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Can Markets Secure Human Rights?

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Abstract

In recent years, State inefficiency in delivering some public goods to everybody has been the main argument set forth by those who sustain that markets should play a more active role in providing those goods and services that are needed to secure human rights. In result, in many parts of the world, we have been witnessing extensive privatization of social security and water distribution, for example. This article argues that markets are not fully equipped to play the role of a supplier of goods and services as human rights, and more specifically of the right to social security and the right to water. The main reason for this is that in the language of markets capability to pay is the key question whereas within the rights language it is entitlement. If in the first case exclusion and inequality are acceptable in the second case the only acceptable situation is the one characterized by inclusion and equality. In other words goods and services can be unequally distributed, rights cannot. Secondly a provider of goods and services as human rights must be a democratically accountable institution, whereas markets are anonymous, and therefore, unaccountable by definition. Finally, markets are also inefficient in providing goods and services as human rights, either because human rights “markets” are not competitive or because market incentives for private provision of human rights are notoriously weak.

INTRODUCTION

In human rights literature many political scientists still adopt Isaiah Berlin's distinction between negative and positive rights. According to this approach, a positive right imposes a moral obligation on a person to do something for someone, while a negative right merely obliges others to refrain from interfering with someone's attempt to do something. Most civil and political rights, such as freedom of speech or a fair trial, usually fall in the first group, and most economic, social and cultural rights, such as the right to education or to social security, tend to be included in the second. Despite the doctrinal interest of this approach, the distinction between negative and positive rights is of little relevance in the practical discussion on responsibility in human rights. Indeed, the great majority of rights, the so-called negative as much as the so-called positive, demand the affirmative action of providing goods and services.

If this seems unquestionable when economic and social rights are concerned - tangible goods like water and housing and intangible services like social security must be produced in order to secure these human rights – civil and political rights would apparently oblige inaction only. It is pure delusion. Would it occur to anyone in their right mind that it is possible to guarantee an individual the right to a fair trial by simply not opposing this same individual having a fair trial? In order to secure the right to a fair trial society needs not only to build the institutions that will conduct the above-mentioned trials and remunerate the services rendered, but also to build the institutions that are supposed to contribute to the training of all the individuals, judges, lawyers, clerks and so on called to participate in a trial.

Realizing that the individual, having duties to other individuals and the community to which he or she belongs, is under a responsibility to strive for the promotion and observance of these recognized rights, responsibility has become one of the major issues in the assertion of human rights. The question that must be answered is, therefore, who or what is or should be responsible for providing rights to the individual. In other words who or what has the obligation to provide those goods and services that constitute rights. In human rights literature in general, the State is usually responsible for securing human rights. Thus, wherever there is a right of an individual, there is a duty of the State to provide institutional protection to this right (Canotilho 1984; Bobbio 1992). This means that there is a positive obligation of the State to do everything within its power to realize fundamental rights, although many maintain that in the case of economic, social and cultural rights there is no subjective right of the citizen in this respect (Queiroz 2002: 102). If one must probably admit that the State should be, in the last resort, the guarantor of civil and political rights, that does not seem so obvious as far as economic, social and cultural rights are concerned.

Can the responsibility model centred in the State be extended to non-State agents' obligations? In an age in which the dominant school in economics is convinced that the State must abdicate of playing a leading role in the economy and simultaneously human rights are supposed to be one of the major legal instruments within international law, it is indispensable to examine the ability of markets, the announced alternative to the State, in securing those human rights that demand the supply of the goods and services necessary to satisfy individuals' political demand. The United Nations system of human rights was established at a time in which the nation-state reigned unchallenged. The progressive autonomy of markets, namely of financial markets, could, then, suggest a redistribution of responsibility for human rights in order to correspond as closely as possible to the distribution of economic influence that characterizes contemporary societies.

Commenting on the Subprime Crash, Jacques Sapir argued that this was above all the result of an unequal income distribution which induced the American middle class to borrow too much in order to maintain its consumption level. According to Sapir credit became a proxy for a more balanced income policy (Sapir 2008). As a matter of fact, more than just an instrument for maintaining their consumption level, Subprime Credit was mainly a proxy for a housing policy which would allow many impoverished middle class families to access housing, clearly recognized as a human right by the Universal Declaration on Human Rights (UDHR) and the subsequent International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted by the general assembly of the United Nations in 1966.

In answering the question in the title the dubious behaviour of markets in this case and its critical consequences for the economy can only lead us to say that Subprime Crash is above all the dramatic and global expression of the inability of markets to secure human rights. Despite the demonstrative power of daily news one must go beyond the anecdotal nature of these arguments, though. The inability of markets to secure human rights is not just a matter of a bad response to the economic situation but also, and perhaps mainly, of an intrinsic inability to deal with human rights, and most especially with economic and social rights. The main issue this article wishes to address concerns, therefore, the conflicting relationship between market provision of goods and services and the promotion of human rights. Water and social security will be the main examples of goods and services which need to be provided in order to secure human rights examined in this article. Much could be said on many other goods and services aiming at securing human rights but these two have the advantage of being relatively homogenous goods and services and thus facilitates the analysis.

