

**Important questions on the human rights to water and sanitation:  
A response to the OECD Water Governance Initiative**

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12<sup>th</sup> May 2020

Progress towards the realisation of the human rights to water and sanitation will depend on the international community's ability to ask hard questions about water governance. How better to develop water services and enhance their availability, quality and safety, accessibility, affordability, cultural acceptability and sustainability, together with equality and nondiscrimination, transparency, participation, and accountability? How to ensure that states use the maximum available resources for the progressive realisation of the rights and avoid retrogression in their enjoyment?<sup>1</sup> Crucially, asking questions on the governance of the rights will only be a first step. Achieving these ambitious objectives will also require the water community to learn and transform practice in policy and service delivery.

It is therefore surprising that the OECD Water Governance Initiative (WGI) advises the Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation to neglect an important aspect of water governance: the choice between public and private service delivery. In a letter submitted in response to the consultation on the Special Rapporteur's thematic report on private sector participation and the human rights to safe drinking water and sanitation,<sup>2</sup> the WGI bases its advice on notable tenets of neoliberal ideology. These include the beliefs that the lack of unequivocal evidence on public vs. private efficiency means that the two sectors are equivalent, and that the main role of the public sector is to regulate and not deliver water services. These beliefs come from the dogmatic preference that multilateral organisations like the OECD and the World Bank show for private management. These organisations disregard the evidence on the problems with the private sector and the merits of strengthening public sector water delivery.<sup>3</sup> Accepting WGI's advice on changing the focus of the thematic report would therefore risk replacing skewed answers for legitimate questions.

By contrast, the concept note issued by the Special Rapporteur in support of the consultation poses important open-ended questions. These questions are most relevant to the mandate of the Special Rapporteur, that includes identifying challenges and obstacles to the full realisation of the human rights to water and sanitation, protection gaps, good practices and enabling factors. For example, one section of the concept note looks at the risks posed by private sector participation to the enjoyment of the rights. Another section discusses the gaps in human rights protection that can be associated with private sector participation. A third section is devoted to the different forms of private sector participation and related trends, like the diffusion of remunicipalisation.<sup>4</sup> Remunicipalisation consists in the return of urban water services to public ownership and management following the termination of private operating contracts. The extent of its diffusion since the turn of the century is symptomatic of the limitations of the private sector. If there have been 235 cases of water remunicipalisation both in the global North and South from 2000 to early 2015,<sup>5</sup> this number has grown to 267 by late 2016<sup>6</sup> and 311 by late 2019.<sup>7</sup> These developments cannot be ignored in a balanced, evidence-based, and careful analysis of the prospects for the human rights to water and sanitation.

PSIRU's research shows in detail how private sector participation poses serious risks to the realisation of the human right to water. In Jakarta, Indonesia a local court decided in 2015 to cancel two private concessions on the grounds of breach of the human right to water. The two concessions had been awarded in 1997 – in the absence of competition - to two multinationals, each in joint venture with cronies of dictator Suharto. In 2001, following Suharto's downfall, the multinationals renegotiated the contracts and the dictator's cronies exited the partnerships. The two concessions failed to meet expectations of superior private sector efficiency. The new contractual terms did in fact remove any

element of financial risk from the companies and gave them no incentive to operate efficiently as profit was guaranteed irrespective of performance. The performance of the two concessions has been abysmal both before and since the renegotiation. Throughout the life of the concessions there has been little improvement in performance and service coverage has only expanded from 44.5 percent in 1998 to 59.4 percent 20 years later. This lacklustre performance is compounded by steep price increases and cost inefficiencies that cast doubts on the justification of these increases. The limited expansion of service coverage – caused in part by the low profitability of connecting poor households – has exacerbated problems of affordability and inequity for the unserved. These are forced to choose between spending as much as half of their daily income to buy water in jerry cans and digging wells to access Jakarta’s polluted low-level groundwater. There are also environmental hazards. The quality of piped water is so bad and service reliability so poor, that the better-off resort to deep water drilling to consume the cleaner deep-level groundwater. As a result, Jakarta is sinking faster than any other big city on the planet.<sup>8</sup> Jakarta is only one textbook case of the problems with water privatisation. There are dozens and dozens of cities, both in the global North and South, that have experienced the risks caused by private sector participation to the enjoyment of the human right to water.<sup>9</sup>

