“The Regulatory Face of the Human Right to Water”

Dr. Bronwen Morgan
Professor of Socio-Legal Studies
Faculty of Social Sciences and Law
University of Bristol
Queens Road
Bristol BS8 1RJ
United Kingdom
Email: B.Morgan@bristol.ac.uk
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The practical trajectories of globalising trends in market liberalisation on the one hand and the spread of human rights initiatives on the other hand, have to date tended to involve quite different groups of actors. But more and more both the conceptual concerns and the actors involved are beginning to converge or interact. Take for example a current debate within international trade law. A prominent expert ² in World Trade Organisation (WTO) law recently argued that the WTO agenda should increasingly constitutionalise human rights (to trade and property), provoking a very spirited response from a human rights commentator ³ to the effect that this was a distortion of the human rights agenda. This debate reflects a more general phenomenon: as regulatory debates take on global dimensions, the distributive issues they raise are increasingly framed in terms of social and economic rights rather than (as tended to happen historically within nation-states) in terms of welfare state provision or developmental goals. This is increasingly the case with water services. The political conflict over how they are delivered is increasingly presented as one of commodification versus the protection of human rights. But the usage goes in more than one direction. As what I call the ‘regulatory face of human rights’ becomes increasingly visible, corporate actors who have typically defended their positions in regulatory locations are starting to frame their interests in human rights terms. Conversely human rights activists are having to confront the intricacies of regulatory politics.

Part I of the paper describes briefly the politics that provide a context for the intersection of regulation and human rights in relation to water services, noting that these politics revolve around an overly simplistic dichotomy between water as human right versus water as commodity. Part II discusses emerging ‘soft law’ initiatives at the international level that illustrate two core arguments. The first is that the human right to water, when institutionalised in the current global context, will depend critically upon a local ‘right to regulate’ and thus the bearer of a ‘human right to water’ is less distinct than might be expected from a consumer exercising his or legal rights under a local regulatory framework. But secondly, the regulatory pull of the human right to water can still conflict with the imperatives of commercially-based delivery of water services. Thus the dichotomy of human right versus commodity does have some relevance: however, its salience needs to be analysed at a much more detailed level than is currently occurring. Some brief sense of the direction this analysis could take is given by referring, in Part III, to some existing ‘hard law’ in one particular setting where the national legal framework already guarantees the human right to water: South Africa. I conclude with some more general observations regarding the relation between consumer rights and human rights, as well as between law and politics, as they bear upon the issue of access to water.

¹ This article reports research from a 32 month research project funded by the Economic and Social Research Council of the UK, entitled ‘The Commodification of Water, Social Protest and Cosmopolitan Citizenship’, (RES Project 143-25-0031). The core phase of the project involves six detailed country case studies which are not discussed in any detail here and any conclusions are highly interim. See www.consume.bbk.ac.uk for more details on the project and the larger Research Programme on Cultures of Consumption of which it is a part. The paper was originally delivered at the Conference Good Water Governance for People and Nature: What roles for Law, Institutions, Science and Finance? held at the Apex City Quay Hotel, Dundee, Scotland from 29 August - 1 September, 2004.


I. The Tribal Politics of Water: Commodity or Human Right?

A key feature of the global debate over water is that the principal fissure of contestation, at least in relation to the issue of “how to bring safe water and sanitation to the entire world”, is between two different networks of non-state actors that tend to emphasise, in what often seems an all too tribalistic politics, two visions which are presented as radically incompatible: ‘water as an economic good’ and ‘water as a human right’.

This is reflected in the nature of the most visible global forum for the political struggles over water: the World Water Forum. Held triannually since 1993, this is convened by the World Water Council (the WWC). The WWC is an international water policy thinktank, a “cross-sectoral and policy level thinktank” created to raise awareness and influence decisionmakers. Its legal status is a French NGO with the status of ‘NGO in operational relations with UNESCO’. Its membership includes research institutes, government agencies, UN institutions, and a few mainstream NGOs and a significant number of large corporations especially in water supply, engineering and construction. A supplementary convening role is also played by the Global Water Partnership (GWP), which is a “working partnership among all those involved in water management: government agencies, public institutions, private companies, professional organizations, multilateral development agencies and others committed to the Dublin-Rio principles”. GWP could be regarded as the more practical, field-based arm of the WWC, establishing partnerships on the ground to implement integrated water resources management. At the 2000 Hague World Water Forum, the GWP wrote a ‘Framework for Action’ that was intended to complement the ‘World Water Vision’ written by the World Water Council. Both the GWP and the WWC secure significant funding from the World Bank, as well as a number of European countries.

