

Washington International Law Journal

Volume 15 | Number 3

9-1-2006

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Recommended Citation

Sarah I. Hale, Comment, *Water Privatization in the Philippines: The Need to Implement the Human Right to Water*, 15 Pac. Rim L & Pol'y J. 765 (2006).

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WATER PRIVATIZATION IN THE PHILIPPINES: THE NEED TO IMPLEMENT THE HUMAN RIGHT TO WATER

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Abstract: Water is widely recognized as an essential element to sustain life, yet attaining universal access to clean drinking water remains a perplexing issue throughout the lesser-developed world. In 1997, with backing from private investment and the World Bank, the Philippine government privatized the municipal water utility of Manila in an effort to improve service and promote efficiency. Nearly ten years later, privatization has failed to produce results and instead has engendered a contentious and polemical debate about the merits of privatization. Indeed, for policy makers, the case study of Manila has become a focal point in the debate about whether private companies or governments should operate municipal water utilities.

This Comment argues that current models for water services, whether private or public, will continually fail to address the economic, social, and political needs of lesser-developed nations unless they recognize the human right to water. Although it has not attained the status of binding international law, the human right to water offers an alternative model for understanding the terms of the privatization debate. In the context of privatization, states must protect the human right to water through strong regulatory measures that guarantee access to water and prevent private companies from infringing on this right.

Privatization in the Philippines currently does not protect the human right to water, and in future plans, the Philippine government should take steps to acknowledge and protect this right through strong regulatory controls and a universal access plan. This issue is timely for the Asian Pacific region, with its large number of failing privatized water systems. Water as a human right will be a useful model for the entire region.

I. INTRODUCTION

In 2002, the World Health Organization estimated that 1.1 billion people lacked access to adequate drinking water and 2.6 billion people still needed improved sanitation.¹ The lack of safe drinking water, sanitation, and hygiene has resulted in serious diseases that kill an estimated 2 million people each year.² A child dies every fifteen seconds from diarrhoeal diseases, which are most commonly related to contaminated drinking water

[†] The author would like to thank Professor Joel Ngugi, Roy Prosterman, Alexander Morrow, and the editors of the *Pacific Rim Law & Policy Journal* for their guidance, suggestions, and assistance in the development of this Comment.

¹ WORLD HEALTH ORGANIZATION (“WHO”), WATER, SANITATION AND HYGIENE LINKS TO HEALTH: FACTS AND FIGURES UPDATED (2004) available at http://www.who.int/water_sanitation_health/publications/facts2004/en/. See generally WORLD HEALTH ORGANIZATION, GLOBAL WATER SUPPLY AND SANITATION ASSESSMENT 2000 REPORT (2000) (describing the importance of clean drinking water for development, health, and sustainability).

² WORLD HEALTH ORGANIZATION, THE RIGHT TO WATER 6 (2003), available at http://www.who.int/water_sanitation_health/rightwater/en/rtwrev.pdf.

and inadequate sanitation.³ A vast majority of people who lack access to adequate water and sanitation live in lesser-developed countries.⁴ For the Asian Pacific region, access to safe drinking water is an especially significant issue; a majority of countries in the region, a third of the population lacks sufficient sanitation services.⁵ The Asian Development Bank has identified water as an essential component in improving the lives of the region's 900 million poor people.⁶ Given these numbers, it should be no surprise that the issue of water has become important on the world's political stage. The United Nations has declared 2005-2015 to be the "International Decade for Action, 'Water for Life.'"⁷

Privatization of water utilities has become a central strategy both globally and in the Asian Pacific region for dealing with the water crisis.⁸ Privatization typically involves the transfer of water utilities from public ownership to private sector ownership and operation.⁹ In recent years, international financial and development organizations encouraged, and often required, lesser-developed countries to privatize state-owned companies in exchange for investment capital and loans for development projects.¹⁰ Privatization has been implemented in cities across the world including Buenos Aires, Argentina; Jakarta, Indonesia; and Nkobongo, South Africa.¹¹ Water privatization is a big business; revenue from the global trade in water

³ *Id.* at 7.

⁴ *Id.* at 6.

⁵ CASTALIA STRATEGIC ADVISORS, SECTOR NOTE ON WATER SUPPLY AND SANITATION FOR INFRASTRUCTURE IN EAST ASIA AND THE PACIFIC FLAGSHIP 6-7 (2004), available at <http://siteresources.worldbank.org/INTEAPINFRASTRUCTURE/Resources/855084-1137106254308/EAPWaterandSanitation.pdf> [hereinafter SECTOR NOTE ON WATER SUPPLY].

⁶ ASIAN DEVELOPMENT BANK, WATER FOR ALL: THE WATER POLICY OF THE ASIAN DEVELOPMENT BANK I (2003).

⁷ *International Decade for Action, Water for Life*, G.A. Res. 58/217, U.N. GAOR, 58th Sess., 78th plen. mtg. at 1, U.N. Doc. A/RES/58/217 (Dec. 23, 2003); SALMAN M.A. SALMAN & SIOBHAN MCINERNEY-LANKFORD, THE HUMAN RIGHT TO WATER: LEGAL AND POLICY DIMENSIONS 82 (2004).

⁸ ADA KARINA IZAGUIRRE & CATHERINE HUNT, PUBLIC POLICY FOR THE PRIVATE SECTOR 4 (2005), available at http://www.worldwatercouncil.org/fileadmin/Financing_water_for_all/Gurria_Task_Force/privatization2004.pdf (estimating fifty-two new water privatization projects between 1999-2004, thirty of which took place in the Asian region).

⁹ See Mark Baker, *Privatization in the Developing World: Panacea for the Economic Ills of the Third World or Prescription Overused?*, 18 N.Y.L. SCH. J. INT'L & COMP. L. 233 (1999); *Water in People's Hands: Building Perspectives and Alternatives*, Proceedings from the National Conference on Freshwater, 19-21 March 2004, Philippines, at 9 (2004), available at <http://www.freedomfromdebtcoalition.org> (a study by the Global Challenge Initiative, which randomly reviewed IMF loan policies in forty countries found out that in the year 2000 alone, IMF loan agreements in twelve countries included conditions imposing water privatization or full cost recovery).

¹⁰ See Baker, *supra* note 9, at 234; Jennifer Naegele, *What's Wrong with Full-fledged Water Privatization?*, 6 J. L. SOC. CHALLENGES 99, 109 (2004).

¹¹ Center for Public Integrity, *The Water Barons*, <http://www.publicintegrity.org/water/default.aspx> (last visited Feb. 28, 2006).

amounts to more than US \$800 billion annually,¹² exceeding that of the global trade in the pharmaceutical industry.¹³ Despite the apparent boom in water privatization, however, the industry is in crisis. The largest transnational companies are rescinding and canceling agreements in the lesser-developed world, including projects in Asia. Most importantly, policy makers disagree about the best course of action.¹⁴

Economists, development experts, and activists actively debate the merits of privately or publicly owned water utilities.¹⁵ On one side, proponents of neo-liberal economic reforms offer privatization as a panacea for expanding water service, arguing the private sector is better suited than governments to delivering services because it is more efficient and responsive to consumer needs.¹⁶ On the other side, advocates of publicly owned water utilities consider water privatization to be part of a larger globalization trend, which allows multinational companies to exploit third world markets and resources.¹⁷ Indeed, the water sector has become a key battlefield for a much larger debate about neo-liberal economics and privatization.¹⁸ Critics of privatization contest the commodification of water and argue the private sector has no role in selling what is essentially a public resource.¹⁹ Thus far, both sides of this polarized and entrenched debate have failed to address the realities of many lesser-developed nations, and the debate has become stale.

Rather than focusing merely on the structures of ownership, governments should pay attention to the significant and essential role of water in sustaining life when formulating water policy, including

¹² Ana Maria R. Nemenzo, Address at the Asia Pacific Conference on Debt and Privatization of Water and Power Services (Dec. 12, 2003), available at <http://www.jubileesouth.org/news/EpZZZZVEEEEdDlvekyi.shtml>.

¹³ Maude Barlow & Tony Clarke, *Who Owns Water?*, NATION, Sept. 2, 2002, available at <http://www.thenation.com/doc/20020902/barlow>.

¹⁴ See *How Not to Help Those in Need*, ECONOMIST, Aug. 28, 2004; JOHN SOUSSAN, WATER AND POVERTY IN THE 3RD WORLD WATER FORUM (2004) (discussing the variety of policy perspectives and proposed solutions).

¹⁵ See *How Not to Help Those in Need*, ECONOMIST, Aug. 28, 2004; JOHN SOUSSAN, WATER AND POVERTY IN THE 3RD WORLD WATER FORUM (2004) (discussing the variety of policy perspectives and proposed solutions to the insufficient clean drinking water).

¹⁶ Naegele, *supra* note 10, at 109.

¹⁷ See e.g., Anita Roddick, *Introduction*, TROUBLED WATER: SAINTS, SINNERS, TRUTH, AND LIES ABOUT THE GLOBAL WATER CRISIS 8 (Anita Roddick & Brooke Shelby Biggs eds., 2004); VANDANA SHIVA, WATER WARS: PRIVATIZATION, POLLUTION, AND PROFIT 24 (2002); BRENDAN MARTIN, IN THE PUBLIC INTEREST? PRIVATIZATION AND PUBLIC SECTOR REFORM 10 (1993).

¹⁸ Erik Swyngedouw, *Dispossessing H2O: The Contested Terrain of Water Privatization*, CAPITALISM, NATURE, SOCIALISM, Mar. 2005, at 81.

