

intersections

A Journal of the Comparative History of Ideas program
University of Washington, Seattle
Volume 12, Number 2 (Spring 2012)

Thomas Coleman, "Who Owns the Water? An Analysis of Water Conflicts in Latin American and Modern Water Law,"
intersections 12, no. 2 (2012): 1-19.

Abstract

Water is the world's most important natural resource. Some would say it is our most important commodity whose allocation should be governed by pricing mechanisms and market transactions. Yet water is unlike any other resource in its mobility, its form and its centrality to the maintenance of human life and human communities. Water's physical, conceptual and social plasticity precludes easy categorizations, creates uncertainty regarding its handling and poses critical questions regarding use and management. During the past three decades, international economic institutions such as the World Bank and the International Monetary Fund have sought to confront such questions by forcing privatization policies on developing nations in accordance with their neoliberal economic philosophies. These policies privatize state water services — generally transferring the rights to large multinational corporations (MNC's) — and ultimately transform water from a public good into a private, economic asset with corresponding private property rights. Lower and middle-class groups have often suffered as a result of these policies and have risen up in opposition to the MNC's and their governments claiming an international right to water. I analyze three water conflicts in Latin America in order elucidate the convergence of coinciding systems of water law: an international legal framework of water as a human right and domestic systems of water as a property right. Specifically, I examine water conflicts in Bolivia, Argentina, and Chile within the context of diverse economic responses to the legal challenges posed by water's uniqueness as a resource. I draw conclusions about analyses of social conflicts, current conceptions of law and global economic theory, as well as present implications regarding the state of water law.

http://depts.washington.edu/chid/intersections_Spring_2012/Thomas_Coleman_Water_Conflicts_in_Latin_America_and_Water_Law.pdf

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Who Owns the Water?

An Analysis of Water Conflicts in Latin America and Modern Water Law

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2010 demonstration celebrating the 10th anniversary of the uprising against the privatization of public water supplies in Cochabamba, Bolivia.

Source: ASICA-Sur

On February 4, 2000, military police from La Paz, Bolivia clad in urban camouflage and anti-riot gear entered the city of Cochabamba to suppress a series of mass protests carried out by Cochabamba's rural and urban inhabitants.¹ Demonstrators, chiefly citizens from the lower and middle classes, were protesting the privatization of water services in the Cochabamba valley and the subsequent spike in monthly water rates. In protesting, the *Cochabambinos* asserted their right to have access to water, which they felt had been trampled by the sharp increase in the price of water. Despite the Bolivian government's attempts to quell the demonstrations, the *Cochabambinos* ultimately prevailed in forcing the rescission of the water contract with *Aguas del Tunari*, a Bolivian subsidiary of the Bechtel Corporation.²

¹ I would like to thank Brian P. Owensby, Professor and Department Chair of the Corcoran Department of History, University of Virginia, for inspiring me to research on this topic. His guidance and advice were invaluable during the course of my research.

² Bechtel is a privately-held construction and engineering company based in San Francisco, California, and has operations in more than 40 countries. See <http://www.bechtel.com/overview.html> (accessed June 14, 2012).

Four years earlier, in Tucumán, Argentina, a similar yet not as well-known conflict had arisen in reaction to the privatization of provincial water services. As in Cochabamba, the federally mandated transfer of water services from the municipalities to *Agua del Aconquija*, the Argentine subsidiary of a French multinational corporation (MNC), triggered a dramatic increase in rates and a decline in water quality. The citizens of Tucumán subsequently organized, claimed a right to sanitary, affordable access to water, and refused to pay their water bills. They too were successful in forcing the municipalities to unilaterally forfeit the contract with the Argentine subsidiary.

Going back still further, in the 1980's a series of legal battles broke out in Chile over distinct interpretations of water rights by users of the same water source. The conflict emerged when a Chilean electric company, ENDESA, built two separate dams diverting water flows from downstream farmers and irrigators. The farmers and irrigators sued on the grounds that the dams interrupted their usage of the water. Unlike the previous two cases, the claimants were not as successful as their *Cochabambino* and Argentine counterparts — the Chilean Supreme Court controversially ruled in favor of ENDESA holding that the farmers' and irrigators' usage would be marginally affected.

In all of these cases, members of the lower and middle classes claimed a right to water, clashing with MNC's and governments over water management. Aside from being a precondition for human survival, water plays a crucial role in certain industries such as agriculture, electricity, and sanitation. In light of the manifold uses for water, it is no surprise that water is a source of significant and intensifying — yet often overlooked — conflict in the world. Many disputes, like the ones in Bolivia and Argentina, have traditionally been analyzed along social and

political lines, while the conflict in Chile has remained largely uninvestigated. This is chiefly because the Chilean conflict did not involve large-scale social upheaval, but rather materialized within the Chilean judicial system at a time of military dictatorship, which left little space for opposition or probing research. Furthermore, the Bolivian and Argentine cases entailed conflicts over a fundamental human right to access water whereas in Chile, the conflicts concentrated on private property rights of water. The convergence, even collision, of these two aspects of water law will be the subject of this article.

Specifically, this essay examines each of the water conflicts mentioned above within the context of water as a human right and as a property right, and then draws conclusions from the evidence gathered. Such conflicts have traditionally been analyzed along the lines of social and political motives, with less attention paid to the legal background of the confrontations. This is understandable, given that the long-term implications of major conflicts tend to be societal rather than legal. Nonetheless, analysis of the legal aspects provides a critical perspective when looking at large-scale social upheaval.

I begin by outlining the global political and economic preconditions of the conflicts. Then I demonstrate that there is significant legal backing in international law instruments to support the claim that human beings have a fundamental right to water. Next, I provide an overview of water in terms of property rights and explain how the nature of water poses a problem to clearly defining property rights. I then examine three sets of conflicts over water in Cochabamba, Bolivia; Tucumán, Argentina; and two river basins in Chile. In doing so, I will consider the social and political history of each nation in order to flesh out the legal aspects of each conflict in context.

I. Background

The Latin American water conflicts cannot be fully understood without knowledge of the political and economic context of the late twentieth century — that is, when water became a commodity.³ The idea that water could be commodified emerged from massive changes in thinking regarding the role and ambit of markets in social life as well as the role and scope of government in providing social services and administering public goods. These changes took a robust form in the late 1970's and early 1980's with the neoliberal policies of the Reagan and Thatcher administrations. Neoliberal policies impel governments, “to give up foreign investment control, liberalize trade, deregulate their internal economies, privatize state services and utilities, and enter into head-to-head competition.”⁴ By the 1980's economic institutions such as the World Bank, the International Monetary Fund, and regional development banks had adopted and begun to espouse this philosophy. In their view, economies function best under conditions of minimal government involvement and robust private ownership of the factors of production. This view also holds that the market is an impartial indicator of value. When the market is allowed to operate freely, according to proponents, goods are distributed most efficiently, economic growth increases, and society as a whole prospers. Thus, the World Bank, backed by Northern governments, pressured developing nations into adopting these policies through structural adjustment plans. These plans stipulated that developing nations would only receive World Bank funding through strict adherence to neoliberal principles. The results of these policies have been highly controversial as MNC's have transformed traditionally public goods into commodities, excluded or reduced

access to these goods through increased prices, and induced substantial capital outflows from Southern countries. The commercialization of water has been no different.