The network of actors embedded in the WWC and GWP emphasise private sector participation in the water sector, notably the delivery of water services to individual citizens, usually at municipal level. The policy goals of these actors include a strong emphasis on ‘governance’ and two key issues receive especial emphasis: cost recovery, and the muted role of the state. In essence, this network of actors stresses a market-led response to global deficiencies in domestic water access where the regulatory structure of the response would be primarily defined by the firms with a cost-recovery principle at its centre to ensure profitability (and thus sustainability of the market-led model).

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4 The quotation is taken from the website of the World Water Council, the convenor of the World Water Forum.
5 Douglas Kysar and James Salzman, "Environmental Tribalism" (2002) 87 Minnesota Law Review
6 Including Mitsubishi, Suez, Evian, Severn Trent, Vivendi, Electricité de France, Japan Dam Engineering Centre, Mitsubishi Heavy Industries, PriceWaterhouse Coopers, US Army Corps of Engineers
7 The current global water and sanitation budget is somewhere between $25 and $75 billion annually, depending on the source of the estimate. The World Water Council claims that $180 billion will be needed annually to produce global water security over the next 25 years. Private sector annual investment in the water sector between 1974 and 1990 was US$300 million; between 1990 and 1997 it rose to $25 billion - a 7,300% increase. While it has more recently tailed off, the ballooning number of contracts held by the ‘big 3’ among others globally certainly testifies to an increasingly significant role for large scale private sector responses to the water issue. Small scale private and community solutions should not, however, be ignored. The Water Supply and Sanitation Collaborative Council, a World Health Organisation body with a UN mandate, claims that just $20 billion will make a big difference. The difference is that WSSCC and WWC envisage strategies of a profoundly different scale, technology and management structures. I will return to this point in the Conclusion.
By contrast, the second key network of non-state actors broadly speaking flatly oppose the model of public-private partnerships and the regulatory ‘bureaucracy of privatisation’ advocated by those actors affiliated with the World Water Council. This second network is a coalition of mainly small NGOs working on development, health, human rights, education and environmental issues, together with a very significant presence of public sector unions. There are important strategic differences within this network, which result in three strands that can be characterised roughly as ‘threatening rebels’, ‘cooperative allies’ and ‘citizens’ agora’. Despite the tensions in this configuration, they all share two stances in opposition to the WWC network: they endorse water as a human right (and oppose this to water as a commodity), and they endorse participatory democracy rather than good governance.

‘Governance’ is used by the WWC and GWP in ways that downplay the role of the state, as illustrated by the following excerpts from the Global Water Partnership’s summary document on Effective Water Governance:

Governance is more inclusive than government per se: it embraces the relationship between a society and its government (p.4)…Governance includes but is not restricted to the perspective of government as the main decision-making political entity (p.7)…For many years the question was ‘can the state steer society’…the question currently posed is less statist: ‘can society coordinate and manage itself’(p.10)…Today government can no longer exercise a monopoly on the orchestration of government (p.10).

Yet this vision of ‘regulating without the state’ is buttressed by a desire for harmonised, best practice or ‘model’ regulatory standards. The recent Camdessus World Panel on Financing Water Infrastructure included a recommendation for funding a study to prepare best practice and model clauses in the legal agreements of public-private partnerships in the water sector. And the network of NGO actors that oppose the commodification of water is also increasingly drawn to the elaboration of model regulatory frameworks, albeit ones that explicitly flesh out the vision of a human right to water. In the next section, therefore, I provide an overview of three different emerging ‘soft law’ initiatives that would elaborate this regulatory dimension of a right to water.

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8 PSIRU, “Investing in the bureaucracy of privatisation - a critique of the EU water initiative papers”, unpublished PSIRU working paper (available at request from PSIRU: Public Services International Research Unit, University of Greenwich, www.psiru.org).
9 At the 2003 World Water Forum, these varying mixes (each containing both Northern and Southern NGOs) met separately, drafted separate documents for feeding into the Ministerial Council, and had a very different ethos from each other.
10 These sought to establish and to demonstrate a lack of consensus with the WWC with sufficient vigour such that their opponents could ‘not afford not to listen’. Linked in particular with Public Citizen (USA) and the Council of Canadians, they performed several direct actions at the Forum clad in blue and yellow arm and headbands screenprinted with ‘water is life’.
11 Linked in particular with the UK-based charity Wateraid and its affiliate Freshwater Action Network, these have a history of various cooperative projects with large companies and with the World Bank, and were included in the formal Ministerial Council as the official ‘NGO Statement’ bearer.
12 This group, convened by the French-speaking NGOs Green Cross and the International Secretariat for Water, generally focused on engaging different groups in dialogue in a very loose informal setting in a round room they actually called the citizens’ agora, avoiding both direct action against and overt cooperation with those in the WWC network.
II. The Human Right to Water: a Right to What Precisely?