¹⁹ See generally SHIVA, *supra* note 17, at 87-105 (explaining how multinational corporations have profited from the commodification of water, with little benefit to the public).

implementing privatization. Several international documents, as well as the domestic laws of a number of nations, recognize water as an essential human right, which must be protected by the state.²⁰ The concept of water as a human right explicitly mandates that both private and publicly owned water utilities respect this right. A policy based on water as a human right would protect the public interest while simultaneously reaping the benefits of private sector involvement, namely efficiency and capital investment.

Manila, the capital city of the Philippines, serves as an important example of how privatization has been implemented in Asia. The experience of privatization in Manila shows how private sector involvement harms the human right to water through high prices, inadequate access, and insufficient quality, which pose real threats to human health.²¹ The 1997 privatization of Metropolitan Waterworks and Sewerage System (“MWSS”) in Manila has failed to provide affordable clean drinking water and sewer services. Despite the plan’s stated goals to expand water service to all of the city’s 11 million residents and provide the utility with financial solvency, the privatization of the MWSS has not delivered meaningful improvements in service and access.²² Like many privatization agreements, the agreement privatizing water in Manila contained little regulation or oversight to protect the public interest.²³ The Philippines is also a useful example because it demonstrates how lesser-developed nations in the Asian Pacific region lack sufficient capital to assume public ownership of water utilities. After a severe financial crisis in the MWSS, the Philippine government has recently acquired eighty-four percent of the failing utility and plans to re-privatize it by mid-2006.²⁴

This Comment asserts that as the restructuring of the MWSS occurs, the Philippines government should enact legislation that formally recognizes the human right to water and create water policies that realize this right. Part II details the privatization experience in Manila. Part III of this Comment outlines the polarized debate over privatization and explains why both positions have become stale and ultimately inadequate. Part IV describes

²⁰ Stephen McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 GEO. INT’L ENVTL. L. REV. 1, 5 (1992); *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment 15 on the Right to Water*, U.N. ESCOR, 29th Sess., Agenda item 3, U.N. Doc. E/C.12/2002/11 (2003) [hereinafter *Comment 15*].

²¹ Public Citizen, *Privatization Fiascos: Philippines*, http://www.citizen.org/cmep/Water/cmep_Water/reports/philippines/articles.cfm?ID=9209 (last visited Oct. 15, 2005).

²² FREEDOM FROM DEBT COALITION, *LESSONS FROM A FAILED PRIVATIZATION EXPERIENCE: THE CASE OF THE PHILIPPINES’ METROPOLITAN WATERWORKS AND SEWERAGE SYSTEM 1-2* (2005), available at <http://www.freedomfromdebtcoalition.org/main/pages/water%20monograph.pdf>.

²³ *Id.* at 3.

²⁴ Eileen A. Mencias, *Gov’t Plans Maynilad Sale*, MANILA STANDARD, Nov. 29, 2005.

how the international community is developing the notion of a human right to water through both multinational agreements and domestic laws. Understanding water as a human right shifts the discourse about privatization by focusing on the essential and important role of water in sustaining life. Because access to water is a fundamental human right, nation-states must protect this right and prevent private companies from infringing on this right. Part V argues the human right to water requires the implementation of regulations to ensure this right is protected. Part VI describes the inadequacy of current regulations in the Philippines and the inability of these regulations to protect the human right to water in Manila. Part VII recommends that the Philippines formally recognize the human right to water, subsidize water for the poor to achieve universal access, and adopt a regulatory system centered on the notion of the availability of water as a human right.

II. DESPITE THE PROMISES OF PRIVATIZATION, WATER AND SEWER SERVICES CONTINUE TO FAIL

The privatization of the MWSS is an illustrative case study of the promise—and eventual failure—of private sector control of water and sewer utilities. Originally enacted in 1997 as the world's largest privatization plan, the privatization of MWSS was aimed at expanding service, lowering water rates, and improving the efficiency and operation of the utility.²⁵ Nine years later, the MWSS has failed to realize these improvements. Instead, in the autumn of 2005, the government reacquired majority ownership of the utility in half of the city as part of a negotiated plan to save the majority shareholder from bankruptcy.²⁶ The Philippine government's current plan is to auction off its shares in an effort to re-privatize the utility.²⁷ The Manila experience demonstrates the flaws in the current privatization agreements and highlights the need for an alternative paradigm.

A. *Privatization Promised to Expand Water Service and Improve Quality*

In 1996, privatization held much promise for the MWSS, a poorly run and flailing public utility. Originally built in 1878, the MWSS is one of

²⁵ MARK DUMOL, *THE MANILA WATER CONCESSION: A KEY GOVERNMENT OFFICIAL'S DIARY OF THE WORLD'S LARGEST WATER PRIVATIZATION I* (2000).

²⁶ Felipe F. Salvosa II, *Maynilad 'Reprivatization' to Be Finalized by June – Finance Dep't*, BUSINESSWORLD (Phil.), Jan. 6, 2006.

²⁷ Mencias, *supra* note 24.

Asia's oldest water and sewer utilities.²⁸ In the early 1990s, as the country emerged from a lengthy rule by the dictator Ferdinand Marcos,²⁹ the MWSS was marred by water losses from leaking pipes and pilfering, sporadic water service that totaled only 16 hours a day, and disappointing connection rates.³⁰ A substantial portion of the population was unconnected to the piped network system.³¹ The sewer system was especially deficient in that more than ninety-two percent of the city was without sewage treatment.³² The most pressing concern for the government was the utility's huge debt owed to international financial institutions.³³

As the Philippines transitioned from the fourteen-year rule of Marcos to the democratic administration of Corazon Aquino, international lending institutions including the World Bank encouraged the new democracy to privatize government-owned industries and utilities.³⁴ Proponents of privatization argued that government-owned utilities were inefficient and that private companies were better suited to managing utilities, because they created incentives for expanded service and efficient use of resources.³⁵

Further, proponents of privatization contended that government-owned water bureaucracies displayed weaknesses in everything from competence and administrative acumen to political control and perverse incentive structures.³⁶ They asserted privatization could mean more affordable water rates and increased access to clean water because the market created incentives to expand connections and charge lower rates.³⁷

²⁸ Metropolitan Waterworks and Sewerage System, About Us, <http://www.mwss.gov.ph/aboutus.asp> (last visited Mar. 16, 2006).

²⁹ See generally MARK R. THOMPSON, *THE ANTI-MARCOS STRUGGLE: PERSONALISTIC RULE AND DEMOCRATIC TRANSITION IN THE PHILIPPINES* (1995) (detailing the Marcos regime and its eventual fall).

³⁰ DUMOL, *supra* note 25, at 5.

³¹ FREEDOM FROM DEBT COALITION, *supra* note 22, at 1.

³² DUMOL, *supra* note 25, at 5.

³³ FREEDOM FROM DEBT COALITION, *supra* note 22, at 1.

³⁴ The privatization of the Buenos Aires water system, for example, emerged from years of authoritarian rule as Argentina transitioned to democracy. During this period, Carlos Menem aggressively pursued economic reforms, including the privatization of several sectors by Presidential decree. See generally Alex Loftus & David A. McDonald, *Lessons from Argentina: The Buenos Aires Water Concession*, at 7, Municipal Services Project: Occasional Papers Series Number 2 (2001), available at http://www.queensu.ca/msp/pages/Project_Publications/Series/PapersNo2.pdf; see also David Hall, *Introduction to RECLAIMING PUBLIC WATER: ACHIEVEMENTS, STRUGGLES, AND VISIONS FROM AROUND THE WORLD* 15, 19 (Belén Balanyá et al. eds., 2005).

³⁵ ALAN SHIPMAN, *THE MARKET REVOLUTION AND ITS LIMITS: A PRICE FOR EVERYTHING* 395 (1999).

³⁶ FREDRIK SEGERFELDT, *WATER FOR SALE: HOW BUSINESS AND THE MARKET CAN RESOLVE THE WORLD'S WATER CRISIS* 21 (2005).

³⁷ TROUBLED WATER, *supra* note 17, at 38.

Moreover, such expansion would be possible because private companies would have the capital to invest in infrastructure and new technologies.³⁸

Given the deteriorated infrastructure of the MWSS, water losses, and international debt, such arguments appealed to Philippine policymakers. Mark Dumol, a key policy maker in the MWSS, argued that bureaucratic procedural requirements, enacted after the Marcos regime to achieve transparent decision-making, actually tied projects “into knots” and produced years of delay.³⁹ In addition to procedural inefficiencies, the MWSS was overstaffed, with 13 employees to every 1,000 water connections. In contrast, the water utility in Jakarta, Indonesia, considered an “efficient” utility, in 2001 had 5.3 workers for every 1,000 connections.⁴⁰ Lastly, held entirely by the government, the MWSS was severely in debt, which added to the national debt.⁴¹

In 1997, in response to the crumbling water infrastructure and critiques of government bureaucracy, Philippine President Fidel Ramos privatized the MWSS.⁴² Using concession agreements⁴³ based on models of privatization enacted in other countries, Ramos turned over responsibility for the operation and maintenance of the MWSS to two companies: the Maynilad Water Service, Inc. and Manila Water Company.⁴⁴ The former, a partnership between the transnational water company Suez and Benpres Holdings, owned by an elite Filipino family, won the western half of the city, while the latter, a group of international investors, including Bechtel and the local firm Ayala Corporation, won the eastern half.⁴⁵ The 25-year concessionary agreement was ambitious.⁴⁶ It established benchmarks for water quality.⁴⁷ It also required the companies to obtain water connections

³⁸ DUMOL, *supra* note 25, at 19.

³⁹ *Id.* at 16-17.

⁴⁰ ASIAN DEVELOPMENT BANK, WATER IN ASIAN CITIES: UTILITIES’ PERFORMANCE AND CIVIL SOCIETY VIEWS 45 (Charles T. Andrews & Cesar E. Yñiguez eds., 2004).

