

Human Rights Council
Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation

Answers to the “Civil Society Questionnaire” posted by SR WATSAN to support his consultation on privatisation and the Human Rights to Safe Drinking Water and Sanitation

Submission by AquaFed

31 January 2020

Introduction

The Special Rapporteur is preparing a report on ‘privatisation’ and the human rights to safe drinking water and sanitation, as described in a [Concept Note](#) and supported by a [Background Document](#).

This document is the response from AquaFed to the Questionnaire to Civil Society Organisations and follows [AquaFed’s response to the ‘Background Document’](#) (see Annex 1) which we submitted to the Special Rapporteur in November 2019. AquaFed’s members have also responded to the Questionnaire individually to give further local context and information. All these documents will be posted to the AquaFed website for full disclosure and transparency.

AquaFed believes that **the Human Rights to Water and Sanitation, the Rule of Law, and Sustainable Development are essential and mutually reinforce one another**. Private water operators, which AquaFed represents, are happy to provide information through this document, and further information upon request, on how they help local authorities and ultimately States to deliver better on the Human Rights.

Key Messages

- **AquaFed and its members were early promoters of the Human Rights to Safe Drinking Water and Sanitation**, defined by the criteria: accessibility, quality, acceptability, affordability and availability. **We continue to promote and campaign for these rights at national and supranational level**. We also supported the adoption of the Sustainable Development Goals targets 6.1 and 6.2 to reach full coverage by 2030.

- **Strong governance and transparency are fundamentals at the root of water and sanitation development, regardless of whether the operator is public or private.** Water governance is progressing, geared by the pioneering work of the OECD and an increasing number of States, but progress needs to be accelerated.
- **The national and local responsible public authorities (the ‘State(s)’) have sovereign power over water and sanitation services and the Human Rights to Safe Drinking Water and Sanitation.** *States must create enabling environments, and be accountable to their citizens and the international community* (Leo Heller, Report of the Special Rapporteur on the human rights to safe drinking water and sanitation, A/HRC/36/45 2017).
- **The Background Document and Concept Note incorrectly suggest that countries allow the transfer of sovereign responsibilities for water and sanitation to the private sector.** The Special Rapporteur should either provide documented cases to support this or amend the Concept Note and Background Document. Our contribution also shows that the Special Rapporteur’s assessment that private operations generally lacks transparency is incorrect.
- **Private water operators work under contract from public authorities to contribute to all criteria of the Human Rights to Water and Sanitation.** The authorities who do so count on private operators’ specific skills, for example cutting-edge technology and innovation capabilities, agility, and experience in human resources and change management, thus enhancing the long-term sustainability of utilities. This document gives multiple examples of private operators’ contribution to water and sanitation for all and achievement of the human rights.
- The bulk of expenditure in water and sanitation are via supplies such as pipes, construction and interventions provided by private entities. Public Private Partnerships (PPPs) are just one of many types of private sector participation, and a public-private interface occurs to bring transparency to improve the situation towards the Human Rights to Water and Sanitation. **In all cases, the State and public authorities have control and responsibility over water and sanitation.**
- **As resolved by the previous Special Rapporteur regarding HRtWS implementation, public and private operators are not distinctive categories with different risks and challenges.** The distinction that she made was between direct public management and management delegated to a third party, be it public or private. This is why we suggested the Special Rapporteur should widen his report to all non-State operators mandated by States (see rationale in Annex 1.)
- **Regarding the risks of potentially impairing the Human Rights to Water and Sanitation, there is no evidence to single out public or private management.** When comparisons are available, for example within a country (and using the same standards and reporting scheme), the results show that private providers perform equally or better than the public operators, and to the benefit of rights-owners.

- **Polemical and ideological debates will never achieve the Human Right to Water and Sanitation for all. What matters is that public authorities make informed and ultimately the best possible choices on how services should be provided.** The idea that eliminating private operators in itself settles water debates, neglects that 90% of water and sanitation services are from public operators - while the Human Rights to Water and Sanitation are not being met for an estimated minimum 2 billion people globally. Citizens want their rights fulfilled and operators' staff have sustainable water and sanitation service provision to all, on the top of their agenda. The overwhelming majority of private operator staff have previously been civil servants and are not interested in opposing public or private operations.

AquaFed's answers to the Questionnaire

The Special Rapporteur would welcome answers to the following questions:

1. Please describe briefly the role and responsibilities of your organization in the water and sanitation sector, particularly concerning assessment or promotion of private provision.

1.1. AquaFed, the International Federation of Private Water Operators, represents private companies that deliver water supply or sanitation services under the direction of public authorities. Our members are providers of all sizes, operating in around 40 countries, as both locally and internationally-owned businesses.

1.2 AquaFed's roles are to:

- provide private water operator expertise into national, international, technical and policy discussions on water and sanitation
- to provide facts driven by KPIs and benchmarks, into subjective and politicised debates.

1.3 We have a **solid, proven and respected record** of supporting the United Nations General Assembly and Member States, the adoption of the Human Rights to Safe Drinking Water and Sanitation, and its deployment in States (see question 7). We also contributed significantly to the development and adoption of the Sustainable Development Goals targets 6.1, 6.2 and 6.3 on wastewater management, to reach full coverage by 2030, in coherence with the other SDGs 6 targets, and SDG targets 1.4 and 11.1 and 17. All of our efforts are documented and publicly available from the UN (e.g. in the ECOSOC Special Status database).

1.4 AquaFed carries out its role in many ways, for example through multi-stakeholder partnerships including the Sanitation and Water for All Partnership, UN Water, World

Water Council and OECD.

1.5. AquaFed's members' role is to make the Human Rights to Safe Drinking Water and Sanitation a reality for everyone by contributing to accessibility, quality, acceptability, affordability and availability (see question 3). AquaFed's view is that public authorities must always be allowed either to provide services that deliver these rights themselves, or choose a private company operator to do this. The only correct choice is the one that is in the best interests of users.

Current situation and trends

2. In your view, what role has the private sector played in the water and sanitation provision in the countries your organization works in (or at the global level)? How has this role evolved in recent decades? Please provide examples.

2.1. The global population is 7.8 billion people and according to United Nations will be almost 10 billion by 2050. AquaFed estimates that 10% of the current population is served by private operators - a minor proportion of the global population. In 2015, 71 % of the population enjoyed safe water services, with little progress since then (Source: WHO, Progress on household drinking water, sanitation and hygiene 2000-2017, 2019). So, whilst the very vast majority of water and provision is through public operators, one out of three people in the world are not receiving their human right to water.

2.2. The term 'private sector' is used to cover:

1. private operators which are regulated and licensed by authorities to contribute to their duty of Human Rights to Water and Sanitation service provision
2. commodity companies such as manufacturers of bottled water or heavy industrial water users
3. supply chain equipment manufacturers and engineering contractors.

The Special Rapporteur's report is focused on the first category, and utmost care is advised not to mix it with legitimate investigations on the two other types of private companies' impact on the Human Rights to Water and Sanitation.

2.3. The Special Rapporteur stated in 2017: *"Where service provision is formally delegated by the State to non-State actors, the State cannot exempt itself from its human rights obligations and retains the obligation to regulate and monitor their activities."* The State must decide how to apply the criteria and metrics of the Human Rights, create enabling environments, with due care for the local conditions and institutional settings. Equally, there is complete consensus amongst the international water and sanitation community that political leaders must assume the political risks of prioritising the criteria of the Human Rights to Safe Drinking Water and Sanitation over other concerns.

2.4. The major evolutions in the involvement of private operators over the last two decades are:

1. a systematic recourse to open public tenders, with the support of consultants
2. the move to performance-based contracts, using an array of indicators with bonuses and penalties: transparency on performance is at the heart of contracts
3. the gradual development of regulators at all levels: dedicated teams within the awarding authorities, and national regulators irrespective of the operators' status
4. governance in water and sanitation overall strengthened and maintained in countries where our members operate
5. an increasing degree of involvement in specific water treatment infrastructures at global level and singular water infrastructure Public-Private Partnerships (desalination plants, drinking water and wastewater treatment plants).

2.5. There are over 10,000 (AquaFed's own estimate) active public-private contracts, which are quite diverse in scope, duration, and potential impact on the Human Rights to Water and Sanitation. The consistently high renewal rates (90%+) of outsourced private water and wastewater operations contracts year after year (Source: Global Water Intelligence, 2019) demonstrate the widespread success of the HRtWS delivery through private sector participation year after year.

In France for example, local authorities are free to organise the HRtWS delivery in-house or through private sector participation, thus using competition as a common sense tool to enhance the public service (Law 93-122 of 29 January 1993 - articles 38 to 41, known as loi SAPIN, and the more recent French transcription of the EU Concessions Directive, order of January 29, 2016 and decree of February 1, 2016).

2.6 Open contract tendering processes are an essential component ensuring transparency, that in turn gives citizens confidence that authorities truly have made the best decision on their behalf. The EU Concessions Directive was a missed opportunity for a level playing field, equality and transparency across the EU in water and sanitation, as these services were left out of the Directive's scope in 2014. As a result, Member States apply different standards on public tendering, which in some cases reduces fairness and access to public information - this only serves to weaken human the HRtWS.

Around the time of the Directive being finalised, AquaFed estimated there were over 12,000 private sector partnership contracts for water or wastewater in Europe designated as "concessions" in the EU legislation. This number exceeded by far the number of contracts in other sectors and may have been close to half the total number of "concessions" contracts across the EU that were potentially subject to the Directive. In that context, excluding water meant the Directive only reached half of its initial target when it was passed.

2.7 Another development to mention is how private operators see clear alignment between their contractual obligations, their own company objectives and with the UN Sustainable Development Agenda. For example, in Spain, private participation increasingly incorporates actions guided by sustainability criteria, taking into account environmental and social aspects and, therefore, promoting the realisation of the human rights to water and sanitation and the fight against climate change within the company's strategy. The private operators orientate their activity towards achieving the SDGs which will allow the local public administrations to comply with Agenda 2030. (Source: Suez Spain).

3. Why do public authorities allow or even attract privatization of water and sanitation services? What would be the alternatives for public authorities?

3.1 Public authorities acting on behalf of the State decide whether to bring in private operators to deliver water and sanitation services, under their control, to reach their targets. The key driver is to achieve the criteria of the Human Rights to Safe Drinking Water and Sanitation progressively.

The authorities retain their sovereign duties of ensuring: accessibility, quality, acceptability, affordability and availability, participation and access to information, equality and non-discrimination. But they elect to outsource some tasks which speeds up the necessary changes, lowers costs and brings in the technical skills that they do not have. The alternative is to operate the services themselves.

The former Special Rapporteur's report in 2010 emphasised that the human rights framework does not express a preference over models of service provision, but insists that in all instances, the human rights to water and sanitation must be guaranteed. Her report observed that: "*arrangements for the delivery of water and sanitation services ... are rarely exclusively public or private*" and that three categories must be considered (Source: De Albuquerque C, Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, A/HRC/15/31, 2010):

- direct management
- delegated service provision (includes private companies, NGOs, community-based organisations and some State-owned companies)
- informal provision.

