

Inequality and Access to water in Latin America: Implementing the Right to Water in Argentina¹

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ABSTRACT

This essay argues that in the context of inequalities and future scarcity, one of the main challenges in the Global South is guaranteeing access to water and sanitation to most of the population and, in particular disadvantaged groups. In this regard, the article explores the right to water providing some insights on the enforceability of the right in Latin America. In this analysis, the impact of climate change on the right to water is considered. In particular, the author addresses the contribution of national courts to guaranteeing access to water by examining landmark rulings in Argentina.

Key Words:

Right to Water; Inequality; Human Rights; Water Security; Climate Change


INTRODUCTION

The unequal access to water and sanitation constitutes one of the various dimension of inequalities observed in the Global South.² This situation is often caused by inequitable distribution of water resources. According to the United Nations (UN), approximately 1.2 billion people live in areas of physical scarcity, and another 1.6 billion people face economic water shortage (UNWater, 2012). In the case of Latin America, although water resources are plenty, there is still unequal access to drinking water and sanitation. To make things even more complex, the transnational environmental effects of climate change on water availability will worsen the current situation.

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² The term “Global South” refers to the countries that are mainly located in the Southern Hemisphere. The term encompasses countries with medium human development (88 countries with a Human Development Index –HDI– less than .8 and greater than .5) and low human development (32 countries with an HDI of less than .5). See Human Development Report 2005.

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Over the past twenty years, access to water has emerged as a human right recognized at the universal level (Brown Weiss, 2012). In 2002, the UN Committee on Economic, Social and Cultural Rights (CESCR) in the General Comment No. 15 defined the right to water as the right of everyone “to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses” (CESCR, 2002). According to the General Comment, states “have to adopt effective measures to realize, without discrimination, the right to water” (CESCR, 2002: 2).


Nevertheless, people around the globe face significant difficulties with accessing water. Indeed, the enforcement of the right to water has encountered many obstacles in developing and developed countries. In 2012, over 1 billion people lack adequate water supply, and several billion lack access to adequate sanitation (WHO, 2012). In addition, “the continuing contamination, depletion and unequal distribution of water is exacerbating existing poverty” (CESCR, 2002: 3).

The difficulties in ensuring effective enjoyment are also underlined in the 2006 Human Development Report (HDR) by the United Nations Development Program entitled “Beyond scarcity: Power, poverty and the global water crisis”. The report describes “the deep inequalities in life chances that divide countries and people within countries on the basis of wealth, gender and other markers for deprivation” (HDR, 2006: 27). In particular, the report underlined that in Latin America, a quarter of the population lacks access to the most basic sanitation.

In this context, the “justiciability” (also referred to as implementation or enforceability) of the right to water in other words, guaranteeing effective access to safe water and sanitation to citizens is crucial. For the purpose of this article, “justiciability” will refer to the activity of judicial bodies to protect the right through different enforcement mechanisms. The enforceability of the right to water and, specifically, of Economic, Cultural and Social Rights (ECSR) is a transnational issue that has been raised by prominent scholarship over the years (Chapple and Leitch, 2011). More importantly, in a future scenario of scarcity, the availability of international and national legal mechanisms for redress is critical.

Latin America represents an interesting scenario to verify how these changes are been operated. Even in countries where the right to water is not enshrined in the Constitution, national courts are enforcing the right. This paper presents evidence that highlights the interlinked relationship between different environmental systems (international and national), and turning attention to the thorny issue of the enforceability of the right to water.

The first section presents an overview of the recognition of access to water as a human right particularly in the Global South by identifying key controversial issues involved in the recognition of the



right. The second section discusses the problems of access to water and the potential impact of climate change on water resources in Latin America. The third section is devoted to the review of the most relevant case law of Argentina's national courts concerning access to water. Lastly, the final section reflects the author's conclusions.