⁴¹ DUMOL, *supra* note 25, at 19.

⁴² Water Crisis Act of 1995, Rep. Act 8041 (1995) (Phil.).

⁴³ UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, CASE STUDIES OF BANKABLE WATER AND SEWERAGE UTILITIES VOLUME I: OVERVIEW REPORT 14 (2005), available at http://pdf.usaid.gov/pdf_docs/PNADE147.pdf. Such an agreement “gives a private company responsibility for not only the operation and maintenance of a utility’s assets, but also for its capital investments . In return for assuming this responsibility, the concessionaire is given full-use rights of the assets for the concession period, typically 25 to 30 years. Ownership of the assets remains with the government, and use rights revert to the government upon expiration of the concession.” *Id.*

⁴⁴ DUMOL, *supra* note 25, at 93-98.

⁴⁵ *Id.* at 82 (describing how Philippine law requires sixty percent ownership in utilities by firms incorporated in the Philippines); Const. (1987) art. XII, §11 (Phil.).

⁴⁶ DUMOL, *supra* note 25, at 56.

⁴⁷ Metropolitan Waterworks and Sewerage System Concession Agreement, art. 5.1.4 (1997), available at <http://www.mwss.gov.ph/files/Concession%20Agreement.PDF> [hereinafter Concession

to 100% of households in their areas within the first ten years and provide 24 hours of water supply each day.⁴⁸ The agreement also aimed to reduce water losses, often due to leaking pipes and illegal connections, from 56% to 32%.⁴⁹ Capital investments were also required for \$7.5 billion during the life of the contract for infrastructure and other improvements.⁵⁰ The privatization of the MWSS was hailed as the first large-scale water utility project in Asia.⁵¹

B. Affordability, Quality, and Accessibility Have Deteriorated Since Privatization

Despite its promise, the privatization of the MWSS has diminished the public's access to quality water.⁵² After privatization, water became less affordable. Although water rates initially declined and services improved in the immediate aftermath of privatization, both concessionaries requested 15% tariff increases from the regulatory body within two years of the agreement.⁵³ This was only the first of a series of rate increases, which eventually left rates 500-700% higher nine years after privatization.⁵⁴ For most residents of the city, higher rates have resulted in a substantial portion of their income going to water and sewer service.⁵⁵

Although the MWSS has made some improvements in the number of water connections throughout the city, these figures are still below the United Nations' goals for connectivity, and below the targets outlined in the concession agreement.⁵⁶ An Asian Development Bank report found that as of 2004, approximately 58% of the city was connected to the water network.⁵⁷ The sewer service is in a particularly bad state, with no improvement since privatization. In 2001, 93% of the city or 10 million residents lacked access to the sewer and waste system.⁵⁸ A 2003 World

Agreement] (detailing the major commitments for each party and separate schedules document the specific benchmarks).

⁴⁸ *Id.* at art. 5.1.2.

⁴⁹ *Id.* at art. 5.1.4.

⁵⁰ *Id.* at art. 5.

⁵¹ DUMOL, *supra* note 25, at 1.

⁵² See FRANCES T.C. LO, MAKING THE PUBLIC WORK: ALTERNATIVE TO MANILA WATER PRIVATIZATION, <http://www.tni.org/asem-hanoi/franceswater.htm> (last visited Oct. 15, 2005).

⁵³ FREEDOM FROM DEBT COALITION, *supra* note 22, at 1; Public Citizen, *supra* note 21.

⁵⁴ FREEDOM FROM DEBT COALITION, *supra* note 22, at 1-2.

⁵⁵ Public Citizen, *supra* note 21.

⁵⁶ Concession Agreement, *supra* note 47, at art. 5.

⁵⁷ WATER IN ASIAN CITIES, *supra* note 40, at 53.

⁵⁸ *Id.* at 52.

Bank study found that Manila was one of the worst major Asian cities, second only to Jakarta, in relation to water and sewer access.⁵⁹

In addition to coming up short on the claims of privatization, on several occasions the transfer of the MWSS has proven to be dangerous to public health. In 2003, the treatment of water by the companies produced an outbreak of cholera, which left more than 600 sick and six dead.⁶⁰ A study that same year by the University of the Philippines' Natural Sciences Research Institute found that Maynilad's water was contaminated with *E. coli* bacteria at 16 per 100 ml of water or more than 700% the national regulatory standard of 2.2 per 100 ml of water.⁶¹ Private sector operation of the water utility has created no meaningful improvements in water quality and failed to meet the standards of the concession agreement.

C. Despite the Significant Problems, Private Sector Involvement Is Still Needed

Despite the failing system, the Philippine government does not have the capital to invest in the MWSS and make it operationally viable. The utility owes well over US\$ 150 million in international and domestic debt.⁶² As many critics of privatization in the Philippines have conceded, for developing countries, private sector investment may be necessary.⁶³ A re-nationalization of the MWSS is simply impossible because "the current government is mired in a fiscal crisis that may degenerate into an economic meltdown if not resolved within the next two or three years. There are no public funds to finance the utility."⁶⁴ Given the lack of funds, privatization remains an important mechanism for bringing both investment and efficiency to the utility.

⁵⁹ Blanche S. Rivera, *IIM in Metro Have No Sewer Access*, PHIL. DAILY INQUIRER, Aug. 2, 2005, at A17.

⁶⁰ FREEDOM FROM DEBT COALITION, *supra* note 22, at 7.

⁶¹ *Id.*

⁶² Press Release, Freedom from Debt Coalition, *On Maynilad's Revised Rehabilitation Plan: GMA Administration Fails as People's First Line of Defense!* (Oct. 9, 2004), available at http://www.cyberdyaryo.com/press_release/pr2004_1009_02.htm.

⁶³ Carla Montemayor, *Possibilities for Public Water in Manila*, in RECLAIMING PUBLIC WATER, *supra* note 34, at 213, 217 (2005) (arguing that the financial crisis in the Philippines may prohibit government ownership).

⁶⁴ *Id.* at 222.

III. CURRENT FRAMEWORKS FOR WATER UTILITIES ARE FIXATED IN A DEBATE OVER PUBLIC OR MARKET BASED UTILITIES

Privatization has become an increasingly contentious yet prominent economic model often promoted by international lending agencies like the World Bank and the International Monetary Fund.⁶⁵ Privatization of water utilities accelerated in the 1990s, including projects in Laos, Indonesia, and Malaysia.⁶⁶ As these international organizations pushed plans for privatization, an often contentious and polarized debate emerged within the international community among policymakers, economists, and social justice advocates about who should provide water services. The debate turns on a market-based or public-based approach to water policy. This debate and the proposed models of private or public water fail to account for the realities of lesser-developed countries, where water privatization has proved harmful to water access and where government ownership is simply not feasible.

A. *Proponents of Privatization Argue the Private Sector Is More Capable of Expanding Water Services*

For more than two decades, proponents have argued that privatization can solve the vexing problem of water distribution through the competitive marketplace. In laying out their position, advocates of privatization first criticize government ownership of water utilities as inefficient and bureaucratic.⁶⁷ They contend governments are ill-suited to distribute resources because they lack the expertise and incentives to act efficiently.⁶⁸ For government actors, they argue, there is simply no economic incentive or pressure from shareholders to expand service areas or lower the number of employees. Curtailing government corruption is also proffered as a benefit of privatization. Proponents of privatization argue that individuals engage in rent seeking behavior by seeking public involvement in the economy in ways that benefit themselves but artificially set prices or create demand.⁶⁹ Without a commercial basis for these prices or demand, individual actors in the government seek to benefit themselves.⁷⁰

⁶⁵ MARTIN, *supra* note 17, at 3.

⁶⁶ WATER IN ASIAN CITIES, *supra* note 40, at 44, 50, 66.

⁶⁷ BERNARDO BORTOLOTTI & DOMENICO SINISCALCO, THE CHALLENGES OF PRIVATIZATION: AN INTERNATIONAL ANALYSIS 7 (2004).

⁶⁸ See, e.g., JOHN D. DONAHUE, THE PRIVATIZATION DECISION 4 (1989).

⁶⁹ Mick Moore, *Rent-seeking and Market Surrogates: The Case of Irrigation Policy*, in STATES OR MARKETS?: NEO-LIBERALISM AND THE DEVELOPMENT POLICY DEBATE 279-80 (Christopher Colclough & James Manor eds., 1991).

⁷⁰ *Id.* at 283.

In addition to criticizing government ownership of water utilities, proponents contend privatization creates social benefits.⁷¹ Privatization promotes economic stability, creates markets that are more responsive to consumer demand than centralized governments, and provides incentives to invest in infrastructure.⁷² To be profitable, private companies typically require full cost recovery for all expenditures. As a standard model, full cost recovery methodically establishes pricing where utilities recover operation and maintenance costs based entirely on the rate consumers pay for water.⁷³ Profitability hinges on these consumer rates.

Proponents also argue de-regulation and a limited role for the state are central to the project of privatization. Private companies are best able to deliver goods such as water because market competition encourages efficiency. Privatization requires an “unbundling” of the government’s role, including ownership and de-regulation.⁷⁴ This “unbundling,” meaning a withdrawal of state regulation, is a prerequisite to allowing free market competition free from government interference.⁷⁵

Although rhetorically privatization calls for governments to assume a smaller role in the economy, the state plays a central part in the private sector model by maintaining and improving economic conditions.⁷⁶ According to proponents of privatization, the proper role for the government in a privatized system is to promote market competition.⁷⁷ This is to prevent abuses associated with monopoly control, where a state-owned entity simply transfers ownership to private hands.⁷⁸ Thus, governments should act to break up monopolies and encourage competition.⁷⁹ Such reforms to promote competition include removing entry barriers such as licensing requirements, opening markets to foreign competition, and enforcing competition laws.⁸⁰

⁷¹ Aslam A. Jaffery, *Economic Freedom and Privatization—From Egypt and Mesopotamia to Eastern Europe*, 28 DENV. J. INT’L L. & POL’Y 365, 371 (2000).

