

# ANALYZING THE IMPLICATIONS OF WATER PRIVATIZATION: REORIENTING THE MISPLACED DEBATE

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*The recent public outcry against the Delhi Jal Board's proposed public-private partnership model has rekindled the contentious debate around water privatization and its impact on the urban poor. Several grass root level organisations and activists have coalesced to form the Water Privatization-Commercialization Committee that is actively opposing the project under the patronage of Retired Justice Rajinder Sachar. In this context, this paper seeks to explore the implications of privatization in the financing and management of water supply systems. While it concurs with much of the criticism that has been raised against privatization, it argues that this failure of privatization is actually a reflection of the 'governance crisis' in the Indian water sector. By undertaking a detailed examination of the reasons for the inherent failure, it concludes that the focus of the current reforms in the water sector must be directed at establishing a foundation of 'good governance', which is imperative to set the stage for a successful process of privatization in India. In this regard, it proposes certain basic, but significant institutional reforms that must be factored into the urban water supply structure to ensure efficiency of the operator, whether public or private.*

## I. INTRODUCTION

The last few decades have witnessed a transformation in the orientation of policy agendas, as state-led practices in public utility provision have been met with increasing discredit, and an emphasis has been placed on private sector involvement.<sup>1</sup> As a part of this trend, privatization has become a cornerstone of the broader reform agenda. In India, a gradual retraction of the state and promotion of private player participation has been a facet of the neo-liberal agenda that was triggered in the 1990's. Public utilities such as electricity boards, the power sector, water supply systems, and the health care sector have been subject to institutional transformation as a part of this ongoing trend of privatization.

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<sup>1</sup> Karen Bakker, *A Political Ecology of Water Privatization*, 70 *STUDIES IN POLITICAL ECONOMY* 6 (2003).

The policy of privatization of water, though presently in its infancy, is not entirely new to the Indian water sector. The National Water Policy, 2002, explicitly encouraged private-sector participation in the planning, development and management of water resources, wherever feasible. It envisaged private player involvement to introduce innovative ideas, generate financial resources, introduce corporate management, and improve service efficiency and accountability.<sup>2</sup> A number of pilot projects were launched in an attempt to engage private players in both the rural and urban water sectors. The case of the Sheonath river, where the Chhattisgarh government handed over a stretch of the river to a private company to manage water distribution, has been particularly significant, albeit much condemned.<sup>3</sup> Apart from this, municipalities of many cities have employed public-private partnerships, where the private player is in charge of operation, management and distribution improvement. Important projects include the Tirupur project (to build, operate and charge for water supply); the Hubli-Dharwad project that aims at 24x7 water supply for residents; the Khandwa project in Hyderabad and most recently, the Delhi Jal Board ('DJB') public-private partnership model. Most recently, the Draft National Water Policy, 2012 encourages the engagement of private companies as service providers for water distribution.<sup>4</sup>

The focus of this paper is on investigating the impact of privatization of urban water services, particularly with regard to the impoverished and more vulnerable sections of society. Significant parts of the world are at the brink of facing an urban water crisis, where with growing urbanization, large sections of the urban poor are deprived of access to 'adequate and safe' drinking water. While rural areas in India too have had some experiences of private player involvement, the scope of this paper is limited to urban areas, as private sector participation in India has had an urban bias.

This paper is divided into two parts. The first part explores the implications of privatization of water supply in India, with particular reference to access to the urban poor. It begins by laying down the primary arguments that have been raised in favour of private sector involvement. Subsequently, we build up a case against privatization and aim to prove its failure in improving access to the urban poor. On a detailed analysis of the underlying reasons for such failure of privatization, we conclude that the problem does not lie in privatization itself, but in the manner of its implementation in developing countries. Therefore, in the second part of this paper we argue that the failure of

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<sup>2</sup> Government of India, Ministry of Water Resources, *National Water Policy*, April 1, 2002, available at <http://wrmin.nic.in/writereaddata/linkimages/nwp20025617515534.pdf> (Last visited on June 3, 2013).

<sup>3</sup> Binayak Das & Ganesh Pangare, *In Chhattisgarh a River becomes Private Property*, 41(7) EPW 611 (2006).

<sup>4</sup> Government of India Ministry of Water Resources, *Draft National Water Policy, 2012*, June 2012, available online at [http://mowr.gov.in/writereaddata/linkimages/DraftNWP2012\\_English9353289094.pdf](http://mowr.gov.in/writereaddata/linkimages/DraftNWP2012_English9353289094.pdf) (Last visited on June 5, 2013).

privatization points to broader issues of governance of the Indian urban water sector, and seek to propose certain institutional changes in this regard. Hence we attempt to debunk the traditional opposition to privatization, but do not endorse it as a mode of water management. We argue that it is the restructuring of the governance mechanism that will ensure both sustainable and equitable water supply, whether public or private.

## II. LEGAL FRAMEWORK GOVERNING URBAN DOMESTIC WATER SUPPLY IN INDIA

Water is placed in state list in Schedule VII of the Constitution of India; thereby giving each state government the prerogative to establish its own system of water supply.<sup>5</sup> Due to the absence of a common body of governing principles, every state has distinct laws, leading to systems of water supply across states lacking comprehensiveness and compatibility.<sup>6</sup> Water policy is also influenced by the central government through less formal mechanisms, such as the formulation of National Water Policies and 'Model Laws'. More importantly, the Centre is able to significantly influence water policy in targeted states by ensuring water supply systems envisaged in schemes such as the Jawaharlal Nehru National Urban Renewal Mission ('JNNURM') are implemented, by the provision of central funds for the same.<sup>7</sup>

Through the 73<sup>rd</sup> and 74<sup>th</sup> Constitutional Amendment Acts, the ultimate responsibility of water supply has been devolved to the elected local bodies, in keeping with the trend of decentralization in recent water sector reforms.<sup>8</sup> While the states lay down the legislative framework for water supply, the management of the system is carried out by the municipalities. Broadly speaking, urban water supply across India works on a twofold mechanism: *first*, urban dwellers having individual piped connections are provided water by a networked water supply system, that is metered or charged by varying mechanisms; and *second*, the municipalities set up community standposts or hand pumps in different areas that are free and an open resource for the public.<sup>9</sup>

<sup>5</sup> Constitution of India, 1950, Schedule VII, List-II, Entry 17.

<sup>6</sup> K. J. Joy & Suhas Paranjape, *Water Use: Legal and Institutional Framework* in WATER AND THE LAWS IN INDIA 238 (2009).

<sup>7</sup> PHILLIP CULLET, WATER LAW POVERTY AND DEVELOPMENT- WATER SECTOR REFORMS IN INDIA 54 (2009) (The Center provides 80% funding for schemes such as the JNNURM and the UIDSSMT and hence secures implementation of them. The example of Khandwa Water Project in Madhya Pradesh shows how implementation of the UIDSSMT was instrumental in bringing privatization to the region); See also Manthan Adhyayan Kendra, *A Case Study of Khandwa Water Supply Augmentation Project*, May 2011, available at [http://www.manthan-india.org/IMG/pdf/Khandwa\\_Case\\_Study\\_Part\\_I\\_Final\\_Version\\_May\\_2011.pdf](http://www.manthan-india.org/IMG/pdf/Khandwa_Case_Study_Part_I_Final_Version_May_2011.pdf) (Last visited on November 23, 2012).

<sup>8</sup> Priya Sangameswaran & Roopa Madhav, *Institutional Reforms for Water* in WATER LAW FOR THE TWENTY FIRST CENTURY 145 (Phillip Cullet, Alix Gualtieri, Roopa Madhav & Usha Ramanathan ed., 2010).

<sup>9</sup> CULLET, *supra* note 7, 144.

In this current framework, since the ultimate management of the system is in the hands of the local bodies, it is at this level that the private players get involved. However, the level and scale of private involvement differs, as 'privatization' encompasses a spectrum of contractual arrangements between the government and the private sector depending on the legal and regulatory framework and the degree of control with the state.

Private sector involvement ranges from service contracts- where the local body merely contracts out certain functions to a private body- to full-fledged divestiture, wherein the ownership is given to the private player.<sup>10</sup> The most common models of privatization are public-private partnerships ('PPP'), such as management or concession agreements.<sup>11</sup> In such arrangements the private party undertakes operation and maintenance of the water supply network, and the assets are owned by the public entity, however, in each model, the level of investment of the private player and risk undertaken vary.<sup>12</sup> The Report of the Working Group on Urban and Industrial Water Supply and Sanitation for the 12<sup>th</sup> Plan that has been submitted to the Planning Commission ('12<sup>th</sup> Plan Report') recommends employing technical and administrative proficiency for projects dealing with improvement of distribution of water supply.<sup>13</sup>

## PART A: IMPLICATIONS OF PRIVATIZATION OF WATER SUPPLY

### III. WHY PRIVATIZE?: THE CASE FOR URBAN WATER PRIVATIZATION

For most of the 20<sup>th</sup> century, collective wisdom in public policy affirmed water management to be a tool for the social legitimization of the state.<sup>14</sup> Water was considered a strategic resource having public health benefits

<sup>10</sup> Jessica Budds & Gordon McGranahan, *Are the Debates on Water Privatization Missing the Point? Experiences from Africa, Asia and Latin America*, 15(2) ENVIRONMENT AND URBANIZATION 4 (2003).

<sup>11</sup> *Id.*

<sup>12</sup> See Amit Bhaduri & Arvind Kejriwal, *Urban Water Supply: Reforming the Reformers*, 40(53) EPW 5543 (2005) (The Tirupur Water Supply and Sewerage Project in Tamil Nadu is a full concession agreement, while the proposed projects of Hubli Dharwad and DJB are management contracts for rehabilitation of network for first few years, followed by operation and management for 10-15 years. In concession agreements, the investment comes from the private player; while in the case of management contracts, the private players get an annual fee for undertaking the supply).

<sup>13</sup> Steering Group on Water Sector, Planning Commission of India, *Report of the Working Group on Urban and Industrial Water Supply and Sanitation for the 12<sup>th</sup> Five Year Plan*, November, 2011, available at [http://planningcommission.nic.in/aboutus/committee/wrkgrp12/wr/wg\\_indu\\_sani.pdf](http://planningcommission.nic.in/aboutus/committee/wrkgrp12/wr/wg_indu_sani.pdf) (Last visited on June 1, 2013).

<sup>14</sup> Bakker, *supra* note 1, 6.

and enormous impact on the environment. Hence, there was widespread consensus regarding the suitability of the state to be in charge of water and sewerage provisions.<sup>15</sup> However, closer to the end of the century, countries across the globe started facing acute water crisis, and concerns were raised regarding the efficiency of public utilities. This concept of state failure emphasizes the flawed management by the state due to structural defects of the public sector system. Critics of the public model argued that involvement of the private sector would solve the many failures plaguing water and sanitation utilities and address the urgency of the emerging water crisis.

Privatization of water services has been seen as a panacea for the problems of government run supply systems, namely, inefficiency, corruption, lack of finance and infrastructure and tremendous wastage. Proponents of privatization argue that it brings in the much needed finance and investment for rehabilitating existing networks and extending infrastructure and services to those who did not have access before.<sup>16</sup> Private players are seen as more efficient and accountable to consumer needs, curing the problem of maladministration of municipal agencies.<sup>17</sup> Most importantly, privatization strikes at the primary problem of state-run networks, which is the under-pricing of water, leading to wastage and excessive leakage by consumers. Hence privatization allows for the transferring of costs to consumers, thereby reducing the losses of the supply system. The underlying assumption is that the market is more efficient than the state at providing basic services.

It is crucial here to elaborate upon the rationale expressed by International Financial Institutions ('IFIs') supporting private sector involvement. Institutions such as the World Bank and International Monetary Fund ('IMF') find favour in privatization as it introduces a new paradigm of market pricing using a 'full-cost recovery' approach, which in turns promotes sustainable use.<sup>18</sup> Such an approach is essential, according to these international funding agencies, to make consumers realize that water has a cost and its supply is not unlimited.<sup>19</sup> Privatization is hence a mechanism to facilitate end-consumer conservation, leading to sustainability and economic efficiency of the resource.

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<sup>15</sup> Gordon McGranahan & Davis Satterthwaite, *Governance and Getting the Private Sector to Provide Better Water and Sanitation Services to the Urban Poor*, 2006, available at <http://pubs.iied.org/pdfs/10528IIED.pdf> (Last visited on February 3, 2013).

<sup>16</sup> MAUDE BARLOW & TONY CLARKE, BLUE GOLD: THE FIGHT TO STOP THE CORPORATE THEFT OF THE WORLD'S WATER 11 (2003).

<sup>17</sup> Amitabh Kundu & Sandeep Thakur, *Access to Drinking Water in Urban India: An Analysis of Emerging Spatial Pattern in the Context of New System of Governance* in MANAGING WATER RESOURCES- POLICIES, INSTITUTIONS AND TECHNOLOGIES 150 (Ratna Reddy & S. Mahendra Dev ed., 2006).

<sup>18</sup> James Winpenny, *Report of the World Panel on Financing Water Infrastructure*, March 2003, available at [http://www.unwater.org/downloads/FinPanRep\\_MainRep.pdf](http://www.unwater.org/downloads/FinPanRep_MainRep.pdf) (Last visited on February 3, 2013).

<sup>19</sup> Matthias Finger, *The New Water Paradigm: The Privatization of Governance and Instrumentalization by the State* in THE BUSINESS OF GLOBAL ENVIRONMENTAL GOVERNANCE 284 (David Levy & Peter J Newell ed., 2005).