In this regard, the World Bank and MNC's have sought to transform water from a public good into private property.⁵ As private property, the rights to water usage and ownership entail the right to exclude access and transfer those rights, all under the protection of law. Thus, under the neoliberal framework, the state's role with regard to water should be limited to, “protecting property, enforcing contracts, and reducing transaction costs and barriers to exchange.”⁶ From this perspective, well-protected property rights promote secure, private investment, and give the holder liberty to reallocate or alienate those rights as he sees fit, allowing the cost of exchange (as governed by supply and demand) to indicate the good's true value. In many cases, however, the value of water according to the market is much higher than many citizens can afford in developing nations, and this has resulted in large-scale deprivation for poorer communities.

As a result, human rights organizations, NGO's, and the United Nations have adopted the stance that water is a fundamental human right and that states have a responsibility to, “respect, protect, and fulfill,” that right.⁷ The idea of water as a human right is a recent development, yet it is gaining importance in various jurisdictions around the world. Nevertheless, the human right to water is a complex issue because it is difficult to enforce. Like property rights, a human right to water would confer upon individuals and communities legal protection and opportunity for

³ A commodity is, “an exchangeable unit of economic wealth, especially a primary product or raw material,” *Collins English Dictionary*, <http://www.collinsdictionary.com/dictionary/english/commodity> (accessed June 10, 2012).

⁴ Maude Barlow, *Blue covenant: the global water crisis and the coming battle for the right to water* (Toronto: McClelland & Stewart, 2007), 37.

⁵ A public good is one that is nonexcludable and nonrivalrous. That is, one cannot exclude others from using that good, nor can the consumption of the good in question reduce or limit a third party's consumption of that good. See David Colander, *Economics* (New York: McGraw-Hill Higher Education, 2009), 415.

⁶ Carl J. Bauer, “Bringing Water Markets Down to Earth: The Political Economy of Water Rights in Chile, 1976-95,” *World Development* 25, no. 5 (1997): 640.

⁷ World Health Organization, *The right to water*. Health and human rights publication series; no. 3 (Geneva: 2003): 7; http://www.who.int/water_sanitation_health/en/righttowater.pdf (accessed May 14, 2012).

redress in the case of infringement on that right. It is therefore necessary to outline below the international legal framework behind the right to water.

Water as a Human Right

Although water is not generally recognized as a fundamental human right, there are substantial grounds in international legal instruments to suggest that a human right to water is as legitimate as the, “right to life, liberty and security of person,” and that the idea of such a right is gaining ground.⁸ To understand this, it is first necessary to establish the basic principles upon which human rights are founded, and then apply those principles to the right to water. According to Amnesty International, “Human rights are basic rights and freedoms that all people are entitled to regardless of nationality, sex, national or ethnic origin, race, religion, language, or other status.”⁹ Rights, in turn, are based on specific principles such as equality, equity, and accountability, which are to be recognized internationally by governments, institutions, and individuals.¹⁰ This means that rights are equal for all and their implementation and protection must be impartial and just. Governments must establish mechanisms to promote and protect these rights and provide redress in case of violation. In the 1993 World Conference on Human Rights, participating nations held that, “human rights are universal, indivisible, inter-related and inter-dependent” and that, “there is no hierarchy of human rights.”¹¹ In other words, no single right is ancillary to others and all human rights reinforce each other.

United Nations international law instruments take many forms, including treaties, conventions, agreements, declarations, conferences, and resolutions. Treaties, conventions, and agreements are interchangeable and binding on signatory states. Declarations, conferences, and resolutions, on the other hand, are often non-binding on member states and may indicate certain developments in the formulation of international customary law. However, widely accepted recurring standards may be incorporated into international customary law and would therefore be binding on states, as evidenced by the Universal Declaration of Human Rights.¹²

The first UN instrument to make explicit mention of a universal right to water was the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Article 14, Section 2, Clause H states that, “parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, . . . the right: . . . to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply.”¹³ Article 14 specifies women in rural areas as having a right to water supply. However, the CEDAW is not exhaustive in its delineation of who may enjoy the right to water supply. Section 2 explicitly states, “on a basis of equality of men and women,” which implies that men previously possessed a right to water supply. Furthermore, as noted above, human rights are based on principles of universality and equality, and therefore this right may be applied to all human beings. Similarly, the 1989 Convention on the Rights of the Child (CRC) declares in Article 24, Section 1 that children have the right

⁸ Quote is from Article 3 of the Universal Declaration of Human Rights. See <http://www.un.org/en/documents/udhr/> (accessed May 14, 2012).

⁹ World Health Organization, *The right to water*, 10.

¹⁰ *Ibid.*

¹¹ Belinda U. Calaguas, “The Right to Water, Sanitation and Hygiene and the Human Rights-Based approach to development,” *Water Aid* (1999): 5; <http://www.righttowater.info/wp-content/uploads/humanrights.pdf> (accessed November 22, 2011).

¹² Centre on Housing Rights and Evictions, *Legal resources for the right to water and sanitation: international and national standards - 2nd edition*, Rights to Water and Sanitation Programme (Geneva: COHRE, 2008): 21; http://www.worldwatercouncil.org/fileadmin/www/Programs/Right_to_Water/Pdf_doct/RWP-Legal_Res_1st_Draft_web.pdf (accessed May 15, 2012).

¹³ United Nations, *Convention on the Elimination of All Forms of Discrimination Against Women*, December 18, 1979; <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article14> (accessed May 15, 2012).

to the, “highest attainable standards of health.”¹⁴ Section 2, Clause C holds that in ensuring that right, states have an obligation to provide, “adequate nutritious foods and clean-drinking water.”

As with the CEDAW, the CRC can be applied to all human beings on the basis that all human rights are universal. Although the CRC on its face applies narrowly to children, it would defy common sense to conclude that children have a right to water, but lose it once they become adults. Overall, these two conventions explicitly mention a right to water for women and children. Moreover, the CEDAW claims this right on the grounds that men and women are equal. In applying this principle of equality, various criminal law treaties, such as the Geneva Convention (III) relative to the Treatment of Prisoners of War or the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, delineate a right to access water.¹⁵ These explicit mentions constitute an international recognition of a human right to water regardless of any circumstances.

Aside from these explicit provisions, multiple treaties and conventions exist asserting implicit rights to water. At the forefront of these implicit instruments is the International Covenant on Economic, Social, and Cultural Rights (ICESCR) of 1966.¹⁶ This covenant makes multiple statements with noteworthy implications. Article 11 proclaims that, “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living,” which includes

a right to food, clothing, and housing.¹⁷ Though this statement cannot be read as an explicit assertion regarding a right to water, it is worth noting that water is an input for many foods and more important, it is a pre-requisite for human life and therefore to an “adequate standard of living.” “An adequate standard of living,” assumes at a bare minimum sufficient access to water. Article 1, Section 2 states that, “In no case may a people be deprived of its own means of subsistence.”¹⁸ In many parts of the world, rural and indigenous communities depend on water not just for drinking but also as an input towards agriculture. For many of these communities agriculture is a source of livelihood and water being necessary for its realization, is protected under this covenant. It is also worth noting that Section 2 mentions, “a people,” implying that rights have a collective component. This is significant because rights have traditionally been understood to have an individual rather than collective meaning, that is, rights belong to individuals not to groups of individuals. The distinction between the two meanings carries implications with respect to methods of remedying water rights violations. It is more difficult for an individual to file a suit claiming human rights violations than it is for a community as a whole, and it is often large groups who are victims of human rights violations instead of individuals.