⁷² *Id.*

⁷³ DAVID HALL, THE PUBLIC SECTOR WATER UNDERTAKING, A NECESSARY OPTION 9 (2001) available at <http://www.psiu.org>,

⁷⁴ Matthias Finger, *Regulation*, in LIMITS TO PRIVATIZATION: HOW TO AVOID TOO MUCH OF A GOOD THING 292 (Ernest von Weizsäcker et al. eds., 2005).

⁷⁵ *Id.*

⁷⁶ Swyngedouw, *supra* note 18, at 81.

⁷⁷ Baker, *supra* note 9, at 259.

⁷⁸ *Id.* at 260.

⁷⁹ Jaffery, *supra* note 71, at 378.

⁸⁰ Baker, *supra* note 9, at 267 n.125.

B. *Advocates for Public Water Critique Privatization for Commodifying Water and Harming the Public Interest*

In sharp contrast, proponents of public ownership of water contend privatization is a failed model, and public ownership is the only viable alternative.⁸¹ Critics lodge two main arguments against privatization: first, water is a public resource and should not be commodified. Second, privatization is incompatible with regulation because it fundamentally alters the democratic control of public resources.⁸² Given these substantial flaws, they argue water utilities should be publicly owned.

Public water advocates contest the very assumption that water should be privatized, arguing that water is a public resource and should not be sold because it would be as implausible as “leasing the rain.”⁸³ Sociologist Erik Swyngedouw explains the transformation of a public resource to a commodified good:

[P]rivatization is a process through which activities, resources, and the like, which had not been formally privately owned, managed or organized, are taken away from whoever or whatever owned them before and transferred to a new property configuration that is based on some form of ‘private’ ownership or control. Privatization, therefore, is nothing else than a legally and institutionally condoned, if not encouraged, form of theft.⁸⁴

The shift from water utilities as a public service operated by the government to a privatized system operated for profit seems antithetical to the essential nature of water to sustain life.⁸⁵ Governments are the only legitimate actors who can provide water services and simultaneously protect the public interest through regulation and policy initiatives.⁸⁶

⁸¹ Hall, *supra* note 34, at 19 (critiquing privatization, but arguing for public centered and controlled water utilities).

⁸² See, e.g., SHIVA, *supra* note 17.

⁸³ See generally MAUDE BARLOW & TONY CLARKE, BLUE GOLD: THE FIGHT TO STOP THE CORPORATE THEFT OF THE WORLD'S WATER 87 (2003) (“Some things are not for sale—things like natural resources (including air and water), genetic codes and seeds, health, education, culture, and heritage. These, and other essential elements of life and Nature, were part of a share inheritance or rights that belong to all people. In other words, they belonged to ‘the commons.’”); William Finnegan, *Leasing the Rain: The World is Running Out of Fresh Water, and the Fight to Control It Has Begun*, NEW YORKER, Apr. 8, 2002, available at http://www.newyorker.com/fact/content/?020408fa_FACT1.

⁸⁴ Swyngedouw, *supra* note 18, at 81.

⁸⁵ See Vandana Shiva, *Monsanto's Billion-Dollar Water Monopoly Plans*, CAN. DIMENSION, Feb. 2000, at 15; BARLOW & CLARKE, *supra* note 83, at 88.

⁸⁶ See Swyngedouw, *supra* note 18, at 81.

Public water advocates cite a number of failed privatization projects, which demonstrate the adverse impacts of privatization on poor communities.⁸⁷ For example, the introduction of water meters in black townships of Johannesburg, South Africa by a privately owned water utility meant many residents were “forced to choose between buying enough food to eat and buying water for basic hygiene and sanitation.”⁸⁸ Public water proponents argue that under a capitalist system, private companies are predisposed to rate increases in order to expand profits and achieve growth. These recurring rate increases force poor people to make trade-off decisions between water and other necessities.⁸⁹ Critics of privatization worry that as water becomes increasingly scarce, markets will price water out of the reach of ordinary people across the globe.⁹⁰

Further, public water proponents argue water privatization results in diminished regulation, oversight, and accountability because agreements often remove all mechanisms that normally protect the public interest.⁹¹ Under a capitalist scenario, private companies have little incentive to pursue public policy goals, such as water subsidies for the poor, because such subsidies may be unprofitable.⁹² Moreover, regulation is often voluntary or included within the privatization agreements. In voluntary self-regulation agreements, the loss of public accountability and public policy goals are especially acute because private companies are not accountable through democratic participation.⁹³ Even if water is provided by the private companies, the task remains “[a] public responsibilit[y] . . . and the market is often more a metaphor than a reality.”⁹⁴ Finally, and most incisively, critics of privatization argue privatization reconfigures the relationship between the state and private sector in ways that hurt the public interest. Privatization

⁸⁷ Vandana Shiva, *Don't Buy the Lie: Myths of Privatization*, in TROUBLED WATER, *supra* note 17, at 34-45.

⁸⁸ Matthew Kavanagh, *Operation Vula Manzi; (Open Water); Resisting Water Privatization in South Africa*, CLAMOR, Nov./Dec. 2005, at 44.

⁸⁹ Jon Luoma, *The Water Thieves*, ECOLOGIST, Mar. 2004, at 52, 54.

⁹⁰ See BARLOW & CLARKE, *supra* note 83, at xviii (arguing that water is a collective good and should not be allowed to be “privatized, commodified, traded, or exported for commercial purposes”); John Luoma, *Water for Profit*, MOTHER JONES, Nov./Dec. 2002 at 34, 88. For example, in Ghana after the government privatized water utilities, the cost of running water topped \$110 a year, in a country where the average annual income is less than \$400. *Id.*

⁹¹ ALFRED C. AMAN, JR., THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM 89-90 (2004) (arguing globalization and privatization have created a new form of “governance,” which has shifted the relationship between the state and the market, and private companies have increasingly defined public policy and left the state with a substantially narrower role).

⁹² See *id.* at 89-90.

⁹³ Alfred Aman, Jr., *Privatization and the Democracy Problem Globalization: Making the Markets More Accountable Through Administrative Law*, 28 FORDHAM URB. L.J. 1477, 1478 (2001).

⁹⁴ AMAN, *supra* note 91, at 99.

creates a governance model aimed solely at building a competitive marketplace, not at achieving public policy goals.⁹⁵ Once water utilities have been privatized, water policy is subsequently driven not by public objectives, but by private interests and market demands.⁹⁶ Further, privatization may affect citizens' relationship with the state, by discouraging democratic participation and engendering a general alienation from the government.⁹⁷

C. *The Debate over Private or Public Ownership of Water Utilities Ignores the Realities of Developing Countries*

The current models for privately or publicly owned water utilities do not adequately account for the conditions within developing countries. Lesser-developed countries pose unique challenges to the framework of privatization, because their economies often lack a strong and competitive marketplace.⁹⁸ First, it is worth noting that privatization most often occurs in lesser-developed countries after other economic models have faltered. Privatization is implemented after a different economic strategy has failed, and to comply with requirements by international lending agencies to secure loans or other forms of investment.⁹⁹ As development scholar and law professor Maxwell Chibundu notes, "the current trend toward privatization expresses the belief that a dead end has been reached in one direction, and the other road must be taken."¹⁰⁰ Because the economy is weak when privatization is implemented, the conditions are not suitable for private competition.

Similarly, proponents of public water ignore the lack of capital in lesser-developed countries and ignore the legacy of public utilities, which are often marked by inefficiency and corruption. The Asian Development Bank estimates US\$ 6.3 billion annually is needed to provide universal access to clean drinking water.¹⁰¹ In the face of such drastic undercapitalization and a dearth of public funds, publicly owned systems are

⁹⁵ Ernst von Weizsäcker, *The General Context, Post-War History: The Ups and Downs of the Public Sector*, in *LIMITS TO PRIVATIZATION*, *supra* note at 74, at 175, 185.

⁹⁶ See Zillah Eisenstein, *Stop Stomping on the Rest of Us: Retrieving the Publicness from Privatization of the Globe*, 4 *IND. J. GLOBAL LEGAL STUD.* 59, 61 (1996).

⁹⁷ Ernst von Weizsäcker et al., *Lessons Learned from Privatization*, in *LIMITS OF PRIVATIZATION*, *supra* note 74, at 351, 357.

⁹⁸ Baker, *supra* note 9, at 258.

⁹⁹ *Id.* at 243.

¹⁰⁰ Maxwell O. Chibundu, *The Shift in Markets: New Movements in International Law Responding to Privatization*, 87 *AM. SOC'Y INT'L L. PROC.* 105, 119 (1993), *cited in* Baker, *supra* note 9, at 243.

¹⁰¹ Sector Note on Water Supply, *supra* note 5, at 5.

simply not feasible. Moreover, as the experience in Manila in the 1980s and early 1990s indicates, publicly owned water utilities can suffer from chronic inefficiency and corruption.¹⁰² Lesser-developed countries are in dire need of an alternative water-supply paradigm, one that recognizes the unique, essential nature of water for life.

