The Impact of Commodification on the Human Right to Water: The Cases of South Africa, Ecuador and California

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Executive Summary

This thesis analyzes the impact of commodification on the human right to water. For this purpose, it illustrates the development and recognition of the right to water as a human right on international, regional and national levels. To combat uncertainties of its normative content, it examines the different legal sources and the relationship between water and other human rights it is either derived from or interrelated with, concluding that it has a unique status. To demonstrate the relationship between state obligations and water commodification, the jurisdictions of South Africa, Ecuador and California are comparatively analyzed regarding their respective provisions, backgrounds and case law. The thesis concludes that commodification negatively impacts access to adequate and safe water, which is largely due to the common understanding of water as an economic good instead of a universal human right, to which marginalized groups are entitled to regardless of their ability to afford it.

Introduction

Water is critical for every aspect of human life. Without water, there is no possibility to hydrate, practice hygiene, grow food, sustain health and enjoy other human rights. Many individuals and communities nevertheless lack access to adequate water. In 2015 alone, 844 million people did not have access to basic water services and a minimum of 2 billion people consumed water that had been subject to fecal contamination.[1] A further 263 million people only had access to limited water services, which implies a necessity of water collection from a source, which is more than a 30-minute roundtrip away, mostly burdening women and children.[2]

The unavailability of water is worsening as the resource is becoming scarcer. This is due to a combination of different factors, including climate change, population growth, pollution of sources as well as competing interests of different water users. Out of the global water occurrence, only 2, 5 per cent is fresh water and therefore usable for domestic and agricultural purposes.[3] The percentage of water directly accessible even decreases when considering that, out of the 2,5 per cent, most fresh water exists in the form of ice, glaciers or snow.[4] Especially the agricultural sector assumes a significant role for food sovereignty and the livelihoods of many, which is why it accounts for 70 per cent of water used, making it the largest water user globally.[5] Industrial uses also provide for competition and encompass water use for extractive industries, among a diverse range of uses. The situation created by the dependence of every living being as well as other users on this finite natural resource is

[1] WHO: Drinking Water, Key Facts, 7 February 2018, http://www.who.int/news-room/fact-sheets/detail/drinking-water (accessed 1 October 2018).
[2] UNICEF: Drinking Water, July 2017, https://data.unicef.org/topic/water-and-sanitation/drinking-water/ (accessed 1 October 2018).
[3] UN Population Network/UN Population Division, Department of Economic and Social Affairs, with contribution by the FAO: Population and Water Resources, http://www.un.org/popin/fao/water.html (accesses 1 October 2018).
[4] Ibid.
[5] OECD: Water use in agriculture, http://www.oecd.org/agriculture/water-use-in-agriculture.htm (accessed 1 October 2018).

therefore placed at the center of many conflicts, which must be resolved by the international community and national governments.

This complicated web of natural limitations and conflicting interests have proven to complicate the conceptualization of the human right to water. While it has been gradually recognized within international frameworks, the roots of its recognition have been political in nature and have not clarified its content. The connection of the right to water to many other human rights has led to an uncertain legal status with equally uncertain implications. International efforts, especially in the context of the CESCR's General Comment No. 15, have contributed to its normative content, but have not been able to elevate the right to water to a right that is uncontested and fully effective. An examination of General Comment No. 15 illustrates, that the right to water can neither effortlessly be classified as an autonomous, nor as a strictly derivative right, giving it a unique status.[6]

Built on a debated normative foundation, the right to water does not reach its full potential in addressing the needs of marginalized groups. This is connected to water commodification, which implies that water is primarily treated as an economic good. As such, especially marginalized groups, which are often ostracized along racial or ethnic lines, find themselves in a position, in which water becomes unaffordable. Its commodification is yet supported by international frameworks as well as by national interpretations of the right to water. This contributes to an adverse understanding of its nature, whereby it is either seen as a universal right or a scarce resource, which must be rationed by the means of cost recovery. The blind eye towards marginalized groups reflects a range of conflicting considerations, which compete with the view of water as being a primarily social and cultural good and human right. The mentioned competing considerations thereby further the complication of capturing the issue of access to sufficient and adequate water in robust human rights terms and frameworks.

[6] Cahill in International Journal of Human Rights: 'The human right to water – a right of unique status': The legal status and normative content of the right to water, p. 395.

This is worsened by the fact that many violations of the right to water occur indirectly or through private entities, which either directly contribute to the unaffordability of water or otherwise interfere with it.

This thesis demonstrates that violations of the right to water often occur or are worsened in connection to water commodification. The chosen jurisdictions of South Africa, Ecuador and California serve to exemplify the above-mentioned issues. Since the jurisdictions all know differently formulated human rights to water within their legal system, they will present the basis of a comparative analysis from which state obligations towards the right to water will be derived. The right to water in South Africa presents an example of an individual rights-based approach against the background of apartheid and lingering deep inequalities. The case of Ecuador exemplifies a modern Constitution, which has been strongly influenced by the contradicting interest of indigenous peoples and political attempts to create a 21st century socialism. California constitutionalizes a regulatory model for the beneficial use of water sources based on public trust, which has led to the prioritization of water for domestic uses. Thereby each jurisdiction provides a different context, in which the impact of commodification can be demonstrated and assessed. While the chosen jurisdictions have differing legal, historic and social backgrounds, the conclusions drawn from them will reassemble to display a common narrative of the significant role of the right to water and causes for violations.

To show the emergence of the human right to water in international frameworks, its development is demonstrated in Chapter I by outlining its growing recognition on international and regional levels. In Chapter II, the normative content and corresponding state obligations of the right to water are assessed by describing the elements of the right as primarily interpreted by the CESCR. Hereby, specific attention will be payed to the scope resulting from its unique status as well as to consequences for marginalized groups and equality aspects. The Chapter further illustrates competing considerations as to exemplify concerns, which arise for state and non-state actors when faced with implications that arise from the recognition of the right.

Within these competing considerations, the issue of commodification will be outlined and its support in international law demonstrated.

Chapter III gives an overview of the right to water as set out in national Constitutions as to subsequently turn to the right to water in South Africa, Ecuador and California. The right is evaluated against its legal, historical and social background. Chapter IV then turns to examine state obligations towards the realization of the right to water by comparatively analyzing the obligations arising from the relevant provisions and interpretive judgements. The special focus of this chapter lies on the South African Constitutional Court case of *Mazibuko v. Johannesburg*.

Chapter V provides for a conclusion on the effectiveness of the human right to water, resulting from an analysis of the aforementioned points, whereby a focus will be put on the ramifications of treating water as an economic good and its effects on marginalized groups.

Chapter VI closes the thesis with an overall conclusion by describing the utilized approach and its results.

I. The Development of the Right to Water as a Human Right

As the Human Right to water has emerged from different sources and remains contested, it is important to demonstrate its progressing course. The following outlines the development of the right on international and regional levels, thereby taking into account legal differences as to illustrate its various forms of recognition.

1. Development and Recognition on the International Level

The beginnings of the human right to water are mostly found in international law, where it has constantly developed within different frameworks and instruments. In 1997, the Sub-Commission on the Promotion and Protection of Human Rights, whose mandate includes

studies on Human Rights issues,[7] instructed the undertaking of an investigation on the right to access drinking water and sanitation.[8] Although a paper hereto was submitted to the Commission on Human Rights in 1999, the latter did not find this to have satisfactory defined the scope of such a right, so that it refrained from further action than to request more work on the subject as to enable the Commission to examine possibilities for its realization and promotion.[9] In the same year, the UN General Assembly adopted a resolution on the right to development, in which it states that "[t]he rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative...",[10] thus explicitly speaking of a human right to clean water, but limiting obligations to such of moral nature.

In 2000, the UN General Assembly adopted the United Nations Millennium Development Declaration.[11] In this, goals connected to topics such as poverty eradication, environmental protection and sustainability as well as the upholding of human rights instruments were set out.[12] These included the goals to enhance sustainable water use[13] as well as the goal to halve the number of those, who are not able to reach or afford safe drinking water by the year of 2015.[14] Although the declaration does not mention the human right to water, it is the first instance of clearly defined international goals for sustainable development and for the achievement of access to water,[15] whereby it draws a connection to individual access. This reflects the acknowledgement of the importance of access to water at a time, in which the right to water was still in the process of emerging as an internationally recognized human right. The inclusion of water in the MDGs was therefore not trivial but influenced the international debate,

[7] See UN Human Rights Council: Sub-Commission on the Promotion and Protection of Human Rights, https://www.ohchr.org/en/hrbodies/sc/pages/subcommission.aspx (accessed 20 November 2018).
[8] Tully in Netherlands Quarterly of Human Rights: a Human Right to Access Water? A Critique of General Comment No, 15. p. 36.
[9] UN Human Rights Commission, Decision No. 1999/108.
[10] UN General Assembly Resolution, No. A/RES/54/175.
[11] UN General Assembly Millennium Declaration, 55/2, 8 September 2000.
[12] Ibid, III, IV, V, VI.
[13] Ibid, p. 23.
[14] Ibid, p. 19.
[15] McIntyre in Sustainable Development Goals- Law, Theory and Implementation: International water law and SDG 6: mutually reinforcing paradigms, p. 173.

in which MDGs prevailed as a framework for discussing the right to water.[16] In fact, the development of the right to water expedited shortly after the declaration, when the Human Rights Council issued a decision requesting the High Commissioner for Human Rights to undertake efforts to define the scope and content of state obligations regarding equitable access to safe drinking water and sanitation in international law.[17]

A significant milestone on the path to the right to water followed in 2002, when the CESCR recognized the existence of the human right to water under the ICESCR in its General Comment No. 15.[18] The Covenant itself includes no explicit mentioning of the right to water. According to the General Comment, the Committee views the legal basis of the right to water as rooted in the right to an adequate standard of living, the right to the highest attainable standard of health as well as the right to adequate housing and the right to food in Articles 11 (1) and 12.[19] While the right to water is not explicitly set out in the Covenant, the Committee considers the right implicit, interpreting the catalogue of rights listed in Article 11 (1), which are necessary for an adequate standard of living as being non-exhaustive, which is visible by the use of the word "including".[20] For the missing of the explicit mentioning of the right to water, it has been suggested to be predominantly due to the facts, that the question of including the right to an adequate standard of living under Article 11 (1) itself was a topic of general discussion while drafting the treaty, and secondly that a lack of awareness towards the scarceness of water as a natural resource existed.[21] It therefrom follows that the right to water was not left out in the drafting process based on a repudiation of the right to water, it rather points to a regrettable misconception of how important the explicit inclusion would prove to

[16] See UN General Assembly Press Release GA/11126, 29 July 2011, where the content of the debate is described as "achieving the human right to water and sanitation in the context of the Millennium Development Goals."
[17] Human Rights Council Decision 2/104, 27 November 2006.
[18] UN CESCR, General Comment No. 15: The right to water, 2003.
[19] Ibid, no. 3, 4.
[20] Ibid, no. 3.
[21] Winkler, Inga: The Human Right to Water- Significance, Legal Status and Implications for Water Allocations, p.42.

be. Contrary to the assumption that drafters were opposed to a right to water, the *travaux préparatoires* of the ICESCR shows, that the drafters considered water as something so essential, that its explicit mentioning was not deemed necessary,[22] which also speaks to the former interpretation. Denying the right to water in absence of its specific mentioning, while the Covenant recognizes the right to food, does further not appear coherent, which is affirmed by the above-mentioned interpretation of the listed rights as not being exhaustive.

While the General Comment is not of legally binding nature, it must be considered that the Committee behind it is the body of experts concerning the Covenant, so that their interpretations are of the highest importance and authority in interpreting the former.[23]
Regarding the development of the human right to water, the ICESCR and its Committee had a tremendous international impact, as the ICESCR is one of the most highly ratified multinational treaties, with 166 parties, and no reservations made to the Convention in regard to articles 11, paragraph 1 and 12.[24]

In 2007, the UN High Commissioner for Human Rights delivered upon the earlier request of the Human Rights Council by issuing a report to the General Assembly on the scope of the right to water. The report refers to the debate and difficulties around the normative scope of the right, ending with the clarification that "the open debate as to whether the human right to access safe drinking water is a stand-alone right or is derived from other human rights should not impair the recognition of access to safe drinking water as a human right."[25] Notably, the report also mentions equality considerations, which have relevance for women and marginalized groups in regards to the right to access water.[26] A non-discriminatory angle to the

[22] Tully, Supranote 8, p. 37.
[23] Breen: Economic and Social Rights and the Maintenance of International Peace and Security, p. 26 and Beail-Farkas in Wisconsin International Law Journal: The Human Right to Water and Sanitation: Context, Contours, and Enforcement Prospects, p. 775.
[24] UN Treaty collections Ratification Status, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en (accessed 16 November 2017).
[25] Ibid, p. 49.
[26] Ibid, p. 13, 24, 47.

right already arose in the General Comment of 2002,[27] whereby neither the latter, nor the High Commissioners' clarification-intended report made significant contributions to the understanding of this dimension. Both rather refer to existing Conventions,[28] which will be elaborated upon below. The main impact of the General Comment and the Report therefore remain the strengthening of the recognition of the Right to Water as a Human Right on the political level.

In 2008, a further development occurred,[29] when the Human Rights Council appointed the first Special Rapporteur on the human right to water and sanitation.[30] The Special Rapporteurs' mandate allows the respective expert to research issues related to the right. For this, the Special Rapporteur visits countries and assists in implementing the right to water and sanitation.[31] By filing annual reports about missions in different states and on issues regarding water and sanitation,[32] the Special Rapporteur contributes to information on the matter.

Several years of human right to water developments finally resulted in action by the United Nations General Assembly. In 2010, the GA, a body equally representing the 193-member states of the UN,[33] explicitly recognized the right to water and sanitation as a human right through the means of a resolution,[34] referring to "the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights."[35] The resolution passed with 122 votes in favor, while 41 states abstained and no states

[27] UN CESCR, General Comment No. 15, above, pp. 13 ff., 48, 53.
[28] See Ibid, p. 4; and UN General Assembly, Human Rights Council Report of the High Commissioner, A/HRC/6/3, above, pp. 11 f., 24, Annex I.
[29] See UN Human Rights Council Resolution A/ HRC/7/22, 28 March 2008, p. 1.
[30] Ibid, p. 2; and UN Human Rights Council Resolution A/HRC/9/28, 2 December 2008, Annex.
[31] See The Special Rapporteur on Water: An Overview of the Mandate, www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/Overview.aspx (accessed 30 January 2018).
[32] See The annual reports of the Special Rapporteur on the Rights to Safe Drinking Water and Sanitation: http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/AnnualReports.aspx (accessed 30 January 2018).
[33] UN General Assembly of the United Nations, http://www.un.org/en/ga/ (accessed 21 November 2017).
[34] U.N. Press Release GA/10967, 28 July 2010.
[35] UN General Assembly Resolution No. A/RES/64/292, 28 July 2010, no. 1.

voted against it.[36] A later resolution passed by the Human Rights Council in 2011 additionally welcomes and confirms the recognition of the right to safe drinking water and sanitation as a human right.[37] The increasing usage and therefore recognition of the human rights' language regarding the right to water is also reflected in the Resolution concerning the Agenda for Sustainable Development,[38] which was adopted by the GA in 2015 and builds upon the earlier-mentioned MDGs.[39] While the MDGs set the goal of enhancing access to water, the new document sets sustainability goals and reaffirms the bodies' "commitments regarding the human right to safe drinking water and sanitation."[40] The rhetoric makes a difference in so far as the MDGs imply a recognition of water as a basic need without its human rights implications.[41] While the MDGs were met by globally halving the number of persons without access to water, the implications of viewing access to water as a human right include a shift to a goal of universal access with a focus on the marginalized.[42] The reference to both, the human right to water and to the reaffirmation of state sovereignty over natural resources in the SDGs, further suggests an awareness of actual responsibility resulting from the human right to water and alongside it, its recognition.[43]

The human right to water is further explicitly included in international treaties, such as the CEDAW, the CRC and the CRPD. The provision in CEDAW obliges state parties to ensure adequate living conditions of rural women in relation to water supply.[44] Under the CRC, state parties "shall take appropriate measures […] to combat disease and malnutrition […] through provision of adequate nutritious foods and clean drinking-water."[45] In the framework of the

[36] See UN Press Release GA/10967, 28 July 2010, https://www.un.org/press/en/2010/ga10967.doc.htm (accessed 21 November 2017).
[37] UN Human Rights Council Resolution No. A/RES/18/1, 2 December 2011, p. 2.
[38] UN General Assembly Resolution No. A/RES/70/1, 21 October 2015.
[39] McIntyre, Supranote 15, p. 173.
[40] UN General Assembly Resolution No. A/RES/70/1, above, p. 7.
[41] Winkler, Supranote 21, p. 217.
[42] Ibid, p. 216.
[43] McIntyre, Supranote 15, p. 177.
[44] Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, Article 14 No. 2 lit. h.
[45] Convention on the Rights of the Child, 2 September 1990, Article 24 No. 2 lit. c.

CRPD, states shall "ensure equal access by persons with disabilities to clean water services."[46] The provisions connect the right to water to different rights: in the CEDAW and CRPD, water supply and access to clean water services are related to an adequate standard of living[47] and the CRC links clean drinking water to the highest attainable standard of health.[48] All three provisions provide for a restricted scope of the right to water. Most noticeably, the personal scope only reaches those, who are covered by the specific group the treaty seeks to protect. In the CEDAW provision, the scope appears even more narrow, as water supply must only be ensured to rural women. The CRC only seeks the provision of water to children, while the CRPD is meant to protect the access to water against discriminatory practices based on disability. The formulation of the provisions thereby does not provide for an individual entitlement with the equal strength of a human right but creates state obligations to provide services related to water to these vulnerable groups.[49] The cases of CEDAW and the CRC however are partly relied on as proof that water is generally accepted as constituting an element of the adequate standard of living.[50] In terms of vulnerable groups, the Geneva Conventions III and IV already obligated states to provide sufficient water for drinking and for matters of hygiene to prisoners of war[51] and internees.[52]

Regarding the UN framework, Catarina de Albuquerque, the first Special Rapporteur on the right to warmer an sanitation, concluded that "for the UN, the right to water and sanitation, is contained in existing human rights treaties and is therefore legally binding."[53]

[46] Convention on the Rights of Persons with Disabilities, 3 May 2008, Article 28 No. 2 lit. a.
[47] See the Convention on the Elimination of All Forms of Discrimination against Women, above, Article 14 No. 2 lit. h; and the and Convention on the Rights of Persons with Disabilities, above, Article 28 No. 1.
[48] See the Convention on the Rights of the Child, above, Article 24 No. 1.
[49] See Bulto: The Extraterritorial Application of the Human Right to Water in Africa, p. 34.
[50] Winkler, Supranote 21, p. 44.
[51] Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, Article 29.
[52] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Articles 85 and 89.
[53] UN NEWS: Right to water and sanitation is legally binding, affirms key UN body, https://news.un.org/en/story/2010/10/354542-right-water-and-sanitation-legally-binding-affirms-key-un-body (accessed 10 July 2018).

2. Development and Protection of the Human Right to Water on Regional Levels

The following will illustrate the development and protection of the human right to water within the systems of the Council of Europe, the European Union, the Inter-American system and the African Union.

a. Council of Europe

Within the Council of Europe framework, the human right to water has been recognized through political means as well as by the European Court of Human Rights. In 2001, the Committee of Ministers passed a recommendation on a European Charter on water resources, which grants everyone the right to "a sufficient quantity of water for his or her basic needs",[54] explicitly including "the right to a minimum quantity of water of satisfactory quality from the point of view of health and hygiene."[55] In later years, the Parliamentary Assembly as well drafted two resolutions related to the right to water. In 2009, the threats of water shortage in the Mediterranean Basin due to climate change led to a resolution, in which the Assembly stressed "that access to water must be recognised as a fundamental human right because it is essential to life on earth and is a resource that must be shared by humankind."[56] In 2016, in the context of water deprivation of inhabitants of frontier regions of Azerbaijan, the Assembly adopted a further resolution, in which it reaffirmed and strengthened its former stance by reminding member states of the importance of the right to water for life and health, stating that it is a precondition for other human rights with state obligations to secure access to water.[57] While neither instruments are legally binding, the Committee of Ministers and the Parliamentary Assembly both assume important roles in the Council of Europe. The Committee of Ministers is comprised of the foreign ministers of the member states,[58] while the Parliamentary Assembly

[54] Council of Europe, Committee of Ministers Recommendation (2001) 14 E, 17 October 2001, Article 5.
[55] Ibid.
[56] Council of Europe, Parliamentary Assembly Resolution 1693, 2 October 2009, p. 2; and See Council of Europe, Parliamentary Assembly Report Doc. 12004, 14 September 2009, Explanatory memorandum by Mr Marquet, Rapporteur, Nos. 5, 7 ff., 10.
[57] Council of Europe, Parliamentary Assembly Resolution 2085, 26 January 2016, p. 1.
[58] Statute of the Council of Europe, 5 May 1949, Article 14.

unites representatives of the member state's national parliaments, thereby presenting a forum for political debate which concerns 830 million Europeans.[59] Contrary to the Committee of Ministers' Recommendation, the mentioned Assembly Resolutions are restricted in scope, since they are intended to address specific situations of crisis. However, the European Court of Human Rights has added to the protection of the right to water in its case law. Although the ECHR holds no mentioning of a right to water, it has occurred in rulings through interpretative measures.[60] While the above-mentioned political instruments mostly connect the right to water to the rights to health and life, the Court noticeably does not base water-related violations on either of those rights.[61] The reason for this is that the Court largely deals with access to safe water in the context of environmental protections, which themselves have been interpreted to fall under the right to respect for private and family life in Article 8.[62] In this domain, the Court has found violations, where water has been contaminated and where the applicants were directly and seriously affected in addition to being able to show a causal link between the environmental harm and Article 8.[63] The Court has also found violations of Article 3 in cases concerning either the deprivation or poor quality of water for detainees. To reach the threshold of Article 3, violations were found where an impaired access to water has led to a degrading treatment.[64] The Court still has potential to broaden the right to water. In this connection it can be expected that the Court may make use of the right to life and health as well as the right to property in the future.[65]

[59] Ibid, Article 22, 25; and Council of Europe: The Parliamentary Assembly in Brief: http://website-pace.net/en_GB/web/apce/in-brief (accessed 21 November 2018).
[60] Braig in Water Policy: The European Court of Human Rights and the right to clean water and sanitation, p. 285.
[61] Ibid, p. 299.
[62] Ibid, p. 292; See European Court of Human Rights, judgment of 4 September 2014, Dzemyuk v. Ukraine, Application no. 42488/02, pp. 77, 79.
[63] See European Court of Human Rights, Dzemyuk v. Ukraine, above, p. 92; and European Court of Human Rights, judgment of 10 February 2011, Dubetska and Others v. Ukraine, Application No. 30499/03 p. 156; and Braig, Supranote 60, p. 293.
[64] See European Court of Human Rights, judgment of 2 December 2008, Tadevosyan v. Armenia, Application No. Application no. 41698/04, pp. 25, 53-58; and Braig, Supranote 60, p. 296.
[65] Braig, Supranote 60, p. 299.

b. European Union

The debate around the right to water in the European Union gained new momentum when the Citizens Initiative *right2water* attained almost 1.9 Million signatures supporting three primary demands directed at EU-institutions. The initiative called for basic water and sanitation provision for all EU-citizens, the exclusion of water from the single market as well as market liberalization and increased efforts of EU-initiatives to achieve universal access to water and basic sanitation. The assumption of the right to water and sanitation presenting a human right thereby forms the basis of the initiatives' campaign.[66]

Issues of water in the European Union are primarily connected to water management and market integration as well as access to water for marginalized groups such as low-income households and minorities.[67] The goal of the initiative is the implementation of new legally binding regulations concerning the primary demands to add to and renew existing frameworks on the EU-level.[68] The initiative further demands the legal recognition of water as a human right in light of EU-members states abstaining to this on the UN-level.[69] Although the EU-Directive of 1998 obliges states "to ensure that water intended for human consumption is wholesome and clean"[70] and dictates quality standards and monitoring mechanisms,[71] it does not explicitly recognize the human right to water.