## IV. THE CASE AGAINST PRIVATIZATION: IMPACT ON THE URBAN POOR

### A. IMPACT ON LOW INCOME HOUSEHOLDS

As discussed earlier, the framework of water supply in urban India is twofold- first, networked water supply through pipelines and second, sources of free water like public standposts, etc. In this section, we aim to investigate the implications of privatized water supply on the urban population linked to the piped network supply.

#### 1. Tariff hikes

Privatization of water is invariably fraught with an increase in tariffs and hence, an exorbitant burden is placed on the urban poor who are unable to cope with the increased price level. This lies at the heart of the debate on the impact of privatization on the poor and has been the subject of considerable debate in the past few decades. We assert that privatization of water utilities will lead to increased cost, whether through a reworking of allocation principles (from social equity to economic equity); change in infrastructure goals (from security of supply to economic pricing) or through a similar redefinition of the principles underlying water supply.

In order to assess the impact of privatization on the price of water, it is important to comprehend the ideological direction and basic strategy underlying the trend of privatization. The major justification behind involving private-players is the need for improved efficiency and financial sustainability.<sup>20</sup> IFIs such as the World Bank and Asian Development Bank, stress that water is an increasingly scarce resource that requires a financially efficient allocation mechanism that only the market can provide.<sup>21</sup> Hence, privatization is firmly grounded on principles of full-cost recovery or economic pricing<sup>22</sup> as opposed to most public network suppliers that often recover only partial costs of water supply. Espousal of such principles of full-cost recovery shall inevitably lead to an increase in consumer prices of water. The 'water wars' in Bolivia stand as the most drastic example of price increases and consequent deprivation for

<sup>20</sup> KAREN BAKKER, *PRIVATIZING WATER: GOVERNANCE FAILURE AND THE WORLD'S URBAN WATER CRISIS* 72 (2010).

<sup>21</sup> This has been constantly reflected in policy documents regarding reforms of water supply issued by the World Bank. *See, e.g.,* Alexander McPhail, Alain R. Locussol & Chris Perry, *Achieving Financial Sustainability and Recovering Costs in Bank Financed Water Supply and Sanitation and Irrigation Projects*, June, 2012, available at [water.worldbank.org/sites/water.worldbank.org/files/publication/financial-sustainability-recovering-costs-water-projects\\_0.pdf](http://water.worldbank.org/sites/water.worldbank.org/files/publication/financial-sustainability-recovering-costs-water-projects_0.pdf) (Last visited on February 3, 2013).

<sup>22</sup> These requirements mean that user fees paid by water consumers must cover all water system costs, which usually include the costs of operation, maintenance and capital expenditure, and sometimes the cost of servicing past utility company debt.

large sections of the poor, with prices hiked to 200-300% within the first few weeks of private operation.<sup>23</sup>

Further, an increase in price levels is unavoidable due to the profit motive that is inherent in any private enterprise. In many cases private companies get profits written into their contracts.<sup>24</sup> Before investing in any project for water supply, private companies will always ensure that their investment is recouped with a satisfactory profit margin.<sup>25</sup>

Many promoters of privatization have raised arguments that in certain models of privatization (particularly in most Indian examples), the tariff structure is controlled by the municipal bodies, wherein only certain specific tasks of operation and management are contracted out to private companies. Hence, the impact of privatization on prices is argued to be diluted. However, we argue, that even in such models of privatization, an increase in tariff is unavoidable. *Firstly*, in most of these cases, the government increases consumer prices prior to privatization in order to attract the private sector and make the investment appear more profitable.<sup>26</sup> Water supply in developing countries is not always considered a profitable enterprise; hence in order to lure investor interest, governments deliberately hike tariffs, so as to minimize the risk for the private player. This may be seen in the case of the DJB project.<sup>27</sup> In this public-private model, the domestic municipal board had the authority to establish tariff structures. However, just preceding privatization, consumers in Delhi witnessed a 10% annual increase in prices.<sup>28</sup> Also, experience suggests

<sup>23</sup> Such price rise has been seen in almost all major privatization efforts in developing countries. In 1999 the Bolivian government granted a 40-year contract to Aguas de Tunari. Weeks after the private company was fully operational, prices of water hiked to 200-300%. Further, the World Bank stipulated no public subsidies must be given to ameliorate increase in water tariffs. Water became completely unaffordable for large sections of the population, and there were massive protests. The gravity of these incidents led to the infamous 'water wars'. While this may be seen as the most drastic form of price increase, it stands to tell the tale of escalating prices as a corollary to privatization. See generally A. Nickson & C. Vargas, *The Limitations of Water Regulation: The Failure of the Cochabamba Concession in Bolivia*, 21(1) BULLETIN OF LATIN AMERICAN RESEARCH (2002).

<sup>24</sup> Miloon Kothari, United Nations Special Rapporteur on Adequate Housing, *Privatising Human Rights: The Impact of Globalization on Adequate Housing, Water and Sanitation*, available at <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan1010131.pdf> (Last visited on February 1, 2013).

<sup>25</sup> Kate Bayliss, *Privatization and Poverty: The Distributional Impact of Utility Privatization* (Centre on Regulation and Competition, Manchester University, Working Paper No. 16, 2002).

<sup>26</sup> This was the case in the privatisation of water in Buenos Aires and was further emulated in the Manila water privatisation. See Kate Bayliss, *id.*

<sup>27</sup> Water Privatization and Commercialization Resistance Committee, *Privatization of Water Services: Myth and Reality*, available at [http://www.indiawaterportal.org/sites/indiawaterportal.org/files/privatization\\_of\\_water\\_services-myth\\_and\\_reality-wpcrc-2012.pdf](http://www.indiawaterportal.org/sites/indiawaterportal.org/files/privatization_of_water_services-myth_and_reality-wpcrc-2012.pdf) (Last visited on February 19, 2013).

<sup>28</sup> See Sujith Koonan & Preeti Samat, *Delhi Water Supply Reforms: Public-Private Partnerships or Privatisation?*, 47(17) EPW (2012) (In this project, the municipal bodies lent assurance to citizens that prices would not be hiked after the water sector reforms were undertaken. However facts reveal a different picture- Since 2009 the water tariffs in concerned areas have

that even if tariff setting is the prerogative of the public body in theory, contracts are often structured such that other decisions that directly impinge on the tariff-setting process are in hands of the private entity, and there is nominal autonomy over the tariff setting process.<sup>29</sup>

This represents a base for subsidies that are strictly targeted at the vulnerable sections, to ensure equity in water pricing.<sup>30</sup> Water subsidies and cross-subsidies<sup>31</sup> are commonly incorporated into water tariff structures in public utilities.<sup>32</sup> However, the present forms of privatization see water as an economic good and mandate full-cost pricing, according to which consumers must pay for what they use.<sup>33</sup> Advocates of privatization (particularly international funding agencies) are averse to subsidies as they create imperfect markets that lead to the distortion of water as an economic good.<sup>34</sup> Private companies do not favour cross-subsidies as they prefer not 'overcharging' their 'best' consumers.<sup>35</sup> Hence, through the course of implementation, privatization has been unable to internalize social equity principles.

## 2. Disconnections

With increasing water prices, large sections of the urban poor are unable to cope with such price levels. The policy of privatization mandates that water be provided only to those who are financially capable of paying for it. In case of non-payment, private companies resort to large scale disconnections to forestall any losses in their investment.<sup>36</sup>

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been raised annually (a) Residential from Rs 5 to Rs 7.19 per m<sup>3</sup>, (b) Mixed from Rs 5 to Rs 14.32 per m<sup>3</sup>, (c) Commercial from Rs 34 to Rs 41.76 per m<sup>3</sup>, (d) Government institutions from Rs 33 to Rs 41.76 per m<sup>3</sup>. The total increase is from Rs 19.17 to Rs 26.26 for 32,148 connections. The DJB revenue increase from 2009-10 to 2010-11 is from Rs 6.812 crore to Rs 13.632 crore. Clearly, prior efforts were made to make sure that the tariff structure is high enough to bear the operator's fee).

<sup>29</sup> Sangameswaran & Madhav, *supra* note 8, 148.

<sup>30</sup> Kundu & Thakur, *supra* note 17.

<sup>31</sup> Cross-subsidies are essentially when users who have the capacity to pay are charged higher prices and this allows the utility to subsidise those who cannot pay the full price. Hence, using social equity principles, water is made accessible to economically weaker sections of society.

<sup>32</sup> Budds & McGranahan, *supra* note 10.

<sup>33</sup> Bakker, *supra* note 20, 36.

<sup>34</sup> GAURAV DWIVEDI, PUBLIC-PRIVATE PARTNERSHIPS IN WATER SECTOR: PARTNERSHIPS OR PRIVATISATION? 26 (2010).

<sup>35</sup> *Id.*

<sup>36</sup> For instance, in Guinea, privatization resulted in severance of a third of the total connections in urban areas as a result of nonpayment. See John Nellis, *Privatization in Africa: What has Happened? What is to be Done?*, October 2005, available at [http://policydialogue.org/files/publications/PrivitizationAfrica\\_Nellis.pdf](http://policydialogue.org/files/publications/PrivitizationAfrica_Nellis.pdf) (Last visited on February 3, 2013). In India, the Asian Development Bank imposed a water supply disconnection policy and increased water tariffs in Rajasthan and Karnataka. See Asian Development Bank, *Rajasthan Urban Infrastructure Development Project No 29120, Report and Recommendation of the President to the Board of Directors*, 1998, available at <http://www.adb.org/sites/default/files/projdocs/1998/rrp-R18998c1.pdf> (Last visited on July 5, 2013) & Asian Development Bank,



Such disconnections are a significant violation of the right to water, particularly in the context of the rights based approach to water. General Comment 15 ('GC-15') of the International Covenant of Economic, Social and Cultural Rights ('ICESCR'), that envisages the normative content of the right to water, vests in every individual the 'right to be free from arbitrary disconnections'.<sup>37</sup> Further, while mandating economic accessibility to water, GC-15 stipulates that "the charges associated with securing water must be affordable for all, and must not compromise or threaten the realization of the Right."<sup>38</sup> Such an embodiment of the right is reaffirmed in another Report of the High Commissioner on Human Rights<sup>39</sup> that provides for procedural safeguards in cases of disconnections.

We argue the policy of complete disconnections espoused by private players in light of inability of the poor to pay, is a grave violation of the right to water on two counts. *First*, by adopting principles of full-cost recovery and prioritizing profits, privatization pre-empts water from being affordable for all sections of society. Unaffordable pricing followed by subsequent disconnection impedes realization of the right to water. *Second*, disconnection of services is often accompanied by the elimination of standposts leaving the poor with absolutely no access and violating the *minimum requirement* that is indispensable for survival. The content of the right to water obligates the state to provide bare minimum of water to the poor.<sup>40</sup> Several jurisdictions, including those that do not define water as a human right such as France, Belgium and England, have denounced disconnections that deprive people of the basic minimum supply of water.<sup>41</sup> In Belgium, users have a right to an uninterrupted minimal service of

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*Karnataka Urban Development and Coastal Environmental Project No 30303, Report and Recommendation of the President to the Board of Directors*, 1999, available at <http://www.adb.org/sites/default/files/projdocs/1999/rrp-R62744.pdf> (Last visited on July 5, 2013).

<sup>37</sup> United Nations Committee on Economic, Social and Cultural Rights [CESCR], *General Comment No. 15: The Right to Water*, E/C.12/2002/11 (January 20, 2003), available at [http://www.unhchr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94/\\$FILE/G0340229.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94/$FILE/G0340229.pdf) (Last visited on May 23, 2013).

<sup>38</sup> *Id.*

<sup>39</sup> United Nations High Commissioner for Human Rights [UNHCR], *Report on the Scope and Content of the Relevant Human Rights Obligations related to Equitable Access to Safe Drinking Water and Sanitation under International Human Rights Instruments*, U. N. Doc A/HRC/6/3, G.A. Res. 64/ 291 (August 16, 2007).

<sup>40</sup> See BRONWEN MORGAN, WATER ON TAP: RIGHTS AND REGULATION IN THE TRANSNATIONAL GOVERNANCE OF URBAN WATER SERVICES 160 (2011)(This obligation on the government is to entitle all citizens to a basic minimum of water and adopt due process while resorting to disconnections. This was upheld in South Africa where there is active socio-economic rights litigation over the access to water. In the case of Residents of Bon Vista Mansions v. Southern Metropolitan Local Council [(2002) 6 BCLR 625], the Court mandated fair and equitable procedure during disconnections such as, reasonable notice of intent to disconnect, provision of an opportunity to make representations, etc).

<sup>41</sup> Cullet, *supra* note 7, 196(France deprecated disconnections on the ground that they would be 'disproportionate measures that deprive users of an element that is essential to life' in the case of Monsieur Francois X and the Union Federale des Consommateurs d'Avignon v. Societe Avidonnaise des Eaux, Order No. 1492/95, May 12, 1995. In England and Wales, privatization

water under all conditions, and there are procedural safeguards for disconnections, that may be resorted to only in cases of immediate danger or fraud.<sup>42</sup> We argue that such policies are imperative to prevent arbitrary disconnections by private players and the resultant violations of the right to water.

### 3. Removal of Public Standposts

It has been argued for a number of years that certain municipal laws in India already allow for disconnection of water services.<sup>43</sup> While this argument may hold water, proponents of this argument fail to realize that when such disconnections would be carried out, people could rely on public standposts provided by the municipality. However, with privatization, the problems of disconnection are exacerbated in light of elimination of sources of free public water.

One of the foremost strategies proposed by private players to improve water sector infrastructure is removal of 'public-standposts' and similar free public water utilities.<sup>44</sup> Private players argue that municipalities are often known to be slipshod in maintaining these standposts and there are numerous environmental and health concerns that arise with such standposts.<sup>45</sup> However, one can trace such a policy stance to the profit motives of private companies.<sup>46</sup> Private companies often regard such public sources of water as "loss-making facilities" and hence push for their elimination. This is essentially a strategy to exert pressure on all residents to adopt piped water supplies.

