



## **The Human Right to Water Under the Conditions of Trade Liberalisation and Privatisation**

### **A Study on the Privatisation of Water Supply and Wastewater Disposal in Manila**

a study on behalf of the Friedrich Ebert Foundation

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#### **Abstract**

Water is an essential for human beings to survive and develop. About 3bn people of a world population of 8.5bn will suffer from water shortage by 2025. 83% of them will live in developing countries, mostly in rural areas where even today sometimes only 20% of the population have access to a sufficient water supply. This actual lack of water is opposed to the theoretical conclusion that there is enough ground water existing in all regions of the world to guarantee an adequate water supply for all people.

The following study concludes that water shortage and the unequal distribution of water are global problems rather than regional problems that require international solutions. It describes three predominant levels and scopes of action which may serve to do away with the global trend to “divide” water between the developing and the developed world. These are: the normative provisions of the United Nations with respect to the Millennium Development Goal, the demand to consider water supply and wastewater disposal a human right, and development cooperation and its financing. The study points out that, by recognising the human right to water, decision makers and actors whose decisions have an impact on the access and accessibility of water are responsible of satisfying the needs to the greatest possible extent.

## **Executive Summary**

### **A. Water – a basic need becomes a human right**

Water is an essential for human beings to survive and develop. This study extrapolates recent figures published by the United Nations, by UN subsidiary organisations and other international organisations in order to describe current and future water crises. According to these figures, about 3bn people of a population of 8.5bn will suffer from water shortage by 2025. 83% of them will live in developing countries, mostly in rural areas where even today sometimes only 20% of the population have access to a sufficient water supply. This actual lack of water is opposed to the theoretical conclusion that there is enough ground water existing in all regions of the world to guarantee an adequate water supply for all people.

The first conclusion drawn from these framework conditions is that water shortage and the unequal distribution of water are global problems rather than regional problems that require international solutions. This study describes three predominant levels and scopes of action which may serve to do away with the global trend to “divide” water between the developing and the developed world. These are: the normative provisions of the United Nations with respect to the Millennium Development Goal, the demand to consider water supply and wastewater disposal a human right, and development cooperation and its financing.

The advantage of the human rights approach is that needs must be satisfied while human rights must be respected, protected and implemented. It is not absolutely necessary for needs to be satisfied by means of legal (human) rights. However, the study points out that, by recognising the human right to water, decision makers and actors whose decisions have an impact on the access and accessibility of water are responsible of satisfying the needs to the greatest possible extent.

### **Normative provisions of water supply and development goals**

On the basis of an overview of international conferences and documents dealing with the issue of water shortage, the study goes into the Millennium Development Goal that aims at reducing the number of people without sufficient water supply and sanitation by half until the year 2015. It can be stated that, after decades of international debates on the improvement of water supply, the political declarations, which have been repeated time and again, have been followed only by limited action and little improvement of water supplies.

Another conclusion of the study is that the great number of world conferences, declarations and action programmes has sensitised governments and international actors with respect to the issue of water shortage and the human right to water. Because of this sensitisation the institutions, bodies and agencies of the United Nations have been discussing the issue of water shortage increasingly from the standpoint of other endangered human rights, such as the right to food, health, shelter, education and development.

## **The human right to water and its relation to other human rights**

The normative demand for the human right to water is derived from article 11 of the International Covenant on Economic, Social and Cultural Rights. It is stated that the human right to water is the precondition for other human rights – such as the human right to live, to appropriate nutrition and sufficient medical care. Taking the right to live as an example, the study brings out that the core obligations of each human right are regarded as compulsory norms (*jus cogens*) of the international law. This means that provisions on human rights become inalienable components of the law which apply to everyone (*erga omnes*). Thus, any violating provisions are null and void.

The study also shows that, apart from being the precondition for other human rights, the human right to water has its own contents and protective duty. It is aimed at guaranteeing that all people have the right to have non-discriminatory and fair access to safe, sufficient and affordable drinking water in order to satisfy their personal needs (such as the preparation of food, the use of water for sanitary facilities and for domestic consumption). Safe drinking water means that the water quality must not jeopardise peoples' health. Affordable water means that the expenditures for water must not jeopardise the fulfilment of other basic needs that are guaranteed by human rights – such as the right to education and food.

