategies at the regional, national, and local levels.<sup>67</sup>

---

59. *Id.* at 17, 25 (reviewing the effects of poor water distribution to the indigent, women, children, immigrants, and indigenous people).

60. Frank R. Rijsberman et. al., *Summary report of the 2nd World Water Forum: from vision to action*, WATER POLICY 387, 389 (2000).

61. Biswas & Tortajada, *supra* note 13, at 131 (citing statements of two Secretary Generals to the United Nations: Boutros Ghali and Kofi Annan).

62. *See generally id.* at 131.

63. *Id.* at 131.

64. *Id.*

65. Rijsberman, *supra* note 60, at 390–91; *see also Public Private Partnership in Infrastructure*, World Bank (2006) (the World Bank postulated that a "tri-partnership" between government, private business, and civil society may produce the ideal water governance structure).

66. Rijsberman, *supra* note 60, at 390–91.

67. Rogers & Hall, *supra* note 7, at 16.

In 2001, the Bonn International Conference on Fresh Water recommended that each country should have applicable arrangements for water governance at all levels, but at a minimum provide each individual with at least fifty liters of clean water per day.<sup>68</sup> In other words, it is preferable for governing schemes to be designed specifically for an applicable area. And the fragmentation of governing structures from area to area is irrelevant to maintaining adequate supplies and promoting equitable access. The ultimate issue is the ability for water governing structures to meaningfully engage all stakeholders, particularly civil society. Current ideas on water governance are missing an essential piece, one that would mandate all stakeholders be given a voice so that the benefits of water may be enjoyed equally.

### III. IS THERE A HUMAN RIGHT TO WATER?

Water is the essence of life, and yet two-and-a-half billion people lack access to safe water.<sup>69</sup> The right to life is one of the most basic human rights codified under law.<sup>70</sup> Water, being an essential element to human life, is thought by some to be implicitly included in that right.<sup>71</sup> However, the human right to water has not been explicitly recognized by a self-standing international treaty.<sup>72</sup> It is commonplace to recognize the life-sustaining quality of water, but merely recognizing this attribute does not establish it as a separate human right.<sup>73</sup>

However, in both domestic and international law, legal norms have emerged which suggest that there is a human right to water. Human rights fall under two classifications: (1) welfare rights, which assure the gift of certain services and goods that are essential to life, and (2) liberty rights, which include the right to life.<sup>74</sup> Welfare rights are considered positive rights because they

---

68. D. de Jong, *Report Bonn Freshwater Conference 3-7 December, 2001 for DGIS* § 7, at 12 (2001).

69. World Health Organization, *The Right to Water* (2003) [hereinafter WHO].

70. See G.A. Res. 217A (III), U.N. Doc. A/810, at 72 (Dec. 10, 1948).

71. See John Scanlon, et. al., *Water as a Human Right?*, INT'L UNION FOR CONSERVATION OF NATURE AND NAT. RES., ENV'TL POL'Y & L. PAPER NO. 51, 18-19 (2004) (arguing that the right to water while not specially enumerated is an implicit component of other rights); see also Salman & McNernery-Lankford, *THE HUMAN RIGHT TO WATER* 7-8 (2004) (explaining that the human right to water is necessary for the recognition of other rights).

72. UN Fact Sheet, *supra* note 3, at 3.

73. See Peter Gleick, *The Human Right to Water*, WATER POL'Y 487, 489 (1999) (recognizing that although the right to food has been recognized there is still famine).

74. McCaffrey, *supra* note 1, at 8.

require affirmative action by governments to provide such rights to their people.<sup>75</sup> On the other hand, liberty rights require governments to ensure noninterference with certain rights.<sup>76</sup> Generally, nations are bound by codifying a bill of rights or generally applicable law, ratification of an international treaty, or the crystallization of self-evident truths in customary international law (CIL).<sup>77</sup> In each of these areas of law, a positive human right to water has begun to take shape.

