

# The human right to water and reform of the Irish water sector

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*The austerity measures imposed upon Ireland under the terms of the 2009 EU/IMF financial bail-out package include the introduction of charging for domestic water and sanitation services, which has led to the establishment of a new national water utility and plans to roll out a nation-wide programme for the installation of domestic water meters. The introduction of such a charging scheme raises a range of, as yet, unanswered questions concerning, for example, the use of social safety nets for those unable to pay, safeguards regarding disconnection or reduction of service in the event of non-payment, the accountability of the new utility for any failure to supply adequate water, and arrangements for meaningful public participation in decision-making concerning water services. While one would normally expect such key policy choices to be guided by the emerging human right to water and sanitation, no applicable provision of Irish law expressly supports the concept. However, policymakers might want to take account of the good governance values inherent to this emerging human right, as there exists the possibility that certain provisions of Irish law, and applicable provisions of European human rights law, might be interpreted so as to impose such values. While much of the current discourse on the human right to water and sanitation concerns its possible application in developing countries, Ireland might hold lessons for other developed countries facing austerity-driven water sector reform, including arrangements for the privatization of water and sanitation services.*

**Keywords:** *human right to water, water sector reform, privatization of water services, constitutional rights, bodily integrity, dignity*

## 1 INTRODUCTION

Despite the fact that the Irish water supply and sanitation sector is currently undergoing its greatest ever transformation, involving the introduction of water service charges for private households and possibly, eventually even some measure of privatization, it remains unclear precisely what influence the ongoing discourse in international law on the emerging human right to water and sanitation might exert on the legal and institutional arrangements to be put in place. While uncertainty persists over the precise legal status and, to a lesser extent, the normative content of the human right to water, it is unclear by what means such a right might be invoked under the existing Irish legal framework. No provision or principle of Irish law – constitutional, statutory or judge-made – expressly supports the right of access to adequate and safe potable water or to adequate sanitation. Neither does any provision of European Union

(EU) law,<sup>1</sup> which is accorded a status superior to that of all other Irish law, including rules of constitutional law, under Irish constitutional arrangements for membership of the EU.<sup>2</sup> However, certain constitutional and statutory provisions might be interpreted so as to encapsulate and guarantee key elements of the human right to water and sanitation. The Constitution of Ireland has been interpreted to include rights to bodily integrity and dignity, which might in some circumstances be understood as guaranteeing a right of access to water and sanitation. In addition, any effective denial of such access might infringe rights provided under the European Convention on Human Rights. Though the key legislative measure applying to the provision of water services, the 2007 Water Services Act, does not confer any express right on individuals to adequate water supply or sanitation, it does confer broad powers on water services authorities to provide both, while Regulations adopted under the 2007 Act oblige water suppliers to ensure that any water provided is 'wholesome and clean'. There also exists the possibility that elements of the human right to water might be vindicated through the potential availability of statutory remedies against water services authorities that fail to supply water of an adequate standard or otherwise interfere with availability of adequate water.

As the current reform of the Irish water services sector is entirely driven by the terms of the financial bail-out provided to Ireland by the EU/International Monetary Fund (IMF) in 2009, which requires the introduction of a range of austerity measures, including that of charging for domestic water services, it is timely that the recent report of the United Nations (UN) Special Rapporteur, Catarina de Albuquerque, on the human right to safe drinking water and sanitation to the Human Rights Council focuses on aggravated risks regarding realization of this right in times of economic and financial crisis.<sup>3</sup> The Special Rapporteur's report identifies risks of retrogressive

1. See, for example, M van Rijswijk and A Keesen, 'Legal Protection of the Right to water in the European Union', in F Sultana and A Loftus (eds), *The Right to Water: Politics, Governance and Social Struggles* (Earthscan, London 2012) 123, where the authors concede, at 127, that 'For the actual protection of water rights it is necessary that individuals can rely on the right to water before a national court. This means within the EU that they depend on the inclusion of a provision from which a right to water can be derived in a treaty or agreement to which their state is a party or a national (constitutional) provision. They cannot rely on EU Directives, as none explicitly contains a right to water. They only elaborate aspects that are necessary to realize the right to water.' It should be noted, however, that public participation, a key element of the human right to water, is central to the 2000 EU Water Framework Directive, which requires EU Member States to 'encourage the active involvement of all interested parties in the implementation of the Directive, in particular in the production, review and updating of the river basin management plans'.

2. Article 29.4.6 of the Irish Constitution provides that 'No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State ... that are necessitated by the obligations of membership of the European Union ... or prevents laws enacted, acts done or measures adopted by the said European Union'.

3. C de Albuquerque, *Report of the Special Rapporteur on the human right to safe drinking water and sanitation*, 11 July 2013, UN Doc. A/HRC/24/44. The link between fiscal austerity and States' commitments to economic, social and cultural rights was recognized recently by civil society organizations in the *Vienna+20 CSO Declaration*, adopted on 26 June 2013, which acknowledges, at 6, para. 19, that 'Deep and far-reaching austerity measures in many parts of the world ... coupled with long-standing financial regulation failures in the North, have deepened economic inequalities within and between countries, with inter-generational

measures that might arise when States find themselves in difficult financial circumstances and spells out the measures necessary to ensure compliance with the non-derogable 'core' obligations arising under this emerging human rights framework. Thus, it provides a useful analysis of the human right to water benchmarks against which the proposed Irish regime can be assessed.

This article first examines the legal nature and key normative requirements of the human right to water which is rapidly emerging in international law, with a view to understanding what it requires of national legal systems. Secondly, it outlines the planned reforms of the Irish water services sector and the legislative framework intended to facilitate and regulate the new water services provider. Finally, it analyses the Irish legal framework for the regulation of water services and for protecting individual rights to water in order to determine whether and how it is likely to promote the realization of the values inherent to the evolving discourse on the human right to water. Ireland provides an interesting example of a State in the developed world which, finding itself having to introduce radical reform of its water services sector as an externally imposed austerity measure, ought to make every effort to ensure that such reform does not prove regressive in contravention of the requirements imposed upon States by the human right to water and sanitation.

## 2 THE EMERGENCE OF THE HUMAN RIGHT TO WATER (AND SANITATION) IN INTERNATIONAL LAW

A considerable degree of international consensus has now been achieved as regards the origins of the human right of access to water in international law and its broad normative content, with the adoption in 2002 of General Comment 15<sup>4</sup> by the Committee on Economic, Social and Cultural Rights (CESCR) of the United Nations Economic and Social Council (ECOSOC). General Comment 15 represents the CESCR's definitive position on the subject and 'is the first recognition by a United Nations human rights body of an independent and generally applicable human right to water'.<sup>5</sup> Though CESCR general comments do not formally impose legal obligations on the parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR), let alone other States, General Comment 15 constitutes a non-binding but 'highly authoritative interpretation of the Covenant' and of the legal implications which flow from key relevant Covenant provisions.<sup>6</sup> As a non-binding interpretation, General Comment 15 may be used to determine whether States have met their treaty

impacts on the realization of the human rights to decent work, an adequate standard of living for all, social protection, food, housing, *water*, health and education, among others' (emphasis added).

4. Committee on Economic, Social and Cultural Rights, *General Comment No. 15, The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. DOC. E/C.12/2002/11, 26 November 2002. Available at <<http://www.unchr.ch/html/menu2/6/gc15.doc>>. Reproduced as Appendix A in E Brown Weiss, L Boisson de Chazournes and N Bernasconi-Osterwalder, *Fresh Water and International Economic Law* (Oxford University Press, Oxford 2005) 407. Hereinafter, General Comment 15.

5. S McCaffrey, 'The Human Right to Water', in E Brown Weiss, L Boisson de Chazournes and N Bernasconi-Osterwalder, *Fresh Water and International Economic Law* (Oxford University Press, Oxford 2005) 93, at 101.

6. McCaffrey, *ibid.*, at 94.

obligations.<sup>7</sup> In addition, it is today possible to identify a significant body of recent State practice supporting the existence of this right. Though a human rights-based approach may be conceptualized ‘in terms of society’s obligations to respond to the inalienable rights of individuals’,<sup>8</sup> fundamental questions persist about the normative status, substantive or procedural requirements, and justiciability of the rapidly emerging rights-based approach to water entitlements. The politically contentious nature of the human right to water was illustrated by the vote on 28 July 2010 on the UN General Assembly Resolution on the Human Right to Water and Sanitation,<sup>9</sup> at which 41 States abstained, including Ireland.<sup>10</sup> Indeed, during the Parliamentary Committee Stage of the process for the adoption of the 2007 Water Services Act, the then Minister for the Environment, Mr Dick Roche TD, refused to accept proposed amendments which would have acknowledged ‘a fundamental right of the individual to access to sufficient, safe, acceptable and accessible water, free from contamination’, on the grounds that there were ‘practical problems in incorporating in law an unencumbered right to water’.<sup>11</sup> However, even at this relatively early stage in its legal development, it is clear that the concept of a human right to water, in addition to empowering individuals and communities by means of enhanced rights of participation in water-related decision-making, may potentially impact on key normative requirements existing under national law.

## 2.1 Legal bases

### 2.1.1 1948 Universal Declaration of Human Rights

In common with other general human rights instruments, the 1948 Universal Declaration of Human Rights does not include an explicit reference to a human right to water, but Article 25 proclaims that ‘[e]veryone has the right to a standard of living adequate for the health and well-being of himself and his family, including food ...’.<sup>12</sup> It would appear from this wording that the list of material conditions required to sustain an adequate standard of living is not intended to be exhaustive and McCaffrey concludes that ‘[i]t is obvious that water, even more than food, is essential to “health and

7. M Williams, ‘Privatization and the Human Right to Water: Challenges for the New Century’, (2007) 28 *Michigan Journal of International Law* 469, at 475. See also, EB Bluemel, ‘The Implications of Formulating a Human Right to Water’ (2004) 31 *Ecology Law Quarterly* 957, at 972.

8. UNDP, *Integrating Human Rights with Sustainable Human Development* (UNDP, New York 1998), at 173–74, cited in E Filmer-Wilson, ‘The Human-Rights-Based Approach to Development: the Right to Water’ (2005) 23 *Netherlands Quarterly of Human Rights* 213, at 213.

9. UNGA Res. A/RES/64/292.

10. For a record of the discussion and voting on the Resolution, see <<http://www.un.org/News/Press/docs/2010/ga10967.doc.htm>>.