The impact of such elimination is complete deprivation of low income households from access to water, constituting a violation of their right to water as well as other human rights that are intricately related to the right to water. The urban poor are faced with disconnections of their piped supply in light of increasingly unaffordable tariff rates, and have no alternative sources of water supply. We hence conclude that such unregulated privatization has glaringly adverse consequences for low income households that previously relied on the piped network supply.

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resulted in large scale disconnections that were held unjustified and consequently the statutory framework was amended to forbid disconnections to dwellings on inability to pay).

<sup>42</sup> PHILLIP CULLET, *supra* note 7, 196 (This was upheld in the case of In Communaute Flamande, Decretreglant le droit a la fourniture minimale d'electricite, de gaz at d'eau, December 20, 1996).

<sup>43</sup> Cullet, *supra* note 7, 195.

<sup>44</sup> For instance, The Kerala Urban Sustainable Development Project imposes on the State Government to convert existing standposts either to individual metered housing connections or to metered standposts. See Asian Development Bank, *Kerala Urban Infrastructure Development Project No 32300, Report and Recommendation of the President to the Board of Directors*, 2005, available at <http://www.adb.org/sites/default/files/projdocs/2005/32300-IND-RRP.pdf> (Last visited on July 5, 2013)

<sup>45</sup> Koonan & Samat, *supra* note 28.

<sup>46</sup> *Id.*

## B. IMPACT ON INFORMAL DWELLERS AND THE HOMELESS

The legal status of informal settlements and slums is in most cases dubious, with the government terming these settlements as ‘illegal encroachments’ and not granting them formal land rights.<sup>47</sup> The attitude of the Indian Government has been particularly apathetic, by failing to regularize these settlements and instead, subjecting them to arbitrary demolitions.<sup>48</sup> This attitude has allowed for the state to obviate its responsibility to provide network utilities to this section of the urban population and render them *persona non grata* in official records.<sup>49</sup> Slum dwellers are unable to access public services and benefits from subsidized public water supply, despite their willingness to pay. The lack of official records and information about this segment of the population leads to their exclusion from any water provision scheme.<sup>50</sup> State officials are wary of extending services so as to ensure no perverse incentives of slum growth are created.<sup>51</sup> In such a situation, the slum dwelling populations are forced to rely on free standposts and informal water vendors for their water supply, thereby compromising the water quality and physical accessibility while incurring a much higher cost.<sup>52</sup>

Although privatization is seen as necessary to extend services to this population, experience suggests that the effect is to the contrary. Most private sector schemes do not extend to these areas because of the unattractive market conditions, and are not obliged to do so, due to their invisibilisation in state records.<sup>53</sup> Multinational companies have asserted their disinterest in extending services to the poor, as they are too poor to be profitable and pose too

<sup>47</sup> Hulya Dagdeviren & Simon A. Robertson, *Access to Water in the Slums of the Developing World*, 10 (Int'l Policy and Inclusive Growth, Working Paper Series, Paper No. 52, June 2009); Usha Ramanathan, *Illegality and the Urban Poor*, 41(29) EPW (2006).

<sup>48</sup> Ramanathan, *Id.*

<sup>49</sup> United Nations Expert Group Meeting on Population Distribution, Urbanization, Internal Migration and Development, *Social and Environmental Aspects of Peri-Urban Growth in Latin American Megacities*, UN/POP/EGM-URB/2008/10 (December 19, 2007); Bakker, *supra* note 20, 111.

<sup>50</sup> Dagdeviren & Robertson, *supra* note 47.

<sup>51</sup> Water Utility Partnership, *Better Water and Sanitation for the Urban Poor: Good Practice from Sub-Saharan Africa*, 2003, available at [http://www.wds.worldbank.org/servlet/main?menuPK=64187510&pagePK=64193027&piPK=64187937&theSitePK=523679&entityID=000333037\\_20080328022843](http://www.wds.worldbank.org/servlet/main?menuPK=64187510&pagePK=64193027&piPK=64187937&theSitePK=523679&entityID=000333037_20080328022843) (Last visited on February 3, 2013).

<sup>52</sup> Most water short areas in urban India depend on informal water vendors for their water supply, who resell water obtained through municipally obtained water source or privately maintained groundwater source, and consumers often end up paying more than 100 times the unit cost than the piped supply. See Budds & McGranahan, *supra* note 10; David McKenzie & Isha Ray, *Urban Water Supply in India: Status, Reform Options and Possible Lessons*, 11 WATER POLICY 454 (2009).

<sup>53</sup> Privatisation contracts in Dar Es Salam, Tanzania and Cote D'Ivoire excluded an obligation to supply in peri-urban slum settlements, while low income settlements in Cartagena, Columbia and La Paz, Bolivia were deemed outside the city's limits and thereby outside the contracts purview; See Water Aid Tanzania, *Water Reforms and PSP in Dares Salam*, 2003, available

great a financial risk.<sup>54</sup> In cases where privatization schemes have been available to these inhabitants, the private contractors require that the existing water connections, if any, be dismantled, to be replaced by new ones for metering and billing purposes. However, the new connection charges for these unplanned settlements are significantly higher, as they are in areas of low network density.<sup>55</sup> Since most connection charges are based on the principle of recovery of capital costs, they become unaffordable for the poor settlements. Further, the private concessionaires fail to cater to the specific issues posed by this market, such as the low water pressure in these areas, the burden of connection fees and transaction costs, pro-poor billing practices etc.<sup>56</sup>

The water project in Hubli-Dharwad demonstrates the exorbitant costs imposed on the poor by proposed privatization schemes. Since the new scheme was available to only those with legal connections, the poor were forced to first pay charges to the municipality to regularize their connection, followed by connection charges to the private service provider.<sup>57</sup> Further, the scheme demonstrated perverse discrimination against the poor, wherein previously legal connections were charged only Rs. 50 per month for cost recovery, while newly regularized connections would have to undertake full cost recovery charges.<sup>58</sup>

The exclusion of the slum dwellers is exacerbated by another conditionality being imposed by way of privatization contracts and IFI funding; the elimination and discouragement of public standposts.<sup>59</sup> Official records state that only 47% of the population has individual water connections, thereby revealing that majority of the population relies on community and shared water supply sources. Despite this, most privatization projects in India threaten to eliminate public standposts, as discussed earlier. Even where protests have ensured that standposts are not eliminated, they are metered and billed, with consumption charges similar to those of individual connections.<sup>60</sup>

In the absence of any water supply provision, the poor settlements are primarily dependent on informal vendors, who either resell water from municipal sources or transport groundwater through tankers.<sup>61</sup> The discourse on privatization is largely silent on the role and regulation of these

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at [http://www.wateraid.org/documents/plugin\\_documents/waterreformsandpsptanz.pdf](http://www.wateraid.org/documents/plugin_documents/waterreformsandpsptanz.pdf) (Last visited on February 3, 2013); Budds & McGranahan, *supra* note 10.

<sup>54</sup> *Id.*

<sup>55</sup> Connection fees vary depending on the distance from the network, *see* Bakker, *supra* note 20, 125.

<sup>56</sup> Bakker, *supra* note 20, 128.

<sup>57</sup> Priya Sangameswaran, Roopa Madhav & Clifton D'Rozario, 24/7 'Privatization' and Water Reform: Insights from Hubli-Dharwad, 47(14) EPW 6 (2008).

<sup>58</sup> *Id.*

<sup>59</sup> Kundu & Thakur, *supra* note 17.

<sup>60</sup> Sangameswaran, Madhav & D'Rozario, *supra* note 57.

<sup>61</sup> McKenzie & Ray, *supra* note 52; Dagdeviren & Robertson, *supra* note 47.

informal sources, which sometimes operate illegally.<sup>62</sup> Informal vendors are characterized by unregulated water quality and high and arbitrary pricing. The general increase in tariff due to privatisation is borne indirectly by these slum dwellers, as these tariffs are passed on by the vendor reseller.<sup>63</sup>

The problem of exclusion from water services to the poor is a more complex problem of governance, entitlement and citizenship and social rights, that privatization does not have the solutions to, and only serves to exacerbate.

## V. INSTITUTIONAL FAILURE OF PRIVATIZATION

In the above analysis we have elucidated the implications of privatization on access to the most marginalized section of society, the urban poor. In addition to this, there are certain inherent reasons for the large scale failure of privatization in developing countries across the world.

### A. TRANSFER OF FINANCIAL RISK

The cornerstone of the arguments in favour of privatization is that the involvement of private agencies will be instrumental in mobilizing finance for cash-strapped governments, and will bring in the much-needed investment for water sector reforms. Pro-privatization arguments assume the willingness of the private companies to provide finances needed for extending and improving infrastructure and to undertake the risks of such investment. However, evidence from privatization projects in India and globally proves that the risk of investment continues to lie with the government.

The bulk of financing for the concessional agreements in public-private partnership comes from public financing.<sup>64</sup> Investment in water infrastructure in developing countries is not an attractive proposition for a private player due to the range of risks involved and the large capital requirement, with recovery of costs taking up to several years.<sup>65</sup> Private corporations are thus undertaking more service/management contracts where there are faster returns on capital and the responsibility of extending service remains with the public body.<sup>66</sup> Such low risk ventures allow the private companies to look over

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<sup>62</sup> McGranahan & Satterthwaite, *supra* note 15.

<sup>63</sup> Australian Government (Water and Sanitation Program), *Increasing Access: The Experience of Small Scale Water Providers in Serving the Poor in Metro Manila*, January, 2004 available at [http://www.wsp.org/sites/wsp.org/files/publications/eap\\_Inc\\_access.pdf](http://www.wsp.org/sites/wsp.org/files/publications/eap_Inc_access.pdf) (Last visited on February 3, 2013).

<sup>64</sup> Bakker, *supra* note 20, 36.

<sup>65</sup> Bayliss, *supra* note 25.

<sup>66</sup> In Guinea and Cote D'Ivoire, billing services were outsourced to the private company while maintenance of infrastructure remained with the government. See Bayliss, *Id.*

efficiency and performance, and arguments of private players extending the service and infrastructure fail.

The water sector reforms of the DJB provide a case in point.<sup>67</sup> The Detailed Project Report of the model revealed the private sector involvement in the financial arrangement was only 15%, whereas the Government directly assumed 70% of the risk.<sup>68</sup> Further, the financial arrangement of the privatization project in Khandwa, Madhya Pradesh, reveals that the public financing of the project was Rs 96 crore, with 80 % of the finance coming from the Central Government and the State Government contributing another 10%. On the other hand, the private company only undertook 10 % of the investment.<sup>69</sup>

In fact trends of privatization in India demonstrate that the government is not only assuming the risk of the project through investment, but also safeguarding the private player from any potential risk to it. In long term concession agreements, such as the Tirupur Water Supply and Sanitation Project in Tamil Nadu, the government has kept large scale contingency funds, to avoid the loss borne by the private contractor.<sup>70</sup> The Government has used public resources to make separate funds to cushion the private corporation from any risk or exigency.<sup>71</sup> The lack of investor interest in entering these agreements leads to governments enticing the private corporations by offering them large concessions and allowing tariff hikes,<sup>72</sup> thereby transferring an additional monetary burden of concessions and subsidies on the government.

## B. BIASED CONTRACT NEGOTIATIONS

The basis of any private provision of water service is the contract between the urban local body and the private corporation, which determines the level of involvement and investment of the private player, the tariff structure, the extent of services etc. The negotiations for this main contract are instrumental as they define the direction of the restructuring exercise towards privatization.<sup>73</sup> In absence of an external regulatory authority, it is the contract which regulates the performance of the contractor, by stipulating the sanctions against the private player when designated targets are not met. However, the

<sup>67</sup> *Delhi Jal Board Privatization Model in Deep Trouble*, TIMES OF INDIA August 17, 2012.

<sup>68</sup> Koonan & Samat, *supra* note 28.

<sup>69</sup> Steering Group on Water Sector, Planning Commission of India, *supra* note 13.

<sup>70</sup> See Bhaduri & Kejriwal, *supra* note 12.

<sup>71</sup> The Government of Tamil Nadu has provided the private company with Rs. 75 crore Water Shortage Period Fund in case of any shortage of water resources during the agreement period, along with a Rs. 50 crore Debt Service Reserve Fund to finance its debt in case of any revenue loss.

<sup>72</sup> Kate Bayliss, *Privatisation and the World Bank: A Flawed Development Tool*, 13 GLOBAL FOCUS (2001), available at <http://www.psiru.org/reports/2000-11-U-WB.doc> (Last Visited on February 1, 2013).

<sup>73</sup> UNITED NATIONS HUMAN SETTLEMENT PROGRAMME (UN-HABITAT), WATER AND SANITATION IN WORLDS' CITIES- LOCAL ACTION FOR GLOBAL GOALS 199 (2003).

power disparity between multinational corporations (where most often the private players are involved) and developing nations, with these corporations often being backed by IFIs, creates an unequal bargaining power and affects the negotiation process, leading to one-sided contracts.<sup>74</sup> These corporations are further protected from multilateral/bilateral trade and investment agreements between countries, which provide for compensation to the companies in case the government decides to terminate the agreement.<sup>75</sup> Further, in order for the urban poor to benefit from the reform projects, it is crucial their interests stand at the forefront from the stage of contract negotiations itself.<sup>76</sup> However, either the efforts of the state to lure investors and represent the project as profitable or the overriding say of the dominant private company, leads to concerns of the impoverished being disregarded.