THE PROVISION OF GOODS AND SERVICES AS HUMAN RIGHTS

As seen above advocates of negative freedom define individual freedom of action as a lack of constraint imposed by other individuals or, very commonly, by the State. This lack of constraint is supposed to allow the individual to take alternative courses of action. However, as the ICESCR recognizes, there are many other constraints than just those inferred by the idea of negative freedom. The lack of means also places a heavy constraint on the freedom to act. Unless these means are available, like food, clothing or shelter, an individual will most certainly be unable to act freely. In his view the poverty that leaves the potential litigant unable to go to court is just as much of a constraint as arbitrary arrest (Archer 1995: 17). This is precisely the argument that advocates of economic, social and cultural rights put forward. Civil and political rights do not make sense, or rather are impossible to ensure, without guaranteeing some economic, social and cultural rights.

According to this set of rights it has to be recognized that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and deprivation can only be achieved if the conditions are created for everyone to enjoy their economic, social and cultural rights, as well as their civil and political rights. Indeed, one may legitimately question the substance of the individual's right to choose, be it a political leadership or a religious belief, when facing the possibility of immediate death in result of a lack of economic means to obtain medical treatment, for instance.

The ICESCR throughout its thirty one articles establishes a set of rights based on the peremptory obligation of guaranteeing all individuals the satisfaction of the needs without which their life (a dignifying life one should add) would not be possible. The first economic right recorded in the covenant concerns the right to self-determination of all peoples along with the right to freely dispose of their natural wealth and resources (art. 1). Next, a set of rights concerning work is formulated. Firstly the right to work *strictu sensu* (art. 6), and secondly the so-called rights at work, which include the right to a wage sufficient enough to provide a decent life to the worker and his or her family;

safe and healthy working conditions; and paid vacations (art. 7). Finally, the right to form trade unions and to go on strike is added to this set of rights (art.8).

The ICESCR also recognizes the right of everyone, regardless of their having a job or not, to an adequate standard of living for themselves and their family, including adequate food, clothing and housing, and to the continuous improvement of living conditions (art. 11). This covenant also proclaims the right to social security, by means of protection schemes in illness and old age, for instance (art 9). Within the rights covering social protection, special reference must be made to rights concerning the protection of mothers for a reasonable period before and after childbirth and those protecting children and young persons from economic and social exploitation, namely by proposing that signatory countries should institute age limits below which the paid employment of child labour are to be prohibited and punishable by law (art. 10). The last set of rights recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, to progressively free education, and to cultural, artistic and scientific freedom (arts. 12, 13, 14, 15 respectively). Finally it should be stressed that the ICESCR proclaims that all rights should be enjoyed by everyone without discrimination whatsoever, be it ethnic, religious or political, or based on gender or economic status (art. 2).

The Provision of Water and Social Security as human rights

It has already been said in the introduction to this text that securing human rights, most especially economic, social and cultural rights, demands the production of both tangible goods like houses or water, and intangible services like justice or social security. As with every human right, this provision of goods and services raises the questions of how and by whom should these goods and services be produced, and also how should they be allocated within the community. As one would expect, the answer to these questions differs according to which goods and services we are talking about, according to their nature. Nevertheless, some general questions apply to all.

Economics traditionally divides goods into two main categories, public and private, according to the combinations of exclusion and rivalry in their consumption. A public good is a good that is non-rivalrous and non-excludable. This means that the consumption of this good by one individual does not reduce the amount of the good left for the consumption of other individuals, and that no individual can effectively be excluded from consuming that good. Private goods are those that, on the contrary are simultaneously excludable and rivalrous. If goods are public it is consensual that the state must provide them if, on the contrary they are private, then the market is usually better qualified to supply them. In reality, however, it is very hard to make all goods fall exclusively into these two categories.

Indeed, based on the combinations of exclusion and rivalry one can determine two other categories of goods. There are goods that are rivalrous but non-excludable and goods that are excludable but non-rivalrous. Goods that fall into the first group are called common pool goods and goods that fall into the second group, toll or club goods. In the first case it is impossible or very hard to stop people from consuming these goods, but the consumption of one individual limits the consumption of another individual. In the other group, consumption of one individual does not affect the ability

of another individual to consume in his turn, but it is possible to exclude individuals from consumption if they are not willing to pay. What does this tell us about the classification of water and social security as goods and services?