In the study, further rights are derived from the human right to water, which are considered a prerequisite to actually implement the right to water. These are, among others: the right to have access to existing water supply systems without being discriminated against, the ban on destroying or separating existing water supply systems, the right to have priority over industrial or agro-industrial water use, the right to be supported in case of financial problems, and the right to information and participation in national and local water policies. If water is supplied by private companies, there is also the right to governmental regulation in order to guarantee that these private companies comply with the duties stipulated by the human right to water.

## **Duties stipulated by the human right to water**

The issue of water supply seen from the human rights point of view is concluded by presenting the duties of governmental and non-governmental actors that correspond to the right to water. These duties comprise among others:

- the duty of a state to respect, protect and implement the human right to water;
- the duty of a state to respect the human right to water in other countries, that is, not to interfere with the fulfilment of other governments' duties to respect the right to water;
- the duty of a state to contribute to the fulfilment of the human right to water in other countries by means of international cooperation;
- the duty of a state to prevent and stop violations of the human right to water and to make no decisions that jeopardise the fulfilment of the human right to water in one's own country or in other countries. This can be done within the framework of affiliation in international organisations;

- the duty of international organisations to respect the human right to water and to contribute to its fulfilment by means of international cooperation;
- the duty of non-governmental actors, such as companies or individual persons, to respect the human right to water and to support its implementation within their own scope of action.

These duties should all be stipulated in a national water strategy. This strategy must be based on the human rights principle and on the human right to water. It should assign governmental and institutional responsibilities to the duties mentioned above.

With respect to the governments' fundamental freedom of choice when taking steps or developing political approaches, the human right to water has core obligations which are not subject to this principle of free choice. These core obligations must be ensured even in times of scarce resources or in states of emergency. Core obligations include the most basic forms of the human right to water such as a non-discriminatory and regular access to a minimum of safe drinking water for personal and domestic use and the access to simple – yet hygienically acceptable – wastewater disposal and sanitary infrastructure.

### **Violation of the human right to water**

In another chapter, the study describes concrete violations of the human right to water and concludes that those countries violate the human right to water which do not act in good faith and which fail to explain why they do not comply with their core obligations. A decisive factor to determine whether such a violation takes place or not is to assess the resources deployed. If a state has not deployed a maximum of available resources to guarantee a basic supply of drinking water and sanitation, to ensure that access to the existing systems is non-discriminatory, or to prevent companies from establishing an unfair price system and excessive charges, the human right to water is violated.

Violations of the human right to water on part of the state may also be manifested indirectly. Among these indirect violations are the lack of laws to regulate water companies, the insufficient enforcement of existing laws, or the lack of a national water strategy.

Violations on part of the state are quite often the result of the government's interference with exercising the human right to water. The study states, for example, that a privatisation per se might represent a violation when no mechanisms of fair pricing and affordable services are introduced during the process of privatising water supply and wastewater disposal systems. The state violates its protective duties if it fails to stop individual persons, groups, companies or other non-governmental actors from interfering.

The duty to respect the human rights in other countries is violated if there are no regulations concerning the use of water resources and, as a result, these resources are used to one's own benefit. The duty to international cooperation is violated if developed countries do not aim at reducing the developing countries' debt burden in order to improve their water supply and sanitary infrastructure. With respect to the duties of non-governmental actors, the study observes that they violate the human right to water if they make it physically or financially impossible to get access to water or if they pollute existing water supplies.

## **Financing the human right to water**

As the implementation of the human right to water and the fulfilment of internationally agreed targets aiming at the improvement of drinking water and wastewater infrastructures require considerable funds, which cannot exclusively be raised on the national level, the study analyses the policies of International Financial Institutions and the existing trade regimes. From the human rights point of view it can be concluded that improvements of drinking water and wastewater infrastructures are carried out only within the framework of national mandates and strategies because these institutions and regimes are not explicitly bound to the human rights.

The World Bank, the International Monetary Fund, the European Union and the World Trade Organisation give priority to including the private sector by means of Public Private Partnerships, joint ventures and foreign direct investments. The preconditions for that are (partial) privatisations of public suppliers, a save investment climate, risk improvement for private companies, and the economic approach that considers water a commodity. Due to these preconditions, governments are subject to international credit terms, investment treaties and private sector agreements which all reduce the national socio-economic scope of action.