### A. Domestic Law

Laws defining water governance structures are ubiquitous in both developing and developed countries.<sup>78</sup> At a minimum, these structures come with certain regulations that must be honored by all stakeholders.<sup>79</sup> For instance, in the U.S. procedural due process affords individuals the right to have their water services not cut off without an opportunity to pursue remuneration or alternative services.<sup>80</sup> Further protections relating to water services were reinforced in 1974 when President Ford signed into law the Safe Drinking Water Act (SDWA). The foregoing authorizes the Environmental Protection Agency (EPA) to set national health standards for drinking water “to protect against both naturally occurring and man-made contaminants that may be found in drinking water.”<sup>81</sup> In 1974, SDWA represented a legal commitment of the US government to provide its citizens with safe drinking water.<sup>82</sup> That legal commitment was reaffirmed in 1996 when SDWA was reauthorized to require the affordability of non-public drinking water.<sup>83</sup> However, despite this affirmative legal commitment, roughly ten percent of Americans drink water that

---

75. Salman, *supra* note 71, at 24.

76. *Id.*

77. Amy Hardberger, *Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates*, 4 NW. J. INT'L HUM. RTS. 331, 334–35 (2005).

78. Rogers & Hall, *supra* note 7, at 14–16.

79. *Id.*

80. Martha F. Davis, *Let Justice Roll Down: A Case Study of the Legal Infrastructure for Water Equality and Affordability*, 23 GEO. J. POVERTY L. & POL'Y 355, 373 (2016).

81. US Env'tl. Prot. Agency, *Understanding the Safe Drinking Water Act 1* (2004), retrieved at <https://www.epa.gov/sites/production/files/2015-04/documents/epa816f04030.pdf>.

82. Richard Weinmeyer et. al., *The Safe Drinking Water Act of 1974 and Its Role in Providing Access to Safe Drinking Water in the United States*, 19 AMA J. ETHICS 1018, 1019–21 (2017).

83. Safe Drinking Water Act Amendments of 1996, Pub.L. No. 104-182 § 101(2), 110 Stat. 1613 (Aug. 6, 1996).

does not meet the standards under SDWA.<sup>84</sup> This may be due to the discretion given to individual states to supervise their public water supply, which as some scholars postulate, has allowed water protections to be non-existent or, at best, fragmented.<sup>85</sup>

However, some states have taken a different approach and recognized a right to water. Both Massachusetts and Pennsylvania have codified a constitutional right to water,<sup>86</sup> and New Jersey has contemplated doing the same.<sup>87</sup> In 2012, California codified The Human Right to Water Act which, as passed, required the state and its agencies to “*advance*” and consider the human right to water in its decision making.<sup>88</sup> Communities in New Hampshire and Maine have also passed ordinances enshrining a “right to water” for its residents and nature.<sup>89</sup> Although some of these laws lack an enforcement mechanism, they still guide state agencies and policymakers with guidance regarding the maintenance and equitable distribution of water.<sup>90</sup>

Furthermore, the Supreme Court of the United States has stated that water, and water utility services are both a “necessity of modern life.”<sup>91</sup> In *Memphis Light v. Craft*, the Court held that “the discontinuance of water or heating for even short periods of time may threaten health and safety.”<sup>92</sup> While the Court was mainly addressing petitioner’s due process rights, its dicta on the need for an uninterrupted supply of water underscores the proposition that there is a human right to water. *Craft*, taken in

---

84. Weinmeyer, *supra* note 82, at 1020–21 (water not meeting the standards under SDWA may include microbes, synthetic chemicals, organic pollutants, radioactive materials, etc.).

85. *Id.* at 1020, 1022 (positing that while 49 states have instituted water regulations in accordance with SDWA, *half* of the US’s drinking water comes from unregulated water supplies) (emphasis added).

86. MASS CONST. art. XCVII; PA. CONST. art. 1, § 27.

87. Michelle Brunetti, *Green Amendment bill advances in state Senate*, Press of Atlantic City (Oct. 15, 2018) retrieved at [https://www.pressofatlanticcity.com/news/press/new-jersey/green-amendment-bill-advances-in-state-senate/article\\_d3614a55-a767-5dda-a76c-a407e516b20b.html](https://www.pressofatlanticcity.com/news/press/new-jersey/green-amendment-bill-advances-in-state-senate/article_d3614a55-a767-5dda-a76c-a407e516b20b.html) (the amendment is expected to make it on the New Jersey ballot for general public approval in 2019).

88. Assemb. B. 685, 2011 Leg. (Cal. 2012) (the bill was later amended to require state agencies “to consider” rather than “to advance” the human right to water).

89. Barnstead, N.H., Barnstead Water Rights and Local Self-Government Ordinance (Mar. 18, 2006); Newfield, Me., Newfield Water Rights & Local Self-Government Ordinance (Mar. 14, 2009); Boston Water and Sewer Comm’n, *Residential Billing Info & Assistance* <https://www.bwsc.org/residential-customers/billing-info-and-assistance>. (last visited Oct. 12, 2019) (requiring that water services may not be terminated, for any reason, to a customer with a serious illness).