11. See further, D Spence, ‘Water Supply: Where We Are and Where We Should Be’, paper delivered at the *Thomson Reuters Round Hall Annual Planning and Environmental Law Conference 2011* (Dublin, 5 November, 2011), at 5.

12. 1948 Universal Declaration of Human Rights, UNGA Res. 217A (III), (New York, 10 December 1948), UN GAOR, 3<sup>rd</sup> Sess., UN Doc. A/64 (1948). The full text of Article 25(1) provides that ‘Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control’.

well-being”); it should therefore be taken to be included by necessary implication’.<sup>13</sup> Similarly, Gleick argues forcefully that water must be implicitly included as one of ‘component elements’ for the maintenance of human health and well-being under Article 25.<sup>14</sup> The express reference to ‘food’ in Article 25 is also significant in terms of finding support for the human right to water in the Declaration, as the CESCR has consistently linked access to water to the right to food in the context of Article 11(1) of the ICESCR.<sup>15</sup>

While the Universal Declaration, which takes the form of a UN General Assembly resolution,<sup>16</sup> is not binding *per se*, it is generally accepted that many of the basic human rights contained therein have become part of customary international law, or at least constitute authoritative interpretations of the UN Charter’s provisions on human rights,<sup>17</sup> and thus bind States generally. However, customary status is normally only accorded to the so-called ‘liberty rights’ contained in the Declaration,<sup>18</sup> rather than the ‘welfare rights’, such as the right to an adequate standard of living.<sup>19</sup> Therefore, it is highly unlikely that the right to an adequate standard of living as set forth in the Declaration, from which a human right to water might be inferred, has attained the status of customary international law.

In respect of economic, social and cultural rights more generally, Article 22 of the Universal Declaration provides that ‘every one, as a member of society, is entitled to realization ... of the economic, social and cultural rights indispensable for his dignity and the free development of his personality’. Clearly any reference to human ‘dignity’ might easily be interpreted to include a right of access to water and sanitation and General Comment 15 advises that ‘[t]he right [to water] should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost among them the right to life and human dignity’.<sup>20</sup> However, in reflecting on the status of civil and political rights or of economic, social and cultural rights set out under the Universal Declaration, it is important to remember that the 1966 Covenants also each form a component of the International

13. *Supra* n 5, at 96.

14. PH Gleick, ‘The Human Right to Water’ (1998) 1 *Water Policy* 487, at 491.

15. See, for example, General Comment 15, paras. 2, 6 and 7. See further, CESCR’s *General Comment 12, The Right to Adequate Food (Article 11)*, UN Doc. E/C.12/1999/5, and Report by Commission on Human Rights Special Rapporteur on the right to food, Mr. Jean Ziegler (E/CN.4/2002/58). See further, *infra*.

16. UNGA Resolution 217A (III), (New York, 10 December 1948). Article 25(1) provides that ‘Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control’.

17. Articles 55 and 56 of the 1945 U.N. Charter provide, rather generally, that the UN shall promote ‘respect for, and observance of, human rights and fundamental freedoms’ and state that it is the duty of all members to promote these goals.

18. See, for example, O Schachter, ‘International Law in Theory and Practice’ (1982) 178 *Recueil des Cours* 9, at 340, who lists among ‘some of the rights recognized in the Declaration and other human rights texts [which] have a strong claim to the status of customary law’, freedom from slavery, genocide, torture, mass murders, prolonged arbitrary imprisonment and systematic racial discrimination.

19. McCaffrey, *supra* n 5. See further, S McCaffrey, ‘A Human Right to Water: Domestic and International Implications’, (1992) 5 *Georgetown International Environmental Law Review* 1, at 8.

20. General Comment 15, para. 3.

Bill of Human Rights, as the specific implementing instrument for each category of right, and ought to be considered the primary source of justiciable rights in each category.

### 2.1.2 1966 International Covenant on Civil and Political Rights

The Committee on Economic, Social and Cultural Rights has linked the right to water to a number of fundamental human rights, 'foremost among them the right to life and human dignity'.<sup>21</sup> In relation to the right to life, it remains unclear whether Article 6 of the 1966 International Convention on Civil and Political Rights (ICCPR) 'merely protects against arbitrary deprivation of life by the State, or also guarantees against death from such causes as lack of water or food, exposure to the elements, or lack of medical attention'.<sup>22</sup> Article 6 guarantees that '[e]very human being has the inherent right to life. This right shall be protected by law'. No one shall be arbitrarily deprived of his or her life, and it has traditionally been understood only to extend to arbitrary deprivations of life by the State.<sup>23</sup> However, since 1982 the Human Rights Committee (HRC) has interpreted the reference to the 'inherent right to life' in Article 6 to mean that the right to life 'includes a socioeconomic component and demands positive action by states'.<sup>24</sup> Clearly, the obligation of States to take 'positive measures' might be expected to include 'providing access to the means of sustaining life'.<sup>25</sup> Therefore, the Committee has determined that the right to life includes the conditions necessary to support life, including the appropriate means of subsistence. This would readily imply an obligation on States to ensure some access to clean water. Further, the various references in the HRC's General Comment 6 to 'infant mortality', 'life expectancy', 'malnutrition' and 'epidemics' are strongly suggestive of the right to water as a lack of adequate water has consistently been linked to these problems.<sup>26</sup> Of course, the problem would remain that 'a broad interpretation raises questions as to what exact action is required'.<sup>27</sup>

However, the Parties to the ICCPR are under an immediate obligation as regards the rights contained therein, as each State 'undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'.<sup>28</sup> This contrasts sharply with the less immediate, progressive obligations imposed under the ICESCR. McCaffrey suggests that the difference in the approach to the enforceability of rights under the two 1966 Covenants provides further evidence that 'welfare' rights, including any inferred right to water, were

21. Ibid.

22. SC McCaffrey, 'The Human Right to Water', in Brown Weiss et al. *Fresh Water and International Economic Law*, *supra* n 5, at 97. See further, McCaffrey (1992), *supra* n 9, at 9–11.

23. See, for example, Williams, *supra* n 7, at 474, alluding to the fact that 'the Human Rights Committee (one of the former enforcement mechanisms of the ICCPR) have often dealt with topics such as state killings and capital punishment'.

24. Office of the High Commissioner for Human Rights, *General Comment No. 6: The Right to Life (Article 6)*, (30 April 1982), UN Doc. A/37/40 (1982).

25. Williams, *supra* n 7, at 474.

26. HRC, *General Comment No. 6*, *supra* n 24.

27. A Hardberger, 'Life, Liberty and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates', (2005) 4(2) *Northwestern Journal of International Human Rights* 331, at 336.

28. Article 2(1).

never intended to receive protection under the ICCPR. He concludes that it is doubtful that States have accepted ‘an immediate obligation – *i.e.*, not one that may be implemented progressively – to take *positive* measures to guarantee their citizens appropriate subsistence (including water) and a decent standard of life’.<sup>29</sup> In light of the considerations set out above, McCaffrey quite reasonably concludes that the right to water ‘flows more naturally’ from Article 11 of the ICESCR.

### 2.1.3 *International Covenant on Economic Social and Cultural Rights*

As General Comment 15, the CESCR’s seminal position paper on the subject, essentially consists of an interpretation of Articles 11 and 12 of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>30</sup> it is not surprising that it should conclude that the emergence of the human right to water in general international law can primarily be traced to these two Articles.<sup>31</sup> Firstly, Article 11(1) of the Covenant, which provides for the right to an adequate standard of living, sets out a non-exhaustive list of related rights which emanate from and are indispensable for the realization of that right ‘including adequate food, clothing and housing’.<sup>32</sup> The CESCR has, through adoption and publication of General Comment 15, given its unequivocal support to the existence of a right to water, concluding that ‘[t]he right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival’.<sup>33</sup> Indeed, one view suggests that water is such a fundamental requirement for an adequate standard of living that its formal inclusion under Article 11 was unnecessary.<sup>34</sup> In this context, General Comment 15 ‘notes the importance of ensuring sustainable access to water resources for agriculture to realize the right to adequate food’ and also takes note of the duty in Article 1(2) of the Covenant, which provides that a people may not ‘be deprived of its means of subsistence’.<sup>35</sup> The

29. *Ibid.*, at 98.

30. UNGA Res. 2200, 21 UN GAOR, 22<sup>nd</sup> Sess., Supp. 49, UN Doc. A/6316 (1967), (1967) 6 ILM 360. Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI) of 16 December 1966, the Covenant has now been ratified by 147 States. See further, J Razzaque, ‘Trading Water: The Human Factor’ (2004) 13/1 Review of European Community and International Environmental Law 15, at 17.

31. Williams, *supra* n 7, at 476, explains that General Comment 15 relies on three rationales to support its finding of a human right to water: that the right can be inferred from other rights protected under Arts. 11 and 12 of the ICESCR (General Comment 15, para. 3); that the right is necessary to protect rights previously recognized under Arts. 11 and 12 of the ICESCR and under the International Bill of Human Rights (General Comment 15, paras 1 and 3); and that the right has been previously recognized in a variety of other international legal instruments which inform the substantive content of the ICESCR (General Comment 15, para. 4).

32. The full text of Article 11 provides: ‘The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions’.

33. *Supra* n 4, para. 3.

34. PH Gleick, ‘The Human Right to Water’ (1998) 1(5) Water Policy 487. See further, SR Tully, ‘The Contribution of Human Rights to Freshwater Resource Management’ (2004) *Yearbook of International Environmental Law* 101, at 108.

35. General Comment 15, *supra* n 4, para. 7. It is worth noting, however, that the CESCR’s *General Comment 12, The Right to Adequate Food (Article 11)*, UN Doc. E/C.12/1999/5, omits an express reference to water, at paras 9 and 10. By contrast, in 2001 the UN Human Rights

CESCR had earlier determined that the right to adequate housing should include 'sustainable access' to safe drinking water, site drainage, sanitation and washing facilities.<sup>36</sup>

The Committee has also found that the right to water is inextricably linked to the right to the highest attainable standard of health, enshrined under Article 12(1) of the Covenant.<sup>37</sup> The relevant text of Article 12 provides:

The States Parties to the Present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The steps to be taken ... to achieve the full realization of this right shall include those necessary for ... (3) The prevention, treatment and control of epidemic, endemic, occupational and other diseases.

