Emerging Global Water Welfarism
Access to Water, Transnational Regulation and Unruly Consumers

Bronwen Morgan
University of Oxford

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Part I: Introduction

Global governance in the water sector appears to be coming of age, at a time and in a manner that gives high prominence to the roles of non-state actors, both civil society and private corporations. A series of United Nations conferences and gatherings dating from the 1970s[1] and the so-called 'International Drinking Water and Sanitation Decade during the 1980s has since the 1990s taken a distinct turn towards the private sector, with an important 1992 UN conference endorsing for the first time the principle that water be treated as an economic good.[2] After private sector investment in water between 1990 and 1997 increased 7,300% on 1974-1990 investment levels,[3] intergovernmental activities in relation to water have intensified,[4] and are increasingly incorporating the private sector as a key partner in their vision.[5] At the same time, private sector actors are themselves forging ahead on their own terms,[6] but not without growing resistance and criticism from civil society. The deeply politically divisive nature of water issues has already led to what some have hailed as the first true institutional innovation in global governance, the World Commission on Dams (WCD),[7] a hybrid institution that put government, NGOs, activists and corporations on a level playing field in an institutional context

[1] Mar del Plata Conference 1977.

[2] International Conference on Water and the Environment, Dublin 1992. The other 3 principles recognise the importance of participatory approaches in water development and management, the importance of the role of women, and the status of water as a a finite, essential and vulnerable resource.

[3] Private sector investment in the water sector between 1974 and 1990 was US$300 million; between 1990 and 1997 it rose to US$25 billion: see Silva et al, 1998, "Private Participation in the Water and Sewerage Sector - Recent Trends", 147 *Public Policy for the Private Sector*, 1-8, The World Bank Group: Finance, Private Sector and Infrastructure Network.

[4] One of the Millenium Development Goals set at the UN Summit of 2000 committed to halve the 1.5 billion people in the world without access to safe drinking water. The 2002 World Summit on Sustainable Development in Johannesburg extended this goal to the 2.5 billion lacking sewage, also to be halved by 2015. The United Nations Commission on Sustainable Development has chosen water, sanitation and human settlement as the focus of its implementation cycle for 2004 and 2005. In January 2004, the European Commission launched the EU Water Facility: http://europa.eu.int/eur-lex/en/com/cnc/2004/com2004_0043en01.pdf.

[5] Bali Guiding Principles and Type II WSSD partnerships. Although less than 10% of all water in the world is currently managed by the private sector, by 2000, at least 93 countries had partially privatized water or wastewater services: LeClerc and Raes (2001), *Water: a World Financial Issue,* PriceWaterhouseCoopers, Sustainable Development Series, Paris, France.

[6] In 2000 the business magazine Fortune 500 declared water to be the oil of the 21st century (*Fortune*, May 15 2000). In April 2003, Schwab Capital Markets hosted a Global Water Conference for investors in Washington DC.?? published Global Water Market. In 2004 the World Economic Forum at Davis announced a new Water Initiative: http://www.weforum.org/site/homepublic.nsf/Content/The+Water+Initiative.

[7] *Dams and Development: A New Framework for Decision-Making* (2000).

unmoored from standard representative and accountability mechanisms, and tasked them with generating general principles to guide the funding and building of dams. More recently, a Global Water Scoping Review[8] has been established to explore the possibility of establishing another, similar, global institution on a different but equally contested issue. That issue, private sector participation in domestic water service delivery, is the focus of this paper.

The paper explores the patterns of global governance emerging in response to the political and legal struggle over the growing trend of supplying urban drinking water[9] on a commercial, for-profit basis, often by multinational corporations.[10] The main goal is to lay out the findings of recent empirical evidence. The research project is only mid-way through the collection of evidence,[11] and the theoretical implications of this evidence will be confined to a brief speculative survey of possible directions in the conclusion. At the outset, though, I do wish to sketch what might be called a 'motivating context' that will help orient the reader to the purpose of laying out the later empirical detail.

The emerging patterns of global governance discussed in Parts II and III are constructed by conflicts endemic to what John Ruggie refers to as the process of embedding liberalism. In a recent article extending his earlier work on embedded liberalism to a global level, Ruggie reiterated the ongoing

[8] Global Water Scoping Process, Survey Questionnaire, December 2003.

[9] The project limits do not extend to rural water supply nor – except tangentially where they have special salience for end-delivery politics – to the larger terrain of water resources.

[10] In all the case studies, the commercial basis for water provision (i.e. its commodification) rather than the public or private character of the provider is what catalyses challenge and resistance. The difference between public and private providers will not be explored in detail in this paper: suffice to say that tentative early findings suggest that private operators are more adversarial and more secretive, and more willing to deprive people of water altogether than public operators, while public operator strategies for warding off challenge are more likely to include inertia and clientilism.

[11] Thus far, my research has focused on both the international level and on three national-comparative case studies carried out in South Africa, Chile and New Zealand. Three more case studies (Bolivia, Argentina and France) will follow, as well as a more systematic survey of trends at the international level. The case studies for the overall research project were selected to vary along a number of different dimensions that explore a cross-section of possible governance contexts. They all involve one or more of the three largest multinational water companies. They include both developing countries and OECD countries (Argentina, Boliva, Chile, France, New Zealand, South Africa), and a full range of different legal structures (one concession, two management contracts, two privatisations, one public-private partnership). I may also conduct a desk study of the recent US experience of private sector delivery of water by foreign multinationals in Stockton, California, Atlanta and New Orleans.

relevance of his original definition of embedded liberalism. That is, he views the politics of global governance today as focused on piecing together "a grand social bargain whereby all sectors of society agree to open markets…but also to contain and share the social adjustment costs that open markets inevitably produce".[12] The substantive issues he identifies – the provision of a social safety net, wage and employment levels, identity, and accountability – are all issues powerfully catalysed by the provision of water as a basic good on a market basis by foreign providers. And the oft-repeated trope of the global debate over this issues – 'is water a human right or a commodity?' – can be elaborated along different dimensions with respect to each of these four important substantive issues. But although the opposition, or purported opposition, between human right and commodity will play an important background structuring role in my presentation of the issues, I seek primarily to add a second dimension to Ruggie's more substantive embeddedness.

My goal here will be to foreground the extent to which the field of global water policy, such as it exists, is becoming *institutionally and procedurally* embedded. The importance of this is largely captured by the notion of routinisation. Substantive embedding is important because it effects a compromise between winners and losers. Such compromises are necessary preconditions for actors to move forward through 'high politics' to a more incremental series of adjustments in solving the problems that generate the conflicts. But the *means* of thus moving forward is made possible by routinisation of procedures and institutional interactions. In some of the bitter conflicts that have happened in recent years over the privatization of water services, severe stand-still or counter-productive policy seesaws have arguably been the main outcome, at least in terms of the narrow but vital goal of getting clean affordable water through the taps to people.[13] Routinisation is important because it builds bridges between 'regulatory space' and 'citizen space'. It stabilises expectations and provides limited predictability, ideally enough to

[12] John Ruggie, 'Taking Embedded Liberalism Global: The Corporate Connection', in *Taming Globalization: Frontiers of Governance,* ed. David Held and Mathias Koenig-Archibugi (Cambridge: Polity Press, 2003), p.1.
[13] Manila, Djakarta, Cochabamba.

establish a basis for ongoing engagement between actors with diametrically opposed views of how to proceed.

The above echoes familiar arguments in favour of the rule of law, and that is no accident. For both administrative law, and the more capacious term 'governance'[14] are in a sense shorthand for the repertoires, strategies and techniques that can effect the kind of routinisation I am envisaging. But I want to emphasise the substantive political stakes constantly haunting routinisation, in ways that discusssions of governance all too often mute. A list of the functions or values served by expanded conceptions of administrative law and governance can sound reassuringly neutral: "accountability, assurance of legality, participation by affected interests, transparency, informed and considered decision-making, responsiveness to affected interests and values in the exercise of administrative discretion, and providing incentives for superior performance in achieving relevant societal objectives".[15] But while some consensus might exist that these values facilitate a collaborative approach to problem-solving in the global arena, the proffered *solutions* to the problems at hand will almost always reflect deep interpretative divisions regarding the practical and substantive implications of these malleable concepts.

In the current global arena, debates about governance are increasingly proxy for debates on the appropriate limits of market capitalism. Alexander Somek's colourful denotation of "modern administrative law" ("the law of bureaucrats with an entrepreneurial kick"[16]) is a nod to the ideological inflection of the topic. This is especially true in the case of water services. Thus we are reconfronted –

[14] I am using governance and administrative law roughly interchangeably in this paper, combining Carol Harlow's observation that modern administrative law's most salient focus is not the single act of law-application anymore but the more systemic "general regulation of issues such as market failure and the balancing of risk" with Christian Joerges assertion that 'good governance' is more apt than 'administration' in situations where there is effectively no hierarchical control – as there is not in the global setting. See Harlow, "European Administrative Law and the Global Challenge" in Craig and de Burca (eds), *The Evolution of EU Law* (OUP 1999), p.273 and Christian JOerges, *Good Governance in Europe's Integrated Market*.

[15] Kingsbury, Stewart and Krisch, "Administrative Law and Global Governance: Research Project Outline", p.21

[16] Somek, "On Delegation", (2003) 23 OJLS 703, p.703.

albeit directly – with the substantive political dimensions of global water governance is twofold. Why emphasise this? First, because it helps retain an understanding of routinisation not just as a technocratic exercise in problem-solving at the margins, but as a political process that selectively opens space for some to participate in setting the basic rules and others not to. Understanding the routines of governance in a political way alerts us to both its potential to effect *structural* change,[17] and the fact that it can be effected by multiple strategies. As already indicated, the most significant cleavage in this sector is between a view of access to water as a fundamental human right and a view that water, at least in its anthropic cycle, is little different from ordinary commercial services. But a rich hybrid of strategies are currently employed in pursuit of one or other of these views, and consumer rights can be as useful to the human rights activists as human rights can be to the corporations.