90. *Cf. Pa. Env’tl. Def. Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017) (the Pennsylvania Supreme Court has suggested that these water right amendments raise the required protections on water sanity and security).

91. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978).

92. *Id.*

conjunction with federal, state, and municipal law, suggests that at the very least the U.S. recognizes water's importance among society, and the interest of providing it safely and equitably throughout society.

Moreover, there is a trend in global jurisprudence to find and preserve a right to water. In 2006, South Africa codified a constitutional right to water, requiring the nation to "take reasonable legislative and other measures" to achieve realization of this right.<sup>93</sup> Shortly thereafter, a citizen of Johannesburg brought an action against the City, challenging whether six kiloliters per month of water to each household was sufficient to support her right.<sup>94</sup> The Supreme Court of South Africa held that the City's restrictive policies were a "material error of law" that infringed upon the citizen's constitutional right to water.<sup>95</sup> However, the Constitutional Court later overturned the Supreme Court's ruling, reasoning that it would be improper for a court to require immediate realization of the right, but notably, did not disagree with the lower court's reasoning.<sup>96</sup> *Mazibuko v. Johannesburg* embodies two general principles: where there is a constitutional right to water, it will be justiciable, and progressive realization of the human right to water is not only practical but also possible.<sup>97</sup>

An individual's fundamental right to life includes the right to enjoy access to clean water. In *Subhash Kumar v. State of Bihar*, the Supreme Court of India held that the right to life is fundamental under Article XI of India's Constitution, and includes the right to enjoy pollution-free water. In *Jorge Hernán. Gómez Ángel v. Alcalde Municipal de Versalles*, a Columbian court held that there is an implied right to safe and sufficient water under its recognition of the right to life, human dignity, health, and a healthy environment.<sup>98</sup> In *Matsipane Mosetlhanyane and Ors v. The Attorney General*, a Botswana court ruled that the government sealing off a water source violated its citizens' implied

---

93. S. AFR. CONST., 1996, ch. 2 ss. 27(1)(b), (2).

94. *Mazibuko v. Johannesburg*, 2010 (4) SA 1 (CC) (S. Afr.).

95. *Id.* at ¶ 28.

96. *Id.* at ¶ 61 (Court held that the South Africa may take steps to progressively realize the human right to water).

97. See UN Fact Sheet, *supra* note 3, at 40, 41; see also Emily Thor, *The Human Right to Water in the United States: Why So Dangerous?*, 26 GLOBAL BUS. & DEV. L. J. 315, 333-34 (Feb. 2013).

98. *Jorge Hernán Gómez Ángel v. Alcalde Municipal de Versalles – Valle del Cauca y el Gerente de la Empresa de Servicios Públicos de Versalles* (2003) C.C. T-410/03 (Colom.).

right to water.<sup>99</sup> At least nine nations have codified or implied a domestic constitutional right to water,<sup>100</sup> while numerous other nations have enacted statutes affirming a right to water.<sup>101</sup> In terms of domestic law, there is a large amount of evidence to suggest that many nations have already legally bound themselves to recognize water as a human right by either codifying a right to water, implicitly inferring the right, or setting up minimum standards to access clean water.

### B. *International Agreements*

“Everyone has the right to life, liberty and security of person.”<sup>102</sup> Human rights law began to take shape at the end of World War II with the creation of the United Nations (UN) and passage of the Universal Declaration on Human Rights (UDHR).<sup>103</sup> While classified as a declaration, the UDHR is widely considered an affirmative statement of CIL, establishing basic human rights for all people.<sup>104</sup> Most notably, Article XXV, states “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.”<sup>105</sup> In 1976, the U.N. General Assembly then adopted the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>106</sup> and the International Covenant on Civil and Political Rights (ICCPR),<sup>107</sup> yet neither of these documents made explicit mention of a right to water at the time of their ratification.

Nonetheless, the U.N. has paid particularly close attention to the water rights that women and children should be afforded

99. *Matsipane Mosetlhanyane and Ors v. The Attorney General*, [2011] Civil Appeal No. CACLB-074-10 (Bots.) (holding that its constitutional provision prohibiting inhumane treatment was infringed by denying the right to access water).

100. Constitution of the Republic of Ecuador 2008, Sept. 28, 2008, art. 3(1), Ch.2 § 1, 2, 7; The Constitution of the Republic of South Africa, May 8, 1996, Ch. 2 § 27; Constitution of the Republic of Uganda, 1995 Oct. 8, 1995, Objective XIV, XXI; The Uruguayan Constitution, Feb. 15, 1967 (with 1989, 1994, 1996, and 2004 amendments), art. 47; Constitution of the Democratic Republic of the Congo, Feb. 18, 2006, art. 48.