In what follows I review three recent ‘soft law’ initiatives which are relevant to the notion of a right to water, though only the first explicitly frames the issues as a human right.

a. United Nations Economic Social and Cultural Rights Committee General Comment 15

There is no directly binding right to water expressed anywhere in the most relevant international treaty: the International Covenant on Economic, Social and Cultural Rights. However in November 2002 the United Nations Committee on Economic, Social and Cultural Rights (UN ESCHR Committee) drew upon other explicitly articulated rights in the Covenant on ESCR, (notably the right to an adequate standard of living and the right to health), to assert that everyone has a right to “sufficient, safe, acceptable, physically accessible and affordable water”. They elaborated this in detail in General Comment No. 15.\(^\text{15}\)

The first thing that is important to note is the fundamental dependence of this right on regulation. Because it is a variable right, depending on progressive realisation and resource availability, the only way to monitor it is to develop indicators and benchmarks.\(^\text{16}\) These, as can be seen from the detail of the right, are deeply embedded in regulatory frameworks. And the General Comment tends to assume that these frameworks will be national legal ones, or at the very least, expressions of national state policy. For example, the obligation to fulfil can be disaggregated into the obligations to facilitate, promote and provide. The obligation to facilitate “requires the State to take positive measures” to assist individuals and communities to enjoy the right. The obligation to fulfil includes “according sufficient recognition of this right within the national political and legal systems, preferably by way of legislative implementation; adopting a national water strategy and plan of action to realize this right”.

The second important feature of the General Comment is that, as the following paragraph makes clear, private actors may discharge those responsibilities as much as state institutions might, and where they do, regulatory frameworks become even more important:

> Where water services...are operated or controlled by third parties, States must prevent them from compromising equal, affordable and physical access to sufficient, safe and acceptable water. To prevent such abuses an effective regulatory system must be established…which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance (Article 24)

b. Draft Declaration on the Right to Access to Essential Services

Now consider a second initiative that is so far in draft stage only. In a Type II public-private partnership initiated under the Johannesburg WSSD umbrella, the French\(^\text{17}\) have proposed a Draft Declaration on the Right to Access to Essential Services. Article 1 of the Draft Declaration states:

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\(^\text{15}\) General Comment No.15 released on 28 November 2002.

\(^\text{16}\) See Articles 53 and 54 of the General Comment, which say, \textit{inter alia}, “States parties may obtain guidance on appropriate indicators from the ongoing work of WHO, FAO, UN-Habitat, ILO, UNICEF, UNEP and UNDP and the UN Commission on Human Rights”.

\(^\text{17}\) Specifically a French non-governmental organisation, Institut de la Gestion Déléguée, which commissions research and organises conferences and debates on the public policy issues raised by network industries, lea by a professional engineer steeped in local government experience. The Draft Declaration and its possible adoption by the UN is currently being discussed in a variety of public settings including UN-Habitat.
Essential services in networks are the vital or basic services indispensable to a dignified and decent life. They include:
- collective services of drinking water and sanitation;
- collective services of hygiene and waste disposal;
- energy distribution services;
- daily public transportation services; and
- information and telecommunications services.

While the draft declaration does not state that access to water is a ‘human right’, the initiative declares itself inspired by the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural rights and the Millennium Goals as well as the World Social Forum in Porto Alegre. But the document is explicitly hybrid: having drawn upon these instruments that are redolent with environmental, social and human rights, it makes a smooth shift to markedly more market-friendly language:

Access to essential services constitutes the indispensable basis for a decent life in the respect of the environment. However, this reality is not shared today by all the user-consumers of the planet. 18

As with the General Comment, the regulatory dimension is key to the practical implications of the right. The Draft Declaration appends to the general right to access collective services of drinking water, key principles of a code of sustainable management that would regulate the provision of such access. It also, similarly to the General Comment, stresses its openness to both public and private providers:

To control the organization of services, public authorities can choose freely among various approaches to management: Direct government control, management through a public body, management delegated to a private or public operator or to an association (Art. 16)

It is clear then, that market-led provision by private sector actors can be made quite compatible with the human right to water at least at this level of generality. The existence of the human right to water imposes a legal duty upon states to fulfil it. Fulfilment of the human right to water is quite consistent with provision of water by private actors to individual citizens. In such a context it also necessitates elaborate regulatory frameworks. Both lead to a central salience for benchmark standards. From the perspective of the UN human rights system: the general duty to fulfil the right to water requires monitoring by benchmarks whoever provides the water (Art 53) and in the case of private actor provision of water, General Comment No. 15 specifically requires an effective regulatory system. The Right to Access to Essential Services builds upon the importance of getting water to the tap of each (now) ‘user’, and enunciates principles (a code of sustainable management) for the regulatory monitoring of such a process. Thus the human right to water, a mandatory obligation of national state governments, 19 can be given technical and practical flesh via the entrepreneurial