IV. EMERGING NOTIONS OF WATER AS A HUMAN RIGHT RECAST THIS DEBATE AND PROVIDE AN ALTERNATIVE FRAMEWORK

Recognizing water as fundamental to life provides an alternative model for the debate about private or publicly owned water utilities. Water as a human right has become an important force over the last decade, with both international and domestic recognition of this right.¹⁰³ Unlike the current discourse over water, which identifies ownership as the key criteria to shape water policy, a human rights paradigm shifts policy to focus on the role of water for individuals and communities.¹⁰⁴

A. *International Law Recognizes the Human Right to Water*

International bodies and some nations recognize the human right to water as an emerging legal category within international law.¹⁰⁵ International bodies like the United Nations have recognized that water is fundamental to human life instead of regarding it as an economic good.¹⁰⁶ Although the right to water has not been expressly recognized, some scholars have implied it from international agreements,¹⁰⁷ because water “sits at the very essence of the right to life and other fundamental rights.”¹⁰⁸ Additionally, some international instruments have explicitly recognized this right.¹⁰⁹

¹⁰² DUMOL, *supra* note 25, at 16-20.

¹⁰³ See, e.g., JOHN SCANLON ET AL., WATER AS A HUMAN RIGHT? 11-20 (2004), available at www.iucn.org/themes/law/pdfdocuments/EPLP51EN.pdf; Peter Gleick, *The Human Right to Water*, WATER POLICY, July 9, 1999, available at <http://www.pacinst.org>.

¹⁰⁴ See SCANLON, *supra* note 103, at 24.

¹⁰⁵ See Erik B. Bluemel, *The Implications of Formulating a Human Right to Water*, 31 ECOLOGY L.Q. 957, 962 (2004).

¹⁰⁶ *Id.* at 966; SCANLON, *supra* note 103, at 41-60 (listing both binding and non-binding international and regional documents that include a human right to water).

¹⁰⁷ SCANLON, *supra* note 103, at 18.

¹⁰⁸ *Id.*

¹⁰⁹ Bluemel, *supra* note 105, at 963.

1. *Treaties and Conventions Recognize the Human Right to Water*

The Universal Declaration of Human Rights (“UNDHR”), adopted in 1948, articulated the basic components of human rights, including the concept that human rights are universal and international.¹¹⁰ One of the most significant rights established by the UNDHR is stated in Article 3: “everyone has the right to life, liberty, and security of person.”¹¹¹ In addition, Article 25 of UNDHR explains that each person has the “right to a standard of living adequate for the health and well-being of himself and of his family.”¹¹² Both of these provisions are a significant basis for the human right to water because water is a necessary precondition to realize these rights. While the most fundamental provisions of the UNDHR are incorporated into international customary law, the provisions that imply a right to water, namely Articles 3 and 25, are not binding on states.¹¹³

Subsequent covenants to the UNDHR are also a basis for the human right to water.¹¹⁴ The International Covenant on Economic, Social, and Cultural Rights (“ICESCR”), which was approved by the United Nations in 1966, “recognize[s] the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”¹¹⁵ Often called a “second generation right,” water has been primarily understood to be a right that is implied in the ICSECR because it is “necessary to achieve primary human rights.”¹¹⁶ Beginning in the 1970s, the international community explicitly recognized water as an essential human right.¹¹⁷ In 1977, the Mar del Plata Conference in Argentina marked the international community’s first declaration on the necessity of water for life.¹¹⁸

In 2002, General Comment 15, issued by the Committee on Economic, Social, and Cultural Rights (“ECOSOC”), characterized water as

¹¹⁰ *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 1st mtg., at pmbl, U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*]; Amy Hardberger, *Life Liberty and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations It Creates*, 4 NW. U. J. INT’L HUM. RTS 331, para. 9 (2005).

¹¹¹ *Universal Declaration*, *supra* note 110, at art. 3.

¹¹² *Id.* at art. 25.

¹¹³ McCaffrey, *supra* note 20, at 8; see Ramin Pejan, *The Right to Water: The Road to Justiciability*, 36 GEO. WASH INT’L L. REV. 1181, 1184 (2004); *Universal Declaration*, *supra* note 110, at arts. 3, 25.

¹¹⁴ Hardberger, *supra* note 110, para. 24; SALMAN, *supra* note 7, at 9.

¹¹⁵ *International Covenant on Economic, Social and Cultural Rights*, Jan. 3, 1976, art. 11, 999 U.N.T.S. 3.

¹¹⁶ Bluemel, *supra* note 105, at 967-68; SALMAN, *supra* note 7, at 2 (discussing second generation human rights).

¹¹⁷ SALMAN, *supra* note 7, at 7.

¹¹⁸ *Id.* at 8.

both a fundamental human need, essential for life, and a prerequisite for the realization of other human rights.¹¹⁹ ECOSOC issues comments to assist state parties with fulfilling their obligation under ICESCR and to create authoritative interpretations of the covenant.¹²⁰ Although not binding customary international law, like some provisions of UNDHR, the comments are authoritative interpretations of the covenant.¹²¹ General Comment 15 formally recognizes an independent right to water, and explains “the human right to water is indispensable for leading a life in human dignity.”¹²² As the Comment states, “safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.”¹²³

Comment 15 also establishes state obligations to realize the right to water. States have a duty to “move as expeditiously and effectively as possible towards the full realization of the right to water.”¹²⁴ Further, states are obligated to prevent the infringement of these rights by third parties, including private companies operating water utilities. When water is distributed by the private sector, “[s]tates parties must prevent them [the private sector] from compromising equal, affordable, and physical access to sufficient, safe and acceptable water.”¹²⁵

2. *States Should Recognize and Protect the Human Right to Water Through Non-Binding International Agreements*

General Comment 15 provides the strongest mechanism for enforcement by making the first incorporation of an explicit right to water into the ICESCR.¹²⁶ General Comment 15 is not a legally binding document, but it is significant because it interprets ICESCR to include a right to water.¹²⁷ The Comment offers guidance to state parties on how to implement the ICESCR and should be viewed as an authoritative interpretation of ICESCR.¹²⁸ Currently, ECOSOC lacks the legal authority to create new obligations for states under ICESCR¹²⁹ and does not have

¹¹⁹ *Comment 15, supra* note 20, at 1; SALMAN, *supra* note 7, at 54.

¹²⁰ MATTHEW CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 90 (1995).

¹²¹ SALMAN, *supra* note 7, at 42.

¹²² Bluemel, *supra* note 105, at 972; *Comment 15, supra* note 20, at 15.

¹²³ *Comment 15, supra* note 20, at 2.

¹²⁴ *Id.* at 18.

¹²⁵ *Id.* at 24.

¹²⁶ Hardberger, *supra* note 110, para. 59.

¹²⁷ SALMAN, *supra* note 7, at 86.

¹²⁸ *Id.*

¹²⁹ SALMAN, *supra* note 7 at 49.

mechanisms to solve disputes about the dimension of obligations under the ICESCR.¹³⁰ Although states are not required to immediately guarantee covenants, they must implement the agreements progressively and to the extent permitted by their resources.¹³¹ General Comment 15 could obligate states to progressively achieve the human right to water if its provisions were adopted into a legally binding international instrument.¹³² Thus, General Comment 15 possesses the important function of establishing a settled interpretation of ICESCR and could be an effective mechanism for ensuring the human right to water.¹³³

B. Nations Are Implementing the Human Right to Water into Domestic Laws

In addition to international treaties and covenants that recognize the human right to water, nations have also recognized this right domestically.¹³⁴ A right to water is implied in the constitutions of 42 nations, which provide general guarantees for a healthy environment to sustain life.¹³⁵ These nations include several in the Asian Pacific region such as Bangladesh, Cambodia, Japan, Korea, and Laos.¹³⁶ As of 2004, eight nations have included provisions to protect access to water in their respective constitutions.¹³⁷ For example, Article 14 of the Ugandan Constitution creates an affirmative duty on the state to protect the right to water by mandating that “[t]he State shall endeavour to fulfill the fundamental rights of all Ugandans to social justice and economic development and shall, in particular, ensure that . . . all Ugandans enjoy rights and opportunities and access to . . . clean and safe water. . . .”¹³⁸ Most recently, in Uruguay a popular referendum reformed the Constitution to add provisions that

¹³⁰ *Id.*

¹³¹ McCaffrey, *supra* note 20, at 8-9.

¹³² CRAVEN, *supra* note 120, at 129.

¹³³ *Id.* at 91.

¹³⁴ Pejan, *supra* note 113, at 1193.

¹³⁵ SCANLON, *supra* note 103, at 42-46 (listing the following nations' constitutions as recognizing a general right to a healthy environment: Argentina, Belarus, Benin, Brazil, Bulgaria, Burkina Faso, Cambodia, Cape Verde, Chile, Colombia, Congo, Costa Rica, Ecuador, Eritrea, Ethiopia, France, Gambia, Greece, Guatemala, Honduras, Hungary, India, Japan, Kazakhstan, Korea, Kyrgyzstan, Laos, Macedonia, Mali, Mexico, Moldova, Namibia, Netherlands, Nicaragua, Panama, Paraguay, Peru, Philippines, Portugal, Slovakia, Slovenia, South Africa, Spain, Switzerland, Togo, Turkey, Uganda, Venezuela, and Zambia).

¹³⁶ *Id.* at 42.

¹³⁷ See The Center for Economic and Social Rights, The Right to Access to Water: Relevant Constitutional Provisions, <http://www.cesr.org/node/view/72> (last visited Feb. 18, 2006) (listing Ethiopia, Gambia, Guatemala, Panama, South Africa, Uganda, Venezuela, and Zambia).