After the initiative presented the EU with the collected signatures, a debate on the matter was held in the European Parliament,[72] followed by a response of the European Commission a

[66] See Right2Water initiative, https://www.right2water.eu/ (accessed 10 July 2018).
[67] See European Commission Proposal for a Diractive of the European Parliament and of the Council on the quality of water intended for human consumption, 1 February 2018, COM (2017) 753 final, p. 23.
[68] See Right2Water Initiative, Press Release: "Commission lacks ambition in replying to first European Citizens' Initiative", 19 March 2014, https://www.right2water.eu/news/press-release-commission-lacks-ambition-replying-first-european-citizens%E2%80%99-initiative (accessed 10 July 2018).
[69] Heinrich Böll Stiftung: Ein Paradebeispiel unter der Lupe: Die Europäische Bürgerinitiative "right2water", 6 September 2013, https://www.boell.de/de/2013/09/06/ein-paradebeispiel-unter-der-lupe-die-europaeische-buergerinitiative-right2water (accessed 10 July 2018).
[70] European Union Council Directive 98/83/EC, 3 November 1998, Art. 4 No. 1.
[71] See Ibid, Articles 5, 7.
[72] See European Parliament News: Right2Water urges privatisation ban in first EU Citizens' Initiative debate, 17 February 2014, http://www.europarl.europa.eu/news/en/press-room/20140217IPR36208/right2water-urges-privatisation-ban-in-first-eu-citizens-initiative-debate (accessed 10 July 2018).

month later, in which it declared its commitment to taking concrete steps towards achieving the initiative's goals.[73] Although this was presented as a positive reaction to the initiative by the body itself, the Vice president of the initiative expressed his disappointment over the Council's failure to actively propose legislation for the matter.[74] In reaction to the perceived insufficient response, the European Parliament passed a resolution, in which it repeatedly referred to the status of the right to water as a human right.[75] A specific request in the resolution is to pass and possibly alter legislation "that would recognize universal access and the human right to water"[76] as well as to include the right to safe drinking water into the Charter of Fundamental Rights of the European Union.[77] The parliament further refers to the UN[78] and to the role of the special rapporteur[79] and emphasizes that the right to water it is not only an established human right under UN law, but also one endorsed by European Union citizens.[80] The parliament lastly reaffirms the nature of the right to access to drinking water as a human right with corresponding state obligations.[81]

The explanatory memorandum of the following proposal for a new Directive by the Council and Parliament in 2018 consequently acknowledges the right to water and sanitation as a human right and views this as established under international law.[82] The proposal includes a new provision regarding "access to water intended for human consumption" and stipulates the obligations for member states to improve the access to drinking water and to ensure the former for marginalized groups.[83] Even though the obligations include the promotion of certain

[73] European Commission, Press Release IP/14/277, 19 March 2014.
[74] Right2Water Initiative, Press Release "Commission lacks ambition in replying to first European Citizens' Initiative", 19 March 2014, https://www.right2water.eu/news/press-release-commission-lacks-ambition-replying-first-european-citizens%E2%80%99-initiative (accessed 10 July 2018).
[75] See European Parliament Resolution P8_TA (2015) 0294, 8 September 2015, no. 9, 10, 15, 16, 18, 39, 46, 59, 64, 78, 88, 89, 92, 104.
[76] European Parliament Resolution, Supranote 75, lit. T, No. 10.
[77] Ibid.
[78] Ibid, No. 15.
[79] Ibid, No. 16.
[80] Ibid, No. 39.
[81] Ibid, No. 78.
[82] European Commission Proposal, Supranote 67, pp. 12, 13.
[83] See ibid, p. 22 f.

types of water, such as tap water as to avoid bottled water,[84] the proposal fails to mention a linkage to the European single market, therefore disregarding this demand by the initiative.

However, the European Union Parliament, as a democratically legitimatized body, established its view, that the right to water exists in international law and firmly recognized the human right on several occasions within the European Union Frameworks and the efforts made to elevate the legal status of the right to water to an explicit human right shows that it is recognized on the European supranational level.

c. Inter-American System

The Inter-American System has similarities to the Council of Europe as well as to the EU system in terms of the human right to water. A parallel to the EU is that a debate concerning the right to water in the Inter-American system has been brought into its sphere from the outside, similar to the efforts of the EU citizens' initiative. In 2015, several NGOs in cooperation with law firms and universities,[85] requested a hearing with the Inter-American Human Rights Commission on the topic of the right to water in the US. The authors of the request asked the IACHR to address violations in the US, which occur because of access to clean water issues resulting from shut-offs or contamination of water as well as affordability issues.[86] The request thereby points to a disproportionate effect on marginalized groups, including Latino communities in California[87] as well as indigenous peoples throughout the country.[88]

The IACHR, which granted the request for a first, as well as for a follow-up hearing,[89] urged the US in the latter to ameliorate the access to water for marginalized groups. Hereby it

[84] European Commission: Press conference Statement by Commissioner Karmenu Vella on the Drinking Water Directive 1 February 2018: https://ec.europa.eu/commission/commissioners/2014-2019/vella/blog/press-conference-statement-commissioner-karmenu-vella-drinking-water-directive_en (accessed 3 February 2018).
[85] See US Human Rights Network Hearing Request of 28 July 2015, https://www.ushrnetwork.org/sites/ushrnetwork.org/files/unitedstates.ushrn_.righttowater_1.pdf, p. 17.
[86] Ibid, pp. 4, 6.
[87] Ibid, p. 1.
[88] Ibid, pp. 9 ff.
[89] See US Human Rights Network Press Releases https://www.ushrnetwork.org/events/iachr-hearing-right-water-americas; and https://www.ushrnetwork.org/our-work/projects-campaigns/previous-projects-campaigns/iachr-regional-hearing-rights-water (accessed 20 November 2018).

dismissed arguments of US representatives claiming to have no obligations under international law in want of ratification of the ICESCR. The Commissions' view is that the nature of the right to water as a human right itself calls for action regardless of treaty ratifications.[90] In 2018, it has again urged the US to remedy human rights issues, this time regarding Puerto Rico, by ensuring basic access to water and sanitation.[91] The Commission has further considered the right to water in a report on indigenous women in the Americas, indicating connections of deprivation of safe water with health issues and asking member states to adopt measures, which ensure full access to water of indigenous women.[92]

The Inter-American Court of Human Rights has likewise dealt with the right to water. Although the Inter-American frameworks do not mention the human right to water in an explicit manner, it has been relevant in the Court's case law.[93] In parallel with the ECtHR, the IACtHR has found the lack of sufficient water for drinking and personal hygiene in detention settings to constitute an element of the right to humane treatment and has accordingly found violations of Article 5 (1), (2) of the American Convention on Human Rights.[94] Outside of detention settings, the Court was confronted with water-related issues in the context of indigenous peoples in vulnerable conditions. Here, the Court found the failure to provide sufficient water and food to these groups to present a violation of the right to life under Article 4 of the Convention.[95] It has even specified that access to quality of water is an element of a decent life and the guarantee of the right to life.[96] The right to water is therefore recognized within the Inter-American system,

[90] Human Rights Brief: Human Rights and Access to Water in the United States, Inter-American Commission Hearings, http://hrbrief.org/hearings/human-rights-and-access-to-water-in-the-united-states/ (accessed 20 November 2018).
[91] OAS Press Release No. 004/18, 18 January 2018, http://www.oas.org/en/iachr/media_center/PReleases/2018/004.asp (accessed 20 November 2018).
[92] IACHR Report of 17 April 2017, OEA/Ser.L/V/II, pp. 101, 106, 207, 212, 231.
[93] See Murillo in Anuario Columbiano de Derecho Internacional: The Right to Water in the Case-Law of the Inter-American Court of Human Rights.
[94] See Inter-American Court of Human Rights, judgement of 1 Februar 2006, López-Álvarez v. Honduras, pp. 104, 108, 113; and judgement of 23 November 2010, Vélez Loor v. Panama, pp. 197, 198, 216.
[95]See Inter-American Court of Human Rights, Judgment of 17 June 2005, Indigenous Community Yakye Axa v. Paraguay, para. 176.
[96] Inter-American Court of Human Rights, Judgment of 24 August 2010, Indigenous Community Xákmok Kásek v. Paraguay, para. 195.

whereby the commission appears to treat its existence as a given, while the Court has mainly derived a human right to water from the right to life.

d. African Union

In the African Union, the right to water has different sources, namely the African Commissions' communications, its resolutions and specified treaties. The case law of the African Commission has mainly located the right to access water within the right to health under Article 16 of the African Charter,[97] which it explained to be rooted in its view, that safe and potable water is an element, which determines health.[98] The Commission has furthermore clarified its opinion that a combination of the right to health in Article 16, the right to property in Article 14 and the protection of the family in Article 18 (1) creates a right to shelter or housing, although not explicitly set out by the Charter.[99] In turn, the right to housing is deemed to include the right to access to safe drinking water in accordance with the Principles and Guidelines on the Implementation of Social and Cultural Rights in the African Charter.[100] Beyond this, the guidelines acknowledge that the right to water and sanitation itself is an implicit right to the Charter via a combination of the Articles 4, 5, 15, 16, 22 and 24 of the Charter, thereby adding the right to life in Article 4, the right to the respect of dignity in Article 5, the right to work in Article 15 as well as the individual and collective right to economic, social and cultural development in Article 22 to the formerly mentioned.[101] In addition to these major efforts in recognizing the right to water, the Commission has passed a resolution in 2015, in which it recalls its own human rights-based approach to natural resources as well as the UN Resolution recognizing the right to water. It also calls on African Union States to "meet their obligations

[97] See African Commission, Communication No. 25/89-47/90-56/91-100/93, 1995, Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah, p. 47; and Communication No. 79/03-296/05, 2009, Centre on Housing Rights and Evictions (COHRE) v. Sudan, pp. 209 f.
[98] African Commission, Communication No. 79/03-296/05, above, pp. 209 f.
[99] Ibid, p. 60.
[100] African Commission: The Principles and Guidelines on the Implementation of Social and Cultural Rights in the African Charter, p. 78.
[101] Ibid, pp. 87 ff.

in providing clean drinking water for all their populations."[102] Explicit obligations for states to ensure the provision of water only exist in treaties in relation to children[103] and women.[104]

3. Conclusion

While most forms of recognition are of political nature, a trend towards the legal recognition of the right to water transpires when viewing the international and regional developments. This is partly the result of a willingness to battle issues related to water, which is best visible in the EU and the Inter-American system, where the human rights language is used to attribute urgency to the regional struggles. The same is true for the international level, where the development of the right to water seems to be in response to water scarcity and its corresponding need to move towards sustainability. The right to water of women, children and persons with disabilities is protected in specific treaties, whereby the effect of its different forms remains to be explored. Chapter 2 serves to examine the question of the normative content of the right to water more closely, while taking into account competing considerations as well as practical implications.

II. The Normative Content of the Right to Water as a Human Right

Defining the normative content of the right to water is difficult for several reasons. As shown, it has different sources and is rarely found as an explicit right in international law, which can hinder a unanimous understanding of the right's content. Further, its conceptualization as a right remains debated, which bears complications in respect to the separation of its scope from that of other human rights. This will be illustrated in the following while taking into account conflicting considerations as well as implications for marginalized groups.

[102] African Commission on Human and People's Rights: Resolution on the Right to Water Obligations, ACHPR/Res.300 (EXT.OS/XVII) 20.
[103] African Charter on the Rights and Welfare of the Child, 1990, Art. 14 No. 2 lit. c.
[104] Protocol to the African Charter on the Rights of Women in Africa, 2003, Art. 15 lit. a.

1. Normative Content: Foundations, Outlines and Uncertainties

The right to water has different sources and only finds explicit international recognition within the CEDAW and the CRC, where it is formulated in vague terms. As the CESCR's General Comment No. 15 has elaborated the most on the right to water, it has assumed an important role in internationally defining its normative content.[105] In relying on said document, the main aspects of the right to water are questions of its quality, quantity (availability) and accessibility.[106]

The accessibility of water includes physical accessibility, economic accessibility, non-discriminatory accessibility as well as access to information in respect to water.[107] The physical accessibility bears considerations of distance to water, determining that water must be within an acceptably close proximity to households, educational institutions or workplaces.[108] Economic accessibility means that water must be affordable for all, whereby the Comment does not elaborate further than stating that charges for water cannot compromise the realization of other human rights.[109] In addressing the non-discrimination angle, the General Comment specifies that the access to water must include "the most vulnerable or marginalized sections of the population."[110] In similarly vague terms, the quantity of water having be available for individuals must be "sufficient and continuous for personal and domestic uses."[111] Water further must be safe and must not present a threat to health, whereby its color, taste and odor have to be acceptable.[112] In determining both, the quantity and quality of water necessary, the Comment refers to WHO standards.[113] Generally, the WHO guidelines on drinking water

[105] McGraw in Loyola University Chicago International Law Review: Defining and Defending the Right to Water and Its Minimum Core, p. 149.
[106] See UN CESCR General Comment No. 15, p. 12, where the question of quantity is subsumed under "availability".
[107] Ibid, no. 12 c.
[108] Ibid, no. 12 c (i).
[109] Ibid, no. 12 c (ii).
[110] Ibid, p. 12 c (iii).
[111] Ibid, p. 12 (a).
[112] Ibid, p. 12 (b).
[113] See Ibid, p. 12 (a),(b).

quality consider drinking water as safe when it "does not represent any significant risk to health over a lifetime of consumption, including different sensitivities that may occur between life stages". [114] Specific considerations thereby regard microbial, chemical and radiological aspects.[115]

While the Comment roughly breaks down the right to water into the mentioned elements, it fails to create a concrete scope for the right. As illustrated above, the ICESCR does not include an explicit right to water. Therefore, the Committee bases the right to water on the right to an adequate standard of living and the right to the highest attainable standard of health. The CESCR does not give its explicit opinion on whether the right to water is derived from an existing right, as it deems this question to be meaningless, considering the connection of the right to water with other rights.[116] The drafting of the General Comment, however, shows that it intended to grant the right to water express recognition as an independent right.[117] For this, the Committee underlines the necessity of water for the health and sheer existence of human beings, observing that without it, other Covenant rights cannot be realized, such as the rights to food, health, work and various cultural rights.[118] It additionally links the right to water to human dignity, which pays regard to the importance of water in leading a dignified life.[119] Thus, the Committee does not only relate the right to water to the determined legal basis in the Covenant, but also to the rights to health, food, life and dignity. This connectivity between the right to water and other rights provides an opening for the question of whether water is an individually standing right itself or a derivative right.[120] While the linkage to other rights is not contested, the General Comment gives no clarification on the result of this connection.[121] Whether it is an

[114] WHO: Guidelines for Drinking Water Quality, Fourth Edition, 2011, p. 1.1.
[115] See Ibid, pp. 1.1.2 ff, 1.1.4 ff., 8.4.4 ff.
[116] Tully, Supranote 8, p. 42
[117] Ibid.
[118] Ibid, no. 6.
[119] Ibid, no. 1, 11.
[120] Donoho in ILSA Journal of International and Comparative Law: Some Critical Thinking about a Human Right to Water,p. 99.
[121] Cahill, Supranote 6, p. 293.

independent or derivative right is not only relevant for the determination of the scope, but also for corresponding state obligations.[122] Following the assumption of water being a derivative right implies the subordination of the right to water to the hierarchically superior right it is being derived from and necessitates a violation claim of the latter.[123] This causes the problem, that the scope of the right varies in accordance with the case and the primary right it is being derived from, which can result in fragmentation.[124] Therefore, an understanding of the normative content of the right to water requires an examination of the correlations and overlaps of the right to water with other rights.[125]

Firstly, water strongly connects to the right to health, as especially the quality and quantity of water relate to a healthy life. It is therefore imaginable, that cases of health issues induced by water-related factors can be remedied by claiming a violation of the right to health.[126] At the same time, the right to water can be infringed on through discriminatory practices without causing health issues, so that the right to water has an application within as well as outside of the scope of the right to health.[127] A similar situation exists in relation to the right to food. The right to adequate food is not only an element of the right to an adequate standard of living but is also specifically tied to water in General Comment No. 15, which emphasizes the importance of water for food provision and agriculture.[128] It moreover mentions water for food preparation as a domestic use, for which water must be available.[129] The question arising from this primarily one of which quantity must be provided under the right to water. A distinction to make here is that water, which is necessary for agricultural or irrigational purposes in the field of food production, is covered by the right to food, as the uses of water in these

[122] See Bluemel in Ecology Law Quarterly: The Implications of Formulating a Human Right to Water, pp. 968 ff.
[123] Shelton: The Oxford Handbook of International Human Rights law, p. 528.
[124] Bluemel, Supranote 122, p. 968.
[125] See Cahill, Supranote 6, pp. 392 ff.
[126] Ibid, pp. 395 ff.
[127] Ibid, p. 396.
[128] UN CESCR General Comment No. 15, p. 7.
[129] Ibid, p. 12 (a).

cases ultimately aim at realizing the right to food.[130] An overlap of the rights to water and food can be seen, where water is used for food preparation or domestic irrigational and agricultural purposes.[131] In these instances, a claim can rest upon the right to water, where water usage is not connected to the production of essential foodstuffs.[132] Water used for cooking and hygiene as well as other domestic uses are thereby brought into the scope of the right to water in General Comment No. 15.[133] The CRC also mentions the right to food alongside the right to water,[134] whereby the separate mentioning of both rights indicates exclusive scopes.[135] The framing of the CRC entails a state obligation to combat malnutrition, which includes the provision of clean drinking water.[136] While this is a rare case of explicit mentioning, the vague formulation does not further the definition of the normative content of the right to water. The Committee merely acknowledges the existence of the treaty provision, without further clarification, neither in this regard nor in regard to the effects of the linkage between the right to water and the right to food in general.[137] The same discrepancy in elaboration is true for the relationship between the right to water with the right to life, which is additionally complicated due to the nature of the right to life as a civil and political right in Article 6 (1) of the ICCPR,[138] which itself has a somewhat debated scope. While the link between water and life is self-evident, the scope of protection depends on the state obligations created by the right to life. Briefly explained, the right to life is subject to different positions, which either view its scope as being narrow or broad.[139] The narrow view implicates that the right to life solely protects against state interferences, while the broader view assumes positive obligations of the state to provide basic needs to protect life.[140]

[130] See Winkler, Supranote 21 p. 130.
[131] See Cahill, Supranote 6, p. 396; and Bluemel, Supranote 122, p. 970, and UN CESCR General Comment No. 15, p. 7.
[132] Ibid.
[133] UN CESCR General Comment No. 15, p. 2.
[134] Convention on the Rights of the Child, above, Article 24 No. 2 lit. c.
[135] Cahill, Supranote 6, p. 397.
[136] CRC, above, Art. 24 No. 2 lit. c.
[137] UN CESCR General Comment No. 15, p. 4.
[138] International Covenant on Civil and Political Rights, 1996, Art. 6 (1).
[139] See Cahill, Supranote 6, p. 397.
[140] Ibid.

The broader view is supported by the Human Rights Committee's General Comment No. 6 on the right to life, which assumes that states have to adopt positive measures for its protection.[141] The latter view results in an obligation of the state to provide water as a basic need, in quantity and quality that is necessary to maintain life.[142] When following the narrow view, the right to life includes at a minimum that the state may neither intentionally nor arbitrary deny water necessary for survival.[143] However, violations of the right to water, which do not result in the loss of life, lead to the same observation as above, that the rights have overlapping as well as different applications. Where water deprivation leads to death, the more likely claim will nevertheless remain a violation of the right to life, as it is the most fundamental right.[144]

The complication of establishing where the normative content of the right to water begins and the normative content of the rights it is being derived from ends, is possibly best seen when considering its normative foundations of Articles 11, 12 (1) ICESCR. To this effect, General Comment No. 15 states that "[t]he right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival."[145] The right to water is presented as a condition for and part of the right to an adequate standard of living as well as the rights to health and life. The seeming assumption of the right to water as an implied right is thereby averse to the otherwise suggested autonomous right to water.[146]

All of the above exemplifies that, while water is derived from Articles 11, 12 (1) of the Covenant and has overlapping applications with other mentioned rights, it simultaneously has characteristics of an independent right with its own normative content. As it can neither be

[141] Human Rights Committee General Comment No. 6, 1982, pp. 1, 5.
[142] Kirschner in Max Planck Yearbook of United Nations Law: The Human Right to Water and Sanitation, pp. 459 ff.; and Cahill, above, 397.
[143] Cahill, Supranote, p. 397.
[144] Ibid; and Kirschner, Supranote 142, p. 460.
[145] UN CESCR General Comment No. 15, p. 3.
[146] Cahill, Supranote, p. 395.

categorized as solely the one or the other, it must qualify as having a "unique status".[147] As this leaves open questions of concrete state obligations and the right's exact scope, especially regarding affordability aspects, the next part will examine possibilities to reach a more precise definition.

2. Scope of Protection: Minimum Core and State Obligations

To reach a more precise conclusion about the normative content of the right to water, the following explores its minimum core and corresponding state obligations arising from both, the minimum core and the concept of progressive realization.

a. The Concept of a Minimum Core

In understanding the purpose of a minimum core approach, it is necessary to regard the nature of obligations towards socio-economic rights. According to the ICESCR, the rights set out therein require progressive realization within the maximum available resources of the respective state.[148] Its ratio lies in granting more liberty to states in fulfilling these resource-intensive rights and stands in contrast to civil and political rights, which require immediate fulfillment.[149] As the obligation to progressively realize a right blurs the lines between a state's efforts to fulfill a right and inability or unwillingness to do so, the minimum core approach can be utilized to determine state compliance.[150] When considering that socio-economic rights operate on a scale with different levels of realization, the minimum core is placed on the low end of the scale, whereas a full realization of the right is placed on the high end of the scale, with varying degrees of fulfillment in-between.[151] The minimum core thereby consists of the most important elements of a right, which are superior in urgency to others, and without which

[147] Ibid.
[148] International Covenant on Economic, Social and Cultural Rights, above, Art. 2 (1).
[149] See McGraw, Supranote 105, p. 153; and International Covenant on Civil and Political Rights, above, Art. 2 (1).
[150] McGraw, Supranote 105, p. 154.
[151] See Winkler, Supranote 21, p. 120.

the right is rendered meaningless.[152] The concept accordingly requires an immediate realization of the minimum core of the right, which, although seemingly contradictive, works together with the principle of progressive realization. The minimum core is merely the minimum level of protection that a state must grant immediately in respect to a right, whereby its obligation to progressively move towards its full fulfillment remains.[153] The minimum core approach has been suggested to have emerged from the German Basic law, which determines, that the essence (*Wesensgehalt*) of the set out fundamental rights cannot be limited,[154] thus acknowledging the existence of a basic content.[155] It is officially accepted and applied by the CESCR, which expresses its view in General Comment No. 3 "that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party [….] If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être."[156] While the concept meets growing international consensus,[157] critics view it as a temptation for states to not move beyond the protection of a right's minimum core.[158] As explained above, the obligation to progressively realize the Covenant right exists in parallel to the immediate minimum core obligation, so that this fear is unsubstantiated from a normative perspective. The minimum core obligations of the right to water are shown below within the larger context of state obligations.