The second payoff of insisting on the political stakes in routinisation goes in the opposite direction: it reminds us of the *limits* of routinisation. Procedural and institutional embedment is not exhausted by the notion of routinisation, but outright disruption and unpatterned conflict is also important. Routinisation defines itself against the stakes articulated by disruptive protest, and the global water field is marked by sustained social protest in many (though importantly not all) of its sites.[18] In comparison, say, to the new forms of governance that Charles Sabel taxonomies in respect of European social policy formation,[19] private sector participation in water provision is much more like a "formative episode of

[17] The way routinisation happens, the detail of its repertoires, strategies and techniques, has a significant bearing on the *future* dynamics of substantive embedding. Classical administrative law, with its focus on restraining and reviewing, provides a forum for adjusting classic tensions between individual rights and systemic efficiency, but it tends to do so at the margins only, leaving relatively undisturbed the structural distribution of power and resources in a particular sector. More broadly conceived conceptions of administrative law and governance may well be more likely to influence such structural distributions.

[18] A recent survey by the Interamerican Development Bank identifies, for almost half those surveyed, social resistance as either a critical issue or one that is both significant and hard-to-solve: "Obstacles and Constraints for Increasing Investment in the Waste and Sanitation Sector in Latin America and the Caribbean", Survey, IADB, November 2003, available on IADB web page.

[19] Charles Sabel, "Networked Governance and Pragmatic Constitutionalism: The New Transformation of Europe".

the [global] welfare state, where social divisions and ideological clashes" dominate.[20] The current flux makes it important to assess the emerging patterns not only of established regulatory frameworks but also of challenges to those frameworks by activists.

I believe that emphasising the aspect of procedural institutional embedding of global liberalism makes it possible to understand the emerging patterns of global governance in water as part of a skeletal architecture of a global welfarism. The substantive outlines of this aim to link trade and aid to provide for some minimal redistribution in favour of social stabilisation in developing countries. But the procedural institutional outlines are my main concern. In Part I, I survey the building blocks of what I call global water welfarism in three dimensions: fiscal, administrative and ideological. In Part II, I explore contextual variations across two of the case studies so far conducted: South Africa and New Zealand.

My eventual aim is to build towards some generalisations about the institutional dynamics of global water governance. But in large part, the emerging patterns so far documented are driven not by the top-down imperatives of the nascent global regime, but by the unpredictable interactions of local context with that regime. It might become possible, at a later stage of the research and analysis, to relate this contextual variation to one coherent set of understandings of how global water welfarism works. I am sceptical, though, and I suspect it would necessitate a projection, probably a normatively saturated one, of what such a 'total regime' *ought* to look like. I do not aim to attempt such a task in this paper, but since, as we shall see, institutional-procedural embedding is still so dependent on the detail of national traditions, that a modest sketch of the global context is necessary in order to set the stage for contrasting the different case studies. In other words, I seek not at this stage to provide a definitive and

[20] Sabel, p.6. The dominance of French and British companies in the sector arguably echoes the older and equally formative episode of colonisation.

coherent set of understandings of the dynamics of global water welfarism, but rather to point out the trends that are cumulatively constructing a global field where, very gradually, a bounded set of actors will repeatedly interact in relation to a finite universe of institutions, procedures and routines.

Part II: Global Water Welfarism

This section aims to sketch for the reader the emerging skeletal architecture that is being constructed at the global level by key actors involved in funding, managing, regulating and consuming water services. I contend that this architecture supports a policy of corporate welfarism in water provision at the global level. The reference to welfarism is intended neutrally, simply to convey the fact that these developments at a global level are portrayed by their proponents as policies that will, amongst other goals, alleviate the plight of those who lack access to water or the means to pay for such access. The likelihood of succeeding in this goal, or even the sincerity of the motivation, is bitterly contested by those who challenge the trajectory of commodification of water.

The debate can be seen as an echo of older debates on the question of whether national welfare state policies established in post-war industrial democracies served merely to legitimate the basic structures and results of capitalism, or to genuinely modulate it as a form of political economy. Placing my sketch of the global water sector in this historical context serves another purpose too: it suggests an implicit analogy between what is happening in a particular sectoral space across state boundaries, and the growth of state institutions at national level. I do not wish to overstate this analogy, and I will take care to point out the most important differences as I go,[21] but I believe this serves a useful purpose of at least temporarily anchoring the readers' institutional imagination.

[21] The most important difference of all is that none of the institutional developments I trace are anchored in structures of representation and accountability that even mildly resemble those that characterise state institutions. This paper makes no evaluation of such issues: at this stage it is confined to mapping, and the analogy with state institutions is intended in a functional way only.

In short form, global water welfarism entails a vision of a regime where public aid supplements the private investment of multinational corporations to solve the social and environmental problems of global water provision, catalysed by a hopeful mix of corporate social responsibility and the probing eye of government and civil society monitors. In what follows, I elaborate this vision by reference to three dimensions: the fiscal capacity, the administrative capacity and the ideological character of this emerging 'regulatory space'. The 'welfare goal' that animates the field of global water welfarism can be envisaged succinctly by reference to the water-related Millenium Development Goals that aim to halve the numbers of people in the world who lack clean drinking water (1.5 billion) or sewage (2.4 billion) by 2015.[22]

The **fiscal capacity** of global water welfarism is provided by an intermeshing of private investment capital and official development aid (ODA). Multilateral development banks have for some time imposed loan conditionalities that require private sector participation in the water sector, and this continues to be the case. [23] Further, since 1999, when the high 1990s level of private sector investment in the water sector mentioned in the introduction began to fall,[24] there has been a trend towards *mixing* aid with investment. This mixing underpins a particular model which is widely disseminated: public-private partnerships where all partners share the goal of efficiently delivered basic goods and services

[22] While this statistic dominates the debate on global water issues, there are of course innumerable other factors driving the emergence of structural reform and the rise of private sector involvement in water service provision worldwide. The most important of these in the developed world include aging infrastructure and heightened environmental standards, while in developing countries, the gap in access just quantified is the major catalyst, made significantly worse by rapidly increasing rates of urbanisation (cite stats from my environmental talk slides).

[23] In fiscal year 2002 the World Bank lent $546 million for water sector projects generally. This increased to $1.4 billion in fiscal year 2003, and in 2004 the board of the World Bank decided to increase its focus upon water *infrastructure* and provide an annual US$4 billion for that purpose. Although the Bank has occasionally stated that it does not make its water infrastructure loans conditional on privatization, in the pending pipeline of proposed loans, there are 22 separate loans, totalling $1.458 billion, that contain privatization and/or cost-recovery policies: Public Citizen, *World Bank Watch*, January 2003 Vol 1, received directly by email, but available at www.wateractivist.org.

[24] David Hall, "Water Multinationals in Retreat", Public Services International Research Unit, January 2003, www.psiru.org. The causes of the decline are not yet well-established, but the political risks engendered by the widespread social protests against private sector participation in water are thought by many to be an important factor.

bolstered by a subsidy framework that will facilitate universal or affordable access. [25] This has been specifically endorsed in the water sector by the World Bank,[26] and efforts to develop a regional lending facility in Africa[27] along similar lines are presently ongoing.

Such fiscal arrangements have been labelled by civil society critics as "a franchising model for global water corporations".[28] They certainly leave open the question of what kind of organisations will provide the **administrative capacity** for actually delivering water services, and this is obviously crucial for developing countries with limited resources. In water, direct provision via multinationals is an important carrier of such administrative and technical capacity. The global water market is growing[29] and is dominated by three firms in particular from France and Britain: Ondeo, Veolia and Thames Water.[30] Furthermore, efforts are increasingly being made collectively by those with the administrative capacity to deliver water services to shape the environment in which they operate in several dimensions: standard-setting, policy, advocacy and implementation. France spearheaded the formation by the ISO[31] of a new Technical Committee on Water and Wastewater Standards in late 2001, with the objective of developing standards on service activities relating to drinking water supply and sewerage. Many major companies in water (including construction and engineering as well as water service

[25] For example, aid pays for subsidies (sometimes even bypassing national governments), national government funds the upfront capital costs upfront and private capital funds operating costs and ongoing investments.

[26] Following their decision to develop the recommendations (check this) of the influential Camdessus Panel on Financing Water Infrastructure, headed by the previous head of the IMF, that reported in 2003.

[27] Africa Water Facility, shortly to be established under the NEPAD framework

[28] Karl Flecker, Polaris Institute, Canada, quoted in "Civil Society Delegations Break from World Water Council Consensus", March 20 2003, http://cupe.ca/www/news/3827, last accessed 6 November 2003,

[29] See *Water Utilities: Global Industry Guide* (Datamonitor 2003)

[30] Ondeo (previously Suez and before that Lyonnaise des Eaux) serves 110 million people in more than 100 countries. Veolia (previously Vivendi Environnment and before that Generale des Eaux) serves 96.5 million people in 90 countries. Thames Water serves 22 million people.Figures, tables, from Pacific Institute for Suez and Vivendi and from the water page for Thames. Sources: Gleick, Wolff, Chalecki and Reyes, *The New Economy of Water*, Pacific Institute, 2002, pp.24-25 and Yaron, "The Final Frontier", Polaris Institute, 2000.