Article 1, Section 1 pronounces that all individuals may, “freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation.”¹⁹ Sections 1 and 2 jointly imply a right to subsist, through which a right to water is construed as a necessary precondition to survival. However, Section 1 also seems to assert a human right to control those natural resources under an individual’s possession without outside interference, hence implying an individual right to

¹⁴ United Nations General Assembly, *Convention on the Rights of the Child*, November 20, 1989; p. 3 <http://www.unhcr.org/refworld/docid/3ae6b38f0.html> (accessed May 14, 2012).

¹⁵ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War* (Third Geneva Convention), August 12, 1949, 75 UNTS 135, <http://www.unhcr.org/refworld/docid/3ae6b36c8.html> (accessed December 5, 2011); International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention), August 12, 1949, 75 UNTS 287, <http://www.unhcr.org/refworld/docid/3ae6b36d2.html> (accessed May 14, 2012)

¹⁶ United Nations, *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, <http://www.unhcr.org/refworld/docid/3ae6b36c0.html> (accessed May 14, 2012).

¹⁷ *Ibid.*, 7.

¹⁸ *Ibid.*, 5.

¹⁹ *Ibid.*

property. The potential for contradiction is clear. Section 1's statement may have been unintentional, but it does crystallize the tension between different views of rights and water, an issue to which I will return. Regardless, the ICESCR prescribes a set of rights from which the right to water is derived.

Though the ICESCR's provisions for a right to water are implicitly established, it is often explicitly cited as an instrument for such a right. This is due to the UN Committee on Economic, Social, and Cultural Rights' explicit mention of a human right to water in General Comment No. 15.²⁰ In 2002, the Committee adopted General Comment 15 to provide, "guidelines for states on the interpretation of the right to water," under the ICESCR.²¹ The Committee's comments are not legally binding; however they signify an authoritative interpretation of specific covenants.²² General Comment No. 15 specifically states that, "the 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."²³ The Committee also announces multiple obligations that General Comment No. 15 confers upon states; for example the obligation to, "move as expeditiously and effectively as possible towards the full realization of the right to water."²⁴ Overall, the Committee affirms through General Comment No. 15 that the ICESCR is not be interpreted exhaustively, that the right to water falls within the framework of the ICESCR, and that water shall be recognized as a human right in the future.

²⁰ For full text, see United Nations Committee on Economic, Social and Cultural Rights, "Substantive Issues Arising in The Implementation of the International Covenant on Economic, Social and Cultural Rights; General Comment No. 15 (2002): The rights to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights," January 20, 2003, [http://www.unhcr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94/\\$FILE/G0340229.pdf](http://www.unhcr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94/$FILE/G0340229.pdf) (accessed December 5, 2011).

²¹ The Rights to Water and Sanitation, "General Comments No 15"; <http://www.righttowater.info/progress-so-far/general-comments-2/> (accessed June 1, 2012).

²² Centre on Housing Rights and Evictions, *Legal resources for the right to water and sanitation*, 6.

²³ *Ibid.*, 225.

²⁴ *Ibid.*, 231.

In 2006, the Sub-Commission on the Promotion and Protection of Human Rights developed a list of standards for the realization of the right to water based on General Comment No. 15.²⁵ These standards include:

Sufficient water – a person must have access to, "50-100 litres daily...and an absolute minimum of 20 litres."²⁶

Water quality – water must be safe for personal consumption and non-consumptive uses.²⁷

Accessibility – water must be within thirty minutes collection time.²⁸

Affordability – a person's, "direct and indirect costs of securing water and sanitation should not reduce a person's capacity to acquire other essential goods, such as food, housing, education and health care."²⁹

Allocation and availability – water should be made readily available for domestic purposes.³⁰

Non-discrimination, participation, and access to information – everyone has the right to participate in the realization of the right to water, as well as a right to adequate information regarding that right.³¹

In conclusion, the UN has established international law instruments that explicitly and implicitly provide for a universal right to water. General Comment No. 15 elucidated the right to water, and the UN Sub-Commission on the Promotion and Protection of Human Rights outlined a set of standards dictating the scope of the right and how it may be applied. The international acknowledgment of this right — as demonstrated by the act of signing and possibly ratifying the aforementioned treaties — is further evidenced by national governments' recognition of a human right to water. Uruguay, for example, has amended its Constitution to

²⁵ *Ibid.*, 8. The CHRE's report draws from the Sub-Commission on the Promotion and Protection of Human Rights, "Final report of the Special Rapporteur on the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation," July 14, 2004, E/CN.4/Sub.2/2004/20.

²⁶ *Ibid.*, 9.

²⁷ *Ibid.*, 10.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*, 11.

³¹ *Ibid.*, 11-13.

recognize water as a basic human right and to prohibit its privatization within the country's borders.³² Bolivia's new Constitution, adopted on February 7, 2009, provides that, "All persons have the right to water and food."³³ Ecuador's 2008 Constitution declares that the, "human right to water is fundamental and indispensable."³⁴ South Africa's 1996 Constitution provides for a similar right: the right to, "sufficient food and water."³⁵ Judicial systems are beginning to uphold this right in court decisions, although many forms of redress are still lacking. Still, if a universal human right to water continues to gain ground, more robust forms of redress will develop.

Water as a Property Right

Property rights are legal instruments that seek to protect the assets of citizens granting individual owners legal authority to exclude others, including governments and states, from limiting the use, possession, or alienation of the assets in question.³⁶ In this light, property rights regimes are just as much of an economic institution as a political one, and this fact is essential when looking at property rights of natural resources, particularly water. When looking at systems of property rights, it is important to remember the economic implications of private property—as such water becomes a commodity. Hence, water can be transferred (bought and sold) to generate profits and tax revenues, and encourage conservation and efficient use. Property rights regimes necessitate infrastructure to coordinate the economic aspects of a private good. For example, adequate infrastructure must be avail-

able to accurately calculate taxes or to facilitate the transfer of water, i.e., through canals, aqueducts, or dams.³⁷ Nevertheless, understanding systems of water property rights is difficult because the specific material qualities of water complicates its relationship to clearly defined rights.

On the one hand, water is a mobile resource, which creates ambiguity as to its location and quantity in a given moment.³⁸ Water can change forms from solid, to liquid, to gas, and is highly dependent on environmental factors, such as the hydrological system as well as natural events. It may lay immobile in a pond or lake, or flow in a river. It may fall from the sky. Given the fact that water can change location and quantity independent of human control, how can governments define water rights for seemingly *public* sources? And how do property rights regimes distinguish between ground water and surface water and rainwater? The Romans were the first to address these questions, defining water in public rivers and lakes as subject to usufruct, whereas water sources limited to private land were considered private.³⁹ Similarly, "ground-water was regarded as part of the subsoil, and hence owned by the owner of the property."⁴⁰ Of course, modern governments have adopted differing approaches in dealing with these concerns.