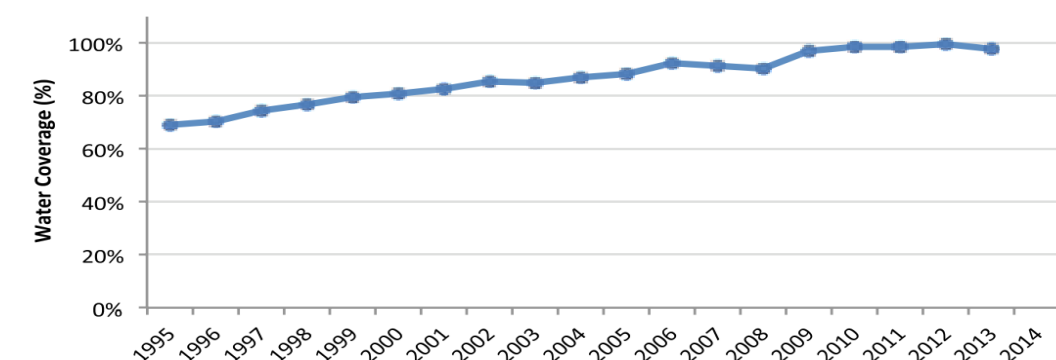
3.2. The key driver for public authorities is to outsource their operations to improve their performance against the Human Rights to Safe Drinking Water and sanitation criteria. **The first of these criteria is improving access.** Authorities always place this at the centre of contractual obligations.

Case study 1: Improving access in Dakar, Senegal.

In Dakar and surroundings, private water operator SDE remarkably increased the coverage, particularly to the poorest citizens, since the contract began in 1995. By 2014, 75 percent of poor people in Dakar had water piped to their premises, with a further 22 percent accessing standpipes. When the contract began 20 years earlier, most poor people with piped water got it from public taps and 20 percent of the entire population—most of them poor—had no access to piped water at all. By 2014, across the city as a whole, 86 percent of people had water piped to their premises.

Water supply has been reliable and available 24 hours per day at constant pressure across most of the system for most of the period since 2007. The significant increase in access and service seen in Dakar was achieved without burdening Senegal's stretched public finances. (Source: Chris Heymans, Rolfe Eberhard, David Ehrhardt, and Shannon Riley, *Providing Water to Poor People in African Cities Effectively: Lessons from Utility reforms*, 2016).

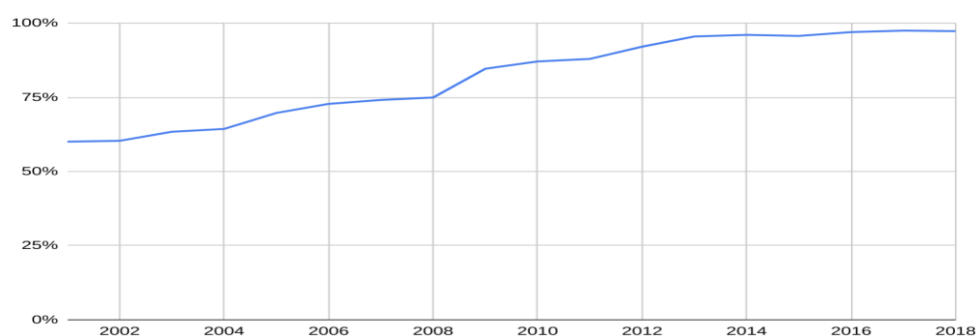
Figure 1: Coverage performance of Sénégalaise des Eaux (SDE) and Société Nationale des Eaux du Sénégal (SONES), Senegal (Chris Heymans, Rolfe Eberhard, David Ehrhardt, and Shannon Riley, *Providing Water to Poor People in African Cities Effectively: Lessons from Utility reforms*, 2016)



Case study 2: Guayaquil, Ecuador

In Guayaquil, the municipal authorities elected to use the private sector to enhance the access to water and sanitation.

Figure 2: Coverage performance in Guayaquil, Ecuador (Source: Interagua annual report, 2019)



Case study 3: Santa Ana, Philippines

The successful ongoing PPP in Santa Ana, Philippines, demonstrates that private sector participation can also be successful on a small scale. This PPP was established by the municipality in 2008 to improve access. When the contract started there were just 335 connections, but in the first year this rose to 1,118.

Because of the positive feedback about the sustainable, 24/7 service and water quality provided by the private water operator (Balibago), the local officials and residents requested speedy expansion in their areas. After three years, the pipe network was extended from 0 Kms to 70.4 Kms and more than 1,000 people were being added to the network each year, faster than contractual obligations.

Between 2015-2018, the number of customers rose from 7,799 to 9,604. This meant a very large % of the area's population were receiving potable water from the network. All 14 barangays (districts) of Santa Ana were connected with water 100% of the time. (Source: [Private operators - Delivering Performance for Water Users and Public Authorities](#) - AquaFed (2016) and Balibago Waterworks System Inc.)

Case study 4: Municipality of Apalit, Province of Pampanga, Philippines

Another example of a private water operator running successful small-scale projects to increase access to people is in Apalit, Philippines. Between 2015-2019, the number of customers rose from 13,991 to 17,201. When the contract started in 2003, there were no pipes at all, but now there is over 106.3 kms of pipes. (Source: Balibago Waterworks System Inc)

3.3. Authorities outsource to improve water quality: Water quality is always an explicit criterion in outsourcing contracts. By engaging the private sector to provide the service, the public sector entity is ensuring that the private party is accountable for any violations that occur within the system.

Konisky and Teodoro, in their paper '[When Governments regulate governments](#)' (2015) show that water and wastewater systems managed by the private sector in the United States have considerably lower violation citations when compared to publicly run

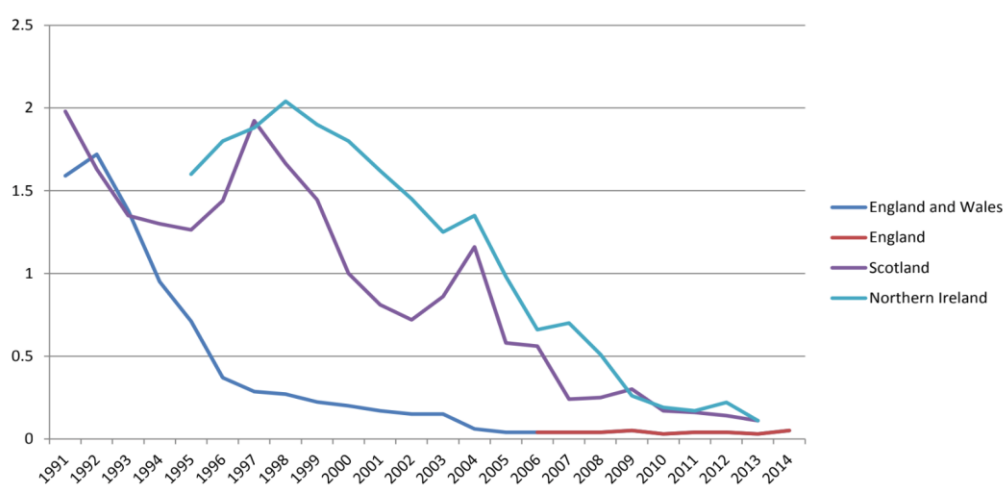
systems. This was supported by [further research in 2018](#) by the Proceedings of the National Academy of the USA in 2018, which said private ownership is ‘associated with compliance’ with the Safe Drinking Water Act.

Case study 5: Water quality in England and Wales

In 2014 the water companies in England carried out 3,853,350 tests, for which there is a numerical standard that must be complied with, either at the consumer’s tap or the point where water leaves a treatment works, treated water storage reservoir or tower. Only a tiny fraction (0.04%) of these tests failed to meet the standards in 2014. This compares very favourably to the situation before water companies became private in 1989.

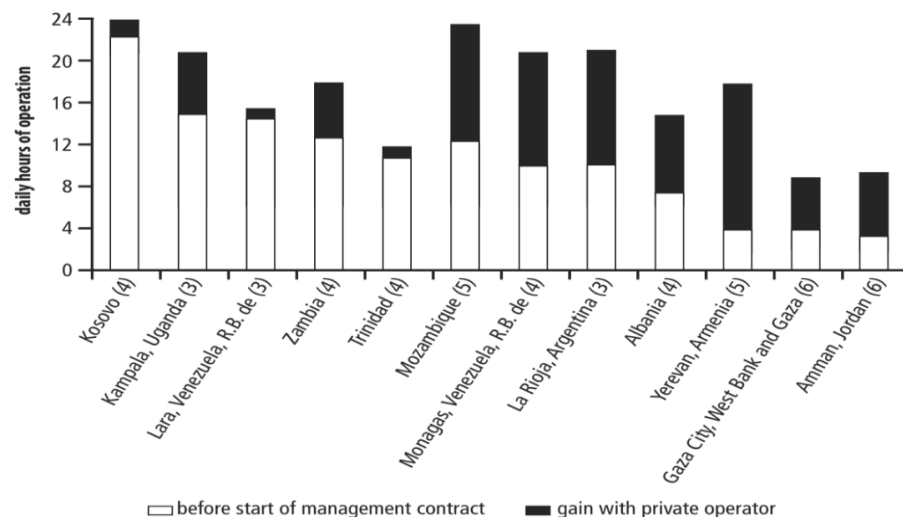
Figure 3 shows the % of failed tests in the X axis and the year in the Y axis. The diagram compares the private English and Welsh companies’ performance compared to the publicly operated providers in Scotland and Northern Ireland – demonstrating that the private companies were more successful. (Source: The position after 25 years of regulation - A report by the Chief Inspector of Drinking Water. Drinking Water Inspectorate, 2015.)

Figure 3: % of failed drinking water quality tests since 1989.



3.4. Authorities outsource to **increase water availability**. For the majority of the world’s population, water is not delivered to homes under pressure on a 24/7 basis. When private operators are hired, they have contractual obligations to improve the continuity of supply. The diagram below (Figure 4) shows the gains with private operators in countries which decided to do hire them.

Figure 4: Gains in Service Continuity under 12 Management Contracts (Source: Philippe Marin, Public-Private Partnerships for Urban Water Utilities: A Review of Experiences in Developing Countries, 2009)



Case Study 6: Cartagena de Indias, Colombia

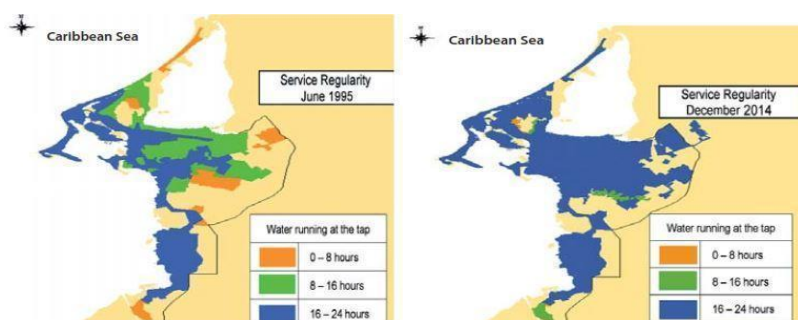
The PPP for the municipal water service of the city of Cartagena de Indias in Colombia has led to major improvements in availability. The contract started in 1995 and is delivered by a “mixed” company owned by the city (50% share), private operator AGBAR (45.9% share) and some local private shareholders (with 4.1%).

The city had significant population growth before 1995, creating serious problems for the water and sewerage systems and, by consequence, to service delivery. The goals of the contract included water supply 24/7, water quality improvement and water loss reduction.