From a strictly technical point of view classifying water is not an easy task. Sustainable consumption of water in nature, drinking it out of a river or a lake, does not imply rivalry nor does it provoke exclusion, and therefore in these circumstances water must be considered a public good. This public character of water seems to be suggested by Adam Smith when he declared quite a while ago that ‘nothing is more useful than water: but it will purchase scarce any thing; scarce any thing can be had in exchange for it’ (Smith 1776). The absence of exchange value, in other words the impossibility of reaching a market price, is indeed another interpretation of what a public good is. Non-rivalry and non-exclusion are reinforced by the fact that there are no property rights on water in its first state, that is to say natural. But this does not mean that there should be no rules for its distribution besides that of first come first served. Fresh water may not be unlimited on the planet, especially if pollution and over-consumption continue at the current pace. For this reason it should be more realistic to include water among common pool goods where unsustainability of consumption has been identified in the absence of strict distributive rules.

However, the form in which water appears before consumers today has not a lot to do with the classification proposed above. Indeed, the great majority of the world’s population benefits from water by the intermediation of infrastructures such as plumbing and other forms of collection and distribution. Contrary to water strictly speaking, however, these infrastructures can be privately appropriated which means that exclusion and rivalry can be simultaneously introduced in terms of water supply. Indeed, one can be excluded from consuming water because one only has access to the water tap if willing to pay, and there can be rivalry because one particular water tap may only serve one particular home and cannot be used without its owner’s permission. In modern times, therefore, water could technically speaking be considered a private good like any other.

Let us now classify social security as an economic good, or rather, economic service, according to the same methodology. First of all there is no rivalry in the consumption of this service, because by benefiting from social security an individual does not interfere with another individual’s ability of benefiting from this same service, with one slight nuance, however, since some might say that a doctor can only see one patient at a time and therefore rivalry is always present. No matter how powerful this argument may be, one should not forget that social security and medical treatment are not quite synonymous. Social security when concerning health means access to treatment, not treatment itself. It is perfectly possible that an individual benefiting from social security might never require medical treatment. In this case one cannot say that, because an individual never received medical treatment, he or she never benefited from social security. Social security is a guarantee of consumption, not consumption itself, as one can easily understand with any kind of insurance. Even if there is no rivalry in social security, there is nevertheless exclusion. Indeed, it is possible to prevent an individual from consuming social security if he or she is not willing to pay. In this sense one can classify social security as belonging to the toll or club goods category. In conclusion water and social security as goods and services are not strictly public and

therefore can be provided by the market. The question one must ask now is should they as human rights? Let us now define water and social security as human rights.

The United Nations Committee on Economic, Social and Cultural Rights proclaimed in November 2002 the Right to Water as a substantive implication of the implementation of the ICESCR, resulting from an extensive interpretation of its Articles 11 and 12. For the record, the first of these two articles recognizes the right of everyone to an adequate standard of living, and the second the right of everyone to the highest attainable standard of physical and mental health. In the introduction of the text in which these substantive implications are commented upon, it is said that water is a limited natural resource and a public good fundamental for life and health, that this human right to water is indispensable for leading a life in human dignity and that it is a prerequisite for the realization of other human rights (UN 2002: 1). In order to reinforce the justification for classifying water as a human right one should also put forward article 15 of the ICESCR that recognizes the right of everyone to take part in cultural life. Indeed, many religious rites also demand the use of water. According to this committee the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use. Finally, a report on the issue of human rights obligations related to access to safe drinking water and sanitation was submitted to the Human Rights Council in accordance with Council resolution 7/22 on Thursday 17 September 2009 in which the comments referred to above are reinforced opening the way to a formal international recognition of the human right to water (Albuquerque 2009).

According to the various proclamations concerning human rights, social security can be considered a human right because it constitutes a prerequisite to the realisation of other rights such as the right to health, the right to an adequate standard of living or the right to the protection of motherhood (CESCR 2006), all concurring to the assertion of the right to life. The right to social security is explicitly referred to in the UDHR, articles 22 and 25, and in the ICESCR article 9. In order to avoid misunderstandings, we should perhaps define what is to be considered as social security, since its definition is exceedingly sparse in every human rights proclamation. Social security can be considered, therefore, as the set of institutions, measures, obligations and transfers whose purpose is, firstly, to guarantee access to health and social services, and, secondly, to provide income security to meet life's risks, in other words to avoid or alleviate poverty resulting from unemployment, disability and old age (ILO 2005).

If one accepts the right to water or the right to social security, then one should also accept that each individual has some sort of credit with society concerning the availability of drinking water or social protection. If there is not enough water or social protection for everybody and therefore the individual's right to water and to social security is not being secured, to whom then should he or she turn? As the right of an individual corresponds perforce to the duty of another or of the community at large, the responsibility issue is crucial in human rights language. In economics language, in turn, if the right is represented by demand, duty should be consubstantiated by supply. Following this same line of thought, if the individual represents demand who or what should represent supply? The question at stake here is can markets play that role, in other words, can markets secure or provide human rights such as water and social security?