On the other hand, governments are not fully capable of managing all of the available water resources at a given time, and therefore property rights have in many cases been left to individual control.⁴¹ In these cases, water management and appropriation is based on societal relationships

³² Centre on Housing Rights and Evictions, *Legal resources for the right to water and sanitation*, 61. See also Rachael Moshman, "The Constitutional Right to Water in Uruguay," *Sustainable Development Law & Policy* 5, no. 1 (2005): 65; <http://www.miniurl.com/s/19x> (accessed May 26, 2012).

³³ Article 16, Section I. See the full-text version of the Constitution of 2009 at: <http://pdba.georgetown.edu/Constitutions/Bolivia/bolivia09.html> (accessed May 25, 2012).

³⁴ Article 12. See, "Constitution de la Republica del Ecuador 2008; Sección primera Agua y alimentación," http://www.wipo.int/wipolex/en/text.jsp?file_id=195600#LinkTarget_14622 (accessed May 26, 2012).

³⁵ Article 27, Section 1, Clause C. See "Constitution of the Republic of South Africa, 1996; Bill of Rights," <http://www.info.gov.za/documents/constitution/1996/96cons2.htm#27> (accessed May 26, 2012).

³⁶ Terry Lee Anderson and Laura E. Huggins, *Property rights: a practical guide to freedom and prosperity* (Stanford: Hoover Institution Press: 2009), 3-4.

³⁷ Bauer, "Bringing Water Markets Down to Earth", 646.

³⁸ Ruth S. Meinzen-Dick and Rajendra Pradhan, "Legal Pluralism and Dynamic Property Rights," International Food Policy Research Institute, CAPRI Working Paper no. 22 (2002): 17; <http://www.capri.cgiar.org/pdf/CAPRIWP22.pdf> (accessed December 5, 2011).

³⁹ Betty Dobkins, *The Spanish element in Texas water law* (Austin: William Byrd Press Inc., 1959), 48-49.

⁴⁰ T.N. Narasimhan, "Water, law, science," *Journal of Hydrology* 349, no. 1-2 (2009): 128.

⁴¹ Philippe Cullet, "Water Law in a Globalised World: the Need for a New Conceptual Framework," *Journal of Environmental Law* 23, no. 2 (2011): 237; ielrc.org/content/a1102.pdf (accessed December 9, 2011).

between the individuals and groups that share the land. This is especially prevalent in indigenous communities where rights to water usage are determined by the dynamics of social relations, that is, heads of families or village elders might make decisions regarding water. In such contexts, according to Meinzen-Dick and Pradhan, a variety of legal systems come into play; a concept known as legal pluralism.⁴² Meinzen-Dick and Pradhan define legal systems in broad terms as, “cognitive and normative orders generated and maintained in a social field such as a village, an ethnic community, an association, or a state.”⁴³ Legal pluralism refers to systems of international, statutory, religious, and customary law, or local norms that in *practice* coexist concurrently and can be used to rationalize different claims to property rights in a single society. The specific legal system invoked by a claimant or group of claimants depends on his, her, or their position within society. Thus indigenous or rural populations might invoke systems of religious and customary law in justifying a claim to water, as their usage is largely governed by tradition and a cultural connection to the land. In contrast, MNC’s would most likely invoke systems of international or statutory law, as they perceive rights to water in terms of clearly defined political and economic instruments. Taking these various legal claims into consideration, it is evident that property rights regimes are difficult to develop and maintain without certain areas of dissension.

The diverse categories of water usage present problems to regimes of property rights. These include domestic use, irrigation, industrial use, hydroelectric use, and waste disposal, and some regimes may not be able to effectively prioritize such uses given a lack of sufficient legislation or government infrastructure. Moreover, a single regime might have different categories of right holders, some of which may share the same water

source.⁴⁴ Prioritizing water rights constitutes a major source of conflict for property rights regimes.

On the whole, systems of property rights for water are complex institutions that require effective infrastructure and clear legislation. Property rights must be well defined so as to avoid ambiguities and limit disputes. Even then, in legally plural environments, there are limits to certainty. Property rights regimes also depend on governments that will consistently and reliably enforce those rights, for, “laws are only as strong as the institution or collectivity that stands behind them.”⁴⁵ But as we shall observe below, this is not always the case.

II. Case Studies: Water Conflicts in Bolivia, Argentina, and Chile

In the following section I will examine three water conflicts in Latin America, beginning with Cochabamba, Bolivia, continuing onto Tucumán, Argentina, and closing with two legal disputes in Chile. In all cases I will explore the human rights and property rights aspects of the conflicts, however in the first two cases more emphasis will be given to the former — and in Chile the latter — due to the information available. In conducting my analysis I will also refer to the social and political histories of each region, as these shed light on the preconditions for conflict and the possibilities for resolution.

Cochabamba, Bolivia

In 1985, the Bolivian government enacted the New Economic Policy (NEP), a plan to decrease government involvement in the economy and to attract foreign investment. The NEP was principally written in order to, “[regain] the support that the IMF, World Bank, Inter-American Development Bank, and the United

⁴² Meinzen-Dick and Pradhan, 2-6.

⁴³ *Ibid.*, 3.

⁴⁴ *Ibid.*, 17-18.

⁴⁵ *Ibid.*, 5.

States withdrew,” in the years prior to its enactment.⁴⁶ In 1993, Bolivian President Gonzalo Sánchez de Lozada instituted the *Plan de Todos* (Plan for All) and effectively solidified the neoliberal policies envisioned by the NEP. During the following four years, the *Plan de Todos* completely restructured the constitution, and revolutionized the judicial systems as well as the nature of citizenship. The chief goal seems to have been to privatize all previously state-owned companies, with the exception of the mining industry, and to minimize the role of the state in relation to the citizenry. Socially, the *Plan de Todos* benefited the indigenous populations as de Lozada greatly enhanced indigenous rights; however, this was accomplished at the expense of the *campesino* and working-class populations, which were largely alienated from political participation.⁴⁷

In 1999, the Bolivian government under President Banzer authorized Law 2029, which introduced a regime of concessions for the provision of water.⁴⁸ This regime established a national Superintendency for Basic Sanitation, which transferred all concessions from the public sector to private entities, with the concessionaire enjoying exclusive rights to water within the concession’s jurisdiction. This meant that all other private entities, individuals, cooperatives, and communities had to enter into private contracts with the concessionaire.⁴⁹ These concessions were intended to provide water to areas with at least 10,000 inhabitants with the contracts lasting 40 years. Traditionally, rural communities and cooperatives controlled water sources, and therefore, “developed their own

rules, distribution systems, and criteria for assigning water rights and tariffs.”⁵⁰

Communities developed their criteria based on customary uses of water that generally regarded water as a public good and a prerequisite for their livelihood. Law 2029 virtually brought an end to the system of water rights and management in the rural communities.