General Comment 15 acknowledges the significance of clean, safe water for hygiene and health, stating that:

Environmental hygiene, as an aspect of the right to health under article 12, paragraph 2(b), of the Covenant, encompasses taking steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water conditions.<sup>38</sup>

Gleick insists that access to water can readily be inferred as a derivative right necessary to meet both the explicit rights to health and an adequate standard of living and cites in support of this contention the following emphatic inclusion of a legally binding right to water by commentators in their 1999 review of human rights progress over the previous 50 years:

There is nothing ill-defined or fuzzy about being deprived of the basic human rights to food and clean water .... As for legal toughness, the simple fact is that the 138 governments which have ratified the International Covenant on Economic, Social and Cultural Rights have a legal obligation to ensure that their citizens enjoy these rights.<sup>39</sup>

However, the ICESCR, and any rights derived therefrom, suffer from a clear lack of immediate enforceability, with Article 2(1) merely requiring each State party 'to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant'. As one commentator has noted in relation to such "second generation" rights, '[t]he principal challenge is therefore linking the expectations of individuals as rights-holders with the duties owed by others.'<sup>40</sup> At the level of the practical enforceability of the obligations set out under the ICESCR, McCaffrey points out that the language of Article 2(1)

Commission mandated the special rapporteur on the right to food to identify emerging global issues pertaining to the right to food, including 'drinking water, taking into account the interdependence of this issue and the right to food', HRC, Resolution 2001/25 on the Right to Food, 20 April 2001, para. 9. See further, Tully, *supra* n 34 at 110.

36. CESCR, *General Comment 4, The Right to Adequate Housing (Article 11(1))*, UN Doc. E/1992/23, para. 8(b).

37. General Comment 15, *supra* n 4, para. 3.

38. General Comment 15, *ibid*, para. 8. This restates the CESCR's earlier recognition that the right to health extends to related issues such access to safe drinking water and adequate sanitation, in CESCR, *General Comment 14, The Right to the Highest Attainable Standard of Health*, UN Doc. E/C.12/2000/4 (2000), at paras 11, 12, 15, 34, 36, 40, 43, 51 and 65.

39. Y Danieli, E Stamatopoulou and CJ Diaz, *The Universal Declaration of Human Rights: Fifty Years and Beyond* (Baywood Publishing Co., Amityville NY 1999), cited in Gleick, *supra* n 14, at 492.

40. Tully, *supra* n 34, at 103.



would provide a lawyer acting for a State accused of breaching its obligations with ‘ample bases for a defense’.<sup>41</sup> However, in relation to the package of obligations set out in General Comment 15 as inherent to the right to water, Tully concedes that ‘several obligations – namely non-discrimination and undertaking deliberate, concrete and targeted steps – are amenable to immediate implementation’.<sup>42</sup> In the case of a number of such ‘core obligations’, expressly identified in General Comment 15 in relation to the right to water,<sup>43</sup> the CESCR has earlier characterized these as being non-derogable and of ‘immediate effect’.<sup>44</sup> The latter obligation identified by Tully, i.e., to ‘take steps ... to the maximum of its available resources’, has been characterized as one of ‘due diligence’,<sup>45</sup> which McCaffrey regards as one that ‘accords with reality’.<sup>46</sup>

#### 2.1.4 Binding International Conventions

General Comment 15 also notes that the right to water, at least as it would apply in a number of specific contexts, has been recognized in a range of binding and non-binding instruments of international law.<sup>47</sup> Of greatest significance are a number of more specialized binding instruments, including the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>48</sup> Article 14(2) of which requires that State parties ensure to women the right to ‘enjoy adequate living conditions, particularly in relation to ... water supply’, and the 1989 Convention on the Rights of the Child (CRC),<sup>49</sup> Article 24(2)(c) of which requires State parties to combat disease and malnutrition ‘through the provision of adequate

41. *Supra* n 5, at 97.

42. Tully, *supra* n 34, at 104. Indeed, usefully for the prospects of enforcing the purported right to water, any State measure or policy affecting access to water or sanitation which might be regarded as inherently discriminatory, could be argued to fall foul of Article 2(2) of the ESC Covenant, which provides that ‘The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.

43. General Comment 15, para. 37. However, an examination of the ‘core obligations’ identified under para. 37 would lead one to conclude that only those obligations listed under para. 37(a), (b) and (f) might plausibly be considered capable of requiring immediate effect. See M Mahayni, ‘The Human Right to Water: Is the State’s Capacity to Fulfil its Obligations Hindered under Public–Private Partnerships?’, (2006) 17(3) Water Law 100, at 102.

44. CESCR, *General Comment No. 3: The Nature of States Parties’ Obligations (Article 2(1))* (1990), U.N. Doc. E/1991/23.

45. See, McCaffrey (1992), *supra* n 19, at 13.

46. *Supra* n 5, at 98, where he explains that ‘While not an ideal outcome, since the right to water of many would not be realized immediately, it must be said that this result accords with reality. No government can immediately turn on the tap for each and every unserved person in the country. The infrastructure involved in making this possible is enormous and expensive’.

47. General Comment 15, para. 4.

48. U.N. Doc. A/34/46 (1979). Entered into force 1981. See also, governmental declarations of intent to ensure universal access to safe drinking water and available sanitation through public distribution systems, contained in the 1995 Beijing Declaration and Platform for Action, UN Doc A/CONF.177/20 (1995) and UN Doc. A/CONF.177/20/Add.1 (1995), *Women and Health*, at paras 92 and 106(x), cited in Tully, *supra* n 34, at 105.

49. U.N. Doc. A/44/49 (1989). Entered into force 1990.

nutritious foods and clean drinking water'.<sup>50</sup> Hardberger highlights preambular and other supportive text in the CRC<sup>51</sup> and points out that Article 6 of the CRC goes further than simply providing that 'States Parties recognize that every child has the inherent right to life' but, in contrast to the Universal Declaration, also requires that States ensure survival of the child to the 'maximum extent possible'.<sup>52</sup>

## 2.2 Substantive/normative content

General Comment 15 explains that the right to water consists of both freedoms and entitlements, the former including 'the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies', the latter including 'the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water'.<sup>53</sup> Essentially, the elements of the right to water 'must be *adequate* for human dignity, life and health, in accordance with articles 11, paragraph 1, and 12',<sup>54</sup> and General Comment 15 elaborates further, stating that the relevant factors in determining such adequacy include availability, quality and accessibility.<sup>55</sup> The requirement of availability stipulates that States ensure a sufficient and continuous supply of water for such personal and domestic uses as drinking, personal sanitation, washing of clothes, food preparation, and personal and household hygiene, in a quantity which corresponds to World Health Organization (WHO) guidelines.<sup>56</sup> Quality refers to the safety of water, in terms of the absence of micro-organisms, chemical substances and radiological hazards potentially dangerous to human health, and to available water being of an acceptable colour, odour and taste for each personal and domestic use.<sup>57</sup> The requirement of accessibility stipulates that water facilities and services should be accessible to everyone without discrimination<sup>58</sup> and has regard to physical accessibility, including physical security, gender and cultural factors and proximity to households, educational institutions and workplaces,<sup>59</sup> economic accessibility, including the issue of affordability,<sup>60</sup> non-discrimination, including accessibility to the most vulnerable and marginalized sections of the population,<sup>61</sup> and information accessibility, including the right to seek, receive and impart information on water issues.<sup>62</sup> The CESCR places special emphasis on the

50. General Comment 15, para. 4.

51. *Supra* n 27, at 347. For example, she refers to the statement in the CRC Preamble recognising that 'childhood is entitled to special care and assistance ...[and] children should be afforded the necessary protection and assistance'.

52. *Ibid.*

53. General Comment 15, para. 10.

54. General Comment 15, para. 11.

55. General Comment 15, para. 12.

56. General Comment 15, para. 12(a).

57. General Comment 15, para. 12(b).

58. Article 2(2) of the Covenant provides generally that 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

59. General Comment 15, para. 12(c)(i).

60. General Comment 15, para. 12(c)(ii).

61. General Comment 15, para. 12(c)(iii).

62. General Comment 15, para. 12(c)(iv).

issues of non-discrimination and equality of access<sup>63</sup> and makes particular mention of a number of ‘individuals and groups who have traditionally faced difficulties in exercising this right’, including women; children; rural and deprived urban areas; indigenous peoples; nomadic and traveller communities; refugees, asylum-seekers, internally displaced persons and returnees; prisoners and detainees; groups facing difficulties with physical access, such as older persons and persons with disabilities, *etc.*<sup>64</sup>

General Comment 15 sets out the nature of the State parties’ obligations arising by virtue of the right to water inherent in the Covenant on Economic, Social and Cultural Rights and explains that, ‘[w]hile the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect’, including the obligation to guarantee the right without discrimination and to take deliberate, concrete and targeted steps towards the full realization of the right.<sup>65</sup> The nature of the latter obligation is clarified by explaining that ‘[t]here is a strong presumption that retrogressive measures taken in relation to the right to water are prohibited under the Convention’,<sup>66</sup> a point strongly reiterated by the CESCR in General Comment 19 on the right to social security.<sup>67</sup>

In her recent report to the HRC, the Special Rapporteur examines the relationship between the principle of non-retrogression and austerity measures, which ‘include raising the price of services disproportionately so that poor people can no longer afford water and sanitation’, and cautions that ‘retrogressive measures are more common and their impacts often exacerbated by austerity measures’.<sup>68</sup> Reading General Comment 15 together with General Comment 19,<sup>69</sup> the Special Rapporteur advises that any State introducing such measures would need to justify them against a range of criteria, including: that the measures are necessary and proportionate, having regard to all available alternatives and to the totality of rights; that a social protection floor has been provided, especially for disadvantaged and marginalized groups and individuals; that the measures are not discriminatory, involving targeted programmes aimed at those most at risk; that meaningful participation of affected groups and individuals has been conducted regarding such measures; that the measures are temporary and short-term in nature; and that accountability mechanisms are in place to ensure independent review of the measures at a national level and to provide redress for victims of rights violations.<sup>70</sup> At this stage of the ongoing process of reform of the Irish water sector it is not at all clear that such criteria are being considered or that they are likely to be enshrined in any future legislative framework. For example, there is little indication that any statutory powers to be introduced under the proposed Irish water services regime to disconnect individuals or to reduce their level of service for

63. General Comment 15, paras 13–16.

64. General Comment 15, para. 16.

65. General Comment 15, para. 17.

66. General Comment 15, para. 19.

67. UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 19: The right to social security (Art. 9 of the Covenant)*, para. 42 (4 February 2008), E/C.12/GC/19, available at: <<http://www.refworld.org/docid/47b17b5b39c.html>>.