18 Institut des la Gestion Déléguée, Draft Declaration on the Right to Access to Essential Services, p.1 emphasis added.
19 Water, air and space are not commodities … These resources are public goods whose beneficiaries will be designated by the public authorities (Art.6, Draft Declaration).
initiative of well-resourced private actors such as multinational water companies in combination with a regulatory framework controlled by public actors.\textsuperscript{20}

c. ISO Technical Committee 224

The complementarity of market-based provision of water services and the human right to water might suggest that socio-economic rights are in practice little different from consumer rights since they are necessarily implemented by regulatory norms that protect consumer (public) interests by establishing minimum standards of provision. A third ‘soft law’ initiative nicely illustrates this more explicitly consumer-oriented approach. In late 2001, the International Organisation for Standards formed a new Technical Committee (TC 224), with the objective of developing standards on service activities relating to drinking water supply and sewerage. This is very strongly an initiative of the industrialised world\textsuperscript{21} with the French playing a particularly significant role. France initiated the proposal and wrote the business plan, and the French Standards Association (AFNOR) provides the Secretariat services. TC 224 has had three substantive meetings to date, the most recent being in September 2003. It has four working groups: Terminology [WG1], Service to Users [WG2], Drinking Water [WG3], and Wastewater Systems [WG4]

Four important features of ISO TC 224 relate it to the nexus of rights and regulation under discussion in this paper. First, it is clear that the standards developed in TC 224 will be equally applicable to both public and private actors at both provider and user\textsuperscript{22} ends. This is one of the few matters that has so far gained consensus. Secondly, one of the most contentious roles to date has been the appropriate role of "cost" or "price" within the standard. WG3 has been discussing this but has been unable to reach consensus, indicating an ambivalence within the regulatory community about the proper scope of profit.\textsuperscript{23}

Thirdly, notwithstanding contention over the appropriate role of profit, the role of ‘consumer’ is much more prominent than the role of the human right to water. Consumer advocacy was advanced as part of the justification of the Committee:

As a result of the world consumer movement, consumers who use the water services, both in the most industrialised countries and in the emerging countries, are more and more demanding concerning the quality of the water service. They are also more and more sensitive to the transparency of the management and to the quality/price ratio of these services. They are therefore very concerned about understanding their water invoice and about obtaining as low a rate as possible.\textsuperscript{24}

\textsuperscript{20} Essential services are organized so as to satisfy the expectations of the interested populations, expressing themselves \textit{both as users and citizens} (Art. 9, Draft Declaration, emphasis added).

\textsuperscript{21} Though Germany, Holland, UK and USA voted against its formation. It is notable that the first three all have large corporate water player interests and the US has strong local political water interests. Mexico, Argentina and South Africa are the only voting developing country members on TC 224 (out of 20 voting members).

\textsuperscript{22} The French standard’s definition of customer - "a natural person or corporate body using the water supply or sewerage services" was expanded to "a person, corporate or \textit{public} body using the water supply or wastewater service."

\textsuperscript{23} Interestingly, France has suggested developing different standards for developed and developing countries. The blurring of the more political differences between public and private, and their replacement with differences in level of economic development, is a deep indicator of the ‘economisation’ of perspectives on water provision within the global water sector.

\textsuperscript{24} ISO Proposal for a New Field of Technical Activity, 17 April 2001, ISO/TS/P 194. Physical scarcity was the second primary justification for the need for regulation at the global level.
Unlike the Draft Declaration however, with its hybrid approach, the idea of encoding ‘rights’ language rather than language referring to either ‘users’ or ‘consumers’ has been highly contested in the ISO committee. All that TC 224 has managed to agree upon to date is that a ‘right to water’ can be included as a customer expectation. This conflict suggests that the hybrid ease with which the Draft Declaration yoked together the notion of a right to water with its provision as a commercial service may be misleading. The possible tensions when humans-rights motivated regulatory norms pull in different directions from the governance norms are elided. This possibility is explored in the concluding section of Part II.

d. Sources of tension

Art. 49 of the General Comment No. 15 gives some basis for an ambiguity that raises the issue:

In order to create a favourable climate for the realization of the right [to water], States parties should take appropriate steps to ensure that the private business sector and civil society are aware of, and consider the importance of, the right to water in pursuing their activities (Art.49).

Does this submit private actors to public standards or merely enjoin private actors not to neglect the right but to pursue it on their terms? This is important because one cannot equate the sufficiency of the regulatory standards that might be developed under the Draft Declaration or in the ISO Committee with the regulatory standards demanded by the General Comment. That is, there could well be an ‘ill fit’ between human rights-based regulatory standards, and standards developed with other goals foremost in mind (consumer welfare, environmental, productive efficiency).

