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THE RIGHT TO WATER: A BRIEFING NOTE

by

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It is widely recognized that a minimum supply of potable water is a vital prerequisite for life, health, dignity, and the realization of other human rights.¹ Yet there are approximately one billion people who currently do not enjoy safe drinking water, thousands of children die every day from water-related illness, and climate change may exacerbate these problems.² Many experts agree that legal recognition of the human right to water is a significant step towards increased access to safe drinking water.³ Therefore prominent organizations, individuals, and governments are campaigning vigorously for recognition of this right.⁴

The right to water requires that all persons have affordable access to a supply of safe water in quantities adequate for essential personal and domestic uses, which include drinking, sanitation, washing of clothes, food preparation, and personal and household hygiene.⁵ An adequate supply requires a minimum of 50 to 100 litres per person per day.⁶

Recognition of the right to water requires governments to respect, protect, and fulfill the right. Respecting the right requires states to refrain from interfering directly or indirectly with the right. Protecting the right means ensuring that third parties do not interfere with or violate the right (e.g. through legislation preventing water pollution). Fulfilling the right requires positive state action—such as investment in water treatment and distribution infrastructure—to ensure that the right is universally enjoyed.⁷

The benefits of recognizing that water is a legally protected human right include:

- stronger water laws, regulations, and policies;
- prioritizing resources for investment in water infrastructure, governance, and management;
- empowering citizens and communities to take part in decision-making processes related to water;
- providing a potential remedy for those whose right is being or may be violated;
- protecting water from pollution and other adverse impacts;
- preventing discrimination or neglect of under-privileged or marginalized communities; and
- providing a means of holding governments and corporations accountable.⁸

It can be argued that the right to water need not be explicitly recognized because it is implicit in other rights such as the rights to life, health, a healthy environment, and an adequate standard of living.⁹ However, ensuring that the right to water receives sufficient attention and resources may require that it be given the prominence and visibility of an explicit and distinct right.¹⁰

There are many misconceptions regarding the right to water.¹¹ It does not entitle everyone to an unlimited supply of water at all times, in any place, under any circumstances. It may be limited by the concept of progressive implementation, and such reasonable and just limits as are necessary in a free and democratic society. The right to water does not obligate

nations to share their water resources with other nations, as state sovereignty is unimpaired. The fact that water is a human right does not mean that it should be free, any more than health care is free. Charging a price for water that reflects its full costs is justifiable on grounds of ecology, equity, and efficiency, subject to the imperative of providing a basic quantity of free or subsidized water for economically disadvantaged communities and individuals.

International Recognition of the Right to Water

Although mention of the right to water dates back to the Mar Del Plata Action Plan that emerged from the UN Conference on Water in 1977, there is not yet a global human rights treaty establishing this right in explicit and universal terms. Almost all nations have endorsed non-binding political declarations that mention the right to water, such as the Programme of Action of the 1994 Cairo Conference on Population and Development, endorsed by 177 States. Article 14(h) of the *Convention on the Elimination of Discrimination Against Women* provides for the right "to enjoy adequate living conditions, particularly in relation to ... water supply." Article 24(2)(c) of the *Convention on the Rights of the Child* sets forth the child's right to "adequate nutritious foods and clean drinking-water."

The right to water is not explicitly included in the *Universal Declaration of Human Rights* or the *International Covenant on Economic, Social, and Cultural Rights (ICESCR)*. However, implicit rights to water and sanitation are arguably included in s. 25 of the *Universal Declaration* (the right to a standard of living adequate for the health and well-being of himself and of his family) and ss. 11 and 12 (the rights to an adequate standard of living and health) of the *ICESCR*. The UN Committee on Economic, Social and Cultural Rights published General Comment No. 15 on the Right to Water in 2002, providing guidelines for the interpretation and implementation of the right.¹² General Comment No. 15 identifies a suite of core obligations related to the right to water that are to be implemented immediately:

- a) To ensure access to the minimum essential amount of water that is sufficient and safe for personal and domestic uses to prevent disease;
- b) To ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups;
- c) To ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household;
- d) To ensure personal security is not threatened when having to physically access water;
- e) To ensure equitable distribution of all available water facilities and services;
- f) To adopt and implement a national water strategy and plan of action addressing the whole population;
- g) To monitor the extent of the realization, or the non-realization, of the right to water;
- h) To adopt relatively low-cost targeted water programmes to protect vulnerable

- and marginalized groups; and
- i) To take measures to prevent, treat, and control diseases linked to water, in particular ensuring access to adequate sanitation.