[31] The ISO (International Organisation for Standards) is a private standard-setting organization based in Geneva. It is a federation of national standards bodies (some governmental, some private-sector business associations) from more than 100 nations. ISO is often criticised for its skew towards industry: its procedures preserve a large formal role for industry in standards development, and industry representatives dominate its more than 2000 technical working groups. Technical Committee 224 is still in the very early stages of defining its scope of work and its long-term survival or salience is not yet clear.

delivery and management) are members of the World Water Council (the WWC), as are the major multilateral development banks. The WWC, legally incorporated in France as a UNESCO-affiliated NGO, describes itself as "the International water policy thinktank dedicated to strengthening the world water movement for an improved management of the world's water". It functions as a forum for policy and advocacy and hosts a tri-annual World Water Forum, until recently perhaps the only non-UN global forum to include a formal Ministerial.[32] Finally, the private sector has also taken a lead in fostering a more implementation-oriented kind support for building administrative capacity, via technical assistance and capacity building. The Global Water Partnership, a network that complements the work of the WWC, funds a wide range of water-related activities globally, at twelve regional levels, and develops and promotes management norms and principles applicable at practical implementation level.[33]

Ideologically, the activities of this web of primarily non-governmental actors are underpinned by familiar neo-liberal views regarding the merits of market efficiency, widely promoted even in a sector so unpromising as water services, with their characteristics of natural monopoly and very high sunk costs. But it is important to note the tempering of 'raw' market reforms with a concern for poverty reduction goals: this is visible both at the general level in development policy[34] and in a range of water-specific documentation.[35] This emergent 'social face' of the neoliberal consensus poses a growing dilemma, perhaps more strategic than philosophical, to opponents and activists. Private sector provision of water services has become an increasingly contentious aspect of the World Water Forum and disruptive civil society protests at the second in 2000 resulted in the inclusion of formal NGO panels at the third in

[32] The World Summit on Information Institute recently did this too.

[33] Toolkit for Integrated Water Resources Management

[34] World Bank 2004 World Development Report: *Making Services Work for Poor People*. See also Kanishka Jayasuriya, "Workfare for the Global Poor: Anti Politics and the New Governance", Asia Research Centre, Murdoch University, Australia, Working Paper No. 8, September 2003.

[35] Examples can be drawn from high-level reports like that of the Camdessus Panel on Financing Water Infrastructure as well as contractual documentation such as concession agreements.

2003.[36] But the dichotomous cleavage in water access politics (whether the provision of safe drinking water should be treated as a commercial service to be purchased or as a human right) that energises the political divide does not sit comfortably with the welfarism increasingly inflecting the rationale of global water policy.

The reason for this is that the notion that human rights and commercial services are inherent opposites is a perspective that dissolves from a point of view that considers the ideological and practical effects of human rights strategies as embedding more deeply the structure of a global market. Take some remarks in 2000 made by Paul Hunt, Rapporteur of the UN ESCR Committee which give to human rights the task of redistributive politics characteristic of national welfare states but transposed now to a global level:

> [T]he Covenant [for Economic, Social and Cultural Rights] - and other international human rights treaties - can be used as a shield to protect the state's poorest citizens from the policies of powerful, global non-state actors … NHRIs [National Human Rights Institutions] can show how the Treasury's negotiators can use the Covenant in negotiations with [International Financial Institutions]. They might offer human rights training for the Treasury's negotiators..[Moreover] just as the Covenant can be used to tackle unfair inequalities within a state, so it can help to address the grossly uneven distribution of power between the economic north and the economic south."

This sounds admirably progressive, but his concluding words are prophetic:

> Economic re-structuring still occurs. But it does mean that the reforms are introduced in ways which minimise avoidable suffering, for instance by the introduction of safety nets for vulnerable groups – *thereby contributing to the reform's longterm sustainability* (emphasis added).

The UN Committee on Economic, Social and Cultural Rights has in fact recently asserted the existence of a human right to water.[37] This attempt to formalise and to specify in more detail what has until now

[36] Levels of resistance to private sector participation, can be mapped along four different trajectories. 'Threatening rebels' (eg anti-globalization activists) use the human rights challenge the most, 'cooperative allies' (e.g. often the environmental groups) make a public good argument focused on the need to internalise ecological externalities. A public good approach, with more emphasis on equity than ecology, is also promoted by 'citizens' agora' groups (e.g. reformist NGOS like Wateraid). Those affiliated with public sector unions use the language of public good mainly to oppose privatization per se.
[37] General Comment No 15 (2002), The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), 26 November 2002.

been more or less a rhetorical claim points towards ways in which the dichotomy can also be challenged from a more empirical perspective.[38] As I have argued in more detail elsewhere,[39] the practical implementation of such a right entails a web of regulatory entitlements and obligations that significantly blur the salience of the distinction between water as human right or as commodity. Socio-economic rights are in practice implemented by regulatory norms that protect consumer (public) interests by establishing minimum standards of provision. Of course humans-rights motivated regulatory norms may and often will pull in different directions from the governance norms advocated by the like of the Global Water Partnership.[40] But since the regulatory dimension of access to water, whether as a human right *or* as a commercial service, has at present almost no operative institutional presence[41] at the global level, it is only at the level of national case studies that one can map more precisely the implications of this ideological ambiguity of global water welfarism.

Part II: From global to national levels

The three dimensions of global water welfarism discussed in Part I can be related to each other by projecting them, dangerously but in the short term helpful analytically, to a 'shadow water state' at the global level. In this ghostly image, legislative potential haunts the World Water Council, the UN Committee on Economic and Social Rights and ISO Technical Committee 224 on Water and Wastewater. Loan conditionalities from the multilateral development banks intersect with the activities of the Global Water Partnership to flesh out these developments in executive fashion while bilateral investment treaties (and possibly even GATS) adjudicate the inevitable conflicts. While each of these tendencies is real, even on a hypothetically extended basis their cumulative effect is insufficient support

[38] I leave aside in this paper any judgment (essentially a question of political values) on whether or not the reduction of suffering for those without water is or is not outweighed by the support it also provides for stabilising a global field of market-based provision.

[39] 'The Bitter Significance of Administrative Responsibility', Working Paper No. 1, available on request.

[40] Global Water Partnership, *Effective Water Governance*, 2002.

[41] A melange of recent (all still nascent) initiatives show that this situation is rapidly changing. The salience of this, as well as a footnoted summary of the most important, is noted briefly in the conclusion.

for the actual execution and implementation of water service delivery. In practice, emergent global water welfarism piggybacks significantly on national-level rule structures.

Institutions and practices at local and national levels, embedded in their own histories, intersect with global water welfarism in varying ways. In this part of the paper, I review trends from two of the three national case studies so far undertaken: those in South Africa and New Zealand. I will show how in each of these the interaction between legislative reform, regulatory experimentation, legal dispute resolution and social movement activism constitute distinct nodes of the global water policy network.

The most important filter of global welfare welfarism is the legislative and regulatory framework established at national (and sometimes provincial level).[42] It is useful to contrast political and transactional frameworks for the provision of water services. Transactional frameworks minimise political discretion especially over tariff-setting processes, and emphasise protection against risk (primarily for those funding infrastructure operation and investment), value for money, affordability and open procurement procedures. Political frameworks preserve political discretion on key issues such as tariffs and prioritise mechanisms for consultation with labour and consumers over the structure of water services. Political and transactional frameworks are not incompatible alternatives but their co-existence tends to generate tensions between the competing policy goals of equity and efficiency implicit in the 'human right versus commodity' dichotomy. Political and transactional frameworks provide different degrees of opportunity and responsiveness for the key actors in the water policy networks.

[42] The IADB survey of November 2003 identifies tariff levels and flawed regulatory frameworks as most important barriers to increased investment in water provision: "Survey: Obstacles and Constraints for Increasing Investment in the Waste and Sanitation Sector in Latin America and the Caribbean", IADB, November 2003. Both issues are still very much within the domain of the national state, notwithstanding the emergent global regime. The World Bank is increasingly focusing its reform efforts on legislative frameworks and it is notable that many specialised 'Water Acts' have recently been passed by developing country governments.

But there is no simple correlation either between political regulatory frameworks and the use of human rights strategies, or between transactional frameworks and commercial strategies. Rather, activists challenge commodification by using – both legally and politically – human rights, consumer rights, participatory management and budgeting, and a range of hybrid amalgams that in different ways lay claim to treating water as a public good. And while commercial providers of water, especially but not only corporate ones, are indeed more likely to use 'commercial' strategies (e.g. investment treaties, property rights, competition law), these intersect with the first set in ways that lead to unpredictable results, as the New Zealand case study will demonstrate.

Furthermore, the evolution of legislative and regulatory frameworks at national level is periodically disrupted – at least in South Africa and New Zealand – by social protest and civil society resistance. The emergent shape of the field is as much a product of this disruption and protest as of repeated political negotiations or legal strategies. While decisive conclusions cannot yet be made given the stage at which the research is at, each case study narrative will highlight two dimensions: the way in which the legislative and regulatory framework for water services mediates tensions between water as a human right and as a commodity, and the range and type of challenges made by ordinary citizens. I will seek to highlight bridges between regulatory and citizen space: that is, mechanisms that respond to disruption and protest in ways that routinise their impact while remaining responsive to the concerns expressed by the protestors. The links with the architecture of global water welfarism are rarely direct or formal, though I will mark them where they are so. But the influence of that regime nonetheless will, I hope, become evident, albeit inflected by the different histories and traditions of each country.