For Cochabamba, *Aguas del Tunari’s* acquisition of the concession for the surrounding region exacerbated an already precarious situation for potable water services. Prior to the concession, “potable-water coverage was reported to be 57 percent and sewerage 48 percent,” for the urban sector alone.⁵¹ The concession immediately triggered spikes in rates between 40 and 200 percent since *Aguas del Tunari* was guaranteed a minimum 15 percent return on their investment.⁵² In response to the spike in rates, various citizens from the lower, middle, rural, and urban classes gathered in a series of demonstrations between January and April 2000. A combination of factory workers and engineers formed the *Coordinadora Departamental en Defensa del Agua y de la Vida* (Coordinating Committee in Defense of Water and Life, hereinafter, *Coordinadora*) that connected the rural and urban communities, organized the movement, and engaged the Superintendency in negotiations to decrease water rates and return water services to the public sector. The *Coordinadora* also held a popular referendum at the end of March in which a preponderance of votes called for the annulment of the *Aguas del Tunari* contract and the modification of Law 2029.⁵³ In spite of aggressive government repression, the *Coordinadora* orchestrated two major protests, one on February 4 and another on April 5, 2000, among

⁴⁶ Benjamin Kohl and Linda Farthing, *Impasse in Bolivia* (New York: Zed Books Ltd., 2006), 65.

⁴⁷ *Ibid.*, 88.

⁴⁸ *Ley 2029, Del 29 de Octubre de 1999*; http://www.legislacionmunicipal.fam.bo/Archivo/Docs/Leyes/Ley_2029.pdf (accessed June 20, 2012).

⁴⁹ William Assies, “David versus Goliath in Cochabamba: Water Rights, Neoliberalism, and the Revival of Social Protest in Bolivia,” *Latin American Perspectives* 30, no. 3 (2003): 17.

⁵⁰ Rocío Bustamante, Elizabeth Peredo, and María Esther Udaeta, “Women in the ‘Water War’ in the Cochabamba Valleys,” in *Opposing currents: the politics of water and gender in Latin America*, eds. Vivienne Bennett, Sonia Dávila-Poblete, and María Nieves Rico (Pittsburgh: University of Pittsburgh Press, 2005), 88.

⁵¹ Assies, 19.

⁵² Bustamante, Peredo, and Udaeta, 79; Assies, 23.

⁵³ Bustamante, Peredo, and Udaeta, 80.

a wide range of peasant and working-class groups that sent Bolivia into chaos as violence spiked and two protesters were killed. On April 10, the Superintendency cancelled the contract with *Aguas del Tunari* and retransferred water services back to a public company, and this time with labor unions and NGO's as members of its governing board.

The conflict involving the protesting parties, the Superintendency, and *Aguas del Tunari* clearly embodied an encroachment on the human right to water under the framework of international law instruments laid out above. The privatization of water services produced three specific violations with regard to water (this analysis does not take into consideration possible human rights abuses carried out by the government in subduing the protests) as listed under the UN Sub-Commission on the Promotion and Protection of Human Rights' list of standards: violations of affordability, sufficient water, and the right to participate in the realization of the right to water. The situation prior to the privatization of water services could already be classified as a human rights violation under this framework as coverage of potable water services was below 60 percent. This number likely plummeted as the rate increases prevented citizens from being able to pay for water services. Some rate increases were calculated at 180 percent, an untenable situation for even middle-class families, and a drastic increase for poor, rural communities, as well as low and medium wage urban workers.⁵⁴ While there is no information on the exact quantities of water that *Cochabambinos* received during this time period, it is reasonable to assume that they were well below the 50-100 liters per day outlined under the UN Sub-Commission on the Promotion and Protection of Human Rights' standard for sufficient water consumption. In terms of participation, the citizens of Cochabamba were completely excluded from the process of water resource management when the

Superintendency granted the concession to *Aguas del Tunari*. Participation in the realization of the right to water entails participation in water management since various water users claim distinct uses of the resource. No such participation was present until the *Coordinadora* actively engaged the government through negotiations, but the *Coordinadora* was in no way a legitimate party to decision-making, and their success stemmed from their ability to organize large-scale social upheaval.

The Cochabamba case also illustrates the unreliability of the Bolivian system of water property rights. Indeed, multiple systems of property rights were present as the Bolivian government left water management to rural and working-class communities. Rural communities relied on cultural norms to govern the distribution of property and resources, and working class urban cooperatives determined their own means of allocating water and assigning tariffs. With little government interference, these practices became entrenched in both groups' lifestyles and water rights became associated with land ownership and concepts of public trust. However, the concession of water services transferred property rights spontaneously, completely disrupting years of custom. While the Superintendency was legally capable of granting concessions to any entity with legal status, the new system of rights, "clearly favored the formation of large enterprises that functioned according to market criteria."⁵⁵ In other words, Law 2029 was partial to MNC's as they were most capable of supplying the capital to invest in infrastructure sufficient for provision of water services to areas of 10,000 or more inhabitants. Furthermore, the exclusivity and the duration of the rights favored investment for which lower and middle class groups had no use. Finally, the concessions were designed to generate profit, and this could only be done by giving the market priority. Indeed, in a situation where the water

⁵⁴ Assies, 22.

⁵⁵ *Ibid.*, 17.

company, “insisted on charging communities for water gathered from handmade rain-catchment systems,” wide spread social discontent was likely to result.⁵⁶ Such a system of property rights is largely untenable.

Tucumán, Argentina

The water conflict that began in the small province of Tucumán in the mid-1990s followed a similar trajectory as in Bolivia. Neoliberal policies espoused by the federal government spawned the privatization of many publically-owned industries in municipalities, causing increased rates and generating the preconditions for social unrest. This conflict is set against a backdrop of political and economic factors that developed in the years leading up to the conflict.

In 1976, General Antonio Bussi came to power as governor of the province of Tucumán during the military dictatorship. His administration remained in power through the return to democratic rule until 1999. In spite of many human rights violations carried out under his governorship, Bussi increased public employment, raised the standard of living, and promoted a nationalist discourse throughout Tucumán.⁵⁷ These points are important in understanding the provincial government’s role in the conflict. At the federal level, President Carlos Menem (1989-1999), backed and pushed by the World Bank, approved a series of emergency and state reform acts which provided for the full or partial privatization of state companies, utilities and social services.⁵⁸ Under these laws — which allowed for the privatization of public services without prior public notification — the Tucumán

provincial government transferred water and sewerage services to *Agua del Aconquija*, a subsidiary of a larger French MNC. It is important to note that Tucumán’s primary source of revenue came from its agro-industry, which was in a state of crisis during the time of the transfer of water services. This agro-industrial crisis produced severely worsened economic conditions for Tucumán’s lower classes. In terms of water management, residents of Tucumán’s various townships had participated in the financing and regulation of water infrastructure. This represented another point of opposition for the residents of Tucumán as they had invested in the preexisting water infrastructure over which *Agua del Aconquija* would later assume control.