68. *Supra* n 3, at 5–6, para. 14.

69. And to a lesser extent several other documents, including UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, (8 December 1999), E/C.12/1999/10, available at: <<http://www.refworld.org/docid/4538838c22.html>>.

70. *Supra* n 3, at 6–7, para. 15.

non-payment of the new charges<sup>71</sup> – a scenario that could not have arisen hitherto – will be formulated having regard to the criteria outlined by the Special Rapporteur. As one commentator points out, in the current debate over water sector reform ‘the focus appears to be on the charges, how they are made up, how they are imposed, rather than on the fundamental right of citizens to be supplied with water’.<sup>72</sup> It is also a cause for concern that the existing legal framework is especially weak as regards mechanisms for meaningful participation and accountability. As the Special Rapporteur explains:

While such retrogression cannot always be avoided ... States must act with care and deliberation, exercise due diligence to assess the impacts of their actions and omissions on the realization of human rights, and adjust their policies and measures as soon as they become aware that current policies might lead to unsustainable results.<sup>73</sup>

In essence, the CESCR uses the established tripartite typology of State obligations under the Covenant to identify three types of specific legal obligations, *i.e.* obligations to respect, to protect and to fulfil the right to water.<sup>74</sup> Obligations to respect include those requiring States to refrain from interfering with access to water or water services, from unlawfully diminishing or polluting water, or from destroying water services and infrastructure. Obligations to protect include those requiring the State to prevent third parties, which includes individuals, groups and corporations, from interfering with enjoyment of the right to water by denying equal access to, polluting or inequitably extracting water resources. Further, where such third parties operate or control water services or infrastructure, States are obliged to ‘prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water’. Clearly this obligation requires the adoption of the necessary legislation to safeguard the interests of all individuals and to establish an effective regulatory system. Obligations to fulfil include a wide range of obligations to require States ‘to facilitate, promote and provide’, such as the promotion of education concerning the hygienic use and environmental protection of water, the provision of appropriate low-cost technologies involving appropriate pricing policies and income supplements, and the reduction of waste and promotion of efficiency in water use.

It should be noted in the context of Irish water services reform that, under the rubric of the obligation to fulfil, Paragraph 27 of General Comment 15 is particularly concerned with the measures required of States to ensure that water is affordable, stating in part that:

Any payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.

71. A current proposal from government suggests that, in place of disconnection, the water pressure may be reduced to a particular household in the event of non-payment of water charges, though it is not clear that the current water supply infrastructure would permit such action. See JM McCafferty, “‘Water poverty’ fears over Irish metering”, *Evening Echo*, 7 October 2013.

72. Spence, *supra* n 11, at 7.

73. *Ibid.*, at 7, para. 16.

74. General Comment 15, paras 20–28. For a concise introduction to this tripartite typology, see A Cahill-Ripley, *The Human Right to Water and its Application in the Occupied Palestinian Territories* (Routledge, London 2011), at 58.

Even more significantly, Paragraph 26 requires that States, *inter alia*, accord ‘sufficient recognition of this right within the national political and legal systems, preferably by way of legislative implementation; [and] adopting a national water strategy and plan of action to realize this right’. Part V of General Comment 15 insists that ‘[e]xisting legislation, strategies and policies should be reviewed to ensure that they are compatible with obligations arising from the right to water, and should be repealed, amended or changed if inconsistent with Covenant requirements’,<sup>75</sup> before providing detailed guidance on what a national strategy or plan of action should contain,<sup>76</sup> including indicators and benchmarks to assist in monitoring the realization of the right to water.<sup>77</sup> It is significant that such guidance stresses the right of individuals to participate in decision-making and to be given full and equal access to information,<sup>78</sup> along with the related principles of accountability, transparency and independence of the judiciary, which the CESCR groups under the rubric of ‘good governance’, which ‘is essential to the effective implementation of all human rights, including realization of the right to water’.<sup>79</sup> Paragraph 50 suggests the key features to be included in a legislative framework adopted to operationalize a right to water strategy, including provisions on targets or goals to be attained, on institutional responsibilities, on monitoring, and on remedies and recourse procedures.

In fact, one can also consider the emergence in international law of a human rights-based approach to water and sanitation entitlements as an expression of universally accepted standards of global governance. This approach addresses many of the difficulties which arise in relation to the precise normative status of the human right to water under international law as well as doubts concerning its enforceability by means of the traditional enforcement mechanisms existing under human rights law. Indeed, a survey of the commonly accredited sources of rules of global administrative law<sup>80</sup> helps to make sense of the wide diversity of mechanisms, in addition to the formal conventional obligations and practice of States, for the generation of rules and standards which inform the procedural and substantive normative content of the human right to water. Such mechanisms include, for example, the International Organization for Standardization,<sup>81</sup> various voluntary codes of corporate

75. General Comment 15, para. 46.

76. General Comment 15, paras 47–49.

77. General Comment 15, paras 53–54.

78. General Comment 15, para. 48.

79. General Comment 15, para. 49.

80. See, for example, B Kingsbury, N Krisch, RB Stewart and JB Wiener, ‘Global Governance as Administration – National and Transnational Approaches to Global Administrative Law’ (2005) 68 (3)-(4) *Law and Contemporary Problems* 1; B Kingsbury, ‘The Concept of “Law” in Global Administrative Law’ (2009) 20(1) *European Journal of International Law* 23; C Harlow, ‘Global Administrative Law: the Quest for Principles and Values’ 17(1) (2006) *European Journal of International Law* 187–214; H Grimes, ‘Responding to the “Water Crisis”: The Complementary Roles of Water Governance and the Human Right to Water’ (2009) 20(2/3) *Water Law* 119; B Morgan, ‘Turning Off the Tap: Urban Water Service Delivery and the Social Construction of Global Administrative Law’ (2006) 17(1) *European Journal of International Law* 215.

81. ISO 24510:2007 Activities relating to drinking water and wastewater services – Guidelines for the assessment and for the improvement of the service to users; ISO 24511:2007 Activities relating to drinking water and wastewater services – Guidelines for the management of wastewater utilities and for the assessment of wastewater services; ISO 24512:2007 Activities relating to drinking water and wastewater services – Guidelines for the management of drinking

conduct,<sup>82</sup> national systems of administrative or environmental law, and of course the institutional machinery which elaborates upon human rights values. Such an analysis permits conclusions to be drawn on the key elements of the human right to water, including procedural and due process requirements, the key rule of law values, the key good governance values (relating particularly to transparency, participation and accountability), and the key human rights values impacting upon the concept. This mode of analysis goes some way towards identifying the rights and obligations created by the human right to water for a variety of actors, including individuals, vulnerable communities, transnational corporations, investors in water and sanitation services, and of course State agencies.<sup>83</sup> The Special Rapporteur likewise places considerable emphasis on good governance values, including ‘the core human rights principles of participation and empowerment, accountability, non-discrimination and equality, transparency and access to information’<sup>84</sup> and on ‘accountable governance’, whereby ‘[i]nstitutions involved in the water and sanitation sectors must be responsive and accountable for their actions, and decisions must be participatory and transparent’.<sup>85</sup>

### 3 REFORM OF THE IRISH WATER SERVICES SECTOR

The EU/IMF Memorandum of Understanding,<sup>86</sup> which was concluded with Ireland in 2009 and sets the terms of Ireland’s financial bail-out, requires that Ireland make sweeping changes to the water services sector, primarily with a view to introducing charges for domestic water services in 2012 or 2013.<sup>87</sup> This measure is one among a wide range of structural reforms intended to underpin Ireland’s economic stability. In addition, it is quite clear that Irish water-related infrastructure and services urgently require considerable improvement by means of capital investment. In terms of water quality, for example, a 2011 report by the Environmental Protection Agency (EPA)<sup>88</sup> outlines the further investments required in order for Ireland to meet the water quality

water utilities and for the assessment of drinking water services. Available at <[http://www.iso.org/iso/iso\\_catalogue/catalogue\\_tc/catalogue\\_tc\\_browse.htm?commid=299764&published=on&includesc=true](http://www.iso.org/iso/iso_catalogue/catalogue_tc/catalogue_tc_browse.htm?commid=299764&published=on&includesc=true)>.

82. See Organisation for Economic Co-operation & Development, *OECD Guideline for Multinational Enterprises*, June 21, 1976 (revised 2000), available at <<http://www.oecd.org/dataoecd/56/36/1922428.pdf>>. See generally, S D Murphy, ‘Taking Multinational Corporate Codes to the Next Level’ (2005) 43 *Columbia Journal of Transnational Law* 389.

83. See further, O McIntyre, ‘The Human Right to Water as a Creature of Global Administrative Law’ (2012) 37(6) *Water International*, 654–69.

84. *Supra* n 3, at 4–5, para. 9.

85. *Supra* n 3, at 8, para. 23.

86. *EU/IMF Programme of Financial Support for Ireland* (16 December 2009), at 26, available at <<http://www.finance.gov.ie/documents/publications/reports/2011/euimfrevise.pdf>>.

87. For a comprehensive account of the proposed reform of the Irish water services sector, and of the existing and proposed legal framework within which such reform must be undertaken, see Danielle Conaghan, ‘Water Policy, Water Regulation and Water Rights: Part I’ (2012) 19(1) *Irish Planning and Environmental Law Journal* 3 and Danielle Conaghan, ‘Water Policy, Water Regulation and Water Rights: Part II’ (2012) 19(2) *Irish Planning and Environmental Law Journal* 52.