In the case of failure of the companies to perform according to the contract, the companies are able to renegotiate the contracts to lower their performance target.<sup>77</sup> Renegotiation has become the order of the day, with the World Bank even writing a manual on how to renegotiate failed concession agreements.<sup>78</sup> Therefore, it is those developing countries that require an overhaul of the supply system that do not have the bargaining power to negotiate a successful contract, thereby leading to a skewed privatization model that brings in none of the proposed benefits of privatization.

### C. NATURE OF CONTRACTS: UNDERMINING ACCOUNTABILITY

Water, by virtue of being a fundamental necessity, demands that the process of its supply and management be defined with effective safeguards and accountability mechanisms in larger public interest.<sup>79</sup> However, experiences of implementation of privatization in developing countries, and even preliminary initiatives in India have demonstrated an acute dearth of liability on the private companies and instances of lapses, corruption etc.<sup>80</sup>

<sup>74</sup> Sangameswaran & Madhav, *supra* note 8, 149.

<sup>75</sup> Aguasdel Tunari, the concessionaire in Cochabamba, Bolivia brought a proceeding against Bolivia before the International Centre for Settlement of Investment Disputes (ICSID), and invoked a bilateral investment treaty between the Netherlands and Bolivia as the basis for jurisdiction in *Aguasdel Tunari v. Republic of Bol.*, ICSID Case No. ARB/02/3.

<sup>76</sup> McGranahan & Satterthwaite, *supra* note 15.

<sup>77</sup> This has been seen in 2001 in Manila in Phillipines, when such renegotiation took place despite the presence of the state regulatory authority. *See generally* Sarah Hale, *Water Privatization in the Phillipines: The Need to Implement the Human Right to Water*, 15(3) PAC. RIM L. & POL'Y J. 790 (2006).

<sup>78</sup> LUIS GAUSCH, GRANTING AND RENEGOTIATING INFRASTRUCTURE CONCESSIONS: DOING IT RIGHT (2004).

<sup>79</sup> Craig Anthony Arnold, *Privatization of Public Water Services: The States' Role in Ensuring Public Accountability*, 32(3) PEPPERDINE L.R. 564 (2012).

<sup>80</sup> Allegations of corruption in privatized water supplies have occurred in many regions of the world. For example, the French multinationals Suez-Lyonnaise and Vivendi were convicted in

The deficit of transparency starts with the very process of granting of concession or consultancy contract to the private player. There is a system of biases and maladministration that operates to grant only 'favoured' companies projects, especially when they are backed by international funding institutions like the World Bank.<sup>81</sup> Such contracts are usually concluded behind closed doors,<sup>82</sup> and information and details of the project are kept out of public purview.<sup>83</sup> Considerable controversy was floating around the DJB project, with allegations of extensive manipulation in the granting of the consultancy contract to Price Waterhouse Coopers ('PWC') in 2005.<sup>84</sup> Documented evidence has been reported to show how the World Bank kept raising objections and altering selection criteria for appointments of consultants until PWC was selected for the DJB restructuring project (supported by the World Bank itself).<sup>85</sup> In addition to this, the secrecy predicament of such contracts is heightened as private companies are exempt from Right to Information ('RTI') review, allowing them to escape public scrutiny.

The nature of contracts and generality of obligation stipulated in such contracts can be seen as one of the primary triggers for lapses in accountability. In most cases governments make long-term contracts with the private company, with a weak system of checks and balances.<sup>86</sup> Since the operation and management of water supply is so complex and nuanced, the performance parameters of the scheme are often left vague, while targets set are either bogus or inconsequential.<sup>87</sup> Such contracts give considerable leeway to the private players to flout the targets and not be held liable for such.<sup>88</sup>

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France of paying bribes to obtain water concessions. Similar instances have occurred in South Africa, Bolivia where the private companies have been alleged to use fraudulent practices in the operation and management of services. See Public Citizen, *Water Privatization Fiascos: Broken Promises and Social Turmoil*, 2003, available at [http://my.ewb.ca/site\\_media/static/attachments/group\\_topics\\_grouptopic/22078/privatizationfiascos.pdf](http://my.ewb.ca/site_media/static/attachments/group_topics_grouptopic/22078/privatizationfiascos.pdf) (Last visited on February 7, 2013). Even in the very recent case of the DJB, certain RTI petitions filed have revealed anomalies in the budget approval for awarding the consultancy contract. Information obtained through the RTI filings suggest that there was no approval by the planning division for the estimate of Rs 3.35 crore drawn up by the DJB for the contract. This has elicited severe criticism regarding corruption in the process. See Koonan & Samat, *supra* note 28.

<sup>81</sup> This shall be discussed in detailed in Part VI (Role of International Financial Institutions).

<sup>82</sup> Kothari, *supra* note 24.

<sup>83</sup> In fact, in *Shri Navroz Mody v. Mumbai Port Trust*, Appeal No. CIC/AT/A/2009/000964 dated 22-07-2008, the Court stated that contracts for privatization of water were cloaked in secrecy, and called for accountability and transparency.

<sup>84</sup> Avjeet Singh, *Political Economy of Reforms: Learning from the Delhi Water Sector Experience*, available at <http://siteresources.worldbank.org/EXTGOVACC/Resources/CaseStudyDelhi.pdf> (Last visited on February 2, 2013).

<sup>85</sup> Aman Sethi, *Private Water, Public Misery*, FRONTLINE April 8, 2006.

<sup>86</sup> Kothari, *supra* note 24.

<sup>87</sup> See Bhaduri & Kejriwal, *supra* note 12.

<sup>88</sup> An interesting example of this is the World Bank's response to concerns about the DJB privatization project. The World Bank has stated that in case of major violations of project targets and obligations, total penalty on a company for all violations put together would not exceed 30% of the management fee. Hence, even if an overt infringement is committed by the company, they stand to lose only a nominal fee. See Koonan & Samat, *supra* note 28.



## VI. ROLE OF INTERNATIONAL FINANCIAL INSTITUTIONS

Through the course of the above arguments, we have seen an overwhelming influence of international financial institutions, particularly the World Bank and IMF, in the ongoing reforms of privatization in developing countries. Most often privatization is a necessary pre-condition for the release of aid funds and has been tied to eligibility conditions for debt relief by the World Bank and IMF.<sup>89</sup> Since developing countries are in acute need of aid disbursement, they are almost forced to align themselves with the policies of privatization.<sup>90</sup> Instances show how such international IFIs have powerfully shaped the national trajectories of water reforms in an array of countries.<sup>91</sup> Therefore, the failure of privatization in many developing countries may not solely lie in the hands of the domestic governments, and can be attributed to the overriding powers of the International Financial Institutions.

The first objective is to understand the nature of the policies of these agencies. The IFI's paradigm of reforms has always had a strong neo-liberal inclination. Their policies envisage water as an economic good that is subject to market forces to ensure efficiency and most importantly, sustainability of this resource.<sup>92</sup> These policies have continually failed to internalize the distributional aspects of water supply and the consideration of social and equitable policies. In fact, even the recent 'shift' of focus by the World Bank from 'Structural Adjustment Program' to 'Poverty Reduction Strategies' has not really achieved much, as the emphasis on markets and efficiency has been strong.<sup>93</sup> The absence of equitable policies is exacerbated when such policies are imposed upon developing countries where large sections of the population are ridden with poverty. Hence, the most significant impact of the IFIs is the trade-off of interests of the vulnerable and impoverished in light of achieving 'financial sustainability' of water.

Along with imposing privatization on borrowing states, IFIs are also assuming a predominant role in determining the selection of the company, consultants, independent regulators etc. To ensure efficiency, procurement and selection of contracts must be done through open and transparent competition,

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<sup>89</sup> Bayliss, *supra* note 25.

<sup>90</sup> Andres Olleta, *Role of the World Bank in Water Law Reforms* in WATER LAW FOR THE TWENTY FIRST CENTURY 84 (Phillip Cullet, Alix Gualtieri, Roopa Madhav & Usha Ramanathan ed., 2010).

<sup>91</sup> See generally Bayliss, *supra* note 72.

<sup>92</sup> See generally Bayliss & Cramer, *Privatisation and the Post-Washington Consensus: Between the Laboratory and the Real World* in DEVELOPMENT POLICY IN THE 21ST CENTURY: BEYOND THE POST-WASHINGTON CONSENSUS (2001) (For a review of the evolution of the World Bank's policy position on privatization).

<sup>93</sup> Bayliss, *supra* note 25.

typically by bidding.<sup>94</sup> However, the World Bank has often been accused of manipulating its upper hand by giving preference to large multinational players.<sup>95</sup> Moreover, the World Bank is underwriting such giant corporations with public money and governments are saddled with the responsibility of assuring returns to shareholders.<sup>96</sup>

Further, at the negotiation stage, concerns are being raised as to whether decision-making can remain open, equitable and inclusive.<sup>97</sup> Engaging international funding agencies and multinational corporations often creates an ‘information asymmetry’ between the private company and the local government, where the former is far better informed.<sup>98</sup> In such cases if the local body is the regulator, this information asymmetry further reduces accountability and transparency.

Another crucial point is the transnational legal setting that seriously undermines a nation’s regulatory framework.<sup>99</sup> Bilateral investment treaties, which provide for disputes to be submitted to arbitration, view any form of national regulation and supervision as potentially expropriatory and often exclude larger public interest issues.<sup>100</sup> The cases of Bolivia and Argentina demonstrate the pervasive political influence of the International Centre for the Settlement of Investment Disputes (allied to the World Bank) on the water sector reforms and policies in these countries. This seriously undermines the role of the domestic regulator which is crucial to the privatization process.

## PART B: REORIENTING THE MISPLACED ‘PUBLIC VERSUS PRIVATE’ DEBATE

### VII. THE MISPLACED DEBATE: IS THE PROBLEM REALLY PRIVATIZATION?

In the above arguments, we have aimed to explicate the controversial debate against private sector involvement in urban water sector. We have established that implementing privatization in the current scenario in India shall only lead to further exclusion of the urban poor from water services. At

<sup>94</sup> James Winpenny, *supra* note 18.

<sup>95</sup> Barlow & Clarke, *supra* note 16.

<sup>96</sup> For instance, as a condition imposed by the World Bank, Chile had to guarantee a profit margin of 33% to Suez Lyonnaise des Eaux regardless of the profitability of the system. See Jennifer Naegelle, *What Is Wrong With Full-Fledged Water Privatization?*, 6 J. L. & Soc. CHALLENGES 110 (2004).

<sup>97</sup> McGranahan & Satterthwaite, *supra* note 15.

<sup>98</sup> UNITED NATIONS HUMAN SETTLEMENT PROGRAMME (UN-HABITAT), *supra* note 73, 201.

<sup>99</sup> Morgan, *supra* note 40.

<sup>100</sup> *Id.*

the same time, continuation of the public distribution system will increase existing problems and inequities. Hence, we argue that the current focus on water privatization actually presents an artificial choice between public and private operators and diverts attention from more foundational questions regarding urban water governance.<sup>101</sup> Primary problems of tariff hike and disconnections, exclusions of certain sections of society and biased privatization arrangements alluded to above, are not problems inherent to privatization, but in the manner it has taken shape in developing countries. The diminished control of the state, the domination of private companies and international funding agencies are issues rooted in the deeper malaise of the state not recognising its obligation to ensure universal access to water. Therefore, one of the primary solutions lies in pinning an enforceable obligation on the state to ensure it discharges its responsibility, whether it performs as the distributor or the supervisor of private companies. Similarly, problems of tariff hike, disconnections and nature of contracts may be tackled by allowing the private player to work in a strong regulatory framework of the state, such that economic policies do not hamper distributional equity.

Hence, solutions to problems of urban water supply do not lie in a simple switch to either public or private distribution, but in reformation of the institutional principles of water supply, as prescribed in the subsequent section. We contend that most of the elemental obstacles in improving water supply relate to more fundamental concerns of governance of urban water utilities.

Let us first elucidate the concept of 'governance' and delineate the fundamental principles that characterize this concept. Water governance refers to the "range of political, social, economic and administrative systems that are in place to develop and manage water resources, and the delivery of water services, at different levels of society".<sup>102</sup> The United Nations Economic and Social Commission for Asia and the Pacific defines 'governance' in terms of decision-making processes and processes for implementing such decisions.<sup>103</sup> It enumerates eight crucial requirements which form the foundation of 'good governance', namely: it must be participatory, to include all actors and stakeholders; it must be consensus oriented; accountable; efficient; transparent, to ensure fairness and to instil faith in the system of governance; responsive; and equitable.<sup>104</sup>

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<sup>101</sup> McGranahan & Satterthwaite, *supra* note 15.

<sup>102</sup> Global Water Partnership Technical Committee, Peter Rogers & Alan Halls, *Effective Water Governance*, 2003, available at <http://www.tnmckc.org/upload/document/bdp/2/2.7/GWP/TEC-7.pdf> (Last visited on February 5, 2013).

<sup>103</sup> United Nations Economic and Social Commission for Asia and the Pacific [UN ESCAP], *What is Good Governance?*, available at <http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.asp> (Last visited on May 18, 2013).

<sup>104</sup> *Id.*

Since the concept of ‘good governance’ finds application in various contexts, it is important here to specifically delineate the contours of good governance in the water sector. Governance of water encompasses a wide gamut of processes by which stakeholders articulate their interests; their input is absorbed, decisions are taken and implemented, and decision-makers are held accountable in the management of water resources and water services.<sup>105</sup> Good governance thus in relation to water would mean, equitable access of water to all, inclusion of excluded areas by implementing affordable costs for usage, and ability to participate in the decisions of water distribution, budgeting etc. It also means transparent procedures with minimum bureaucratic hurdles, maximum efficiency and minimum wastage of resources. A recent paper commissioned by the Global Water Partnership identified that the approach to water governance must be open and transparent as opposed to clouded with bureaucracy; inclusive and communicative in place of being exclusive and expert-driven; coherent and integrative in preference to sector-specific; and equitable and ethical as opposed to biased in favour of the elite majority.<sup>106</sup> It is thus evident that problems of accountability, centralized decision making and exclusion of the poor, as explained in previous sections, stem from the governance approach rather than private/public operation of the water utility. Therefore, in the subsequent sections, we suggest reforms for the restructuring of water utilities to make them more democratic, accountable and transparent.