For example, there are at least two aspects of the General Comment that would be unlikely to be included as primary objectives of a code of sustainable management under the Draft Declaration. The first relates to land rights: Article 16c, in urging that States parties should take steps to ensure that…deprived urban areas have access to properly maintained water facilities…insists that “no household should be denied the right to water on the grounds of their housing or land status”. The second relates to redistributive issues. Again, in urging that States ensure that water is affordable, the General Comment insists that States parties must adopt the necessary measures that may include, inter alia: … (b) appropriate pricing policies such as free or low-cost water; and (c) income supplements. It goes on to require, implicitly, cross-subsidization: “Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households” (Article 27.

The implications of substantive obligations such as these also raise the looming relevance of the General Agreement on Trade in Services (GATS) to the provision of safe drinking water. The language of ‘access to essential services’ is deeply resonant with the GATS. While the supply of water services have not to date been the subject of commitments by member states under the GATS, there is significant political momentum, particular from the EC, for

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25 WG2 was originally named "Service to Consumers", although ‘users’ was substituted to encompass non-billable and non-consumptive uses.
26 The services negotiations are operating along the request-offer model, whereby WTO member governments first submit requests to their trading partners outlining the areas they wish to see further liberalization commitments in the partner's market. The requests are then followed by the offers, where members outline how
doing so, as well as vigorous opposition. Without going into too much detail, suffice to say that GATS applicability would make private sector participation in the provision of water services (and, by extension, in the fulfilment of any right to access the essential service of – or human right to – water) extremely costly to reverse and much more difficult and risky to (re)regulate. The legal uncertainties of the legitimate scope of (re)regulation of services subject to GATS disciplines mean that it is at least possible that GATS disciplines would ‘trump’ any human rights-based requirements in relation to services committed by states under the international trade regime.

Such trumping, however, should not be taken to suggest that GATS eliminates all regulatory scope: rather, it legitimates only the ‘least trade-restrictive’ regulatory infrastructure. What is less clear is whether the kind of human rights-based regulatory requirements that I have highlighted above would be ‘unnecessarily’ restrictive. While there is no space to pursue this question here, it is important to note that more generally, an emerging aspect of the regulatory politics of GATS is the effort to develop ‘trade-neutral’ regulatory standards that can co-exist with the market-opening mechanisms of that agreement, and one can note that the ISO has won some recognition as an appropriate forum for developing such ‘trade-neutral’ standards.

Thus far, then, I have established that the human right to water, as soon as it is legally adumbrated, is quite compatible with private sector participation in the water sector and as such implicates significant regulatory power on the part of national states. On the other hand, specific obligations under a human rights-based regulatory framework may be in tension with a legal framework that facilitates efficient commercial delivery. Let us turn, then, to a country which has developed a regulatory framework at national level directly in the shadow of a constitutional guarantee of a human right to access sufficient drinking water: South Africa.

27 The EC has requested 72 countries (not including France) to open their water sectors for ‘commercial presence’ (investment) by European Companies to supply ‘water services’ through the GATS, using the newly proposed classification referred to in footnote 37. WTO, Council for Trade in Services, Communication from the European Communities and Their Member States, “GATS 2000: Environmental Services”, S/CSS/W/38 (22 December 2000). See also J. Hillary, “GATS and Water: The Threat of Services Negotiations at the WTO”, Save the Children UK research paper (2003) at 22.

28 The EC has proposed a revision to the classification of Environmental Services under the WTO List to include “Water for human use and wastewater management; including water collection, purification and distribution services, and wastewater services”: WTO, Council for Trade in Services, Communication from the European Communities and Their Member States, “GATS 2000: Environmental Services”, S/CSS/W/38 (22 December 2000). See also Ruth Caplan, “Down the Wrong Road to Cancun”, Article on Public Citizen Newsletter site, http://www.citizen.org/cmep/Water/cmep_Water/wtogats/articles.cfm?ID=8962;

29 For this reason, fear of GATS applicability to water issues was one of the dominant issues in the various debates between different groups at the World Water Forum.


31 This is by no means uncontested. The ISO is a private standard-setting organization that is often criticised for its skew towards industry: its procedures preserve a large formal role for industry in standards development, and industry representatives dominate the more than 2000 technical working groups of ISO.
South Africa

The South African constitution guarantees a right of access to sufficient food and water, adequate housing, social security and health services:

s.27: Health care, food, water and social security
   (1) Everyone has the right to have access to ... 
       b. sufficient food and water; and ...
   (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights...