[152] Ibid, p. 119.
[153] Winkler, Supranote 21, p. 120.
[154] Basic Law of the Federal German Republic, 1949, as amended by 2017, Art. 19 (2).
[155] McGraw, Supranote 105, p. 155; and Winkler, Supranote 21, p. 120.
[156] UN CESCR, General Comment No. 3: The Nature of States Parties' Obligations, 1990, p. 10.
[157] Winkler, Supranote 21, p. 117.
[158] Winkler, Supranote 21, p. 123.

b. State Obligations: Progressive realization and Minimum Core Obligations towards the Right to Water

International law establishes general state obligations as well as those connected to the right to water. Both, socio-economic as well as civil and political rights, imply the general state obligations to respect, protect and fulfil the relevant rights. When distinguishing between positive and negative state obligations, the obligation to respect belongs to the latter and the obligations to protect and fulfil to the former type of obligation.[159]

The obligation to respect entails that states must refrain from interfering with the enjoyment of a right. Related to the right to water, this includes that a state must refrain from polluting water sources or limiting access to water services.[160] In its obligation to protect, the state must prevent third parties from interfering with a right. This obligation bears the significance that it obliges states, inter alia, to protect rights-holders from violations through actions of corporations. To preventively act, the state must adopt measures necessary to protect rights, which it can do in the form of legislation or other measures.[161] Hereto also belongs that the state must enforce contract clauses it has with private corporations regarding investment promises or the compliance with quality standards.[162] The obligation is therefore of further relevance, where the state does not sanction violations of the such, leaving corporations unpunished.[163]This can be applied, where private entities carry out water supply or in other ways interfere with water sources or access. Lastly, the CESCR has subdivided the obligation to fulfil into the obligations of the state to facilitate a right, meaning it must assist individuals in realizing it, to promote the right, meaning that steps have to be taken to educate society on water-related issues, and to provide the right, which implies that the state has to fulfil the right

[159] Koch: Human Rights as Indivisible Rights- The Protection of Socio-Economic Demands under the European Convention on Human Rights, p. 17.
[160] UN CESCR, General Comment No. 15, p. 21.
[161] Ibid, p. 23.
[162]Bohoslavsky/Martin/Justo in International Law Review Colombia: The State Duty to Protect from Business-Related Human Rights Violations in Water and Sanitation Services, p. 82.
[163] Ibid.

for those, who are incapable of doing it themselves.[164] Among other things, this includes the adoption of price policies to make water affordable for all, if necessary through free or low-cost policies.[165] The Committee generally assumes the provision of water (services) to those in need to present a special obligation of the state.[166] To remove de facto discrimination, it must take steps, such as ensuring water allocation and investing in water services, which go beyond only benefitting privileged parts of society.[167]

As previously explained, the principal state obligation in general terms is to progressively realize the right to water.[168] Consequently, retrogressive measures are prohibited, if the state is not able to prove that the retrogressive step was the only and justified alternative to other measures.[169] While violations can occur by acts of commission or omission, a violation is only constituted where the state is unwilling to fulfill the right. Where the state is unable within its maximum available resources in accordance with Article 2 (1), non-realization of a right cannot present a violation.[170] This does not mean that a state can entirely refrain from taking measures. On the contrary, even where a state has little resources, it is not free from the obligation to take steps towards the realization of the right.[171]

Apart from the obligation to progressively realize the right to water, the Committee has established minimum core obligations. In accordance with the concept, these must be given immediate effect.[172] The first minimum core obligation of the state is "to ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease."[173] Among others, further core obligations are to ensure access to water for

[164] UN CESCR, General Comment No. 15, p. 25.
[165] Ibid, pp. 26 f.
[166] Ibid, p. 15.
[167] Ibid, p. 14.
[168] International Covenant on Economic, Social and Cultural Rights, 1976, Art. 2 (1).
[169] UN CESCR, General Comment No. 15, p. 19.
[170] Ibid, pp. 41-43.
[171] Ibid, 11.
[172] Ibid, p. 37.
[173] Ibid, p. 37 (a).

disadvantaged and marginalized groups on a non-discriminatory basis,[174] to adopt relatively low- cost targeted water programs[175] and to take measures to prevent, treat and control water-related diseases.[176] The minimum core obligations reflect the core content of the right, which is the protection of basic needs.[177] The obligation to provide a minimum amount of water correlates to domestic uses. This is in line with the prioritization of uses in General Comment No. 15, which acknowledges the many purposes of water and determines that "priority in the allocation of water must be given to the right to water for personal and domestic uses."[178] The latter have been established to include water for drinking, hygiene and cooking purposes.[179] The core obligations of the right to water as encompassing the protection of basic needs reflects its history of emergence. As seen above, the right to water language has been largely used to shed light on water-related issues. Hereby, the right has been historically tied to health and survival, as every step of its recognition, including its justification and the rights it has been paired with, show.[180] Moreover, international standards used to outline the normative scope of the right to water, such as by the WHO, always connect technical factors like water quantity and quality to maintaining life and health.[181] These points of reference are in turn picked up by other actors involved in evolving the right to water, such as the CESCR. In this respect, it is unsurprising that the basic needs rhetoric, which was used by the Human Rights Committee in clarifying the scope of the right to life,[182] has found application in defining the minimum core of the right to water. The recurring emphasis on the tie between the right to water with life and health suggest that its scope must be interpreted along the lines of their protection. The exact

[174] Ibid, p. 37 (b).
[175] Ibid, p. 37 (h).
[176] Ibid, p. 37 (i).
[177] McGraw, Supranote 105, p. 158.
[178] UN CESCR General Comment No. 15, p. 6.
[179] Ibid p. 2.
[180] For further elaboration See McGraw, Supranote 105, pp. 158 f.
[181] See Howard/Bartram: Domestic water quantity, service level and health: what should be the goal for water and health sectors, WHO, 2002, Table S1; and WHO: How much water is needed in emergencies, 2013, pp. 1, 7; and WHO: Guidelines for Drinking Water Quality, above, pp.
[182] Human Rights Committee General Comment No. 6, above, pp. 1, 5.

implications for the water quantity and affordability for minimum core obligations and the progressive realization of the right are briefly outlined in the following.

c. Implications for Quantity and Affordability

The sufficient amount of water is an element that is constituted in line with international standards and expert opinions. According to the minimum core obligations of the right to water, the minimum amount provided by the state must be able to fulfill basic needs. To this effect, international standards have set minimum amounts of water, which are needed to comply with different levels of protection. These must be seen as reference points rather than rigid regulations, since the amount required to meet different levels of need have to be put in relation to the respective individuals and their circumstances.[183] The determination of sufficiency therefore demands a contextualized approach in every case.[184] General amounts of reference as set by experts range between 20-100 l per capital per day. 20 l per capita per day thereby ensures water for consumption and only very basic hygiene, posing a high level of health concern.[185] As any amount lower than this would seriously threaten life, this must be the least amount to be provided in order to protect the minimum core of the right to water. However, even this is deemed as too low by some experts, which is especially true where an individual has higher needs due to illnesses, hot climate, pregnancy or other circumstances.[186] Only those, who have intermediate access to water of around 50 l per capita per day are estimated by the WHO to be subject to a low level of health concerns, while a minimum of 100 l per capita per day of water is deemed to serve all consumption and hygienic needs, thereby posing no threat to health.[187] An amount of 50 l per capita per day is able to fulfill more basic needs in terms of hygiene and

[183] Winkler, Supranote 21, pp. 131, 133; and McGraw, Supranote 105, 167.
[184] Ibid, p. 131.
[185] Howard/Bartram, Supranote 181, Table S1
[186] See Von Schnitzler: Democracy's Infrastructure: Techno-Politics and Protest after Apartheid, p. 184, where Peter Gleick's opinion is illustrated that the minimum amount of water for residents in Phiri, South Africa, should be set at 50 liters per person per day.
[187] Howard/Bartram, Supranote 181, Table S1.

other forms of consumption and is therefore higher on the scale of realization as the minimum core. In determining sufficiency of water, one must also refer to the interrelated rights. Especially health and dignity come to mind, which must be considered when determining water amounts for personal hygiene and cleaning. As 100 l per capita per day pose no threat to health, they serve as a reference point for an ideal amount of water.[188] The sufficiency of water therefore finds its bottom of the scale, hence minimum core, at the amount that protects life, with 20 liters as a rough indicator, whereby progressive realization should lead to the provision of higher amounts of water over time with its full realization at the top of the scale, which is roughly 100 l per capita per day.

In connection to water quantity protected by the scope of the right to water, a clarification is needed on whether this indicates an obligation for low-price or free provision of this quantity. It has already been established that the CESCR considers water provision at a low cost or for free as necessary, where the price would otherwise create access to water issues. In a report to the General Assembly, the former Special Rapporteur on the human right to water and sanitation has affirmed the notion, that the price of water can never hinder the realization of other rights.[189] Whereas supporters of privatization argue in favor of regulating water by attributing high prices on the market, the Special Rapporteur opposes the idea that a high price for water can be deemed affordable in dependence on the consumers' willingness to pay for it.[190] The suggestion is that a threshold to water pricing should exist, whereby this cannot be an absolute stare standard, but must be flexible depending on the aggrieved person and situation.[191] Just as the CESCR, the Special Rapporteur considers that, in instances, where even low prices for water cannot be afforded, the provision of it must be for free.[192] Existing thresholds deem water affordable, when its cost corresponds to 2-3 % of the household

[188] Winkler, Supranote 21, p. 134.
[189] UN General Assembly Report, A/HRC/30/39, p. 24.
[190] Ibid, p. 26.
[191] Ibid, p. 27.
[192] Ibid.

income.[193] To comply with this, the state might have the obligation to provide aid through public financing.[194] Hereby different forms of public aid are possible, such as income assistance, vouches or cross-subsidization.[195] In any case, water supply may not be cut-off and made unavailable, where the costs cannot be afforded, as this would be a clear interference with the right to access water.[196] Where the circumstances call for free water provision, the human right to water does not imply a free provision of unlimited amounts, but the minimum core amount that corresponds to the above-said.[197] Bringing together considerations of a minimum free basic provision for those in need with the obligations of the state to protect the right to water from violations through third parties, it must be pointed out, that private entities are often the cause for unaffordable water prices. As private entities are not subject to human rights obligations, the responsibility must be sought with the state. In these cases, the obligation to introduce and enforce legislation is important and could imply that the state imposes the legal obligation on the private entities to act in accordance with the outlined low- or free cost schemes, where necessary.[198]

3. Competing Considerations

Competing considerations of globally northern states as well as practical and ideological considerations concerning the recognition of the human right to water and its implications will

[193] See Human Rights Council and its mechanisms, https://www.ohchr.org/EN/Issues/Women/Pages/HRMechanims.aspx (accessed 15 July 2018).
[193] UN Development Programme, Human Development Report 2006 "Beyond scarcity: Power, poverty and the global water crisis", p. 97, which sets the threshold at 2 %; and Camdessus/Winpenny: Report of the World Panel on Financing Water Infrastructure, p. 19, http://www.worldwatercouncil.org/fileadmin/world_water_council/documents_old/Library/Publications_and_reports/CamdessusReport.pdf (accessed 20 November 2018).
[194] Ibid, p. 31.
[195] Winkler, Supranote 21, p. 138.
[196] Catarina De Albuquerque: Responses to Questions from Interactive Dialogue Human Rights Council, 24st session, p. 1 (d).
[197] Winkler, Supranote 21, p. 138.
[198] See Ibid, p. 139.

be briefly outlined below. Subsequently a special focus will be put on considerations of water ownership and commodification.

a. General Competing Considerations of Globally Northern and Wealthy States

As previously noted, the Resolution recognizing the right to water as a human right passed with 122 states voting in its favor. Among these were Bolivia, Brazil, Argentina, Mexico, Costa Rica, Colombia, Peru and Nicaragua as well as European Union States including Germany and France. Unlike these states, 41 members abstained from casting a vote, including powerful global players such as the USA, Canada, Japan, the UK and Australia. Delegations, external observers and legal scholars have given various explanations for this outcome.

In the case of the abstaining USA, its representative recognized the benefit of water for other human rights, but not the right itself, criticizing that the resolution draft lacked transparency, while Canada similarly expressed that the scope of the right to water has not been defined in the resolution. The underlying critique is to be understood as the normative content of the right to water being short of precision and creating ambiguity concerning obligations, a flaw which is also seen by others, which advocate for a clarification of the right.[199] A further issue of abstaining states was taken with the circumstance, that the resolution was not passed with a full consensus, a point which was seen as a reason to deny the recognition of the right by a number of other states, among them Australia, which considered consensus to be a crucial requirement.[200] Scholars have also interpreted the 41 abstentions to evidence a lack of global consensus[201] and contented that non-consenting states cannot be legally bound by the resolution.[202] Further substantial objections to the recognition of water as a human right were made by the UK, which opposed the idea of the right to water as a freestanding right by claiming

[199] See Mirosa/Harris in Antipode: Human Right to Water: Contemporary Challenges and Contours of a Global Debate, pp. 933, 934.
[200] See UN Press Release GA/10967, 28 July 2010, Statement of the Representative of Australia.
[201] Gupta/Ahlers/Ahmed in RECEIL: The Human Right to Water: Moving Towards Consensus in a Fragmented World, p. 298.
[202] See Donoho, Supranote 120, pp. 95, 102.

a lack of a legal basis altogether. In contrast, Nicaragua stated that the right to water was crucial for dignity and health and Argentina as well as Costa Rica explicitly acknowledged the existence of a state responsibility to provide water.[203] Colombia, also having voted in favor, recognized the right based on an interpretation of the Colombian Constitutional Court, which recognizes the right to drinking water solely when presenting a matter of life.[204]

In comparing states which have voted in favor of the resolution to those which have abstained, it can be observed that most of the abstaining States are such of wealth and political stability, being from the global north, which presumably have less issues with access to safe drinking water, while many of the states in favor of the resolution are from the global south, and as such developing countries and less wealthy. This is peculiar in a sense that providing safe drinking water can be expected to be less troublesome for wealthy, politically stable states, which in turn raises the question of why they have not voted in favor of the resolution and therefore recognition of the right to water as a human right.

For many states, a possible answer is the fear of an obligation of water resource redistribution on a domestic and international level.[205] Canada for instance, as a State rich of water resources, is concerned with a sovereignty loss over water, especially vis-à-vis the USA.[206] Concurrently, the recognition of water as a human right can also lead to criticism of states, who voluntary practice water export for money.[207] In the context of Canada this can also lead to criticism of the situation of the First Nations regarding access to water.[208] In Australia, water policies have been evolving towards a strong water market with emphasis on interests of

[203] See UN Press Release GA/10967, 28 July 2010, statements of the representatives of Nicaragua, Argentina and Costa Rica, https://www.un.org/press/en/2010/ga10967.doc.htm (accessed 21 November 2017).
[204] See ibid, statement of the representative of Colombia.
[205] Donoho, Supranote 120, p. 108.
[206] Barlow in Global Policy Forum: Access to water is most violated Human Right, July 21 2010, https://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/development-democracy-and-human-rights/49335-access-to-clean-water-is-most-violated-human-right.html (accessed 18 January 2018).
[207] Harnum in RECIEL: Deriving the Right to Water from the Right to Life, Liberty and Security of the Person: Section 7 of the Canadian Charter of Rights and Freedoms and Aboriginal Communities in Canada, p. 306.
[208] Ibid.

stakeholders others than the public,[209] providing the state with gross economic advantages,[210] which could present a motive to abstain in the vote. The UK has too taken steps to open the water market to competing water suppliers, claiming an effort to provide citizens with better water services, while the undertaking is estimated to procure the state with a large net benefit.[211]

For the cases of less wealthy states, it is conversely possible to argue, that it is easier for these to recognize the right to water and subsequently not fulfill it, than for more developed and resourceful states, which would be faced with greater pressure to give effect to the recognized right.[212] The flipside of this, as perceived by critics, is that states of the global south recognize such rights as a tool of gaining assistance of more developed nations.[213] Although the possibility cannot be excluded, this assertion ignores the real instances of crisis concerning water. An example for this the sponsor state of the resolution, Bolivia, which experienced a water war in Cochabamba in 2000 following water privatization and, as a consequence, low access rates and quality of water.[214] The motivation for many states to recognize the right to water as a human right is therefore the desire to elevate the pivotal need for water to a legal level, which reflects its significance. The provided cases of wealthier states conversely exemplify the existence of conflicting considerations of abstaining states with the recognition of water as a human right.

[209] Connell in Agriculture and Agricultural Science Procedia: Irrigation, water markets and sustainability in Australia's Murray Darling Basin, Vol. 4, 2015, p. 138; and Global Water Intel: Australian Reforms May Stimulate Water Privatization, https://www.globalwaterintel.com/news/2018/23/australian-reforms-may-stimulate-water-privatisation (accessed 10 June 2018).
[210] See Crase/Pawsey/O'Keefe in Economic Papers: A Note on Contradictions in Australian Water policy, Vol. 32, No. 3, September 2013, p. 3 353–359.
[211] See The Telegraph: Government opens the floodgates to water market competition, 31 Marc 2017, http://www.telegraph.co.uk/business/2017/03/30/government-opens-floodgates-water-market-competition/ (accessed 18 January 2018).
[212] Sunstein in Syracuse Law Review: Why does the American constitution lack social and economic guarantees?, p. 15.
[213] Donoho, Supranote 120, pp. 103 f.
[214] Baer/Gerlak in Third World Quarterly: Implementing the human right to water and sanitation: a study of global and local discourses, pp. 1532,1535.

b. Practical and Ideological Criticisms of the Right to Water as a Human Right

Other arguments brought forward against the recognition and implications of the human right to water involve practical and ideological considerations, such as effectiveness and alternate solutions.

Firstly, it is possible to refrain from the human rights rhetoric and instead speak of a responsibility towards water resources. The reason for this is that the existence of a right attributes an individualistic dimension to water, ignoring the relations to those commonly dependent on it.[215] Leaving behind the rights language and viewing water as a responsibility implies that humans take care of water sources, which in turn benefits all of those who rely on it.[216] This approach focuses on sustainability issues and connections within the environment as well as between humans and the environment or other living beings.[217] Although this notion has a strong moral basis, as it calls on humans to use abilities and technological developments for the protection of the environment and of others,[218] the mere recognition of a responsibility does not seem equip to solve the complexity of issues.

When accepting the use of the legal language, it can be thought of whether environmental claims are preferable compared to human rights. In many cases, the right to water has overlapping points with environmental rights and sovereignty aspects, which might be better served in an environmental framework.[219] This could in turn be more conform with the state's political orientations, on which the regulations of environmental issues depend.[220] The disadvantageous result of this would be that it would rob individuals of the possibility to make individual claims, which also hinders justice development in the area.[221] It further does not

[215] Hiers: Water: A Human Right or a Human Responsibility?, pp. 482 f.
[216] Ibid.
[217] Ibid, pp. 485 f.
[218] Ibid, pp. 492 f.
[219] Huang in Florida Journal of International Law: Not Just Another Drop in the Human Rights Bucket: The Legal Significance of a Codified Right to Water, p. 360.
[220] Ibid.
[221] Ibid, p. 359.

address state obligations specifically connected to water, such as the provision of an adequate infrastructure.[222] Both illustrated alternatives fail to include those, who do not suffer from a lack of water directly due to environmental issues, but due to access issues. This puts those in rural areas and marginalized groups in a worse position, as it cannot address questions of redistribution or pricing of water. An imaginable path to realize the alternatives of responsibility and environmental framings could be to pair those notions with a human rights claim. This way the individual and common angles could be addressed.

Another approach is to simply categorize water as a need. For this, it has been argued that human rights do not arise solely due to a particular human dependence or need on a resource.[223] This view concludes that individual claims are not appropriate to fulfill the need, since issues around water are seen as having to be solved in a political process, in which the state can decide upon the handling of resources.[224] An explanation for the desire to translate the need for water into the human rights language is the attempt to use it as a tool against neoliberalism and its results of privatization and marketization of water.[225] Regarding this, it has been argued, that a human rights claim does not provide for an adequate measure, for it ignores the collective nature of the need for water.[226] Neoliberalism can moreover not be defeated by the recognition of water as a human right, for a human rights framing is not seen as excluding water from marketization.[227]

Moreover, human right to water claims are partly considered non-enforceable. In this context, the nature as a socio-economic right is brought forward, as it demands state action and presents a financial burden, which is assumed to become greater over the time due to water scarcity.[228] The vagueness of state obligations under international law is further relied on to

[222] Ibid, p. 360.
[223] Donoho, Supranote 120, p. 95.
[224] Ibid, p. 106.
[225] Baer/Gerlak, Supranote 214, p. 1531
[226] Ibid.
[227] Ibid.
[228] Donoho, Supranote 120, pp. 105, 109.

substantiate the claim that the emerged right to water is meaningless.[229] Hurdles to the enforcement are also seen in the lack of strong international enforcement mechanisms as well as in the fact that the transportation of water is complicated due to the heaviness of water and resulting high costs.[230] It is true that no single international enforcement mechanism exists for the right to water. However, different instruments with individual complaint procedures, such as in the CESCR[231] or CEDAW[232] as well as monitoring possibilities by the Human Rights Council[233] and other bodies exist and can be pursued within their scope of application.

c. Ownership, Commodification and its Support in International Law

As an introduction to the discussion of water commodification, considerations guarding water ownership and rights will be outlined as to illustrate the issues and debate surrounding water commodification as well as its support in international law.

(i) Water Ownership and Rights

Water ownership and rights dictate to whom and to which extent water ownership or rights are granted. Generally, these questions could either fall within the field of civil or public law. Under the theory of civil law, the ownership of water finds its root in the civil law itself.[234] According to the theory of public law, water falls within public law due to the assumption, that the state naturally has the power over water governance.[235] Consensus seems to exist, that water, as a natural resource, is owned by the state, which assumes control for the public.[236] This is in line with a General Assembly Resolution regarding natural resources, according to which "[t]he

[229] Ibid, p. 114.
[230] Beail-Farkas, Supranote 23, p. 792 and Donoho, Supranote 120, p. 111.
[231] See the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Art. 1, according to which communications concerning parties to the Protocol can be considered.
[232] See the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Art. 1.
[233] See Human Rights Council and its mechanisms, https://www.ohchr.org/EN/Issues/Women/Pages/HRMechanims.aspx (accessed 15 July 2018).
[234] Lei/Shamori in China Legal Science: Private-Public Duality of State Ownership of Water Resource, pp. 4 ff.
[235] Ibid, p. 5.
[236] Smith in Cardozo Journal of International and Comparative La: Water as a Public Good, pp. 297 ff.

right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned."[237] Therefore, water as a resource belongs to the state by virtue of its sovereignty. This is at least the case, where water sources contain considerable quantities of water, which bring the source under the umbrella of sovereignty and with it state ownership.[238]

Water as a natural resource can be further categorized as a common good (*res communis*), as being of open access, or as a public good.[239] A common good is such, that does not justify exclusive use, but is shared by a specific group forming a community.[240] An open access implies that there is no regulation in place, leaving water available to whomever, while the categorization as a public good means, that water is for public use, although managed by the state. [241] The latter is also referred to as the public trust doctrine and can be traced back to roman law, which dictated that "[b]y natural law these things are common to all: the air, running water, the sea, and as a consequence the shores of the sea."[242]

Since water resources are generally owned or managed by the state, private corporations gain access through legal means, constituting public-private relationships. The details of the transfer of rights depend on the water rights system in the relevant jurisdiction.[243]

The main legal systems are the doctrine of prior appropriation and riparian law. Under the theory of prior appropriation, water rights fall to the first possessor with no regards to the type of water,[244] giving priority to those, who have gained access to the water first.[245] Riparian law, which stems from the common law system, is in contrast to this and dictates that the person,

[237] UN General Assembly Resolution, No. 1803 (XVII) of 14 December 1962, p. 1.
[238] Smith, Supranote 236, p. 295.
[239] Distasto/Ciervo in Rivista Internazionale di Scienze Sociali: Water and Common Goods: Community Management as a Possible Alternative to the Public-Private Model, p. 143.
[240] Ibid, p. 147.
[241] Ibid, p. 146.
[242] Wiel in Harvard Law Review: Theories of Water Law, p. 530, quoting Institutes of Justinian.
[243] See Porcher/Saussier: Facing the Challenges of Water Governance, pp. 3 ff.
[244] Ibid, p. 531.
[245] Ibid, p. 534.

whose land the water is on, gains the right of water usage over it.[246] In the case of several land owners, the parties concerned share equal rights to the water, resulting in no prioritization.[247] In both instances of the riparian law doctrine, the right arising is restricted to a reasonable use of water.[248] In the US, a clear separation between the two systems can be seen, as riparian law prevails in the east, whereas western water law favors the doctrine of prior appropriation.[249] While riparian law is related to surface water, groundwater can have deviant regulations, although the trend shows a similar treatment to surface water.[250] Both doctrines present a tie to property, whereby the tie is stronger in the case of prior appropriation, through which exclusive rights can be gained, while riparian law solely grants a right to reasonable use.

A transfer of water rights to private entities can result from different manners. Some jurisdictions allow the transfer of water alongside the transfer of the property, on which the water occurs.[251] Where water stays within the property of the state and is not sold, the granting of water rights is possible through permit issuing for permanent use as well as a through leasing for temporary use.[252] A state can further entre into a concession agreement with a corporation, allowing for uses regarding water-related tasks. These are mostly concluded in connection with water and sanitation or sewage services by private providers.[253] Where cases concern companies associated with the bottled beverages industry, the state grants specific permits, e.g. allowing the withdrawal of water in a certain amount.[254] The permits hereby often have a specified time frame, which nevertheless can amount to many years. It is also possible that

[246] Singh: The Human Right to Water- From Concept to Reality, p. 87.
[247] Wiel, Supranote 242, p. 534.
[248] Teclaff in Natural Resources Journal: What You Have Always Wanted to Know about Riparian Rights, but were Afraid to Ask, pp. 40 f.
[249] Tarlok in Environmental Law: Western Water Law and the Challenge of Climate Disruption, p. 9 and Rozmarin in Nebraska Law Review: The Dual-System of Water Rights in Nebraska.
[250] Smith, Supranote 236, p. 302.
[251] For example, see Oregon Revised Statutes, Title 45, 2017, § 540.510.
[252] Broadbent/Brookshire et. al in Natural Resources Journal: Water Leasing: Evaluating Temporary Water Rights Transfers in New Mexico through Experimental Methods, p. 719
[253] See World Bank Group: Water and Sanitation Concession / BOT / DBFO, https://ppp.worldbank.org/public-private-partnership/sector/water-sanitation/concessions-and-bots (accessed 5 September 2018).
[254] See Court of Appeals of Michigan: Michigan Citizens for Water Conservation v. Nestle Waters North America Inc., 09 N.W.2d 174, 269, I p. 6.

permits are tied to certain conditions, which can include considerations of effects on others or the environment.[255] Therefore water is usually guarded and managed by the state, which has the possibility to transfer water property or usage rights to private entities. The concrete manners thereby depend on the jurisdiction and the relevant doctrine therein.

(ii) Water as a Market Commodity

For the present purposes, water commodification shall be understood as the exchange of money for water on the market, which encompasses issues of water privatization. As the following will show, water commodification is widely accepted in international law, although it creates affordability issues in terms of water services.