The problem of inequitable access to water points to another major aspect of governance failure; the marginalisation and rejection of the poor sections of the population by the state, by deeming them ‘illegal occupants’. Dwellings in slums or on pavements and other public spaces are deemed illegal by the state, thereby condemning this large population to a status of illegitimate citizenship. Such marginalisation demonstrates why concerns of the poor have never dominated mainstream debates on water supply provision, thereby allowing for their needs to be side-lined and ignored. Karen Bakker explains that the exclusion of the poor is systemic, fuelled by misplaced notions of development and modernization that have been inherited over the years. Post-colonial states have inherited the development patterns of the colonial regime wherein full citizen and social rights were accorded only to the upper sections of society.<sup>107</sup> Since full recognition of citizenship rights is limited to the elite, public services such as water, education, electricity, regarded as the “material emblems

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<sup>105</sup> This definition is adapted from that of the Institute on Governance, a non-profit organization founded in 1990 to promote effective governance. For more information, see Institute on Governance, available at <http://www.iog.ca/> (Last visited on February 28, 2013)

<sup>106</sup> The Global Water Partnership, available at <http://www.gwpforum.org/gwp/library/Governance.pdf> (Last visited on February 28, 2013).

<sup>107</sup> Bakker gives the example of Jakarta, Indonesia to show how the colonial policy of excluding the ‘natives’ from the piped supply network extended into the post colonial periods. The city of Jakarta remained divided in the post colonial period, with the poorer sections of population not receiving the benefits of urbanization and modernization; See Bakker, *supra* note 20, 115-117.

of citizenship” are provided only to these upper sections of the population. Infrastructure based systems such as water supply have the exclusion of the poor and the slums literally hardwired into the network, with piped networks not extending to those sections of the city.<sup>108</sup> It has been argued that there exists a systemic bias against the poor, irrespective of whether the operator of water service has been public or private.<sup>109</sup> Governments are incentivised to undertake more visible infrastructural projects catered to elite sections of society, with investment-heavy ‘invisible’ water piped networks receiving low priority.<sup>110</sup> Such an ‘elite capture’ of resources and public provisions has been evident in the literature on housing and settlement rights of the urban poor in India.<sup>111</sup> In such a situation, the private provision of water services does not prove to be a solution, but only serves to aggravate this process of exclusion. The solution therefore seems to be in extending the full range of entitlements and social and citizenship rights to these excluded populations, possibly through a rights based approach, as discussed later in the paper.

The importance of governance reforms have been recognised in the 12<sup>th</sup> Plan Report which emphasizes that without addressing the fundamental governance impediments plaguing the Indian water sector, any amount of technological changes, influx of investment; or infrastructural innovations shall only have *limited usefulness*.<sup>112</sup> It has identified a threefold problem in the Indian governance model- lack of participation of water users at various levels; lack of transparency and the imperative need for institutionalized accountability. While we will deal with each of these reforms in a nuanced manner later, we emphasize that an efficient and well governed utility is at the core of the reform process, and the management of the utility, whether public or private, is secondary.

## VIII. SETTING THE STAGE FOR PRIVATIZATION: WHAT INDIA MUST KEEP IN MIND

We argue that the success of privatization is hinged on a foundational restructuring of water governance and a re-haul of the underpinning institutional principles. While it would be beyond our expertise to suggest an adept governance model for India’s water sector, we lay down the foundational principles that India must institutionalize in order to reform the water sector and facilitate successful privatization.

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<sup>108</sup> *Id.*, 28.

<sup>109</sup> *Id.*, 47.

<sup>110</sup> *Id.*, 47, 117.

<sup>111</sup> Ramanathan, *supra* note 47.

<sup>112</sup> Steering Group on Water Sector, Planning Commission of India, *supra* note 13.

## A. ADOPTING A RIGHTS BASED APPROACH TO WATER

It is accepted that the concept of privatization is not inherently contradictory to accepting a human right to water. In fact, we argue that a well-defined and enforceable paradigm of entitlements to water is an essential pre-condition to privatization in India.

### 1. Understanding the Domestic Rubric of the Right to Water

In order to assess the ramifications of privatization in India, it is crucial to comprehend the domestic rubric of the right to water.<sup>113</sup> A plethora of constitutional and legal provisions govern the availability, control and distribution of water.<sup>114</sup> However, a human right to water is not explicitly guaranteed under any statutory or constitutional provision. An activist interpretation of the right to life under Article 21 of the Constitution has been extended to recognize a fundamental right to water.<sup>115</sup> While the initial catena of cases pronounced such a right only in pollution and environment-related cases, the later trajectory of cases<sup>116</sup> have addressed the more fundamental concerns of access to resource and the right to safe and adequate drinking water. These cases have recognized an obligation on the state to provide safe drinking water to all.<sup>117</sup>

With regard to the nature of water as a resource, the Supreme Court in *M.C. Mehta v. Kamal Nath*<sup>118</sup> held that water is a community source which is to be held by the state in public trust, by recognizing the state's duty to respect the principle of inter-generational equity. Hence the state is a trustee of water resources, and must ensure equity in distribution of water utilities. Apart from this, the Directive Principles of State Policy in Article 37 of the Constitution envisage the principle of equal access to material resources of the country.

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<sup>113</sup> Videh Upadhyay, *Water Rights and the 'New' Water Laws in India- Emerging Issues and Concerns in a Rights Based Perspective* in INDIA INFRASTRUCTURE REPORT, 2011- WATER: POLICY AND PERFORMANCE FOR SUSTAINABLE DEVELOPMENT 56-57 (2012).

<sup>114</sup> S. Murlidhar, *The Right to Water- An Overview of the Indian Legal Regime* in THE HUMAN RIGHT TO WATER (Eibe Riedel & Peter Rothen ed., 2006).

<sup>115</sup> Jayna Kothari, *The Right to Water: A Constitutional Perspective*, available at: [http://www.ielrc.org/activities/workshop\\_0612/content/d0607.pdf](http://www.ielrc.org/activities/workshop_0612/content/d0607.pdf) (Last Visited, February 2, 2013).

<sup>116</sup> Upadhyay, *supra* note 113 (These include Wasim Ahmed Khan v. Govt. of Andhra Pradesh, (2002) 5 ALT 526 (DB); Mukesh Sharma v. Allahabad Nagar Nigam, 2000 All LJ 3077; Diwan Singh v. SDM, 2001 All LJ 273; S.K. Garg v. State of Uttar Pradesh, 1999 All LJ 332; Gautam Uzir v. Gauhati Municipal Corpn., (1999) 3 GLT 110; Vishala Kochi Kudivella Samrakshana Samithi v. State of Kerala, (2006) 1 KLT 919).

<sup>117</sup> Roopa Madhav, *Context for Water Sector and Water Law Reforms in India* in WATER LAW FOR THE TWENTY FIRST CENTURY 120 (Phillip Cullet, Alix Gualtieri, Roopa Madhav & Usha Ramanathan ed., 2010).

<sup>118</sup> (2002) 3 SCC 653; AIR 2002 SC 1515.

Notwithstanding the constitutional provisions and fundamental right to water, water supply is considered a 'local' responsibility.<sup>119</sup> A Model Municipal Law, passed by the Ministry of Urban Development in 2003, delineates the functions and responsibilities of municipalities with respect to provision and supply of water.<sup>120</sup> Since it would not be feasible to examine the separate laws of each state, we aim to expound the nature of obligations of municipalities as under the Model Law that has largely been relied on by the states. § 47(1)(a)(i) of this Law obligates the municipality to "provide on its own or arrange to provide through any agency...water supply for domestic, industrial and commercial purposes". While this Section makes water supply an obligatory function of the municipality, one sees that subsequent sections make the fulfilment of this obligation contingent on various other factors.<sup>121</sup> The duty of ensuring sufficiency of water is circumscribed to those measures that are "reasonable at a practical cost". Further the responsibility of the municipality to supply water to places that do not have networked supply is limited to only "as far as is possible" by the Municipality. Further, § 171(2) vests all discretion of deciding whether measures are practicable or of a reasonable cost with the Municipality itself. We argue that this is a marked dilution in the obligations assumed by the municipality. In most states, drinking water is regarded as a contractual rather than statutory right.<sup>122</sup>

Hence despite the existence of a developed body of case law that recognizes the right to water and State laws that delineate the duty of municipalities with respect to water supply, the content of the right is inadequate and has not been adequately elaborated upon.<sup>123</sup>

Further, a major drawback of water law in India is that there is no legislated standard to define 'clean' water, unlike most of the world.<sup>124</sup> Although the Bureau of Indian Standards ('BIS') prescribes standards to assess the suitability of water for drinking purpose,<sup>125</sup> this benchmark is merely

<sup>119</sup> By the 73<sup>rd</sup> and 74<sup>th</sup> Amendment, the governance of water supply has devolved to the elected local bodies, in keeping with the trend of decentralization. Thus the responsibility of urban water supply lies with the municipalities established under different state legislations.

<sup>120</sup> Ministry of Urban Development and Poverty Alleviation, *Model Municipal Laws*, October 2003, available at [http://urbanindia.nic.in/legislations/li\\_by\\_min/Model\\_Municipal\\_Law/indexmml.html](http://urbanindia.nic.in/legislations/li_by_min/Model_Municipal_Law/indexmml.html) (Last visited on February 2, 2013).

<sup>121</sup> Joy & Paranjape, *supra* note 6.

<sup>122</sup> Phillip Cullet & Roopa Madhav, *Water Law Reforms in India: Trends and Prospects* in WATER AND THE LAWS IN INDIA 528 (2009).

<sup>123</sup> CULLET, *supra* note 7, 52.

<sup>124</sup> For instance, in the United States potable water quality is legislated and enforced under the Safe Drinking Water Act. Also, a developing country like South Africa has well-defined national standards for drinking water and the state has a duty to test potable water on a monthly basis to ensure adherence to the prescribed standards. Steering Group on Water Sector, Planning Commission of India, *supra* note 13.

<sup>125</sup> For the current standard see Bureau of Indian Standards, *Drinking Water Specification (Second Revision of IS 105000*, December 24, 2009, available at [http://bis.org.in/sf/fad/FAD25\(2047\)C.pdf](http://bis.org.in/sf/fad/FAD25(2047)C.pdf) (Last visited on February 2, 2013).

recommendatory and not legally enforceable.<sup>126</sup> The deficiency of a precise and elaborate right to water creates major apprehensions regarding the implications of privatization, as we will argue hereinafter.

## 2. International Context of The Right to Water

The human right to water has been recognized by various international instruments<sup>127</sup> and agencies, as well as by different national governments.<sup>128</sup> The most elaborate embodiment of this right is General Comment 15 of the ICESCR, which lays down the normative content of the right encompassing both procedural and substantive components.<sup>129</sup> The substantive components include: availability, accessibility, quality stipulations whereas the procedural framework guarantees the right to information concerning water issues, due process in case of disconnections, the right to participate, provision for effective remedies, etc.<sup>130</sup> It imposes a 'constant and continuous duty' on states to move towards full realization of the right to water, while also imposing the minimum core of the right for immediate realization.

In addition to international rights instruments, many countries have embodied the right to water in their constitutions or legislations.<sup>131</sup> Noteworthy in this regard is South Africa, which not only has an explicit right to water written into its Constitution, but also has statutorily recognized contours of this right. In the aftermath of the cholera epidemic that was due to privatization in many cities, South Africa recognized the importance of a rights based approach. In 2000, the state announced a 'lifeline of free water for all' set at 25 litres per person per day and provided at 6,000 litres per household per month, regardless of income.<sup>132</sup> This policy is now strictly enforced despite practical obstacles and vehement resistance from IFIs.<sup>133</sup>

<sup>126</sup> Steering Group on Water Sector, Planning Commission of India, *supra* note 13.

<sup>127</sup> For instance, the human right to water has been explicitly recognized under the Convention on the Rights of the Child, G. A. Res. 34/180, Art. 24, U.N. Doc. A/RES/44/25 (November 20, 1989) and the Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. Doc. A/34/46 (1979). The U.N. General Assembly has also confirmed the existence of the human right to water, *see* G. A. Res. 54/175, ¶ 12, U.N. Doc A/RES/54/175 (December 17, 1999).

<sup>128</sup> CULLET, *supra* note 7, 51 (§27(1)(b), Constitution of South Africa explicitly guarantees the right to access to adequate water. Also, in Uruguay, the right to access to potable water and access to sanitation is a fundamental right since 2004).

<sup>129</sup> Alix Gowlland Gualtieri, *International Human Rights Aspects of Water Law Reforms in WATER LAW FOR THE TWENTY FIRST CENTURY* 246 (Phillip Cullet, Alix Gualtieri, Roopa Madhav & Usha Ramanathan ed., 2010).

<sup>130</sup> Violeta Petrova, *At the Frontiers of the Rush for Blue Gold: Water Privatization and the Human Right to Water*, 31(2) BROOK. J. INT'L L. 15 (2005-2006).

<sup>131</sup> *See* Hale, *supra* note 77 (42 Countries have codified the human right to water in their legislative or constitutional framework, examples being South Africa, France, Uruguay, Namibia to name a few).

<sup>132</sup> Budds & McGranahan, *supra* note 10.

<sup>133</sup> Water Aid Tanzania, *supra* note 53.