As the phrasing ‘access to’ suggests, the obligations of the state may well be second-order. In a sense, socio-economic rights ground a constitutionalised administrative law rather than a discourse of substantive entitlements, albeit one with a particular bite on the distributive facets of regulatory frameworks for the provision of health, education, food or water. The Grootboom case, the most prominent South African case to date which declared the state’s housing policy to be unconstitutional, illustrates what I mean by this. The court noted that “the real question . . . is whether the measures taken by the State to realise the right afforded by s 26 are reasonable” [para 33], and it articulated three indicia of reasonableness by which to judge policy: “targeted at those who are unable to access adequate housing through the market” [para 36], "comprehensiveness" [para 40] "balance and flexibility" [para 36]. These are clearly very vague. And the vagueness of the obligations highlights the fact that the clarity of a human right to water is unlikely to be rapidly advanced by judicial considerations of what it means. Social and economic rights (which is what the human right to water would fall under) are notoriously politically sensitive since their effective elaboration requires the political branches to adjust their allocation and distribution of resources, sometimes at a highly systemic level, in response to judicial direction. This sensitivity means that far from there being a directly enforceable right to receive a particular resource or public benefit, judicial elaboration of a human right to water is more likely to craft a right to a ‘reasonable regulatory approach’.

For the most part, a judgment on what is a ‘reasonable regulatory approach’ will be made by the legislature. But there will be occasions when court rulings may impinge on those judgements. Let us examine three in which they have done so to date in South Africa.

In Manqele v Durban Transitional Metropolitan Council the applicant, an unemployed women who occupied premises with seven children, sought a declaratory order that the discontinuation of water services to the premises was unlawful. She argued that the by-laws in terms of which the water services was disconnected were ultra vires the Water Services Act. Mangele relied on her right to a basic water supply as referred to in the Act and did not rely on the Constitution. The council argued, successfully, that as no regulations had at that time been promulgated to give meaning to the right to a 'basic' water supply, the right she relied on had no content. Manqele was thus denied a remedy, in principle on this technical ground, but the judge also commented on the fact that she had illegally reconnected to the water supply,

32 Government of the Republic of South Africa and Others v. Grootboom and Others 2001 (1) SA 46 (CC)
arguably implying that this also underpinned her denial of a remedy. The case galvanised the government to gazette regulations just under a year later defining precisely in volumetric terms a basic water supply.

In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*, the provision of this basic water supply (now clearly a legal obligation) was given some due process protection. The applicants sought interim relief on an urgent basis for the reconnection of their water supply, relying directly on the Constitution. The court held that the obligation to respect existing access entails that the state may not take any measures that result in preventing such access. By disconnecting the water supply, the council had *prima facie* breached the applicants' existing rights. The court referred to the Water Services Act and noted that the Act provides that a water service provider may set conditions under which water services may be discontinued. The court further that the procedure according to which water services may be discontinued must be fair and equitable and must provide for reasonable notice of the intention to disconnect the service and must provide for an opportunity to make representations. Where a person proves to the satisfaction of the relevant water services provider that he or she is unable to pay for basic services, the service may not be discontinued. The court held that a *prima facie* violation of a local council's constitutional duty occurs if a local authority disconnects an existing water service, and that such disconnection therefore requires constitutional justification. The *Bon Vista* decision does flesh out the national regulatory framework in such a way as to strengthens its *procedural* protection of the consumer or citizen. Ask Kok and Langford argue, while this could be seen as quite consistent with the General Comment standards, the Constitutional Court of South Africa does not regard itself as bound by international law interpretations regarding the ‘minimum core’ of social and economic rights. Thus the consistency with the General Comment may be quite accidental or in any event confined to procedural issues. The court is much more tentative in evaluating the government’s substantive decision, for example in the area of redistribution.

In this respect the case of *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) is instructive. A local government authority had charged the residents of former black townships a flat rate for electricity and other municipal services, whilst charging the residents of the former white suburbs a metered rate. In addition, the local government authority, as matter of practice, did not collect arrears payments in the former black townships, whereas it did in the former white suburbs. Although the areas in question were no longer officially segregated along race lines, the undisputed effect of these policies and practices was that residents of the former white suburbs paid more for services than residents of the former black townships. The court accordingly held that they amounted to indirect discrimination on the basis of race. However, only the selective enforcement policy was eventually found to

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34 2002 (6) BCLR 625 (W).
35 Anton Kok and Malcolm Langford, “The Right of Access to Sufficient Water” in *Socio-economic Rights in South Africa: Analyses and Materials* (ed. Danie Brand and Christof Heyns), 2004: they refer in particular to Para 56 of General Comment No 15: ‘Before any action that interferes with an individual’s right to water is carried out by the State party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and that comprises: (a) opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies.
37 See paragraph 32 of the case report.
be unfair.\textsuperscript{38} In respect of the first leg of the claim, the court decided that the policy of continuing to charge a flat rate for electricity in the former black townships of Pretoria “did not impact adversely on the respondent’s dignity in any material way”, and was therefore not unconstitutional.\textsuperscript{39} In coming to this conclusion, the court expressly endorsed the constitutioanality of cross-subsidisation in the electricity sector, and remarked that “cross-subsidisation … is an accepted, inevitable and unobjectionable aspect of modern life”.\textsuperscript{40} However as Roux and Vahlé argue, the court was very divided on this issue and its hesitation even to endorse cross-subsidisation policies already in place after legislative deliberation suggests that it would be extremely unlikely to impose greater rates of cross-subsidisation than the political branches would tolerate. Moreover to the extent that the South Africa legal framework did affect the redistributive design of the regulatory framework here, it resulted from more general legal rights of equal treatment and not from any implication of the specific right to access sufficient water.