An earlier General Comment published by the Committee on Economic, Social and Cultural Rights confirmed that governments have a core obligation to ensure the satisfaction of, at the very least, ‘minimum essential levels’ of each of the rights enunciated in the *International Covenant on Economic, Social, and Cultural Rights*.¹³

Momentum toward explicit and binding international recognition of the right to water has been building. In 2007, the UN High Commissioner for Human Rights concluded “that it is now time to consider access to safe drinking water and sanitation as a human right [necessary] to sustain life and health.”¹⁴ In 2010, the UN General Assembly passed a resolution recognizing the right to water, with 124 nations voting in favour, none against, and 41 nations abstaining. The resolution stated “the right to safe and clean drinking water is a human right that is essential for the full enjoyment of life and all human rights.”¹⁵ Canada was among the nations that abstained (see Appendix for details of Canada’s opposition to recognizing the right to water).¹⁶ Later in 2010, the UN Human Rights Council issued a similar resolution, confirming that “the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and is inextricably related to the highest attainable standard of physical and mental health, as well as the right to life and human dignity.”¹⁷

The recent UN General Assembly resolution on the right to water has already had a demonstrable effect. In January 2011, the Botswana Court of Appeal relied on the resolution in ruling that the constitutional rights of the Bushmen of the Kalahari were being violated by the government’s refusal to allow them to access a water source within a wildlife reserve where they resided.¹⁸

National Recognition of the Right to Water

At the national level, the right to water is also gaining broader legal recognition.¹⁹ In 2007, the UN High Commissioner for Human Rights observed that “an increasing number of States are recognizing safe drinking water as a human right in their constitutions, as well as national legislation, while national courts are enforcing it as a justiciable right.”²⁰

A. Constitutional Protection

Constitutional protection of the right to water can occur through explicit provisions or through recognition that the right is implicit in other human rights. Constitutional provisions explicitly requiring the protection and/or provision of clean water are found in at least 17 nations, and are increasingly prevalent in new constitutions.²¹ For example, both the Dominican Republic and Kenya enacted new constitutions in 2010 that recognize the right to water.²² In South Africa, the right to water is explicitly articulated in its 1996 *Constitution* and is enforceable through the courts:

27. Health care, food, water, and social security

(1) Everyone has the right to have access to—

...

(b) sufficient food and water ...

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.²³

Explicit constitutional recognition of the right to water has had a significant effect on South African water laws and policies, and has contributed to major investments in infrastructure.²⁴ In 2000, South Africa also passed legislation implementing the procedural rights entrenched in the *Constitution* (e.g. access to information), which are essential for the full enjoyment of substantive rights.²⁵ Recognition of the constitutional right to water is credited with spurring the extension of potable water to ten million South Africans (predominantly black and poor) in ten years.²⁶ Nelson Mandela describes increased access to safe drinking water for millions of South Africans as “amongst the most important achievements of democracy in our country.”²⁷ In Uruguay, the constitutional provision guaranteeing the right to clean water also prohibits privatization of the water supply. UN data show that 100% of Uruguayans enjoy access to improved sources of drinking water, consistent with their constitutional right.

In a number of nations where there is no explicit constitutional right to water—including Argentina²⁸, Belgium²⁹, Brazil³⁰, Costa Rica³¹, Colombia³², India³³, Indonesia³⁴, Nepal³⁵, and Pakistan³⁶—courts have held that the right to water is an implicit but enforceable constitutional right. These courts based their decisions on the fact that access to safe drinking water is a fundamental prerequisite to the enjoyment of other human rights, including the right to life and the right to live in a healthy environment. For example, in Argentina, based on the constitutional right to a healthy environment, courts have ordered governments to provide communities with potable water, construct drinking water treatment facilities, provide medical treatment for individuals harmed by contaminated drinking water, and carry out environmental remediation of polluted watersheds.³⁷ An Argentine case involving Chacras de la Merced, a poor community whose drinking water was being contaminated by inadequate wastewater treatment in an upstream municipality, illustrates the potential for using the right to a healthy environment to advance the right to water.³⁸ An ENGO brought a lawsuit against the upstream municipality and the province on behalf of local residents asserting a violation of their constitutional right to a healthy environment. The Court agreed that there was a violation of the right and ordered the government to upgrade the wastewater treatment plant and, in the interim, provide a supply of clean water to the residents of Chacras de la Merced.³⁹ The court-ordered infrastructure improvements were completed, and in an interesting development, the municipality passed a law mandating that all future sewage and sanitation tax revenues must be re-invested in upgrading and maintaining the sewage system. As observed in a recent Harvard Law Review article, “Although justiciability alone is not a panacea, it is a step in the direction of ensuring access to sufficient water.”⁴⁰

The right to life, which arguably includes an implicit right to water, is universally found in national constitutions.⁴¹ There are also 89 nations whose constitutions now explicitly recognize the right to live in a healthy environment.⁴² The right to clean water is regarded as an integral element of this broader right. Empirical evidence demonstrates that there is a

strong correlation between environmental provisions in constitutions and superior environmental performance.⁴³

Constitutional recognition of the right to water does not create an absolute right to water. Courts will take into account the specific circumstances of a case and the challenges facing a government in determining whether the right is being violated.⁴⁴

B. Legislative Recognition

Dozens of countries explicitly recognize the right to water in national legislation or policy, including Algeria, Angola, Argentina, Bangladesh, Belarus, Belgium, Brazil, Burkina Faso, Cameroon, Central African Republic, Colombia, Costa Rica, Dominican Republic, Finland, France, Germany, Ghana, Guatemala, Guinea, Honduras, Indonesia, Latvia, Luxembourg, Madagascar, Mauritania, Namibia, the Netherlands, Nicaragua, Norway, Paraguay, Peru, Portugal, Romania, Russia, Senegal, South Africa, Spain, Sri Lanka, Tanzania, Ukraine, and Venezuela.⁴⁵ For example, France enacted a new law in 2006 that explicitly recognizes the right to water:

Art. 1. Water is the common heritage of the nation. Its protection, enhancement and development, in accordance with the balance of nature, are of general interest.