At the beginning of the contract, there were areas where households received water supply less than 8 hours a day and on average water was running at the tap for only 14 hours a day. But the rehabilitation and replacement of the existing network means supply is continuous in almost all the city (99.3% of the time on average).

Figure 5: Change in service regularity in Cartagena de Indias between 1995 and 2014.

(Source: [Private operators - Delivering Performance for Water Users and Public Authorities - AquaFed \(2016\)](#))



3.5. Authorities outsource to enhance affordability. Authorities that outsource compare the price to the consumer between direct management and outsourcing. For example, in France the Regional Audit Chamber observed in 2017 that from 2010 to 2017, water rates could be reduced by 18.7-21% via outsourced services in the Paris region to the 4 billion people living outside the historical City of Paris. Whereas inside the city, Eau de Paris took the direct management and could only reduce them by 2.6% (Source: [Chambre Régionale des Comptes Ile de France, Enquête régionale sur l'alimentation en eau potable de la métropole du grand Paris, 2017](#)).

The Vienna Chamber of Labour found that the private companies in England and Wales provide the most affordable prices compared to other countries in Europe. (Source: [Comparison of European Water Supply and Sanitation Systems. Commissioned by Vienna Chamber of Labour](#) (Department of Environment and Transport and Austrian Association of Cities and Towns, 2018).

In Spain, where the private sector serves 50% of the population, studies show there is no price difference according to the management scheme (Source: [OCU, 2016](#)) and [FACUA, 2019](#)).

In France, where private operators serve $\frac{2}{3}$ of the population, LeLannier and Porcher, 2014 and Chong et al 2015 have shown that water prices are explained by the complexity of the service (e.g. resource type, population density), whereas the public or private nature of the provider is not statistically significant.

A common misconception is that private water operations entail higher prices. In reality, no public authority would outsource the operation of its water/sanitation services if a cheaper option with direct public management was available and credible. In practice, price increases in case of a new contract result from operational needs and new ambitions such as investment in new infrastructure and keeping the incumbent public operator would have led to higher price increases than with the option of private sector participation.

In the example of Buenos Aires, after the early termination of the contract, the government decided to cover investments no longer with tariffs but with taxes to allow

the utility to keep going (Source: M. Schiffler, *Water Politics and Money*, 2016): this decision could equally have been taken with the PPP.

Global Water Intelligence's (GWI) [annual Global Water Tariff Survey 2019](#) looked at water tariffs at 558 cities across 184 countries. It found that in 2019, of the 20 cities with the highest tariffs, 14 (70%) have public operators, including the top three cities in terms of highest tariffs.

These various data sources show that price rises are not linked to whether the services are private or public, but in fact a range of very many other factors, such as the need to invest in new infrastructure, better manage existing infrastructure or prepare for climate change.

3.6. Beyond the straightforward improvement on the key Human Rights to Water and Sanitation criteria, Authorities outsource to use the private sector differentiators: international expertise, technologies, innovation, customer centricity, and capacity to reform utilities for a better service.

Case Study 7: Customer service in Manila

The table below in Figure 6 shows the information about Manila since the start of private sector participation and how it enhanced the service in every way, including customer service. Customer-centricity is addressed further in question 8.

Figure 6: Performance of Manila Water before and after privatization (Source: Manila Water Annual report, 2013)

		1997	2013
Access		49 %	94 %
Population served	Million	3.0	6.1
Customer satisfaction		28 %	93 %
Continuity of supply		26 %	98 %
Labor productivity	Staff/1,000 connections	9.8	1.4
Non-revenue water		63 %	11 %

3.7 There is no doubt that private operators' technology and capability for change management is a significant reason for public authorities to introduce them. Success is achieved with significantly higher efficiency when there is a long-term, close relationship between the operator and the authority. Small and medium municipalities benefit from price efficiencies linked to the fact of being part of a bigger platform with shared resources and developments. For example, a small or medium size municipality cannot afford to develop a commercial software or many other tools that private water operators already have after years of experience and investments.

3.8 Authorities work with private operators to transfer risks that a private partner can manage better. The private operator can better control the likelihood of the risk occurring, best able to control the impact of the risk on project outcomes, or able to absorb the risk at lowest cost. Typical risks include: the condition of the existing system, construction risk, operating risk, the environmental/social risks (Source: World Bank Public Private Partnership Legal Resource Centre, Allocating Risks in Public-Private Partnerships, 2016). For example, in France the traditional affermage contracts involve the revenue risk and operating risk transferred to the private operators, whereas the authorities retain the risks for construction.

The Global Infrastructure Hub's [Water Distribution PPP Risk Allocation Matrix](#) also explains in detail what the risks are from private sector participation and how they are allocated in various types of contracts. This document explains clearly the many risks the private operator takes on from the public authority, which benefit users and significantly reduces the risk of their rights being infringed.

4. In your view, have International Financial Institutions (IFIs) recently encouraged privatization? Could you provide concrete examples?

4.1. AquaFed has seen IFIs focus on encouraging Sovereign states to turnaround and improve their public utilities. When Governments prefer private provision, IFIs have the expertise and independence needed to bring support. In this case, outsourcing or concessioning includes provisions on transparency and to ring-fence, contractually, the corresponding water money and avoid confusion with other budgets.

5. In case of economic crises, have the promotion of privatization increased?

5.1. One could argue that in an economic crisis, this should drive water management to more efficiency, which would favour private operations. However, during economic crises, the political debate may also steer in the opposite direction. The 2008 economic crisis did not trigger a wave of outsourcing.

Private provision

6. In your experience, if the private sector is involved in provision of water and sanitation services, what process was undertaken prior to the decision to adopt this model of provision? What types of concerns have been considered in such decisions?

6.1. Authorities analyse the gap in the delivery against the Human Rights to Safe Drinking Water and Sanitation. For example, when Morocco decided a policy of Public Private Partnerships for water, wastewater and electricity services in large cities, the goal was indeed to increase service quality and coverage and ramp-up wastewater collection and treatment.

6.2 When States want to allow local authorities to call on private operators to contribute to the Human Rights to Water and Sanitation, they have to adapt their legislation most of the time.

Case Study 8: Enabling law in Colombia

In Colombia, for example, the law (Law 142 of 1994, issued on the basis of a constitutional reform of 1991) established Colombia's domestic public services, fixing rules and principles of economic competition for regulated services and empowering the President of the Republic to allow the regulatory commissions (potable water and basic health; combustible gas and energy; and telecommunications) to develop the applicable standards in each sector (Source: OECD, 2009)

The authorisation for the provision of services by the private sector is based on the political constitution of Colombia, as well as on the law. In this way, the private sector can be linked as a direct service provider or as an operator, after public bidding either of the market or of the infrastructure; in this process it can compete with other public or mixed providers, but in any case, the rules of operation for all of them is in law.

According to figures from the SSPD (Source: Informe Sectorial sobre los Servicios Públicos de Acueducto y Alcantarillado 2014-2017. SSPD) more than 53% of water and sewage users were served by companies whose main capital contribution comes from the state sector, 24.1% from companies with mixed capital and only 19.3% of users are served by companies whose capital contribution is totally private. Because of Law 142/1994, the total drinking water coverage increased from 77.7% to 92.4% in the period 1993-2017. In 2017 the urban coverage with drinking water in Colombia reached 97.8% (Source: Plan Director Agua y Saneamiento Básico Visión Estratégica, 2018-2030).

6.3. The concerns that have been considered are:

- **impact on tariffs:** the association between private sector participation and tariff rises stems from the massive investment programs imposed on the private operator to improve the situation left by poor-performing public operators. In recent contracts, authorities carefully balance the tariffs increase with other sources (taxes or international aid where relevant, as described under the OECD "3T" terminology). This is not unique to private sector participation, as many States using the in-house service provision cover the investments with taxes (Ireland being one example amongst many others).

However, as mentioned in section 3.5 above, a private partner is only selected if the private sector participation contract is the cheaper option to achieve political targets than keeping the incumbent public operator. To ensure that the private partners spending closely aligns with the contract aims, it includes detailed provision for the traceability of expenses, and investments.

- **the fate of the staff, including fears of redundancies:** Private sector participation contracts often include measures that ensure a better career through social packages, and quite often a specific provision to ban redundancies (as with the example of Berlin under private management). In terms of training, agreements with private operators quite often make specific provisions - see the Riyadh case study below. Our members also observe that the overwhelming majority of private staff are local people, and have a past of civil servants. Rightly they are concerned about the quality of the services they provide and the stability and opportunities in their job.
- **the loss of market by local suppliers:** for this reason, a number of tenders integrate criteria about local sourcing of supplies. For example, in the USA, the State laws about the minority vendor community requests that purchasing should be accessible to local minority vendors. The private partners' website serves as a de facto recruiting tool for minority vendors, with thousands of certified minority suppliers currently registered.

Case study 9: The National Water Company in Riyadh

The National Water Company wanted to develop a new culture during the years 2008-2014 and hired a private company to help with the implementation of Riyadh projects (total headcount 4,500). There was a Talent Program and induction for new employees, supporting the in-sourcing process of contracted out activities, and enhancing overall staff skill set. 4,000 staff were trained over the course of the contract, representing 1% of staff costs (€2.5 million per year). (Source: Riyadh City Water & Wastewater Services, Strategy Cluster: Staff Training and Development Programme, 2008).

7. How could public authorities use the features of private providers to foster the realization of the human rights to water and sanitation (HRtWS)? Is private provision positive for the progressive realization of the human rights to water and sanitation? If yes, in which circumstances?

7.1 Authorities carry out a gap-analysis between their targets on the Human Rights criteria and their current state, evaluate the changes and investments necessary, and evaluate how different vehicles including PPPs can help bridge this gap. Consultants are often advised to do such a study independently of both the incumbent and related organisations, and potential bidders. The second stage is the stakeholder consultation and the vote by the responsible body, the third being the open public tender.

7.2. When outsourcing to private operators, public authorities do routinely specify their expectations and metrics for the human rights criteria plus also other factors such as participation, access to information, equality and non-discrimination, sustainability, and accountability. AquaFed's view is that the KPIs should be standardised, mandated for all operators (public and private) and published at least at national level to allow informed comparisons by the civil society and all stakeholders.

We deeply regret that public operators oppose transparency requirements with the argument that being public in itself guarantees that the HRtWS are best served without a need for transparency. This is not true. They also argue that transparency is too expensive, but private operators have no choice but to do all the contractual reporting and remain competitive over in-house operations (see section 9).

7.3. The involvement of the private sector is positive (see section 3). Otherwise the private partners lose the contract or are exposed to penalties and according to local settings, prosecution. The KPIs provide the substance and necessary transparency.

7.4. Some circumstances help ensure that private provision is positive for the progressive implementation of the Human Rights to Safe Drinking Water and sanitation. These are:

1. the non-negotiable will of awarding authorities to enhance water or sanitation services to all their population
2. the commitment of a tandem of a political leader and a senior civil servant with technical expertise in the field, to drive the project involving private provision
3. the installation of a dedicated team to oversee the operator
4. the reliance on objective negotiation for problem solving
5. the inclusion in the contract of performance targets that contribute to HRWS criteria and principles.

All projects that benefit from these points above yield substantial benefits for the progressive realisation of the Human Rights to Safe Drinking Water and Sanitation. Other enabling environment criteria may help further but cannot replace the points above.