THE HUMAN RIGHT TO WATER IN THE GLOBAL SOUTH


The recognition of the human right to water as such is recent (Anand, 2007: 511). In historical evolution, the legal instruments adopted in earlier decades in the international arena contain only references to the right to water (Freestone and Salman, 2009: 337). In recent times, the need to ensure equitable access to water resources has been the object of various regulations. In this vein, the UN convened the First World Conference on Water (Mar del Plata, 1977) and subsequently launched the International Decade of Drinking Water and Sanitation (1981-1990), setting as a goal to ensure access by 600 to 800 million people to safe water (Tanzi et al, 2001). In 1992, the International Conference on Water and the Environment established different principles, including the principle that "fresh water is a finite and vulnerable resource, essential to sustain life, development and the environment".³

At the UN level, the efforts undertaken by human rights bodies have resulted in binding soft law instruments that recognize access to water as a human right. Among them it is worth emphasizing the above-mentioned 2002 General Comment No. 15 on the right to water. Even though the comment has a soft law nature, it defines the standards to be met in the access to water for personal and domestic uses namely: accessibility, affordability, and non-discrimination. The right creates an obligation to respect, protect and fulfill on the part of the state. Whereas the obligations to respect and protect involve a negative dimension, the obligation to fulfill implies an active dimension. In other words, states must undertake actions to guarantee the access to water to all the citizens such as building pipelines to bring running water to sectors which do not have access.

As for the binding instruments, while the International Covenant on Civil and Political Rights does not expressly recognize the right to water, other human rights treaties do include an explicit recognition of the right to water.⁴ In this regard, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in paragraph 2(h) of Article 14 outlines that States Parties shall

³ The "Dublin Statement on Water and Sustainable Development" was adopted during a meeting of experts on water-related problems that took place on the 31 January 1992 at the International Conference on Water and the Environment (ICWE), Dublin, Ireland, organized on 26-31 January 1992.

⁴ Various non-governmental organizations have advocated for an international convention on the right to water. See: <http://www.watertreaty.org/>.



ensure that women “enjoy adequate living conditions, particularly in relation to [...] water supply”. Furthermore, the Convention on the Rights of the Child in paragraph 2(c) of Article 24 requires state Parties to combat diseases and malnutrition “through the provision of adequate nutritious foods and clean drinking-water”. Similarly, the Convention on the Rights of Persons with Disabilities in Article 28.2(a) affirms the obligation of States to “ensure equal access for people with disabilities to clean water services”.

In this evolution of the right to water, it is worthwhile to refer to the 2010 resolution of the General Assembly on “The right to water and sanitation” (backed by the majority of the UN member states) that underlined the scope and nature of the right. This is a step in the right direction and represents the consensus of the international community expressed through the favorable votes on the resolution.⁵


As for the relationships between the right to water and climate change, according to the forecasts, future climate change will produce negative effects on access to water in certain regions (UN, 2009). In particular, vulnerable areas, such as deserts and coastal areas, and large cities will lack water resources in the future (Brown Weiss, 2012).

Different UN agencies have stressed the need to ensure access to safe water and sanitation in the context of climate change. In this regard, it is worth mentioning the Human Rights Council Resolution 7/23 “Human rights and climate change”, the report of the Office of the High Commissioner for Human Rights -OHCHR- on the relationship between climate change and human rights (2009), and the Human Development Report 2007/08 UNDP, “Combating climate change: Human solidarity in a divided world” (Olmos Giupponi, 2011).

The OHCHR Report underlined the negative impact of climate change on the access to water (OHCHR, 2009). According to this report, climate change will, and already does, adversely impact people’s rights to water and sanitation by causing floods and droughts, changes in precipitation and temperature extremes that result in water scarcity, contamination of drinking water and exacerbation of the spread of diseases. Also, in the report entitled “Climate Change and Human Rights Water and Sanitation” (2010), the independent expert noted the need to promote a human rights approach based on integrated management of water resources, which emphasizes participation, not discrimination, and accountability.