(a) Outline of the Problem

A recurring argument in the commodification debate is that the scarceness of water demands that it be rationed by the means of commodification. At the same time, it is precisely the scarcity that gives water its value as a market commodity.[256] Opponents of commodification and privatization of water conversely point to various disadvantages. The handling of water by private entities can lead to a lack of regulation regarding the water market as well as to a lack of transparency regarding water policies due to the fact that private companies do not owe the same access to information as does the state.[257] This can also lead to a lesser quality of water.[258] Private involvement in the water market has further been suggested to be more vulnerable to corruption, where corporations offer money within public-private partnerships.[259] Corporations

[255] Tewari in Interdisciplinary Journal of Economics and Business Law: Functioning of Water Markets in South Africa, p. 34.
[256] Jaffe/ Newman in Organization and Environment: A Bottle Half Empty: Bottled Water, Commodification, and Contestation, p. 32; and Nieuwoudt/Backeberg in Water SA: A Review of the Modelling of Water Values in Different Use Sectors in South Africa, pp. 703-710, p. 703.
[257] Figueres/Tortajada/Rockstrom: Rethinking Water Management- Innovative Approaches to Contemporary Issues, p. 48 ff.
[258] Johnson/South/Walters in International Journal of Law, Crime and Justice: Commodification and exploitation of fresh Water Property, human rights and green criminology, p. 154.
[259] Figueres, Tortajada, Rockstrom, Supranote 257, p. 48 ff.

are thereby often in a position to avoid high tax burdens, while contributing to water pollution punishment-free.[260]

States nevertheless allow the involvement of private entities because the provision of water has become costlier for the state and many have been subjected to pressure exercised by powerful global players such as the IMF and the World Bank. Both institutions grant loans to debt-suffering states, whereby the loan agreements in many cases include water policy-related conditions. According to these, states must privatize water and refrain from subsidizing water supply as to install the principle of full cost recovery to receive the needed loans. The idea behind this is that the financial burden of water provision should be shouldered by the users instead of by the state. The full cost recovery model thereby includes all costs arising from water provision in addition to a reasonable profit margin.[261]

Although the World Bank presents itself as having a socially driven mission and being the solution to problems of water accessibility,[262] users have not necessarily gained advantages from the described approach.[263] This is at least the case for those, whose access to water has not ameliorated because of their inability to afford commodified water and who are forced to turn to health-threatening alternatives.[264] Benefits that do arise, do so for multinational corporations and the global water market.[265]

A more sustainable and equal access-enhancing approach could be to support the public sector, especially on the local level, as to respond more to the domestic circumstances and needs rather than to apply the same method of policy-influencing to a number of states with diverse

[260] Johnson, South, Walter, Supranote 258, p. 156 f.
[261] News & Notices for IMF and World Bank Watchers: IMF and World Bank push Water Privatization, p. 27, https://www.citizen.org/sites/default/files/imf-wb_promote_privatization.pdf; and Report of the International Fact-Finding Mission On Water Sector Reform in Ghana, 2002, pp. 44 ff., https://www.citizen.org/sites/default/files/factfindingmissionghana.pdf (accessed 26 August 2018).
[262] See The World Bank Annual Report, 2017, pp. 13, 17.
[263] The Guardian: The Water Margin, 16 August 2007, https://www.theguardian.com/business/2007/aug/16/imf.internationalaidanddevelopment (accessed 26 August 2018).
[264] See ibid.
[265] Barlow/Clarke: Blue Gold: The Fight to Stop the Corporate Theft of the World's Water, p. 156.

backgrounds.[266] In this connection it is worth pointing out that those subjected to these conditions by the World Bank and IMF are in most instances post-colonial states in sub-Saharan Africa and generally the global south.[267] Complicating the issue further are Bilateral Investment Treaties, which limit the state's power to control and regulate water handling by private corporations even more.[268] This is due to the treaties allowing a range of actions by foreign investors and to measures being subject to arbitration tribunals, such as the International Centre for Settlement of Investment Disputes, which pass recommendations or orders purely based on the respective investment treaties, thereby disregarding national and international human rights law.[269]

Although the current emphasis lies on the global south, the paradigm of favoring the commodification of water, possibly over human rights considerations, also exists in the global north and developed countries, including states of the EU. Examples for this are the economically instable states, which face pressure of EU bodies to privatize their water management and supply.[270] The result in the case of Portugal has been a rise in water costs by 400 %.[271] Ireland too has privatized its water services and implemented a system of full cost recovery, whereby these costs have previously been covered by taxes.[272] The motivation for the Irish governments' action, which included more than the mentioned measures, was to gain financial support from the IMF in order to improve the economic situation in a time of crisis.[273]

[266] Biswas/Tortajada: Water-Pricing and Public-Private Partnership, pp. 78 ff.
[267] News & Notices for IMF and World Bank Watchers, above, pp. 23 ff.
[268] Bohoslavsky/Martin/Justo, Supranote 162, pp. 82 f.
[269] Ayala in Revista De Derecho: Restoring the Balance in Bilateral Investment Treaties, pp. 155 ff.
[270] Boelens/Perreault/Vos: Water Justice, p. 231.
[271] Right to Water Initiative: MONITOR- Commission Plans for Water Privatization, 13 February 2013, https://www.right2water.eu/de/node/279 (accessed 4 September 2018).
[272] International Monetary Fund, Ireland: Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding, 3 December 2010, p. 24, https://www.imf.org/external/np/loi/2010/irl/120310.pdf.
[273] International Monetary Fund, Press Release No. 10/496: IMF Executive Board Approves € 22.5 Billion Extended Arrangement for Ireland**,** 16 December 2010.

Examples of full water privatization, in which the state does not own water utilities, are provided in the cases of England and Wales.[274]

Common to the global north and south is a displayed discontent with water privatization measures by the public, causing demonstrations[275] as well as referendums repealing its implementation.[276] This last point allows for the assumption that public participation should be a regarded factor in water management. Whatever the solution to the problem, water is being treated as an economic good, which is supported by international law.

(b) Support of Water Commodification in International Law

The issue of water scarcity and commodification is precisely addressed in the *Dublin Statement on Water and Sustainable Development*, which was introduced in 1992 at the United Nations Conference on Environment and Development in Rio de Janeiro. It establishes four principles, the so-called Dublin Principles, intended to be of guiding character concerning the handling of the topics water, sustainable development and environmental protection. While the first principle opens with the fact that water sustains life and should therefore be managed effectively,[277] the fourth principle provides an according solution:

"Within this principle, it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price. Past failure to recognize the economic value of water has led to wasteful and environmentally damaging uses of the resource. Managing water as an economic good is an important way of achieving efficient and equitable use, and of encouraging conservation and protection of water resources."[278]

[274] European Environmental Agency Technical Report No. 16/2013: Assessment of Cost Recovery through Water Pricing, p. 28.
[275] See Prempeh: Against Global Capitalism, p. 125 and Agencia EFE: Salvadoran Labor Unions Denounce Push to Privatize Water, 22 June 2018, https://www.efe.com/efe/english/world/salvadoran-labor-unions-denounce-push-to-privatize-water/50000262-3657907 and The Guardian: Tens of Thousands March through Dublin to Protest Against Water Charges, 21 March 2015, https://www.theguardian.com/world/2015/mar/21/tens-thousands-march-dublin-protest-water-charges (accessed 4 September 2018).
[276] European Public Service Union, Press Communication: EPSU Welcomes the Result of the Italian Water Referendum, 14 June 2011, https://www.epsu.org/article/epsu-welcomes-result-italian-water-referendum (accessed 4 September 2018).
[277] The Dublin Statement on Water and Sustainable Development, 1992, Guiding Principles, Principle No. 1.
[278] Ibid, Principle No. 4.

The two important elements of this recommended solution are that water has an economic value, thus should be commodified, and that commodification will serve as means to preserve scarce water resources. The chosen market-based approach is supposed to work as an incentive to modify the consumer's behavior, the underlying logic being that those, who must pay for water, will choose to use less of it, leading to less waste. While the principle explicitly recognizes the right to water, it fails to address the issue of how exactly to tackle non-affordability for parts of the society as well as allocation and fair distribution. Although the principles are solely meant to provide guidance and are legally non-binding in nature, they have had decisive influence on the global understanding of water management.[279]

Supporters of the approach in the Dublin Principles claim an over-emphasis of the categorization of water as an economic good by its opponents, asserting its interpretation as being pro-liberalization not to be justified.[280] Yet, it must be considered that the establishment of the Dublin Principles took place parallel to rising discussions of water as a human right as well as to the above-described efforts of the World Bank to achieve water privatization in a range of states.[281] As a matter of fact, the World Bank took the opportunity and utilized the principles to justify its own policy of water pricing, thereby going as far as calling the Dublin Principles "the *magna carta* for water resources management."[282] The principles therefore add a conflicting and opposed understanding of water as a good to the discourse.

The logic of leaving the management of a scarce resource up to the market is a highly contested solution to the problem. Since water has the unique nature of being indispensable for many aspects of life and its sustainment, a higher price will not lead to an over-all limited consumption thereof.[283] As a good, of which everyone is in need, the demand will not decrease,

[279] Cullet et al: Water Law for the twenty-first century, p. 40.
[280] Laskowski: Das Menschenrecht auf Wasser, p. 68.
[281] For example, the case of South Africa; For more see Piper: The Price of Thirst, pp. 106 ff.
[282] The World Bank: Regulatory Frameworks for Water Resources Management, p. 7.
[283] Newsweek: The Race to Buy up the World's Water, https://www.newsweek.com/race-buy-worlds-water-73893 (accessed 6 September 2018).

and water will be bought independently of its price.[284] Corporations profiting off this will not be incited to preserve water, but to sell more of it, leading to the opposite result of the one expected by the market-based approach.[285] Phrased differently, water will still be consumed in high rates, but only by those, who can afford the rising prices.

General Comment No. 15 and the UN Resolution on the right to water and sanitation both briefly address this question, by stating that water must be affordable.[286] The usage of the word "affordable" implies that the Committee does not assume that water cannot be traded on the market for money. The General Comment however elaborates that "[w]ater should be treated as a social and cultural good, and not primarily as an economic good"[287] and that the realization of other rights may not be threatened due to emerging costs and charges.[288]

Contributing further to the international discourse is the World Water Council, which is comprised of different organizations, including intergovernmental organizations of the United Nations, such as the FAO,[289] UNESCO and the UN Human Settlements Programme.[290] Other members include the World Bank and private water corporations, among them some of the biggest worldwide, such as Suez[291] and Veolia Groupe,[292] whereby Suez and the World Bank are founding members.[293] Part of the World Water Council's activities is the organization of the World Water Forum, which takes part every three years and facilitates discussions for a global water agenda among the various stakeholders.[294] While efforts to reconcile the interests of different stakeholders appear expedient, given the dominance of the private sector, the World

[284] Ibid.
[285] Ibid and Johnson/South/Walter, Supranote 258, p. 149
[286] UN CESCR, General Comment No. 15, p. 2, 12 (c) (ii); UN General Assembly Resolution No. A/RES/64/292, p. 2.
[287] UN CESCR, General Comment No. 15, p. 11.
[288] Ibid, p. 12 (c) (ii).
[289] World Water Council: List of Members, above, p.21.
[290] Ibid, p. 53.
[291] Ibid, p. 49.
[292] Ibid, p. 54.
[293] World Water Council, Constitution and By-Laws, 2016- 2018, Article 6.
[294] See World Water Council, World Water Forum, http://www.worldwatercouncil.org/en/world-water-forum (accessed 6 September 2018).

Water Council remains a private organization. As such it is largely perceived as a clear privatization and commodification advocate, which tries to retain hold over the international water market under the pretense of sustainability goals.[295]

Summarized, there is no international consensus in legal frameworks or other forums concluding that water cannot be commodified. Regarding human rights, the pivotal task lies in finding a balance between commodification and consumer needs, which does not threaten the realization of the right to water or other human rights. The right to water is exposed to a large international debate, wherein a strong tension is created regarding the adverse assumptions of water as a social and cultural good versus an economic good.

4. Practical Consequences of Uncertain Foundations and Competing Considerations

The efforts in defining a right to water within the framework of the ICESCR, as well as the outlined considerations competing with the right to water, appear to miss a focus on the most marginalized groups. The water crisis discourse often reduces the complex issues to questions of availability, therefore naturalizing the crisis and ignoring problems of inequality and power dynamics.[296] These are precisely areas, which the human right to water should redress.[297] Yet, the international focus regarding the normative scope of the right to water is on its connection to the right to life, health and dignity, whereas States mainly focus on maintaining sovereignty over natural resources and on financial and economic implications. While General Comment No. 15 attaches the principle of non-discrimination to the right to water, it does so in a generic way. The framed obligations do not require positive actions for states to give aid to marginalized groups, which meaningfully go beyond the general obligations a state has vis-à-vis every human

[295] See Bear: Stemming the Tide, pp. 68 ff. and The Council of Canadians: Water Justice Groups Denounce World Water Forum's "Citizen's Process", https://canadians.org/blog/water-justice-groups-denounce-world-water-forums-citizens-process; and Barlow: Blue Future, pp. 95 ff.
[296] Loftus in Geographical Journal: Water (In)Security: Securing the Right to Water, p. 351.
[297] Hughes in Journal of Law and Religion: Pro-Justice Ethics, Water Security, Human Rights, p. 527.

rights subject. This is where a discrepancy in protection arises for those, who were initially intended to gain protection from the human right to water.

In terms of a gender perspective, women's access to water is often threatened to a higher proportion than that of men, which is especially the case in rural areas, and the reason that their protection requires more depth.[298] These gender inequalities are acknowledged by the CEDAW Committee, which establishes a sectoral approach to the right to water in its General Recommendation No. 37.[299] It recommends state parties to: "[p]romote and protect women's equal rights to food, housing, sanitation, land and natural resources, including adequate drinking water, water for domestic use and for food production and take positive measures to guarantee the availability and accessibility of these rights, even during times of scarcity. Particular attention should be paid to ensuring that women living in poverty, particularly those in informal settlements in both urban and rural areas, have access to adequate housing, drinking water, sanitation and food, especially in the context of disasters and climate change."[300]

These recommendations underscore the reality that women carry extra burdens concerning water: especially in rural areas, women are those, who collect water and thereby suffer threats to their security and health.[301] Time-intensive water collection also hinders women in pursuing other activities, which would favor their personal development, such as education and work. Rural Tanzanian women need between four and seven hours daily in order to collect water by walking to far-away sources.[302] In this time, women are further endangered of being subjected to sexual- and other forms of violence.[303] The situation is worsened, where water scarcity is of immanency or where severe illnesses, such as HIV/AIDS, are common.[304]

[298] Langford/Russel: The Human Right to water, p. 304.
[299] CEDAW Committee Recommendation No. 37 CEDAW /C/GC/37, 7 Februar 2018, pp. 5, 33, 60.
[300] Ibid, p. 72 (a).
[301] Winkler, Supranote 21, p. 61.
[302] Brown in Gender and Development: Unequal Burden: Water Privatization and Women's rights in Tanzania, p. 61.
[303] Hellum/Kameri-Mbote et al: Water is Life: Women's human rights in national and local water governance, p. 47.
[304] Pistilli in Cardozo Journal of Law & Gender: Women, Water and Privatization: A Human Rights-Based Approach to Global Water Governance, p. 11; and Brown, Supranote 302, p. 63.

The latter connects to a gender-based task distribution, in which women are the primary caretakers in the household. They are therefore responsible for taking care of children and the ill, which in the case of HIV/AIDS requires high amounts of water.[305] Summarized, women in rural areas are the water managers for their families and communities.[306] While the said mainly sheds light on issues of physical access, it must also be viewed in light of affordability. African rural areas are typically struck by poverty, which provides for the broader marginalization that intersects with gender and creates this aggravated situation for women.[307] Women's access to water can therefore require additional considerations that acknowledge the described impact on other human rights. [308] Suggestions for improvement include the involvement of women in official water management and policy development, educative measures, and an increased focus on distance to water sources and gender-specific reforms.[309]

A rural women's right to access water is explicitly set out in CEDAW.[310] To this effect, the right to water for women can include water for purposes other than domestic uses. This stems from the rhetoric of linking adequate living conditions to water supply, bringing water for food production, as an element of the former, into the scope of the right.[311] As water for food production has been excluded from the normative content of the right to water in the above, the result of this uncertainty and normative fragmentation. Apart from this, a focus on the special burden of women must regard the right to sanitation, which finds mentioning alongside water supply in CEDAW.[312]

A further marginalized group that exemplifies the possible need for a stronger focus on discrimination is indigenous peoples. These also disproportionately suffer in terms of access

[305] Brown, Supranote 302, p. 63.
[306] Singh et al in Rural Society: Gender and Water from a Human Rights Perspective: The Role of Context in Translating International Norms into Local Action, p. 190.
[307] See Hellum/Kameri-Mbote, Supranote 303, pp. 47 ff.
[308] Ibid.
[309] Pistilli, Supranote 304, p. 4; and Brown, Supranote 302, p. 64; and CEDAW Committee Recommendation No. 37 CEDAW /C/GC/37, above, p. 72.
[310] Convention on the Elimination of All Forms of Discrimination against Women, above, Article 14 No. 2 lit. h.
[311] Hellum/Kameri-Mbote, Supranote 303, p. 46.
[312] See Ibid, p. 49 ff.

to adequate water, which is often connected to historic discrimination an exclusion from political participation.[313] Similarly to women, water-related issues often lead to the infringement of other human rights, especially where a lack of access to water negatively affects cultural rights.[314] These instances require consideration from a human rights perspective and could call for a prioritization of indigenous peoples in matters of water allocation.[315] In respect to the situation of indigenous groups, the CESCR refers to Article 1 (2) of the Covenant and dictates that "[s]tates parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples."[316] The reference to Article 1 (2) of the Covenant gives a collective dimension to the right to water.[317] Here, the CESCR adds a level of protection for indigenous people's access to water, that has not existed in international frameworks before.[318] However, where there has been an infringement on water uses for cultural purposes, this has typically been claimed under the provision protecting the rights of minorities in Article 27 ICCPR, as is the case for Article 6 where indigenous peoples have died in relation to water.[319] The coverage of different claims under different frameworks again bears potential of fragmentating the right to water as well as Committee competencies.[320] For indigenous peoples, a remaining issue is that their access to water is often infringed on because of water pollution resulting from mining or other activities.[321] The mentioned frameworks do not provide strong protections for this constellation,[322] which partly explains the growing

[313] Riedel/Rothen: The Human Right to Water, p. 59.
[314] Winkler, Supranote 21, p. 207.
[315] Ibid.
[316] UN CESCR General Comment No. 15, above, p. 7.
[317] Misiedjan/Gupta in Utrecht Law Review: Indigenous Communities: Analyzing their Right to Water under Different International Legal Regimes, p. 87.
[318] Ibid.
[319] Ibid, p. 81.
[320] Ibid, p. 89.
[321] Jackson/Barber in Aquatic Procedia: Recognizing Indigenous Water Cultures and Rights in Mine Water Management: The Role of Negotiated Agreements, p. 83 ff.
[322] Misiedjan/Gupta, Supranote 317, p. 81.

emphasis on environmental rights alongside the right to water.[323] A primal example for this is the Constitution of Ecuador,[324] which finds attention in the below sections.

Regarding access to water, there seems to be deep inequality for marginalized groups, which is not properly addressed by the normative scope of the right to water, as state obligations are not directed at eradicating these issues in a matter that is specific enough. This results in possible fragmentation of the right to water and competencies of international bodies as well as in the need to pair the right to water with other rights to give it more effect.

III. The Right to Water in National Constitutions

This chapter attempts to identify approaches in Constitutions that seek to address uncertainties in the international recognition of the right to water. For this, an overview of the right to water in national Constitutions will be provided with a subsequent focus on the jurisdictions of South Africa, Ecuador, California and their respective legal, historical and social backgrounds regarding water.

1. Overview of Constitutional Recognition of the Right to Water

The right to water is not merely a construct of international law, but also present in various national Constitutions. Formulations of the right vary greatly, diverging in whether and how the Constitution refers to quality, quantity of water, which rights the right to water is affiliated with, as well as how state obligations are formulated. The Constitution with the most newly introduced right to water is the Constitution of Slovenia, which states that "[e]veryone has the right to drinking water […] which shall be ensured by the State directly".[325]

[323] See Akchurin in Law & Social Inquiry: Constructing the Rights of Nature: Constitutional Reform, Mobilization, and Environmental Protection in Ecuador.
[324] See the Constitution of Ecuador, Art. 71, 72.
[325] The Constitution of the Republic of Slovenia, 1991 as amended in 2016, Art. 7o a.

A similar framing can be found in the Kenyan and South African Constitutions, which both determine that "everybody has the right" to water,[326] while the Constitution of Congo simply guarantees it.[327] Deviant from this approach is the formulation in the Constitution of Ecuador. According to its Article 12 "[t]he human right to water is essential and cannot be waived."[328] It therefore not formulated as an individual right, as are the Kenyan and South African provisions, yet it declares the right to water as a human right.

Rather than using an individual rights rhetoric, several Constitutions formulate the right to water from a perspective of state obligation and responsibility. Exemplary for this are the Constitutions of Ethiopia and Nicaragua, which both use the state and its policies as a starting point and dictate that the state must aim at or promote the provision of water.[329] The case of Nicaragua thereby does not refer to access to water but obliges the state to provide water as a public service.[330]

Using the same obligation-based approach, the Constitutions of Uganda and Gambia frame the obligation of the state in such way that it has "to endeavor" to fulfill or facilitate the right.[331] The often-chosen state obligation approach roots in the nature of the right to water as a socio-economic right, whose realization is seen as more resource dependent than many civil and political rights.[332]

The shown examples of Constitutions with an individual right framing formulate state obligations to progressively realize the right to water. In the Kenyan Constitution, the general implementation clause dictates that the state obligation in regard to socio-economic rights is to "…take legislative, policy and other measures, including the setting of standards, to achieve the

[326] The Constitution of Kenya, 2010, Art. 43 (1) (d), The Constitution of the Republic of South Africa, 1996, Art 27, No. 1 lit. b.
[327] The Constitution of The Democratic Republic of the Congo, 2005, Art. 48.
[328] The Constitution of Ecuador, 2008, Art. 12.
[329] See The Constitution of the Federal Democratic Republic of Ethiopia, 1995, Art. 90 Nr.1 and The Constitution of Nicaragua, 1987 as amended by 2005, Art. 105.
[330] The Constitution of Nicaragua, above, Art. 105.
[331] The Constitution of Uganda, 1995, Art. XIV (b) and The Constitution of the Republic of Gambia, 1997, as amended by 2001, Art. 2016 (4).
[332] Cullet et al, Supranote 279, pp. 14 f.

progressive realization."[333] A very similar formulation can be found in the South African Constitution, which obliges the State to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realization."[334] The notion that the realization of the right to water is a progress thereby complies with the reality that its effectiveness underlies complex issues of state capacities and should not be understood to render the value of the right null.[335] As shown above, the obligation of progressive realization is established in international law for socio-economic rights.

In addition to the general framing of the right to water, Constitutions diverge regarding the content of the right. Many Constitutions refer to the quality of water as having to be clean or safe[336] and to the quantity as having to be adequate or sufficient.[337] Other constitutions refer to drinking water directly.[338] Many provisions also link the right to water to other rights, such as housing, health, environmental practices, food and security[339] or relate it to the regulation of natural resources by the State.[340] The clear constitutional renunciation of water privatization is conversely unique to the Constitution of Slovenia. The explanation for this is that the introduction of the right into the Constitution was in reaction to the rising value of water alongside its privatization and the realization, that water had to be regulated accordingly.[341] This is further reflected in the fact that the constitutional clause deems water as a public good.[342]

[333] The Constitution of Kenya, 2010, Art. 21 (2).
[334] The Constitution of the Republic of South Africa, 1996, Art 27, No. 2.
[335] Bartram: Routledge Handbook of Water and Health, p. 517.
[336] See The Constitution of the Republic of Slovenia, above, Art. 7o a, The Constitution of Kenya, 2010, Art. 43 (1) (d), The Constitution of the Federal Democratic Republic of Ethiopia, 1995, Art. 90 Nr.1 and The Constitution of Uganda, 1995, Art. XIV (b).
[337] See The Constitution of Kenya, above, The Constitution of the Republic of South Africa, 1996, Art 27, No. 1 lit. b.
[338] See The Constitution of Uganda, 1995, Art. XIV (b) and The Constitution of Slovenia, 1991 as amended in 2016, Art. 7o a and The Constitution of The Democratic Republic of the Congo, 2005, Art. 48.
[339] See The The Constitution of the Republic of South Africa, 1996, Art 27, No. 1, The Constitution of the Federal Democratic Republic of Ethiopia, 1995, Art. 90 Nr.1 and the Constitution of Uganda, 1995, Art. XIV (b) among others.
[340] See The Constitution of The Democratic Republic of the Congo, 2005, Art. 9 and The Constitution of Uganda, 1995, Art. XIII, XXVII (i), (ii).
[341] The Guardian: Slovenia adds water to constitution as right for all, 18 November 2016, https://www.theguardian.com/environment/2016/nov/18/slovenia-adds-water-to-constitution-as-fundamental-right-for-all (accessed 13 February 2018).
[342] The Constitution of the Republic of Slovenia, 1991 as amended in 2016, Art. 7o a.

Regarding the mentioned linkages of the right to water with other rights in various Constitutions, this exhibits a parallel to international law and to the interrelation of human rights as explored above. However, the elements established by General Comment No. 15 have only been adopted in part in the national Constitutions. The question of whether the right to water is autonomous is positively solved for the respective jurisdictions by introducing the right into the conclusion, whereas further questions concerning different elements of the right remain unsolved by the national provisions themselves. The task of their clarification thus lies with the national judiciaries, legislators and administrators.