II.1. South Africa

South Africa is a developing country possessing a relatively high level of state capacity and fiscal autonomy, making it an interesting case for exploring the relative salience of national and international dynamics in its governance of water services. Fiscally, it is much less dependent on foreign aid than many other developing countries, having only taken out one World Bank loan since its transition to democracy in 1994. Nonetheless, in the immediate aftermath of winning power, the ANC government substituted their electoral platform, known as the Reconstruction and Development Programme (RDP) with an alternative strategy they called GEAR – the Growth, Employment and Redistribution Strategy. RDP was a state-driven programme of redistribution in the social democratic mould, fed by extensive local consultation and participation, while GEAR was a market-led strategy that prioritises economic growth and provides redistribution later and residually. This shift, which one commentator has labelled the 'great U-turn',[43] was significantly influenced by a deliberative process in which international capital interests played a critical role.[44]

The shift from RDP to GEAR had direct implications for water services policy. It included a policy commitment by the government to keep the non-tradable input costs of economic production for industrial consumers (electricity and water primarily) as low as feasible for the purpose of attracting foreign investment. At the same time, GEAR also constrained government borrowing, limiting intergovernmental transfers, crucial for local government delivery of water services.[45] These pressures fed directly into the new democratic government's legislative framework for water services, which faced the immense challenge posed by a mere 34% of its citizens having access to piped water. The result is a

[43] Allister Sparks, 'The Great U-Turn', *Beyond the Miracle* (Jonathan Ball Publishers 2003).

[44] A series of meetings in Europe in the late 1980s between ANC economists and the apartheid government culminated in the 1989 Lausanne Colloquium where a large number of foreign economists were also present; in 1992 Mandela attended the World Economic Forum in Davos and later that year the Mont Fleur colloquia convinced Trevor Manuel, future Finance Minister, to support a market-led model. 6 months before the ANC came to power, Manuel sought a loan commitment from the IMF on that basis: Sparks 2003.

[45] The Department of Finance in real terms cut intergovernmental grants which pay for municipal service subsidies by 85 percent between 1991 and 1997: Patrick Bond 1998: 4, citing the Financial and Fiscal Commission (1997:18).

legislative framework that one interviewee characterised as 'schizophrenic',[46] reflecting an underlying legitimation crisis poignantly illustrated by the jarring transition in this 1996 speech by the Mayor of Johannesburg:

> Transformation has a price. Our country has been liberated into an era governed by the fundamental principles of non-racism, non-sexism and justice for all. But please understand the particular conditions of government which require resources to give people the basic services which are their fundamental right as citizens of this country... Businessmen from the US are used to fast services. It takes us six months to find out who owns a piece of land. There are danger signals when our councillors and administrators do not meet the investors' aspirations. Some administrator tells the investor to go to such a room and there they find a woman painting their nails. This is the way to rule ourselves out of international global competition.[47]

South Africa water welfarism seesaws in similar fashion between the human rights dimension and the needs of investors, as the following compressed narrative will convey.

On the one hand, South Africa, almost alone in the world,[48] has made a formal constitutional commitment to a human right to water.[49] And this legal commitment is backed by a genuine political will to effect major redistributive change in this crucial area of basic socio-economic need.[50] On the other hand, over the decade 1994-2004, in tandem with the more general shift from RDP to GEAR, three principal trends can be observed: first, the overlay of an initially political framework with a transactional one; secondly, a distinct muting of an initial preference for public sector provision, and thirdly, marked decentralisation to municipal governments mostly stretched very tight for resources and expertise. In what follows I make a limited commentary on the main trends in regulatory oversight, the extent of private sector participation, legislation and policy, focusing on punctuated change across time.

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[46] Karin Pearce, Executive Director of MIIU, Interview.

[47] Tokyo Sexwale, Mayor of Gauteng Province, September 1996, in a speech relaunching the Masakhane campaign.

[48] Uganda makes a constitutional commitment to a *right* to water, and Gambia, Ethiopa and Zambia include constitutional aspirations endeavouring to provide clean safe water.

[49] Section 27 of the 1996 Constitution reads, as relevant: 1) Everyone has the right to have access ... b) *sufficient food and water;* (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

[50] In the first 10 years the percentage of the population with access to water increased from 34% to more than 76%, though criticisms have been made of both the sustainability and the quality of the access provided (Wellman 1999).

Regulatory oversight

DWAF CWSS Division[51]		MIIU	Dept of Provincial and Local Govt		Treasury
1994	1997	1998	2000[52]	2001	2003

Choosing explicitly from the outset to avoid the creation of an independent regulatory agency,[53] regulatory oversight was initially located in a Community Water Supply and Sanitation division of the Department of Water Affairs that, in tune with the social democratic spirit of RDP, also worked directly with communities in a participatory fashion to provide water supply. As the U-turn began to become operative, a unique institution for providing technical support to local government gained ascendancy. The Municipal Infrastructure Investment Unit ("the MIIU") deserves further comment, since it illustrates well the interpenetration of national and international personnel and knowledge. The MIIU is a government department structured as a non-profit company, with the objective of facilitating private sector investment in infrastructure, including water and sanitation. It reports to the Department of Provincial and Local Government and relies on its accounting and employment systems, but it operates at arms-length from that department with considerably more flexibility and autonomy as a result of its company structure.

While MIIU has no formal political authority, its capacity to provide both funding and expertise means that it has a powerful influence in shaping the terms of any deal for which it provides support. That influence promotes, broadly speaking, the models, techniques and norms promoted by the World

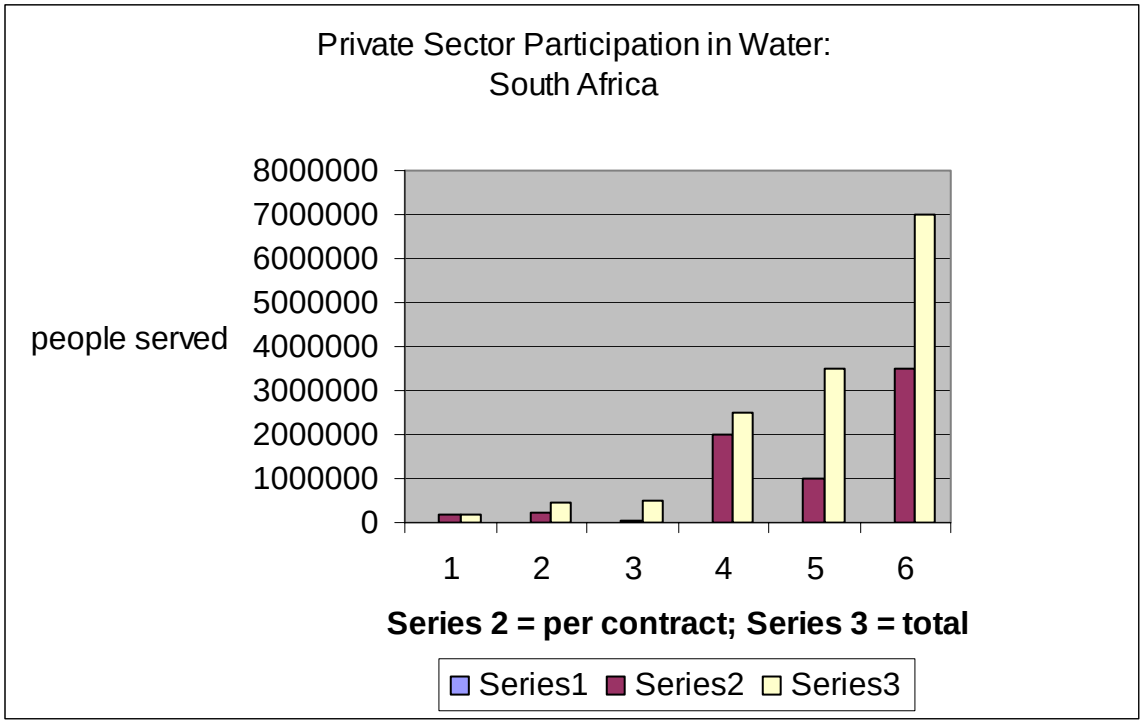
[51] Department of Water Affairs and Forestry, Community Water and Sanitation Division.
[52] In 2000 fully democratic local government structures came into power for the first time, and was given responsibility for infrastructure and basic services in water. The re-demarcated jurisdictions merge previously racially and economically divided areas; at the same time budgetary caps on local government have been imposed.
[53] Abri Vermuelen, Department of Water Affairs and Forestry, Interview.

Water Council and the Global Water Partnership.[54] USAID provides considerable funding to MIIU to support expatriate advisors who work locally and report through the MIIU governance structures. These advisors have facilitated extensive knowledge transfer about approaches to water services from all over the world.[55] The MIIU's policy-based influence has recently been supplemented by greater legal control given to the Treasury under the latest Municipal Financement Management legislation.

The above trend in regulatory oversight from political to transactional has largely tracked a steady increase in the extent of PSP, at least as measured by population coverage:

[54] This is despite the fact that there is no significant personnel *overlap* between the South African institutions and the global ones. But there is much more consensus on the models, techniques and norms that support commodified delivery of water services than there is on the desirable alternatives.

[55] Though the Executive Director stressed that "USAID doesn't have any say over what we do, in the South African context that's probably fairly different [from other developing countries]….there's very very little leverage over the decisions of government here" (Karin Pearce Interview).