101. “National Water Resources Policy and the National Water Resources Management System,” 9.433, de Jan. 8, 1997, Diário Oficial [D.O.U.], § 1: 470, 8.1.1997 (Brazil); Water Resources Commission Act (Act No. 552/1996) (Ghana).

102. G.A. Res. 217A (III), *supra* note 70, at 72.

103. Hardberger, *supra* note 77, at 335, 336.

104. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 (1987).

105. UDHR, *supra* note 102, art. XXV.

106. *See generally* International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ECESCR].

107. *See generally* International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

under law. For instance, the first treaty to explicitly enumerate a right to water was the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) in 1979.<sup>108</sup> CEDAW requires that nations take appropriate measures to ensure adequate water for women.<sup>109</sup> Then in 1989, the U.N. adopted the Convention on the Rights of the Child (CRC).<sup>110</sup> In Article VI, the CRC requires that nations ensure to the “maximum extent possible” the survival of children by providing means of subsistence and sufficient health care.<sup>111</sup>

It wasn't until the 1990s that discussion on water as a human right began to rise to the forefront of international human rights law.<sup>112</sup> In 2002, the ICESCR adopted General Comment No. 15, which interpreted Articles XI and XII of the Covenant as encompassing:

The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water. 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 requirement.<sup>113</sup>

The Comment's reasoning is couched on the basis that Article XI's requirements of providing an adequate standard of living could not be adhered to without providing “the most fundamental conditions for survival,” water.<sup>114</sup> And that access to water is so closely related to health that such a right cannot be denied.<sup>115</sup>

In 2010, the U.N. General Assembly adopted for the first time a resolution recognizing clean sanitation and drinking water as a human right.<sup>116</sup> Subsequently, the U.N. Human Rights Council

108. G.A. Res. 34/180, at 6, Convention on the Elimination of All Forms of Discrimination against Women (Dec. 18, 1979); 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1979).

109. *Id.* at art. 14 (2)(h); Scanlon, *supra* note 71, at 5, 6 (noting that the right was specifically designated for women due to the large role they played in gathering water).

110. Convention on the Rights of the Child, G.A. Res. 44/25 annex, art. 24, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (1989).

111. *Id.* at art 6; Hardberger, *supra* note 77, at 347 (suggesting that art. 6 of the CRC creates an affirmative duty on nations to provide the means to ensure the survival of children, i.e. water).

112. Stephen C. McCaffrey, *The Human Right to Water: A False Promise?*, 47 THE U. OF THE PAC. L. R. 221, 226 (2016) [hereinafter A False Promise].

113. UN Comment No. 15, *supra* note 9, at 2.

114. *Id.* at 3.

115. *Id.*

116. UNGA Res. 64/292, *supra* note 9, at 1.

adopted a similar resolution in 2010 which recognized water as a human right.<sup>117</sup> However, the magnitude of these resolutions were lessened, as the votes were not unanimous. The countries abstaining included: Canada, Denmark, Japan, the Netherlands, Sweden, the United Kingdom, and the United States.<sup>118</sup> Professor and water governance expert, Stephen McCaffrey, posits that the failures of the abstaining countries, whether borne out of fear or due to the lack of an international norm at the time, causes the foregoing resolutions to be taken for granted.<sup>119</sup>

International tribunals have also been willing to infer a human right to water. In *Liliana Assenova Naidenova v. Bulgaria*, the Human Rights Committee (hereinafter “Committee”) held that a Bulgarian city was not permitted to shut off its resident’s access to water due to lack of payment.<sup>120</sup> In *Ángela Poma Poma v. Peru*, the Committee held that diversion of water away from indigenous people destroyed their ecosystem and disregarded their rights to cultural enjoyment.<sup>121</sup> In *Riad & Idiab v. Belgium*, the European Court of Human Rights (ECHR) found that it would be inhumane to deny detained asylum seekers an adequate amount of water for consumption and hygiene.<sup>122</sup> In a case before the Inter-American Court on Human Rights, it was determined that the seven-and-a-half liters of water is the minimum necessary amount of needed per day for true fulfillment of the right to water and decent existence.<sup>123</sup> These cases exemplify the efforts of a broad array of international tribunals to build upon the principles announced in Comment No. 15, and subsequent resolutions, by enforcing or inferring the rights to water.