PSIRU’s research also shows how even strong regulatory frameworks designed to enable privatisation may have gaps in the protection of the human rights to water and sanitation. In England, water supply and sewerage were privatised in 1989. Economic regulation was entrusted to Ofwat, a powerful and resourceful regulator that in 2017 had 174 permanent employees and a budget of over £25 million. Ofwat is a non-ministerial government department – independent of government and accountable to Parliament – with the power to shape the regulatory framework and a central role in ensuring the success of privatisation. While Ofwat claims that £111 billion have been invested since privatisation, tariffs have increased by 40% above inflation since 1989 and there was no improvement in efficiency between the first five years of private operations and the last five years of public management. From 2007 to 2016, the private companies have paid over £18 billion in shareholder dividends, producing an upward pressure on pricing and causing an alarming increase in water poverty. In 2014-15, an estimated 23% of households in England were spending more than 3% of their income on water and sewerage and an additional 11% were spending over 5% of their income. This meant that 34%, more than a third of households in England were affected by water poverty. As a result, arrears in water charges are a contributing factor of destitution in the UK. Private companies’ profit-seeking tactics and regulatory complacency were co-determinants of this alarming increase in water poverty. Irrespective of Ofwat’s statutory responsibility for protecting the interests of all consumers, it has failed for over 25 years to adequately address the issue of water affordability by a growing section of society. This contrasts with the robust action that Ofwat has taken to protect the interests of the companies and ensure their ability to remain profitable - for example with its 2002 decision to make the companies’ licences virtually perpetual - and suggests that Ofwat has for too long selectively defined its own remit to exclude the protection of vulnerable consumers.<sup>10</sup> Despite the specificities of the institutional and regulatory framework of England’s privatised water and sewerage services, these gaps in protection are not exceptional. Indeed, PSIRU’s research on the experience with over 40 contracts in more than 20 countries – covering diverse forms of private sector participation in the global North and South – finds evidence of systematic private interest-seeking irrespective of the type of contractual and regulatory arrangements.<sup>11</sup>

The upshot is that the concept note identifies serious risks and concerning protection gaps, given the prominence of private sector participation in international water policy. It is urgent to better understand the causes, modalities and consequences of these risks and gaps. In fact, identifying the enabling factors for the full realisation of the human rights to water and sanitation requires engaging with the constraints discussed in this letter. The rationale for the concept note and thematic report is robust and the authors have to be congratulated for following the true spirit of the rights: to put the collective needs of human communities and the environment over and above the needs of the market.