THE INABILITY OF MARKETS TO SECURE HUMAN RIGHTS

One of the crucial questions one should answer about asserting human rights consists in determining which institution is better qualified to ensure every citizen the amount of goods and services that meets both the quantitative and the qualitative requirements of securing economic, social and cultural rights. If water strictly speaking can be classified as a public or a common pool good, and tap water as a private good, the entire process of providing safe water to people displays a dual character. On the one hand water can be, and indeed has been on many occasions, distributed by private companies. On the other hand, water being also a human right one is forced to admit the preponderance of its public character. Indeed, if water constitutes a human right because it is essential to life and a prerequisite for the enjoyment of other human rights, the excludable character of private goods means, therefore, that it is possible for an individual to be deprived of the human right to water on the basis of purchasing power. This immediately transforms the inability to get access to water into a rights violation and consequently into a major political issue.

In recent years state inefficiency in delivering water to all, for example, most especially in developing countries (see UNDP 2006), has constituted the main argument set forth by those who sustain that markets should play a more active role in providing those goods and services that satisfy human rights. As a result, one has been witnessing extensive privatization of water supply in developed as much as in developing countries. The same sort of discussion has also taken place on social security with some nuances resulting from the obvious singularities of this service. In the following pages we will try to demonstrate that markets are not fully equipped to play the role of the main provider of human rights because, first, the markets do not state social preferences; second, they are not accountable; and finally, they are inefficient.

Markets do not state Social Preferences

First of all, when universal rights such as human rights are being promoted, one is asserting a social preference. Rights, if they are to be fully taken as rights, must be equally allocated amongst all those entitled to enjoy them within the community. Basic liberties, for instance, do not admit any allocation other than an egalitarian one (see Rawls 1972). Indeed, it is quite unacceptable for some individuals to deposit more votes in the ballot box than others. One need not be reminded that universal suffrage, as opposed to historical property or tax-based electoral systems for example, confers one and only one vote to every citizen of voting age. Beyond the legitimate statutory exceptions, basic liberties do not admit exclusion either. If a citizen is arbitrarily excluded from participating in an election, this not only means that he is denied his right to vote but also that the right to vote is not ensured in the community to which he belongs, even if all except one are allowed to participate in the voting. Indeed, rights are either guaranteed for all or they are not guaranteed for anyone.

In the case of the provision of goods and services as human rights one is therefore inclined to admit that the degree to which people's needs are covered in a certain instance may be better than in another. A situation in which, for instance, all the population benefits from safe tap water or social security is better than any other.

Actually, when human rights are concerned universal coverage is the only acceptable situation, at least as a tendency. Any situation other than universal coverage must therefore be considered not only inferior, but also unacceptable, as it could constitute a violation of a human right.

In this sense, markets should have a hard time promoting human rights simply because they do not state social preferences, such as preferences of structure concerning, for example, income distribution or water and social security coverage. As a result of all the information conveyed by economic agents, markets can state many preferences in response to consumer's wants, as for instance how much water and social security to produce, how and when, to satisfy viable demand but they do not have arguments to assert that universal coverage is better than any other structure of water and social security distribution.

In satisfying viable demand the issue is ability to pay, in other words purchasing power. With rights, on the other hand, the issue is quite different; the heart of the matter here concerns entitlement, the criteria according to which an individual should be qualified to enjoy rights (purchasing power being obviously excluded) and the consequences of the use of such criteria. What matters for markets is that agents are satisfied, in other words that sellers are able to sell the amounts they wish at market prices and that buyers are able to buy what they intend at the same market prices. The fact that some agents are not able to buy what they wish at market prices on account of an excessively tightened budget constraint is of almost no concern. In terms of private goods in general this may be acceptable, but when private goods are taken as rights exclusion, once again, becomes intolerable.

Therefore, and despite the fact that there are many examples of public inability to achieve universal water coverage, especially in developing countries, like in Dar-es-Salam, Tanzania, or in Ouagadougou, Burkina-Faso, for example, where less than 30% of the population is connected to the public water distribution system frequently because water is still too expensive for poor households (UNDP 2006: 9-10), water distribution supplied by markets has proven to be a poor alternative to public distribution when universality is at stake. In Manila, in the Philippines, for instance, Maynilad Water Services, a private company controlled by multinational corporation Suez-Ondeo, which held Manila's west zone concession, raised tariffs by as much as 400% between 1997 and 2003. Manila Water Company, owned by the Ayala Corporation, the east zone concessionaire, in its turn raised water tariffs by 700% in the same period (Netto 2005). Considering the purchasing power of the average citizen of the Philippines and the fact that for the same period prices in general rose 36.9% in the country (WDID, 2008), it should not be difficult to predict that the privatization of water distribution resulted in a considerable part of Manila's population being deprived of their right to water. As a matter of fact, unlike Manila Water, Maynilad has since returned to public management by Manila's Metropolitan Water and Sewerage System as a result of public protest motivated by unmet concession agreement targets in terms of coverage, pricing, service obligations, non-revenue water and water quality (Montemayor 2005).