### 3. The Need of a Rights Based Approach for Privatization

A right to water is instrumental in making water a legal entitlement, rather than a commodity and service, thereby giving each citizen a range of legal tools to secure their rights.<sup>134</sup> Such a scheme of entitlements empowers the poor and disadvantaged against exploitation and exclusion, as well as provides for socially inclusive policy formulation.<sup>135</sup> It is important to note that private provision is not in itself inconsistent with the right to water.<sup>136</sup> In fact, it is argued that a rights based approach to water provides the perfect policy platform for private water services, which may achieve the benefits of private involvement, while ensuring larger public benefit.<sup>137</sup> Having a definite right to water with explicit recognition of duty bearers is instrumental in ensuring that the state does not obviate its responsibility, whether it performs as the service provider or as the regulator, in case of private sector involvement.<sup>138</sup>

Although the exact contours of the right to water are not fixed, the right does not mandate the state to provide free water for all.<sup>139</sup> The Constitutional Court of South Africa has specified that the right to water does not require the state to provide water for all on demand, but it ensures that the state takes reasonable legislative and other measures to ensure achievement of the right, within available resources.<sup>140</sup> Many see this aspect of progressive realization emphasized on by the Constitutional Court as a limitation of the rights based approach.<sup>141</sup> However, we argue that the experience of South Africa suggests the constitutional recognition of the right has been crucial in formulation of national water policies for universal access.<sup>142</sup> The case of Namibia suggests that having a strong legislative framework such as the Namibian Water Act,

<sup>134</sup> World Health Organisation, *The Right to Water*, March 2004, available at <http://www.who.int/watersanitationhealth/rtwrev.pdf> (Last visited on February 2, 2013).

<sup>135</sup> *Id.*

<sup>136</sup> This is evident in Points 27 and 49 of GC-15 where the private provision has been accepted, provided water remains affordable. See BAKKER, *supra* note 20, 150; Henri Smets, *Economics of Water Service and the Right to Water* in FRESH WATER AND INTERNATIONAL ECONOMIC LAW 173 (Edith Brown Weiss, Laurence Boisson & Nathalie Bernasconi-Osterwalder ed., 2005).

<sup>137</sup> Hale, *supra* note 77, 4.

<sup>138</sup> Petrova, *supra* note 130.

<sup>139</sup> Luis Marin, Ricardo Sandoval, Fanny Tagle, Eva Sanchez & Victor Martinez, *Water as a Human Right and Asian Economic Resource: An Example from Mexico* in WATER ETHICS 117 (Roman Llamas, Luis Martinez-Cortina & Aditi Mukherji ed., 2009).

<sup>140</sup> This case arose from the challenge of the citizens to two policies of water services. The first, installation of prepaid water meters and second, the limit of 25 kilolitres per household per month under the free water policy. The Constitutional Court upheld both these policies saying that the state had the duty of progressive realization with available resources in *Lindiwe Mazibuko v. City of Johannesburg*, s Case CCT 39/09 [2009] ZACC 28.

<sup>141</sup> MORGAN, *supra* note 40, 163 (It is argued that the right to water has given no substantive entitlements to the people but has merely required the government to undertake a 'reasonable regulatory approach').

<sup>142</sup> After the outbreak of cholera in 2000 due to large scale disconnections of water supplies, the government enacted Free Basic Water Policy as part of the Water Services Act, providing 6000 litres per month to poor households. See Hale, *supra* note 77, 4.

1956 which specifies the role and responsibilities of the state in the provision of water services, as well as guidelines for private operators, provides a strong legal and regulatory framework for the provision of water services, whether it is by the state or by private players.<sup>143</sup>

We recognize that the rights based approach has many limitations as it gives no clear solutions to questions of ecological rights and sustainability and complicates the gamut of already existing water rights.<sup>144</sup> However, we argue for the right to water, not as a solution, but as a strategy that will be instrumental in the formulation of a robust legal framework with a rights and entitlements based approach.

### *B. PRO- POOR WATER GOVERNANCE: RECOGNIZING 'ILLEGAL' DWELLERS AND GRANTING LAND RIGHTS*

As discussed above, the exclusion of the urban poor from the water supply system stems from the state attributing the status of illegality and ineligibility to these informal dwellers.<sup>145</sup> These inhabitants are termed 'encroachers' and trespassers on public land, with no legally recognizable property rights over the land they occupy.<sup>146</sup> Lack of a secure tenure and property rights puts the residents in a permanent state of insecurity and impermanence, subject to arbitrary demolitions by the State.<sup>147</sup> More significantly for this paper, it denies them access to water and other basic amenities, which require official land registration.<sup>148</sup> They are therefore forced to spend large parts of their income on more expensive, informal sources of water, leading to a vicious cycle of poverty.<sup>149</sup>

The absence of official land rights points to a broader systemic denial of basic citizenship rights for the poor, wherein they are not granted the right to vote or a ration card and therefore, are unable to exert influence on the political and governance system.<sup>150</sup> This compounds the problem wherein the exclusion created by the insecure land tenure further reinforces exclusion from the political and urban system. This attitude of the state reflects the perception

<sup>143</sup> Olleta, *supra* note 90, 31.

<sup>144</sup> Bakker, *supra* note 20, 149.

<sup>145</sup> Usha Ramanathan, *Demolition Drive*, 40(27) EPW (2005).

<sup>146</sup> Ramanathan, *supra* note 47.

<sup>147</sup> Diana Mitlin, *A Fund to Secure Land for Shelter: Supporting Strategies of the Organized Poor*, 15(1) ENVIRONMENT & URBANIZATION 181 (2003).

<sup>148</sup> Bakker, *supra* note 20, 124.

<sup>149</sup> Mitlin, *supra* note 147.

<sup>150</sup> Mitlin, *supra* note 147; Alternate Law Forum, *Mumbai to Shanghai without Slums*, available at <http://www.altlawforum.org/node/193> (Last visited on February 28, 2013).

of these residents as rural migrants that may not be given the full range of urban citizenship rights.<sup>151</sup>

The legal system has furthered this marginalization, with various archaic laws providing for arbitrary slum demolitions with no provision for effective resettlement.<sup>152</sup> The attitude of the judiciary has been inconsistent, with a majority of judgments reflecting the elitist notions of citizenship internalized by the state.<sup>153</sup> However, in the landmark case of *Olga Tellis v. Bombay Municipal Corpn.* ('Olga Tellis case'),<sup>154</sup> the Supreme Court recognized the importance of settlements of the pavement and slum dwellers under the right to livelihood, read under Article 21 of the Constitution. Consequently it prohibited arbitrary demolitions of their housing, requiring any demolition to follow a reasonable and just procedure in light of the negative mandate of Article 21.<sup>155</sup> This was reaffirmed in *Ahmedabad Municipal Corpn. v. Nawab Khan Gulab Khan*,<sup>156</sup> where the Court gave additional protection to the slum dwellers by emphasising that they could not be treated as migrants, due to the constitutional protection of free movement under Article 19(e) of the Constitution. Despite these Supreme Court affirmations, most of the jurisprudence on slum evictions and the right to land for the poor demonstrates a callous disregard for this section of society. A host of Delhi and Bombay High Court judgments have termed the poor 'trespassers and encroachers'<sup>157</sup> and have prioritized 'cleaning up of the city'<sup>158</sup> over the right to life and livelihood of the residents. By declaring the provision of resettlement as a 'burden on the public exchequer',<sup>159</sup> they have discounted the obligation of the state to provide secure housing for all.<sup>160</sup> The judgment of the Supreme Court in *Almitra H. Patel v. Union of India*<sup>161</sup> best reflects this attitude, wherein the Court likened the provision of land rights to a slum dweller to rewarding a pickpocket.

<sup>151</sup> Darshini Mahadevia, Rutul Joshi & Rutool Sharma, *Approaches to the Lands for the Urban Poor, India* (Centre for Urban Equity, Working Paper No. 2, 2009).

<sup>152</sup> See, e.g., Slum Areas (Improvement and Clearance) Act, 1956; The Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971; The Maharashtra Vacant Lands (Prohibition of Unauthorised Structures and Summary Eviction) Act, 1975.

<sup>153</sup> See Ramanathan, *supra* note 47.

<sup>154</sup> (1985) 3 SCC 545: AIR 1986 SC 180.

<sup>155</sup> *Id.*

<sup>156</sup> (1997) 11 SCC 121: AIR 1997 SC 152.

<sup>157</sup> *Lawyers Cooperative Group Housing Society v. Union of India*, CW No. 267 and CM 464 of 1993, Delhi HC Court; *Krishna Dhar v. GNCTD*, WP (C) 3419 of 1999, December 14, 2005, Delhi High Court.

<sup>158</sup> *B.L. Wadhwa v. Union of India*, (2002) 9 SCC 108: AIR 2002 SC 1913.

<sup>159</sup> *Lawyers Cooperative Group Housing Society v. Union of India*, CW No. 267 and CM 464 of 1993, Delhi High Court.

<sup>160</sup> Other judgments include *Hem Raj v. Commissioner of Police*, WP (C) No. 3419 of 1999, December 14, 2005 (Del), Delhi High Court; *Okhla Factory Owners' Association v. Govt. of NCT of Delhi*, (2003) 8 DLT 517; *Wazirpur Bartan Nirmata Sangh v. Union of India*, (CWP 2112/2002); *Pitampura Sudhar Samiti v. Govt. of NCT of Delhi*, CWP 4215/1995.

<sup>161</sup> (1998) 2 SCC 416: AIR 1998 SC 993.

Such perceptions demonstrate why the concerns of the poor have been ignored by both public and private water provision services. In this context, we argue that the only manner in which the poor may be integrated in the system of water supply is by the provision of land rights and secure tenure. While this paper does not aim to suggest the modalities or the specific set of property rights that must be granted to ensure security of tenure, we emphasize on the importance of these rights for the inclusion of these citizens in the governance of urban systems. Apart from the widely accepted impacts of secure tenure on alleviation of poverty,<sup>162</sup> official land rights overcome the roadblocks of insecure status and lack of official records, allowing for the extension of the networked water supply to the poor settlements. Private or public water services may safely invest in extending the infrastructure to these sections of the population. The UN HABITAT has also stressed on the importance of land rights to ensure informal residents are seen to have the ‘right to the city’ and enjoy the full range of citizenship rights.<sup>163</sup> This in turn leads to inclusion of these citizens in decision-making processes and shapes their access to political systems, ensuring that their needs are addressed by governance bodies.<sup>164</sup> Hence, aims of inclusive decision making and participatory governance in the water sector, elucidated further in subsequent questions, can be given effect by granting these rights.

At this juncture, it is important to emphasize that we do not aim to suggest that the right to water or access to water supply must be contingent on the grant of land rights. In fact, the normative content of General Comment 15 states that no household “*be denied the right to water on the grounds of their housing or land status*”. While securing the right to water, through public water sources or otherwise, is paramount for the state, we aim to propose secure land rights as an additional measure to overhaul the larger institutional approach and system.

A recent Delhi High Court judgment reflects a progressive approach wherein the Court mandates the state to provide effective resettlement to evicted slum dwellers, emphasizing that they cannot be treated as ‘second class citizens’.<sup>165</sup> The introduction of the Rajiv Awas Yojana (‘RAY’) and the Model Property Rights for Slum Dwellers Act by the Central Government (‘Model Law’) in 2011 also demonstrate a positive shift in the state’s policies. The objective of RAY is stated as, “Bringing existing slums within the formal system and enabling them to avail of the same level of basic amenities as the rest of the town”.<sup>166</sup> While the content of the Model Law and the RAY has been

<sup>162</sup> Meinzen-Dick, *Property Rights for Poverty Reduction* (DESA Working Paper No. 91, December 2009).

<sup>163</sup> See UNITED NATIONS HUMAN SETTLEMENT PROGRAMME (UN-HABITAT), *supra* note 73, 9.

<sup>164</sup> Meinzen-Dick, *supra* note 162.

<sup>165</sup> *Sudama Singh v. Govt. of Delhi*, WP(C) 8904/2009.

<sup>166</sup> Government of India Ministry of Housing & Urban Poverty Alleviation, *Rajiv Awas Yojana: Guidelines for Slum- Free City Planning*, available at [http://mhupa.gov.in/w\\_new/RAY%20](http://mhupa.gov.in/w_new/RAY%20)

criticized,<sup>167</sup> and the success of implementation of these centralized schemes has been questioned,<sup>168</sup> we argue that these policies may be instrumental in marking a paradigm shift in the attitude and perception of the State and its agencies.

### C. THE NEED TO ESTABLISH A COMPREHENSIVE REGULATORY FRAMEWORK

Advocates of water sector reforms and privatization argue for the role of the state to be changed from a service provider to the crucial role of a regulator, to ensure the best interests of both consumers and the managers of supply systems.<sup>169</sup> In fact, it has been asserted that failures in privatization are in effect a failure of effective regulation by the state, either by contract or by institutions.<sup>170</sup> Regulation by contract<sup>171</sup> remains problematic due to the higher bargaining power of the multi-national corporations, leading to one-sided contracts with vague targets and performance parameters.<sup>172</sup> Ineffective institutional regulation has directly been linked to governance failure, wherein countries with weak governance capacity lack the ability to regulate the private corporation.<sup>173</sup>

Let us first establish the paramount importance of effective state regulation while privatizing public utilities, especially water. The supply of water, particularly networked water supply is almost always characterized as a natural monopoly.<sup>174</sup> This could be due to various factors like expense of transporting or duplicating of networks, owing to the unique nature of water

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Guidelines-%20English.pdf (Last visited on February 28, 2013).