¹³⁸ *Id.*; see CONST. (1995) art. 14 (Uganda).

explicitly recognize the human right to water.¹³⁹ Passed with more than two-thirds of the popular vote, the constitutional amendment called access to water “essential for life,” amounting to a “human right.”¹⁴⁰ Although such efforts represent a minority of nations, the global direction as indicated by Comment 15 is for greater recognition of such rights. Further, the numerous recognitions of the human right to water can be interpreted as state practice to establish customary international law. As more nations execute these norms into domestic law they will create a solid basis for a right to water under international customary law.¹⁴¹

V. IN ORDER TO PROTECT THE HUMAN RIGHT TO WATER, DOMESTIC IMPLEMENTATION IS NEEDED

Regardless of whether private or public entities own and operate water utilities, governments must first recognize the human right to water and ensure these entities respect the human right to water. States must therefore retain control over water policy and regulation to “ensure both minimal and progressive access to needed services on a nondiscriminatory basis.”¹⁴² In contrast to the model proposed by advocates of privatization, where governments cede all control and regulation except to foster competition, a human rights framework mandates active government protection of these rights.¹⁴³ This means “states cannot allow market forces and pure profit to drive the provisions of basic service.”¹⁴⁴ This section outlines the basic elements of a domestic implementation of the human right to water. Although no nation has fully implemented the human right to water,¹⁴⁵ South Africa’s Water Services Act and program to create universal access represent the best efforts to date to implement a comprehensive water policy that recognizes and protects the human right to water.¹⁴⁶

¹³⁹ CONST. (2004) arts. 47, 188 (Uru.).

¹⁴⁰ DAVID HALL, MAKING PRIVATIZATION ILLEGAL-NEW LAWS IN NETHERLANDS AND URUGUAY 2 (2006), available at <http://www.world-psi.org/TemplateEn.cfm?Section=Water&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=32&ContentID=2516>.

¹⁴¹ SCANLON, *supra* note 103, at 9.

¹⁴² Rhonda Copelon, *The Invisible Framework of International Human Rights: A Source for Social Justice in the U.S.*, 3 N.Y. CITY L. REV. 59, 65 (1998).

¹⁴³ BORTOLOTTI & SINISCALCO, *supra* note 67, at 7; SALMAN, *supra* note 7, at 80.

¹⁴⁴ Naegele, *supra* note 10, at 114.

¹⁴⁵ Bluemel, *supra* note 105, at 985.

¹⁴⁶ Lyla Mehta & Zolile Ntshona, *Dancing to Two Tunes? Rights and Market Based Approaches in South Africa’s Water Domain* 20 (2004), available at <http://www.ids.ac.uk/ids/research/water/pubs.html>.

A. *The Human Right to Water Requires Accessibility, Adequate Quality, and Quantity of Water*

As General Comment 15 outlines, implementation of the human right to water requires states to protect the essential elements of this right.¹⁴⁷ The substantive components to a human right to water include accessibility, sufficient quality, and adequate quality of water.¹⁴⁸ The most central element to the human right to water is that water must be accessible. Accessibility means water is obtainable within a short distance from the home, it is affordable, and the distribution of water is free from discrimination. Additionally, accessibility also means the ability to participate in decision-making about water policy and information about water issues.¹⁴⁹ Both quantity and quality of water are also essential items to ensure the right to water is both sufficient and healthy.¹⁵⁰

B. *As the South African Model Shows, Universal Access Is a Fundamental Component to the Human Right to Water*

South Africa is one of the few countries that recognizes a human right to water in its Constitution and has enacted domestic legislation guaranteeing each person a minimum amount of water per day.¹⁵¹ The explicit recognition of the human right to water is coupled with a national water policy that implements a universal access program.¹⁵² Although the water policy has faced criticism for not expanding water access expediently enough, it nevertheless exemplifies one major approach to implementing the human right to water.

In response to the disparities of apartheid South Africa,¹⁵³ the 1996 Constitution attempts to remedy socio-economic inequalities by broadly guaranteeing basic rights, including the right to sufficient water.¹⁵⁴ Section 27(1)(b) of the Constitution defines that “everyone has the right . . . to have

¹⁴⁷ SALMAN, *supra* note 7, at 65-66.

¹⁴⁸ *Comment 15*, *supra* note 20, at 1; SCANLON, *supra* note 103, at 18.

¹⁴⁹ *Id.* at 13.

¹⁵⁰ *Id.* at 12.

¹⁵¹ Pejan, *supra* note 113, at 1194-95.

¹⁵² *Id.* at 1205.

¹⁵³ See Andrew Allan, *A Comparison Between the Water Law Reforms in South Africa and Scotland: Can a Generic National Water Law Model Be Developed From These Examples?* 43 NAT. RESOURCES J. 419, 436 (2003); Gabriel Carter, *Remembering Water: Overcoming Historical Amnesia in South Africa*, 8 COLO. J. INT'L ENVTL. L. POL'Y 359, 367 (1997).

¹⁵⁴ See S. AFR. CONST. 1996 pmbl (aiming to “improve the quality of life of all citizens and free the potential of each person”). See generally Robyn Stein, *Water Law in a Democratic South Africa: A Country Case Study Examining the Introduction of a Public Rights System*, 83 TEX. L. REV. 2167 (2005); Pejan, *supra* note 113, at 1194.

access to sufficient food and water.”¹⁵⁵ Further, the state must “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”¹⁵⁶

In order to implement these rights, the South African legislature passed the Water Services Act (“WSA”), which creates a domestic framework to protect the right to water.¹⁵⁷ The law declares that because water is a human right “every water services institution must take reasonable measures to realise these rights. Every water services authority must, in its water services development plan, provide for measures to realise these rights.”¹⁵⁸ WSA has created several significant measures including decentralized control of water decisions through Water Services Authorities (“WSAU”). Every WSAU has the duty to “all consumers or potential consumers in its area of jurisdiction to progressively ensure efficient, affordable, economical and sustainable access to water services.”¹⁵⁹ The law explicitly allows for the contracting of water services to private companies, but requires such companies to abide by all provisions of the WSA.¹⁶⁰ Further, in interpreting the Constitution and WSA, South African courts have held that the right to water requires proper due process before a utility can disconnect a user for lack of payment.¹⁶¹ Moreover, in *Residents of Bon Vista Mansions v. South Metro Local Council*, a court held that service cannot be disconnected if a person shows they do not have the means to pay.¹⁶²

In 2000, a major modification was made to the WSA when South African President Thabo Mbeki initiated the Free Basic Water policy (“FBW”), which provides 6000 liters per month to poor households each month free of charge (based on an average size of a household of eight people).¹⁶³ The FBW supplies this water subsidy to poor households

¹⁵⁵ S. AFR. CONST. 1996 ch. 2, §27.

¹⁵⁶ *Id.*

¹⁵⁷ Water Services Act 108 of 1997 (S. AFR.), available at http://www.acts.co.za/water_serv/index.htm.

¹⁵⁸ *Id.* at ch. 1, sec. 3.

¹⁵⁹ *Id.* at ch. 3, sec. 11.

¹⁶⁰ *Id.* at ch. 3, sec. 19.

¹⁶¹ Hardberger, *supra* note 110, para. 65.

¹⁶² *Residents of Bon Vista Mansions v. S. Metro Local Council*, 2002 (6) BCLR 625, 643-44 (W) (S. AFR.), cited in Hardberger, *supra* note 110, at para. 65.

¹⁶³ SOUTH AFRICA DEP'T OF WATER AFFAIRS AND FORESTRY, FREE BASIC WATER: QUESTIONS AND ANSWERS 4 (2002), available at <http://www.dwaf.gov.za/Documents/FBW/QA brochureAug2002.pdf> [hereinafter DWAF FAQ].

through an application process. FBW is a landmark achievement;¹⁶⁴ within two years of implementation, 27 million South Africans enjoyed this right.¹⁶⁵

Although some lawmakers and poverty activists in South Africa contend the water policy has not fully implemented a human right to water,¹⁶⁶ the WSA and FBW are significant improvements over the previous system based solely upon privatization.¹⁶⁷ Whereas before this legislation water prices had soared beyond what poor and middle class South Africans could afford, now the poorest of South Africans are provided with at least a minimal amount of water.¹⁶⁸ The South African model is an important, but not ultimate, step in achieving the human right to water.

C. *To Realize the Human Right to Water, States Must Regulate Water Utilities*

In order to translate the rhetoric of the human right to water into concrete protections, states must respect and tend the human right to water through regulation.¹⁶⁹ In addition to policies aimed at achieving universal access, regulation is essential to achieve these goals and protections for the human right to water.¹⁷⁰ Although a full fledged regulatory scheme that protects the human right to water has not been developed, such a system would be based on the essential elements of the human right to water.¹⁷¹ In order to foster accessibility, this regulatory system would include independent monitoring, public participation, and transparent decision-making.¹⁷² To ensure water quality is not compromised, the state must monitor for health and safety and impose penalties when water suppliers do not comply.¹⁷³ Further, as will be discussed further in Part VII, elements of the human right to water exist in the regulatory systems of a number of countries, including Malaysia and Brazil.

¹⁶⁴ Mehta, *supra* note 146, at 17.

¹⁶⁵ DWAF FAQ, *supra* note 163.

¹⁶⁶ Rose Francis, *Water Justice in South Africa: Natural Resources Policy at the Intersection of Human Rights, Economics, and Political Power*, 18 GEO. INT'L ENVTL. L. REV. 149, 181 (2005).

¹⁶⁷ Mehta, *supra* note 146, at 20.

¹⁶⁸ Hardberger, *supra* note 110, para. 65.

¹⁶⁹ Bluemel, *supra* note 105, at 973.

¹⁷⁰ *Id.*

¹⁷¹ Sean Flynn & Katherun Boudouris, *Democratizing the Regulation and Governance of Water in the United States*, in RECLAIMING PUBLIC WATER, *supra* note 34, at 73 (describing the functionality and significance of the consumer regulatory boards); Naegele, *supra* note 10, at 114.

¹⁷² *Comment 15*, *supra* note 20, at 26.