Recently, the U.N. and large portions of the international community have doubled down on recognizing a human right to water. In 2013, the U.N. Human Rights Council issued a resolution reaffirming the principle that “the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living.”<sup>124</sup> Notably, in the preamble of its resolution, it added that accessible and affordable water should be

---

117. H.R. Council, 15th Sess., U.N. Doc. A/HRC/15/L.14 (Sept. 24, 2010).

118. U.N. GAOR, 64th Sess., 108th plen. mtg., U.N. Doc. GA/10967 (July 28, 2010).

119. A False Promise, *supra* note 112, at 227.

120. U.N. H.R.C., 106th Sess., U.N. Doc. CCPR/C/106/D/2073/2011 (Nov. 27, 2012).

121. U.N. H.R.C., 95th Sess., U.N. Doc. CCPR/C/95/D/1457/2006 (Apr. 24, 2009).

122. *Riad & Idiab v. Belgium*, 29810/03 Eur. Ct. H.R. at 19, 26 (2008).

123. *Case of the Xákmok Kásek Indigenous Community v. Paraguay* (Merits, Reparations, and Costs), Judgment, Inter- Am. Ct. H.R. (ser. C), No. 214, at 44–45 (Aug. 24, 2010).

124. H.R. Council, 24th Sess., U.N. Doc. A/HRC/RES/24/18 (Oct. 8, 2013).

delivered without discrimination.<sup>125</sup> In 2011, the WHO issued a resolution reaffirming the human right to water as announced by the U.N. in 2010.<sup>126</sup> This was a significant development because WHO rules are generally accepted as authoritative.<sup>127</sup>

### C. Customary International Law

A positive finding that there is a human right to water under CIL is merely a steppingstone among many needed to reach the ultimate goal of providing clean water to all. International law does not require states to consent to a principle for it to be bound, if that principle rises to a level of customary law.<sup>128</sup> Under Article XXXVIII of Statutes of the International Court of Justice (ICJ), CIL is an acceptable form of law.<sup>129</sup> In order for a principle to be considered a custom, there must be a *general acceptance* of it as a rule.<sup>130</sup> General acceptance may be shown by: (1) a state's practice is consistent with considering the principle as a rule, and (2) the state's conformity to the rule is caused by a legal obligation, or *opinio juris*.<sup>131</sup> The rationale for CIL is that a state's practice is a form of implicit consent, enough to legally bind it to that practice.

The majority of the international community strives to provide water in accordance with the principle that water is a human right. State practices, mostly on the domestic level, show that most governments attempt to honor their responsibility of providing clean water to their citizens.<sup>132</sup> State practices are evidenced by some of the domestic policies mentioned previously. For instance, the U.S. alone distributes roughly 322 billion gallons of water per day.<sup>133</sup> Nearly ninety percent of global water utilities are state-run.<sup>134</sup> Both international and domestic courts are generally reluctant to allow water utilities to be shut off without at least allowing the user to seek help.<sup>135</sup>

---

125. *Id.* at 1–3.

126. World Health Assembly Res. WHA64.24, at 2 (May 24, 2011).

127. Alison Lakin, *The Legal Powers of the World Health Organization*, 3 MED. L. INT'L 23, 25 (1997); see also UN Fact Sheet, *supra* note 3, at 29–30.

128. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 580 (6th ed. 2003).

129. Statute of the International Court of Justice, Statute, 1945 I.C.J., art. 38.

130. BROWNLIE, *supra* note 128, at 6, 12; e.g., G.A. Res. 217A (III), *supra* note 70, at 73.

131. *Id.* at 8 (*opinio juris* means “an opinion of law or necessity”).

132. See UN Fact Sheet, *supra* note 3, at 26, 28.

133. See U.S. Geological Survey, *supra* note 2.

134. See Tropp, *supra* note 9, at 27.

135. Liliana Assenova Naidenova v. Bulgaria, No. 2073/2011, Human Rights Committee (30 Oct. 2012); see generally Pa. Env'tl. Defense Found. v. Commonwealth, 161 A.3d 911 (Pa. 2017).

Generally, it is either too morally, politically, or legally taxing for a state to diverge from the practice of providing water to its citizens. Yet many individuals, even in developed nations, fall through the cracks of water governance schemes as they are not provided an adequate supply of potable water.