7.5 Another way in which private operators are positively progressing the human rights is through working in partnership with municipalities on innovation projects. These are focused on ensuring the human rights can be delivered in the long term, for example

by ensuring water and sanitation services are sustainable and adapt to climate change.

Case Study 10: Water re-use in Granada

In Spain, Emasgra, the mixed company from Granada, has achieved practically 100% of the treated water is reused for the irrigation. 100% of the sand and fat sludge is recovered as fertilizer in agriculture or gardening, and energy self-sufficiency is achieved during some months of the year, during which renewable energy has been exported to the electrical network. (Source: Suez Spain)

Case Study 11: La Farfana 'biofactory'

In Chile, Aguas Andinas has transformed its La Farfana water treatment plant into a biofactory, i.e. an energy self-sufficient infrastructure, which not only produces biogas and fertilizer for crops, but in the future can be a source of regenerated water production that will serve to guarantee the supply to the population seriously threatened by the increasing droughts due to climate change. This transformation has been recognized by the UN and has been awarded as a "Momentum for Change". (Source: Suez Spain)

8. How have instruments and mechanisms in place allowed the users (and non-users) to complaint and get remedy from private providers?

8.1. At the risk of losing political support, private operators have to be more customer-centric than public operators, resulting in better customer interaction and ultimately satisfaction. For example, Spanish company Aqualia not only provides multi-channel customer service (via website, app, social media, telephone) but also closely monitors and benchmarks its customer service performance. In 2018, satisfaction with its call centre was at 96% based on nearly 750,000 calls.

8.2 Awarding authorities incorporate complaint management and remediation into tender and contract specifications, with adequate performance indicators. Contractually speaking, there are many standard clauses through which the public authorities monitor the private company performance and can impose fines or even cancel the contract when such performance is not considered acceptable.

A good example of recent development of a standard for private sector participation contracts has been prepared by Proinversión in Peru. Proinversión is a public entity attached to the Ministry of Economy and Finances, is responsible for the execution of the promotion to facilitate private investment in infrastructure through PPPs. They have been elaborating a standard contract which is, as of today, in its final phase of public consultation. This a 400-page contract with 72 chapters of clauses and 22 annexes and

demonstrates how public administrations in most countries are protected and capable of handling their relationships with private companies.

There are many clauses dealing with authority power over the private operator and monitoring performance, including:

- Controversy Resolution (Clauses 9.4, 11.7)
- Payment Deductions (Chapter 18)
- Penalties (Chapter 19)
- Indemnity in favour of the “Public Administration” (the State of Perú in this case)
- Dispute Resolution Committee (Chapter 45)

8.3. Beyond complaint management, the possibilities of recourse and appeal may not be specific to the water sector, and reflects the development of the Rule of Law in any State: local settings, with and without private operator, must be analysed in this context, covering consumer rights and information etc.

8.4. In countries where water and sanitation operations are widely outsourced to private operators, the legislation picks up the instruments developed by private operators into the legal system, resulting in a level playing field for public and private sector alike. For example, in France the water-ombudsman which was initiated by private operators now benefits the majority of customers regardless of the nature public or private of the local operator. In England and Wales, an independent consumer body (CC Water) monitors the private companies’ performance and supports users in disputes and redress.

9. Do private providers advocate for stronger regulation? If so, why?

9.1. AquaFed advocates for stronger regulation for HRtWS-related criteria and more transparency for all types of operators. These criteria are the responsibility of the State and must be defined at this level to avoid disparate approaches at local level. Strong regulation underpins trust and confidence in any water and sanitation system – it benefits users, operators, public authorities and regulators.

9.2 More broadly, private and institutional investors favour strong regulation because it can give them more certainty and stability around their investments. For example, English and Welsh water companies have been able to invest more than £5bn a year because investors favoured the strong regulatory and institutional framework.

9.3 AquaFed welcomed the recent proposal by the European Commission and European Parliament, via the Drinking Water Directive Revision, to mandate all operators to disclose

information investments and customer complaints. However, the German Federation of Public Operators (Source: AöW-Position to the European Commission's proposal for a recast of the directive 2018) and the European Federation of Public Service Union EPSU (Source: EPSU - Position on the recast of the Directive 2018) advised the deletion of such indicators, explaining it would damage their business model.

The fact that a number of States echoed this and obtained the cancelation of these points infringers on participation and access to information criteria. It also leads to a lack of good quality, peer reviewed studies, whereas such study would help States deliver better and quicker on the HRtWS criteria. Finally, it demonstrates that influential public actors fear transparency and their trade-unions fear transparency, with the explicit argument that international benchmarking and transparency would put their business model at risk, thus recognizing that they do not perform in a satisfactory manner.

10. How has been the relationship between private providers and public authorities at the local level? What are potential concerns public authorities and users face vis-à-vis private providers?

10.1. When customer service improves, customers are satisfied. The question is rather whether objective KPIs are in place to objectivise the impacts. The high renewal rate of contracts shows that the relations between private providers and public authorities at the local level remain positive in 90% of cases. This also shows that in the overwhelming majority of cases, public and private parties to the contracts prioritise sustainable fulfilment of the HRtWS criteria, over polemics.

10.2. The main concern from public authorities is to be in capacity to co-pilot the contract over its entire lifetime – the very reason for which private operators call for strong governance. This starts with strong State-wide organisation and performance indicators on HRtWS criteria. Conversely, we observe that those opposed to private sector participation equally oppose strong governance and KPIs (a telling example is the EU Drinking Water Directive highlighted above).

11. How have private providers contributed to or harmed the realization of the HRtWS? Please give examples.

11.1. We refer you to our answers to question 3. There are more published examples:

- [AquaFed, Private operators delivering performance for water-users and public authorities, 2016.](#)
- [AquaFed, Water and Jobs. Private Operators: Employers and Job Creators, 2016.](#)

12. What is the nature of the information available on service provision? Does it allow for the adequate accountability of private providers and public authorities?

12.1. Information publicly available on service provision is partly decided by national regulations and partly built into the contract by the public authorities in charge. Private providers have no option but to submit themselves to such requirements, for the sake of contract obligations fulfilment and to earn their license to operate.

12.2 AquaFed believes isolated data are meaningless, and AquaFed has always been a supporter of mandatory, public Key Performance Indicators, which put local results in perspective with a wider regional or national or historical context. This best involves a national regulator, which is tasked to maintain the performance database, and enables academia to analyse such data with statistical robustness, in an otherwise very opaque domain.

As an example, comparison data of the English and Welsh companies is fully available online - DiscoverWater.co.uk. Users, citizens and right-holders can compare their company's performance to others. The data is regulatory data so fully robust.

13. Who monitors the performance of private providers in respect to the normative content of the HRtWS and how? Who intervenes when there are risks of human rights violations and how is it done? Who imposes penalties in case violations occur?

13.1. Awarding authorities oversee their private providers using performance indicators, internal audits, third party audits, complaints from users and meetings with stakeholders.

For example, SEDIF (France), a public authority responsible for water delivery to 4 million people, uses 170 KPIs - 2/3 of which involve either a bonus or penalty depending on actual performance - to closely watch the performance of its private operator. Nearby public operators of comparable sizes only use 40 KPIs. SEDIF also uses a consultant to regularly check the data acquisition and results of the private operator. Another example, from England and Wales, is [the Consumer Council for Water \(CC Water\)](http://www.ccwater.org), which monitors affordability, access, price and a range of other performance issues of the private water companies. CC Water is independent and also helps consumers challenge the water companies in disputes and complaints.

In any case, performance is monitored and the private operator is subject to fines and even the cancellation of the contract. In fact, private operators welcome having tight reporting schemes taken up at national level: it is rather public bodies who oppose.

13.2. Awarding authorities or State authorities intervene when there are risks of human rights violations. For example, in England and France, national authorities banned disconnections, contrary to other countries where public providers dominate, who do use disconnections.

14. What are the main challenges public authorities face regarding availability, accessibility, quality and affordability when private actors provide water and sanitation services? Please give examples.

14.1. The main challenges are the same whether or not the service involves private operators. The Human Rights challenge, overall, differs according to location: in developed countries, the service is mostly ensured and the challenge is to maintain the infrastructures and evolve them to face global change including climate change, for which private provision is a route to optimize the value for money.

14.2 In developing countries, the need is to develop access and secure 24/7 safe water and sanitation services, and to find the finance and resources for this. The overwhelming blatant violation of the HRtWS is with the 2 billion people lacking safe water or sanitation services, but since they do not involve private operators, they are not covered by the present study.

14.3 A specific challenge is the service provision to those at risk of being left behind (for example migrants). This requires to-be-invented solutions to overcome the mostly transitory solutions. This lies in the hands of the public authorities, as it involves different administrative bodies and necessitate the designation of a specific responsible authority. AquaFed believes the recognition of the Human Rights to Water and Sanitation is helpful in this regard.

14.4. The main difficulty, in any situation, is to strike a balance between social, economic and environmental sustainability of the water or wastewater service, especially regarding price impacts. This is not at all linked with the choice to outsource or not the operations.

15. Do you know any case of corruption involving private provision of water and sanitation services? Please give the necessary details.

15.1. Corruption is a common problem with public sector contracts, and water operations are in theory as susceptible as others. In practice, big contracts for water operations and typically the operating companies are generally long-term, and subject to public and political debates and media attention.

For example, during and after the Berlin contract, local media suggested the private operations involved financial wrongdoings, whereas no court-case was even filed. More, the responsible public authorities confirmed the CEO and management team in office after the contract termination, which could not have happened if any of them would have been involved in unclear financial matters. For comparison, the proved case of corruption of the CEO of the Leipzig municipal public water utility - € 3 million- only received marginal attention, if any.

To AquaFed's knowledge, there has not been any major settled case of corruption visible at international level specifically for water operations in the last 20 years, showing that corruption is not an issue when good governance and transparent tendering procedures are in place and effective.

15.2 Petty corruption reduction is one of the first targets of private operators entering business, because it puts the entire service at risk of failing the targets set by the public party. This is why private operators have developed a range of training, capacity building, HR management by performance and other tools to gradually phase out this corruption.

16. Has the private sector shown more capacity to mobilize funds than the public sector? Could you please give concrete examples?

16.1. In a high number of contracts, private operators were selected to bring capacity including a financial capacity, for example to pay the necessary works. This investment capacity is thoroughly captured in the contract and duly followed.

17. In your opinion, is there power imbalance in a public-private partnership? Could you please give concrete examples of effects of this relationship?

17.1. There is always a power imbalance but not in the way anti-private activists advocate. As the public party is the one with political legitimacy and authority, the capacity to decide on tariffs and targets and the power to penalize or replace the private operator, its word is final. This power is framed by national and international law in business conduct, public tendering, inter alia, and therefore by the rule of law. Moreover, procurement laws, public health laws, environmental laws, accounting laws, tax laws, etc tightly frame the operations of the private company.

There are many examples of private water companies making long-term losses or not meeting the contractual economic results due to breaches of contract by the public granting authority. Private water companies rarely invoke early termination of contracts

even when they have strong legal grounds to do so, and continue to try to provide the best service possible keep going until the contract ends. Water companies usually are characterised by their long-term view, big commitment with the public service they provide and the citizens they work for.

On its side, the private operator has the capacity to file a claim in a jurisdiction if it perceives that contractual commitments are violated but the public party has exactly the same right.