1. 1992: 25 yrs concession to Ondeo for Queenstown water
2. 1994: 10 yrs lease to Ondeo for Stutterheim water
3. 1995: 10 yrs lease to Ondeo for Nkonkobe water[56]
4. 1997: 2-5 yrs management contracts for four BOTT consortia in four provinces for rural water[57]
5. 1999: 2 x 30 yrs concessions[58] to Saur and Biwater for Dolphin Coast and Nelspruit Water
   1 x 20 yr concession to Veolia for Durban wastewater treatment plant
6. 2001: 5 yrs management contract to Ondeo for Johannesburg water[59]

Total PSP coverage by 2003 = 7 million (roughly 15%) of total population

But this upward trend is complicated by the fact that the depth and breadth of legal delegation the government has been willing to commit to private companies has actually seesawed abruptly. The

[56] These three apartheid era contracts – now regarded as poor models – were negotiated after a series of visits by World Bank officials and Ondeo representatives and a seminar on private sector participation hosted by the Development Bank of Southern Africa. The process was secretive, unstructured, based on poor data, excluded stakeholders and was almost entirely unregulated. Monitoring responsibility fell entirely on local authorities with strikingly weak technical capacity

[57] The four consortia for the BOTT scheme, which aimed to assist local government in four provinces in building infrastructure and delivering water and sanitation, were each led by a subsidiary of a global corporation. Direct service delivery occurred in an unregulated setting without risk-sharing. The private sector was paid directly by the South African government and indirectly by US$115 of aid from the EU over 4 years. A large NGO - the Mvula Trust carried out community capacity-building activities in partnership with the consortia.

[58] The funding for these concessions mixed international aid, government funds and private capital: e.g. Nelspruit concession was financed in substantial measure by 150 million rand over 7 years from the Development Bank of Southern Africa (DBSA), who also provided 45% of the finance for the Veolia concession for the Durban waste treatment plant.

[59] All the global water companies listed on this line (who are the lead but not necessarily partners in consortia including local SA companies) are members of the World Water Council: The Water Observatory, *A Fact Sheet on Water Sector Privatization*, Institute for Trade and Agriculture Policy IATP Water Note #3, available at http://cupe.ca/www/news/3827.

broader political costs of each series of long-term commitments result in a pull-back to more cautious short-term experiments.

In similar fashion, the legislative and policy framework has also seesawed significantly. Over time, however, a rough pattern of 'action and reaction' seems to be resulting in a gradual increase in the transactional focus at the hard law level, while tempering it politically with soft law or policy initiatives.

Legislation-Policy Interaction

Sect 27 Constitution	Water Services Act	Municipal Services Act		Municipal Financial Management Act	
1994	1997	1998	2000	2001	2003
	Water Policy Preamble	Framework Agreement for Restructuring of Municipal Services		Free Basic Water Policy	Strategic Framework Credit Control Code

The starting point is the unusually eloquent preamble to the country's first major policy paper on water, which amplifies the constitutional commitment to the full panoply of commitments that a human right to water might entail:

> The dictionary describes water as colourless, tasteless and odourless - its most important property being its ability to dissolve other substances. We in South Africa do not see water that way. For us water is a basic human right, water is the origin of all things - the giver of life. We want the water of this country to flow out into a network - reaching every individual - saying: here is this water, for you. Take it; cherish it as affirming your human dignity; nourish your humanity. With water we will wash away the past, we will from now on ever be bounded by the blessing of water.[60]

The Water Services Act that later fleshed out the 1997 Policy Paper enacted, somewhat less poetically, an initial framework of political regulation that tried to temper distributive externalities and ensure ongoing democratic input into decisions about water service delivery. [61]

[60] White Paper on Water Policy 1997.

[61] In the face of strong resistance from labour to private sector involvement, the Act expressed a legislative preference for public provision, and gave the national government a residual power to cap profits from water services: Water Services Act 1997, s10(2)(b).

The subsequent waxing star of the MIIU and its promotion of the Nelspruit concession provoked considerable conflict with organised labour[62] that was temporarily resolved by the signing of a "Framework Agreement for the Restructuring of Municipal Service Provision".[63] But this was superseded in fairly short order by the Municipal Systems Act 2000, again an uneasy compromise.[64] Decentralization policies have deflected the working through of this uneasy compromise to ill-equipped local government structures, intensifying political conflict. The expansion of PSP has continued in the face of this conflict, albeit on restricted terms,[65] but importantly, the government did establish in 2001 a Free Basic Water Policy establishing a universal right to access 25 litres of water per person per day within 200m of their dwelling.

The overall result of this can be summed up as a hard law framework that is increasingly transactional and relatively neutral to the identity of the provider, combined with policy-based, non-statutory measures to legitimate this approach. The latter do not reinscribe opportunities for political participation and influence into the regulatory framework, but rather ameliorate its harshest side-effects. But arguably South Africa's passionate commitment to a human rights approach has developed over time, in the context of the imperatives of transactional risk and commercial service delivery that

[62] Labour charged that the preference for public provision expressed by the Water Services Act 1997 had not been given adequate attention. Their objections delayed contract negotiations by two years.

[63] This re-affirmed a strong preference for public provision, as well as a sectoral forum which labour hoped would monitor compliance with the Framework Agreement: Veotte interview.

[64] This act was less clearly in favour of public provision as a first option, and clarified that water service providers (including private companies) could be directly involved in service payment collection. The apparent illegality of this under prior legislation had led to the withdrawal of private lenders and the substitution of DBSA funding in the Nelspruit concession: Ross Kriel, "Facing Local Government Post-Demarcation: Impact of the Regulatory Framework on the Private Sector – Case Studies and Analysis", paper prepared for the Development Bank of Southern Africa Symposium on Risk Management, 1 September 2003, p.3. To labour, the legislation gave elaborate formal procedural protections around the choice to involve PSP (s78), as well as the power for politicians to set tariffs in water services, and a credit control code that tempered the private sector's newly acquired power to collect payment directly (s94(1)(c).

[65] E.g. the 5 year management contract for Johannesburg Water and (not represented on the time line) a voluntary tri-sector partnership that Durban Metropolitan Water Services have been experimenting with over the last few years with Veolia (Vivendi) Water, with support and funding from the World Bank and the NGO Business Partners for Development. By virtue of the short length of the Johannesburg contract and the non-legal nature of the Durban partnership, both of these frameworks for private sector participation bypass the political regulation requirements of s78 Municipal Systems Act.

dominate the fiscal and administrative support for the emerging strategy of global water welfarism, into a type of soft consumerism. As the Executive Director of the MIIU comments:

> You've got to be able provide the free basic services, cut the damn thing off when the person's consumed that amount and be able to bill in a reliable way. [But] your credit control policy must include – as opposed to the hard-line 'forcing people' kind of approach – a customer relations function, a complaints centre, a mechanism of incentivising payment and that kind of thing. It's all about creating new systems, new management capacity and we're saying, really, that whilst you're doing that pay attention to *the human consumer issue stuff* because if you don't do that you've got very little chance of success.[66]

"Cutting the damn thing off" is precisely what inflames civil activism. In the rest of the discussion of the South African case, I outline the strategies and influence of social protest in relation to the trends summarised above.

In part, of course, it is protest that has brought the legislative and regulatory framework to its current uneasy mix of contradictory signals. Organised labour has played the most important role in tempering the transactional focus of that framework.[67] But consumer-based resistance in the townships and peri-urban areas to the *implementation* of this move towards greater cost-recovery and marketization in the delivery of water has important implications for the viability of the framework changes. Here there have long been severe problems of mass non-payment for services, the result of collective political action taken by township residents in protest against apartheid. Apartheid has ended, but now cost recovery principles applied to previously badly underserviced areas, even in diluted form, have raised tariffs very significantly from the low base flat rate that was charged (but not paid) under apartheid. Township residents continue to boycott payment, and in relation to water, have mixed marches, protests, payment boycotts, illegal reconnections, political education and test case constitutional litigation to disrupt the policies of the government.

[66] Note here the set of principles governing credit control articulated in the 2003 Strategic Framework (4.5.8), including communication, fair process, warnings, restriction rather than disconnection as a last resort and even, unusually in legislation, compassion.

[67] See footnotes 61,62,63.

A brief turn in a little more detail to one particular instance of these patterns, in the regional city of Durban illustrates the variety of strategies seeking to alter the terms of the social bargain fixed at legislative and regulatory level. These tend to co-exist in counterproductive parallel rather than interacting productively to build bridges between regulatory and citizen space. This is in essence because of a conflict between strategies that seek to build political agency and strategies that are aimed at embedding responsible consumer behaviour. At present, the former have more mass support, and undermine the goals sought by the latter. Consider the following schematic representation of activist strategies employed in relation to Durban Metro Water Services, a division of municipal government corporatised in 2000 and serving close to a million customers in a region with a complex political history that provides a rare counterweight, through Zulu tribal and Indian interests, to the dominance of the ANC in national politics. In a separate paper expanding on this,[68] I provide a breakdown of four different types of activist groups carrying out these strategies and link the different racial, geographic, age and status characteristics of each group to the type of strategies employed. Since the salience of this derives from details of local political history which will not be discussed in this paper, I have omitted the full key to the table: suffice to say that a web of overlapping practices cuts across all the groups. What interests me for present purposes are the relationships between the strategies and the resulting potential – if any – for their integration into the formal governance framework.

	Collective	*Individualistic*
Adversarial	*Test case litigation* *Marches, protests, illegal reconnections*	*Legal defence*
Cooperative	*Marches, protests* *Political education, building social movements and potentially political parties*	*Customer Service Agents/ Community Development Officers*

[68] "Unruly Consumers, Socio-Economic Human rights and 'Struggle Law", Working Paper No. 3 in progress.

Mass mobilisation strategies swing between cooperative peaceful modes and adversarial violent ones in a pattern one participant calls 'popcorn politics'.[69] Routinisation is gradually being established, but in the direction of creating political agency for pursuing (vaguely if at all specified) alternatives to capitalism. This rejects the government's current models altogether: the aim is to harness the current 'politics of sheer refusal'[70] into a more pro-active, mundane, sustainable political education that will create a sense of collective identity for those excluded not just from basic provision in water, but also in health, education and shelter.[71] Some strands of this activism seek to build an alternative political party, but whether or not the activists aspire to this level of representation, they mobilise around pragmatic service delivery issues such as service standards and the cost of water in order to build political agency against the more structural agenda of neoliberalism and privatisation.