2. The Constitutional Right to Water in South Africa, Ecuador and California

The next part pays close attention to the constitutional recognition of the right to water in the Constitutions of South Africa, Ecuador and California. The jurisdictions have been chosen because of their value for a comparative analysis based on their different structures and formulations as well as political and historical backgrounds. The right to water in the case of South Africa presents an example of an individual rights-based approach, which has arisen against the background of deep historical inequality and competing financial interest. Ecuador's case exemplifies a modern Constitution, which has experienced strong indigenous influences and in which the right to water must be evaluated in the context of other provisions and interests, resulting from the political attempt to create a 21st century socialism. The Californian Constitution does not include a right to water but constitutionalizes a regulatory model for the beneficial use of water sources based on public trust, which led to more attention being given to the right to water. All jurisdictions will be examined in a legal, social and historical context.

a. South Africa

The status of water in South Africa must be viewed against the background of its complex historical influences and climate-conditioned factors. Because of climate change, the country has suffered many droughts, varying in intensity, leading South Africa to be one of the most

water scarce countries on the continent.[343] Adding to this dire situation is the population growth, which has disproportionately occurred between 1990 and the present.[344] At the same time, 2018 has brought the harshest drought experienced in Cape town to date, forcing the government to announce a state of national disaster and to call on the population to restrict water usage.[345] This intensifies the already complicated societal and political situation, which South Africa faces due to its post-colonial background and apartheid legacy.

(i) Significance and Development of Water Rights

Under the Dutch rule, water in South Africa was viewed as belonging to the public, whereby the Dutch settlers reserved the right to make use of water or restrict it to others, where they saw need.[346] This notion of state control was later rejected by the British, resulting in a shift in water law to the riparian doctrine under the subsequent British rule.[347] During this period, rural blacks were excluded from society and forced to live on land, on which little water could be found.[348] While there were formal restrictions on the black community to owning land,[349] most property was owned by the wealthy, white community.[350] The tie of water rights to land ownership under the riparian doctrine laid the ground steps for a long-lasting inequality of access to water. The situation for Africans of color worsened when apartheid was introduced by the National Party in 1948, legally manifesting the segregation. The system was intended

[343] See World Resources Intitute: Water Stress by Country, https://www.wri.org/resources/charts-graphs/water-stress-country (accessed 5 September 2018); and Department of Water Affairs and Forestry: Water Conservation and Demand Management Strategy for the Agricultural Sector, p. 4.
[344] Statistics South Africa: Statistics 2000, p. 8, 1.1, http://www.statssa.gov.za/publications/SAStatistics/SAStatistics2000.pdf; and Mid-year population estimates 2018, http://www.statssa.gov.za/?p=11341 (accessed 5 September 2018).
[345] The South African: SA drought crisis finally declared a national disaster, 13 March, 2018, https://www.thesouthafrican.com/sa-drought-declared-national-disaster/ (accessed 5 September 2018).
[346] Tewari, Supranote 255, p. 695 ff.
[347] Ibid, p. 697 ff.
[348] Piper, Supranote 281, p. 104.
[349] Gerhart in Foreign Affairs: The Origins and Demise of South African Apartheid- A Public Choice Analysis, p. 37.
[350] Schreiner in Dinar /Pochat/Albiac-Murillo: Global Issues in Water Policy: Water Pricing Experiences and Innovation, p. 290.

to grant minority ruling to the white population, while restricting the rights of the colored population in terms of freedom of settlement and movement as well as education.[351]

Africans of color were only allowed to live is designated urban areas.[352] This led to an impaired access to water, leaving the suppressed black communities with only 11 % of the countries' water, although presenting 70 % of the population.[353] Yet, high prices of water had to be payed, which was in part due to the *Lesotho Water Project*. This project was undertaken by the apartheid government and involved the building of damns in order to reverse the flow of the Orange River.[354] The reversal rerouted the river to the cities of Pretoria and Johannesburg, especially to parts inhabited by the white population.[355] This did not only give rise to deaths and water-related health problems to the people of Lesotho, but also generated high costs, which were expected to be covered by the provinces, including South Africans of color, who have not benefited from the project.[356] Residents of black townships were additionally expected to cover the costs for the residencies, which had been forced upon them, including costs for water.[357] To protest the injustice of the insufficient access to services and the system of apartheid itself, people in townships boycotted the payments, which resulted in water cut-offs.[358]

Since consequences of the above have never been eradicated, an economic apartheid prevails until this day.[359] Although the installment of a democratic system under Nelson Mandela's ANC promised the redistribution of land, wealth and more government spending for socio-economic matters, this hope soon had to fade, as rules and restrictions of a globalized

[351] Kemerink/Ahlers/Van der Zaag in Water SA: Contested Water Rights in Post-Apartheid South Africa: The Struggle for Water at Catchment level, p. 587.
[352] Tempelhoff in Water History: The Water Act, No. 54 of 1956 and the First Phase of Apartheid in South Africa (1948–1960), p. 204.
[353] Piper, Supranote 281, 105.
[354] Ibid, p. 110 ff.
[355] Bond: Against Global Apartheid, p. 233.
[356] Piper, Supranote 281, p. 111.
[357] Morgan: Water on Tap: Rights and Regulation in the Transnational Governance of Urban Water Services, p. 156 and Piper, Supranote 281, p 111.
[358] Ibid.
[359] Piper, Supranote 281, p. 103.

market and the apartheid-debts combined with a massive drought held the government from moving forward. The pressure in terms of economic stability and a lack of water led the to the government taking a loan from the World Bank and IMF for 850 million dollars, which had several attached conditions. Under these, the new government had to commit itself to compensate the debts made by the former government during apartheid, to grant market entry to foreign investors and to privatize water services, while implementing full cost recovery.[360] When apartheid debt was not forgiven, and private foreign companies like *Suez* took over water supply, the price for water rose, leading to unaffordability for parts of society, affecting especially townships, whose water supply was again cut-off.[361]

(ii) New Constitution and Present Legal Status

The change in government was yet not in vain, for a new Constitution was passed in 1996. It encompasses the principles of equality[362] and human dignity[363] as well as a range of socio-economic rights[364] and is generally viewed as a progressive Constitution. Among the new socio-economic rights is the right for everyone "to have access to sufficient food and water".[365] Furthermore, the Constitution guarantees a right to adequate housing[366] as well as social assistance to those in need of it for social security.[367] It also holds that constitutional property rights may not outbalance the state's competence to pass water reform "in order to redress the results of past racial discrimination"[368] and that the South African Human Rights Commission must be provided with information on the improvement of the realization of the right to water and other socio-economic rights annually.[369]

[360] Saul/Bond: South Africa- The Present as History, p. 129 and Piper, Supranote 281, p. 106 ff.
[361] Piper, Supranote 281, p. 112.
[362] The Constitution of the Republic of South Africa, 1996, Art. 9.
[363] Ibid, Art. 10.
[364] See Ibid, Art. 25, 26, 27.
[365] Ibid, Art. 27 (1) lit. b.
[366] Ibis, Art. 26.
[367] Ibid, Art. 27 (1) lit. c.
[368] Ibid, Art. 25 (8).
[369] Ibid, Art. 184 (3).

Present water regulation is guided by the Public Trust Doctrine,[370] which implicates that the state manages and protects natural resources, among them water.[371] In South Africa, the doctrine stems from national water legislation, whereby the National Water Act, as one of the relevant national frameworks, specifically states that the national government "as the public trustee of the nation's water resources… must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate."[372] The National Water Act as the sub-constitutional national law therefore led to the transformation of all private water to become public.[373] This also means that the competence to allocate water and make licensing decisions lies with the state.[374] In taking any decisions, the responsible catchment agencies have to "be mindful of the constitutional imperative to redress the results of past racial and gender discrimination and to achieve equitable access for all to the water resources under its control."[375] This is also reflected in the section regulating compulsory licensing. Where water can be allocated, applicants must apply for a license to use water.[376] In considering the applications and allocating water, the agency must also allocate "to each of the applicants to whom licenses ought to be issued in order to redress the results of past racial and gender discrimination in accordance with the constitutional mandate for water reform".[377]

The choice of the words "must" and "ought to be" implicate that the aforementioned considerations are not subject to discretion but are imperative when allocating water. This shows evidence of a legislative awareness of the apartheid legacy and necessity to overcome it, in order to achieve an allocation of water that is fair and equitable. In terms of pricing, the

[370] See Takacs in Berkeley Journal of International Law: South Africa and the Human Right to Water: Equity, Ecology and the Public Trust Doctrine, pp. 55-108.
[371] Feris in Law Environment and Development Journal: The Public Trust Doctrine and Liability for Historic Water Pollution in South Africa, p. 3.
[372] National Water Act of the Republic of South Africa, Act No 36 of 1998, 20 August 1998, Paragraph 5 (1).
[373] Takacs, Supranote 370, p. 81.
[374] Ibid, p. 704.
[375] National Water Act of the Republic of South Africa, Paragraph 79 (4) (a).
[376] Ibid, Paragraph 43 (1).
[377] Ibid, Paragraph 45 (1), (2) lit. c.

competence for a pricing strategy for water use charges falls with the minister of water affairs and forestry, who may also differentiate in the strategy based on equity considerations.[378] Socio-economic and demographic aspects are thereby included as possible equity-based elements of concern.[379] This also appears as a measure to redress historically generated racial inequality, for these provide matters of demographics and inability to pay for water services. As opposed to the licensing regulation, the minister "may" make these differentiations, which expresses discretion instead of mandatory conduct. A failure to adjust the pricing strategies on behalf of those financially unable to comply with it would arguably nevertheless not respect the constitutional mandate, which grants the right to water to "everyone", including the most vulnerable. As the Constitution is the highest legal document, these principles must be respected by the minister when applying national law. The state obligation formulated by the Constitution is to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" [380] of the right. The language of progressiveness is picked up by the other water legislation, which obliges relevant authorities "to progressively ensure efficient, affordable, economical and sustainable access to water services."[381] The gap of explicit affordability considerations in the National Water Act is therefore filled by the Water Services Act, which binds water service authorities.

The language of the constitutional and simple law provisions is strongly worded and in favor of the realization of the right to water for all, regardless of color, gender and status. The realization did yet not automatically occur with the constitutional implementations. This can be seen by the fact, that private services were still allowed to operate water systems, leading to the above-mentioned cut-offs, as has happened in the case of operations by *Suez* in 2000 and onwards.[382] Marginalized parts of society were left with consuming polluted water, which lead

[378] Ibid, Paragraph, 56 (3) lit. a.
[379] Ibid, (4) lit. a (i), (iii).
[380] The Constitution of the Republic of South Africa, Art. 27 (2).
[381] National Water Services Act of the Republic of South Africa, Act no 108, 1997, Paragraph 11 (1).
[382] See Piper, Supranote 281, p. 112.

to a severe cholera outbreak at the end of 2000, with more than 10.000 instances thereof.[383] The majority of those affected by the epidemic were from the rural black areas, in which communities were not able to access safe drinking water, since they either lacked water connection altogether or were cut-off in line with the full cost recovery policies conducted by private suppliers.[384] While the Department for Water Affairs and Forestry declared responsibility and emphasized a need to inform and educate the public about waterborne diseases,[385] this falls short in recognizing the fact that, regardless of provided information, many were faced with no alternative but to consume polluted water.

In the case of Johannesburg, so-called "ventilated improved pit latrines" and "shallow sewages" were installed, whereby waste is stored instead of discharged. These waste storage systems contributed to the pollution of water sources, and, in the case of shallow sewages, implied that users had to manually relieve the waste from the system. The measures were installed by the private operator *Suez*, which, despite possible resulting health issues, gave the instructions to manually remove the waste in order to save costs.[386]

In 2001, a policy for the provision of a free basic water supply was introduced and a system of three different types of water consumption implemented. According to this system, poor households have access to 6 kiloliters of water per month as a free basic supply. Financially better situated households underlie a standard tariff, whereas the highest cost category of hedonistic users[387] is billed by a higher, marginal cost, depending on the liters consumed.[388]

[383] Department of Water Affairs and Forestry of the Republic of South Africa: Guideline for the Management of Waterborne Epidemics with an Emphasis on Cholera, p. 4; and Hemson/Dube: Water services and public health: the 2000-01 cholera outbreak in KwaZulu-Natal, South Africa, p. 4.
[384] Hemson/Dube, Supranote 383, p. 6.
[385] Department of Water Affairs and Forestry, Supranote 249, pp. 7, 8.
[386] Andreasson: in African Affairs: Governance in the New South Africa- Challenges of Globalisation, pp. 336 ff.; and Piper, Supranote 281, p. 113.
[387] Tewari, Supranote 255, p. 705
[388] Dinar/Pochat/Albiac-Murillo, Supranote 350, p. 302.

While the policy of providing an amount of free water sounds as it would be beneficial for poor rural black communities, its effectiveness hinges on a few points. The local government is tasked with the implementation of the policy. For this, it receives an equitable share of the annual national budget as a part mean to finance the policy.[389] The second and more emphasized measure of finance is cross-subsidization, which implies that users are needed, who consume and pay for more water in order to finance the free supply for others.[390] This is problematic in poor rural communities, where excessive users are missing.[391] Even if this were not the case, rural areas often face the issue of not having the necessary infrastructure available to deliver the water supply.[392] The financial and practical issues can lead to a failure to connect poor households to water.[393] In addition to this, the authority of the municipality[394] can lead to disparate interpretations of the policy, especially of the question of who is indigent.[395] The reason for this is that municipalities define poverty ad hoc, partly using arbitrary income thresholds.[396]

Where the local government succeeds to provide the 6 kiloliters of basic supply to a household, this does not mean that the basic water needs of the households are met. The policy calculates with eight persons per households, which means that there is an amount of 25 liters per person available daily.[397] However, rural households often consist of more members and the policy fails to adjust the amount of water provided to the actual number of residents.[398] Because of these and other issues, the free basic supply later became subject to legal action, which will be discussed further below.

[389] Department of Water Affairs and Forestry: Free Basic Water Implementation Strategy, p. 17
[390] Ibid, pp. 19 ff.
[391] Tulk in University of Denver Water Law Review: Realising the Human Right to Water: A Conflict Between Realisation and Implementation – The South African Experience, p. 184.
[392] See pp. 33, 43 and ibid.
[393] Tulk, Supranote 391, p. 184.
[394] See National Water Services Act of the Republic of South Africa, above, paragraph 1 (XX).
[395] Dinar/Pochat/Albiac-Murillo, Supranote 350.
[396] Dugard in Socio-Economic Rights- Progressive Realizarion?: The Right to Water in South Africa, p. 14.
[397] Department of Water Affairs and Forestry, Supranote 256, p. 8.
[398] See Founding Affidavit of Lindiwe Mazibuko in the matter of Mazibuko and Others v City of Johannesburg and others, para. 69, 77.

The fight for domestic water is also challenged by different uses, which, in the context of South Africa, lies especially in the use of water for agricultural and industrial purposes.[399] It is also used to generate hydroelectric power and therefore electricity,[400] whereby this use is secondary to that for agricultural purposes.[401] In this area between 50 % and 70 % of all fresh water is used.[402] Within agriculture, most of the water is used for irrigation, which does not occupy an unimportant role for the South African society. Irrigation water is indispensable for farming, which creates food security.[403] The agricultural sector further employs the majority of South Africans and therefore is the source of income for most.[404] These sectors have also been suffering the consequences of the South African drought. In respect to irrigation, water shortage requires that water must be transported for it to be allocated, whereby even more water is lost in the transportation process.[405] Because water is vital in all these aspects, its importance as a resource is not reducing in any sector. While the tensions between different water users inevitably rise and water for domestic use is influenced by the decision-making of private actors, the realization of the human right to water becomes increasingly threatened.

b. Ecuador

Ecuador is a post-colonial state with a multiethnic population. In most recent history it was marked by political and economic instability alongside a constant flux in governmental leadership. In 1967, oil was rediscovered and subsequently rose to become the major subject of export in the country.[406] The presidency of Sixto Durán Ballén from 1992-1996 brought

[399] Department of Water Affairs and Forestry, Supranote 210, p. 4.and El Chami/El Moujabber in South African Journal of Science: Drought, Climate Change and Sustainability of Water in Agriculture: A Roadmap towards towards the NWRS2, p. 1.
[400] Rached/Rathgeber/Brooks: Water Management in Africa and the Middle East: Challenges and Opportunities, p. 10.
[401] Van der Linden/Feris: Compendium of South African Environmental Legislation, p. 335.
[402] See Department of Water Affairs and Forestry, Supranote 257, p. 5 and El Chami/El Moujabber, Supranote 399, p. 1.
[403] El Chami/El Moujabber, Supranote 399 p. 2.
[404] Ibid.
[405] Department of Water Affairs and Forestry, Supranote 257, p. 5.
[406] Akchurin, Supranote 323, p. 945.

neoliberalism and water privatization into Ecuadorian politics. With this, efforts to sell indigenous lands in the context of a land reform were made, which many years later turned out to become an important step for the introduction of right to water to the Constitution.[407]

The path of the right to water in Ecuador has been strongly influenced by indigenous peoples, farmers and environmentalists, whereby the attempts at adopting strong neoliberalist measures gave rise to ingenuous voices in the public sphere. These had already suffered ostracism during the period of Spanish colonialism, in which they were forced to move to higher altitudes in the Andean with less resourceful land.[408] This caused violent conflicts in the post-colonial era between haciendas, which are remnants of Spanish colonialism, and indigenous people, until water rights regimes were introduced.[409] Consequences of the unequal occurrence of water on indigenous lands remains to have an impact on water distribution to this date.[410]

(i) Significance and Development of Water Rights

When the neoliberal developments took place, the interests of indigenous peoples were represented by the nationally biggest organization thereof, the Confederación de Nacionalidades Indígenas del Ecuador (CONAIE). The organization opposed itself to neoliberal stances, for the indigenous felt that it was harmful to their culture and to nature and the society in total.[411]

When neoliberalism started to threaten the indigenous handling of water resources, indigenous groups brought forward specific demands, including ethnic and territorial autonomy as well as participation by indigenous peoples in decisions affecting water. Attempting to

[407] Lu/Valdivia/Silva: Oil, Revolution and Indigenous Citizenship in Ecuadorian Amazonia, pp. 6 ff.
[408] Skarbø/VanderMolen in Culture, Agriculture, Food & Environment: Irrigation Access and Vulnerability to the Climate-Induced Hydrological Change in the Ecuadorian Andes, p. 36.
[409] Boelens/Zwarteveen in Development and Change: Prices and Politics in Andean Water Reforms, pp. 745 ff.
[410] Skarbø /VanderMolen, Supranote 408.
[411] Andolina in Latin American Research Review: The Values of Water- Development Cultures and Indigenous Cultures in Highland Ecuador, pp. 9 ff.

reduce the lingering effects of colonialism, CONAIE called for a plurinational state, in which the cultures of non-indigenous and indigenous peoples could be reconciled.[412]

The program of water privatization was influenced by the World Bank and the Inter-American Development Bank, which advocated for the implementation of large-scale privatization in Ecuador.[413] A report of the World Bank states that "[t]he objectives of the reform program are to reduce the size of the State and make it more efficient by restructuring and downsizing agencies, offering incentives for early withdrawal from public employment, privatizing many public enterprises, and transferring to the private sector many of the responsibility currently under public sector purview."[414] The 200 million dollar loan granted to Ecuador by the World Bank was motivated by this undertaken shift in power and focus from the state to the private sector, which simultaneously presented conditions for the loan.[415] Because of these conditions set by the World Bank and Inter-American Development Bank, water was reconceptualized as a scarce commodity, leading to decentralized management and only little state regulation.[416] Although the reconstruction of the relationship between state and market was intended to stabilize the economic situation of the state,[417] 1998 showed high numbers of poverty, critically effecting 46 % of the population.[418] Economic strategy continued to emphasize and favor the extractive industries of oil and mining. The practices were viewed as threatening the environment and livelihoods of many, which unified indigenous peoples with environmentalists and farmers, thus forming a common movement.[419]

As water became a matter of public discussion, proposals for new legislature to guide water rights were drafted by different stakeholders and handed to congress. Hereby, the

[412] Andolina, Supranote 411, pp. 9 ff.
[413] Ibid, p. 10.
[414] The World Bank, Report No. PIC1551: Ecuador-Structural Adjustment Loan, No. 3.
[415] Ibid, No. 8, 9.
[416] O'Neill: Decentralizing the State: Elections, Parties, and Local Power in the Andes, pp. 14 f and Andolina, Supranote 272, p. 10; and QUELLE p. 284
[417] See the Report of the World Bank, Supranote 272.
[418] Flores in Voices from the Poor from Many Lands: The Perils of Poverty, p. 397.
[419] Akchurin, Supranote 323, p. 950; and Velásquez in Latin American Perspectives: Tracing the Political Life of Kimsacocha Conflicts Over Water and Mining in Ecuador's Southern Andes, pp. 161 ff.

relationship of indigenous peoples to water was disregarded and their organizations largely left out of the discussions.[420] Concessions for mining in protected wetland areas as well as new a involvement of the World Bank and the Inter-American Development Bank followed in 2001.[421] In the instance of the latter, the city of Guayaquil was granted a 40 million dollar loan, conditioned by the requests to transfer control of the water system to the international corporation Bechtel.[422] Although the corporation had stipulated to make needed investments in the local water system, appropriate action was not taken. Old pipelines were not fixed, water quality not raised, and sewage treatment not adequately conducted. Health issues appeared as the result of illegal dumping of waste into rivers as well as due to consumption of unfit tap water. While the pollution of the river caused a variety of health issues, the tap water consumption caused over 150 Hepatitis A infections. Costs for water consumption were yet imposed on the consumers, who had no alternative to the low-quality water. The company further practiced water cut-offs and overcharging of water, by charging for quantities, which in reality were not consumed.[423]

(ii) New Constitution and Present Legal Status

In reaction to the dissatisfaction caused by the neoliberal policies, Rafael Correra was elected president in 2006 with the goal of creating a "21st century socialism"[424] and a citizen's revolution.[425] Correra's platform ran on the promises to form a post-neoliberal policy, to fight poverty, reinstate state control over natural resources and introduce a new Constitution.[426] The drafting process of the aforementioned included public participation and was in acceptance of

[420] Andolina/Laurie/Radcliff: Indigenous Development in the Andes, pp. 139 ff.
[421] Velásquez, Supranote 419, p. 158; and ibid.
[422] Food & Water Watch: Bechtel Profits from Dirty Water in Guayaquil, Ecuador, p. 1, http://ciel.org/Publications/MurkyWaters_Background_15Apr08.pdf (accessed 22 September 2018).
[423] Food & Water Watch, Supranote 280, p. 2.
[424] Boelens,/Hoogesteger,/Baud in Geoforum: Water Reform Governmentality in Ecuador: Neoliberalism, centralization and the Restraining of Polycentric authority and community rule-making p. 284.
[425] Velásquez, Supranote 419, p. 155.
[426] Boelens,/Hoogesteger,/Baud, Supranote 424, p. 285; and Akchurin, Supranote 323, p. 942.

non-exclusive constitutional proposals.[427] The new Constitution of 2008, which passed the constitutional referendum by 64 %,[428] reflects the several efforts that had been made by the indigenous and environmental groups during the drafting process and previously. For the first time, the Constitution included rights of nature as well as the right to water.[429]

Article 12 is the first right in the chapter of the good way of living and states that "[t] he human right to water is essential and cannot be waived. Water constitutes a national strategic asset for use by the public and it is unalienable, not subject to a statute of limitations, immune from seizure and essential for life."[430] The description of the right to water as being essential and non-waivable presents a strong formulation. In terms of the commodification of water, the provision on the right itself remains silent by only deeming water as a national strategic asset, which is for public use. The right does also not have a concrete definition but can be read in light of the rest of the Constitution, such as the provision on the right to health. This states that the right to health is linked to the right to water, whereby the former is guaranteed by the state.[431] It can also be read in interrelation with the right to a dignified life as set out in Article 66[432] of the Constitution.[433] In other relation to water, the constitutional provision on energy and technology includes that the right to water, among other rights, may not be jeopardized by the use or development of the former.[434] The question of the involvement of private entities is addressed in the chapter on strategic sectors, services and state enterprises of the Constitution. It here repeats that water is for public use and adds that "[a]ny form of water privatization is forbidden."[435] It further determines that public entities alone should be tasked with the provision

[427] Akchurin, Supranote 323, p. 943.
[428] Weisbrot/Johnston/Lefebvre in Center for Economic and Policy Research: Ecuador's New Deal: Reforming and Regulating the Financial Sector, p. 3.
[429] Whittemore in Pacific Rim Law & Policy Journal Association: The Problem of Enforcing Nature's Rights under Ecuador's Constitution: Why the 2008 Environmental Amendments Have No Bite, pp. 659 f.
[430] The Constitution of Ecuador, Art. 12.
[431] Ibid, Art. 32.
[432] Ibid, Art. 66.
[433] Emel/Cantor: New Water Regimes, p. 88.
[434] The Constitution of Ecuador, Art. 413.
[435] Ibid, Art. 318.