## **Water as a commodity and water services in the framework of global competition**

In view of this pressure to privatise, the study then delves into the question of how the trade in water and wastewater services would influence the human right to water. If water and wastewater services – as demanded by the European Union – became the subject matter of negotiations within the framework of the World Trade Organisation, and thus were subject to the GATS-negotiations, an international juridification would take place, making it impossible for governments to give priority to socio-economic factors and to reverse the economicalisation of water in order to protect the human right to water without being sanctioned. In order to respect, protect and comply with the human right to water in one's own country and in other countries, it is the duty of governments to control whether trade negotiations to liberalise and deregulate the markets would lead to a reduction of the national scope of action.

## **The human right to water as a regulatory framework of privatisation**

Governments are free to decide whether they want to have public or private water supply in order to implement the human right to water. The study distinguishes the kind of water supply from the commodification of water. This means that water is a social and public commodity which also has an environmental value and must therefore be used in such a way that these values are linked to one another in a sensible and sustainable way. The study comes to the conclusion that one should not mistake the economic value of water for a commercial value.

If water and wastewater services are supplied by private companies, governments are obliged to give the protection of human rights priority over economic policy and international trade treaties. More concretely, they are obliged to regulate and control water consumption and water supply. This control should be based on the understanding that water may have an economic value, but that it cannot be considered a commodity that can be left to self-

regulation in the markets. This is the difference between economic value and commercial use of water resources. In addition to that, water can only be supplied by a monopoly due to the fact that it is liquid. In contrast to other goods that can be counted, mixed or separated, such as power supply or telecommunications, competitive water supply structures are both technically and financially impossible, because water will always mix. Thus, water demands monopolistic supply structures. This does not restrict the profit motive of water suppliers in the sense of the market, but rather in an ethical, normative and legal sense as expressed in the human right to water.

If water privatisation deteriorates the exercise of the human right to water, e.g. because supply costs have risen and water is not affordable any more, the government has the duty to justify the privatisation by giving good reasons and weighing up different options. Even after privatisation processes, governments are obliged to make sure that the poor have access to a basic water supply and sanitation.

## **B Case study on water supply privatisation in Manila**

The theoretical considerations of the human right to water are followed by a case study on water supply privatisation in Manila. This case study describes the process of privatisation in 1997 and examines whether this process as well as the experience gained until 2003 do justice to the normative claims of the human right to water. Manila provides a good example because in the mid-1990's the city was lacking resources and was suffering from considerable water shortages. Therefore, it had to raise international funds from the World Bank and the Asian Development Bank, and was forced to attract private foreign direct investments. The study shows that in order to facilitate foreign direct investments, privatisation had to provide for the possibility of property and profit.

Furthermore, the examination of an individual process of privatisation offers the chance to examine workers' rights during the entire process. The study makes clear that, apart from the engagement of International Financial Institutions and transnational water corporations, it was mainly the erroneous design of the privatisation process and the lack of political will to create a powerful regulatory agency that have led to the partial failure of this particular privatisation. For that reason, the study analyses the individual issues of the dispute between the concessionaire *Ondeo/Suez Lyonnaise des Eaux* and the regulatory agency and outlines a framework in order to fulfil the licensing agreement that respects the human rights to water, and it shows a way of how to award new concessions.

## **Conclusions and recommendations drawn from the case study of Manila**

There is no doubt that the system of water supply and wastewater disposal in Manila was worse before the privatisation than it is today. While the public water suppliers refused to deliver water to illegal settlements, this issue does not concern private suppliers. For the new customers, each new water connection means a reduction of the water price, because they do not need to buy water anymore from dealers who charge much higher prices. In addition to that, water connections are now installed by taking into account technical considerations, a fact that has reduced corruption.

The following observations can be emphasised:

- **Lack of competition**

Although the urban area was divided into two supply areas, there is no competition between the suppliers. Instead, each supplier has a monopoly within his own area. The end-customers are not mobile enough to choose their supplier by moving from one area to the other. The only advantage of two suppliers would be a comparison of their offers, carried out by the regulatory agency, in order to adapt the offers in a customer-friendly way (most-favoured principle). This, however, does not take place due to the limited scope of action of the regulatory agency. Therefore, the only advantage of privatisation that is left, namely the comparability of services, is not made any use of.

- **Water supply and wastewater disposal**

It is true that during the first five years of the concession roughly 1 million people have been connected to the water supply network. However, the target of the private suppliers and the expectations of the regulatory agency and the end-consumers have not been fulfilled. In many areas – with the exception of some pilot projects – the waste water disposal infrastructure has hardly improved. The number of water connections could not keep pace with migration and the increase in population.