This is in stark contrast to the young activists who work with 'consumer education' programmes run by Durban Metro Water Services in partnership with Vivendi (Veolia) Water, seeking to build social and political consensus around the direction of reform. Here the focus is on paying bills, managing debt schedules, water conservation techniques, the proper operation of sanitation systems and the like. The structural questions that are the concern of the more disruptive activists are part of the taken-for-granted background for this work. There has been a limited shift to a more politicised and less technical conception of these programmes. Those liaising between citizens and the two partner providers were initially known as 'Customer Service Agent' but in the second phase of the project were renamed 'Community Development Officers'. This reflects the early inefficacy of the technical, problem-solving approach, and the realization by the partners that the preconditions for securing consensus required a less instrumental approach to this mode of responding to affected interests and providing a voice for participation. More recent expansions of this effort to bridge regulatory and citizen space have

[69] Desai interview
[70] Pithouse interview
[71] Social Indaba, cross-sectoral forums and networking, including international connections and their impact.

contracted, interestingly, not with foreign multinationals but with a local South African firm (PSU) that has more experience of working with local township communities, and builds into its strategies some attention to structural issues (e.g. hiring only those in the local community who have been unemployed for a certain amount of time).

In tandem with these 'soft' approaches of two very different kinds, formal legal strategies also play two kinds of roles in the activism around water. The first, more procedural one, is a 'legal defence fund' that provides pro bono assistance for those involved in direct actions that often lead to arrest, eviction or assault. This is a strategy that legitimises, by reference to civil and political rights, the actions of activists. As one organiser said:

> There is this huge ideological project – the local press and the vast majority of academics are all saying 'there is one way of doing things, it's the way that competitive nations do things. We've all got to pull together, these [water activists] are messing it up for us, they're holding us back.'...Now getting a court case can really help with the ideological stuff – it helps show these people are not criminal, they are not lazy, [their actions] are actually in line with the values of the new society that was founded.[72]

Procedural legal defence, then, clears a space for political participation on the part of those marginalised by the changes in policy, not just by freeing activists physically to continue their political work, but also by countering tendencies to dismiss the activists as irresponsible hooligans. This is, indirectly, a way of keeping open the possibility of integrating the demands of the activists into the more routine negotiations over the terms of the legislative and regulatory framework.

Secondly, with a more substantive goal in mind, in the hope of enforcing access to water directly as a socio-economic right in itself, some constitutional litigation test litigation has been brought to challenge disconnection for non-payment of bills on the basis that it unconstitutionally denies access to sufficient water. The results are mixed and limited. In the two cases decided to date at lower court level, one held that disconnection was a prima facie breach of the constitutional right to water, placing a burden on the water provider to demonstrate that they had provided a panoply of due process rights before

[72] Pithouse, interview.

disconnecting.[73] The other case declined to grant any remedy, in part on a technical ground[74] but also (albeit indirectly) because the judge considered that the plaintiff's illegal reconnection to the system had deprived her of the benefit of the rights accorded by the Water Services Act.

The cumulative effect of the two cases is to provide important but purely procedural protection to citizens who pay what they can afford, and refrain from civil disobedience in their broader demands to the political decision-makers. The litigation has no effect on the principal issue that divides the stakeholders in the broader structural conflict: the justice or appropriateness of a cost-recovery approach to the delivery of water services.[75] It softens the impact of that policy approach, but in a way that accords more dignity to responsible consumers rather than giving more voice to political participants.

[73] *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625. In the instant case, no such demonstration (either of fair and equitable procedures, of reasonable notice of intent to disconnect, or of provision of an opportunity to make representations) had occurred, and reconnection was therefore ordered.

[74] The plaintiffs had neglected to plead the direct constitutional obligation and were relying on the Water Services Act whose regulations specifying the minimum amount of water to which each citizen has a right had not yet been enacted: *Manqele v Durban Transitional Metropolitan Council* 2002 (6) SA 423.

[75] There has in fact been some other litigation in relation to water with very interesting structural potential. In *Pretoria City Council v Walker* 1998 (2) SA 363, a group of white residents in Pretoria refused to pay their electricity and water bills after local government redemarcation amalgamated their suburb with neighbouring townships. New water connections in those townships were heavily cross-subsidised by the rates paid by white residents, who claimed this violated their constitutional right to equality. They lost narrowly in the Constitutional Court, which expressly endorsed the constitutionality of cross-subsidisation and characterised it as "an accepted, inevitable and unobjectionable aspect of modern life". While the courts here *endorsed* a resource allocation decision aimed at social transformation, however, it is far less probable that they would obligate the political branches to *intensify* their existing efforts (except perhaps in relation to temporary circumstances of an emergency nature such as the situation homeless people in the *Grootboom* case). In other words, this legal strategy probably has little proactive potential from the point of view of the activists.

II.2. New Zealand

In New Zealand, the recent evolution of the legislative and regulatory framework for water services illustrates a fascinating interaction between regulatory politics and unruly consumer activism. This interaction, sustained over time by a small but unrelenting core of activists, has significantly contributed to recent legislative change that constrains both the scope and extent of private sector participation in water services, as well as prohibiting the disconnection of citizens who do not pay their bills. There are three key links in the chain of events that have welded unruly activism with lasting legal change: small political parties, autonomous (and fragmented) local government, and an unorthodox use of the courts in a context of 'light-handed regulation'.

New Zealand from 1984 to 1999 was internationally recognised as a particularly marked case of text-book application of market-strengthening reforms. Many state-owned sectors, from electricity, telecommunications, airports, postal services to banking were first corporatised, and then privatised, with the result that New Zealand's highly protected, welfare state economy was transformed into an open economy with extensive private sector involvement.[76] These changes were deeply unpopular at citizen level, but this did not impede the rapidity of their imposition due to the unicameral, non-federal nature of the first-past-the-post parliamentary system that was then in place. The unpopularity of the imposed changes did, however create structural change over time: in the mid-1990s a Mixed Member Proportional voting system replaced first-past-the post and this system by 1999 led to the election of a minority Labour government, in coalition with green and further-left parties, on a platform that promised to move away from the market

[76] According to the 2000 UNCTAD World Investment Report, NZ is the most transnationalised economy in the OECD, with productive, financial, retail, energy, transport, media and communications sectors all primarily owned by transnational corporations: cited by Bruce Curtis, "Third Way Partnerships, Neo-Liberalism and Social Capital in New Zealand", Research Paper No.4, Local Governance and Partnerships Research Group, University of Auckland, New Zealand, www.lpg.org.nz/publications/, accessed 27 November 2003, p.4.

Water services were a flashpoint in the first half of the 1990s in this struggle, and contributed to the success of the most radical left new party, the Alliance, at the level of local government in New Zealand's capital city, Auckland. The impetus during the 1990s to move to private sector delivery in water, one of the core activities for local government, was built by a 1995 conference on the water sector run by the investment bank First Boston, a series of impassioned speeches by the director of the New Zealand Business Roundtable Roger Kerr, and background lobbying of local officials by multinational water companies[77]. These interests built a case for private sector participation along the same lines that it had been built for the national level, referring to it as 'finishing the business'.[78] Two major reforms of the Local Government Act 1974, the main legislative framework shaping the delivery of water services,[79] increased pressure on local governments to demonstrate value for money in all their activities and to justify decisions not to use the private sector in providing services to local communities. Water as a direct responsibility of local government appeared more and more anomalous in the national picture.

But this very anomaly made it an apt focus for the large numbers of citizens who did not support the national privatisation programme, and contributed to the formation of the Alliance party and its success in regional local government on a platform of anti-privatization. A complex political battle between local and central government eventually resulted in the passing of legislation that corporatised the *bulk* water supplier for Auckland but explicitly prohibited its privatization.[80] Like the veto control of a leftwing anti-privatization party at regional government level over bulk water privatization, the veto

[77] Laila Harre interview.
[78] New Zealand Business Roundtable, *Local Go*
[79] A new Local Government Act was passed in 2002, on which more below. Also very important is the Resource Management Act 1994, which governs decisions like abstraction permits and pipeline construction, at the border between the natural and anthropic water cycles.
[80] The Local Government Act 1974 as amended in 1998 prohibits Watercare's six local authority shareholders from selling their shares. It also requires that they work in the best interests of those who live in Auckland, that Watercare maintain prices at the *minimum* levels consistent with the effective condition of its business, and that it is not permitted to pay a dividend to its local authority shareholders.

control of local councils over whether or not to privatize or contract out *retail* water services has similarly been an important factor in the low level of water privatization in New Zealand. The greatest pressure has occurred in the Auckland metropolitan region, which has grown by 25% in the last 5 years, and where six fragmented councils pose a barrier to economies of scale in infrastructure services.

Each council, reflecting the New Zealand tradition of autonomous local government, has had the discretion to make separate governance arrangements for the delivery of water. Only the smallest has involved the private sector: Papakura District Council, with just 40,000 residents, awarded a 30 year franchise to a private multinational consortium comprised of Veolia Water (Vivendi), Thames Water (RWE) and Halliburton KBR in 1997. In the same year, Auckland City Council corporatised its water services, creating Metrowater, a local authority trading enterprise fully owned by the local council. The Papakura franchise together with the creation of Metrowater catalysed a trajectory of unruly consumer activism that not only derailed other councils' plans to corporatise but also resulted ultimately in legislative constraints on privatization at local as well as wholesale level. This was achieved by small-scale but rambunctious social activism that challenged the commodification of water through an unorthodox mix of civil disobedience, legal strategies, savvy use of media and political lobbying. Their approach mixed a practical reliance upon (some would say distortion of) administrative law and consumer rights litigation with a rhetorical public emphasis on human rights, environmental and social justice issues.