Most states have, at a minimum, some regulations that protect its citizens access to water. A large majority of those states have codified principles that assure citizens access to water will not be arbitrarily interrupted or infringed upon.<sup>136</sup> And the majority of states at the U.N. have accepted to be bound by both the U.N. General Assembly's Resolutions and the Human Rights Council's Resolution.<sup>137</sup> As of 2018, one hundred and sixty-nine (169) states have ratified the ICESCR, and many of them have accorded to General Comment No. 15.<sup>138</sup> Taken together, this all points to the emerging *opinio juris* that there is an affirmative right to water. Simply, the majority of states supply water to their citizens with very little limitation, under the impression that they are bound by law or custom to do so.

Finding that there is a human right to water under CIL will force the hand of those states who are reluctant to, or only facially, recognize it as a right. Moreover, finding this right to be CIL will essentially move the needle in pressuring persistent objector states who are reluctant out of fear of economic loss or exposure to legal liability to create policy that improves access to clean water and gives its citizens influence over water management. Perhaps, a more important impact would be the transparency that may come with a positive CIL finding. Currently, many states only pay lip-service to human rights law, and specifically, providing water to its people.<sup>139</sup> A human right to water under CIL will add transparency to water governing schemes, and subsequent regulations, as it will ideally increase the engagement of citizens and private businesses. However, the biggest obstruction to finding water as a human right under CIL may not be a legal dilemma at all, but rather the will of the international community, on a whole, to recognize the right.

---

136. See Tropp, *supra* note 9, at 27.

137. See A False Promise, *supra* note 112, at 226.

138. ICESCR, *Status of Treaties*, UN (Sept. 2018), [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-3&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en).

139. Meshel, *supra* note 46, at 270–71.

## IV. GETTING IT RIGHT

Methods of water governance will be defined differently in each individual community, but a prerequisite for all methods will be to find water as a human right. There is a convergence between effective water governing methods and the recognition of water as a positive right.<sup>140</sup> The effectiveness of water governing methods depends on individualized approaches that involve the correct amount of input from each and every stakeholders.<sup>141</sup> Currently, only some water governance schemes utilize this pluralistic approach, and even they have struggled to get it right.<sup>142</sup> Essentially, the missing piece to solving the water governance crisis is unilateral recognition of water as a human right.

The recognition of clean water as a human right will set a minimum threshold, under law, for water quality, quantity, and distribution. Ideally, this right should require positive action by all stakeholders.<sup>143</sup> Governments would be required to ensure that clean water is equitably distributed throughout civil society. The demand for clean water would increase; thus, there is a need for innovation and infrastructure development to be undertaken by private entities. An expansion of regulation will also likely be needed to prevent dubious water management and pricing practices by public and private actors. Perhaps most importantly, civil society will be granted a robust voice as a stakeholder. Recognizing water as a human right will secure civil society's treatment as an equitable stakeholder.

*A. Water as a Human Right*

The crystallization of the human right to water has begun under CIL. Individual state practices of providing minimum access to clean water are in conformity with the several international treaties and documents that provide for a human right to water. While the foregoing is not universally accepted within international law, the origins of many CILs did not exhibit a

---

140. See Hardberger, *supra* note 77, at 334. Lakin, *supra* note 127, at 6, 12.

141. See Tropp, *supra* note 9, at 26, 29.

142. UNITED STATES GOVERNMENT CONSOLIDATION ON ENVIRONMENTAL ISSUES RELATIONS TO THE UNITED NATIONS UNIVERSAL PERIODIC REVIEW: A SUMMARY, 11 (2014) (noting that many stakeholders are currently excluded from the water governing process, which can contribute to poor water utility and distribution).

143. Meshel, *supra* note 46, at 292, 295 (arguing that recognizing water as a human right would facilitate the engagement and involvement of all relevant stakeholders).

unanimous acceptance at the outset.<sup>144</sup> This CIL will take time to influence nations, who will likely be reluctant at first, to fully acquiesce. At least anecdotally, this supports the proposition that although the right is not codified, we are at least moving in that direction.<sup>145</sup>

States that do not wish to immediately cede to this right may object and attempt to avoid obligation. However, the vast majority of nations should weigh the consequences of objecting to an obligation to provide its own people with clean water.<sup>146</sup> In practical terms, without an established right to water roughly three and a half million people, mostly children, die each year from a lack of water or water-related diseases.<sup>147</sup> If the tangible toll caused by bad water governance doesn't incentivize nations to recognize water as a human right, perhaps the issue should be framed differently to appeal to pecuniary desires.