18. When there is private participation in the water and sanitation sector, to what extent the private actor brings its own financial resources to the service?

18.1. There is always financial involvement by private operators. Common to all private operators is that by definition they are bound to provide the necessary finance and resources for the fulfilment of their contractual obligations. So in that sense, they have to be able to finance all the necessary capabilities to deliver the contract.

18.2 However, what changes is the degree of that involvement and this is always decided by public authorities depending on their requirements. There are operators which specialise in service agreements and other similar contractual schemes where no significant infrastructure finance is required from the public authorities.

Other operators are able and willing to participate in the structuring and financing of significant CAPEX programs, providing the public authorities with additional sources of value with their ability to ‘crowd-in’ and blend other sources of finance (including their own) at a very competitive cost (see Case Study 12).

Some of our members fund smaller projects themselves – in some cases even attracting low cost commercial finance that is actually cheaper than development loans. The benefits are passed on to users through lower tariffs.

18.3 The English and Welsh companies have raised on average around £5bn of finance a year to invest since they were created in 1989. This is mostly private capital, but also other funds such as European Investment Bank funds (Source: Water UK). And it is worthwhile remembering that finance raising and investment levels, and of course the tariffs, are controlled by Ofwat. In Chile, the association of private companies, ANDESS, says their members raised US\$538 million in 2018 and aims to almost double that in the coming years, to meet the country’s water and sanitation needs. In the United States, the association of private operators, NAWC, has stated in the past that its six largest members together invested \$2.7 annually in their systems and that more recently, the ten largest invest \$3 billion annually.

Case Study 12: The “El Realito Aqueduct” water supply project - blended finance example

This is a greenfield BOT in Mexico involving a 1 m³/s drinking water treatment plant and a whole aqueduct system comprising 132km pipeline, three pumping stations, 6 deposits, 6km of electric lines and 56km of access ways. The private operator designs, builds, finances, and operates the plants for 23 years.

This project was able to raise \$167 million of “blended finance” resulting in a very affordable tariff for the local water utility (client): 23% Equity, 38% public funds from FINFRA and 39% of commercial debt. The equity and the commercial debt were raised and structured by a JV between Aqualia (one of the major water multinationals) and ICA (a leading Mexican construction company).

The innovative and efficient three-trust system implemented in the project helped to attract the interest of commercial banks, which in 2011 provided a \$65 million 18-year loan to the JV at an initial financial cost equal to the Mexican sovereign debt. The project started operations in 2015 and has been fully functional since then. (Source: Aqualia)

Remunicipalization

19. Have you studied any case of remunicipalization? Why and how has it occurred? What types of difficulties has the public authority faced to establish the new municipal provider? Please, provide details of those processes.

19.1 The data we provided in Annex 1 prove that ‘remunicipalisation’ is a political argument, and it is grossly exaggerated. It has absolutely no connection to human rights issues and is solely based on political motivation. We are very surprised that this issue has been brought into a study on human rights.

Water has never been de-municipalised. Private operators do not own the water –public authorities always control the water sources and, in most countries, even own the water infrastructure. Even in England Wales, in the case of private utilities, they are heavily regulated in every aspect of their operations, and key decisions such as investment and tariffs are all set by the regulator, not the company. These companies have to be licensed to operate from OFWAT.

Remunicipalisation is an artificial construct, used by activists to over-represent something that is very natural, namely the shift from delegated management to direct public management at the conclusion of a private sector participation contract – this is normal as contracts are time-limited. Indeed, municipalities always keep legal and political control. They have the capacity to replace the operator if needed.

At the end, the organising public authority may decide to renew the contract, to hire another operator or to operate directly with internal means. Changes of operators are normal decisions (from public to private and vice versa) and happen all the time. This is why depending on locations, every year there are public operators succeeding to private ones and private operators succeeding to public ones.

19.2. Water-UK reviewed large-scale utilities in Europe and the United States which were ‘remunicipalised’ since 2000 (2019, Water-UK: Remunicipalisation of Water Utilities), demonstrating that under the ‘private’ model companies’ performance improved across the board on a number of specific metrics. The study highlights a possible decrease of investments post-‘remunicipalisation’, and concludes that the expected benefits of ‘remunicipalisation’ are not materialised. There is no evidence either on a better transparency when operations are taken back in-house, whereas those opposing private operators consistently use the transparency argument.

19.3. The renewal of outsourced private water and wastewater operations contracts is also based on a case-by-case evaluation of the potential benefits of public service provision versus private: the high renewal rates (90%+) shows that ‘remunicipalisation’ does not in itself bear the improvement potential of outsourced services.

19.4. Shifts from delegated management to direct public management are often linked to a political majority swing or to a political opposition; they may not be in the interest of citizens and rights-holders. For example; in Cochabamba, the termination of the contract did not benefit rights-holders (2015, Manuel Schiffler: Water, Politics and Money, A Reality Check on Privatization); in Buenos Aires, heavy subsidies from public budgets were necessary to allow the public operator to meet its targets (Ibid).

In cases when services were moved back to public operators (for the variety of reasons mentioned above), the questions one should ask are: did services actually get better, and were the rights to water and sanitation really strengthened or actually made worse after the switch to the public operator?

ANNEX 1: AquaFed response to the “Background Document”

UN Special Rapporteur on the Human Right to Water and Sanitation: Consultation on privatisation and the human rights to water and sanitation (2019)

AquaFed response to the “Background Document”

26 November 2019

Introduction

The Special Rapporteur (SR) is preparing a report on private sector participation to services delivery (PSP) and the human rights to safe drinking water and sanitation as described in a Concept Note.

The initial consultation, launched in September 2019, is supported by a “Background Document”.

Representatives of AquaFed met the Special Rapporteur, and an officer from the OHCHR, on 17 October 2019, as part of the consultation for this study. The SR described the Background Document to AquaFed as a review of external sources and a potential draft of the future report. The SR also described the Background Document as ‘work in progress’.

AquaFed welcomes informed debate and rigorous assessment about the performance of private operators and the delivery of the Human Rights. It is essential that we reflect on what has worked well and where lessons need to be learned, to continue to ensure people’s rights are fulfilled.

At that meeting with the SR, AquaFed conveyed to Mr Heller and his colleague that we have serious concerns about the lack of accuracy and balance in the Background Document. The SR and his colleague agreed to receive AquaFed’s comments in writing and to publish them.

This document presents AquaFed’s comments on the ‘Background Document’.

Summary

- AquaFed and its members were early promoters of the Human Rights to Safe Drinking Water and Sanitation. We have a solid, proven and respected record of supporting its adoption by the United Nations General Assembly and Member States. We also contributed to the development and supported the adoption of the Sustainable Development Goals targets 6.1 and 6.2 to reach full coverage by 2030, in particular waste management.

- As reported in 2010 by the former Special Rapporteur, “*The State cannot exempt itself from its human rights obligations by involving non-State actors in service provision. Irrespective of responsibilities of the latter, the State remains the primary duty-bearer for the realisation of human rights.*” Consequently, the State must decide how to apply the criteria and metrics of the Human Rights, to create the enabling environment, with due care for the local conditions and institutional settings. As an example, on this basis AquaFed recently put forward specific policy proposals to EU legislative bodies on how to table this Human Right in the revised Drinking Water Directive, with specific attention to access and transparency.
- Altogether, less than 10% of the world’s population is served by private water and wastewater operators mandated by States - so they are hardly ‘prevalent’ as suggested in the Background Document. 90% of water and sanitation services are from public operators, out of which an estimated minimum 2 billion people globally lack access to public services.
- AquaFed strongly disagrees with the risks identified in the ‘Background Document’ as risks exclusive to the private sector. Many of these risks apply to States, public authorities, and all types of operators.
- Many of the risks are presented in the Background Document without any evidence of ever having caused any harm or of being systemic in any way. Conversely, AquaFed does not understand why the SR leaves out evidence of positive outcomes and progress delivered by private operators to the benefit of right-owners.
- Unless the SR can provide robust evidence that each risk is material and private sector only, the report should be broadened to all non-State service providers mandated by States, or to all non-State service providers, as was done in 2010 by the previous SR. Furthermore, this focused report should only consider risks that do not exist in a similar way when the State delivers the service itself.
- As other risks might be brought to the SR throughout his consultation, AquaFed requests to have the right to review the draft semi-final report to enlighten him on potential other cases of unfairness. Throughout our work with the current and previous SR, we have always tried to make constructive contributions to the mandate.
- Concerning international arbitration, there are no peer-reviewed publications with evidence of any harm to any right-holder that resulted from international arbitration. We believe this should be excluded from the Background Document and indeed the study as it is completely irrelevant to the scope. International arbitration applies to a wide range of actions and services related to contracts between States and non-state actors. To our knowledge, there is no particular reason to assess or state that water and sanitation services are a problem in this framework.

The previous SR’s report on non-state actors, including private operators

In 2010, the former Special Rapporteur published a report on Private Sector Participation¹. Based on an overview of the role of non-State service providers throughout the world, the report emphasised that the human rights framework does not express a preference over models of service provision, but insists that in all instances, the human rights to water and sanitation must be guaranteed.

The 2010 report clarified that States remain the primary duty-bearers, whatever organisational solution is chosen for the service delivery. *“When the State does not directly provide services, its role nevertheless remains obligatory and critical”*. Furthermore, the Special Rapporteur observed that *“arrangements for the delivery of water and sanitation services ... are rarely exclusively public or private”*².

The 2010 report analyses the different types of service provision and considers that from a human rights perspective, three categories must be considered: direct management, delegated service provision and informal provision. In the former SR’s view, the ‘delegated service provision’ category includes private companies, NGOs, community-based organisations and some State-owned companies:

“Services are also often operated through State-owned companies, that is, companies that are totally or in the majority owned by the State, but that are legally distinct entities from the State itself. “From the perspective of human rights, the crucial aspect is that the State has delegated the task of providing water and sanitation services to a third actor;”

This rights-based analysis convinced the previous SR to shift the scope of her report from private companies to all non-State providers.

Key points about the current Background Document (Oct 2019)

Representativeness of the information and cases used

AquaFed has very strong concerns about the lack of balance in the information presented in the Background Document. It suffers heavily from ‘lamppost syndrome’ - the focus on a delivery route of secondary importance, but one that can be seen clearly, whilst problems in mainstream service provision are not investigated because they are not under the spotlight. This imbalance is exacerbated by the sources used, many of them lacking scientific rigour.

For example, the study published by PSIRU³ on water remunicipalisation points to 180 cases in 14 years worldwide. But in France alone, the State Agencies record between 500 and 700 tenders, annually, dealing with water or wastewater services outsourcing. So, the “prevalence of remunicipalisation” as endorsed by the Background Document is not supported by simple statistics. See ANNEX II for data.

References not considered by the Background Document

¹ 2010 De Albuquerque c., Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, A/HRC/15/31

² 2010 former SR report on non-State actors, paragraph 61

³ 2014 Lobina, E, Kishimoto, S, and Petitjean O, Here to Stay, Water Remunicipalisation as a Global Trend

Findings from global institutions should be included in the report, as they demonstrate that millions of people have benefited from private sector participation and their rights fulfilled, which would support our view that private service providers have a positive impact on HRWS.