In some of the poorer neighborhoods of La Paz, Bolivia, the same multinational company Suez-Lyonnaise des Eaux, through its local subsidiary Aguas del Illimani, also raised water tariffs by 600% in 2004 whereas the inflation rate was 4,5% (WDID,

2008), and the objective of connecting 15,000 households to the water distribution system was cut down to zero (Chavez 2005: 11). As a result of the pressure exerted by more than six hundred district associations, the government eventually revoked the concession contract with Aguas del Illimani (Chavez 2005: 11) just as happened with the American based Bechtel in April 2000 in Cochabamba after dramatic water tariff increases and expropriation of community water systems (Gómez and Terhorst 2005).

Comparative history concerning water supply can also explain why the market fails in efficiently promoting the right to water in poor countries. Private companies supplying water in developed countries have inherited a heavy infrastructure paid by past public investments, supplying universal coverage to an average high-income market. In developing countries, on the other hand, limited and frequently damaged infrastructure, low levels of connection and high levels of poverty, increase the tensions between business profitability and the supply of water at a fair price to all. In Buenos Aires, Argentina, for example, the water concession holder managed to expand the connections to the supply system, but at a slower pace than agreed in the concession contract because progress was slower in the poorer areas of the city. In Jakarta, Indonesia, likewise, three quarters of the new connections concerned medium and high income households or private and public institutions (UNDP 2006). As a matter of fact, according to Pedro Arrojo (2006), multinational companies, which got hold of the majority of the privatized concessions in the world, may be interested in water distribution management but not in infrastructural investment.

Market provision of social security as a human right seems as limited as for water. According to the Committee on Economic Social and Cultural Rights only 20% of the world's population benefits from adequate social protection (CESCR 2006), which makes social security one of the lesser guaranteed human rights on the planet. These figures concern both private and public schemes. It is hard to illustrate the specific incapacity of markets to cover the needs of the population as far as the human right to social security is concerned, as there is no country in the world where social security is fully privately provided. Indeed, in most of the countries where private companies have access to the provision of social security they complement or are complemented by a public scheme. In this respect the United States is, probably, the closest example to a fully privatized provision of social security one can find.

Here, incapacity to pay for health insurance, at the origin of many individuals' inability to benefit from medical treatment, has been one of the major arguments put forward to claim the reform of the country's health system. Indeed, in the United States of America the cost of health insurance is considered to be responsible for the fact that, in 2007, 28% of adults, or an estimated 50 million people, were not insured or had experienced a time without coverage in the past 12 months (Collins et al, 2008: 3). To this exclusion of a large part of the population from the benefit of the human right to social security one should also add inequality, as amongst those that can afford health insurance many are inadequately or underinsured (Collins et al, 2008: 10).

Markets are not accountable

As we have already mentioned, in the language of human rights the rights of individuals correspond to duties of other individuals, in other words human rights

represent the rights which individuals have over the conduct of others. Therefore, if the rights of some individuals are not ensured, this is due to the fact that other individuals or institutions have failed in carrying out their duties. In human rights language, responsibility is therefore a key issue. This responsibility issue is reinforced by yet another element of the human rights' rhetoric. In the language of markets deprivation has been seen as the outcome of either nature's random behavior or human incompetence. In other words, deprivation resulted either from nature playing nasty tricks on people or people being incapable of making the right decisions in addressing basic economic problems. The search for the good life signified, therefore, a struggle to dominate nature or to predict and mitigate its whims, and a quest for efficiency in human action. The rhetoric of human rights, in contrast, introduces a substantially different approach to deprivation by transforming economic problems into possible rights violations, that is to say into discrimination or structures that prevent people from exercising rights (Offenheiser and Holcombe 2003: 275).

When the State, for example, fails in ensuring an individual his human rights, the State is accountable, either legally in a court of law or politically through elections. If the market fails in ensuring human rights, whom should an individual turn to? The State is both elected and known, the market, on the other hand, is by definition anonymous. Indeed, markets in a capitalist society are at the most indirectly accountable to corporations' shareholders (Ellerman 2007: 16-17). According to this logic of corporate governance in a capitalist society, decisions are not taken by all those affected by them, but by those who own the capital. Therefore, at best, in a society where economic decisions are mainly taken by the market, democratic control becomes dependent on each shareholder's financial weight; at worst, citizens will be governed by an unaccountable entity. In this sense, the market is therefore unequipped to secure human rights in general and the rights to water and social security in particular.