In 1995, *Agua del Aconquija* officially began operating water and sewerage services for the province of Tucumán. The first release of water rates indicated a 104 percent increase from what the provincial company had charged. In the coming months residents of different cities in Tucumán united to form ADEUCOT (*La Asociación en Defensa de los Usuarios y Consumidores de Tucumán*, Association for the Defense of Users and Consumers in Tucumán). ADEUCOT organized protests, initiated a movement to boycott water payments, and ultimately called upon the provincial government to rescind the contract. The government, however, remained neutral until January 1996 when dark water began to flow from faucets in San Miguel de Tucumán. This event instigated a swell in the “stop payment” campaign, and caused the provincial government to mention the possible annulment of the contract with *Agua del Aconquija*. At this point the situation transformed from a local conflict into an international controversy. Officials from *Agua del Aconquija* feared a unilateral cancellation of the contract and accordingly obtained a public statement from the French ambassador admonishing the Argentine state. Finally, the Argentine national government joined the verbal confrontations in support of Tucumán, although this did not have serious

⁵⁶ Michael Goldman, *Imperial nature: the World Bank and struggles for social justice in the age of globalization* (New Haven: Yale University, 2005), 262.

⁵⁷ Norma Giarracca and Norma del Pozo, “To Make Waves: Water and Privatization in Tucumán, Argentina,” in *Opposing currents: the politics of water and gender in Latin America*, eds. Vivienne Bennett, Sonia Dávila-Poblete, and María Nieves Rico (Pittsburgh: University of Pittsburgh Press, 2005), 94-95.

⁵⁸ On August 17, 1989, President Menem approved *Ley 23696, Ley de Reforma de Estado* (State Reform Law). Section II, Article 8 provides for the, “total or partial privatization or liquidation of companies, corporations, establishments or productive lands owned wholly or partly by the State,” (translation mine). See text online at: http://www.defensor-alejo.com.ar/legis_web/nac/reforma.htm (accessed June 18, 2012).

effect. In September 1996, the government of Tucumán unilaterally rescinded the contract with *Aguas del Aconquija* (however, it was not until a year later that operations were fully terminated due to contract stipulations).⁵⁹

Much as in Bolivia, the effects of water privatization in Argentina constituted a human rights violation under UN international law instruments. The most salient evidence of this violation is the dramatic rise in water tariffs that had amounted to 104 percent more than the cost of public water services.⁶⁰ While the ‘stop payment’ campaign symbolized an act of social defiance, it is highly unlikely that many low and middle class families could have afforded to pay for water services given the poor economic conditions afflicting Tucumán at the time. Also similar to the Bolivian case is the lack of participation that the public had in realizing its right to water. In fact the Menem administration's legal efforts to implement the privatization of public services precluded public consultation, and prevented the citizens of Tucumán from partaking in decision-making processes of water management.⁶¹ The Argentine case also exhibited one other factor in designating a human rights violation: poor water quality. While water services were under *Agua del Aconquija*'s control, dark water flowed from Argentine faucets for a month. The private company claimed that an increase in manganese had occurred near the water's source, yet did little to neither ameliorate services nor decrease the rates. It was at this point that the provincial government sided with ADEUCOT. On the whole, privatization of water services severely impeded citizens' right to water, as rates were exorbitant, residents were excluded from water management decision-making, and the quality of water diminished.

With regard to issues of private property rights, the extent to which clear property rights existed

in the first place is questionable. What is certain is that like the Bolivian case, the system of property rights in Argentina was unpredictable in relation to the citizenry. The fact that the national legislature could enact a law authorizing the transfer of all public services to private corporations independent of public consultation poses serious questions about institutions and the democratic process in Argentina. Under the tenants of a representative democracy, law-makers are expected to legislate according to the constituents that elected them, not to MNC's and international organizations that exert influence on different sectors of government. This means incorporating the citizenry into the decision-making process and precludes actions taken without public consultation. That the U.S. government, the World Bank, and the IMF encourage such behavior on the part of MNC's and governments of Southern nations raises further questions about their commitment to the democratic process. Regardless, an institution such as property rights must be predictable and trustworthy to the effect that laws cannot upend the system overnight.

Relying on years of practice, the residents of Tucumán had largely considered water to be a public good. Local residents created their own system of water management through local cooperatives, some of which they financed. The concession to *Agua del Aconquija* was controversial because the corporation would accrue revenue from the investments of Tucumán's residents. Among the seven provincial municipalities that contested the concession, Monteros requested that the provincial government provide financial compensation for the residents' initial investments.⁶² These facts combine to suggest that water management and subsequently rights were traditionally a matter of municipal concern. Just like in Bolivia, the privatization of water services in Argentina was destined to create social tension.

⁵⁹ Giarracca and del Pozo, 96-99.

⁶⁰ *Ibid.*, 96.

⁶¹ *Ibid.*

⁶² *Ibid.*

Chile

The water conflict I examine in Chile is an outlier compared to the Bolivian and Argentine cases. Because of this contrast it provides useful insight into differing systems of water rights. The Chilean case is different for two main reasons. First, Chile comprises a well-established and strictly-adhered to system of water property rights rooted in its political history. Second, the main sources of conflict stem from disputes over these property rights as opposed to a fundamental right to water. Thus, the Chilean conflict is comprised of two legal battles concerning rights to a water source rather than a major social movement as in the case of Bolivia and Argentina. To do this, I will begin with a brief explanation of Chile's political history and how that gave rise to Chile's revolutionary Water Code of 1981.

The history of Chile's Water Code begins in 1973 when General Augusto Pinochet instituted a military government that would rule Chile for nearly twenty years. This government utilized civilian advisors and political allies from the conservative right to restructure the political and social environment, while harshly repressing opposition through, "murder, 'disappearance,' detention, or exile."⁶³ One of the major tenets of the military government was the emphasis on market freedom and neoliberalism, as seen by a group of advisors who obtained their graduate degrees in economics from the University of Chicago.⁶⁴ These two groups collaborated to create the conditions for deregulated markets of private goods through a well-organized system of property rights. In 1981, water was formally added to the property rights framework with the establishment of the Water Code.

The 1981 Water Code was a clear response to the 1967 Water Code and Agrarian Reform Law,

which made water public property subject to government administration.⁶⁵ Under the new code, water technically remained public property, however, the right to water was legally guaranteed as private property. The new code separated water rights from landownership and authorized the DGA (*Dirección General de Aguas*, General Water Directorate) to, "grant all requests for new water rights, free of charge, whenever the water [was] physically and legally available," without explanations of the water's use.⁶⁶ Once granted, those rights could be bought, sold, transferred, rented, or inherited at the owner's discretion. This relocated any disputes regarding water to the realm of civil law rather than administrative law. Prior to the 1981 Water Code, the DGA was authorized to settle disputes over water rights in place of the courts. The relocation of disputes to civil law epitomized the neoliberal tenet of minimal government involvement in two ways. First, it absolved the DGA of its regulating and adjudicative powers. Second, it incentivized disputants to engage in private-bargaining as to avoid the costs of litigation before the civil courts.⁶⁷ This further removed property rights from public control.

Another feature of the Water Code was that it defined a new type of property rights, called nonconsumptive rights. Nonconsumptive rights differed from consumptive rights (all other rights) in that it allowed, "its owner to divert water from a stream and use it, as long as the water is then returned unaltered to its original channel, for use by others downstream."⁶⁸ The creation of this right was meant to promote the hydroelectric industry in the mountainous regions of Chile, while also protecting the rights of irrigators and farmers downstream who possessed consumptive rights. However, the Water Code of 1981 was ambiguous in defining the relationship between consumptive and non-

⁶³ Carl J. Bauer, *Siren song: Chilean water law as a model for international reform* (Washington D.C.: RFF Press, 2004) 36-37; Brian Lovemann, "Military Dictatorship and Political Opposition in Chile, 1973-1986," *Journal of Interamerican Studies and World Affairs* 28, no. 4 (1986): 6.