In addition to these international human rights instruments, the legal basis for the right to water arises from the basic rights and guarantees enshrined in national constitutions. In Europe, for in-

⁵ The above-mentioned resolution was adopted by 122 votes in favour, none against and 41 abstentions.




stance, Belgium recognizes the right to water in its regions (Armeni, 2008) while in Spain it is enshrined within the powers assigned to municipalities (1978 Spanish Constitution, articles 148.1.10 and 149.1.221).

In the Global South, the right to water has been recognized directly or indirectly in national constitutions such as the constitutions of South Africa, Ethiopia, Kenya, Bolivia, Ecuador and Uruguay. While these constitutions specifically enshrine the right to water, the constitutions of Gambia, India and Venezuela provide indirect recognition. One of the most advanced constitutions in the matter, the Constitution of South Africa, expresses the obligation of natural and legal persons to respect the right to water. In particular, Article 27(1) (b) establishes the right of everyone to “access to sufficient water”. Similarly, in Latin America, Uruguay’s Constitution states in Article 47 that “water is an essential resource for life” and that “access to water and sanitation” are human rights. In India, several courts have established a right to water in the broader context of the right to life recognized in Article 21 of the Constitution of India.

In summary, the right to water has arisen as the right to have equal access to water. Accessibility is understood in different ways: physical accessibility, affordability, non-discrimination and access to information. These requirements concerning the right to water must be defined in light of specific circumstances. As for quantity, there is no international consensus on how many liters per day a person needs to satisfy basic survival and health needs. In the case of *Mazibuko v City of Johannesburg*, the Constitutional Court of South Africa determined that the necessary quantity was 25 liters per person per day or 6 kilolitres per household per month. The Special Rapporteur of the UN on the issue of human rights obligations relating to access to safe drinking water and sanitation, has estimated that an amount in the range of 100 liters per capita per day is required to realize the right to water, this amounts to 36,500 liters per capita per year. With regard to quality, water must be safe, which requires that it should be free from micro-organisms, chemical substances and radiological hazards that threaten a person’s health.

Yet, questions remain regarding the implementation of the right. First, states still disagree on the recognition of the right to equal access to water, partly because there is no binding specific international instrument (a treaty) in this regard.

Secondly, it is necessary to determine in each case that is entitled to the right, who is supposed to guarantee the access and who has legal standing to bring a claim for the violation of the right. On the one hand, environmental national systems have accommodated a new right, but the contours of it must be defined by national courts. On the other hand, as seen before, the right to water creates an obligation for the state to respect, protect and fulfill. The question as to whether these obligations should be applied to



non-state actors, such as multinational corporations, seems more debatable (Letnar Cernic, 2011:303). The third question relates to the implementation or the adoption of measures to ensure the effective access to safe water and sanitation (Pejan, 2004). This requires the enforcement of the right at national level by granting effective judicial protection.⁶ This leads to the question of the implementation or “justiciability” of the right to water, which involves the activity of judicial bodies and various enforcement mechanisms to protect the right.⁷ Where the right to water is explicitly recognized in the constitution, national courts, especially the Constitutional Courts or Supreme Courts, must ensure that it is respected in case of violation (Marauhn, 2009). Where the right to water is not explicitly recognized in the constitution, national courts give an authoritative interpretation according to which the right to water is implicitly protected through the recognition of other rights, such as the right to life.

One particular aspect, taking into account the future predictions, regards the negative effect of climate change on the right to water as a human rights violation. There are additional problems of causality and the burden of the proof (Spain, 2011: 343). Some cases give a clear example of these obstacles. In the Inuit Petition to the Inter American Commission of human rights, the Inuit people sought relief from violations resulting from global warming allegedly caused by acts and omissions of the United States. However, the Inter-American Commission concluded that it was not possible to determine the causality link (Inuit Circumpolar Conference, 2005).⁸ Recently, in Costa Rica, different complaints were brought before the Supreme Court relating to the negative impact of climate change, claiming that the state is responsible for building appropriate infrastructure and to diminish the risks and damages caused by tropical storms that have increased dramatically over the years.⁹ The complaints submitted were not upheld because of the difficulty in demonstrating the causal link and the absence of evidence of environmental damage.