The Auckland Water Pressure Group (WPG) formed in 1996 with a fluctuating membership of as many as 2000 people, mainly from lower working class families, to lobby against the corporatisation of Metrowater,[81] and in particular the related shift from property rate-based flat tariffs to volumetric user-

[81] Sister groups in other districts of Auckland were later formed to protest the privatization of Papakura Water and thje planned corporatisation of Manakau Council Water. The WPG also worked closely with Citizens Against Privatization, a

pays methods of charging for both water and sewage treatment. Their principal strategy, especially initially, was civil disobedience: a subset of up to 500 members of the WPG refused to pay their bills or in some cases withheld only the waste treatment charges. Their main justification was rooted in claims of distributive social justice: they argued that the charges were an illegitimate commodification of a basic human right,[82] and that they were regressive and damaged the capacity of large poor families to provide for their basic needs.

The WPG has received extensive publicity in the media over the last six years,[83] not least because of their unorthodox responses to pressure from Metrowater to pay up, which included at different times parking an old fire-engine (bought to enliven public protest marches) over water meters to prevent disconnection, collective neighbour gatherings to concrete over the meters for the same purpose, and sending part payment of bills to Metrowater written on bricks. The WPG used the publicity garnered from these events to back up their lobbying of certain key members of parliament. By the late 1990s the Alliance party had won seats at the national level under the MMP system and formed, together with the support of the Green Party, the coalition that enabled the minority Labour government to govern. When the government moved to reform the 1974 Local Government Act to supplement the 'value for money' emphasis of the 1990s with a more political focus on consultation and community participation, these minority politicians held crucial leverage. The Minister for Local Government was an Alliance member, and the Chairman of the Select Committee overseeing the legislative reform was the leader of the Green Party. These two were to be critical votes in modifying the essentially open-

more green-based community group in Waitakere Council that had existed for longer and had fought the initial water privatization initiatives in the early to mid 1990s.

[82] The human rights dimension to their argument developed more recently as a result of growing links between the water activists and other activists involved in advocacy of social and economic rights. These relationships led the water activists to make express links between certain sections of the UN Committee's General Comment No. 15 regarding the right to water, and what was on their part initially purely a distributive justice argument.

[83] Cite comparative media coverage stats on rates and housing community protest groups in Auckland over the same period

ended facilitative nature of the new 2002 Local Government Act in one limited area: the involvement of the private sector in water service delivery.

Now the most important hinge between the activists' strategies of direct action, and their political impact on minority politicians, was the way that activists used the courts as a forum for amplifying and, importantly, legitimising the publicity they received regarding their civil disobedience. In a series of different legal actions, not one of which has been successful in legal terms, the Water Pressure Group brought a wide range of tactics to bear in pursuit of their primary goal of preventing or reversing both privatization and commercialisation. While this pursuit was, especially latterly, *justified* by reference to claims that access to water is an internationally recognised socio-economic human right, the actual strategies used drew upon consumer rights, due process rights, nd traditional civil and political rights of free speech and fair election procedures.

The activists combined this range of strategies in novel ways that simultaneously routinised the conflict over water delivery and re-disrupted the arena: this curious combination occurred because of their frank disregard for the coherency and consistency of their strategies *in legal terms*. Most of their potentially successful legal arguments would at most have tempered the commercial provision at the edges in ways not dissimilar to the South African constitutional litigation. What they cared about was the ability to mobilise politicians to vote, asserting repeatedly, "it's not the court of law that counts but the court of public opinion". The sequence of litigation did two related things, neither by conscious intention. First, it enlarged the space for political participation of ordinary citizens in policymaking, in part by exposing the civil and political rights limitations in the governance space for policymaking on water services. Secondly, it occupied that space in part by direct political action, but also so as to use legal arguments based on the status of water as a commercial service to fight against commercialisation itself.

This kind of bridge between regulatory and citizen space is very different from the consensus-oriented, 'problem-solving' approach that characterises, for example, the tri-partite partnerships focused on consumer education in South Africa. A legal action that could incrementally sharpen the commercial focus of water service delivery by, say, holding the supplier to its quality warranties, is used instead to re-politicise the original structural decision to commercialise water. This is not achieved by the legal action, but by the cumulative interaction of at least five strategies: i) using consumer rights instrumentally against the water companies; ii) employing civil disobedience as an enforcing tool; iii) appealing to socio-economic human rights as a rhetorical justificatory frame; iv) litigating civil and political rights to legitimise the negative implications of civil disobedience in the wider community, softening the image of unruly bandits acting in frank dismissal of shared community norms such as paying bills; v) using media exposure and political lobbying of minority party members who hold the balance of power as the key implementing tools

The sequence of actions that achieved this began with direct action, and then backed this up with a legal challenge to the commercial nature of water services. When this failed, a sequence of more indirect legal challenges followed, which were portrayed outside the courtroom as vindicating a range of different types of human rights: free speech, procedural fairness, socio-economic rights to water and to a clean environment, and the right to have a fair election. In *legal* terms however, these actions increasingly depend on the activists exercising their legal rights as consumers of commercial services.

The initial strategies were of direct action, mixing a refusal to pay water bills with marches, postcard campaigns, and lively debates on talk shows. After a year or so, Metrowater began to pressure the boycotters to pay by disconnecting their water supply. One of the founding members of the WPG lodged a claim in the Disputes Tribunal (an alternative dispute resolution venue for small claims) that pleaded his case in terms of the old common law doctrine of 'prime necessity', in particular the

principle that monopoly suppliers of essential services must charge no more than a reasonable price. He lost, however, and a High Court declaration that confirmed the primarily commercial nature of water services[84] was seen by Metrowater as a major victory.

The boycottters, however, have persisted in using the Disputes Tribunal as a forum for pressing their claim. Taking fully on board their status as consumers of a commercial service, boycotters now lodge a 'letter of dispute' with Metrowater that bases their objection on a breach of the Consumer Guarantees Act.[85] A series of some 50 separate cases over the last 3 years in the Disputes Tribunal on this basis has gradually catalysed a chain of events with considerable potential to re-open structural issues about the structure of water services in Auckland.[86] While this litigation is currently still unresolved, two further claims more directly founded in civil and political rights claims played a role in securing the important legislative restrictions on private sector participation contained in the Local Government Act 2002.

In the first case, some WPG members draped their houses in vociferously worded banners protesting the creation of Metrowater and naming key politicians as betraying the public interest. When the Auckland City Council ordered the removal of these banners under local by-laws, the activists defended their actions as free speech protected by the New Zealand Bill of Rights Act 1990. Although they lost

[84] The court agreed that this doctrine applied to water, but held that the common law rule was displaced by Part IV of the Commerce Act on price control, which precluded private enforcement and restricted regulatory intervention solely to the 'lighthanded touch' of the Commerce Commission on the motion of the Minister: *Metrowater v Gladwin et al*, High Court of New Zealand, 17 December 1999, unreported judgement of Salmon J.

[85] When Metrowater bills a customer for wastewater treatment it states that it is passing on charges it pays to the bulk supplier (Watercare) for this service and charges a volumetric fee calculated at 75% of the water used that month. The dispute letter claims that this is misleading the customer in breach of the Consumer Guarantees Act because Watercare actually charges Metrowater a *fixed*, and not a volumetric, charge for wastewater treatment. The dispute letter also claims that the level of charges breaches the requirement of para 27 of the General Comment No. 15 by the UN Committee on Economic, Social and Cultural Rights, asserting that "Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households:"

[86] The Disputes Tribunal's refusal to allow these claims to be heard together via the representation of the Treasurer of the Water Pressure Group has led to a District Court action for breach of natural justice, charging bias, denial of opportunity to call relevant witnesses, denial of representation as in breach of Section 27 of the New Zealand Bill of Rights Act 1990. The potential effect of this is threefold: it raises the legal claim of misleading charges by Metrowater in a formal court of precedent, it does so by class action in substance if not in form, and it requires evidence from Watercare on its internal decisionmaking regarding cost structures for wastewater tariffs.

the case, the substantial political ramifications[87] led to a legislative amendment to clarify that the Human Rights Act does apply to local government.

The second case challenged the validity of a local election.[88] Candidates elected to the local council on an anti-privatization platform were discovered to have made contemporaneous loyalty pledges to the dominant party to support public-private partnerships in water services. The WPG lodged a petition to nullify the election result on the basis of an offence of undue influence, claiming that electors had been induced to vote by a misrepresentation. The notion that they had misrepresented their position depending on identifying 'privatization' with public-private partnerships that contracted out management of water and the income stream derived thereby on a longterm basis. The judge rejected this identification, remarking that:

> some might say that it is of the very nature of politics that candidates will promote their policies in a way [that] takes advantage of knowing that different interpretations might be put on the meaning of his or her words, unrestrained by any political equivalent of the "misleading or deceptive conduct" provisions of the Fair Trading Act relating to commerce (para 47).

While these cases were legal failures and financial burdens of considerable magnitude for the WPG, they legitimised, at least in part, the political cost of being perceived as unruly and irresponsible consumers. By 2001, for example, Metrowater had recognised the 'letter of dispute' as a legitimate basis for not disconnecting customers who refused payment, at least while the matter was pursued in the Disputes Tribunal. And the election case enabled a public debate about the popular versus technical meanings of the word 'privatization' and repoliticised the issue in relation to the water sector. This created the political space for the Alliance and Green party members to insist on inserting the crucial

[87] The occupant of the house refused to comply and was charged with contempt of court. He continued to refuse to comply and was jailed for 18 days. The Auckland City Council moved for a withdrawal of the contempt order in embarrassment at the publicity it was receiving on the issue: *Auckland City Council v Finau*, District Court of Auckland, unreported judgment of Joyce J, 28 February 2003.