It is not necessary that water needs to be classified as either a market good or a human right, as both can operate in unison for the benefit of all stakeholders. In fact, the lack of formal recognition of water as a human right has allowed it to become a valuable market good, ripe for exploitation.<sup>148</sup> A market for water may be maintained even if it is recognized as a human right. Of course, significant regulations and oversight would have to be employed to assure this right is not abused by avaricious businesses, which will ultimately necessitate the creation of new jobs thereby stimulating the economy. Once a right is established, both business and government will be subjected to some oversight by civil society. For instance, Government will be made to undertake regulation assuring that water is provided, and private

---

144. See *Asylum Case (Colom. v Peru)*, Judgment, 1950 I.C.J. 266, 276–78 (Nov. 20); see also *Paquete Habana v. U.S.*, 175 U.S. 677 (1900).

145. Hardberger, *supra* note 77, at 354.

146. Perhaps this is where the reluctance to find water as a human right comes from: the fear that once a positive right is found, it will be politically damning for a nation to object to that right and economically harmful to accept it.

147. See generally *The United Nations World Water Development Report 2018: Nature-Based Solutions for Water*, UN WATER (2018), <https://unesdoc.unesco.org/ark:/48223/pf0000261424>.

148. See e.g., Rachel Stein, *A Roundtable Discussion with Simon Ortiz, Teresa Leal, Devon Pena, and Terrell Dixon*, in *THE ENVIRONMENTAL JUSTICE READER: POLITICS, POETICS & PEDAGOGY* 21–23 (Joni Adamson, Mei Mei Evans & Rachel Stein eds., 2002) (describing a millionaire's attempt to buy aquifers in the San Luis Valley, and then sell the water from those aquifers at a profit to the cities of Reno and Las Vegas); see also Joe Nick Patoski, *Boone Pickens Wants To Sell You His Water*, *TEX. MONTHLY*, (Aug. 2001) (describing T. Boone Pickens purchase of a rural Texas aquifer, and then his plan to resale the water to large cities).

business may facilitate, within the confines of said regulation, to distribute water. Simply, it is not mutually exclusive for water to be a human right or market good.

### *B. Defining the Parameters*

Any finding of water as a human right would be effectively moot if reasonable parameters are not defined. At the outset, there must be a minimum threshold at which a nation or private actor cannot diverge from its responsibility of providing water. I suggest that, at a minimum, water governors provide at least fifty to one-hundred liters of water for basic consumption and hygienic needs, as recommended by the World Health Organization.<sup>149</sup> And this water supply should be reserved for each person in the governed area, as suggested by the Inter-American Court on Human Rights.<sup>150</sup>

Further, the duality of water as a shared right and a market good *must* persist.<sup>151</sup> As previously discussed, regulations preventing the exploitation of the water market must also occur. I propose that a sufficient starting point for reasonable regulation is to base the cost of water on the median home value within a given geographical area, with no exceptions for arbitrary rate hikes. This assures that everyone will be charged an affordable rate according to their personal means. It also allows public and private utilities to operate at an advantageous cost. For those who are indigent or do not have a home, water should be provided free of charge.<sup>152</sup> Under this plan, the ultimate burden of providing water will fall upon the state and those private companies that assume a duty to distribute water. The state may choose to give these private companies a monopoly of certain areas or allow competition; however, under either plan, the private companies may not exceed the price ceiling for the particular geographical area. This is an area where government and private actors can work together to expand access to fountains, shelters, and bathing quarters for the indigent and homeless.

---

149. UN Fact Sheet, *supra* note 3, at 8.

150. *Xákmok Kásek Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 214, ¶ 195 (Aug. 24, 2010).

151. See Hardberger *supra* note 77, at 353 (noting that a change to the status quo may leave nations uncertain on what their obligations are under international law); see also *The Flood Dries Up: International Water Companies*, THE ECONOMIST (Aug. 28, 2004), <https://www.economist.com/business/2004/08/26/the-flood-dries-up> (noting the benefits of keeping private water companies engaged in the market).

152. See *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978) (this proposition already has legal and normative support within the U.S.).

In developing nations, the international community will bear a significant burden to help domestic governments provide access to clean water. At the same time, domestic governments must make a significant effort on their own to provide access to clean water, without interruption. Transparency is key here as any failure to comply with this standard should result in human rights violations and subsequent cross-market sanctions by the international community.<sup>153</sup> However, where the domestic government cannot handle its responsibility, I propose that the international community assign a “parent country” to assist with reasonable water resource needs. The parent country will be obligated to provide for the actual water deficiencies of a developing nation. Parent countries may also contract with private businesses, at their own expense, to provide water to the developing country or improve upon the countries water infrastructure. Accordingly, the more effective the parent country is in curing the long-term water deficiencies of a developing nation, the less support it will have to provide. This will allow the wealth and innovation, concentrated in developed countries and private business, to be shared with developing countries at the expense of the parent country and for the betterment of the international community as a whole.