Because of the limited impact of the courts on the substantive dimensions of the regulatory framework for providing access to water in South Africa, legislative compromises play much the greater role in balancing the tensions involved in servicing vulnerable populations and running a viable business. I will close the discussion of the South African case with an example of how this legislative dimension can be shaped by actors who have no formal role whatsoever in the constitutional and public law framework that bears on water as a human right: the banks that lend the money for infrastructure projects. A fascinating (and non-judicial) example of a clash between financing issues and the legislative regulatory dimension of water service provision provides the context. The Municipal Systems Act 2000 (SA) clarified that water service providers (including private companies) could be directly involved in service payment collection. The apparent illegality of this under the Water Services Act 1997 (SA) (the function being apparently reserved to local government only) had led to the withdrawal of private lenders (and the substitution of development bank funding) in a major concession with the international private sector negotiated in Nelspruit in 1999.\textsuperscript{41} The clarification of the later act was directly shaped by the banks’ response: yet nothing in the regulatory frameworks of any of the soft law initiatives discussed in Part II would accommodate this. It appears then, that not only does a very specific context need to be present to elucidate the relative incompatibility or complementarity of ‘human right’ and ‘commodity’ vis a vis water services, but also the impact of the entire range of relevant stakeholders needs to be taken into account.

\textbf{Conclusion}

In sum, the apparent opposition between a human right to water and its commodification is at least over-drawn. The implementation of a right to water, whether as a human right, or as a market right, requires an extensive regulatory framework. A ‘right to access to essential services’ could implement the human right to water by means of creating a market framework for the provision of safe drinking water to individual consumers. In such a context, the subject of the human right to water and the subject of consumers’ rights within a regulatory infrastructure governing private sector provision of water, are not as different from each other

\textsuperscript{38} See paragraph 81 of the case report.
\textsuperscript{39} Paragraph 68 of the case report.
\textsuperscript{40} See paragraph 63 of the case report.
as the politics of the issue currently suggests. ‘Water as a commodity’ is not necessarily implacably incompatible with ‘water as a human right’. But tensions remain. In particular, what is manifestly diluted are more collective dimensions of participatory democracy. Many of the groups and networks fighting for water as a human right are fighting also for a more bottom-up vision of participatory democracy. One organisation that has long stressed the importance of community-centred approaches to the global ‘water problem’, urges:

As the WSSCC has long argued, it is not only increasing access to water and sanitation but increasing access to the management of water and sanitation that will determine whether progress is made and sustained.

In somewhat technocratic terms it is arguably ‘access to the management of water and sanitation’ that is at stake in the participatory democracy goals of the network of ‘water activists’. Such a goal is all too easily elided in the regulatory politics of the human right to water, and that occurs in part because of the growing prominence of a legal dimension to the debate. To say that the prominence of law is ‘growing’ is to put the story of water into longer historical perspective. For that story is, I would argue, an exemplar of key forces shaping the struggle to put a ‘human face’ on globalisation that is analogously equivalent to the nationally-based ‘welfare state’ politics of last century. But while welfare state politics of the turn of last century were centrally about labour-capital conflict and fiscal redistribution, the contemporary global version of such politics revolves around regulation and human rights. What was once openly debated as a question of who gets power and money, now becomes a debate still about power and money but conducted through the prism of legal and economic expertise. And law is being called upon to play an increasingly constitutive role in shaping the use and the limits of this expertise.

There is a loss inherent in this shift. While it cannot be closely argued here I want to suggest in provocative closure that the difference between the status of the subject of human rights and the claimant of consumer rights has to date depended on the possibility of disjuncture between the political and legal meanings of rights. Such a disjuncture that implies that rights claims can detach from, exceed or leak beyond legal dimensions and thereby challenge their limits – whether by implicitly drawing upon some kind of ‘natural rights’ claim as liberal versions tend to do, or by exposing internal and constitutive contradictions that weld together the legal and the political, as critical perspectives maintain. In other words, it is in the capacity to transcend legal dimensions of rights that the very political resonance of ‘rights talk’ lies.