<sup>167</sup> National Advisory Council, *Draft Recommendations of the Working Group on Urban Poverty on Reforms proposed for Rajiv Awas Yojana*, available at [http://nac.nic.in/press\\_releases/ray\\_draft.pdf](http://nac.nic.in/press_releases/ray_draft.pdf) (Last visited on February 28, 2013).

<sup>168</sup> The Urban Vision, *Has JNNURM Succeeded in Addressing Urban Poverty?*, November 8, 2012, available at <http://www.theurbanvision.com/blogs/?p=1060> (Last visited on February 28, 2013).

<sup>169</sup> Asian Development Bank, *Water for All* §37, 47 (2003).

<sup>170</sup> Olleta, *supra* note 90, 84.

<sup>171</sup> *Supra* Section V(C): Biased contract negotiations and nature of contract undermining efficiency.

<sup>172</sup> Sangameswaran, Madhav & D'Rozario, *supra* note 57 (Regulation by contract has been seen as time consuming and ineffective, most often leading to renegotiation of contracts. This has been seen in the case of Hubhli-Dharwad project in India, which was initially contracted for 24/7 water supply. However, soon enough the contract was renegotiated to provide merely 6 hours of water supply a day); BAKKER, *supra* note 20, 95 (Moreover, sometimes companies set their original price and profit margin low so as to secure the bid, and then increase the price through renegotiation, making regulation by contract ineffective).

<sup>173</sup> Bayliss, *supra* note 25; Olleta, *supra* note 90, 84.

<sup>174</sup> In the water sector, multiple networks competing for the same consumers are bound to have superior infrastructure costs than a single networking system. Hence, owing to the peculiarities of water in a supply network, there is usually a single network owner. Hence, it is widely argued though there may exist competition *for* the market, there exists no competition *within* the market. It is in this sense that the private agency that controls the water supply network is a

in a supply network.<sup>175</sup> Since there is little scope for competition, the operating agency may abuse the monopoly powers and is susceptible to inefficient management unless regulated.<sup>176</sup> Here, even profit motive does not necessarily motivate the private operator to upgrade efficiency or ensure high quality of output.<sup>177</sup> In fact a regime of regulation is even more crucial in developing countries to safeguard the interests of large sections of the poor, as the primary goal of any private company will be ensuring economically viable operation. The regulator then is obliged to ensure that collective interests of the poor are not marginalized.<sup>178</sup> Hence, good governance in case of privatized water supply requires a robust regulatory framework that covers tariff control, checks on water quality and environmental issues.<sup>179</sup>

The inability of regulators to enforce compliance on private companies has been seen as the downfall of privatization worldwide. For instance, escalation of water tariffs in Guinea post privatization has been attributed entirely to the weak institutional and regulatory capacity of the government. The regulator was powerless to make the private operator company comply with its financial disclosure requirements, allowing the private firm to double its profits, while the customers were being grossly overcharged.<sup>180</sup> Similarly in the case of Manila, the privatization agreement allowed for only minimal oversight by the regulator.<sup>181</sup> The failure of the regulator to enforce the provisions of the agreement led to rate increases and fall in standard of water quality.<sup>182</sup> Similarly, the dramatic failure of privatization in Bolivia's Cochabamba has been attributed to the limitations of government capacity to effectively regulate private sector participation.<sup>183</sup> On the other hand, countries that have implemented privatization successfully, such as the United Kingdom, France and Spain, have powerful regulators acting as the link between the consumers, the private supplier and the state.<sup>184</sup>

A significant amount of empirical evidence, along with economic theory suggests that perverse incentives are bound to arise with privatization of network water supply, therefore it is appropriate regulation that becomes

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monopolist. See UNITED NATIONS HUMAN SETTLEMENT PROGRAMME (UN-HABITAT), *supra* note 73, 166.

<sup>175</sup> Bayliss, *supra* note 25.

<sup>176</sup> KAREN BAKKER, GOOD GOVERNANCE IN RESTRUCTURING WATER SUPPLY 35 (2003).

<sup>177</sup> *Id.*

<sup>178</sup> Halcrow Management Series, *Public Private Partnerships and the Poor*, 2002, available at [https://dspace.lboro.ac.uk/dspace-jspui/bitstream/2134/9672/2/PPP\\_and\\_the\\_Poor\\_-\\_2\\_Implementation\\_-\\_Complete.pdf](https://dspace.lboro.ac.uk/dspace-jspui/bitstream/2134/9672/2/PPP_and_the_Poor_-_2_Implementation_-_Complete.pdf) (Last visited on February 1, 2013).

<sup>179</sup> BAKKER, *supra* note 20, 34.

<sup>180</sup> C. Menard & G. Clarke, *A Transitory Regime: Water Supply in Conakry, Guinea* (World Bank Development Research Group, Policy Research Working Paper No. 2362, 2000).

<sup>181</sup> Hale, *supra* note 77, 769.

<sup>182</sup> Hale, *supra* note 77, 789.

<sup>183</sup> Nickson & Vargas, *supra* note 23.

<sup>184</sup> See BAKKER, *supra* note 25, 33.

the key determinant of performance.<sup>185</sup> Further, it has been widely agreed that the regulatory regime must be in place before the contract for privatization is implemented to ensure fairness in the contract bidding and negotiation and to ensure inclusion of pro-poor policies.<sup>186</sup> However India is characterized by regulatory vacuum when initiating public-private partnership for water supply. For instance, the Act constituting the DJB prescribes the functions of the Board and authorizes it to de-centralize the services provided by it to private entities.<sup>187</sup> However, no supervisory power is given to the Board in case of such de-centralization and no separate independent body has been set up to regulate the private units.

Many argue that a strong regulatory regime proves to be a disincentive for private investment in the water sector. However, we suggest that an optimal regulation would safeguard the contesting objectives of welfare and profit.<sup>188</sup> If a regulatory framework serves as a tool to remove the distortions or externalities affecting investment, while maintaining the welfare measures, an increase in the welfare effects may be observed. This argument can be substantiated by examples of countries where private investment has been substantial, despite strong regulation.

England and Wales adopted the privatization route in 1989, however soon the fallouts of equating liberalization and privatization were felt. The state proceeded with a process of re-regulation, where the government furthered its policies and objectives.<sup>189</sup> Despite such regulation, the Office of Water services estimates an average of £3.7 billion investment per year, compared with an average figure of £2 billion per year during the 1980s and clearly attributes it to the increasing success of privatisation in England.<sup>190</sup> Similarly, in France, the state enforces strict regulation through quality control and management safeguards terms. Yet, the population served by private sector in terms of water utility provision is more than 70%.<sup>191</sup> Hence we assert that efficient state regulation will support and strengthen, rather than deter private investment in the water sector.

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<sup>185</sup> BAKKER, *supra* note 176.

<sup>186</sup> Warwick Smith, *Utility Regulators: The Independence Debate* (The World Bank Group, Private Sector Note No. 127, 1997).

<sup>187</sup> The Delhi Jal Board Act, 1998.

<sup>188</sup> T. N. Srinivasan, *Analytical and Regulatory Issues in the Competition for Private Investment Between and Within Developing Countries*, available at <http://www.econ.yale.edu/~srinivas/AlyticalandRegulatory.pdf> (Last visited on May 21, 2013).

<sup>189</sup> Karen Bakker & Ben Page, *Water Governance and Water Users in a Privatised Water Industry: Participation in Policy-Making and in Water Services Provision: A Case Study of England and Wales*, 3(1) INT. J. WATER 41 (2005).

<sup>190</sup> The Director General of Water Services, *Annual Report 2004-2005*, available at [http://www.ofwat.gov.uk/aboutofwat/reports/annualreports/rpt\\_ar\\_2004-05.pdf](http://www.ofwat.gov.uk/aboutofwat/reports/annualreports/rpt_ar_2004-05.pdf) (Last visited on May 21, 2013).

<sup>191</sup> Eduard Perard, *Water Supply Public or Private*, February 2009, available at [http://gem.sciences-po.fr/content/publications/pdf/Perard\\_WaterSupply022009.pdf](http://gem.sciences-po.fr/content/publications/pdf/Perard_WaterSupply022009.pdf) (Last visited on May 21, 2013).

#### D. ACCOUNTABILITY AND TRANSPARENCY

The governance of urban water sector in India is plagued with institutional inefficiencies, poor operating performance and weak managerial capacity. We argue that efforts of privatization will be futile unless governance of water sector is infused with transparency, managerial efficiency and accountability. The 12<sup>th</sup> Plan Report<sup>192</sup> emphasized that interventions of private sector involvement would not be effectual until governance of utilities is democratized and improved. The Report accentuated the need of reforms to be directed toward institutionalizing transparency and making the agencies involved in water supply legally accountable.<sup>193</sup>

The undermined accountability in water governance may be attributed to the lack of a comprehensive legal framework based on common principles, and the multiplicity of actors involved in water supply mechanisms. The existing water law framework in India is characterized by the co-existence of a number of different principles emanating from different legal instruments, customary practices and judicial decisions that are not necessarily compatible with each other.<sup>194</sup> This complexity is further compounded by the fact that ‘water’ falls within the State list of Schedule VII and hence every state is governed by a distinct municipal law.<sup>195</sup> Here, we would like to clarify the objection is not to legal pluralism or diversity in the law,<sup>196</sup> but to the lack of uniform underlying principles, leading to a chaotic welter of legal instruments. In this scenario, contracting out operation and management of water supply to private agencies only increases the range of actors and makes it difficult for citizens to pin down the obligation on a particular agency. The example of the Hubli-Dharwad project demonstrates that the multiplicity of agencies and actors involved make it impossible to attribute liability or hold any particular agency liable for lapses in water supply.<sup>197</sup> Hence, it is necessary for water sector reforms to address the issue of institutionally reforming public utilities to make them more accountable

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<sup>192</sup> Steering Group on Water Sector, Planning Commission of India, *supra* note 13.

<sup>193</sup> Steering Group on Water Sector, Planning Commission of India, *supra* note 13.

<sup>194</sup> Cullet & Madhav, *supra* note 122, 511.

<sup>195</sup> The problem lies not only in the fact that each State has a separate water law, but also that different states have different institutional structures for service delivery. The three broad institutional service delivery models prevalent in India today are Urban Local Bodies (for instance in Gujarat and Madhya Pradesh); City-Level Parastatal Bodies (for example the DJB) and State-Level Parastatal Bodies (existing in Haryana, Rajasthan, Kerala etc). Such lack of uniformity can undermine accountability in case of large-scale private sector involvement.

<sup>196</sup> Joy & Paranjape, *supra* note 6.

<sup>197</sup> The main actors involved in urban water supply in Karnataka involve the following- the urban development department that is the main agency for urban water supply schemes; the Karnataka Urban Water Supply and Drainage Board that designs and implements water supply schemes; the Bangalore Water Supply and Sewerage Board; urban local bodies that regulate maintenance of all water supply schemes and the Karnataka Urban Infrastructure Development and Finance Corporation which is the channelling agency for the schemes of multilateral agencies. See Sangameswaran, Madhav & D’Rozario, *supra* note 57.



and bringing uniformity in existing water law before the advent of private sector involvement.

The other very crucial principle of ‘good governance’ for water reforms is ensuring a free flow of information and making the decision-making process transparent.<sup>198</sup> For any institution to be accountable, it is necessary that the decision-makers provide all the stakeholders, including the citizens, a comprehensive information base.<sup>199</sup> The Right to Information Act, 2005 is a noteworthy success on this behalf; however we argue that its relevance is limited on two counts. *Firstly*, international agencies and private companies do not fall within the ambit of this Act, hence information regarding privatization contracts with multinational companies may be immune. *Second*, there is no system in place to ensure that the municipal bodies ensure dissemination of all information on a regular basis. A glaring example of this is the DJB project whereby the implementation of reforms had been a secret affair without proactive consultation with the affected people.<sup>200</sup> The Walkerton Inquiry Report<sup>201</sup> recommends that all municipal contracts with external agencies should be made public.<sup>202</sup> This has been implemented in Melbourne where all service contracts with corporatized agencies are made publicly available through paper copies as well as on the internet.<sup>203</sup> We argue for the similar institutionalized accountability, open decision-making and active dissemination of information to pave the way for success of privatization.

### *E. ENCOURAGING PARTICIPATORY GOVERNANCE & STRENGTHENING ROLE OF LOCAL GOVERNMENTS*

The 73<sup>rd</sup> and 74<sup>th</sup> Amendments to the Constitution heralded the era of democratic decentralization for India, by which matters vested in the state governments were devolved on urban local bodies and village panchayats. Decentralization is one of the cornerstone principles of water sector reforms.<sup>204</sup>

However, existing trends in water management and the structure of water supply mechanisms reveal that in practicality, water is far from being a ‘local’ responsibility. The 1960’s saw the emergence and establishment of parastatals for larger urban areas and expanding cities. Presently a number of

<sup>198</sup> BAKKER, *supra* note 20, 23.

<sup>199</sup> This is a widely accepted and acknowledged principle of good governance. *See* BAKKER, *supra* note 20.

<sup>200</sup> Koonan & Samat, *supra* note 6.

<sup>201</sup> John Livernois, *The Economic Costs of the Walkerton Water Crisis*, 2002, available at <http://www.uoguelph.ca/~live/WICP-14-Livernois1.pdf> (Last Visited on February 4, 2013).

<sup>202</sup> *Id.*

<sup>203</sup> UNITED NATIONS HUMAN SETTLEMENT PROGRAMME (UN-HABITAT), *supra* note 73, 42.