Finally, I propose that private businesses be employed by the international community, and particularly developing countries, to provide water governing services. These services should be subsidized by the international community, if the country hosting the private business cannot provide adequate compensation. Of note, the involvement of private business, while enticing, should be watched closely. Thus, I propose the creation of a World Water Court, supported by regional and subordinate regional bodies meant to remedy any potential infringement on the right to water. These courts should be distinct from other international judicial bodies as they will serve the sole purpose of resolving water right issues. Ultimately, it may be up to the international community as a whole to organically craft regulation and common law defining acceptable parameters for the human right to water. Penalties to be imposed against violating stakeholders and remedies to be doled out may also be codified by the international community or

---

153. See William J. Cosgrove & Danial P. Loucks, *Water Management: Current and Future Challenges and Research Directions*, 51 WATER RESOURCE RES. 4823, 4825–26 (2015) (suggesting that international trade negotiations within the WTO, WTO Doha Development Agenda, and Hong Kong Ministerial Mandate may be a source for appropriate remedial measures addressing water resource issues).

through common law. This is not an insurmountable task, but it should not be taken for granted if the human right to water is to be sustainable for generations to come.

### *C. Pluralistic Partnership*

Recognizing water as a human right has the potential to disrupt the status quo of water governance, an accomplishment that is desperately needed. Stakeholders across the water governance scheme have become complacent. Governments are not forced to assure that clean water is being effectively distributed.<sup>154</sup> This is partially due to the limited voice of the civil society, the primary beneficiaries of water supplies. It is also due to private actors not being incentivized to take risks on water projects.<sup>155</sup> The large majority of civil society has become complacent with their access to water and the quality at which it is provided.<sup>156</sup> And their advocates, such as NGOs, can only apply enough pressure to initiate incremental change in water quality and distribution.<sup>157</sup> Largely, all stakeholders suffer from a lack of meaningful partnership and cooperation between them.

However, a pluralistic partnership will not occur organically; there must be an impetus: the recognition of water as a human right. This recognition will inevitably force government and private entities to work together to provide the right's affirmative benefits to civil society. Intuitively, recognition will allow civil society, including government and business, to have some recourse if the right is infringed upon. This will force nations to expand the regulatory sector to provide and maintain clean water, assuring the protections secured by the right. Logically, if everyone is given a positive right, there will be free exercise of that right leading to an increase in demand for water. Businesses will be forced to innovate to compensate for the newly established demand for water. It is important to keep in mind that, ideally, this right will apply globally, so nations will likely need the support of private actors to maintain effective distribution of water resources. Finally, civil society, secured with a positive right, will have more influence in the planning of water governing schemes.

---

154. See generally Peter J. Hammer, *The Flint Water Crisis, the Karegnondi Water Authority and Strategic-Structural Racism*, CRITICAL SOC. 1, 4–5 (2017).

155. Tropp, *supra* note 9, at 27.

156. Castro, *supra* note 20, at 104.

157. Håkan Tropp, PATRONAGE, POLITICS, AND POLLUTION: PRECARIOUS NGO-STATE RELATIONSHIPS: URBAN ENVIRONMENTAL ISSUES IN SOUTH INDIA 182 (1998).

## V. CONCLUSION

The missing piece to the water governance puzzle is the recognition of water as a human right, because “[b]y means of water we give life to everything.”<sup>158</sup> One of the biggest impediments to inclusive forms of governance is the lack of engagement by stakeholders.<sup>159</sup> Mainly, it is civil society that suffers from passive engagement,<sup>160</sup> or is prohibited from participating in the governing process.<sup>161</sup> Finding water to be a human right forces governments (or private entity surrogates) to involve civil society and provide a minimum water standard to its beneficiaries. This in turn will provide civil society with the opportunity to meaningfully participate and improve water governance. In sum, recognition of water as a human right under CIL provides the impetus to create and maintain a sustainable framework for water governance.

---

158. WHO, *supra* note 69, at 12 (quoting Koran 21:30).

159. *See* Castro, *supra* note 20, at 104.

160. *Id.*

161. *See* UN Fact Sheet, *supra* note 3, at 17, 19.