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- <sup>1</sup> Brown, C., Neves-Silva, P. and Heller, L., 2016. The human right to water and sanitation: a new perspective for public policies. *Ciencia & saude coletiva*, 21, pp. 661-670 (<http://www.scielo.br/pdf/csc/v21n3/1413-8123-csc-21-03-0661.pdf>).
- <sup>2</sup> OECD Water Governance Initiative, 2020. Letter to Léo Heller, Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation, The Hague, Netherlands, 21<sup>st</sup> April 2020 ([https://www.ohchr.org/Documents/Issues/Water/Questionnaire/States/Letter\\_OECD.pdf](https://www.ohchr.org/Documents/Issues/Water/Questionnaire/States/Letter_OECD.pdf)).
- <sup>3</sup> Lobina, E. and Hall, D., 2009. Thinking inside the box: Why the World Bank is not learning. PSIRU Reports, 10 March 2009 (<https://gala.gre.ac.uk/id/eprint/1727/1/2009-03-W-wbank.pdf>); Lobina, E., 2005. Problems with Private Water Concessions: A Review of Experiences and Analysis of Dynamics. *International Journal of Water Resources Development* 21(1): 55-87; Lobina, E., 2018. Commentary on the European Commission's "Study on Water Services in Selected Member States. PSIRU Reports, February 2018 ([http://gala.gre.ac.uk/19211/7/19211%20LOBINA%20European\\_Commission%E2%80%99s\\_Study\\_on\\_Water\\_Services\\_2018.pdf](http://gala.gre.ac.uk/19211/7/19211%20LOBINA%20European_Commission%E2%80%99s_Study_on_Water_Services_2018.pdf)). (<https://www.tandfonline.com/doi/pdf/10.1080/0790062042000313304?needAccess=true>).
- <sup>4</sup> Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation, 2019. Expert consultation on private sector participation and the human rights to safe drinking water and sanitation - Organized by the UN Special Rapporteur on the human rights to safe drinking water and sanitation, Mr. Léo Heller. Concept note, 13 September 2019 ([https://www.ohchr.org/Documents/Issues/Water/Conceptnote\\_private%20sector\\_final.docx](https://www.ohchr.org/Documents/Issues/Water/Conceptnote_private%20sector_final.docx)).
- <sup>5</sup> Kishimoto, S., Lobina, E. and Petitjean, O. (eds.), 2015. *Our public water future: The global experience with remunicipalisation*. Amsterdam, London, Paris, Cape Town and Brussels: Transnational Institute, Public Services International Research Unit, Multinationals Observatory, Municipal Services Project and the European Federation of Public Service Unions (<http://www.psiru.org/sites/default/files/2015-04-W-OurPublicWaterFutureFINAL.pdf>).
- <sup>6</sup> Kishimoto, S. and Petitjean, O. (eds.), 2017. *Reclaiming public services: How cities and citizens are turning back privatisation*. Amsterdam and Paris: Transnational Institute, Multinationals Observatory, Austrian Federal Chamber of Labour (AK), European Federation of Public Service Unions (EPSU), Ingeniería Sin Fronteras Cataluña (ISF), Public Services International (PSI), Public Services International Research Unit (PSIRU), We Own It, Norwegian Union for Municipal and General Employees (Fagforbundet), Municipal Services Project (MSP) and Canadian Union of Public Employees (CUPE) ([https://www.municipalservicesproject.org/sites/municipalservicesproject.org/files/publications/reclaiming\\_public\\_services.pdf](https://www.municipalservicesproject.org/sites/municipalservicesproject.org/files/publications/reclaiming_public_services.pdf)).
- <sup>7</sup> Kishimoto, S., Steinfort, L. and Petitjean, O. (eds.), 2020. *The Future is Public: Towards democratic ownership of public services*. Amsterdam and Paris: Transnational Institute (TNI), Multinationals Observatory, Austrian Federal Chamber of Labour (AK), Canadian Union of Public Employees (CUPE), Danish Union of Public Employees (FOA), De 99 Van Amsterdam, The Democracy Collaborative (US), European Federation of Public Service Unions (EPSU), Ingeniería Sin Fronteras Cataluña (ISF), MODATIMA (Movement of defence of water, land and the environment, Chile), Municipal Services Project (MSP), the Netherlands Trade Union Confederation (FNV), Norwegian Union for Municipal and General Employees (Fagforbundet), Public Services International (PSI), Public Services International Research Unit (PSIRU), University of Glasgow and We Own It ([https://www.tni.org/files/publication-downloads/futureispublic\\_online\\_def.pdf](https://www.tni.org/files/publication-downloads/futureispublic_online_def.pdf)).
- <sup>8</sup> Lobina, E., Wegmann, V. and Marwa, M., 2019. Water justice will not be televised: Moral advocacy and the struggle for transformative remunicipalisation in Jakarta. *Water Alternatives* 12(2): 725-748 (<http://www.water-alternatives.org/index.php/alldoc/articles/vol12/v12issue3/534-a12-2-17/file>).
- <sup>9</sup> Lobina, E., 2019. UK - Strong and weak lock-in of water governance outcomes in England. In Porcher, S., Saussier, S. (Eds): *Facing the Challenges of Water Governance*, pp. 155-188. Palgrave Studies in Water Governance: Policy and Practice. Basingstoke and New York: Palgrave Macmillan; Lobina, E., 2017. Water remunicipalisation: Between pendulum swings and paradigm advocacy. In Bell, S.; Allen, A.; Hofmann, P. and Teh, T.H. (Eds), *Urban water trajectories*, pp. 149-161. London, UK: Springer ([https://gala.gre.ac.uk/id/eprint/14983/1/14983%20LOBINA\\_Water\\_Remunicipalisation\\_2017.pdf](https://gala.gre.ac.uk/id/eprint/14983/1/14983%20LOBINA_Water_Remunicipalisation_2017.pdf)); Lobina, E. and Corporate Accountability International, 2014. *Troubled Waters: Misleading industry PR and the case for public water*. Corporate Accountability International, Boston, November 2014 (<http://psiru/reports/troubled-waters-misleading-industry-pr-and-case-public-water>); Lobina, E. and Hall, D., 2007. Experience with private sector participation in Grenoble, France and lessons on strengthening public water operations. *Utilities Policy*, 15, pp. 93-109; Lobina, E., 2005. Problems with Private Water Concessions: A

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Review of Experiences and Analysis of Dynamics. *International Journal of Water Resources Development* 21(1): 55-87 (<https://www.tandfonline.com/doi/pdf/10.1080/0790062042000313304?needAccess=true>).

<sup>10</sup> Lobina, E., 2019. UK - Strong and weak lock-in of water governance outcomes in England. In Porcher, S., Saussier, S. (Eds): *Facing the Challenges of Water Governance*, pp. 155-188. Palgrave Studies in Water Governance: Policy and Practice. Basingstoke and New York: Palgrave Macmillan.

<sup>11</sup> Lobina, E. 2013. Remediable institutional alignment and water service reform: Beyond rational choice. *International Journal of Water Governance* 1(1/2): 109-132

([https://gala.gre.ac.uk/id/eprint/5008/1/5008%20LOBINA\\_Remediable\\_Institutional\\_Alignment\\_2013.pdf](https://gala.gre.ac.uk/id/eprint/5008/1/5008%20LOBINA_Remediable_Institutional_Alignment_2013.pdf));

Lobina, E., 2005. Problems with Private Water Concessions: A Review of Experiences and Analysis of Dynamics. *International Journal of Water Resources Development* 21(1): 55-87

(<https://www.tandfonline.com/doi/pdf/10.1080/0790062042000313304?needAccess=true>).