<sup>204</sup> CULLET, *supra* note 7, 74.

states in India<sup>205</sup> have adopted the parastatal model, whereby this state level body has the exclusive authority over the provision for water supply and sewerage services.<sup>206</sup> The responsibility for capital as well as operation and management lies with this state-level parastatal. Further, different states<sup>207</sup> have also proceeded to set up special purpose organizations whose mandate covers both water supply and sewerage.<sup>208</sup> These special purpose boards at the state level have full and pervasive control over all aspects of water supply.<sup>209</sup> In fact, most times these bodies are formed such that their mandate and control is exclusive, leaving nominal or no powers in the hands of the local government. For instance, § 28 of the Karnataka Urban Water Supply and Drainage Board Act, 1973 expressly states that the local authority shall have no power to investigate, prepare or execute any scheme without the approval of the State Board. Hence we see, the expected devolution of powers to the local bodies has seriously been diluted and most of the powers have been usurped by states, violating principles of democratic decentralization.

The crucial role of decentralization and involvement of local bodies has been stressed upon not only under the Indian Constitution, but also at the international level through policy documents, where the efficacy of water supply systems has been attributed to local government participation.<sup>210</sup> Local governance of water ensures accountability to the local residents and hence, is an important foundation for the involvement of private players. Institutionalizing decentralization and ensuring responsibility vests in the local bodies is, we argue, a fundamental principle of ‘good governance’ in water reforms.

Another important facet of the decentralization principle is participatory governance, i.e. ensuring that all beneficiaries and other stakeholders are involved in the decision making process at all stages.<sup>211</sup> The Dublin Principles<sup>212</sup> mandate that water management and development should be based

<sup>205</sup> The States in India that have internalized the parastatal model as of 2011 include- Haryana, Rajasthan, Kerala, Uttar Pradesh, Uttarakhand and Odisha.

<sup>206</sup> Steering Group on Water Sector, Planning Commission of India, *supra* note 13.

<sup>207</sup> See, e.g., Tamil Nadu (The Tamil Nadu Water Supply and Drainage Board Act, 1970); Karnataka (The Karnataka Urban Water Supply and Drainage Board Act, 1973); Uttar Pradesh (The UP Water Supply and Sewerage Act, 1975); Punjab (Punjab Water Supply Sewerage Board Act, 1976).

<sup>208</sup> K. C. Sivaramakrishnan, *Drinking Water Supply: Right and Obligation* in WATER AND THE LAWS IN INDIA 260 (2009).

<sup>209</sup> Each one of the Acts for such boards provides that it is the function of such state level board to regulate and develop water supply and sewerage.

<sup>210</sup> UNITED NATIONS HUMAN SETTLEMENT PROGRAMME (UN-HABITAT), *supra* note 73, 140.

<sup>211</sup> Cullet & Madhav, *supra* note 122, 514; Steering Group on Water Sector, Planning Commission of India, *supra* note 13.

<sup>212</sup> The 1992 International Conference on Water and the Environment in Dublin set out a statement on Water and Sustainable Development, which became known as the “Dublin Principles”. The Dublin Principles have been adopted by numerous international, multilateral and bilateral agencies, including the World Bank. See International Conference on Water and the Environment, January 26-31, 1992, *Dublin Statement on Water and Sustainable Development*, U.N. Doc. No. 37.819/H/D/Misc. (July 22, 1992).

on a participatory approach, involving users, planners and policy makers at all levels.<sup>213</sup> The need for user participation is premised essentially on the failure of centralized schemes to deliver benefits to water users at the local level.<sup>214</sup> In this context, participatory governance is crucial for an array of reasons: it can make decision-making more effective; it may lead to greater political acceptability of decisions and most importantly, it fosters accountability.<sup>215</sup> In fact, institutions like the World Bank themselves have been actively promoting decentralization and participation.<sup>216</sup>

An integral part of participatory governance in developing countries like India is pro-poor water governance whereby the urban poor must equally be a part of the decision-making process as the urban elite: either through representative political structures or through direct participation in water management provision.<sup>217</sup> We argue that the capacity of the marginalized sections to influence decision making and their participation in water governance is imperative to ensure that their interests are internalized. However with Indian state's approach of non-recognition of the impoverished sections as elaborated upon earlier, any attempt at any stakeholder consultancy is almost always limited to the 'full citizens'<sup>218</sup> and the elite. There is a substantial gap in participation of those in dire need of access to water, evidenced by the example of the DJB mentioned in the previous section.<sup>219</sup>

Participation to ensure efficacy of water reforms, is an umbrella concept envisaging participation from policy planning and project design to the implementation and management of water schemes.<sup>220</sup> Hence, the lack of consultation and even communication at the initial levels can be seen as a fundamental violation of the spirit of democratic decision-making. It is for this reason we argue for water governance to internalize a democratically decentralized structure to set the stage for successful and responsive privatization.

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<sup>213</sup> Another reflection of this principle is in Agenda 21 (which is a plan of action adopted by more than 178 governments at the United Nations Conference on Environment and Development ('UNCED') held in Rio in 1992). Chapter 18 of this Agenda emphasizes on the need for full public participation. See United Nations Conference on Environment and Development, Rio de Janeiro, *Agenda 21*, June 3-14, 2001, available at <http://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> (Last visited on June 21, 2013).

<sup>214</sup> Cullet, *supra* note 7, 75.

<sup>215</sup> As identified by Karen Bakker in BAKKER, *supra* note 176.

<sup>216</sup> World Bank, *Water Resource Management- A World Bank Policy Paper*, 1993, available at: <http://siteresources.worldbank.org/INTWRD/214573-1111579063201/20424649/WRMExSumof1993WaterPolicy.pdf> (Last visited on February 5, 2013).

<sup>217</sup> McGranahan & Satterthwaite, *supra* note 15.

<sup>218</sup> BAKKER, *supra* note 20, 27.

<sup>219</sup> Cullet & Madhav, *supra* note 122, 511.

<sup>220</sup> Cullet & Madhav, *supra* note 122, 526.

## IX. CONCLUSION

This paper has been aimed at debunking the traditional ideological opposition to privatization, and reorienting the debate to the core concerns of water governance. The principal genesis of the entire opposition towards privatization rests on a foundational assumption- that privatization of water inevitably leads to commodification of the resource. The criticisms countering privatization that we have discussed earlier, particularly the invariable tariff hike and exclusion of the urban poor, although empirically proven, presuppose that involvement of the private player necessarily entails the commodification of the resource. In conclusion, we aim to illustrate that the debate against privatization has been misplaced, and propose a balanced consideration of water as an economic resource as well as a social good.

The formulation of water as a pure economic good, advocated by the neo liberal agenda, implies that water will be allocated according to the purchasing power of individuals to ensure efficient market allocation, thereby entailing principles of full cost recovery and elimination of subsidies.<sup>221</sup> Anti-privatization campaigners have denounced these policies, stating that such formulation was inconsistent with the conception of water as a ‘public’ or ‘social’ good. They argue that water is a common resource, whose availability should favour social well being, and therefore, water distribution must be public.<sup>222</sup> Principles of market allocation will hamper access to the poorer sections of society, converting citizens with rights to mere customers of private water corporations.<sup>223</sup> Evidently, the ideological overtones of the conception of water as an economic good versus a social good have subsumed the debate on water privatization.

We argue that this debate has detracted attention from the unique nature of water as a non-substitutable and essential resource,<sup>224</sup> and one that has economic value.<sup>225</sup> Important policy documents such as the Bonn Recommendations for Action, demonstrate a middle path by recognizing that ‘water is an economic and social good’.<sup>226</sup> The UN Commission on Human Rights recognises that water is an economic good of great value, however emphasising that it cannot be treated like an ordinary commodity subject to free

<sup>221</sup> Marin, Sandoval, Tagle, Sanchez & Victor Martinez, *supra* note 139, 97-100.

<sup>222</sup> Marin, Sandoval, Tagle, Sanchez & Victor Martinez, *supra* note 139, 97.

<sup>223</sup> Radha D’Souza, *Nation v. Peoples: Inter-state Water Disputes in India’s Supreme Court in WATER AND THE LAWS IN INDIA* 238 (2009); Koonan & Samat, *supra* note 6.

<sup>224</sup> Office of the High Commissioner for Human Rights, *The Dublin Statement on the Strengthening of the United Nations Human Rights Treaty Body System*, January 14, 2010, available at [www2.ohchr.org/english/bodies/HRTD/docs/DublinStatement.pdf](http://www2.ohchr.org/english/bodies/HRTD/docs/DublinStatement.pdf) (Last visited on February 28, 2013).

<sup>225</sup> BAKKER, *supra* note 20, 128.

<sup>226</sup> International Conference on Fresh water, *Bonn Conference Report: Recommendations for Action*, December 3-7, 2001, available at <http://www.earthsummit2002.org/ic/freshwater/Bonn%20Recommendations.pdf> (Last visited on June 8, 2013).

forces of demand and supply.<sup>227</sup> We similarly argue for a conception of water that prevents the commodification of the resource, and recognizes both the social and economic value of water, in light of its unique nature.<sup>228</sup> Such an approach allows the intervention of the private player, subject to the supervision or regulation of public authorities, in light of the essential and basic nature of water.<sup>229</sup> As suggested earlier, establishing a strong regulatory framework, creating democratic and accountable governance, inclusion of the poor in the discourse on reforms, prevents abuse by the private player assuaging apprehensions of water being treated as an exclusively economic commodity.

The middle path, advocated by this paper, is essential to balance the requirement of sustainable water use with the goal of universal and equitable access to water. Blanket provision of private services, which eliminate access for large sections of the urban population, is not the appropriate solution for sustainable water usage. Similarly, under pricing of water leads to financial crises of the water utility, resulting in inefficiency and maladministration.<sup>230</sup> Therefore, the solution lies in implementation of suitable tariff policies, irrespective of private or public management, as has been done in Mexico.<sup>231</sup>

In conclusion, we elucidate this balanced approach through the example of Porto Alegre in Brazil. The water supply system in the city demonstrates that the embodiment of 'good governance' principles, as prescribed above, can lead to socially equitable water supply, despite being privatized. Here distributive privatization has proved to be efficient and inclusive, and at the same time catering to concerns of sustainability, under a model of what is termed as 'participatory budgeting.' Participatory budgeting is a process by which citizens present their demands and priorities for civic improvement, and play an influential role in budget allocations made by the municipalities.<sup>232</sup> The Municipal Department of Water and Sewerage, the principal local governance body, is largely inclusive having more than 1000 citizen registered as members,

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<sup>227</sup> United Nations Economic and Social Council [ECOSOC], Sub-Commission on the Promotion and Protection of Human Rights, Report of the Special Rapporteur Mr. El Hadji Guisse, *Relationship between the Enjoyment of Economic, Social and Cultural Rights and the Promotion of the Realization of the Right to Drinking Water Supply and Sanitation*, U.N. Doc. E/CN.4/Sub.2/2002/10 (June 25, 2002).

<sup>228</sup> BAKKER, *supra* note 20, 139.

<sup>229</sup> *Relationship between the Enjoyment of Economic, Social and Cultural Rights and the Promotion of the Realization of the Right to Drinking Water Supply and Sanitation*, *supra* note 227.

<sup>230</sup> Budds & McGranahan, *supra* note 10.

<sup>231</sup> Mexico has implemented a volume based pricing system that prevents wasteful consumption, along with social tariffs and targeted assistance for disadvantaged groups. See Marin, Sandoval, Tagle, Sanchez & Martinez, *supra* note 139, 121.

<sup>232</sup> World Bank Empowerment Case Studies, *Participatory Budgeting in Brazil*, available at [http://siteresources.worldbank.org/INTEMPowerment/Resources/14657\\_Particip-Budg-Brazil-web.pdf](http://siteresources.worldbank.org/INTEMPowerment/Resources/14657_Particip-Budg-Brazil-web.pdf) (Last visited on February 13, 2013).

and each citizen who is registered has equal rights and votes.<sup>233</sup> Such participation accrues the benefits we have stressed upon earlier. In fact, the primary empowering aspect of this model of participatory budgeting is the active participation of low-income segments of the population in the decision making process and also regular information disclosure fostering accountability. Even if contracts are granted to private players, the details of the contracts and the impacts of the services employed will have to be disclosed to the public. This model has achieved considerable success in the form of piped water being available to 99.5% of the population of the city including the poor and vulnerable which around a decade ago was 2%.<sup>234</sup> In a city where a vast number of people live in isolated slums, achieving such a result was possible because of the inclusion of people in the governance and regulation of water.<sup>235</sup>

The second success of the water privatization system in Porto Alegre lies in the implementation of the progressive policy of Social Tariff, which grants the first 10 cubic metres of water at the price of 4 to the poor and economically weak members of the society in addition to charities and schools.<sup>236</sup> After the initial allotment, water is provided at a base rate for the sustenance and financing of the system. This is illustrative of the 'middle ground' that we have proposed wherein the right of a person to clean water has been given priority without jeopardizing the financial interests. Such a model would encompass the efficiencies of distribution achieved by the private players and the social objectives of and realization of the right to water.

To conclude, we assert that the water reform agenda in India must not be misdirected by political agendas or ideological backings of the various stakeholders. Instead, it must internalize the proposed solutions, by imposing a non-derogable obligation on the state to ensure efficient and sustainable water governance. The current opposition to privatization must be readdressed to account for governance concerns to ensure successful urban water sector reform in India.

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<sup>233</sup> ODETE MARIA & ANDRE PASSOS CORDEIRO, *THE CASE FOR PUBLIC PROVISIONING IN PORTO ALEGRE* 5 (2003).

<sup>234</sup> Gianpaolo Baiocchi, *Participation, Activism, And Politics: The Porto Alegre Experiment And Deliberative Democratic Theory*, 34, available at <http://www.ssc.wisc.edu/~wright/Baiocchi.pdf> (Last visited on February 13, 2013).

<sup>235</sup> World Bank Empowerment Case Studies, *supra* note 232.

<sup>236</sup> MARIA & CORDEIRO, *supra* note 233.