AquaFed draws the attention of the Special Rapporteur to the documents listed in Annex IV. They include reports of global institutions, other academic documents, neutral research defending neither private nor public service delivery, and our own publications.

The risks are not exclusive to Private Sector Participation

Chapter four of the Background Document lists several “*human rights risks of private sector participation*”. However, when a human right problem arises in the field, the presence of a private company operating the service is not the exclusive reason as to why users’ human rights have been affected.

After careful study, Annex I of this AquaFed document demonstrates that when put in context, none of the risks identified in the Background Document are material and systemic in the case of private service providers mandated by public authorities. This is because:

- a) either the description or characterisation of these risks result from a misinterpretation of how water services are organised and implemented
- b) or similar risks would apply with public operators in similar contexts
- c) or are not attributable to the operator, public or private or other/mixed/ civil society etc but to a public authority or a lack of governance. In many cases operators, public or private or other, are not enabled by responsible public authorities to satisfy fully the HRWS
- d) or they could only be found in individual cases that do not provide evidence of any systemic risk. In all types of entities, even in public and private operators or others as mentioned above, there are good, medium and bad performers. The evidence of a field case is not an evidence of a systemic risk
- e) or they are conceptual and lack supporting evidence of a particular right-holder having his right to safe drinking water or sanitation materially harmed by the action of the operator
- f) or there is statistical evidence of a positive contribution of PSP to this HRWS criterion.

Unless the SR can provide robust evidence that each risk is material and private sector only, the report should be broadened to all non-State service providers mandated by States or to all non-State service providers as was done in 2010 by the former SR. Furthermore, this focused report should only consider risks that do not exist in a similar way when the State delivers the service itself.

International Arbitration and Bilateral Investment Treaties

As detailed in Annex III, AquaFed is surprised that the Background Document includes six paragraphs on international arbitration with details on five arbitration cases. Indeed in 2009, AquaFed had to debunk such allegations that resulted into a consultation organised by OHCHR and the UN Special Rapporteur on Business and Human Rights. The AquaFed contribution entitled “*Bilateral Investment Treaties and the Right to Water. The case of the provision of public water*”

supply and sanitation services”⁴. This submission concluded that “*the BIT obligations of a State to protect the investment of foreign shareholders of a local water operator are certainly compatible with and beneficial to the needs of this State to respect, protect and fulfil the Right to Water in its national territory.*”

To our knowledge, the rationale of our submission was never dismissed by any rigorous neutral body and there is no fact-based evidence of any harm to any right-holder that resulted from international arbitration. Hence, it appears unnecessary for a SR report focusing only on Private Sector participation to mention this issue of international arbitration.

AquaFed and private operators

AquaFed, the International Federation of Private Water Operators, represents private companies that deliver water supply or sanitation services under the direction of public authorities.

Our members are providers of all sizes, operating in around 40 countries, as both locally and internationally owned businesses⁵. These companies operate through PPP contracts or licenses to supply drinking water and to provide sanitation services to their populations.

The necessity for detailed contracts, strict monitoring and detailed regular reporting, means that knowledge of the work of private water operators mandated by governments is far more extensive than knowledge of any other type of water supply in both developing and developed countries.

Nevertheless, the experiences of the private sector help the United Nations to promote the Human Right to Water in a way which helps all operators to further develop access to drinking water and sanitation to the billions of people who need these public services, in coherence with the 2030 agenda and more specifically SDGs 6, SDG targets 1.4 and 11.1 and 17.

Further information is included in the Annexes:

- I. Detailed comments on risks mentioned in the Background paper
- II. The alleged ‘Remunicipalisation’ trend
- III. International arbitration and HRWS
- IV. Additional documents that should be considered



4

http://www.aquafed.org/Public/Files/publication/2009_10_aquafed_bits_and_the_righttowater_ruggie_4706396f24.pdf

⁵ More information on AquaFed, its governance and positions on www.aquafed.org

FINAL

AquaFed

THE INTERNATIONAL FEDERATION OF
PRIVATE WATER OPERATORS

www.aquafed.org

Neil Dhot
Executive Director
AquaFed

ANNEX I

Risks according to the Background Paper (VERSION OF OCTOBER 2019): AquaFed comments

After careful reading and study, it appears that all ‘risks’ mentioned in Chapter 4 of the background report:

- a) either the description or characterisation of these risks result from a misinterpretation of how water services are organised and implemented
- b) or similar risks would apply with public operators in similar contexts
- c) or are not attributable to the operator, public or private or other/mixed/ civil society etc, but to a public authority or a lack of governance. In many cases operators, public or private or other, are not enabled by responsible public authorities to satisfy fully the HRWS.
- d) or they could only be found in individual cases that do not provide evidence of any systemic risk. In all types of entities, even in public and private operators or others as mentioned above, there are good, medium and bad performers. The evidence of a field case is not an evidence of a systemic risk
- e) or they are conceptual and lack supporting evidence of a particular right-holder having his right to safe drinking water or sanitation materially harmed by the action of the operator
- f) or there is statistical evidence of a positive contribution of PSP to this HRWS criterion

Our comments below analyse the content of the Background Document with respect to each criterion and principle of the HRWS. These comments are presented by using the same numbering and structure as the chapter 4 of the Background Document. The table below summarises our analysis:

	Case	a	b	c	d	e	f
Para.	Alleged risk on						
4.1	Affordability	x	x	x			
4.2	Availability		x	x	x		
4.3	Safety		x		x		X
4.4	Discrimination	x	x	x	x		X
4.5	Sustainability	x	x	x	x	x	
4.6	Disconnection		x	x			X
4.6	Retrogression		x	x	x		X
4.7	Power imbalances	x	x		x	x	

By consequence, we believe that unless new and up to date evidence is provided that each risk is material and private sector only, a human rights report focusing only on private providers of water or sanitation services should not include any of the risks mentioned in the Background Document.

4.1 Affordability of services

- In this section but also others in the Background Document, there is a false statement suggesting tariffs are set by private operators. To be very clear - private operators do NOT set tariffs.
- Decisions on tariffs are always taken by the public authority and/or independent regulators. The public authority assesses what the citizen can pay for, adjusts tariff structures, and is responsible for appropriate recourse to subsidies (referring to the 3T approach of the OECD), for spending that cannot be covered from tariffs. The previous Special Rapporteur in 2010 stated that *“States must put into place supplementary social policies to ensure inclusiveness, such as safety nets and subsidies. These measures must be well targeted to actually reach those who need it most.”*
- The Background Document associates tariff hikes with privatisation. The case of Paris (Section 22 of the background report) is indeed telling: between 1985 and 2010 (the period of PPP contracts) drinking water tariffs were multiplied by 2.7 but the wastewater part of the bill was multiplied by a factor 4.5 although the service was ensured by a public operator.
- Applying the Background Document reasoning would lead to conclude on a risk of tariff hikes associated with public service delivery, but AquaFed does not think this way: authorities have a responsibility to decide on appropriate investments and delivery mode, and nothing should limit their freedom. In the specific case of Paris water supply, this allowed the city to improve the treatment, the removal of lead pipes, and the reduction of leakage from 22% down to 4%.
- As reported by the previous Special Rapporteur in 2010: *“while non-State service providers do not determine tariff structures unilaterally, they can be involved and make suggestions on how to ensure that services are affordable, also to the poorest.”*⁶

Thus, this “affordability” risk falls into **cases a) b) and c)**.

By consequence, unless the scope of the report is broadened to all services organised by States, this part on tariffs should not be included into the final report.

4.2 Lack of availability of services for all

- As duty-bearers, authorities must specify their availability targets, and align the local targets of the service providers, regardless of their nature.
- In this case of Jakarta (paragraph 61), closing private wells was decided by the State, not by the private operator. The same policy could have been applied with public operators.
- Conversely, there are numerous examples e.g.in Morocco, Niger and elsewhere where private operators were called in to increase the availability of water services (See Marin, 2009, Schiffler, 2015), and AquaFed’s own publications.

⁶ 2010 SR report on private sector participation, paragraph 50

- For hundreds of millions of people served by public water networks, lack of availability means that water is only available from their private tap or from public taps a few hours a day or a few days a week. The World Bank looked for statistical evidence of impact of PPP contracts on water rationing. Their global report mentions that *“Many water utilities in the developing world struggle with water rationing and low water pressure, usually because of massive water leaks in highly deteriorated networks. The poor are disproportionately affected”* and includes a long development on the matter. It did not find any example of retrogression but found many examples of positive impact of PPPs such as:
 - Colombia: *“10 PPP projects in Colombia that started under conditions of water rationing. In all cases, strong progress was made, and service continuity was often re-established after five or six years.”*
 - Argentina: *“In Buenos Aires (Argentina), water shortages that had plagued the population during summer months were ended in the first year the concessionaire took over (1993), and the overall improvement in service continuity was sustained over several years (Delfino, Casarín, and Delfino (2007) mention that the proportion of customers with appropriate water pressure jumped from 17 percent in 1993 to 60 percent in 1998, and to 74 percent in 2003.)”*
 - Africa: *“In Western Africa, the overall experience with continuity of service has been positive (Fall and others 2009). In Dakar, the private operator started with an average of 16 hours per day, and continuous service was re-established by 2006.”*
 - Management contracts: *“Another sample set is provided by management contracts, a significant number of which were implemented in situations of water rationing”. “Out of the 12 documented PPP projects that started with intermittent service and for which reliable before-and-after data were available, in 10 cases water rationing was significantly reduced by the end of the contract”.*
 - Yerevan, Armenia: *“The continuity of service increased to 18 hours per day, exceeding the contract target by more than 25 percent, and by 2005, 70 percent of the population enjoyed continuous service.”*

Thus, this “availability” risk falls into **cases b), c) and d)**.

By consequence, unless new evidence is provided, this risk should not appear in the final report.

4.3 Poor quality and safety of the water and sanitation provided

- Compliance with national and local quality and service standards is a minimum requested from any operator, public or private.
- Non-compliances may happen with any operators, public or private. Just to take the example of paragraph 62, USA acknowledges numerous Boil Water Notices every year, the majority of them affecting communities served by public operators.
- When comparative elements are available, like in France where public and private operators undergo similar compliance checks by independent laboratories under the responsibility of the Ministry of Health, microbiological non-compliance rates are

constantly lower with private operators⁷. In the case of England and Wales, Marin 2009 has shown statistical evidence that operators deliver better quality since privatization.

- AquaFed’s contribution to the Special Rapporteur in 2010 (Chap. 6.1)⁸ also illustrates that non-compliances are not specific to the private sector (never contradicted by rigorous observers).
- Paragraph 59 of the Background Document claims the NAWC “*intensively and perennially lobbies Congress and the Environmental Protection Agency to refrain from adopting higher water quality standards.*”⁹ The information in this paragraph is not supported by any documentation, only a political paper not providing any evidence to justify this statement. Usually private operators advocate for high water quality standards because they know that poor water quality is a high risk for them. The NAWC certainly never lobbied to refrain from adopting higher water quality standards.

Thus, this “safety” risk falls into **cases b), d) and f)**.

Unless new evidence is provided, this risk should not appear in the final report.