88. EPA, *Water Quality in Ireland 2007–2008: Key Indicators of the Aquatic Environment*, (24 February 2011), available at <<http://www.epa.ie/pubs/reports/water/waterqua/Water%20Quality%20in%20Ireland%202007%20-%202008%20%20Key%20Indicators%20of%20the%20Aquatic%20Environment.pdf>>.

targets mandated by 2015 under the EU Water Framework Directive.<sup>89</sup> Indeed, the Irish Government estimates that the cost to the exchequer of providing water services reached €1.2 billion in 2010, with operational costs amounting to €715 million and capital costs amounting to €500 million, and is committed to effecting a transition to a non-Exchequer based funding model by the start of 2014.<sup>90</sup> In addition to a number of recent high-profile incidents concerning public health risks, most notably due to contamination of water supplies by cryptosporidium,<sup>91</sup> the current system of water services provision is regarded as inefficient and wasteful, with average water leakage levels estimated at 41 per cent, far above the level of 10 per cent considered to be a realistic international target.<sup>92</sup> Further, the number of people employed in the provision of water services in Ireland is 25 per cent higher than the United Kingdom (UK) median<sup>93</sup> and operating costs per connection are more expensive than in the UK or Northern Ireland by 50–100 per cent.<sup>94</sup>

Therefore, the current *Programme for Government* includes a commitment to install household water meters and move to a charging system, as well as to establish a new State water utility company, Irish Water, to take over the investment and maintenance programmes of the 34 existing local water services authorities. A report commissioned on the establishment and role of Irish Water and the related Position Paper issued by the Department of Environment, Community and Local Government have recommended that it should be established as a public utility with full statutory responsibility for the introduction of water metering and customer billing for water charges, for investing in and operating water services infrastructure, and for sourcing private finance for investment in capital projects.<sup>95</sup> The full transfer of operations from water services authorities/local authorities to Irish Water is intended to be completed by the end of 2017. Irish Water will be regulated in respect of its impacts on the natural environment by the EPA and will be subject to economic regulation by

89. Directive 2000/60/EC establishing a framework for Community action in the field of water policy (2000) OJ L327/1 (22 December 2000). An extensive montage of elaborate substantive environmental protection requirements apply under the Water Framework Directive and under related EU environmental legislation. Take, for example, Directive 91/271, the Urban Waste Water Treatment Directive, and Directive 76/464, the Dangerous Substances Directive, with its various daughter directives setting emission specific standards for prescribed substances whose toxicity, persistence and bio-accumulation make it desirable that they should be eliminated or carefully controlled, including such substances as mercury and its compounds, cadmium and its compounds, hexachlorocyclohexane, carbon tetrachloride, DDT and pentachlorophenol, aldrin, dieldrin, endrin, isodrin, hexachlorobenzene, hexachlorobutadiene, chloroform, 1,2 – dichloroethane, trichloroethane, perchlorethylene and trichlorobenzene.

90. See Conaghan, *supra* n. 87, at 5–6.

91. See, for example, ‘Galway faces water rationing over Summer’, *Irish Times*, 7 May, 2007.

92. Department of Environment, Community and Local Government Position Paper: *Reform of the Water sector in Ireland* (January 2012), at 13, available at <<http://www.environ.ie/en/Publications/Environment/Water/FileDownload,29192,en.pdf>>. See further, Conaghan, *supra* n. 87, at 6, 7.

93. *Ibid.*

94. DoEHLG, *Water Sector Reform Implementation Strategy* (October 2012), at 29.

95. PwC, *Irish Water: Phase I Report* (January 2012). Both the Report and the Position Paper, *ibid.*, were published by the Department on 15 January 2012 and are available at <<http://www.environ.ie/en/Environment/Water/WaterSectorReform/>>. See further, Conaghan, *supra* n. 87, at 3. In October 2012, the Department published its *Water Sector Reform Implementation Strategy*, available at: <<http://www.environ.ie/en/Publications/Environment/Water/FileDownload,32001,en.pdf>>.

the Commission for Energy Regulation (CER), which will oversee the setting of tariffs for water supply and sanitation services. The recently established New Economic and Recovery Authority (NewERA) will have responsibility for reviewing the capital investment plans of commercial semi-state companies, including Irish Water. While such a multiplicity of regulatory agencies is far from ideal, this issue is overshadowed by the sheer complexity of the existing legislative framework. At a recent conference, the Assistant Secretary at the Department of the Environment, Community and Local Government noted in his paper that:

...there is a suite of environmental legislation, placing specific obligations on water services authorities in relation to drinking water quality and waste water treatment. A number of amendments will be required to ensure that these obligations are mapped across to the new utility.<sup>96</sup>

The key difficulty is that this 'suite of legislation' currently encompasses 150 separate legislative instruments.<sup>97</sup>

Arguably, the commitment under the EU/IMF Memorandum of Understanding regarding the introduction of domestic water charges will merely bring Ireland into line with the obligation under the EU Water Framework Directive for EU Member States to 'take account of the principle of recovery of the costs of water services ... in accordance in particular with the polluter pays principle'<sup>98</sup> in setting water prices, in respect of which Ireland currently avails, somewhat questionably, of an exemption.<sup>99</sup> It is intended that domestic water charges will only be levied for water used in excess of a free allowance which is to be provided to every household, though no decision has yet been taken on the level of free allowance to be provided or on such details as how it might take account of such factors as large households.<sup>100</sup> Pending the universal installation of domestic water meters, the Government has not rejected the possibility that flat water charges might be imposed as an interim measure.<sup>101</sup> As the installation of meters in 1.3 million homes might take longer than anticipated, having regard to the experience in other jurisdictions such as the UK, such flat charges might continue for many years, at least in certain areas or as regards certain types of dwelling. Unless account could be taken of the number of people residing in a household, the imposition of flat charges would have serious implications for those living alone, particularly vulnerable groups such as the elderly, in a manner which could not be regarded as 'fair' according to the Special Rapporteur.<sup>102</sup> Indeed, such a policy might easily fit into the 'pattern of neglect of the needs of the most vulnerable and marginalized groups in society across planning, institutional responsibilities and resource allocation' identified by the Special Rapporteur.<sup>103</sup>

96. 'Current Policy Issues in the Water Sector and the Establishment of Irish Water', paper delivered at the *ICEL / EPA Environmental Regulation and Enforcement Conference*, 18 October 2012.

97. See C Allen, 'Following the Water – Obligations of Water Services Authorities' (2012) 19(4) *Irish Planning and Environmental Law Journal* 166, at 166.

98. Directive 2000/60 establishing a framework for Community action in the field of water policy, 23 October 2000, Article 9(1).

99. Under Article 9(4) of the WFD.

100. See Conaghan, *supra* n 87, at 8.

101. *Ibid.*

102. See, *supra* n 3, at 17–18, para. 64.

103. *Ibid.*, at 14, para. 50.



The EU/IMF Memorandum of Understanding does not, however, require the privatization of any aspect of the Irish water sector and the current Water Services Act, 2007 (as amended) currently provides three levels of safeguards to ensure continuing ‘democratic control’ over the sector.<sup>104</sup> Section 27 provides that the Minister may only transfer any of his or her own functions or the water services authorities’ functions to a private operator if he or she is satisfied that ‘democratic accountability for the function concerned will be ensured’. There does not appear to be any equivalent requirement in respect of a State-owned utility company, raising questions regarding the accountability of the key actor in the provision of water and sanitation services. Under section 31(12), a water services authority cannot contract with private operators where this would involve the transfer of the authority’s assets or infrastructure to that private operator. Finally, under Article 40(7), a water services authority which contracts out its services to a private operator will ‘continue to be responsible for the compliance of those services with the requirements of this Act’. However, there would appear to be every likelihood of private entities acquiring some form of interest in water services infrastructure when one considers that one of the Government’s key reasons for establishing Irish Water as a public utility is that with this model ‘[b]orrowing capacity [is] higher than other models allowing the entity to become self-funding sooner’,<sup>105</sup> and that the new Water Services Investment Programme for the period 2010–2012 ‘includes 360 contracts to commence in the period at a cost of €1.8 billion with the value of schemes in planning amounting to €3 billion’.<sup>106</sup> The fact that the current reforms will move water services from municipal and central authorities to a (State-owned) commercial enterprise, will involve the installation of meters in 1.3 million homes to facilitate domestic charging, and will create a customer-supplier relationship between the water utility and every water user in the State, will understandably cause many to speculate that privatization of the water utility might become attractive in the future.<sup>107</sup> Indeed, other financial bail-out packages agreed with indebted States during the current crisis have included express conditions requiring private sector participation in public services delivery, including water services provision.<sup>108</sup> Therefore, any new bail-out package for Ireland, or extension of the existing arrangements, could conceivably stipulate some element or form of privatization. While private sector involvement in the provision of water and sanitation services is not in any way incompatible with the requirements of the human right to water

104. Sections 27, 31(12) and 40(7). See further Conaghan, *supra* n 87, at 5.

105. DoECLG, *Water Sector Reform Implementation Strategy*, *supra* n 95, at 29.

106. *Ibid.*, at 30.

107. See, for example, the ongoing debate facilitated by the Institute of International and European Affairs, at <<http://www.iiea.com/blogosphere/who-owns-our-water-in-europe-and-does-it-matter>>. The Special Rapporteur has elsewhere outlined the key challenges arising in cases of non-State provision of water and sanitation services, see *Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation*, 29 June 2010, (A/HRC/15/31), available at: <<http://www2.ohchr.org/english/issues/water/ixpert/docs/A-HRC-15-31-AEV.pdf>>.

108. See, for example, the *Memorandum of Economic and Financial Policies and Technical Memorandum of Understanding between the International Monetary Fund and Greece*, 21 December 2012, available at: <[www.imf.org/external/np/loi/2012/grc/122112.pdf](http://www.imf.org/external/np/loi/2012/grc/122112.pdf)>, cited by the Special Rapporteur, *supra* n 3, at 13, para. 45.

as set out under General Comment 15,<sup>109</sup> it is often assumed by those opposed to privatization that recognition of the human right to water ought to hinder such private involvement.<sup>110</sup> The issue remains contentious as illustrated by the recent condemnation by AquaFed, the international federation of private water operators, of the decision by the European Commission (EC) to exclude water from the list of services to be covered by the proposed Concessions Directive.<sup>111</sup>

Under the current Irish legislative framework, charges for domestic users of water and sanitation services are prohibited by section 105 of the Water Services Act, though this section has not commenced.<sup>112</sup> Section 17 of the 2007 Act, however, empowers the Minister to introduce by regulation a financial assistance scheme for ‘any person’ specifying, *inter alia*, the amounts of assistance and the eligibility criteria for such assistance. The Act does not provide for a waiver scheme for low-income domestic water users, along the lines of that available for publicly-provided waste collection schemes, although it does provide for a waiver for non-domestic users where the water services authority is satisfied that it is ‘appropriate to do so on grounds of personal hardship or quality of water supplied’.<sup>113</sup> Non-domestic users to benefit from such a waiver might include schools for example. Thus, current legislation would appear to allow for a scheme of financial assistance along the lines of the UK ‘Watersure’ scheme,<sup>114</sup> but new or amending legislation would be required for any waiver scheme for domestic users. The Government’s 2012 Position Paper merely states that further work will be undertaken in respect of the approaches to be deployed to support low income households in relation to domestic water charges.<sup>115</sup> Therefore, it is quite clear that a new legislative framework will be required, which ought to take account of the safeguards set down in General Comment 15 and of the Special Rapporteur’s recent guidance on the measures necessary to ensure compliance in times of economic and financial crisis.