- **Water price and exchange rate movements**

The bidding procedure took place exclusively on the basis of a base price. However, the price of water is by no means an independent variable but determined by other factors. If these factors are not taken into account, constant water prices cannot be guaranteed. The factors that determine water prices are:

- foreign exchange risk due to the amount of foreign outside capital;
- amount of invested capital;
- experience in the water sector;
- quality or quantity of the water supply;
- water consumption;
- water losses.

As these factors can change in the course of privatisation, the goal to keep price stability at a low level could not be achieved. Water prices have risen by up to 425%, because the suppliers were given permission to pass on the foreign exchange risk of the US-Dollar to the end-consumers. The study comes to the conclusion that, under the human rights point of view, this automatic passing-on of foreign exchange risks to the end-consumers must be rejected. The use of water cannot be made dependent on the exchange rate of the national currency against an international key currency. If family incomes are paid in the national currency, the price of water must not be guided by international financial aspects. Such a procedure would not do justice to the prioritisation of water as a social and cultural good. And in addition to that, this

could shift the ratio of water expenditure compared to other private expenditure to the disadvantage of other human rights.

The study also criticises that there are different prices in different areas. This may violate both the prohibition of discrimination and the right to get a non-discriminatory access to water. As the state has a protective duty, the study points out that it would be the duty of the regulatory agency to annul this difference. For example, this could be done by subsidising private households and thus guaranteeing a uniform base price as an indispensable minimum.

- **Water losses**

Water losses have risen by up to 70%. If the reduction of water losses is considered a criterion of efficiency, the study comes to the conclusion that private water suppliers work less efficiently than public providers. In Manila, higher water pressure and more water in the supply systems means higher water losses. Private companies, therefore, are not able to work more efficiently if, for profit-making reasons, they do not carry out necessary investments.

- **Water quality**

On average, the water quality has improved, but it is still subject to considerable fluctuations. In times of water shortage, the water quality deteriorates mainly in the poorest districts and slums. With respect to the water quality, the study therefore identifies social discrimination, which contradicts the human right to water.

- **Lack of justice**

The study detects a lack of justice which is manifested by shifting the risk of a sufficient water supply from the public to private companies and then to the individual consumer. From the human rights point of view, this lack in justice should be eliminated by subsidising a minimum amount of water for a sufficient supply of private households. The government could also oblige private companies to supply a certain cost-free amount of water and to cover the total costs by introducing a progressive price system for water consumption above the cost-free amount. In view of the fact that priority should be given to private water consumption (including hygiene and food preparation), one could also think of establishing different water prices for private consumption, subsistence farming and industrial consumption.

- **Social discrimination due to privatisation**

The price systems in Manila are proportional to consumption. This system mainly puts the poorest parts of the population at a disadvantage. Private providers minimise their costs for connecting water pipes in slums by promoting so-called local water committees. These committees are sent uniform invoices, no matter how many individual water connections there are. This means that, due to the progressive price system, households supplied through the local water committees must pay a higher water price than those with their own water connection.

- **Weak regulatory agency**

In order to strengthen the regulatory agency, the study recommends to establish this agency on a legal basis rather than on the basis of a franchise agreement. In doing so, the agency



would be independent of the concessionaires and the former public provider. The agency could also be established before the launch of the privatisation and, possibly, accompany the entire process.

- **Weak arbitration**

Concerning international arbitration, the study has detected, among other weak points, a lack of participation on the part of consumer initiatives, workers' organisations and trade unions in the decision-making process. It is recommended to create a national arbitration committee in charge of cases of privatisation, which has the right to take legal action. Such a commission should be composed in equal numbers of government representatives, local decision-makers, company representatives, trade union representatives and representatives of consumer pressure groups. The representatives should be elected in public elections.

- **Lack of transparency, information and participation**

The study comes to the conclusion that the lack of transparency during the bidding procedure is one of the main reasons for the dispute between the regulatory agency, the concessionaires and the civil society. For that reason, not only the decisions but also the underlying information should be publicly available. This is not only a precondition to participate in compliance with human rights, but also a demand on its own.

Furthermore, a participation in compliance with human rights needs to formalise participation procedures. It also requires the duty to consult those groups affected when the regulatory agency and the private concessionaires make their decisions. It is the duty of trade unions, non-governmental organisations or consumer initiatives to legitimate by disclosing their financing and their interests. And, they should be nominated as representatives by the people affected.