4.4 Lack of equality in provision and discrimination against users

- Paragraph 64 claims “*the operations of private sector participants in the water and sanitation sector have been demonstrated to have led to discriminatory outcomes for many users, particularly the poor, marginalized, and women.*” No serious justification of such allegation was ever documented rigorously by any neutral observer. This a copy of allegations of anti-private lobbies without statistical evidence. Private water operators apply the instructions that they receive from the States or awarding authorities. They neither set priorities of public policies nor rules of conduct with water-users.
- Paragraph 65 makes claims about private operators hiking tariffs to increase revenues and in sub-Saharan Africa during the 1990s, that “*intensified inequalities in the provision of such services, at the expense of low-income households.*”

We again have to correct this inaccuracy and remind that:

- water rates are not set by private water operators of public water services – they are set by responsible public authorities (a category of States)
- there are means to increase average water tariffs with pro-poor measures alleviating the affordability issues, and AquaFed would only direct the reader to the UN literature on this aspect
- profits are not a characteristic differentiating private operators from public operators. In all cases, well-run public operators delivering good quality services also make a profit. In some cases, they have a higher profitability than private operators.

⁷ La qualité de l’eau en France, données 2013, Ministère de la santé et des affaires sociales

⁸ <https://www.ohchr.org/Documents/Issues/Water/ContributionsPSP/Aquafed5.pdf>

⁹ Water for All, ‘Top 10 reasons to oppose privatization’ <https://www.citizen.org/wp-content/uploads/top10-reasonstoopposewaterprivatization.pdf> 1

- The quotations on Africa seem to put aside all the benefits brought by private operators to poor slum-dwellers by extending quality services to slums. These service extensions are documented for example in the World Bank review of all large PPP contracts in developing countries. They contribute significantly to improving equality between those who are lucky to benefit from a water service delivery and those who have no public service and must find water by their own means often at a higher cost.
- Paragraph 66 claims “*Private sector participation has also been shown to have a disproportionality negative effect for people living in rural communities*”. This allegation was never documented or evidenced. Either evidence is provided or it should be taken out of the report.
- Another extract from paragraph 66 is... “*This is because private firms often see rural areas as less profitable meaning they are more likely to deprioritize them, both in terms of actual provision and service improvement. This reality was identified in Senegal, where private sector participation improved access to water and sanitation in urban areas, but failed to afford equal access to people living in rural areas*”.¹⁰ This example of Senegal is a complete distortion of the mission report of the previous Special Rapporteur in 2011. She indeed found that “*most progress made was concentrated in urban areas (mainly in Dakar), and some rural areas continue to be neglected*”. Although a Private Water Operator has operated for many years through a PPP contract with the positive results highlighted by the Special Rapporteur, no private operator was ever mandated in rural areas. The Special Rapporteur did not blame any private operator for these urban/rural disparities but explained that “*these disparities are related to an inequitable allocation of public and donated financial resources and to different hydrogeological and sociological constraints*”. She noted the State’s intent to use private water operators to improve the rural situation: “*Plans for the future expansion of the rural water supply include promoting the participation of private actors in the management of all boreholes and redirecting State efforts to monitoring and regulatory activities, and providing back-up support*”.
- And another extract from paragraph 66: ... “*This has also been identified as the case in poor countries more generally, as many multinational private water providers have openly stated that “low-income populations do not represent an attractive market because they are too poor to be profitable and represent too great a financial risk.*”¹¹ Leaving aside that each private company has its own strategy, there are numerous active PPPs in poor countries of Africa (Uganda, Niger etc). Conversely, if poor countries do not call to private operators, this is their freedom.
- Paragraph 67 claims ... “*private sector participation which leads to the provision of discontinuous services (as was the case in Jakarta, Indonesia), or which leads to the provision of unsafe water (as was so in Tucuman, Argentina) can have a negative impact on women, as it is women who are more frequently called on to collect water when piped services are unavailable,*

¹⁰ A/HRC/21/42/Add.1, para. 30

¹¹ Jessica Budds and Gordon McGranahan, ‘Are the debates on water privatization missing the point? Experiences from Africa, Asia and Latin America’(2003) 15:2 Environment and Urbanization 87, 109

or to care for family members made sick by consumption of poor quality water.¹² This has a negative impact on their ability to access work and education, thereby entrenching poverty, and can leave them exposed to greater chances of violence and injury when undertaking often hazardous trips to waterpoints.¹³ We agree on this general statement on women being penalised by discontinuity of services and unsafe water. However,

- these are not issues attributable specifically to the private sector
- discontinuity of services in Jakarta do not result from PSP. They resulted from the lack of raw water made available by a public entity. Discontinuities did not disappear when the service was transferred to a public operator
- there is evidence of PWOs contributing positively to the life of women. See the AquaFed report on Women (to be completed by AquaFed)

Thus, this “discrimination” risk is not specific to PSP and there is no statistical evidence that it has a significant probability with PSP. It falls into [cases a\), b\), c\), d\) and f\)](#).

Unless new evidence is provided, this risk should not appear in the final report.

4.5 Lack of sustainability

- Paragraph 68 states *“Private sector participation can impact on the sustainability of water and sanitation services, particularly where the drive for increased profitability reduces the investment made by private companies into infrastructure renewal or improvements”*.¹⁴ The quoted reference compares privatization (full-divestiture) models with PPP models, two different forms of PSP. It says that privatization provides incentives to over-invest while PPPs provide incentive to under-invest. It never mentions any issue of sustainability in any of the two types of models.
- Paragraph 68 also states... *“Where investment is not made to improve services or repair infrastructure that is at risk of failing, sustainability is affected as continued deterioration will be likely to lead to total or partial loss of service. As noted in relation to water provision, the evidence points to a lack of investment—public or private—in the maintenance and expansion of utility networks as a general rule, even where [private sector participation] leads to an increase in operational efficiency. This lack of investment raises concerns about the long-term sustainability of the operational improvements achieved.”*¹⁵ This rightly states that the lack of

¹² Interactive side event to #CSW63, jointly organised by PSI, FEMNET and APWLD and opened by UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston. 14 March 2019. “Addressing the human rights implications of privatization for women and girls”. <http://www.world-psi.org/en/addressing-human-rights-implications-privatization-women-and-girls>

¹³ See, for example, Interactive side event to #CSW63, jointly organised by PSI, FEMNET and APWLD and opened by UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston. 14 March 2019. “Addressing the human rights implications of privatization for women and girls”. <http://www.world-psi.org/en/addressing-human-rights-implications-privatization-women-and-girls> and A/73/179, para. 44

¹⁴ Janice A. Beecher. (2001). Privatization, Monopoly, and Structured Competition in the Water Industry: Is There a Role for Regulation, p.16. <https://core.ac.uk/download/pdf/60534877.pdf>

¹⁵ Katharina Gassner, Alexander Popov and Nataliya Pushak, ‘Does Private Sector Participation Improve Performance in Electricity and Water Distribution?’ (World Bank, 2009) 4

investment is an issue for the whole sector (it writes ‘public or private’) that is not specific to PSP. Its roots lie in public policies or poor governance and regulation but not in operators.

- Paragraph 69 states... *“Furthermore, challenges of sustainability are notable in contracts that are time-limited as private providers do not consider the need to invest to ensure services operate properly beyond their concession period, thereby generating sustainability risks once the concession comes to an end”*. This is completely inaccurate and there is no evidence to support such a claim. This demonstrates a lack of understanding of what happens in reality. Investments programmes are framed by States and at the end of a PPP contract, a private operator has contractual obligations to leave the water/sanitation systems in good operating order and in specified situations
- This “sustainability risk” is pure invention. There is no evidence of such a risk associated specifically with private service provision. Underinvestment threatening sustainability is a common policy issue in many developed and developing countries. It is highly debated in the USA where most operators are public and in France where most investments are financed and managed directly by public entities. Having said that, fortunately, real cases of decrease of services like in some former Soviet-union countries after 1990 are limited and are not related to private operators.

This “sustainability risk” falls into **cases a), b), c), d) and e)**.

By consequence, unless new evidence is provided, this risk should not appear in the final report.

4.6 Retrogression

- The IWA Manual of the Human Rights to Safe Drinking Water and Sanitation for Practitioners¹⁶, that was written in collaboration with the previous Special Rapporteur and her staff, highlights in chapter 7.3 that ‘cut-offs, credit control and debt collection’ are one of the most sensitive issues for practitioners. It provides examples of policies that apply in Flanders, the western part of Belgium where there are only public providers and France where these policies apply both to public and private operators.
- Disconnections are not specific to private operators, and as a matter of fact, the possibility to disconnect is always decided by the awarding authority. There are many public operators implementing water cuts. Due to their prominence in water services, the number of cuts made by public operators probably exceeds the number made by private operators. Conversely, private water operators apply local rules that apply to all types of operators. In some cases, they are instructed to cut bad payers. In some countries, like the UK or France, national law forbids cuts.

The disconnection risk falls into **cases b), c and f)**. It is not specific of private water operators. The resulting “retrogression risks” should be discarded from the final report at least for these three reasons. Furthermore, it falls also into **case d)**.

¹⁶ http://www.aquafed.org/Public/Files/publication/2016_10_iwa_manual_rtw_9781780407449_full_6c14bc9c50.pdf

4.7 Power imbalances

- Paragraphs 71 and 72 are a theoretical construct imagined by anti-private and anti-multinationals lobbies.
- Governments have many options: they can opt for hiring a private company or another or none. Governments are lawmakers, decision-makers on tariffs, objectives of the partnership and provisions of the PPP contract. They also set up controls and regulatory bodies. A private company enjoys none of these powers.
- In the last two decades, the growing experience of consulting companies and law firms with respect to water regulation and PPP contracts has meant that any government willing to enter into a partnership through a PPP contract hires firstly competent advisors that ensure a proper negotiating balance with potential private companies.
- In any case, the partnership is not built between equals. The public authority is the only one that can make political decisions and has always the last word in negotiations, if any. Thus, the allegation of states being “forced” to give more favourable conditions to a private partner is pure invention.
- Furthermore, we do not know any factual evidence of such a theoretical power imbalance having resulted into harming the HRWS of anybody.
- In the USA, the situation is exactly the opposite for the majority of private operators, those who own the water infrastructure. For them, increasing their investments means increasing their profits since the amount of investment is a criterion used by regulators to set tariffs. This is why regulators keep limiting investments. The quoted reference is a political leaflet that does not provide any data to justify its content.
- The claim in paragraph 71 that “*other cases providers might simply threaten to withdraw from provision should states seek to tighten regulation surrounding their operations*” needs to be justified by providing evidence. Where and when such a case of withdrawal happened? Who are the right-holders whose access to safe drinking water was consequently penalised?
- The claim that the enormous wealth (of private operators) enables them to expend millions of dollars on court battles, which is often not possible for states, particularly developing states is a theoretical construct. There is no example of a government having lost a lawsuit because its legal defence was insufficiently funded.
- Paragraph 72 is a re-invention of the real facts of this La Paz-El Alto project. The initial contract was a great success. Many initially-unserved people of La Paz and El Alto in the contractual area got access to safe drinking water supply. However, El Alto kept growing and people outside the PPP contractual area complained to the government that they had no public service. Later, the government instructed Aguas del Illimani to extend its service to these unserved area and increased tariffs to generate the additional revenues that were necessary to

finance the important related investment programme. These increases were not accepted by the served population. After several events detailed in our 2009 submission to the SR on Business and Human Rights, the two parties eventually terminated the contract by mutual consent in 2006 thus avoided recourse to International arbitration. It is hard to see where any power imbalance “forced” the Bolivian government to do anything.