A key question in respect of the water services charging scheme proposed by the Irish Government is that of the extent of any free allowance granted either per capita or per household. Whereas Irish people are estimated to use 150 litres of water per

109. See generally, O McIntyre, ‘Water Services Privatisation and Recognition of the Human Right to Water in International Investment Law – Finding Fertile Ground in Unlikely Places’, in D French (ed), *Global Justice and Sustainable Development* (Martinus Nijhoff, Dordrecht 2010) 207–28.

110. See, for example, H Smets, ‘Economics of Water Services and the Right to Water’, in E Brown Weiss, L Boissin de Chazournes and N Bernasconi-Osterwalder (eds), *Fresh Water and International Economic Law* (Oxford University Press, Oxford 2005), 177–83; B Morgan, ‘Turning Off the Tap: Urban Water Service Delivery and the Social Construction of Global Administrative Law’ (2006) 17 *European Journal of International Law* 215.

111. AquaFed Press Statement: ‘AquaFed denounces exclusion of water from Concessions Directive’ (2 July 2013), available at: <<http://www.iwapublishing.com/template.cfm?name=news1642>>.

112. Under section 25(2) of the Water Services Bill 2013 it is intended that ‘The functions of each water services authority under section 105 of the Act of 2007 in so far only as they relate to dwellings are transferred to the Board and the subsidiary [Irish Water] ...’.

113. Section 105(4), Water Services Act, 2007 (section 105 has not yet been commenced). Schools, for example, might be included among the non-domestic users expected to avail of a waiver under s. 105(4). See further, Conaghan, *supra* n 87, at 8–9.

114. Details available at: <<http://www.ofwat.gov.uk/consumerissues/assistance/watersure/>>.

115. *Supra* n 95, at 21.

capita per day (l/c/d)<sup>116</sup> and people in the Netherlands 124 l/c/d, one international expert has estimated that domestic requirements and water requirements for maintaining a water efficient non-agricultural economy capable of sustaining a high level of human development could be satisfied by 135 l/c/d, including water distribution losses of 10-15 l/c/d.<sup>117</sup> The Price Waterhouse Coopers (PwC) Phase 1 Water Report commissioned by the Government cites two regimes which provide for free allowances, that of 41 l/c/d in the Flanders region of Belgium, and that of 25 l/c/d in the South African metropolitan municipality of Johannesburg,<sup>118</sup> though it should be noted that in Flanders there is also a standing charge for water, while in Johannesburg, and in other South African municipalities, the quantum of water provided under the “free basic allowance” has regularly been the subject of litigation.<sup>119</sup> While neither the World Health Organisation (WHO) nor any other relevant UN agency has provided guidance on the minimum quantity of domestic water required to safeguard human health, one leading international commentator has proposed that 50 l/c/d constitutes a basic domestic water requirement,<sup>120</sup> and an independent report on UK water charging policy from 2011 appears to support this figure by recommending that low-income households with more than one child be given a discount amounting to the equivalent of 50 litres of water each day for each child.<sup>121</sup> Indeed, it appears that a free allowance in Ireland of around 60 l/c/d has been suggested at an Inaugural Summit on Water Metering in 2011.<sup>122</sup> Whatever type of free allowance is eventually provided for, the legislative framework ought to be sufficiently sophisticated ‘to eliminate both formal and substantive discrimination on all prohibited grounds’.<sup>123</sup> This would require, *inter alia*, systematic monitoring of the effects of the policy, effective economic regulation and the establishment of an accessible and efficient means of review and redress for those adversely affected in a disproportionate manner.<sup>124</sup>

116. See Conaghan, *supra* n 87, at 9–10.

117. J Chenoweth, ‘Minimum Water Requirement for Social and Economic Development’, (2008) 229 *Desalination* 245, cited by Conaghan, *supra* n 87 at 10 and 13.

118. *Supra* n 95, at 71–72.

119. Notably in *Mazibuko and Others v. City of Johannesburg and Others*, (CCT 39/09) [2009] ZACC 28, available at: <<http://www.saflii.org/za/cases/ZACC/2009/28.pdf>>.

120. PH Gleick, ‘Basic Water Requirements for Human Activities: Meeting Basic Needs’, (1996) 21(2) *Water International*, 83–92, cited by Conaghan, *supra* n 87, at 10.

121. A. Walker, *The Independent Review of Charging for Household water and Sewerage Services* (Dept. of Environment, Food and Rural Affairs (DEFRA), December 2009), available at <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/69459/walker-review-final-report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69459/walker-review-final-report.pdf)>. However, these recommendations were rejected by DEFRA as likely to be unaffordable and were excluded from the April 2011 DEFRA consultation paper, *Affordable water: a consultation on the Government’s proposals following the Walker Review of Charging*, available at: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/82240/110405-walker-consult-condoc.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/82240/110405-walker-consult-condoc.pdf)>.

122. T O’Brien, ‘Water Charges will “Aid Conservation”’, *Irish Times*, 1 June 2011, cited by Conaghan, *supra* n 87, at 10.

123. Special Rapporteur, *supra* n 3, at 9, para. 24. General Comment 15 reminds us, at 6, para. 13, that ‘The Covenant thus proscribes any discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status, (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to water’.

124. Special Rapporteur, *ibid.*, at 15–16, paras 53–56.

### 3.1 The human right to water (and sanitation) in Irish law

While Ireland is a party to the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), the primary instrument from which the purported human right to water (and sanitation) derives, and has stated its intention to sign up to the Optional Protocol to the ICESCR, which is intended to establish a complaints procedure through which individuals will be able to bring complaints concerning violations of their economic, social and cultural rights, it has declined to support the UN General Assembly's 2010 Resolution on the Human Right to Water and Sanitation,<sup>125</sup> abstaining in the General Assembly vote which was carried by 122 States in favour and 41 abstentions, with no States voting against.<sup>126</sup> Neither has Ireland expressly recognized such a right by virtue of any domestic law instrument, legislative or constitutional, though elements inherent to the human right to water might be guaranteed under certain statutes or may come to be protected through further elaboration of unenumerated rights under Article 40.3 of the Constitution. It also seems highly unlikely that EU water-related and environmental directives<sup>127</sup> or the EU Charter of Fundamental Rights<sup>128</sup> provide a justiciable basis for this emerging right.<sup>129</sup>

Interestingly, Ireland's recently adopted policy for international development sets down three goals, including that of 'better governance, human rights and accountability', and six priority areas for action, including 'essential services' and 'human rights and accountability'.<sup>130</sup> Regarding essential services, the policy commits the Irish Government to 'support the implementation of appropriate and sustainable social protection programmes that ... improve access to basic services' and focuses on the needs of vulnerable people, the very poorest households, people with disabilities, and women and children, and on 'efforts that reduce maternal and infant mortality'.<sup>131</sup> It further notes that '[t]o improve service delivery, we will support institutional changes so as to strengthen relationships of accountability – between policymakers, service providers, and citizens'.<sup>132</sup> Likewise, regarding human rights and accountability, the policy explains that '[g]ood governance and accountability are vital components for the realization of human rights and are key to addressing the inequality, discrimination and exclusion that lie at the core of poverty'.<sup>133</sup> Thus, while the Irish

125. Resolution 64/292, 28 July 2010.

126. It would appear that Ireland's reticence regarding recognition of the human right to water is due to concerns over the possible cost implications of a resulting obligation to provide water services to all, including those living in remote areas and/or sparsely populated areas. See further, Spence, *supra* n 11, at 5.

127. See, for example, van Rijswick and Keesen, *supra* n 1, at 127.

128. See, in relation to the relatively limited significance of Article 37 on 'Environmental Protection' of the EU Charter of Fundamental Rights, G Marín Durán and E Morgera, 'Commentary on Article 37 of the EU Charter of Fundamental Rights – Environmental Protection', Edinburgh Europa Institute Working Paper No. 2013/2 (2013).

129. Though aspects of the human right to water related to water pollution and environmental quality are quite comprehensively covered under the Irish legislative framework on environmental law. A recent joint report by the European Environment Agency and the Joint Research Centre affirms the linkage between the environmental protection of water resources and the promotion of human health, see EEA/JRC, *Environment and Human Health*, EEA Report No. 5/2013, at 48–53.

130. Government of Ireland, *One World, One Future: Ireland's Policy for International Development* (May, 2013), at 2.

131. *Ibid.*, at 22.

132. *Ibid.*

133. *Ibid.*, at 24.

Government would clearly appear to subscribe to the values and approaches inherent to the human right to water, it might appear to regard such a right as only relevant in the developing world. Such double standards are unlikely to be considered acceptable at home.

### 3.2 A constitutional right to water and sanitation?

The two key values identified under the Irish constitution which might function to support the existence of a human right to water are those of bodily integrity and dignity. According to Danielle Conaghan:

...the constitutional rights to bodily integrity and dignity, respectively, could be interpreted in light of the Preamble (and the directive principles of social policy) as encompassing a right to water and sanitation, given that access to both is essential to sustain human health and life.<sup>134</sup>

The critical importance of safe drinking water has long been recognized as an issue of constitutional relevance in Ireland, having given rise to the doctrine of unenumerated rights under the 1937 Irish Constitution. In 1965, the Irish High Court famously held that, had it been convinced that fluoride added to the public water supply was hazardous to human health, it would have found the statute providing for the addition of fluoride unconstitutional as a violation of the plaintiff's right to 'bodily integrity'. This unspecified personal right to bodily integrity recognized by Kenny J in *Ryan v Attorney General*<sup>135</sup> as arising under Article 40.3.2 of the Constitution can now be understood as a prohibition on any State authority imposing or supplying a service which is dangerous to the life or health of any person.<sup>136</sup> The right to safe, adequate and affordable access to water and sanitation services might easily be found to fall within the scope of the constitutional right to bodily integrity or of another of 'the many personal rights of the citizen which flow from the Christian and democratic nature of the State which are not mentioned in Article 40 at all' envisaged by Kenny J.