As a matter of fact, responsibility and democratic control of water suppliers has recently proved to be a key element in reaching universal water coverage. In Porto Alegre, Brazil, for instance, water services were private until 1904; then the city took them over. In 1961 it created a deliberative council and has represented many sectors in overseeing the DMAE (Municipal Department of Water and Sanitary Sewage) and played an important part in its success (Maltz 2005: 34). The implementation in 1989 of the participatory budget, a municipal management system that was created specifically in Porto Alegre within which the city people get together in meetings throughout the year and decide where the investments are going to be made, brought DMAE even closer to society and established a new level in control over the utility (Maltz 2005: 34).

As one might expect, people are mainly interested in obtaining wider access to water and sanitation and thus, between 1989 and 1996, the number of households with access to water services rose from 94.7% to 99.5% while the percentage of population served by the municipal sewage system rose from 73% to 84% (Maltz 2005), these figures being the highest in Brazil.

Markets are Inefficient

Water can be used by people for different purposes, from human consumption to production activities such as transportation, industry, agriculture and fishing, as well as

cultural, recreational, leisure, conservation and environmental activities. Taking into consideration the diversity of uses and the indispensability of water to satisfy basic human needs, a new question is raised, which is how to prioritize the different types of water demand. A competitive market allocates water between different alternative uses in accordance with the laws of economic efficiency. These laws only consider the direct use value for human consumption and the value of economic goods produced when water is used as an input. However, supporting water allocation between alternative uses based on laws of economic efficiency can produce inefficient social allocation, especially when the decision is between human consumption and agricultural or industrial uses. Being inefficient from the point of view of human consumption, this market mediation can therefore lead to the violation of an individual's right to water.

From this perspective, and given its crucial role in human survival, it is perfectly admissible for society to establish priorities. In this context, when water supplies are not enough to satisfy all uses, it seems quite acceptable that priority should be given to direct human consumption over other uses, such as leisure. As a matter of fact, this priority should be kept even when the alternative use is land irrigation. Though agriculture is vital to guarantee other human rights, like access to food, it is possible to farm without irrigation, whereas it is impossible for a human being to survive without drinking water. However, in many parts of the planet, mainly in developing countries, the lack of access to irrigation water can lead to a denial of the right to food and indirectly to a violation of the right to water in those cases where water is indispensable to produce crops.

Markets are also eco-inefficient. Indeed, water is exhaustible over a given period of time, which means that its use can only be renewable if the extraction rate is lower, or equal, to the recharge rate. This is a vital question, since securing human rights in general and the right to water in particular does not consider any sort of term beyond which it would be acceptable for a human right to be no longer guaranteed, which implies that water as a human right should have a sustainable use. In such circumstances, it is difficult to conciliate individual and social interests, since no market mechanism can prevent the total amount of individual consumption resulting from the maximization of individual utility from exceeding the recharge rate. This issue becomes more acute in case of water contamination as the price mechanism per se cannot generate enough incentives to treatment and reuse by markets, except in regions where extreme scarcity boosts water prices.

Finally one must say that water markets can hardly be called markets. Indeed, for technological reasons, water distribution can be considered a natural monopoly in the sense that if competition is allowed between companies in order to get hold of a concession, the consumer cannot choose his supplier as he can, for instance, with cable television or telephone. If one is dissatisfied with one's cable television or telephone supplier, one can change. On the contrary, one cannot change on an individual basis one's water supplier. For this set of reasons, therefore, and if economic, social and cultural rights are to be taken seriously, it is of the utmost importance that decisions concerning water distribution should be made by all those affected by that same distribution, which means that it should be submitted to democratic control, implying therefore public, or at least mixed, rather than private management alone.

The arguments sustaining market inefficiency in providing social security are quite different from those concerning water distribution as a result of each sector's idiosyncrasies. Efficiency means, here, the ability to cover risks adequately. The main argument concerns the fact that the insurance market, as any inter-temporal market, is affected by problems related to incentives and information. These problems explain why, for instance, insurance companies have never been able to supply a product that can adequately cover the risk of unemployment, despite the fact that such a product would probably be highly praised by workers. One can identify two main problems affecting private unemployment insurance.

The first, which will not be explored too deeply here, concerns the difficulty in calculating both the insurance premium and the substitution income received by the insured in the event of unemployment. The second concerns asymmetric risks or the so called anti-selection phenomenon (see Piketty 1997). One can easily presume that some workers are more exposed to the risk of becoming unemployed than others. It is, therefore, quite natural that competition between insurance companies could lead to attracting preferentially low risk clients, in other words workers that have a weak probability of losing their jobs, and if possible to exclude those that, on the contrary, have a stronger probability of becoming unemployed. This problem could be mitigated if income was in some way indexed to the risk of unemployment. The higher the risk of becoming unemployed, the higher the wage would be and therefore the higher the insurance premium. But that is obviously not the case. Actually, workers who suffer from a higher risk of unemployment such as those who are poorly qualified are frequently also those who get the lowest wages. On the other hand, one could also consider as an injustice that those workers who are submitted to the highest risk of unemployment should, in addition, be those who must pay the highest insurance premiums.