of water services, drinking water and water for irrigation, making the state the sole authority for every related matter.[436] This created state authority over water appears to be in stark contrast to the previous decentralized, neoliberal water governance. Water is further mentioned as a development goal[437] and has relevance for the state's obligation to ensure food sovereignty.[438] To this end, the guarantee of uninterrupted provision of public clean water services forms a part of the state's guarantee to habitat and decent housing.[439]

The newly implemented rights for the environment include the right of nature to be respected[440] and restored.[441] Thereby the Constitution picks up the indigenous terminology of *Pacha Mama*, which means Mother Earth, seemingly fulfilling promises on integrating notions of and respect for the indigenous part of the population.[442] The rights granted to the environment are in so far significant for the right to water, as its violation often occurs as a consequence of its pollution or overuse of water sources, which under the new Constitution is impermissible from the environmental perspective. The interests clashing with environmental interests and the right to water nevertheless did not vanish because of the Constitution. Conversely, the economic faith of Ecuador remained dependent on extractive industries, leading to the passing of a mining law under Correra, which allowed foreign companies to undergo mining activities, although in direct conflict with indigenous access to water.[443] Therein laid the irony that Correra had initially experienced much support from the indigenous community, to which he had asserted connections prior to his election.[444] The law also allowed for the president to make discretional decisions by declaring zones as special mining zones, to which concessions could then be

[436] Ibid.
[437] See Ibid, Art. 276 No. 4.
[438] See Ibid, Art. 281 No. 4, 282.
[439] Ibid, Art. 375 No. 6.
[440] Ibid, Art. 71.
[441] Ibid, Art. 72.
[442] Velásquez, Supranote 419, p. 157; and Akchurin, Supranote 323, p. 943.
[443] Whittemore, Supranote 429, pp. 663 ff.
[444] Lauderbaugh: The History of Ecuador, p. 163.

obtained.[445] The movements sparked by this Constitution-contradicting event were faced with harsh measures, such as shut-downs of NGOs and indigenous organizations.[446] The drafting process of the new water law nevertheless persisted as a topic of public interest, attracting ongoing involvement of different interest groups.[447]

Already before the new law came into force, the National Water Authority SENAGUA was established in 2008, in fulfillment of the constitutional provision, which requires the installation a single authority for water management.[448] It took until 2014 before the new water law was passed by congress, the "*Ley orgánica de los recursos hídricos uso y aprovechamiento del agua*"[449] Its Art. 3 states that the objective of the law is to guarantee the human right to water ("*garantizar el derecho humano al agua*"),[450] as well as to regulate and control all other aspects in relation to it, including the use of water resources.[451] The law further adds that access to water is a human right ("*El acceso al agua es un derecho humano*")[452] and that water has to be conserved and protected.[453] Moreover, Article 318 of the Constitution is mirrored in Article 6, where the law says that any form of water privatization is prohibited.[454] It specifies that any delegation of water management to the private sector or outsourcing of public services related to the integral water cycle thereto are forbidden.[455] Commercial agreements imposing profit-based economic regimes for water management face the same fate under the provision.[456] The general prohibition of water privatization in all its forms therefore clearly goes against allowing

[445] Beveridge and Diamond PC News & Events: Ecuador Highlights, relying on Art. 24 of the mining law, http://www.bdlaw.com/news-544.html (accessed 22 September 2018).
[446] Ibid, pp. 664 ff.
[447] See Americas Quarterly: Ecuadorian Water Law Sparks Outrage from Indigenous Communities, 23 October 2009, https://www.americasquarterly.org/ecuador-indigenous-water-law (accessed 20 September 2018).
[448] Moscoso/Feijo/Silva in Resources: The Vital Minimum Amount of Drinking Water Required in Ecuador, p. 2; Constitution of Ecuador, Supranote 69, Art. 411, 412.
[449] Ley orgánica de los recursos hídricos uso y aprovechamiento del agua del Ecuador, Año II- Nº 305, de agosto de 2014.
[450] Ibid, Art. 3.
[451] Ibid.
[452] Ibid, Art. 4 (e).
[453] Ibid, Art. 4 (b).
[454] Ibid, Art. 6.
[455] Ibid, Art. 6 (a), (b).
[456] Ibid, Art. 6 (c).

private entities, such as Bechtel, to take over the water supply and to gain financial profit therefrom, as has happened in the Ecuadorian past. However, the following article holds exceptions, allowing for participation of private entities when the relevant public authority declares a state of emergency,[457] or, in much more ambivalent terms, does not have the technical or financial capacity to provide water services.[458] Although this seems to be unconstitutional in relation to Article 318 of the Constitution, this exception is possible, for the constitution itself in Article 316 states that "[t]he State may delegate participation in strategic sectors and public services to mixed-economy companies in which it has a majority shareholding"[459] where this is subject to national interest.[460] Of course, water is repeatedly mentioned as a strategic asset, bringing it under the umbrella of Article 316. It further allows the State to exceptionally "delegate the exercise of these activities to private enterprise and the grassroots solidarity sector of the economy, in the cases set out by law."[461] One of the cases set out by law, as shown, is one in which there is a lack of technical or financial means of the public authority. In absence of further concretion of when such a stage is reached, the exceptions set out by Article 7 of the simple law are open to interpretation.

By constitutionally transferring all competences regarding water to the state and declaring it a good of strategic importance for national affairs, the government has in fact gained extensive powers in relation to water under the pretense of satisfying the needs of citizens and communities.

According to SENAGUA, access to water has yet increased since the introduction of the Constitution by 14,6 % between 2006 and 2016. While the access across the board reached 83,6 % in 2016, the access in rural areas was less with 59 %.[462] SENAGUA has also signed a

[457] Ibid, Art. 7 (a).
[458] Ibid, Art. 7 (b).
[459] Ibid, Art. 316.
[460] Ibid.
[461] Ibid.
[462] Emel/Cantor, Supranote 433, p. 86.

Ministerial Agreement, which establishes a formula for water cost calculation as well as a minimum amount of drinking water, which is set at 200 l per person per day.[463] The ministerial agreement relies on Art. 59 of the water law, which determines that the minimum amount necessary to fulfill basic water needs has to be established by the water authority to satisfy the human right to water.[464] This is helpful since it gives some content to the right to water, which is missing from the constitutional provisions. Nevertheless, it has already been suggested that the set minimum disproportionately effects minorities in rural areas, due to the fact that the difficulties in providing the same amount of water to each area, independently of operator efficiency and municipality size, translates into higher costs for consumers.[465]

The recent history of Ecuador shows clear conflicts of the right to water with interests of the government in gaining economic growth, between ethnicities in competing for water resources amongst each other as well as with actors of industries, especially extraction industries. While the consequences of the newly set minimum amount of drinking water and the change in presidency after Correra are not conclusive yet, the right to water depends on exceptions made on behalf of other industries and strategic asset usage as well as further efforts to define the right to water in a manner that will enhance the access to water for all parts of society.

c. California

As a state, which is part of a federal system, California's water laws and rights are guided by legal frameworks and institutions on the state as well as federal level. In recent times, California has gained much attention in relation to water due to the episode of drought it has

[463] Secretaría Nacional del Agua, Acuerdo Ministerial No. 2017- 1522, No. 2017-1523, 23 May 2007 and Reformar El Acuerdo Ministerial No. 2017- 1522, 28 June 2017.
[464] Ley orgánica de los recursos hídricos uso y aprovechamiento del agua del Ecuador, Supranote 317, Art. 59.
[465] See Moscoso/Feijo/Silva, Supranote 448, pp. 14 f; and Emel/Cantor, Supranote 433, pp 97 ff.

faced between 2011 and 2017.[466] In the history of the state, two courses regarding (a) the evolution of water laws and (b) social questions connected to water, are important in understanding the status quo.

(i) Significance and Development of Water Rights

The water law in California constitutes a mix of the riparian doctrine and the doctrine of prior appropriation, creating a hybrid system, which is sometimes referred to as the "California doctrine".[467] The existence of the hybrid regime was recognized by the Supreme Court of California in *Lux v. Haggin*, in which it did not dismiss either of the doctrines, when it was faced with a conflict over water use between the appropriative right of a private company and the right of a riparian proprietor.[468] It is noteworthy, that the Court of 1886 already saw the danger of granting unlimited appropriative rights over water to private companies, so stating that, in the opinion of the Court, "it does not require a prophetic vision to anticipate that the adoption of the rule, so called, of "appropriation" would result in time in a monopoly of all the waters of the state by comparatively few individuals. […] Whether the fact that the power of fixing rates would be in the supervisors, etc., would be a sufficient guaranty against over-charges would remain to be tested by experience."[469]

After a period of uncertainty caused by the dual application of the doctrines, an act was implemented in 1914, creating a state agency with the authority to allocate surface water by granting permits for its use.[470] In subsequent years, conflicts over water arose, even including

[466] National Integrated Drought Information System: California is no Stranger to Dry Conditions, but the drought from 2011-2017 was exceptional, https://www.drought.gov/drought/california-no-stranger-dry-conditions-drought-2011-2017-was-exceptional (accessed 24 September 2018).
[467] See Sugg in Resources: An Equity Autopsy: Exploring the Role of Water Rights in Water Allocations and Impacts for the Central Valley Project during the 2012–2016 California Drought, p. 2.; and Johnson: United States Water Law: An Introduction, p. 46.
[468] Supreme Court of California, Lux et al. v. Haggin et al, 69 Cal. 255; 10 P. 674 (1886).
[469] Ibid, par. 187.
[470] California Water Boards, Supranote 326.

violent outbreaks,[471] leading up to the case of *Herminghaus v. South California Edison Co.*[472] This case, again, provided a matter of dispute over a water source.[473] Although the decision was heavily anticipated, partly because of the hope that water use would be restricted to solely encompass reasonable use, the Court ruled in favor of the riparian owner's choice to use water regardless of the possibility of a more beneficial use through others. Riparian water rights were therefore not restricted by the court in the way many stakeholders had hoped.[474]

As a result, the legislature passed an amendment to the Constitution in 1928. Since, it encompasses the requirement "that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented."[475] It further restricts the right to water "to such […] as shall be reasonably required for the beneficial use to be served."[476] The constitutional amendment fulfills the demands for a limitation on water rights, so that they only exist to the extent of reasonable use. It further does not engage in a distinction between the source of the right, so that the standard applies to both, riparian and appropriative, uses. The introduced amendment was confirmed by the Californian Supreme Court in 1935[477] and still presents good law, meaning that water rights must be balanced according to the possibilities of maximum use and minimal waste.[478] The Constitution further includes the demands that water shall be used for the public by incorporating the public trust doctrine, according to which the state of California has the regulative power and control over the water resources enlisted.[479]

[471] Miller in Water Rights and the Bankruptcy of Judicial Action: The Case of Herminghaus v. Southern California Edison, p. 83.
[472] Supreme Court of California, Herminghaus v. South. California Edison Co., 200 Cal. 81; 252 P. 607 (1926).
[473] Ibid, par. 85 ff.
[474] Miller, Supranote 471, pp. 95 f.
[475] The Constitution of California, Art. X, Section 2.
[476] Ibid.
[477] See Supreme Court of California, Peabody v. City of Vallejo, 2 Cal (2d) 351, p. 40 (1935).
[478] Louden in University of Denver Water Law Review: California Takes Another Cookie from the Policy Jar, pp. 125 f.; and Miller, Supranote 471, p. 103.
[479] See the Constitution of California, Art. X, Sections 4, 5, 6.

The regulation and control of appropriated water is thereby specifically mentioned as being under state authority in cases of sale, rental and distribution of water.[480]

(ii) Present Legal Status

Drawing upon the necessity for water to be used beneficially, the California Water Code determines that domestic, irrigational, municipal and industrial uses, among others, are beneficial.[481] Although no prioritization can be derived from this, Section 106 dictates a prioritization of water for domestic uses, whereas irrigational uses are of secondary prioritization vis-à-vis other uses.[482]

The federal legislation incorporating water-related regulations is the Safe Drinking Water Act (SDWA) of 1974. When passed, it only presented one of many laws which were intended to guarantee environmental protection.[483] Through it, the US Environmental Protection Agency has gained federal regulative power. The content of the SDWA deals mainly with the quality of water by setting levels for microbes and chemicals and determining needed protection for water sources,[484] whereby non-quality-related aspects are not covered by the Act.[485] Two points of criticism often attached to the law are that its set standards are obsolete measured by today's scientific standards and that it does not apply to small water systems.[486] The latter is a matter of concern, since the Environmental Protection Agency has estimated that more than 13 million households depend on private drinking wells.[487] For the water systems the SDWA applies to, its implementation competency lies with the federal agency as well as

[480] Ibid, Art. X, Section 5.
[481] California Water Code, WAT, Section 1257.
[482] Ibid, Section 106.
[483] Weinmeyer et al. in AMA Journal of Ethics: The Safe Drinking Water Act of 1974 and its Role in Providing Access to Safe Drinking Water in the United States, p. 1019.
[484] Environmental Protection Agency: Understanding the Safe Drinking Water Act, pp. 2 f, https://www.epa.gov/sites/production/files/2015-04/documents/epa816f04030.pdf (accessed 23 September 2018).
[485] Larson in Notre Dame Law Review: Law in the time of Cholera, p. 1300.
[486] Weinmeyer, Supranote 483, pp. 1022 f.
[487] Environmental Protection Agency: Private Drinking Water Wells, https://www.epa.gov/privatewells (accesses 24 September 2018).

with the state.[488] For this, California has passed the California Safe Drinking Water Act, which is incorporated in the California Health and Safety Code and determines that the State Water Resource Control Board is in charge of maintaining drinking water programs.[489] The Board is also the body, which develops water plans and policies and reports these to the Environmental Protection Agency.[490] In 2006, it passed a significant new law, declaring that "[e]very resident of California has the right to pure and safe drinking water."[491]

Notwithstanding the efforts made by the State to ameliorate the status of water for domestic uses and to emphasize its importance, a pattern of social inequality effects the ability of access to water for many Californians. The reason for this goes back to occurring waves of immigration to California, especially to its Central Valley.[492] The Central Valley is the area in California with the biggest agricultural production, in fact providing for over half of the state production, which serves consumers beyond state and national lines.[493] Especially the 1990s brought a wave of migration, which is connected to the agricultural growth of the region and the motive of many migrants to earn money within the sector.[494] Within the Central Valley, San Joaquin Valley, which lies in the south, is one of the poorest areas in California and consists largely of people of color due to the described settlement patterns.[495] The area has three main interconnected problems, namely inefficient or missing infrastructure, a lack of big water systems and severe water contamination.[496] The insufficient infrastructure is a consequence of political unwillingness to make investments in rural areas, where the costs

[488] Weinmeyer, Supranote 483 p. 1020.
[489] California Health and Safety Code, Safe Drinking Water Act, § 116271 (b).
[490] California Water Boards: Plans and Policies, https://www.waterboards.ca.gov/plans_policies/ (accesses 24 September 2018).
[491] California Health and Safety Code, Supranote 350, § 116270 (a).
[492] Cowan: California's San Joaquin Valley and the Appalachian Region: Comparison and Contrast, p. 4.
[493] Franics/Firestone in Willamette Law Review: Implementing the Human Right to Water in California's Central Valley: Building a Democratic Voice Through Community Engagement in Water Policy Decision Making, p. 495; and UN General Assembly, Human Rights Council Report A/HRC/18/33/ Add.4, 2 August 2011, p. 35.
[494] Cowan, Supranote 492, p. 4; and Avalos: Migration, Unemployment, and Wages: The Case of the San Joaquin Valley, p. 125.
[495] Franics/Firestone, Supranote 493, p. 498.
[496] Ibid, pp. 498, 514.

would exceed those in urban areas.[497] Hereto it should be pointed out that additionally many of the rural areas in San Joaquin Valley are unincorporated.[498] Because of this, the access to water of good quality as well as sufficient quantity of many is severely impaired.[499] Residents of the area therefore depend on small water systems, which, as explained above, do not fall under the umbrella of the SDWA, leaving the water sources mostly unregulated and uncontrolled. A grand majority of 90 % of residents depend on groundwater as a source of water,[500] which many access through private wells.[501] Because of the closeness of the residencies to farms, the groundwater accessed has been subject to agricultural pollution for decades.[502] It therefore shows high levels of nitrates,[503] which cause cancer as well as reproductive- and other health issues.[504] A further contribution to this pollution is provided by hydraulic fracturing, which is exempt from the SDWA, although pollutive.[505] The only alternative to contaminated water therefore lies in the purchase of bottled water. The dependence on a disproportionately expensive commodified good is not insignificant, since the bottled water does not only have to serve drinking water needs, but all domestic needs, including cooking and hygiene. A disparate impact on the poor can therefore be observed, which in the case of San Joaquin Valley translates to a disparate impact on the Latino community, which makes up almost half of the residents.[506]

Within and outside of the Valley, these problems are increased by the inscrutable distribution of water-related tasks to various agencies and institutions, not only between the federal and state level, but in addition on the local levels.[507] The spread-out competencies

[497] Pannu in California Law Review: Drinking Water and Exclusion: A Case Study from California's Central Valley, pp. 234, 237; and Francis/FireStone, Supranote 493, p. 498.
[498] Ibid, 231.
[499] Ibid, pp. 234, 237.
[500] UN General Assembly, Human Rights Council Report A/HRC/18/33/, Supranote 355, p. 36.
[501] Pannu, Supranote 497, pp. 226, 237.
[502] Franics/Firestone, Supranote 493, p. 499.
[503] UN General Assembly, Human Rights Council Report A/HRC/18/33/, Supranote 355, p. 34.
[504] Franics/Firestone, Supranote 493, p. 499.
[505] UN General Assembly, Human Rights Council Report A/HRC/18/33/, Supranote 43.
[506] Ibid, p. 34.
[507] Pannu, Supranote 497, p. 246.

hamper the ability of residents to file complaints, which is worsened by the angst of water shut-offs in the case that inadequate water quality is detected.[508] Those in San Joaquin Valley, which represent 10 per cent of the Californian population, are forced to spend around 20 % of their annual income on a combination of water services and bottled water,[509] which also negatively impacts other human rights. To this effect, a resident of San Joaquin Valley has stated: "We buy all the necessary food for our children and we buy the water. But that might mean we buy less food for our children."[510]

The latter statement was taken after California has famously implemented a human right to water. Although the above-mentioned provision already provided for a right to pure and safe drinking water, a collaboration of organizations pursued to have the Californian legislature pass a bill, which would implement the right to water as a human right. The bill almost passed in 2009 after it was passed by the Californian Assembly and Senate but failed due to a veto by then-governor Arnold Schwarzenegger.[511] Further efforts led to a new processing of the bill in 2012. In this instance, the facts that a similar provision already existed and that the recognition of the human right to water could carry financial implications, were brought forward by opposers to the bill.[512] It nevertheless passed all legislative steps so that it became "the established policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes."[513] The state policy now binds all state agencies when conducting tasks related to water for human consumption.[514] In relation to the above-mentioned issues, it is however notable that the provision also clarifies that the state has no expanded obligations beyond those existing to

[508] Ibid, p. 238.
[509] UN General Assembly, Human Rights Council Report A/HRC/18/33/, Supranote 355, p. 34.
[510] News Deeply: Toxic Taps: Getting to the Roots of California's Drinking Water Crisis, 5 July 2017, https://www.newsdeeply.com/water/articles/2017/07/05/getting-to-the-roots-of-californias-drinking-water-crisis (accessed 24 September 2018).
[511] California Assembly Committee on Water, Parks and Wildlife, Bill analysis of Bill AB 685, p. 3, http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0651-0700/ab_685_cfa_20110425_121011_asm_comm.html.
[512] Louden, Supranote 478, p. 131.
[513] California Water Code, WAT, Section 106.3 (a).
[514] Ibid, Section 106.3 (b).

provide water or develop water infrastructure.[515] Despite its addressing of water affordability, it is not clear how well the provision will contribute to a balancing of the right to water of California residents with the state's enormous economic dependence on agriculture. In the context of the Central Valley, specific equality considerations and integrative measures are necessary to address the gap between legislation and the prevailing circumstances.

d. Conclusion: Different Backgrounds with Similar Stories

Water has a significant role in all three above-examined jurisdictions. All states are plagued by climate change, whereby especially South Africa and California are subject to droughts, limiting the amount of water available. The biggest competitor for water sources is the agricultural sector, which uses large amounts of water. Hereto it can be pointed out, that the agricultural sector is not of unimportance for the protection of human rights, as it is responsible for producing food, leading either to food sovereignty or to employment in the field. The industrial sector further competes for water, as it is needed for the extraction industry and the creation of hydropower. In terms of political emphasis, the extraction industry is of biggest importance in Ecuador, where the economy has been made especially dependent on the extraction of oil, regardless of its effects on the human right to water.

Water management has been mishandled by private actors, whereby the World Bank has had decisive influence on this process in the cases of Ecuador and South Africa, which both faced economic hardship. All states have shown an instance of marginalization along ethnic lines impairing the right to water. The main marginalized group in South Africa is the black part of society, especially in black townships, due to the colonialist and apartheid background. Colonialism has also contributed to marginalization of indigenous peoples in Ecuador, which have been forced to live on water-scarce land and generally faced societal exclusion. In California the factor leading up to the marginalization of the poor, Latino communities rather

[515] Ibid, Section 106. 3 (d).

stems from work migration for the agricultural sector. Residents of the Central Valley have yet to experience any political efforts to elevate their access to water, whereby infrastructure, as in all above cases, plays a vital role.

The implemented rights to water present a constitutional provision in both, South Africa and Ecuador, and solely simple law in California. The States display similar traits regarding the historical development of water rights in the face of inequality as well as its social significance. In all instances, the different issues surrounding water have led to the introduction of the human right to water. However, the way that water is dealt with on a day-to-day basis seems to depend greatly on the administrative authorities, which have discretionary decision powers regarding water policies.

IV. State Obligations in South Africa, Ecuador and California

The obligations created by the right to water will be examined in the context of the frameworks in South Africa, Ecuador and California. A comparative analysis along the lines of the framing of the obligation, the content given to the right and the effectiveness resulting from the former points will lead to a conclusion of existing state obligations and their role in realizing the right to water. In examining the content of the obligations, interpretive case law will be minded, whereby special emphasis will be given to the South African *Mazibuko* case.

1. Framing of the Obligation

The South African Constitution obliges the state to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realization"[516] of the right to water. The state therefore must actively work towards the realization of the right and cannot solely refrain from interfering therewith. The obligation thereby does not exist beyond the

[516] The Constitution of the Republic of South Africa, Art. 27 (2).

state's resources,[517] which again acknowledges the difficulties and financial implications of socio-economic rights. Since the framing speaks of "achieving" progressive realization,[518] the obligation does not require an immediate realization of universal access to water. Although this sounds like a limitation of the state's obligation, it provides for some direction as how to approach the achievement of the right. This guidance is missing from the Ecuadorian human right to water, which does not address any state obligation in the provision establishing the right itself.[519] State obligations can however be found in the constitutional chapter on basic principles. In accordance with its Article 3 No. 1, it is one of the state's prime duties to guarantee "without any discrimination whatsoever the true possession of the rights set forth in the Constitution and in international instruments",[520] especially the right to water, among others.[521] The mentioning of the right to water as one of the first prime duties demonstrates that the Constitution of Ecuador attaches high importance to the right. The duty to "guarantee… the true possession"[522] of the right yet provides for inferior direction to that given by the South African Constitution, in which a clear positive obligation to take reasonable measures is established. It further does not include any element of evolvement over time, as does the South African provision by including the terminology of "progressiveness". However, Article 32 of the Ecuadorian Constitution links the right to water to the right to health.[523] Here, the state has the obligation to guarantee the right by means of different policies.[524] The obligation to implement policies for the protection of health presents a positive obligation of the state, which could be transferred to health-related aspects of the right to water. This assumption is supported by the direct linkage made between both rights in the provision of the right to health and by the

[517] See ibid.
[518] Ibid.
[519] See The Constitution of Ecuador, Article 12.
[520] Ibid, Article 3 No. 1.
[521] Ibid.
[522] Ibid.
[523] Ibid, Art. 32.
[524] Ibid.

mentioning of both rights alongside another in the above-mentioned prime duties of the state. The question of how the state must go about guaranteeing the true possession of the right in other aspects than those directly health-related is left open, which corresponds to the above-outlined uncertainties and possibilities of fragmentation of the right to water in international law.

The Californian provision has a different approach to both examples put forward. It declares the human right to water an established state policy with the corresponding obligation,[525] that relevant state agencies "shall consider this state policy when revising, adopting, or establishing policies, regulations, and grant criteria…".[526] Section (c) of the provision thereby specifically excludes the possibility that the provision creates an obligation to "provide water or to require the expenditure of additional resources to develop water infrastructure.."[527] While state agencies have discretion in how to consider the human right to water policy, they by no means must directly provide water or improve infrastructure therefore. This is a concrete limitation of obligations, which does not appear in the South African or Ecuadorian case. The provision further differs to those from South Africa and Ecuador because it solely binds agencies, which have relevance for domestic water uses. The rights in Ecuador and South Africa are imbedded in the respective Constitutions and therefore bind all state power.