¹⁷³ *Id.* at 24.

VI. THE HUMAN RIGHT TO WATER IS NOT PROTECTED IN THE PHILIPPINES

The basic components of the human right to water are not protected in the Philippines. Foremost, there is no explicit recognition of this right. The Philippine Constitution, enacted in 1987, contains a number of human rights provisions, including a general right to a healthy environment.¹⁷⁴ This does not ensure or protect the human right to access to water. Further, the two main components of domestic implementation of the human right to water are inadequate.

A. *Lack of Access Prevents the Realization of the Human Right to Water*

Although in June of 2005 Gloria Arroyo vowed to bring clean drinking water to all households in the Philippines within 5 years, such efforts have not been initiated.¹⁷⁵ Water appropriation is not based on equality or guaranteed access. Issued in 1976 by President Ferdinand Marcos, Executive Order No. 1067, the Philippine Water Code establishes a basic framework for appropriation and utilization of water, including establishing a system of water rights.¹⁷⁶ Specifically, the Water Code declares that all water belongs to the state and can be appropriated by the state.¹⁷⁷ The code specifically allows for the appropriation of water for domestic purposes, meaning, “Use of water for domestic purposes is the utilization of water for drinking, washing, bathing, cooking or other household needs, home gardens, and watering or lawns or domestic animals.”¹⁷⁸ However, the code does not include any recognition of the human right to water or provide for universal access. Water rates in Manila compound the issue of access. As detailed above in Part II, water rates are tremendously high and connection fees often run upwards of \$100.¹⁷⁹

B. *Regulatory Mechanisms Do Not Protect the Right to Water*

In addition to the general laws of the Philippines being inadequate to protect the human right to water, regulation of the MWSS is inadequate and allows the utility to violate this right. Although the Local Water Utilities Authority law governs the regulation of most water utilities in the

¹⁷⁴ Const. (1987) art. XIV, §17 (Phil.).

¹⁷⁵ Anthony Spaeth, *A Matter of Trust*, TIME, June 6, 2005, available at <http://www.time.com/time/asia/covers/501050613/story.html>; Montemayor, *supra* note 63, at 217; Lo, *supra* note 52.

¹⁷⁶ Use and Management of Waters, Water Code, Pres. Dec. No. 1067, Art. 2 (1976) (Phil.).

¹⁷⁷ *Id.* at art. 3.

¹⁷⁸ *Id.* at art. 10.

¹⁷⁹ FREEDOM FROM DEBT COALITION, *supra* note 22, at 7.

Philippines, it exempts the MWSS from this oversight.¹⁸⁰ Instead, the regulation of the MWSS is part of the privatization agreement.¹⁸¹ The contract established a semiautonomous body to approve rate adjustments and oversee implementation of the contract.¹⁸² These responsibilities include ensuring water quality meets national levels and approving rate increases. The private companies fund the operations of the regulatory body. Members of the regulatory body are appointed and are not democratically elected.¹⁸³

As detailed above in Part II, the privatization of the MWSS has failed to achieve the targeted goals of the contract. The Regulatory Office failed to regulate the MWSS in any meaningful way; it has allowed rapid rate increases and water quality to fall below national standards. The regulation's structure is not conducive to ensuring the goals of the contract were met and the public's interest was protected. As a number of critics of privatized water in Manila have pointed out, the Regulatory Office has no "teeth" to enforce the provisions of the agreement. Even the current head of the Regulatory Office, Herman Cimafranca, has noted the body's lack of enforcement mechanisms: "This is, to tell you frankly, almost a spineless and toothless paper tiger . . . if we tell them to cease and desist from implementing these rates . . . they will not follow because the concessionaires will say that we have no right to do that."¹⁸⁴ This lack of clear enforcement and mandate forced the Regulatory Office to behave more as a "neutral negotiator" between the companies and the Philippine government than as a regulator.¹⁸⁵ The Regulatory Office's role as a negotiator rather than regulator is evident in the recent tariff price increase. The Regulatory Office negotiated lower rate increases, still beyond the contract's provisions, in exchange for reduced service targets.¹⁸⁶

Another structural problem in the concession agreement with the private companies is the lack of public participation and transparency. The Regulatory Office members are explicitly appointed, with no term limits and no public accountability. Further, the Regulatory Office has no provision for public participation or inclusion, which might shape the policy of the board. The lack of transparency has left the Regulatory Office open to accusations

¹⁸⁰ Local Water Utilities Authority, Pres. Dec. No. 198 (1973) (Phil.).

¹⁸¹ Concession Agreement, *supra* note 47.

¹⁸² DUMOL, *supra* note 25, at 56; Metropolitan Waterworks and Sewerage System, Regulatory Office, http://www.mwss.gov.ph/regulatory_office.asp (last visited Mar. 16, 2006).

¹⁸³ Concession Agreement, *supra* note 47, at Art. 11.

¹⁸⁴ Roel Landingin, Center for Public Integrity, Loaves, Fishes and Dirty Dishes: Manila's Privatized Water Can't Handle the Pressure (2003), <http://www.publicintegrity.org/water/report.aspx?aid=51>.

¹⁸⁵ SEGERFELDT, *supra* note 36, at 102.

¹⁸⁶ Landingin, *supra* note 184.

of corruption and collusion with the private companies.¹⁸⁷ Civil society groups, like the Philippine Water Vigilance Network, have been especially critical of the repeated government funded bailouts of the private companies, and the Regulatory Office's approval of these arrangements.¹⁸⁸ Most recently, they point to the government's decision in late 2005 to buy an eighty-four percent interest in the Maynilad Corporation, which allowed some of the company's shareholders to withdraw from the agreement without serious financial harm.¹⁸⁹ The Regulatory Office approved the deal, even though the contract contained no provision for a buyout arrangement. An audit by a nonpartisan government agency was critical of the buyout, saying it was "disadvantageous" to the government¹⁹⁰ and at the expense of the public interest.¹⁹¹ Such accusations indicate the lack of transparency and fundamental lack of public confidence in the concession agreement and Regulatory Office.

C. *Policy Makers and Social Justice Advocates Are Overly Fixated on the Public/Private Dichotomy in Envisioning a New Water Policy*

Discourse over privatization in the Philippines, like the global debate, is stale and fixated on public or private ownership of water utilities.¹⁹² Re-privatizing the utility has simply renewed promises of greater efficiency, heightened expectations for improved performance, and decreased water rates.¹⁹³ Simultaneously, social justice advocates continue to wholly reject privatization, pointing to the recent failure of the MWSS as proof that utilities must be owned by the government.¹⁹⁴

VII. THE PHILIPPINES SHOULD IMPLEMENT THE ESSENTIAL COMPONENTS OF THE HUMAN RIGHT TO WATER

Privatized water in Manila shows the need for the Philippines to provide greater protection of the public's interest, including the recognition

¹⁸⁷ Montemayor, *supra* note 63, at 221; FREEDOM FROM DEBT COALITION, *supra* note 22, at 1.

¹⁸⁸ *Water in People's Hands*, *supra* note 9, at 21.

¹⁸⁹ Lo, *supra* note 52, at 2.

¹⁹⁰ Iris Cecilia C. Gonzales, *Regulator at a Disadvantage Under Maynilad Rehab Plan*, BUSINESS WORLD (Phil.), Dec. 2, 2005; Christine A. Gaylican, *Maynilad Takeover Bad for Govt*, PHILIPPINE DAILY INQUIRER, Dec. 6, 2005, at 1.

¹⁹¹ Iris Cecilia C. Gonzales, *Advocacy Group Presses Bid to Stop Maynilad Rehab*, BUSINESS WORLD (Phil.), Dec. 5, 2005.

¹⁹² Lo, *supra* note 52.

¹⁹³ Jennee Grace U. Rubrico, *Gov't Nominees Join Maynilad Board*, BUSINESS WORLD (Phil.), Jan. 10, 2006.

¹⁹⁴ FREEDOM FROM DEBT COALITION, *supra* note 22, at 8.

of the human right to water. Like many developing countries, the Philippines does not have public capital to invest in water utilities.¹⁹⁵ As the experience of Manila shows, the essential right to water is violated by inadequate access to clean, affordable water and insufficient regulation.¹⁹⁶ The Philippines must reshape how privatization is taking place by enacting legislation that regulates the water sector and provides protections for the human right to water. In the case of the Philippines, the human right to water serves as a basis to balance the interests of the public and private sectors.

A. *Recognition of the Human Right to Water Is Essential*

A constitutional amendment that recognizes the human right to water is essential to ensure that all Filipinos have access to water. A constitutional amendment would establish water as an entitlement and create a government obligation.¹⁹⁷ Such a step would create a fundamental right that guarantees “sufficient, safe, acceptable, accessible and affordable water, without discrimination.”¹⁹⁸

Making the right to water an explicit constitutionally protected right would mean citizens have a cause of action if that right is infringed.¹⁹⁹ As cases in South Africa show, this is an important legal tool. For example, the Supreme Court of South Africa held in *Government of South Africa v. Grootboom* that the government had a duty to ensure constitutional rights are achieved, and that it must take reasonable steps to realize these rights.²⁰⁰

A constitutional provision creates an affirmative obligation for the government to safeguard this right, regardless of who owns a water utility. Thus, a guaranteed right to water in the Philippine Constitution is important because it will protect the right to water, regardless of whether public or private companies operate water utilities.²⁰¹

¹⁹⁵ Montemayor, *supra* note 63, at 217.

¹⁹⁶ FREEDOM FROM DEBT COALITION, *supra* note 22, at 3.

¹⁹⁷ For model language, see S. AFR. CONST. 1996; SCANLON, *supra* note 103, at 46.

¹⁹⁸ WORLD HEALTH ORGANIZATION, THE RIGHT TO WATER, *supra* note 2, at 28.