In turn, the preambular objective of assuring 'the dignity and freedom of the individual' has been described as being among 'the most laudable objects', which are 'to inform the various Articles of the Constitution'.<sup>137</sup> Further, this express objective would appear to have been complemented by the Supreme Court's recognition in *Re a Ward of Court (No. 2)* of a right to dignity amongst the unenumerated rights protected by the Constitution, where the Court included, among the factors to be taken into account in determining the best interests of a person in a long-term persistent vegetative state, the rights to bodily integrity and to dignity in life.<sup>138</sup> Denham J stated that '[a]n unspecified right under the constitution to all persons as human persons is dignity – to be treated with dignity'.<sup>139</sup> Though there has been little judicial analysis of the scope or potential implications of such a constitutional right to

134. D Conaghan, 'Water Policy, Water Regulation and Water Rights: Part II' (2012) 19(2) Irish Planning and Environmental Law Journal 52, at 53.

135. [1965] IR 294.

136. *The State (C) v Frawley* [1976] IR 365 and *The State (Richardson) v Governor of Mountjoy Prison* [1980] ILRM 82.

137. *Buckley v Attorney General* [1950] IR 67, per O'Byrne J.

138. [1996] 2 IR 79, at 167.

139. *Ibid.*

dignity,<sup>140</sup> '[b]oth Denham J. and O'Flaherty J. appeared to consider that a right to dignity could be impaired by external factors'.<sup>141</sup> Also, it is noteworthy in the context of the right of access to adequate sanitation that the constitutional notion of dignity is strongly associated with the right to privacy.<sup>142</sup>

Of course, the constitutional guarantee of equality set down in Article 40.1 of the Constitution might also be relevant in ensuring access to water and sanitation services for minorities or other vulnerable groups, such as members of the Traveller community.<sup>143</sup> Once again, the notion of human dignity is central and Walsh J. noted in *Quinn's Supermarket v Attorney General* that 'this provision is not a guarantee of absolute equality for all citizens in all circumstances but it is a guarantee of equality as human persons and ... is a guarantee related to their dignity as human beings'.<sup>144</sup> Further, Denham J. stated in *Re a Ward of Court (No. 2)* that the concept of equality guaranteed under Article 40.1 'is not a restricted concept, it does not mean solely that legislation should not be discriminatory. It is a positive proposition'.<sup>145</sup> Thus Article 40.1 imposes a positive obligation upon the State to take legislative measures to protect and promote effective equality between different groups within society and, by so doing, to eliminate indirect discrimination in access to water and sanitation services. In the case of Travellers or other vulnerable or marginalized groups, the notion of autonomy might also be relevant. In recent years the courts have placed considerable emphasis on autonomy as a constitutionally protected value which is inherent to the rights to liberty and due process and which was recognized by the Supreme Court as a distinct personal right in *Re a Ward of Court (No. 2)*.

In addition, Article 45 of the Constitution sets forth the 'directive principles of social policy' which, though not directly applicable by any court in testing the constitutionality of a legislative measure, 'are intended for the general guidance of the Oireachtas' and have been taken account of in certain circumstances.<sup>146</sup> Article 45.4.1 notes that '[t]he State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged', while Article 45.4.2 provides that '[t]he State shall endeavor to ensure that the strength and health of workers, men and women, and the tender age of children shall not be abused'. Clearly, such principles might assist the courts in interpreting

140. See, in particular, C O'Mahony, 'There is No Such Thing as a Right to Dignity: A Rejoinder to Emily Kidd White' (2012) 10(2) *International Journal of Constitutional Law*, 585–87.

141. Conaghan, *supra* n 134 at 53.

142. See *McGee v Attorney General* [1974] IR 284, *Norris v Attorney General* [1984] IR 36, and *Kennedy v Ireland* [1987] IR 58. For example, in his dissenting judgment in *Norris*, Henchy J. commented, at 71, that, having regard to the purposive Christian ethos of the Constitution, 'there is necessarily given to the citizen, within the required social, political and moral framework, such a range of personal freedoms or immunities as are necessary to ensure his dignity and freedom as an individual in the type of society envisaged'.

143. Article 40.1 provides that 'All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function'.

144. [1972] IR 1, at 13–14.

145. [1996] 2 IR 79, at 159.

146. *Murtagh Properties Ltd. v Cleary* [1972] IR 330; *Landers v Attorney General* (1973) 109 ILTR 1; *Attorney General v Paperlink Ltd.* [1984] ILRM 373. See Conaghan, *supra* n 134, at 54 and 67; G Hogan and G White, *JM Kelly: The Irish Constitution* (4th edn) (Butterworths, Dublin 2003), at 2078–86.

the rights outlined above in a manner which would provide the greatest possible protection for vulnerable individuals, groups or communities in an era of charging for water and sanitation services in a manner consistent with the requirements of General Comment No. 15.

The emergence of the human right to water in international law might itself play a role in the interpretation and application of the above constitutional protections. Though, in the event of a conflict between the provisions of an international convention and any provision within the domestic legal framework, the domestic rule will be given effect in accordance with Article 29(6)<sup>147</sup> and Article 15.2.1,<sup>148</sup> while the courts have on a number of occasions been willing, in the absence of such conflict, to consider the provisions of international instruments to which the State is a party with a view to informing their understanding of the applicable constitutional standards. For example, in *State (Healy) v Donoghue*, the Supreme Court had regard to Article 6 of the European Convention on Human Rights (ECHR), which Ireland had ratified but had not at that time incorporated into the domestic legal system, when considering the scope of the right to legal aid under Irish law.<sup>149</sup> Therefore, the Court was willing to have regard to an unincorporated international instrument in interpreting the constitutional right to a trial in due course of law as protected in Article 38, and of the guarantees set out in Article 40.3 of the Constitution. Similarly, in considering the constitutional status of the presumption of innocence pursuant to Article 38, *Costello J in O'Leary v Attorney General* reviewed the status afforded to the presumption under both Article 6(2) of the ECHR and Article 11 of the Universal Declaration on Human Rights (UDHR), to conclude that 'by construing the Constitution in the light of contemporary concepts of fundamental rights (as I am entitled to do: see *State (Healy) v Donoghue*) the plaintiff's claim obtains powerful support'.<sup>150</sup> Therefore, the CESCR's interpretation of the Covenant as it applies to water and sanitation entitlements might be considered by the Irish courts in order to assist in identifying a broad international consensus on the normative character and implications of the emerging human right to water and sanitation.

Various rights arising under the ECHR might prove relevant in this regard.<sup>151</sup> For example, Article 2 of the European Convention on Human Rights on the right to life is commonly regarded as requiring that States have an obligation 'not only to refrain

147. Article 29(6) provides that 'No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas'.

148. Article 15.2.1 provides that 'The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State'. According to the Supreme Court in *Re Ó Laighléis* [1960] IR 93, 'Where there is an irreconcilable conflict between a domestic statute and the principles of international law or the provisions of an international convention, the courts administering the domestic law must give effect to the statute ... if this principle were not to be observed it would follow that the Executive Government by means of an international agreement might, in certain circumstances, be able to exercise powers of legislation contrary to the letter and the spirit of the Constitution'.

149. [1976] IR 325. According to O'Higgins CJ, 'it is sufficient to say that the existence of the Convention demonstrates clearly that it was ... generally recognised throughout Europe that, as one of his minimum rights, a poor person charged with a criminal offence had the right to have legal assistance provided for him without charge'.

150. [1993] 1 IR 102, at 107.

151. For a detailed account of the environment-related rights which might be derived from the European Convention on Human Rights, see Council of Europe, *Manual on Human Rights and the Environment* (2nd edn) (Council of Europe, Strasbourg, 2012), at 30–116.

from taking life “intentionally” but further, to take appropriate steps to safeguard life’.<sup>152</sup> One commentator suggests that the right to water might one day apply directly under the European Convention:

...if the European Court of Human Rights were to recognize that it is a necessary element of some protected general human rights (e.g., the right to dignity or the right to life). This could potentially occur, as the European Court is already moving towards recognition of the right to a clean environment (which did not exist when the Convention was adopted).<sup>153</sup>

In addition, the European Court of Human Rights has held in the *Guerra* case<sup>154</sup> that Article 8 of the European Convention on Human Rights, which guarantees the right to respect for private and family life, imposes a positive duty of States to impart information in respect of the risks and the measures to be taken in the case of a major environmental accident as ‘the right protected is infringed unless the subject can obtain information about the health risks to which she or he is exposed’.<sup>155</sup> Also, in the *Zander* case,<sup>156</sup> the European Court of Human Rights found that the lack of a procedure by which the applicants could review the decision of a licensing authority to permit the dumping of waste without the taking of precautionary measures to prevent pollution of the applicants’ drinking water amounted to a breach of the right to a fair and public hearing under Article 6 of the Convention, thus supporting the participatory right of access to justice, at least in relation to environmental matters.<sup>157</sup> Such procedural requirements appear all the more widely accepted and applied when one considers that broad informational and participatory rights are generally also included under regional and global environmental instruments. The concept of participation in international environmental law is exemplified by the 1998 Aarhus Convention,<sup>158</sup> which involves three components – namely freedom of access to environmental information, participation in environmental decision-making, and access to justice (administrative or judicial recourse) in environmental matters. Such participation requirements are also central to the carrying out of an adequate environmental impact assessment (EIA) consistent with the standards established under international law.<sup>159</sup>

The provisions of unincorporated international instruments, such as the 1966 ICESCR, may also become relevant through the operation of a presumption of compatibility of domestic law with international obligations. In *State (DPP) v*

152. See Gleick, *supra* n 34, at 493, citing RR Churchill, ‘Environmental rights in existing human rights treaties’, in AE Boyle and MR Anderson, *Human Rights Approaches to Environmental Protection* (Clarendon Press Oxford, 1996) 89–108 and *Association X v. United Kingdom, Application 7154/75*, (1979) 14 *Decisions and Reports of the European Commission on Human Rights*, at 31–32.

153. H Smets, *supra* n 110, at 178.

154. *Guerra and Others v Italy* (1998) 26 *European Human Rights Reports* 357.

155. P Cullet and A Gowlland-Gaultieri, ‘Local Communities and Water Investments’ in Brown Weiss, Boisson de Chazournes and Bernasconi-Osterwalder, *supra* n 110, 303, at 316.

156. *Zander v Sweden* (1993) 18 *European Human Rights Reports* 175, at para. 29.