[88] *Bright v Mulholland* [2002] DCR 196.

section into the Local Government Act 2002 that considerably restricts public-private partnerships in water.[89]

Finally and, interestingly, a lastminute intervention in the bill by the Department of Health, piggybacking on the committee representations of the WPG,[90] led to an amendment prohibiting disconnection of water and only allowing restriction where it would not create unsanitary conditions. The activists immediately utilised their civil right to access information under the Official Information Act to create pressure for implementation of this new state of affairs. In the process of gathering information from the six different councils in the Auckland region, they were able to illustrate important disparities between the policies of public and private providers in relation to disconnection,[91] which is fodder for their broader campaign.

Part III: Drawing Some Conclusions

The reader will notice that I refrained from summarising the two narratives of the case studies within Part II. The reason for this was that I wish to conclude by building backwards towards the global dimension discussed at the beginning in two steps: first, drawing some purely comparative conclusions;

[89] The Act prohibits local governments from divesting themselves of water supply and wastewater services within their areas, unless it is to another local government authority. Limited contracting-out of water services operations can take place, but are limited to 15 years and where contracts are entered into, the local council must at all times retain control over water pricing, water services management and the development of water policy. These restrictions do not prohibit all public-private partnerships outright, but they significantly dilute their commercial scope and attractiveness. Arrangements similar to the Papakura franchise are prohibited. See *Local Government Act 2002*, Sections 130-137.

[90] Although the Health Department found the Water Pressure Group useful in securing amendments to the local government legislative framework, it is galvanised by a more long-term aim of passing new legislation (the Health (Drinking Water) Amendment Bill) that would for the first time impose compulsory drinking water standards upon local authority water providers. The catalyst for this was the recent water contamination disaster in Walkerton, Ontario, Canada, which killed 7 people (Prendergast interview).

[91] United Water, the private company which holds the Papakura franchise, denies that it is bound by the relevant provision and continues to disconnect people for non-payment. Metrowater, the corporatised water provider for Auckland City Council, argues that the interaction between its customer contract and the statutory provision still permit it to restrict water supply, though they have ceased disconnection. North Shore Council and Manukau Council, both of whom still provide water directly through local government, have discontinued both restriction and disconnection: replies to Official Information Requests made in January and February 2004 by Penny Bright, WPG.

and only then, juxtaposing the global dimension so as to propose some tentative conclusions about the linkage between national and global..

Comparative implications

To begin with, I summarise in tabular form the key patterns across both cases, noting that the convenient institutional typologies that can sometimes cap off a comparative analysis of governance patterns are disrupted by my working conception of governance, which encompasses patterns of social protest in addition to more conventionally routinised ways of ordering our affairs.

	South Africa: a schizophrenic policy context of 'adversarial ad-hocism'	**New Zealand: 'unruly decentralisation'**
Political and institutional context	• formal constitutional commitment to a human right to water, • competing ideological strands amongst government decisionmakers • fragmented responsibility for water services across local jurisdictions of vastly different capacities • strong traditions of civil society mass protest	• unitary single-house parliamentary authority • 'light-handed' regulation • sparsity of public interest organisations • relentless activists • fragmented responsibility for water services • newly emerging strength of small parties under proportional representation voting.
Patterns of social activism	• constitutional, human rights and administrative law legal strategies • mass mobilisation – both peaceful and violent – demanding social justice • mass civil disobedience (payment boycotts) • consumer education programmes run by providers	• small-scale but rambunctious social activism • small-scale civil disobedience (payment boycotts), • consumer rights and administrative law legal strategies • savvy use of media • political lobbying..

Since the real interest of comparative analysis lies in charting relationships between those features bullet-pointed above, let me suggest that traditional comparative analysis of the South African and New

Zealand cases would predict patterns rather different from those that have been identified, and that the differences can be accounted for in part by reference to certain characteristics of the social activism, and in part by the effects of the global regime of water welfarism.

The argument would be as follows. South Africa provides, for historical reasons, a rare combination of powerful politically organised civil society, both in labour and social movement terms, and actually existing extremely low or non-existent social provision for communities of colour. As a consequence, the politics of resistance and protest vis-a-vis dynamics of liberalisation and globalisation there are not rearguard action, in contrast to established structures in European welfare states, but can draw on, at a national level, strong political will and constitutionally embedded legal commitments to universal access to essential services such as education, health, housing, food and water. The opportunity, then, for social movements to play a co-equal role with powerful market actors in debates over how markets should be substantively embedded is unusually present in the South African context. Yet what we find instead is not productive collaboration, but for the most part fractious parallel trajectories of legislative change and social protest that intersect at punctuated stages to produce a schizophrenic policy environment of contradictory signals.

New Zealand, on the other hand, would seem a promising setting for expansive private sector participation in the water sector, with its combination of already high levels of transnational ownership of major infrastructure assets, its 'light-handed' approach to regulation and a history of centralized political power which left few powerful public interest organisations as routine contributors in major policymaking decisions. It would also seem an unpromising setting for adversarial legalism, which typically emerges in settings where independent bureaucratic agencies operate in a context of separation of powers and/or federalism, providing multiple veto points for the development of social policy, and legal rules for costs and group actions encourage citizens to test those veto points. Yet an unruly type

of adversarial legalism has flourished in New Zealand, and shaped the legislative environment for water services in ways inimical to the expansion of private sector participation.

What accounts for these unexpected results? In part, perhaps, internal institutional political factors of a kind familiar to standard comparative analysis. In New Zealand, for example, the serendipitous combination of the MMP voting system and the fragmented jurisdictions of local government control over water services surely provided a fertile structural context for magnifying the effects of unruly consumer activism. But the activism itself is also crucial: that the Water Pressure Group moved the boundaries of what seemed politically imaginable was something the key players in New Zealand almost unanimously agreed upon, even where they lamented the fact. And in South Africa, the fact that social protest is mobilised *against* those who were former comrades in the struggle to dismantle apartheid, using similar strategies in a painful echo, may partly account for its quality of fractious parallelism, while the internal ideological divisions within the governing coalition, in particular the power of organised labour within that coalition, accounts for the punctuated concessions made at the policy level to temper the overall shift in the legislative framework towards transactionally-based support for private sector participation. In both cases, social protest is part of the process of constructing binding bargains, and in both cases it is most effective at building bridges between regulatory space and citizen space when it responds not directly to global actors or the nascent institutions being built in the global field, but rather to opportunities and incentives that are created by *domestic* legal and political configurations.

From national to global

I am tempted, in this very early stage of drawing temporary conclusions from only partially complete research, to emphasise the *distance* between the global and national levels of governance in the provision of water services. In many ways, this paper does more to juxtapose the national and global levels than

to link them. And I think this is an important perspective to retain: it suggests that where water is concerned, the network of corporate actors so central to the global water welfarism outlined in Part I have so far limited capacity to embed that regime procedurally or institutionally outside national settings. Rather – and counter to Ruggie's stress on the corporate connection', as embodied in self-regulatory initiatives and voluntary partnerships, as a critical mechanism in global governance – national legislative and regulatory frameworks are either more important (as in New Zealand, where PSP is so far very low) or at least retain considerable significance *alongside* self-regulatory and tri-sector partnership initiatives (as in South Africa, where the cooperation of government as one of the partners is in any event critical).

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Nonetheless, I would also argue that the influence of the global regime is presently somewhat masked by this relative institutional invisibility. Let me close by simply listing in very short form a series of points that represent my current assessment of the future direction of the present trajectory:

- knowledge transfer is an important but indirect mechanism of governance and global water welfarism strongly illustrates its deployment
- a network of knowledge-transfer-based governance routines at the international level is currently complemented by a decentralised arrangement of distinct national institutional frameworks that are typically traditional command-and-control in nature
- over time, the network does shape the evolution of these frameworks. The multinational water companies and multilateral lending institutions are able to deploy their knowledge more as part of epistemic communities promoting a 'model' that that is presented as demonstrably more efficacious in terms of a particular coherent intellectual perspective (neoclassical economics).

Changes in national legislative frameworks influenced by these actors are less visible and appear less political

- activists also operate in the context of international networks, but these resemble advocacy networks rather than epistemic communities. This means that the possibility of diffusing practically effective strategies across boundaries is diluted by their dependency on specific political configurations of opportunity in particular national settings. Changes in national legislative frameworks influenced by these actors appear more reactive, more local and more political
- both sets of changes are the procedural and institutional effects of substantive ideological disagreement over how far the delivery of water services should be governed by a framework of untempered market capitalism
- that disagreement is presently resolved primarily at national level, but both sets of actors have begun working towards broad statements of rules that would be applicable at the global level and interpreted and fleshed out by global institutions[92]

[92] There are a growing number of potentially relevant developments, of which two sets can be contrasted to illustrate the range. Compare the possibility that water services may become subject to the General Agreement on Trade in Services (something the EU has quite vociferously been requesting of many developing countries in recent times) with the promotion by NGOs of the UN Committee on Economic, Social and Cultural Rights' Committee's General Comment No. 15 of November 2002 on the right to water as a legally binding obligation. Fleshing out each of these, compare the new ISO Technical Committee on Water and Wastewater standards, with a guide being developed by The Centre on Housing Rights and Eviction in Geneva to illustrate regulatory 'best practice' conforming with the dictates of General Comment No. 15 already mentioned flourishes and develops significant service standards, they could conceivably become the focus of a debate about the acceptable limits of trade-neutral regulation for water services.