There is no factual evidence of any case of “power imbalance” having resulted in harming the HRWS of right-holders. By consequence, this “power imbalance risk” falls into [cases a\), b\), d\) and e\)](#).

This alleged “risk” is far from being real and from impacting the HRWS. By consequence, this risk should not appear in the final report.

4.8 Other elements of human rights risks to be included in a more advanced stage of the report

- Unfortunately, corruption exists in many countries. However, it is hard to see how its impacts on public-private partnerships may exceed its impacts on public operation of water and sanitation services by civil-servants who, most of the time, are not controlled by any strong regulator and have no clear instructions from their politically responsible public authority.
- The only available estimate of the global cost of corruption is produced by Transparency International. They multiply the revenues of water/sanitation operators by a ratio of corruption identified in the construction sector: as a result, their best estimate is in proportion of revenues. This is far from providing evidence of corruption being more a problem with private operators than with public operators as the latter ones have higher global revenues and have higher local freedom to act.

Hence, this risk is speculative and not supported by research or official agencies’ investigations.

ANNEX II

The alleged ‘remunicipalisation’ trend

Remunicipalisation is a political argument, and it is grossly exaggerated. It has absolutely no connection to human rights issues and is solely based on political motivation. Water has never been de-municipalised, nowhere, and never. Private operators do not own the water –the municipalities always own and control the sources and the infrastructure.

Remunicipalisation is an artificial construct, used by activists to over-represent something that is very natural, namely the return of a contract to the public at its conclusion.

Contracts are time-limited. At the end, the organising public authority may decide to renew the contract, to hire another operator or to operate directly with internal means. Changes of operators are normal decisions. This is why depending on locations, every year there are public operators succeeding to private ones and private operators succeeding to public ones.

There are many reasons why the operation of services is changed from private to public operator:

- natural end of contract and municipality never planned for another concession
- at the end of the contract private companies bid for a new contract but the public operator won the bid
- there are issues with the contract and it is terminated early (either to the satisfaction of all parties, or with resort to the courts)
- the municipality not delivering its side of the contract
- conflict in the contract between municipality and company because of financial insufficiency of the tariff system, or many other reasons
- the decision to go from private to public operator is purely political and not related to any performance or financial issues of the private operator (e.g. Paris)

Data

- High renewal rates (90%+) of outsourced private water and wastewater operations contracts per year. (Source: GWI)
- Between 2000-2019, 75% of concession, affermage and lease agreements expired naturally as expected. 11% terminated early and 14% were actually extended. (Source: GWI). These data are close to the World Bank 2009 report in PSP in urban utilities showing that 9% of contracts terminated early.
- There has been a year on year rise in population served by private operators – around 233,300 in 2000 and 361,778 in 2018. But within that are significant regional differences – Asia Pacific region has seen the sharpest and consistent rise. (Source: GWI)
- The number of contracts signed has fluctuated cyclically since 2000. Some regions it is currently rising, others such as Western Europe the number has dropped slightly in last two years. Again, the biggest riser is Asia Pacific region. (Source: GWI)
- Total active projects up from 903 in 2000 to 2,703 in 2019. (Source: GWI)

ANNEX III

International Arbitration and the Human Right to Water and Sanitation

The AquaFed written contribution is a 16-Page document entitled “*Bilateral Investment Treaties and the Right to Water. The case of the provision of public water supply and sanitation services*” was submitted on the 1st of October 2009. After commenting on all allegations of impacts of Bilateral Investment Treaties and their provisions for international arbitration on the HRWS, this submission concluded that:

- *“The existence of Bilateral Investment Treaties (BITs) enhances the ability of States to attract foreign expertise, technology and investment, thereby helping them to meet their obligations to implement the Right to Water. These BITs do not create any obligation that would prevent the States from organising the progressive implementation of the Right to Water.*
- *Therefore, the BIT obligations of a State to protect the investment of foreign shareholders of a local water operator are certainly compatible with and beneficial to the needs of this State to respect, protect and fulfil the Right to Water in its national territory.”*

In its paragraphs 6.2 and 6.3.5.2, this submission comments the allegation of an indemnity paid by the government after an arbitration would prevent it from implementing the HTWS in its country. It explains that: *“the bulk of the amount of the indemnity to the operator is usually the reimbursement of investments that it [the private company] has already made in the execution of its contractual obligations to carry out investment decisions made by the State. These investments are already giving benefits to the State (without the State having paid for them up to the termination of the contract)”*.

“This exceptional indemnity is mainly a postponed payment of a cost that was decided previously by the State to benefit the population and that has been borne temporarily by a third party with the related risk. The State and the water-users are already enjoying the benefits, but the investor has not recovered his investment costs. Even if all public budgets are constrained, the postponed payment of an investment that is already giving benefits to the State and to the population cannot be viewed as an additional economical burden to the country.”

“Such expenditure would not prevent the State from implementing its human rights obligations. If this is considered to be the case, it could be argued that any public expenditure such as organising military defence or a diplomatic network or investing money in a public corporation would challenge the ability of the State to fulfil its human-rights obligations.”

We could add today that as no government uses all their financial capacity to develop access to safe drinking water and sanitation in their country and there are billions of people without access to safe drinking water, most central governments should be sued for violating the HRWS! This is not realistic.

Alleging that such an indemnity from the State prevents the fulfilment of human rights obligations is therefore unfounded. To our knowledge, the rationale of our submission was never dismissed by any rigorous neutral body. This is why we still think this debate on international arbitration is closed.

ANNEX IV

ADDITIONAL DOCUMENTS THAT SHOULD BE CONSIDERED BY THE SPECIAL RAPPORTEUR

Global Institutions

- Marin, P. 2009. Public-Private Partnerships for Urban Water Utilities: A Review of Experiences in Developing Countries. Trends and Policy Options; no. 8. World Bank. *(The study assesses the performance of the 65 largest water PPP projects that have been in place for at least five years in developing countries between 1990 and 2003, providing services to a combined population of almost 100 million (ie around 50% of the population served by water PPP projects of the period)).*
- United Nations Economic and Social Council (2005). Realization of the right to drinking water and sanitation Report of the Special Rapporteur, El Hadji Guissé
- Gassner K, Popov, A, Pushak, N. (2009) [Does Private Sector Participation Improve Performance in Electricity and Water Distribution?](#) The World Bank PPIAF.
- GPOBA. (2009). Output-based aid in Morocco – extending water services to the poor in urban areas.
- OECD (2006). [Opportunities and challenges arising from the increasing role of new private water operators in developing and emerging economies](#). Background Issues Paper for OECD Global Forum on Sustainable Development "Public-Private Partnerships in Water Supply and Sanitation - Recent Trends and New Opportunities".

Academic and research

- Galiani S, Gertler P and Schargrodsky E. (2005). Water for Life: The Impact of the Privatization of Water Services on Child Mortality; Journal of Political Economy, 2005, vol. 112 no.1: *(showing that public health increased faster in areas served by private operators than in areas served by public operators).*
- Franceys R and Jalakam A. (2010). The Karnataka Urban Water Sector Improvement Project - 24x7 Water Supply is Achievable.
- Heymans C, Eberhard R, Ehrhardt D and Riley S. (2016). Providing Water to Poor People in African Cities Effectively: Lessons from Utility Reforms
- Schiffler M. 2015, Water, Politics and Money, A reality check on privatisation.
- Waterpreneurs. (2018). White Paper on [Innovative finance for scaling-up “water, sanitation and hygiene” \(wash\) market-based solutions](#)

AquaFed publications

There are many relevant AquaFed publications on the [Aquafed website](#) and in our [archive](#).

- AquaFed stands up for Human Rights, every day - publication at the occasion of the 2016 [Human Rights Day](#).

- Collaboration with the OHCHR and with the [Special Rapporteur on the human rights to safe drinking water and sanitation](#). The Federation has made significant contributions to the work of Mrs. Catarina de Albuquerque and Mr. Léo Heller. These include *in particular*:
 - In 2017 submission to the Special Rapporteur's enquiry on 'Service regulation and the human rights to safe drinking water and sanitation' ([pdf](#))
 - In 2017 support to the Special Rapporteur's field visit to Mexico.
 - In 2016: Joint contribution to the Special Rapporteur's enquiry on gender equality with the Women for Water Partnership ([pdf](#))
 - In 2016 submission to the Special Rapporteur's enquiry on development assistance ([pdf](#))
 - In 2010: 2010 - contributions to the report on the role of Non-State Actors, including the private sector (PDF links: * [Introduction](#); * [Contribution of Private Water Operators to the Right to Water and Sanitation](#); * [The Roles of Government](#); * [Bibliography](#); * [Avoiding Misconceptions](#); * [Synthesis](#))
 - [Contributions on the right to sanitation](#) (2009)
 - The advocacy work of AquaFed during the period 2005-2010 is presented in a long list with some important quotations highlighted. ([pdf](#)).
- AquaFed Press Release (2014) AquaFed calls upon the EU to be more active in implementing the Human Right to Safe Drinking Water and Sanitation
- AquaFed (2013): [The value chain of realising the right to water and sanitation](#), as presented by Gérard Payen at the 3rd IWA Water and Development Congress and Exhibition, Nairobi, October 2013. (as published in the 2016 IWA Manual on the Human Rights to Safe Drinking Water and Sanitation for Practitioners – BOS, R. 2016 -)
- AquaFed. (2010): Private Water Operators contribute to making the Right to Water & Sanitation real
- AquaFed. (2009): The Need to Define the Human Right to Sanitation in Order to Promote its Implementation
- AquaFed. (2007). [Practitioners' Views on the Right to Water, AquaFed's submission to the OHCHR study on human rights obligations related to equitable access to safe drinking water and sanitation](#).

See below a chronological overview of the Federation's activities:

- In 2016, the International Water Association (IWA) published the 'Manual on the human rights to safe drinking water and sanitation for practitioners' (*a multi-year project to which the Federation contributed significantly*) ([pdf](#)).
- In 2015, AquaFed issued its second edition of its flagship publication on "Private Operators Delivering Performance for Water Users and Public Authorities" ([pdf](#)) (*illustrates - through field cases from around the world - how private operators contribute to the realisation of the dimensions of the human rights to safe water and sanitation. See our documents section for the versions [English](#), [French](#), [Spanish](#).*)
- In 2014 AquaFed issued three proposals for the human rights to water and sanitation to be better recognised; and in particular for them to be included in the European Charter ([pdf](#)).

- In 2012 - [*Are we asking the right questions?*](#) – *(AquaFed calls for the real needs for drinking water to be addressed by governments, making visible estimates that “roughly half the people in the world have no assurance that the water that they use is safe and that even more have their human right to safe drinking water unsatisfied.)*
- 2012 - AquaFed co-organises with the Swiss government, the French Water NGO Coalition and the global Water and Sanitation Program the thematic part of the 6th World Water Forum on "Guaranteeing access to Water and the right to Water", including 18 hours of sessions. *(This resulted in water professionals and decision-makers becoming far more aware than before about the practical content of the human right. A multi-stakeholder debate on the implementation of the right has been organised with many different stakeholders. The panellists were a minister, a mayor, a parliamentarian, a regulator, a public operator, a private operator, a unionist, an NGO representative and the UN special rapporteur. All agreed that they have a responsibility to act for the implementation of the right.)*