But it is also a disjuncture that groups who fight for that political resonance often seek to close. Many, though by no means all, of such groups would endorse the following goal:

The recognition of human rights may be won by the activism of social movements, but this victory must be secured by the development of legal concepts that can be

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42 Details of the Alternative World Water Fora in Florence, Sao Paulo, New York and Delhi, held parallel to the Kyoto World Water Forum.
43 The Water Supply and Sanitation Collaborative Council (WSSCC), 'Kyoto: the agenda has changed' (Flyer distributed at the Third World Water Forum, Kyoto, Japan.
44 Or – in equally technocratic terms - a ‘right to regulate’, as intimated in the Introduction?
45 See W Brown and J Halley (eds), Left Legalism/Left Critique (Durham: Duke University Press, 2002) for a recent example of skepticism about the extent and value of a ‘turn to legalism’ in social activism.
understood and used by public decision makers. Further, this work must be accomplished inside the courthouse, legislature, or agency door.46

One could read the increasingly legalistic turn of the international human rights movement in this light, and the specific mobilisation around the ‘human right to water’ in the same light. But I want to argue that quite another direction is suggested by two important implications of the picture pieced together here of the regulatory dynamics of that struggle.

First, the global context of the network of practices around claiming and institutionalising a human right to water pushes the ‘transcendent trajectory’ of rights talk downwards to the level of local (subnational) democracy. But the activists’ push upwards towards the legal implementation of an international human right has at least the potential to mobilise powerful actors who may support that implementation in ways inimical to local-level control and participation of the ‘service provision’. Secondly and relatedly, because the key actors are private companies and there is no global ‘state law’ in relation to water, the legal dimensions against which water activists define their challenge are privately set. In the context of severe asymmetrical power relations between the private sector actors and their challengers, the local democratic articulation of the human right to water all too easily becomes local implementation of consumer rights in a market-led model of water services provision.

The broader academic resonance of this overall argument has two dimensions. First, the regulatory face of human rights is an important aspect of an interesting intersection between social movement scholarship and legal scholarship.47 Secondly and relatedly, it provides a challenging example of the encroaching effects of legalism on political activism.48 From both these perspectives, the instrumental effects of the increasing interpenetration of regulatory space and human rights endeavours may be at odds with a deeper, more elusive dimension of these practices that is loosely about identity-conferring dimensions. Conflating human rights and consumer rights strategies may often secure quite considerable instrumental success in the struggle over water policy, but the symbolic resonance of the two strategies and the self-image of those groups mobilising them seem very different. It is arguably only when there is a strong turn to law, rather than to politics, that the inevitability of their conflation occurs. If this is true, then it is important not to close the disjuncture between law and politics in the struggle over human rights.

At the somewhat bland level of global fora such as the Third World Water Forum, the blurring of the line between law and politics tends to generate evasive political rhetoric that elides the real issues of power and money at stake. To talk of ‘win-win’ solutions provided by public-private partnerships that not only evidence ‘good governance’ but also provide sufficient financial resources to bear the cost of implementing the human right to water is to sidestep the profoundly different motivations and politics of the groups advocating good governance and human rights. Is there then potential for more productive conflict in the growing entanglement between law and politics that a human rights approach to basic needs engenders? Upendra Baxi is pessimistic about where this entanglement will lead, viewing the increasingly complex linkages between development and conditional aid as steadily implanting a more trade-related, market-friendly concept of human rights that dilutes their

48 See Wendy Brown and Janet Halley (eds), Left Legalism/Left Critique (Duke University Press 2002).
radical potential. By contrast, Ed Rubin is pragmatically optimistic, emphasising the importance of detailed day-to-day politics:

Social movements literature emphasizes that the ideas and values we care about most...were fought for, bled for, and died for. They are the glories of our current civilization, not because we possess the pallid virtue of perceiving these principles as they float about in some sort of transcendental nimbus, but because we possess the effulgent virtue of maintaining and re-creating them amid the chaos and danger of ongoing circumstances.

Wendy Brown and Janet Halley also echo this optimism provided an engagement with legalistic modes of challenge is avoided. They insist upon the virtues of non-legalistic modes of political engagement with rights frameworks (and, I would add, with the complex entanglement of rights and regulatory frameworks). Those virtues include a wide range of cross-culturally accessible idioms and multidimensional arguments unconstrained by the dichotomies of legally-referenced frameworks. In this context of water, the relevant implication is to avoid too much concentration on global norm-making practices, or at least to ground such practices in the cultural specificities of how different regions within the world engage this entanglement of rights and regulation. The lesson, then, is to animate this engagement not by reference to sterile dichotomies of commodification versus human rights but to the complexity of local traditions of participatory collective action, administrative law and the like, without reducing these traditions to enumerated principles. It is, to end with Wendy Brown and Janet Halley’s words:

...a project that insists on understanding by precisely what paths, mechanism and contingencies we have come to a particular troubling pass. It embodies a will to knowledge, it really wants to know how things work and why, not just what principle we are supposed to uphold, what line we are supposed to toe, what side we are supposed to cheer...This work...can free us....to our most deeply held values and rekindle the animating spirit of those values.”