¹⁹⁹ Although Constitutional protections to the right to water have been subject to very little litigation, cases in France and South Africa support the argument that these rights are justiciable. See SCANLON, *supra* note 103, at 46.

²⁰⁰ Pejan, *supra* note 113, at 1196; Gov’t of Rep. of S. Afr. v. Grootboom, 2000 (11) BCLR 1169 (CC).

²⁰¹ Montemayor, *supra* note 63, at 216.

B. To Achieve Universal Access, the Philippines Should Develop a Free Basic Water Program

Following the example of South Africa, the Philippines should adopt a policy of universal water access. The full cost recovery model, currently used by the private companies in Manila, impedes universal access because it has produced significant rate hikes. Because water privatization often prices the poorest water users out of the market, the Philippine government should guarantee this population a sufficient amount of water for survival.²⁰² Moreover, this population is most likely to lack access to water.²⁰³ Using the WHO's calculations for need, the Philippine government should adopt legislation to implement a free basic water program.²⁰⁴ Implementing a subsidized water program would be an important first step to universal access because it would guarantee that even those most likely to be priced out of market-based water systems have access, including economic access to water.

Unlike other free water programs, like the policy enacted in South Africa, the Philippines should not allow for disconnections if poor households fall behind on payment of any water above the subsidized amount.²⁰⁵ Without such a provision, the very purpose of the free water program to guarantee universal access would be undermined. Further, in some rural areas, the policy may need to be expanded. Cost benefit analysis may show, as it has in South Africa, that the government is better off paying for additional subsidized water since this population is at heightened risk of exposure to contaminated water in household use.²⁰⁶

C. The Philippines Should Enact New Regulations to Ensure the Human Right to Water Is Not Infringed

Even if private companies operate water utilities, the Philippines has an obligation to ensure the human right to water is protected.²⁰⁷ A comprehensive new regulatory law requiring all water utilities, whether publicly or privately owned, to comply with basic standards for water access, quality and quantity would ensure that the elements of the human right to water are respected. The current method of enacting regulations

²⁰² BARLOW & CLARKE, *supra* note 83; Hardberger, *supra* note 110, at para. 72.

²⁰³ WORLD HEALTH ORGANIZATION, THE RIGHT TO WATER, *supra* note 2, at 22.

²⁰⁴ *Id.*

²⁰⁵ Mehta, *supra* note 146, at 19.

²⁰⁶ *Id.*

²⁰⁷ Naegele, *supra* note 10, at 114.

within concession agreements creates the potential for a patchwork of regulations, where the public interest right to water is better protected in some service areas, while not protected at all in others. Like the Philippines' recently enacted Clean Water Act, national regulations would create a comprehensive national policy.²⁰⁸ The case of private-company abuses of the MWSS shows the need for regulation cannot be overemphasized.²⁰⁹ Regulation is "necessary to ensure the consistent delivery of service obligations, to determine 'efficient' pricing, to conserve water, to extract professionalism from managerial staff, and to ensure the financial viability of the utility. . . ."²¹⁰ Regulation is an essential component of any water policy that seeks to protect the right to water.

1. *The Philippines Should Create an Independent Regulatory Body with Strong Oversight Mechanisms*

Essential to the implementation of any regulation is the creation of an independent regulatory body, with enforcement mandates to hold companies or public sector operators accountable if they violate the human right to water.²¹¹ An independent regulatory structure makes it less likely that an authority would be "captured" by private companies, yet promotes the greater efficiency of privatization that benefits the consumer.²¹²

Unlike the Regulatory Office created out of the privatization agreement, any new agency must be transparent, accountable, and have clear mechanisms to sanction violators.²¹³ To achieve this, members of the regulatory board should be democratically elected in order to promote responsiveness to the public. Examples from water management in Penang, Malaysia suggest such elements are essential to creating a water policy that is both efficient and protects the public's interest.²¹⁴ Although the utility in Penang is government-owned, its management emulates private participation in the water sector by focusing on budget consciousness, yet simultaneously retaining an ethos of public service.²¹⁵ In particular, demands by locals for

²⁰⁸ Philippine Clean Water Act of 2004, Rep. Act 9275 (Mar. 22, 2004).

²⁰⁹ Montemayor, *supra* note 63, at 221.

²¹⁰ *Id.*

²¹¹ Alberto Heimler, *Competition and Regulation in Public Utilities*, in PRIVATISATION, COMPETITION, AND REGULATION 175 (2000); Raimund Bleischwitz, 'Co-evolution' Between State Regulation and the Private Sector, in LIMITS TO PRIVATIZATION, *supra* note, at 74, at 341.

²¹² Heimler, *supra* note 211, at 189.

²¹³ FREEDOM FROM DEBT COALITION, *supra* note 22, at 8.

²¹⁴ Charles Santiago, *Public-Public Partnership: An Alternative Strategy in Water Management in Malaysia*, in RECLAIMING PUBLIC WATER, *supra* note 34, at 55-61.

²¹⁵ *Id.* at 57-58.

transparency and accountability resulted in unprecedented levels of scrutiny, including election of representatives to the water board.²¹⁶ Because the regulatory board was ultimately responsible to voters, political parties made strong regulation of the utility a cornerstone of their platforms.²¹⁷

2. *The Regulations Should Provide for Increased Public Involvement*

While General Comment 15 includes public participation in water decisions as an essential element of the human right to water, the current concession agreement contains no such mandate. In adopting a new regulatory framework, the Philippines should include the right of citizens and community groups to contribute to water policy. Such public involvement in water management adds an element of “responsive regulation,” which allows for flexible and adaptive approaches by including perspectives not traditionally included in privatization agreements and traditional command and control regulation.²¹⁸ The participatory budget process in Porto Alegre, Brazil, about which other scholars have written extensively, exemplifies responsive governance.²¹⁹ The water and sanitation utility includes a “deliberative council” where citizens can voice concerns and demands to the utility.²²⁰ This level of participation includes shaping the developments of the water network into certain parts of the city, decreasing contamination of waterborne bacteria, and proposals from citizens for budgetary allocations.²²¹ This practice has produced a close relationship between users and the utility and has resulted in greater problem solving, as the utility is more able to judge community needs and demands.²²² The council model used in Porto Alegre makes the regulation of the utility more fair, “more deliberative, and more accountable.”²²³

In the Philippines, public participation in water policy has empirically promoted public awareness and increased efficiency. For example, community participation has proved effective in water management to

²¹⁶ *Id.*

²¹⁷ *Id.* at 58-59.

²¹⁸ Bleischwitz, *supra* note 211, at 346-47.

²¹⁹ Hélio Maltz, *Porto Alegre's Water: Public and for All*, in RECLAIMING PUBLIC WATER, *supra* note 34, at 29-31.

²²⁰ *Id.* at 30.

²²¹ *Id.* at 30-34.

²²² *Id.*

²²³ Marianne Beisheim, *Private Governance: Private Rules for Privatization?*, in LIMITS OF PRIVATIZATION, *supra* note 74, at 332.

prevent leakage and illegal connections.²²⁴ Citizen involvement is key to implementing a water policy that is both responsive and effective.

D. Successful Implementation of the Right to Water Will Depend on Extra-Legal Factors

Whether these efforts are ultimately successful in fixing the failures in the privatization of the MWSS and establishing a domestic implementation of the human right to water will ultimately hinge on the political will of the Philippine government and how private companies respond to such measures. In particular, establishing a broad human right to water in the constitution may have implications beyond the utility sector.²²⁵ Given the Philippines' chronic water shortages and struggles over water allocation, the human right to water may affect the agricultural sector as well.²²⁶ Recognizing this right may, for example, create challenges to riparian water rights or to large-scale water projects like dam building and water-diversion projects. Although General Comment 15 provides guidance on these issues, the magnitude of these issues may discourage a full implementation of the human right to water.

Given the mobility of private companies, especially the large multinational companies that often participate in privatization agreements, enacting a domestic right to water policy may create a disincentive for them to invest. Although such possibilities are real, concerns over private sector investment should not delay the implementation of the human right to water. The experience of the MWSS in the Philippines shows how private investment in its current form is unworkable, because it fails to improve water service, and in some cases, makes water too expensive to be accessible to much of the population.

Finally, any implementation of the human right to water will take flexibility and creativity. Balancing the public interest in the human right to water and privatization will necessarily require a responsive administration. Policies enacted to protect one element of the human right to water may negatively affect another. In South Africa, the implementation of the FBW has discouraged private companies from expanding water services into poor communities because these communities are less likely to pay for any additional water they use.²²⁷ Facing challenges like these, the regulatory

²²⁴ Montemayor, *supra* note 63, at 217.

²²⁵ Bluemel, *supra* note 105, at 985-1005.

²²⁶ IBON FOUNDATION, *THE STATE OF THE PHILIPPINE ENVIRONMENT* 47-55 (2000).

²²⁷ Francis, *supra* note at 166, at 181.

board must create incentives for private investment without jeopardizing the human right to water.

VIII. CONCLUSION

Privatized water in Manila exemplifies how the privatization of water utilities jeopardizes the public's interest through full cost recovery and inadequate regulation. For lesser-developed countries like the Philippines, the answer to this dilemma is not to simply forsake private sector involvement in favor of public utilities, because these nations lack the capital to make the necessary investments to improve water and expand access. Instead, states must recognize that water plays a crucial role in sustaining life and should be defined as an entitlement through a human rights framework, rather than as a commodity. In the case of the Philippines, current water law and regulations are inadequate to protect the human right to water. The human right to water could be protected in the Philippines through constitutional recognition of this right, a universal-access policy that provides subsidized water to the poorest residents, and stronger regulation of water utilities.