- **The myth of foreign direct investments**

The study comes to the conclusion that it is a fallacy to believe that, in such an investment-intensive sector as the water supply sector, privatisation will pump enough foreign direct investment into ailing economic sectors. On the contrary: In Manila, public authorities, International Financial Institutions and bilateral development funds are still the main investment sources. An increase in private engagement could be achieved by adding a clause to the franchise agreement stating that only public providers of public private partnerships are entitled to receive the funds provided by the International Financial Institutions. If, however, private companies were granted international public funds, services in compliance with human rights and a low profit margin should be among the terms of credit. Credits from public and international authorities should be granted in national currencies. Public guarantees should not be demanded if the credits are given to private companies.

- **Workers' rights**

If a state-owned company enters the market economy, workers are confronted with considerable changes, in particular, if the declared target of the privatisation is to achieve more efficiency and productivity and to reduce bureaucracy and payroll costs by outsourcing certain services. The study shows that the number of employees was reduced by more than a third through early retirement programmes and severance packages. In doing so, the vested social rights of the former civil servants were compensated and the payments within the

framework of the severance packages were higher than the customary severance payments in the public sector.

In addition, privatisation offers the advantage to outsource business segments into the services sector, such as repair and maintenance services, and to subcontract other companies in order to build new water pipes or wastewater systems. This outsourcing, together with an increase in activities to improve water supply and wastewater disposal, has led to the fact that, on the whole, the number of employees in the water sector has increased.

With respect to workers' rights, the study remarks that current remunerations are higher and that employees are more motivated due to a performance-oriented pay system and stock options. As civil servants on the Philippines are not allowed to found or be a member of a trade union, there was no possibility of collective bargaining or industrial action prior to the privatisation. In the course of privatisation, works councils have been established, and it became possible to found trade unions. The unions have a considerable influence on health and safety measures and on social working conditions. However, the study also points out that workers employed by the subcontractors do not benefit from the work of these company unions, and that, quite often, they do not have a workers' representation in their company.

- **Reform of the bidding procedure and new concessions**

As the concession of the western area has failed and is to be allocated, the study ends with some recommendations for that procedure. Concession and water supply should be linked to a number of criteria. Among others, these criteria could be:

- to reduce foreign capital in order to be able to estimate foreign exchange risks;
- to limit the amount of one's own investment in order to be able to assess creditworthiness;
- to calculate the achievable profit in order to assess the economic value of water and, if need be, in order to relate this economic value to the social value and the human right to water;
- to take into account existing experience in the water sector in order to assess the management practice;
- to accept workers' rights (pension schemes / health and safety / job security in order to reduce the payment of severance packages);
- to calculate the end price, because the standard tariff only is a part of the total spending of a household;
- to oblige the concessionaire to improve water pipes and water supply in order to do justice to the human right to water;
- to grant discounts and free minimum amounts of water in order to push through the prohibition of discrimination;
- to issue basic information on water quality or quantity in order to comply with those requirements of the human right to water that concern health protection;

- to improve the consumers' income structure in order to remedy social distortions stemming from water prices;
- to assess the ecological impact of water consumption and the use of water;
- to consider water losses in order to assess the concessionaires' efficiency.

The study closes with the proposal that new concessions should be granted to new types of providers. Workers' cooperatives could be founded or consumer networks could take on the water supply. It would also be possible to further divide and regionalize the concessions and give them to smaller companies.

## Conclusions

The study brings out that the human right to water puts people into the centre of all efforts to distribute water resources in a just way and to provide access to safe drinking water and adequate sanitation. Water must be safe, affordable and sufficient for each individual person. To consider water not only a social and cultural good, but also an economic commodity must not lead to the fact that water as a commodity takes precedence over the human right to water.

All governments, international organisations and private companies are called upon to implement the right to water. Depending on their spheres of influence and responsibilities, it is their duty not only to respect the right to sufficient, safe and affordable water supply and waste water disposal systems but also to protect this right and to support its implementation. A central element to protect this human right is the creation of national, regional and international water strategies that define the rights and duties of the actors involved. Such a water strategy should aim at accepting different forms of water supply and waste water disposal, and it should orientate towards the priorities stipulated by the consumer.

The increase in binational and multinational trade liberalisation does narrow down these scopes of action because governments bind themselves to credit agreements, trade treaties and private investment agreements. As private investments always lead to (partial) privatisation, it is the duty of governments and the partners involved to choose the course of action which most favours the human right to water. Privatisation procedures must be transparent, and they must be carried out in a participatory way. They should include the creation of a powerful regulatory agency. It is inadmissible to submit the human right to water to economic reservations.

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