⁶⁴ Bauer, *Siren song*, 42.

⁶⁵ See full-text of the 1981 Water Code at: <http://www.leychile.cl/Navegar?idNorma=5605> (accessed May 18, 2012).

⁶⁶ Bauer, *Siren song*, 32.

⁶⁷ *Ibid.*, 34

⁶⁸ *Ibid.*

consumptive rights, which is the root of the legal battles.⁶⁹ The complexity of the legal conflicts in Chile was further aggravated by the inherent neoliberal aspects of the Water Code itself. Since the rights were considered private property, disputes were supposed to be settled through private bargaining or the courts, though judges were largely unfamiliar with water issues, as witnessed in the conflicts below.

The series of legal battles that developed in Chile centered around two dams used for hydroelectric production built along the Maule and Bío Bío Rivers, respectively. The rivers had two conflicting users: the rivers' vigilance committees and the hydroelectric companies. The vigilance committees were comprised of local farmers and irrigators who managed the distribution of water to the rivers' various canals. It is important to note that, both sides of the disputes had opposing demand for water in that, "power companies [wanted] to store water during the summer to meet high national electricity demand in winter, while farmers [wanted] to store water during the rainy winter for use in the summer growing season."⁷⁰

The first conflict began in 1990 when Pehuenche a subsidiary, of the former national electric company, ENDESA, constructed a reservoir upstream from the Colbún Dam, which was the first dam built along the Maule River and was consequently built by ENDESA. The government privatized ENDESA between Colbún and Pehuenche's construction; however the government maintained control over Colbún in order to create competition for Pehuenche. In November, Pehuenche closed the dam's gates in order to fill the reservoir, which consequently discontinued the flow of water to the farmers and irrigators downstream. The vigilance committee

asked Pehuenche to open the gates and renew the flow of water, but Pehuenche declined and the vigilance committee sued. The vigilance committee, backed by the DGA, asserted that in filling the dam, Pehuenche violated the farmers' and irrigators' rights because the Water Code granted priority to consumptive rights. Colbún later joined the dispute on the vigilance committee's side, claiming that they were still fulfilling their obligations to the irrigators', and in doing so were losing money because they were releasing water without receiving any from upstream.⁷¹ Pehuenche and ENDESA interpreted the Water Code to not prioritize the different types of rights, and argued that nonconsumptive rights, "implicitly included the right to fill reservoirs and temporarily regulate river flows."⁷² The appellate court in the city of Talca ruled in favor of the DGA and the vigilance committee; however ENDESA and Pehuenche appealed to the Supreme Court. The Supreme Court initially remanded the case to the DGA in spite of the fact that the DGA had no legal authority to make a judgment. Then after hearing the case again, the Court refused to rule on the issue and persuaded both parties to settle the matter through private arbitration. This phase lasted years with the only issue being whether Pehuenche owed the irrigators compensation; the vigilance committee withdrew from the arbitration before an agreement could be reached. Thus, the first case resulted in a victory for ENDESA and its subsidiary, while also leaving the legal issue of consumptive versus nonconsumptive rights unresolved.

The Pangué Dam case brought finality to the issue. ENDESA began construction of the Pangué Dam in 1993, but a coalition of, "environmental and indigenous organizations and downstream irrigators and canal associations," sued to preclude the dam's completion.⁷³ The coalition sued on the exact same grounds as the

⁶⁹ These rights are addressed in Articles 12-16. These provisions seem to imply that consumptive rights are primary. Article 14, which defines nonconsumptive rights, states that, "the extraction or restitution of waters shall not damage the rights of third parties to the same waters, in terms of their quantity, quality, substance, opportunity of use, and other details," (translation mine). See 1981 Water Code [fn. 66].

⁷⁰ Bauer, *Siren song*, 106.

⁷¹ *Ibid.*, 108.

⁷² *Ibid.*

⁷³ *Ibid.*, 110.

vigilance committee of the Maule River—the environmental and indigenous organizations joined because they feared that the dam’s completion would have negative impacts on the environment and the indigenous communities. Again, the Santiago appellate court ruled in favor of the coalition who had asserted the primacy of consumptive rights, and ordered that ENDESA cease construction until it reached an appropriate agreement with the downstream users. ENDESA unsurprisingly appealed the decision and this time the Supreme Court ruled on the substantive issue. Relying on a report filed by the DGA, which had changed sides, the Supreme Court held that the effects of the dam on the downstream users would be questionable and ruled in favor of the nonconsumptive rights. Finally, it held that users who felt that their rights had been violated after the dam’s completion could bring a later claim.

In sum, the Supreme Court’s decision appeared to be partial to larger companies and the neoliberal inclinations of the current military government. Article 14’s text seems to imply that consumptive rights are primary to nonconsumptive rights through its reference to, “opportunity of use.” This phrase is crucial as it suggests that the opportunity to use the water—not just the quantity, quality, or the substance—cannot be hindered by a third party’s usage. The building of the dam would have affected downstream users’ consumption of the water, and this implies that the consumptive rights should be given priority in situations of doubt. Notwithstanding that the Supreme Court’s ruling was perhaps unconvincing on a legal level, it is not surprising that it ruled in favor of the larger companies given the government’s ideology. The Chilean judicial system took shape under an extremely conservative military executive and largely came to embody those conservative traits. Thus, it is probable that the DGA’s report to the Supreme Court was reflective of political

pressure from the executive.⁷⁴ Under such pressure the court was more likely to rule in favor of the party whose use would have greater effects on the nation—that is, the electricity demands of the nation over the economic demands of certain farmers and irrigators. A ruling in favor of nonconsumptive rights was advantageous to a burgeoning industry that was capable of generating profitable dividends. As Carl Bauer remarks, the Supreme Court’s decision in favor of nonconsumptive rights exhibited, “a major transfer of wealth from irrigators to electric companies, and a significant redefinition of property rights, on the basis of legal reasoning of dubious quality.”⁷⁵ Indeed, it was the members of lower and middle class groups that came out on the losing side of these battles. Overall, the Chilean cases raise questions about the alleged independency of courts from politics since the Supreme Court appeared to be largely influenced by outside actors.

It is important to note that full privatization of water services did not occur in 2001 and that the 1981 Water Code largely dealt with the rights of irrigators, farmers, and companies.⁷⁶ The majority of research with regards to Chilean water management focuses on the characteristics of the 1981 Water Code, while little is dedicated to aspects of social equity and the distribution of drinking water.⁷⁷ This could be due to a few reasons. First, the Chilean system of water rights is completely distinct from other countries because it is one of the most sharply defined systems in the world, despite the continuing tension between consumptive and non-consumptive rights. Second, the Chilean system epitomizes neoliberal ideology and has since become the poster child of Washington Con-

⁷⁴ Bauer, *Siren song*, 110.

⁷⁵ *Ibid.*, 111.

⁷⁶ María de la Luz Domper, “Chile: A Dynamic Water Market,” *Libertad y Desarrollo* (2009): 4; http://www.policynetwork.net/sites/default/files/Chile_March09.pdf. (accessed May 18, 2012).