Since the Californian provision merely obliges state agencies to consider a policy, the it does not create a state duty to provide individuals with access to water.[528] The obligations for South Africa and Ecuador allow for no such conclusion. However, it is not clear how suitable the Ecuadorian right is for achieving individual access to water, as it is the vaguest of the presently examined. In any case, the exact implications for states are also conditional on the

[525] California Water Code, WAT, Section 106.3 (a).
[526] Ibid, Section 106. 3 (b).
[527] Ibid, Section 106.3 (c).
[528] Francis of Safe Water Alliance: The Legal Implications of AB 685: California's Human Right to Water Bill, p. 13

content the right has been given in the respective framework and on the interpretation of the elements by the judiciary.

2. The Content of the Right to Water to which the Obligation Corresponds

When defining the exact content of the right to water and the obligations of the state that correspond thereto, recurring issues are whether the right to water is quantifiable and if it implies that the state must provide certain quantities of water either limited in price or for free. The Ecuadorian Constitution has no mention whatsoever of either of these elements.[529] Although the duty to guarantee the right to water without discrimination could provide for an affordability angle and the connection of the right to water to other rights could create a state obligation to provide a certain quantity, this is not clear from the constitutional provision itself. The duty of Californian agencies includes that they must make affordability considerations when engaging with water-related policies and regulations.[530] While the right also includes accessibility, it does not mention quantity.[531] Both aspects find mentioning in the South African provision, which gives everyone the right to access sufficient water.[532] Here too the question arises of what qualifies as sufficient. The reason that this is complicated and disputed is that a concrete answer to these questions can put a managerial, administrative and financial burden on the state. It appears that states are willing to accept international, expertise-based standards for quality, but expert assessments of a minimum quantity of water necessary to maintain health and dignity are not as easily accepted as a base for the realization of the human right to water. How difficult it is to create substantive state obligations in this matter can be demonstrated by case law.

[529] See The Constitution of Ecuador, Article 12.
[530] See California Water Code, WAT, Section 106.3 (a).
[531] See ibid.
[532] See The Constitution of the Republic of South Africa, Art. 27 (1) (b).

a. The Role of the Constitutional Court of South Africa in Defining State Obligations Towards the Fulfillment of the Human Right to Water

In one of the first right to water litigations, *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*,[533] the residents of flats in Hilbrow, Johannesburg, were unable to pay for water services and were thus faced with a disconnection of water supply.[534] Because of this, the resident applicants claimed a violation of their right to water under the Constitution and Water Services Act.[535] The case was decided by a division of the South African High Court, which concluded that the disconnection of water supply constituted a prima facie breach of the States' obligation to not interfere with the right to water.[536] The burden to justify the lawfulness of a disconnection is therefore on the state.[537] In terms of inability to pay, the Court ruled that basic access to water supply cannot simply be disconnected, where the persons affected are unable to pay.[538] Although not decided by the constitutional court, the case is one of the first steps towards the implementation of the right to water, for it obliges the state to respect the physical access.[539] It also touches upon the issue of inability to pay for water, whereby it does not contribute any further to either the mentioned issue nor to the definition of sufficiency. Both aspects were subject to a later litigation, which was decided by the Constitutional Court, namely the case of *Mazibuko v. Johannesburg*.[540]

[533] South African High Court, Residents of Bon Vista Mansions v Southern Metropolitan Local Council 2002 (6) BCLR 625(W).
[534] Winkler, in Law, Social Justice & Global Development: Judicial Enforcement of the Human Right to Water – Case Law from South Africa, Argentina and India, p. 6.
[535] Tulk, Supranote 391, p. 182.
[536] Winkler, Supranote 534, p. 6.
[537] Ibid.
[538] Unknown, in Harvard Law Review: What Price for the Pirceless?: Implementing the Justiciability of the Right to Water, p. 182.
[539] Tulk, Supranote 391, p. 186.
[540] Constitutional Court of South Africa, Mazibuko and Others v. City of Johannesburg and Others, Case CCT 39/09, 2009, ZACC 28.

(i) Outline of the Background and Facts of Mazibuko

The applicants in the case of *Mazibuko* were residents of Phiri, which is a part of Soweto.[541] This is an urban area, which was developed under apartheid to exclude black people from living in white areas.[542] Accordingly, the residents of Phiri are poor, as were the applicants.[543] The water service for Soweto residents, which was installed under apartheid, used to include that residents pay a flat rate for water charges. The flat rate was based on the assumption that a household would consume 20 kiloliters per month. As residents consumed more water than this and Soweto only generated 1 per cent of the revenue created through water services, the municipality saw need to intervene. To combat the claimed waste of water, Operation *Gcin'amanzi* (meaning to save water) was implemented.[544]

Operation *Gcin'amanzi* includes three levels of water provision, whereby service level 1 provides a tap within 200 meters of the household, service level 2 provides a tap in the yard or the household itself and service level 3 provides for metered water. The option of service level 2 thereby only has restricted water flow, providing for 6 kiloliters of water per month. The residents of Phiri were given the choice between service level 2 or the installment of a prepaid meter with 6 kiloliters of free water per household per month. In this system, once the 6 kiloliters were used, the prepaid meters allowed the consumer to purchase credit to access more water. Where credit was not purchased, the provision of water was suspended thereafter.[545]

The provision of 6 kiloliters of free basic water supply per month was based on a calculation, that assumed a household would contain eight people,[546] which would amount to 25 liters of water per person per day and would therefore be in accordance with the ministerial

[541] Ibid, pp. 4, 5.
[542] Ibid, p. 10.
[543] Ibid.
[544] Ibid, p.p. 11-13.
[545] Ibid, pp. 14 ff.
[546] Founding Affidavit of Lindiwe Mazibuko in the matter of Mazibuko and Others v City of Johannesburg and others, para. 121.

regulations that had been passed.[547] The latter states that "a minimum quantity of potable water of 25 liters per person per day or 6 kiloliters per household per month" meets the minimum standard for basic water supply.[548] However, in a poor area as Phiri, households often contain more residents than provided for by the calculation.[549] Since the residents were unable to purchase extra credit, they were often left without access to water for half of the month.[550] In the case of one of the applicants, Lindiwe Mazibuko, the free basic water supply was shared by a household of twenty people.[551] Even though water was only used for basic needs, such as drinking, cooking and sanitation, 6 kiloliters per month were not enough, which sometimes led to the applicant not drinking sufficient water and the members of the household not being able to flush the toilet.[552] Other applicants faced similar situations, in one case not having enough water to properly take care of an HIV-infected family member and in another not having enough water to provide for an ill family member and subsequently hold his funeral.[553] In another instance, people lost their lives to a fire because the water provision and pressure was insufficient to avert the emergency.[554]

The applicants claimed, that the fact, that they have only been given the chance to choose between service level 2 or a prepaid meter was unlawful and unreasonable and that the disconnection of water services for those, who cannot pay, was a violation of their constitutional right. They further contended that 25 liters per person per day was not sufficient to meet all basic human needs. Their assertions were supported by international expert in the field, Peter Gleick, who, in referencing international standards, such as by the WHO,[555] stated that a

[547] See South African Department of Water Affairs and Forestry: Regulations relating to compulsory national standards and measures to conserve water, Section 3 (b).
[548] Ibid.
[549] See Founding Affidavit of Lindiwe Mazibuko in the matter of Mazibuko and Others v City of Johannesburg and others, para. 69, 77.
[550] Ibid, para. 101.
[551] Ibid, para. 68.
[552] Ibid, para. 112.
[553] Ibid, para. 118.1, 181.2.
[554] Ibid, para. 118.4.
[555] Von Schnitzler, Supranote 186, p. 184.

minimum amount of 50 liters per person per day was a necessary minimum starting point to meet the basic needs of Phiri residents.[556]

In course of the litigation, in which the two basic issues were that the city's policy of providing 6 kiloliters per household per month was unconstitutional and the installment of prepaid meters unlawful, the High Court and Supreme Court of Appeal reached different conclusions. The High Court ruled that the prepaid system was discriminatory and the water policy unreasonable.[557] It also deemed that a free basic water supply should amount to 50 l per person per day, thereby clearly quantifying the right and deciding on the sufficiency.[558] The Supreme Court of Appeals ruled that the installment of prepaid meters was unlawful, reasoning that the City had no authority to do so. Regarding quantity, it diverged from the High Court's ruling and determined that 42 liters per person per day were sufficient to lead a dignified human existence in accordance with Article 27 (1) (b) of the Constitution.[559]

Since the applicants were not satisfied with the latter ruling, they appealed to the Constitutional Court, which for the first time was faced with the constitutional right to access to sufficient water.

(ii) The Constitutional Court's Assessment of State Obligations

One element clear from the *Mazibuko* judgement is that the right to "access" water does not create an obligation for the state to provide everyone with water upon demand. This is reasoned by the framing of the obligation to take reasonable measures to progressively realize the right.[560] The exact implications of this progressive realization are the center of the Court's assessment. The nature of the obligation plays a role in the question of whether and how to quantify the

[556] Founding Affidavit of Lindiwe Mazibuko in the matter of Mazibuko and Others v City of Johannesburg and others, par. 146.
[557] Constitutional Court of South Africa, Mazibuko and Others v. City of Johannesburg and Others, p.26.
[558] Ibid.
[559] Ibid, p. 28.
[560] Ibid, p. 50.

right to water and in the matter of how the state can fulfill the requirements that arise from Article 27 (2) of the Constitution.

(a) Standard: Quantifiable Minimum Core vs. Reasonableness

The question of quantifiability of the right to water arises in the context of the examination of the policy. The Court takes the request to order a provision of 50 liters per person per day as a request to set a quantifiable minimum standard of the right to water.[561] Although the Court recognizes that this notion stems from international law,[562] it rejects the minimum core approach for socio-economic rights. It hereby refers to the *Grootboom*[563] case, concerned with the right to housing, in which the Court initially dealt with the question of a minimum core.[564] Here, as well as in the case of *Treatment Action Campaign No. 2*,[565] the Court's case law dictates that the setting of a minimum core is not compatible with the obligations of the state to take reasonable measures.[566] For this, the Court brings forward two main arguments, one being a textual argument and the second regarding separation of power in a democracy.[567]

In the opinion of the Court, requiring the state to provide a minimum core would equal an obligation to immediately fulfill the right to sufficient water.[568] This is contrary to the obligation in Article 27 (2) of the Constitution, whose text dictates that the state must realize the right progressively.[569] Because the state must take reasonable steps for this, the standard applied by the Court is the standard of reasonableness. According to the Court, this does not require immediate fulfillment by the state, but rather assesses the state obligations in the

[561] Ibid, p. 51.
[562] Ibid, p. 52.
[563] Constitutional Court of South Africa, Government of the Republic of South Africa v. Grootboom, CCT 11/00, 2000 ZACC 19.
[564] Constitutional Court of South Africa, Mazibuko and Others v. City of Johannesburg and Others, Supranote 477, p. 53.
[565] Constitutional Court of South Africa, Minister of Health v. Treatment Action Campaign No. 2, CCT 08/02, 2002, ZACC 15.
[566] Constitutional Court of South Africa, Mazibuko and Others v. City of Johannesburg and Others, Supranote 477, pp. 48 f.
[567] Ibid, p. 57 ff.
[568] Ibid, p. 57.
[569] Ibid, p. 58.

respective context.[570] A minimum core approach is conversely viewed as not allowing this contextual assessment.[571] In this connection the Court points to the fact, that required water quantity depends on the individual situation, so that it can vary.[572]

The separation of power in terms of a separation between the judiciary on the one and the executive and legislature on the other side, is seen by the Court as giving the latter two branches the prerogative to decide on which goals to achieve.[573] This is especially the case since the Court assumes that quantity depends on many factors, which it considers necessary to be assessed by the other branches.[574] For not being able to set these varying standards and for reasons of accountability in a democratic system, the Court views itself not equipped to make these decisions.[575] While these branches are the ones tasked with making policy decisions, including defining sufficiency, the Court's task lies in examining the policy under the aspect of reasonableness.[576] It therefore sees the formulation of the obligation in Article 27 (2) as preventing it from quantifying the human right to water by giving it a minimum core. In turning away from the approach of the CESCR, it applies the standard of reasonableness to state obligations towards socio-economic rights.

(b) How does the State fulfill its obligation to act reasonable?

Since the state has the positive obligation to take measures, the Court examines whether these are reasonable.[577] Because reasonable steps act as measures to achieve progressive realization, the government has the obligation to review its policies.[578] For the taken measures to be reasonable, the government must further set clear targets to achieve,[579] which it must be able to

[570] Ibid, p. 60.
[571] Ibid.
[572] Ibid, p. 62.
[573] Ibid, p. 61.
[574] Ibid, pp. 57, 61, 62.
[575] Ibid, p. 62.
[576] Ibid, p. 65.
[577] Ibid, p. 66.
[578] Ibid, 67.
[579] Ibid, p. 70.

explain.[580] In the present case of the free basic water policy, the former is deemed reasonable by the Court, because the respondents revised the policy and introduced the possibility to apply for an additional emergency water supply in the course of the litigation.[581] In the view of the Court, this shows that the government took steps towards the further realization of the right to water. The amount of the water provided is thereby not subject to the question of reasonableness.[582] What is relevant to the constitutional standard in *Mazibuko* is that the government implemented a policy, which it then revised and reconsidered.[583] As a result thereof, the policy was continually redefined as to enhance access to water of the indigent.[584] The argument brought forward by the applicants, that the calculation does not do justice to the actual number of people living in households, is thereby rejected by the Court, which finds that an actual examination would present too big of an administrative burden.[585]

Regarding the prepaid meters, the Court deals with Section 4 (3) of the Water Services act, which regulates unlawful discontinuation of water supply. Here the Court explains its interpretation of the section as dealing with permanent disconnections. Since the usage of the free 6 kiloliters in the prepaid meter solely leads to a temporary disconnection until the next month, the Court does not see this as a discontinuation, so that Section 4 (3) cannot lead to the unlawfulness of the measure.[586] Since the offered options of Service level 2 and the prepaid meter are both deemed lawful by the Court, they can also not be held as threatening the applicant's access to water.[587]

Based on the prepaid system, two further arguments are made by the applicants, which are rejected by the Court grounded on a comparison with the prior flat rate system. Firstly, the

[580] Ibid, p. 71.
[581] Ibid, pp. 40, 92.
[582] See Ibid, pp. 94 f.
[583] Ibid, pp. 92, 162.
[584] See pp. 40, 44, 81, 92, 93, 97.
[585] Ibid, p. 84.
[586] Ibid, pp. 105, 114- 123.
[587] Ibid, p. 125.

Court does not accept that the system of prepay and suspension is in breach of the state's negative obligation to not interfere with the access of water.[588] Secondly, it rejects the argument, that the installment was unreasonable because it was retrogressive.[589] Concerning the latter point, the comparison drawn by the Court is between the policy and the old system, under which residents received more water under a flat rate system, which most residents did not pay. Although they de facto had access to more water, the fact, that they unlawfully did not pay their bills while receiving the water, is not seen as an adequately comparable situation to a system in which water is actually provided for free.[590] To this effect, the Court explicitly states that "[t]he systems must be compared on the assumption that people paid the charges levied for water."[591]

Lastly, the fact that the residents of Phiri were only given the choice to choose between service level 2 and the prepaid meters was not viewed as evidently constituting an undue impact on the poor, which was reasoned with the different backgrounds of Phiri and other areas as well as with the lawfulness of both options itself.[592] Hereto the Court mentions that different situations, especially one which is intended to correct inequality, can call for different state measures without being discriminatory.[593] The Court therefore does not establish a general state obligation to provide water to the indigent part of society in the same manner as to other users.

(c) Obligations summarized

Summarized, the state has a negative obligation not to interfere with one's access to water. This does however not mean that it must provide every individual with water upon demand. That everyone has the right to access sufficient water further does not create a state obligation to ensure a minimum amount of water for individuals as this is contrary to the obligation to take

[588] Ibid, pp. 136 f.
[589] Ibid, p. 139.
[590] Ibid, pp. 139-142.
[591] Ibid, p. 139.
[592] Ibid, pp. 126, 129.
[593] Ibid, pp. 151, 156.

reasonable measures to progressively realize the right in the view of the Court. To fulfill the latter, it is efficient that the state takes any measures under its prerogative to move towards a fuller achievement of the right, as long as the set goal is clear and can be explained by the state. Thereby measures must be revised and reconsidered and cannot be retrogressive. Hereby it does not appear that the state must take measures further where marginalized groups are concerned. The obligation to take reasonable steps is met, where the state fulfills the mentioned points.

b. The Role of the Constitutional Court of Ecuador in Defining State Obligations Towards the Fulfillment of the Right to Water

So far, the Ecuadorian Constitutional Court has not examined the exact content of the right to water, so that no specific elements and state obligations can be derived from its case law. On the constitutional level, the right to water therefore has not been quantified or put in a context of affordability or discrimination issues. The Court has however touched upon the right to water in decisions examining executive decrees.

The first case concerns an executive directive,[594] which was issued by the president to establish a state of exception, giving the Court the opportunity to elaborate on the nature of socio-economic rights.[595] As the executive decree in the instance was issued by the state to protect the right to a healthy environment,[596] the Court mentions the principle of *buen vivir* or *el sumak kawsay*.[597] The principle protects the good way of living, which in the latter version of *el sumak kawsay* stems from indigenous notions.[598] The Court elaborates that the notion maintains the balance between human beings, natural resources as well as development, in a framework, which provides for a range of socio-economic rights.[599] In terms of obligations, the Court notes that member states of the ICESCR have the obligation to progressively guarantee

[594] Corte Constitutional del Ecuador: Sentencia No. 0006-10-SEE-CC, Caso No. 0008-09-EE, 25 March 2010.
[595] Ibid, p. 9.
[596] See the Constitution of Ecuador, Article 14.
[597] Ibid, p. 2.
[598] Akchurin, Supranote 323, p. 954
[599] Ibid, p. 9.

the rights set out therein.[600] Although it does not specifically refer to the right to water, it mentions this in the context of the good way of living, in whose chapter the right to water appears.[601] Water can also be assumed to be relevant for the reason that it is a natural resource and generally a socio-economic right.

Since the Court points towards the progressive nature of the obligation that stems from the Covenant, it is suggested that the court assumes that the nature of state obligations concerning the right to water is also progressive. This is supported by a case dealt with by the Court shortly after,[602] in which it refers to General Comment No. 15.[603] In this case, the Court examines an executive decree, which declares a state of emergency in the province of Carchi.[604] The objective of the decree set out by the state in this case was to guarantee the provision of water for human consumption and agricultural use.[605] When addressing the objective of the decree, the Court mentions that it serves to protect the right to access water as protected by Article 318.[606] This is interesting in so far, as Article 12 of the Constitution does not speak of a right to "access" water. That it nevertheless exists is confirmed by the Court, which clarifies that is it derived from the Article, which regulates water service management by the state.[607] When examining the competence of the central state and executive to issue the protective measures of the decree, the Court mentions the constitutional protection of water in Article 12 and Article 318 and emphasizes its role as a human and fundamental right, which is also a patrimony for public use and indispensable and essential for human life.[608] At this point, the Court refers to the General Comment, where it reaffirms that water is a limited natural resource, which is fundamental for life and health. The former is also true for leading a dignified life and being

[600] Ibid, p. 9.
[601] See The Constitution of Ecuador, Chapter 2.
[602] Corte Constitutional del Ecuador: Sentencia No. 0010-10-SE-CC, Caso No. 0006-10-EE, 08 April 2010.
[603] Ibid, p. 11.
[604] Ibid, p. 1.
[605] Ibid, p. 6.
[606] Ibid, p. 7.
[607] Ibid; and See the Constitution of Ecuador, Art. 318.
[608] Ibid, p. 11.

able to realize other human rights. The Court also mentions the state obligation determined in the General Comment, which includes that the state must adopt efficient measures to give effect to the right to water without discrimination.[609]

According to the Court, the development of the right to water on the international level is recognized by the Ecuadorian Constitution in the Articles 12 and 318.[610] The Court elaborates that the respect for the right is based on its role as a strategic and highly protected resource and the fact that every individual is in need of water that is sufficient, healthy, accessible and adequate for human use, food sovereignty and ecological wealth, among other things.[611] The right is further intended to prevent dehydration and reduce the risks of illnesses in relation to water.[612] To this effect, the Court explains, that the state guarantees access to socio-economic rights, such as to the right to water, to a healthy and clean environment, to health, to education, to development and more.[613] According to the judgement, these rights are not only declaratory, but must be respected by the state, which must assume a protective role. In the view of the Court, the state has assumed this protective role by establishing effective mechanisms for managing, providing, supplying, storing and distributing water.[614]

Neither cases deal directly with a claimed violation of the right to water, so that the Court's rulings do not concentrate on its content and correlating state obligations. Yet, some conclusions can be drawn from the Court's assessment of the right to water. Especially the references in both cases to the ICESCR point towards the Court accepting the content of the right and state obligations as determined on the international level. This is especially the case, where the Court refers to the obligation to progressively realize the guarantee of socio-economic rights. How exactly the state must fulfill its obligation to guarantee the right in a

[609] Ibid.
[610] Ibid.
[611] Ibid.
[612] Ibid, p. 12.
[613] Ibid.
[614] Ibid.

progressive manner is not clear from the cases, but the latter case indicated that the state has a positive obligation to introduce measures to give the right to water an effect that goes beyond declaratory meaning. It is also noticeable, that the right is being brought into connection with the right to health and especially with the purpose to prevent illnesses. This allows for the assumption that the state has the obligation to introduce measures that at least enhance the access to water, which is adequate for health in accordance with the Articles 318 and 12. The reaffirmation of the General Comment and the need for water that is sufficient, healthy, accessible and adequate for human use again shows a tendency to accept the international standards for the human right to water. The state therefore has an obligation to provide access to water, which is appropriate for a healthy, dignified life. The vagueness of the judgements nevertheless does not provide for a conclusive determination of the content of the right and resulting obligations. It therefore remains unclear, which obligations the state has to provide water to the marginalized and which sufficiency and affordability measures it must take, if any. In any case, it appears that the Court assumes an obligation to progressively realize the right, which could also mean that it accepts immediate minimum core obligations derived from international law.

c. The Role of the Supreme Court of California in Defining State Obligations Towards the Fulfillment of the Right to Water

As previously stated, one main difference between the human right to water provisions of South Africa and Ecuador versus California, is that the latter appears in simple law as opposed to the Constitution. Although the Californian Court could theoretically be faced with interpreting individual rights on the sub-constitutional level, the case lies different in the human right to water provision. The reason for this is that it does not create an individual right, as indicated above, but is part of a state policy, which shall be considered by state agencies. Because it is the agencies, which apply the policy and its elements, any sort of litigation in connection to the

provision is deemed as very unlikely.[615] To this effect, it does not provide for the possibility to claim monetary damages, where agencies are alleged to not have considered the policy.[616] This is due to Californian law, which only allows state liability for state omissions, where a statute specifically gives authorization,[617] which is not the case in the right to water provision.[618] Because the provision gives much discretion to agencies in deciding how to consider the policy, other forms of litigation are also unlikely.[619]

The Californian Court system therefore does not play a role in interpreting the right to water provision and corresponding state obligations. The state agencies applying the provision are rather those, who exercise their discretion in handling the right to water, including its specific elements attached in the provision. The state obligation remaining is therefore the one, which obliges the relevant agencies to consider the right to water policy.

V. Effectiveness of the Human Right to Water: Lessons from National Constitutions

The efficiency and implementation of the right to water is hinged by different factors in the examined jurisdictions. These factors can be judiciary interpretation, framing of the obligation, the interaction of the right to water provision with others as well as certain external factors. While the right has not been fully realized in the jurisdictions, this does not mean that the introduction of the right to water has not enhanced the situation or at least possibilities to further the realization. The different versions of the human right to water as displayed above yet give rise to evaluate which factors hinge or enhance the effectiveness of the right in the respective jurisdictions.

615 Francis Supranote 528, p. 12.
616 Ibid, p. 11.
617 See Californian Government Code, GOV, §§ 814, 815.
618 Francis, Supranote 528, p. 11.
619 Ibid, p. 12.

1. South Africa

In the case of South Africa, the right to water is negatively affected by the Court's interpretation given in the case of *Mazibuko*. Even though South Africa grants a constitutional right to everyone to access sufficient water, the presented litigation did not lead to such outcome.[620] This is partly because the Court refuses to establish a minimum core obligation of the right to water. Would the Court have accepted that the realization of the right requires that each individual has to be provided with a minimum amount of water per person, the applicants in the case would have experienced immediate relief to some extent.