In the framework of laws and regulations previously established, the use of water belongs to every physical person, for food and hygiene, and everyone has the right to access to drinking water under conditions economically acceptable to all.

The costs of water use, including environmental costs and the resources themselves, are borne by users, taking into account social, environmental, and economic consequences and geographical and climate conditions.⁴⁶

In nations where the rule of law is respected and there are adequate resources available, it can be expected that laws and policies recognizing the right to water will be implemented and enforced, resulting in greater access and less human suffering.

Conclusion

The right to water is not a silver bullet that will automatically address the world's water crisis. However it is a powerful tool that can be used to focus attention and resources on improving access to water for those individuals and communities who currently endure the hardships imposed by the absence of safe water.

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Appendix: Canada's Position on the Right to Water

Canada's Constitution does not explicitly acknowledge the right to water. There is no federal legislation explicitly recognizing the right to water.⁴⁷ To date, no Canadian court has acknowledged the right.⁴⁸ Most surprisingly, Canada opposes international recognition of the right to water.⁴⁹ At the UN Commission on Human Rights in 2002 and 2003, Canada was the only country to vote against resolutions recognizing the right to water.⁵⁰ Canada also played a key role in blocking a motion by Germany and Spain to officially recognize water as a human right at the UN Human Rights Council in March 2008.⁵¹ Canada lobbied against the UN General Assembly's resolution on the right to water in 2010, and was among the 41 countries that abstained from voting.⁵²

The federal government has offered two unconvincing rationales for its opposition. First, recognizing a human right to water would detract from other more pressing human rights by redirecting energy and resources. What could be more pressing than a situation that undermines the health and well-being of a billion people, including Canadians? Second, the human right to water could compel Canada to export water to nations where there are water shortages, including the United States. There is no legal justification for this fear, as recognition of the right to water would impose no such obligation. Canada recognizes the right to health but is not legally compelled to export doctors, nurses, or medical supplies to nations in need.

The more likely rationale is concern that Canada is failing to meet its obligation to respect, protect, and fulfill the right to water.⁵³ Thousands of Canadians lack access to safe drinking water, predominantly Aboriginal people living on reserves. The federal government estimates that there are approximately 5,000 homes in First Nations communities (representing an estimated 20,000+ residents) that lack basic water and sewage services.⁵⁴ Compared to other Canadians, First Nations' homes are 90 times more likely to be without running water.⁵⁵ As of 2010, 49 First Nations communities have high-risk drinking water systems and more than 100 First Nations face ongoing boil water advisories (out of roughly 600 First Nations in Canada).⁵⁶ The federal government admits that "The incidence of waterborne diseases is several times higher in First Nations communities than in the general population, in part because of the inadequate or non-existent water treatment systems."⁵⁷ Many of these deplorable situations have been dragging on for years and in some cases decades.⁵⁸

The disparity between water quality on and off reserve in Canada has been criticized by the United Nations Committee on Economic, Social, and Cultural Rights, the Royal Commission on Aboriginal Peoples, and the Auditor General of Canada.⁵⁹ In 2005, the Commissioner for Environment and Sustainable Development concluded "When it comes to the safety of drinking water, residents of First Nations communities do not benefit from a level of protection comparable with that of people living off reserves. This is partly because there are no laws and regulations governing the provision of drinking water in First Nations communities, unlike other communities."⁶⁰

Endnotes

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S. 3(1) Everyone has a right of access to basic water supply and basic sanitation.

(2) Every water services institution must take reasonable measures to realise these rights.

(3) Every water services authority must, in its water services development plan, provide for measures to realise these rights...

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²⁸ Courts have ordered governments to provide potable water, construct drinking water treatment facilities, treat individuals harmed by contaminated drinking water, and carry out environmental remediation. See Chacras de la Merced case www.cedha.org.ar Paynemil Mapuche Community case http://www.righttowater.org.uk/code/legal_4.asp

²⁹ Judgment No. 36/98, 1 April 1998, Belgian Court of Arbitration. <http://www.arbitrage.be/public/f/1998/1998-036f.pdf>

³⁰ Litigation based on the constitutional right to a healthy environment has produced a policy that all Brazilians have the right to a core minimum of environmental services including water and sanitation. See SCJ Appeal No. 575.998 (Minas Gervais). SCJ Appeal No. 70011759842 (Rio Grande do Sul), 1 December 2005. SCJ Appeal No. 70012091278 (Rio Grande do Sul), 25 Jan. 2006.

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- ⁴⁴ *Mazibuko et al. v. The City of Johannesburg et al.* (2010) 3 BCLR 239 (Constitutional Court).
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