157. See, Cullet and Gowlland-Gaultieri, *supra* n 155, at 317.

158. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, (Aarhus, 25 June 1998), 38 *ILM* 517 (1999).

159. See, for example, Arts 2(2), 2(6), 3(8) and 4(2) of the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991), 30 *ILM* 800 (1991). See also, the Protocol on Strategic Environmental Assessment (Kiev, 21 May 2003).



*Walsh*, Henchy J expressed the view that domestic laws were generally presumed to be in conformity with the then unincorporated ECHR,<sup>160</sup> an approach endorsed by O'Hanlon J in *Desmond v Glackin (No. 1)*,<sup>161</sup> who took the view that the provisions of the ECHR, then unincorporated, ought to be considered by Irish judges in determining what public policy actually was. Similarly, Finlay Geoghan J in *Nwole v Minister for Justice*, held that

The provisions of the Refugee Act of 1996 [regarding the processing of applications for asylum] must be construed, and its operation applied by the authorities, in accordance with the Convention on the Rights of the Child which has been ratified by Ireland.<sup>162</sup>

It is worth noting that, as stated above, the Convention on the Rights of the Child is one of a number of international conventional instruments commonly cited in support of the existence of a human right to water under international law.

### 3.3 Statutory right to water and sanitation?

Under the existing 2007 Water Services Act, there is no clear legal duty placed upon any State authority to provide water and sanitation services. Under section 30, the Minister is placed under a general duty to facilitate the provision of safe and efficient water services and wastewater infrastructure and has overall responsibility for the monitoring and supervision of the water services authorities in the carrying out of their functions. Section 31 sets down the various powers of the water services authorities and section 31(2) provides that a water services authority 'may' provide water services in accordance with any prescribed standards. Section 32 states that water services authorities are entitled to take 'all such necessary measures' to ensure compliance with their obligations under section 31, including the treatment and supply of drinking water and the provision, operation or maintenance of sewers and wastewater collection and treatment facilities. Water services authorities are only obliged to take these measures if directed to do so by the Minister under section 31(3).<sup>163</sup> On a detailed examination of the legislation, Conaghan concludes that 'the intention of the Oireachtas was that there should be no duty on water services providers to provide water services, in the absence of a Ministerial request or regulations requiring them to provide same'.<sup>164</sup> Likewise, there are no requirements for the provision of toilet facilities in public places, although water services authorities have a general power to provide such facilities. Part H of the 1997 Building Regulations do not specify the provision of toilets in various kinds of buildings, but a myriad of legislative provisions specify in detail the requirements in respect of restaurants, workplaces, mines and quarries, nursing homes, construction sites, *etc.* Similarly, toilet facilities are normally required for funfairs and events permitted under Part XVI of the Planning and Development Act 2000.

160. [1981] IR 412. See also, *O Domhnaill v Merrick* [1984] IR 151, where Henchy J noted that the 1957 Statute of Limitations, enacted after the State had ratified the ECHR, should be deemed to be in conformity with the Convention in the absence of any contrary intention, and should be construed and applied accordingly.

161. [1992] 2 ILRM 490.

162. High Court, 31 October 2003, at 12.

163. According to Conaghan, *supra* n 134, at 55–56 and 67, the Minister has not, to date, exercised this power.

164. *Ibid.*, at 55.

Water services authorities are required, under section 36 of the 2007 Act to prepare strategic plans setting objectives for, and specifying measures required for, the protection of human health and the environment, the provision of sufficient water services for domestic and non-domestic requirements in the area to which the plan relates, and to support proper planning and sustainable development, including sustainable use of water resources. In so doing, they are required to ensure compliance with a host of EU water-related directives, notably including the 2000 Water Framework Directive and the 1991 Urban Wastewater Treatment Directive.

However, where they do provide water services, water services authorities are under a duty to ensure that the water supplied meets the relevant and applicable quality standards, such as those applying under the European Communities (Drinking Water) (No. 2) Regulations 2007.<sup>165</sup> The Environmental Protection Agency (EPA) has primary responsibility for monitoring the compliance of water services authorities with the prescribed water quality standards for human consumption and for enforcing compliance with these standards.<sup>166</sup> While the EPA acts as the supervisory authority for services authorities, the authorities themselves supervise any other person providing water services within their functional area<sup>167</sup> and may apply to the High Court for an injunction to require a person to comply with a direction given. The EPA and water services authorities are also entitled to bring prosecutions under the Drinking Water Regulations, while the water services authorities may prosecute any person under the 2007 Act who 'causes or permits' water in any waterworks or service connection to become polluted. The EPA will continue to enjoy such a regulatory and enforcement role in respect of *Irish Water*.

Generally, there currently exists a comprehensive, if confusing, array of statutory provisions for safeguarding the quality of water intended for human consumption.<sup>168</sup> However, there also exist a number of statutory provisions to restrict access to water supply, which might prove questionable in the light of the emerging human right to water. For example, section 55 of the 2007 Water Services Act makes it an offence to connect illegally to a water supply without obtaining the consent of the water services authority. While this provision is primarily intended to protect the integrity of the water supply,<sup>169</sup> it might have implications for access to water by non-settled communities. The absolute right to connect to a public sewer was abolished in 1990 and it is now necessary to get permission from the appropriate water services authority under section 61 of the 2007 Act. Any person who has obtained planning permission for a development under the Planning and Development Act 2000 will be deemed to have the right to connect to the public sewer if the permission so provides. A person may, of course, be required to connect to a public sewer under section 61. Similarly, under section 31(19) of the 2007 Act a statutory right to water services is expressly stated not to exist in relation either to unauthorized structures or to the unauthorized uses of land or structures. Once again, this provision might have implications for the

165. S.I. No. 278 of 2007, which transpose Directive 98/83 on the quality of water intended for human consumption.

166. Water Services Act 2007, section 58A, as inserted into section 107 of the Environmental protection Agency Act 1992.

167. Drinking Water (No. 2) Regulations, Article 3.

168. See Allen, *supra* n 97, at 166.

169. For example, under section 33, a water services authority or the Minister may specify technical requirements with which connections must comply in order to minimize leakage and protect the integrity of water works.

enjoyment of the human right to water among the traveller community or, alternatively, for application of the guarantee of equality under Article 40.1 of the Constitution. Under section 56(16), water services authorities are entitled to restrict or prohibit water use where they are of the opinion that a serious deficiency of available water exists or is likely to exist in its functional area, and it has the power to issue conservation notices and emergency notices to assist in conservation. Water services authorities are granted immunity under section 56(12) from any liability arising from the consequences of restricting or cutting off water supply.

Whereas the Minister has the power to serve a compliance notice on a water services authority under section 30(7) of the 2007 Act where that authority is not performing its functions satisfactorily or is in breach of a prescribed performance standard, the 2007 Act does not give individuals the power to request that such action be taken by the Minister. Similarly, the EPA alone enjoys extensive supervisory powers under the 2007 Drinking Water (No. 2) Regulations. For example, where water quality does not meet prescribed standards, the EPA may direct a water services authority to prepare and implement an action programme, may apply to the High Court for an injunction to require the authority to comply with a direction given, and may also prosecute the authority. However, there would appear to be no such role for individuals in either process, raising doubts about true accountability which, according to the Special Rapporteur, requires that 'a legal framework, appropriate policies, functioning institutions, and the necessary procedures and mechanisms must exist so that individuals and communities can seek redress and secure their rights to water and sanitation'.<sup>170</sup>

#### 4 CONCLUSIONS

It is unfortunate that the Irish Government did not take steps to reform the Irish water services sector during more favourable economic times, as the process will inevitably involve more difficult choices in the current circumstances. As the Special Rapporteur explains:

Water sector reform often leads to increases in water prices ... Even though these price rises might be indispensable to ensure sustainability, such decisions need to be carefully considered during times of economic and financial crisis because increases occur when people have the least personal resources to adjust. Price increases are instituted concurrent with rising unemployment and social spending reductions, leaving many unable to afford essential services. This may lead to disconnections by service providers ...<sup>171</sup>

It is quite clear that, in order to meet the requirements of the Covenant as currently understood any new Irish statutory framework for the provision of water and sanitation services will need to address carefully a host of key issues. For example, pending the roll-out of water meters, any interim arrangements for levying flat charges ought to be sufficiently flexible to cater for smaller households. Of course, any charges imposed for the installation of water meters would need to be both reasonable and flexibly applied. Similarly, the free allowance of water to be applied should be calculated so as to sensitively reflect current patterns of water needs and should be sufficiently flexible to cater to large households and vulnerable persons. It is not at

170. *Supra* n 3, at 21, para. 83.

171. *Ibid.*, at 10–11, para. 32.

all clear at this stage that any scheme of differential allowances or charging is even being considered. When setting water charges, the economic regulator should establish a transparent and participatory process for assessing affordability. The charging system itself should incorporate effective social protection floors, possibly involving differential free allowances, welfare supplements, waivers and progressive charging. Detailed safeguards will need to be established in respect of moves to disconnect or reduce service to customers in the event of non-payment, including an easily accessible process for appealing against such decisions. Likewise, policy guidelines will be required to ensure that transient communities can enjoy effective access to water and sanitation services. More generally, the new regime of charging for water and sanitation services will require an appropriate governance framework, incorporating effective mechanisms to ensure transparency, participation, reviewability and accountability.

As the Special Rapporteur points out, 'the economic and social dimensions have to be balanced: while service provision relies on raising sufficient revenue, this must be achieved in such a way as to ensure affordability for all people in society, including those living in poverty.'<sup>172</sup> In designing measures to include social protection floors and to ensure general affordability, the Irish Government should remember that the emergence of the human right to water also has implications for certain of the organizations providing the financial bail-out. According to General Comment 15, 'The international financial institutions, notably the International Monetary Fund and the World Bank, should take into account the right to water in their lending policies, credit agreements, structural adjustment programmes and other development projects ... so that the enjoyment of the right to water is promoted'.<sup>173</sup> While nothing about the emerging human right to water could be argued to prevent the charging of reasonable fees for the provision of water and sanitation services, it is generally understood that:

...practical application of the right to water should help to ensure that certain aspects of social protection, relating particularly to affordability, equality of access, restrictions on disconnection, public participation, and quality of supply, are respected and protected.<sup>174</sup>

172. *Ibid.*, at 8, para. 21.

173. General Comment 15, at 18, para. 60.

174. McIntyre, *supra* n 109, at 207.