However, the applied standard of reasonableness has advantages, such as allowing the state to deal with resources in an appropriate manner, without the Court making decisions with direct budgetary implications.[621] At the same time, this does not foster the access to water of the poor residents of Phiri, but rather leaves more discretion to the state, by demanding less immediate action of it.[622] The question of what is reasonable, although subject to judiciary supervision, is in essence left to the government, which ultimately can decide on any measures as long as it is not retrogressive to the former.[623]

The judgment also received criticism for not exercising more power in interpreting the right.[624] While the argument of the Court, that it is not equipped to make such decisions, carries some weight regarding a limitation on judicial power, international standards and expert opinions, such as given by Peter Gleick, suggest that 25 liters of water per person per day are insufficient. The Court could have therefore relied on this information, especially since the applicants in *Mazibuko* did not even have access to that much water per person. Since the Court

[620] Tulk, Supranote 391, p. 187.
[621] Magaziner in North Carolina Journal of International Law: The Trickle Down Effect: The Phiri Water Rights Application and Evaluating Understanding, and Enforcing The South African Constitutional Right to Water, p. 575; and Unknown in Supranote 492: What Price for the Priceless?: Implementing the Justiciability of the Right to Water, p. 1088.
[622] Magaziner, Supranote 621, pp. 576 f.
[623] Dugard, Supranote 396, p. 10.
[624] Tulk, Supranote 391, p. 187.

did not accept the solution suggested by Gleick, it shall be mentioned that the respondents in *Mazibuko* also brought an expert witness to make testimony, which was contrary to that made by expert Peter Gleick on behalf of the applicants. In this it was suggested, that the explanations of Gleick, indicating that the necessary minimum amount of water for Phiri residents was 50 liters per person per day, were false.[625] Hereby the respondent's expert testimony was based on practical and financial constraints of the state as well as the difficulties of considering and quantifying the role of dignity.[626] The Court used the presence of conflicting expert opinions to underscore its inability to quantify the right to water, although there was no doubt that the applicants were actually faced with water cut offs for half of the month. That the status quo of water provision was insufficient could have been grounded on the facts.

The ultimate interpretation of the Court, that the state's measures were reasonable, meant that the applicants were still left without sufficient water, despite the facts that they were poor and partly caretakers of the young, the old and the sick.[627]

Conversely, establishing a minimum standard could have also had the negative effect of giving the government the opportunity to provide a minimum amount and then rest upon the quantity declared as constitutional.[628] Here it must however be considered, that the obligation to progressively realize the right would have remained, so that a minimum amount could have served as a starting point, from which the state would have had the obligation to take measures to realize the right further. In theory this can be assumed to be the fact, since the minister's regulation included that water services must supply a minimum of 25 liters per person per day.[629] Any new regulation leading to a lower amount would be retrogressive and therefore

[625] Von Schnitzler in Journal of American Ethnological Society: Performing Dignity: Human Rights, Citizenship and the techno-politics of Law in South Africa, p. 343; and Magaziner, Supranote 621, p. 578.
[626] Ibid.
[627] Tulk, Supranote 391, p. 191.
[628] Cooper in Journal of African Law: After Mazibuko: Exploring the Responses of Communities Excluded from South Africa's Water Experiment, p. 71.
[629] See South African Department of Water Affairs and Forestry: Regulations relating to compulsory national standards and measures to conserve water, Section 3 (b).

unreasonable. This is of course only true where the state abides to the actual number of persons living in a household, so that this could have been little consolation for the residents of Phiri. These have been left with a worse situation in terms of water quantity than under apartheid, because the Court did not find it necessary to order the state to undertake an evaluation of the numbers of persons per household and because it did not accept a comparison of a situation that was not based on the premise that water was payed for.[630] By stating that the applicants were only without water temporarily, the Court further diminished the severity of the issue.

The fact, that the residents were de facto worse off than before was not validated by the Court, which is worrisome as it shows that it does not distinguish between those who are able and those who are unable to pay for water.[631] The harm done by this is mostly felt by the poor and within that group by caretakers and women.[632] This shows one of the conflicts at the core of socio-economic rights: While the fact that their realization relies on the willingness and ability of states to provide administrative and financial remedies is often used to not fully realize them, socio-economic rights are exactly intended to overcome the inability to enjoy rights due to inability to pay.[633]

These traits of the judgment have been partly deemed as evidencing that the Court uses a neoliberal baseline to justify the governmental measures.[634] This is supported when considering that the Court uses the fact, that residents did formerly not pay for the water flat rate, to justify the prepaid meters.[635] In terms of having a fair water distribution of which everyone can live a dignified life off, this is not convincing. The argument, that the measures were justified because they prevented a waste of water is also not convincing, since the wealthy

[630] Constitutional Court of South Africa, Mazibuko and Others v. City of Johannesburg and Others, Supranote 477, p. 139.
[631] Roithmayer in Constitutional Court Review: Lessons from Mazibuko: Persistent Inequality and the Commons, p. 325.
[632] Dugard, Supranote 396, p. 13.
[633] Tulk, Supranote 391, p. 188.
[634] Roithmayer, Supranote 631, pp. 325 ff.
[635] Constitutional Court of South Africa, Mazibuko and Others v. City of Johannesburg and Others, Supranote 477, pp. 130- 142.

were not restricted in their water usage, as long as it was paid for. The justification therefore does not seem to be water availability, but cost recovery.[636] Hereby the court does not give a finalized evaluation of the question of whether the government has the obligation to provide water for free to those in need.[637] While this is what the free basic water policy is intended to do, no further obligations in terms of affordability can be derived from the *Mazibuko* judgment. The judgment does also not serve to improve the infrastructural issues connected to water. Because of this line of reasoning by the Court, it is partly suggested that the Court accepted the issue to present a simple matter, ignoring the complexity of the situation, which especially arises for the poor.[638]

The judgement shows that the state obligations are weak in a sense that it leaves much discretion to the government. The state must however constantly revise and reconsider its measures, which avoids a standstill in the development of the right to water.[639] While it cannot be ignored that the applicants in *Mazibuko* did not experience a positive effect from the judgment, it also must be considered that the governmental measures may have never occurred without the constitutional mandate. The right to water provision is further of constitutional nature, which allows individuals to move to the Constitutional Court, so that the measures are not uncontrolled. The possibility of judicial supervision somewhat balances out the discretion of the government because it can still be found in violation of the right to water, where it does not progress the realization. It is yet striking that the right to water is considered in light of its economic worth by the Court and not dependently thereof.

[636] Roithmayer, Supranote 361, p. 325.
[637] Dugard, Supranote 396, p. 11.
[638] Kidd: Poisoning the Right to Water in South Africa, p. 14.
[639] Constitutional Court of South Africa, Mazibuko and Others v. City of Johannesburg and Others, Supranote 477, pp. 92, 162.

2. Ecuador

For one thing, the Constitutional Court of Ecuador has not made any decisions, which in themselves promote the human right to water, especially not in terms of affordability or quantity considerations. This is worsened by the lack of any defined content of the right to water in the provision. Because the right lacks content and a clear state obligation, the role of the Court could be important in clarifying the aforementioned. Then again, it can be derived from the above-mentioned judgements that the state has the positive obligation to take measures to realize the right.[640] It seems that the government is aware of this, since it has taken measures to protect water sources and it has implemented a minimum amount of water necessary to fulfill the right. The provision also gives activist groups and individuals the possibility to point to the Constitution in support of their right to water claims, which is a positive development compared to the former Constitution. The new Constitution also appears to have led to a higher access to water, which is connected to the fact that it must be provided by the state.[641] The effectiveness of the human right to water yet faces two issues: one is the correlation of the human right to water with other constitutional rights and the second is that the judicial independence of the Court's justices cannot be assumed unequivocally.

As outlined above, the constitutional chapter regulating the strategic sector, to which water belongs, still allows the state to take measures, which would otherwise conflict with the constitutional right to water. It gives the state much discretion in that sector, which can allow it to continuously promote extractive industries,[642] which does not only give rise to resource competition but can also lead to the pollution of water. This is due to the Constitution allowing decisions for the national interest,[643] which can justify the strategic use of resources and lead to the justification of a multitude of measures. Although the human right to water is declared as

[640] See Corte Constitutional del Ecuador, Supranote 552, p. 12.
[641] Emel/Cantor: New Water Regimes, Supranote 433, p. 89.
[642] See the Constitution of Ecuador, Supranote 70, Articles 407 and 313 ff.
[643] See Ibid, Art. 316 and Art. 407.

an essential right, which cannot be waived,[644] it in fact can. It is thereby hard to imagine a scenario, in which the Court would turn down an explanation of national interest, especially since the Constitution does not solely view water as a human right, but also as a national strategic asset.[645] Those suffering the most from this have been illustrated to be residents of rural areas, which enhances the marginalization of indigenous peoples.

Adding to this, the Ecuadorian judiciary has been as instable as the political developments of the state.[646] When the new Constitution was implemented, the newly formed government under Correra removed the head judge of the Constitutional Court and impeached the justices which were affiliated with him.[647] Judicial removals have been a general practice in Ecuador due to the ideological differences, which result in judicial turnovers corresponding to new governments.[648] Although the current president of Ecuador has promised to not get involved in such practices, even the current judiciary system faces criticism for political interference.[649] A dependency of justices on the executive and legislative branch could lead to a weak human right to water. Here it can be thought of laws in favor of the extractive industry, in which the government has a vested interest due to financial advantages. Where justices rule in favor of the government, a conflict with the right to water can be predicted.[650]

The Ecuadorian right to water is strongly formulated at first sight, but the correlation with other rights as well as the lack of a defined content or state obligation robs it of its effectiveness. Where the judiciary is in fact not independent, the effectiveness can be hindered further by government-favoring interpretations. So far, the implementation of the right to water

[644] See ibid, Art. 12.
[645] Ibid.
[646] Basabe-Serrano/Polga-Hecimovich: Legislative Coalitions and Judicial Turnover: The Case of Ecuador's Constitutional Court (1991-2007), p. 1; and Whittemore, Supranote 429, p. 673.
[647] Basabe-Serrano/Polga-Hecimovich, 646, pp. 8 f.
[648] Ibid, p. 17.
[649] See Human Rights Watch: Ecuador: Political Interference in the Judiciary, https://www.hrw.org/news/2018/04/20/ecuador-political-interference-judiciary and Ecuador: Ensure Judicial Independence, https://www.hrw.org/news/2014/01/29/ecuador-ensure-judicial-independence (accessed 1 October 2018).
[650] See Whittemore, Supranote 429, pp. 673 f.

in Ecuador has not led to an obvious enhancement of access to water for the marginalized. As in the case of the South African provision, the advantage of constitutional supervision remains.

3. California

The most noticeable aspect of the right to water provision in California is that it is a policy and not an enforceable right, which would allow individuals to claim access to water.[651] It also only binds relevant agencies, but not all state entities or even water service providers.[652] The framing of the obligation for the state authorities is thereby not very strong as it only obliges them to "consider" the human right to water policy.[653] As explained above, it does not create an obligation to provide California residents with water or to even enhance the possibility by providing infrastructure.[654] The aspects of access to water and it being hindered by a lack of infrastructure thereby are key issues for those living in the Central Valley. For them, the implementation of the human right to water policy does not have a direct effect, which would remedy their situation.

The Californian provision does not oblige state authorities to implement any new regulations or policies that would immediately enhance the access to water. Instead of having to take new measures, they must consider the policy when engaging in other water-related activities.[655] Although the obligation to consider the human right to water exists, the state authorities have discretion in how to make the consideration.[656] The provision also does not further the aspects of quality, since these remain regulated by the existing frameworks, such as the Safe Drinking Water Act.[657] The effectiveness of the provision is further hindered by the lack of litigation possibilities, as explained above.[658]

[651] Francis, Supranote 565, p. 13
[652] Ibid.
[653] See California Water Code, WAT, Section 106. 3 (b).
[654] See Ibid, Section 106.3 (c).
[655] Francis, Supranote 565, p. 11.
[656] Ibid, p. 12.
[657] Ibid, p. 9.
[658] Ibid, p. 11.

However, the Californian provision is the only one out of the examined jurisdictions, which adds the element of affordability to the human right to water. From this it follows, that when state agencies engage in water-related tasks, their considerations must include affordability. The enlisted factors of safety, cleanness, affordability, accessibility and adequacy generally give the applying agencies guidance on how to consider the right.[659] This adds an extra layer to the already existing priority of water use for human consumption.[660] The aspects also include that more attention must be payed to marginalized groups.[661] Because these factors have to be observed whenever dealing with regulations or policies, every consideration made is one that moves the right to water towards its full realization.[662]

The obligation to consider implies that the policies, regulations and grants at hand should be adjusted in a way, that pursues the goal of achieving universal access to water. This also means that any policy, which is newly created, cannot be in a direct conflict with the right to water. The policy provision is however simple law, which implies that it is not above other regulations, but works together with them, so that any other policies and regulations have to be considered to the same extent as the one implementing a human right to water.[663]

However, the way, in which the provision works, can lead to a sort of progressive realization, as it moves towards the fulfillment of the right to water with each consideration, this supposes that the state agencies always make these considerations.[664] If they fail to fulfill the obligation, there is little a citizen can do, which is one of the biggest weaknesses of the constellation. The provision yet shows that the state is making an effort to enhance and realize the right.[665] While it is inferior in nature to the provisions in Ecuador and South Africa, this

[659] International Human Rights Law Clinic of the Berkeley School of Law: The Human Right to Water Bill in California: An implementation Framework for State Agencies, p. 3.
[660] Ibid, p. 5.
[661] Ibid, p. 8.
[662] Ibid, p. 10.
[663] Ibid, p. 7.
[664] Ibid, pp. 8 f.
[665] Ibid, p. 8.

does not mean that it cannot lead to a positive effect on the human right to water. In fact, where state agencies make adequate considerations of the human right to water and its elements with every policy, the access to water can develop in due time and within the state's possibilities.

4. Conclusion

a. Effectiveness of the Examined Jurisdictions

The *Mazibuko* judgment lets the South African obligation appear to be weak for the reasons that its content relies on the government's own choice, it does not create a minimum core and it does not oblige the government to take on the administrative burden to make sure, that water provision calculations correspond to the amount of people living in the household. The obligation is further weakened by the Court's interpretation because it fails to dismantle past racial discrimination by viewing the right to water in the context of its economic worth. In terms of the impact of commodification on the right to water, the Court does not truly assess this impact, because it does not examine the situation of the Phiri residents as different from those, who are able to pay for water, but as different from those, who have paid for water in the past. This falls short of acknowledging that colonialism and apartheid have created the situation that Phiri residents are now in. It does not signal that the state has special obligations towards the marginalized.

While the government has discretion in choosing the measures to progressively realize the achievement of the right, the constitutional provision ensures, that the measures are not uncontrolled, but subject to judicial examination. This means that the government cannot rely on prior policy installments, but will have to show, that these have been progressed. Although the wording of the obligation does not allow the Court to dictate an obligation to immediately realize the right, it is clear, that the government must take measures, which have to be constantly revised and reconsidered. The obligation to do so, although slowly, furthers the right to access water, so that it is not an ineffective right. The question of effectiveness is more urgent

concerning the Ecuadorian provision because it leaves the decision, on which measures to take, even more in the hand of the state. Not considering the possibility of a dependent Court, this is due to the vague content of the right and the virtual missing of any formulated state obligation. When bringing a claim to the constitutional Court of Ecuador, the connection to other rights could however serve as an argumentative basis to give the right more content. Far worse in impacting the effectiveness of the right are the constitutional provisions, which make the right to water subject to governmental exceptions in the context of strategic assets, extractive industries, and water provision by private entities. Similarly, the Californian provision also must be seen in the context of all state policies, to which it is not superior law. This, as well as the lack of judicial supervision, is where the biggest weaknesses in the provisions' effectiveness lie. Although criticized above, the South African obligation gives the most effectiveness to the right to water, as it does not allow for retrogressive measures and has led to concrete indications for state action. This conclusion has yet to be treated with caution, as applies to the general right to water, but not necessary to those, in socially excluded and suppressed situations.

b. The Impact of Commodification: Affordability Matters

Generally, it can be observed that the powers of the administrative authorities as well as the judiciary play a major role in developing the right to water. Although they are bound to written legal limitations of the respective provisions and systems, none of the illustrated cases seem to have such limitations, which would hinder the interpreting bodies from using their discretion in a more equality-enhancing way. The access of marginalized groups in every instance is yet impaired because their interests loose when balanced against economic considerations: it has become clear, that commodification especially has a negative impact on the right to water of marginalized groups, which have been historically ostracized. In the examined jurisdictions, the social exclusion along racial and ethnic lines has led to poverty and other disadvantages. In the case of South Africa, the right to water is mostly impaired for black residents of rural areas,

whereby the same is the case for indigenous peoples in Ecuador and Latino residents of California's Central valley.

The cases have exhibited two kinds of negative impacts resulting from water commodification, namely immediate and distant effects on the right to water. Immediate effects on the right to water occur, where the price given to water on the market leads to in affordability, which in turn leads to no or little access to water or to the necessity to turn to health-threatening alternatives. This can be true, where consumers are dependent on bottled water or where private entities operate water services and install the system of full-cost recovery. In the latter case, the immediate effect on the right to water can arise in the form of lower quality of water in addition to access issues. However, the fact, that universal access to water has not yet been achieved, is not solely due to negative impacts created by water commodification. Barriers to water access are also provided by a lack of infrastructure, or sheer political unwillingness. Rural areas in particular miss adequate water infrastructure, which would serve to provide safe water. In many instances, the right to water is further impaired, where governments fail to balance the right to water with other interests it may have. The interests of saving money and gaining financial benefits from cooperating with other industries often outweigh considerations of universal access to water, even where the former leads to water pollution or direct conflicts with the right. To this effect, it is presently suggested that the human right to water would gain efficiency if heavier emphasis was placed on equality considerations. As the efficiency of the right to water has been shown to largely depend on how it is interpreted, an approach could be to derive more concrete positive obligations based on the principle of Article 2 (2) ICESCR. As it dictates that the Covenant rights must be guaranteed without discrimination, the obligation to eliminate *de jure* as well as *de facto* discrimination has been suggested to present an immediate obligation, ergo binding those applying the respective rights.[666] This could be utilized in respect to the

[666] See Ssenyonjo: Economic, Social and Cultural Rights in International Law, pp. 85 ff.

human right to water to address its inefficiencies towards marginalized groups in terms of affordability as well as other aspects.

c. Recommendations and Outlook

The fact, that universal access to water has not yet been achieved, is not solely due to negative impacts created by water commodification. Barriers to water access are also provided by a lack of infrastructure or sheer political unwillingness. Rural areas in particular miss adequate water infrastructure, which would serve to provide safe water. In many instances, the right to water is further impaired, where governments fail to balance the right to water with other interests it may have. The interests of saving money and gaining financial benefits from cooperating with other industries often outweigh considerations of universal access to water, even where the former leads to water pollution or direct conflicts with the right. The commodification of water is therefore only one out of many interests, that conflict with the right to water. Furthermore, the complication of conceptualizing the right to water on the international level has left much discretion to national bodies, which in turn are faced with the need to define its content. Hereby, national implementation authorities and judiciaries should lay a stronger focus on the marginalized and equality considerations.

To avoid violations by third parties, states must take legislative and other preventive measures, which do not leave regulatory gaps for these to operate in a harmful way. Water for domestic use should thereby be prioritized vis-à-vis other interests.

It is also necessary that the right to water is introduced on the national level, whereby this must transpire in the form of an individual claim within a constitutional framework. The latter is the case since the international level does not offer the same complaint and enforcement opportunities. In this regard, the comparative analysis of state obligations has shown, that the right faces less issues in effectiveness where it is embedded in a constitutional framework, elevating it to the highest binding law and opening it to judicial control. To further advance the

right to water, inclusive public participation and transparency is necessary, so that all societal groups can partake in the public discourse as to democratically decide on how to manage the natural resources, on which they are dependent. The state must also take responsibility for past discrimination and marginalization by paying special attention to the water needs of these groups. In a social sense, this requires the recognition, that they have been forced into their present situation, in which they are unable to purchase sufficient water. In a legal sense, this requires the passing of regulations, which are flexible and allow for divergent pricing schemes for water provision to the marginalized and poor. Where even low prices cannot be paid for, this scheme must include water provision for free by the state. Hereby this must be based on the actual situation of the consumer and not on assumptions, which do not pay due respect to the real circumstances. As this also raises the question of the quantity of water to be provided, states must not deter from accepting minimum amounts, which are necessary to sustain health. For this, expert opinions already exist and can be relied on. Where doubts in these guidelines exists, states should seek an advancement of scientific information, which corresponds to the exact conditions on the ground. In any case, claimed impossibility of setting a minimum amount of necessary water should not be used a pretext for not being able to realize the human right.

VI. Conclusion

The broader aim of this thesis was to demonstrate the development, recognition and importance of the human right to water and the impact that commodification has on it. For this, international, regional and national legal frameworks were examined in regard to their various forms of including and dealing with the right to water. The focused aim was to illustrate, that commodification has a negative impact, especially on the rights of marginalized groups. Commodification and the implied treatment of water as an economic good thereby effect the right to water on different levels. Beginning with the refusal of states to recognize it, water

commodification has influenced the international discourse on water pricing, has led to strong involvement of private entities in water service provision and has served as a baseline for examining implications of the right to water on the national level. The latter has been demonstrated in length through outlining, analyzing and criticizing the South African case of *Mazibuko* concerning the free basic water policy of the City of Johannesburg. While the thesis has shown that commodification has a strong impact on the right to water, it has also been shown that this is only one issue in a web of complications surrounding the right. Especially the difficulties in conceptualizing the right to water as a robust human right have left open questions about its status and have led to uncertainties regarding its normative content. Competing considerations other than water commodification have been shown to also play a role in respect to these complications. Exemplary for this are interests of states in generating profit, such as through extractive industries, or interests in saving economic resources.

To present the above-mentioned, Chapter I of this thesis has closely examined the emergence of the right to water in international and regional law, where it has become clear, that the right to water certainly is a recognized human right, but one of which the recognition has mostly been triggered through political means. In that connection, the differing stories of its emergence in international and regional systems have led to different forms, interpretations and formulations, which require further clarification of its nature and scope.

Chapter II has set out to clarify this scope by examining the elements of the right to water as determined by General Comment No. 15 as well as the relationship of the right to water with other human rights. Hereby close attention was payed to overlapping scopes of and differences to other rights. By regarding relevant literature and interpretative methods, this chapter has shown that the right to water was derived from other human rights, especially from the right to an adequate standard of living in the ICESCR, but also has a somewhat autonomous status. The phenomenon of the right to water having been derived from other human rights while having its own scope and independent application led to the conclusion, that the human

right to water can neither be categorized solely as the one or the other but has a unique status. By illustrating divergencies of the right to water as well as considerations, which compete with it, the Chapter has also pointed to a lack of focus on marginalized groups. Concerning the latter, the cases of women and indigenous peoples have been chosen to exemplify extra burdens carried by these groups in respect to water and a corresponding need to include equality considerations about gender and indigenous practices.

Chapter III illustrated the wide-spread recognition of the human right to water on national levels and the varying formulations it has found by comparing the rhetoric and nature of the rights, rights it has been paired with, and resulting obligations. Part two of this Chapter has laid special focus on the right to water in the jurisdictions of South Africa, Ecuador and California. To clarify the status of the right to water in the chosen jurisdictions, this part of the thesis illustrated the development of the right in the different jurisdictions and has assessed its framings against historical backgrounds. A comparison of the former led to the conclusion that all jurisdictions have brought forward a constitutional or other right to water in response to difficulties arising from its handling and dissatisfaction of the population therewith. It also served to demonstrate a parallel in marginalization along racial and ethnic lines, concluding that black South Africans, Indigenous Ecuadorians and Latino Californians are faced with the most severe struggles concerning access to sufficient and clean water.

Chapter IV has presented state obligations, which arise from the right to water by comparing the mentioned jurisdictions in regard to the framing of the obligation and its content as set out by the provision. For this, the roles of the Court in assessing the obligations was examined in each jurisdiction, whereby the Constitutional Court of South Africa played the most prominent role in issuing the Mazibuko judgement, while the Ecuadorian Court could only be assessed by analyzing case law connected to, but not focused on the right to water. The Supreme Court of California has been shown to play the smallest role therein, as the right to

water in California is not constitutionalized, but solely provides a policy, which stems from the constitutionalized regulation of water.

Chapter V has evaluated the effectiveness of the right in the previously examined jurisdictions and has concluded, that the South African provision, which is constitutionalized and presents a rights-based approach, is the most effective. Criticizing the judgment led to the assumption, that the Court could serve more to address needs of the historically marginalized rural black communities if it were not to use the assumption that water is an economic good as a baseline for its judgment. The Californian provision was deemed the least effective as its analysis has shown, that it does not open the path for litigation, whereas the Ecuadorian provision has been shown to lack effectiveness due to tensions with other constitutional provisions and questionable judicial independence.

Overall, it is not possible to over-emphasize the importance of the human right to water for every aspect of human life. Although water as a resource is facing increasing threats, violations of the right to water are cause by unequal social power distribution and political unwillingness more often than by actual physical unavailability. While not all issues regarding the right to water are connected to its commodification, it has been shown to have a negative impact, which can ultimately be avoided, where this is desired by the respective governments. In order to give more effectiveness to the right, these must acknowledge that marginalized groups require special protection.

Already now the human right to water is the subject of several social movements and individuals, which have recognized that, without water, all other endeavors are ultimately meaningless.

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