If private unemployment insurance does not seem to attract private enterprise, private health insurance or private retirement pension schemes have been quite successful. Nevertheless, it can be argued that the market intrinsically fails in providing health insurance and retirement pensions as human rights, as well. As far as health insurance is concerned, there are two main arguments to sustain public instead of private provision. First of all, where health is concerned, only the supplier or in other words the doctor can correctly measure its value, which means that with private insurance there is a risk of consumers being forced to support excessive prices and excessive consumption (Piketty 1997). Secondly, a purely private system would most certainly try to calculate each subscriber's health risk, leading to the same problems detected above with the unemployment insurance.

Let us now examine retirement pensions. The main problem here consists in the market's imperfection when dealing with transferring an individual's income from the active period to the retirement period. In other words, through capitalization, in contrast with the public contribution system, a private insurance company cannot guarantee by the end of its customer's active period a comfortable level of income without operating in financial markets (Piketty 1997). To start with, the inherent uncertainty attached to most financial operations should prevent the epithet 'security' being applied to a pension obtained in such a manner. One can agree with the fact that modern management systems can significantly reduce the risk of the above-mentioned operations, and sometimes can even provide higher pensions to retired workers.

Nevertheless, one should not be talking of social security but simply of investment, two substantially different concepts.

An individual may prefer one to the other, and it could even be demonstrated that by choosing a private pension scheme an individual would benefit from a higher income than by choosing a public system, but in the end a private scheme still would not be social security. Indeed, with a public pension system, income is an *a priori* guarantee which constitutes the essence of a right, whereas with a private pension scheme, income constitutes an *a posteriori* result of a financial operation, whose profitability is submitted to probability, an uncertainty that contradicts the binding character of a right.

CONCLUSION

We have seen in the previous pages that human rights, most especially economic, social and cultural rights, demand the production of both tangible goods, such as houses or water, and intangible services such as justice or social security. As for every human right this provision of goods and services raises the questions of how, and by whom, these goods and services should be produced, and ultimately, how they should be distributed within the community. Despite the fact that the State has not been able to adequately provide rights such as water and social security everywhere, we sustain that markets do not constitute an alternative. This is not due to any sort of incompetence or insincerity of the markets, though.

Rather than charging the hidden interests in the economy, somewhat taken as illegitimate or just unethical, for the incapacity in asserting the human right to water and to social security, as it could ensue from the debate concerning individual responsibility in the recent financial crisis, for example, one should concentrate on the logic of market economy itself. First, economic rationality and human rights seem lost in translation. Indeed, market's postulates are intrinsically contradictory with human rights as the best possible result according to market logic, a result that may encompass inequality and exclusion for instance, can easily constitute a violation according to human rights principles.

Second, the market, as an absolute value and an infallible means of rationally allocating goods, tends to reduce all categories of goods, and, thus, of rights, to only one, the commodity. This *commodification* of society, which is at the foundation of the market discourse, is contradictory with a society whose purpose is to enhance human rights. Indeed, to produce goods and services in order to satisfy a consumer's viable demand is one thing; to produce these exact same goods and services in order to satisfy a citizen's request is quite another. The tension lies precisely along the line that separates these two different manifestations of an individual need; the former of an economic and therefore private nature, and the latter of a political and therefore public nature. The production of goods and services as human rights has an essentially normative character that implies responsibility and accountability. By transforming rights into commodities the market overrides both concepts.

Only public provision (or at least strong regulation of market provision) of those goods and services that satisfy rights adequately responds to the demands of

accountability and universality. This public provision does not have to be ensured by the State, however. The democratic principle of subsidiarity sustains that decisions concerning rights must be decentralized to a point as close to the people concerned as possible. As regards water distribution, for instance, local governments have indeed frequently obtained the best results in reconciling accountability and universality with economic and environmental efficiency, the city of Porto Alegre in Brasil being the perfect illustration of such an advantage.

In relation to social security, only a public system, or strongly regulated, can guarantee that individuals are treated equally in their access to health insurance, for example. In other words only a public system can guarantee that despite his or her medical history an individual is not left out of social protection. Furthermore, as far as retirement pensions are concerned, privatization transforms a right into an investment, and even if one may end up concluding a posteriori that a particular private investment can produce more utility for the individual than public social security, such investment, hazardous by nature, lacks that element which constitutes the essence of a right, that is to say the a priori guarantee of the benefit.