⁷⁷ For Bauer’s assessment of the limits of previous research, his recommendations for future research, and his prescriptions for water policy, see *Siren song*, 124-136.

sensus prescriptions in World Bank reports.⁷⁸ Third, the lack of research could arise from the fact the military dictatorship would have repressed research that demonstrated anything but favorable analysis of the system. If the government was willing to engage in, “murder, ‘disappearance,’ detention, or exile,”⁷⁹ to silence opponents as noted above, then it is logical that the government would also have censored research that yielded data contradicting the regime’s policies. Moreover, the rampant repression has probably manufactured a culture of political apathy and fear for civilians unconnected to the government. Finally, Chile is one of the more affluent nations in Latin America, and any social unrest that could have occurred after the transition to democracy might have been mitigated by better economic conditions. Differing views on the privatization of water exist as some reports highlight the increased coverage of water services and the institution of subsidies to alleviate price increases, while still others claim sharp rises in rates.⁸⁰ Still, the lack of a major social conflict in light of the aforementioned uncertainties renders the success or failure of water privatization in Chile a mystery.

III. Conclusion

When considering these three case studies, it is clear that law and society can never be completely separated from each other. Law is the mechanism by which governments legitimately uphold the principles and ideals that comprise a society. Any system of rights depends on legal institutions to ensure and enforce them. Thus, social discord has legal implications since it arises as a reaction to perceived transgression,

which systems of rights seek to prohibit or remedy. Both the Bolivian and Argentine conflicts gave rise to civil disputes in the International Centre for Settlement of Investment Disputes (ICSID). Following the annulment of *Agua del Tunari’s* contract, the Bechtel Corporation filed a \$25-million lawsuit in the ICSID claiming that the termination of the contract would result in the loss of future profits.⁸¹ Veolia Environment (previously Vivendi), the major shareholder of *Agua del Aconquija*, filed a similar lawsuit in the ICSID against the Argentine government. Because social conflicts can have unforeseen legal implications, it is necessary to rupture the dichotomy between social and legal analysis of major conflicts.

Yet the above conflicts have also demonstrated that national systems of rights with relation to water usage and ownership are by no means adequate. If anything, the above conflicts have shown us that current examples of water management necessitate a reworking of the international discourse on water rights, and this is mainly due to MNC’s and neoliberal policies. When the ICSID decided that Argentina owed Veolia Environment compensation on the grounds that, “the disputed amount (8-10 per cent of monthly bills) between the counterparties is ‘a relatively small sum for the average customer’ but for [*Agua del Aconquija*] it was considered to be a substantial amount relative to its projected return,” it became evident that things are awry.⁸² The ICSID failed to consider that the average customer was often a member of the lower or middle class for whom a rise in eight to ten percent is also a substantial amount.

While I have only looked at three cases, they reveal a need to seriously consider access to water as a human right. The legal framework to

⁷⁸ The Washington Consensus is a term coined by John Williamson in 1989 referring to a set of ten neoliberal policies that the major economic institutions of Washington were thought to agree upon as necessary prescriptions for Latin American countries. See John Williamson, “A Short History of the Washington Consensus,” Peterson Institute for International Economics (2004): 1; <http://www.iie.com/publications/papers/williamson0904-2.pdf>. (accessed June 19, 2012).

⁷⁹ Bauer, *Siren song*, 6.

⁸⁰ de la luz Domper, 5-6; Barlow, 109.

⁸¹ Goldman, 261.

⁸² Hulya Dagdeviren, “Political Economy of Contractual Disputes in Private water and Sanitation: Lessons from Argentina,” *Annals of Public and Cooperative Economics* 82, no. 1 (2011): 36.

realize this need is already present in a variety of UN international law instruments, though obstacles remain. The first is obtaining world-wide recognition and acceptance of the right. This may only be possible through a convention explicitly claiming water to be a fundamental human right, equal with rights mentioned in the Universal Declaration of Human Rights. Second, if such a right exists, how does the global community enforce that right? This might be possible through international tribunals or the establishment of an international water court, however either option requires careful planning. The fact that the ICSID ruled in favor of Veolia Environment when it was the citizens of Tucumán who suffered the injustice of decreased access to safe water raises questions about the priorities of international organizations (and their corresponding arbitration boards) as well as the reach and untouchable nature of MNC's. It is necessary to understand that states are not the only perpetrators of human rights violations, and in the case of water, those guilty of violations are MNC's. However, how could a court determine a sanction for an MNC? Could it revoke an MNC's corporate charter? These cases illustrate that it may be time to modify the legal identity and characteristics of MNC's.

Third, systems of property rights pose obstacles for the establishment of a universal human right to water access. This issue is primarily philosophical in that systems of private property rights are rooted in ideological stances that markets function best with minimal government involvement. Proponents of these stances hold that the allocation of resources is most efficient under conditions of minimal government involvement and clearly defined private property rights.⁸³ Therefore, it is impossible that such a right could exist under the Chilean system of property rights or any other similar system. This is because such a system transforms water into a commodity with corresponding property rights,

whose fundamental purpose is to make an asset private and excludable. For access to water to be a human right, excludability, through price or any other mechanism, cannot exist. Thus, the creation of a human right to water would simultaneously require institutional modifications in many countries. Government regulation would be absolutely necessary to ensure equitable and equal allocation of water resources, which directly conflicts with the neoliberal preferences of the world's leading actors.

Finally, the establishment of a universal right to water challenges current notions of law and its corresponding attributes. Modern conceptions of law and rights narrowly perceive rights to be applicable to individuals and not to collective entities. Such conceptions stem from liberal, Rawlsian-based views that individuals are inherently valuable and deserving of respect.⁸⁴ While this liberal philosophy of rights is important in protecting individuals from the masses, it ignores the possibility of infringement on groups of individuals. As mentioned above, human rights violations involve communities and peoples, and a narrow idea of rights applying only to individuals would be incompatible with the administration of an international system of human rights to water. On a similar note, conceptions that law is independent of political influence must be changed. The Chilean cases demonstrated that the Supreme Court could be manipulated into formulating a decision that defied legal reasoning. While in theory a judge's obligation should be to the law, this is not always the case and is becoming more prevalent in constitutional law conflicts around the world. A universal system of water rights would necessitate that legal scholars stray away from traditional conceptions of the law and acknowledge other possibilities.

In short, establishing a universal right to water presents many questions. The answers to these

⁸³ Bauer, "Bringing Water Markets Down to Earth", 4.

⁸⁴ John Rawls, *A theory of justice* (Boston: Harvard University Press, 1971), 585.

questions are beyond the scope of this paper, yet are worth examining in further research. Nevertheless, it is necessary for the global community to discuss and consider the creation of water as a universally recognized human right. In doing so, countries would have to come together to rework the multifarious conceptions regarding international organizations, MNC's, and the scope of international and domestic law. The lines between different systems of law that govern jurisdictions are becoming more blurred, and it may be necessary to acknowledge the existence of legally pluralistic environments in the future. Legal pluralism might be the best method of solving disputes over water and ensuring equal and equitable access. However, it is most important that people and nations recognize that problems of water allocation do exist and must be resolved. Only then can the global community work to fix them.

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