REFERENCES

Albuquerque, C. (2009) *Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation*, Human Rights Council, United Nations. Online. Available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-24_E.pdf (accessed 8 April 2010).

Archer, R. (1995) *Economic Democracy*, Oxford: Oxford University Press.

Arrojo, P. (2006) *El Reto Ético da la Nueva Cultura del Agua: Funciones, Valores y Derechos en Juego*. Barcelona: Ediciones Paidós.

Bobbio, N. (1992) *A Era dos Direitos*, Rio de Janeiro: Editora Campus.

Canotilho, J. G. (1984) 'Tomemos a Sério os Direitos Económicos, Sociais e Culturais', special issue of the *Boletim da Faculdade de Direito de Coimbra, Estudos em Homenagem ao Prof. António de Arruda Ferrer Correia*.

(CESCR) Committee on Economic, Social and Cultural Rights (2006) *Day of General Discussion on the Right to Social Security*. Proceedings, Geneva, 15 May. Online. Available HTTP: <<http://www.ohchr.org/english/bodies/cescr/discussion.htm>> (accessed 10 April 2007).

Chavez, W. (2005) 'Effervescence Populaire en Bolivie', *Le Monde Diplomatique*, Mars.

Collins, S. R., Kriss, J. L., Doty, M. M. and Rustgi, S. D. (2008) *Losing Ground: How the Loss of Adequate Health Insurance Is Burdening Working Families: Findings from the Commonwealth Fund Biennial Health Insurance Surveys, 2001–2007*, The Commonwealth Fund.

Ellerman, D. (2007) On the Role of Capital in “Capitalist” and in Labor-Managed Firms, *Review of Radical Political Economics*, 39 (1): 5-26.

Gómez, L.S. and P. Terhorst (2005) ‘Cochambamba, Bolivia: Public-Collective Partnership After the Water War’, in B. Balanyá, B. Brennan, O. Hoedeman, S. Kishimoto and P. Terhorst (eds) *Reclaiming Public Water Achievements, Struggles and Visions from Around the World*, TNI/CEO Press Release.

ILO (2005) *Social Protection as a Productive Factor*, Geneva: ILO

Maltz, H. (2005) Porto Alegre’s Water: Public and for All,’ in B. Balanyá, B. Brennan, O. Hoedeman, S. Kishimoto and P. Terhorst (eds) *Reclaiming Public Water Achievements, Struggles and Visions from Around the World*, TNI/CEO Press Release.

Montemayor, C. A. (2005) ‘Possibilities for Public Water in Manila,’ in B. Balanyá, B. Brennan, O. Hoedeman, S. Kishimoto and P. Terhorst (eds) *Reclaiming Public Water Achievements, Struggles and Visions from Around the World*, TNI/CEO Press Release.

Netto, A. (2005) ‘Private Sector Still Running After Water Rights’, Asia Times on-line, 26 March. Online. Available HTTP: <http://www.atimes.com/atimes/Asian_Economy/GC26Dk01.html> (accessed 23 January 2006).

Offenheiser, R. and Holcombe, S. (2003) ‘Challenges and Opportunities in Implementing a Rights-Based Approach to Development: An Oxfam America Perspective’, *Nonprofit and Voluntary Sector Quarterly*, 32 (2): 268-306.

Piketty, T. (1997) *L’Économie des Inégalités*, Paris: La Découverte.

Queiroz, C. M. M. (2002) *Direitos Fundamentais (teoria geral)*, Coimbra: Coimbra Editora.

Rawls, J. (1972) *A Theory of Justice*, Cambridge MA: Belknap Press of Harvard University Press.

Sapir, J. (2008) ‘Global finance in crisis,’ *Real-World Economics Review*, 46, 20 May, pp. 82-101. Online. Available HTTP: <http://www.paecon.net/PAERReview/issue46/Sapir46.pdf> (accessed 14 July 2008).

Smith, A. (1776) *An Inquiry into the Nature and Causes of the Wealth of Nations*. Online. Available HTTP: <<http://socserv2.socsci.mcmaster.ca/~econ/ugcm/3113/smith/wealth/wealbk01>> (accessed 15 March 2006).

UN (2002), *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights. General Comment N° 15*, Committee on Economic, Social and Cultural Rights, 19-29 November. Online. Available HTTP: <<http://www.unhchr.ch/html/menu2/6/gc15.doc>> (accessed 18 March 2006).

UNDP (2006) *Human Development Report. Beyond scarcity: Power, poverty and the global water crisis*. Online. Available HTTP: <<http://hdr.undp.org/hdr2006/pdfs>> (accessed 17 February 2007).

WDID (2008) World Development Indicators Database: Facts and Statistics. Available on-line at <http://www.nationmaster.com>.