ACCESS TO WATER AND INEQUALITY IN LATIN AMERICA


While water resources are abundant in Latin America, which is estimated to have 35% of the fresh-water around the world, a significant percentage of the population has no access to safe water and sanitation, and only 20% of the population has access to adequate sanitation (UNEP, 2008). One of

⁶ See Harvard Law Review. 2007. “What price for the priceless?: Implementing the justiciability of the right to water” 120 Harv. L. Rev. 1067.

⁷ These mechanisms provide for a rapid defense of the human right at stake. In Latin America, these procedures have different names, such as *acción de tutela*, *recurso o acción de amparo*.

⁸ Translations from Spanish into English are made by the author unless otherwise noted.

⁹ See Constitutional Chamber of the Supreme Court (San José) Judgement 10-016575-0007-CO/Res. N° 2011005052 (15/04/2011) and Judgement 11-009595-0007-CO/Res. N° 2011012282 (09/09/2011).




the main reasons for this situation is the deficient management of water resources. As, a result, a considerable number of Latin American countries face the same problems as countries with chronic water shortages. 71.5 million people, who comprise of nearly 13.9% of the population of Latin America, lack access to potable water. 63% of this population (45 million people) live in rural areas (IPCC, 2007). The uneven access to water is related also to the broader issue of inequality in the region. In addition, many rural communities depend on limited freshwater resources, both surface and groundwater, and many others rely on rainwater, using collection methods that are highly vulnerable to droughts (IPCC, 2007).

The main problems are; difficult physical access, economic affordability and pollution. There is also a significant water pricing inequality. In 2000, for instance, statistics show that low-income families paid 1.5 to 2.8 times more for their water than non-low-income families (World Water Council, 2006). In addition, the quality of the water received by the low-income families was worse, increasing the danger of diseases. There are problems of exploitation and pollution of groundwater, as well as lakes and river pollution. Furthermore, hurricanes, particularly in Central America, and the effects of El Niño, have devastating consequences, which will worsen if the forecasts actually occur (World Water Council, 2006). In addition to this, there are areas in which water resources are scarce such as certain deserts or coastal areas.

According to the Human Development Report (HDR) 2006, the main inequalities observed in regard to the access to water in Latin America are as follows:

- a. Price inequality: As stated above, for millions of households the high price of water tariffs reduces the already scarce economic resources. There is evidence that “the poorest 20% of households (about half of them live below the \$1 a day threshold for extreme poverty) in Argentina, El Salvador, Jamaica and Nicaragua allocate more than 10% of their spending to water” (HDR, 2006: 51).
- b. Group identity as a marker for disadvantage: In Latin America this results in disparities between indigenous and non-indigenous people. For instance, the report highlights that in Bolivia “the average rate of access to piped water is 49% for indigenous language speakers and 80% for non-indigenous language speakers” (HDR, 2006: 54).
- c. Regional divides: There are disadvantaged areas within different countries in which the measures taken to reduce the disparities have had limited positive impact. The report mentions the case of Mexico, in which “more than 90% of the population is connected to a safe water source -and two-thirds of households are connected to a sewer. But coverage drops sharply from




more developed urban areas and more prosperous northern states through smaller towns, to more remote rural areas and the poverty-belt states of the south” (HDR, 2006: 54).

Also, in Latin America the problems relating to the access to water are closely linked to a deficient water management. The Latin American Water Tribunal (Tribunal Latinoamericano del Agua - TRAGUA), an independent environmental justice forum established in 1998, has underlined that the current situation can be improved by transforming institutions where decisions are made regarding policy development, management and achieving greater effectiveness of justice mechanisms (TRAGUA, 2011).

From a legal and institutional point of view in Latin America over the last past fifteen years, there has been a trend towards the protection of access to water as a constitutional right. As a result, some Latin American countries, such as Bolivia (2009), Ecuador (2008) and Uruguay (2004) reformed their constitutions to explicitly enshrine the right to water.¹⁰ In other Latin American countries, the constitutions include an indirect recognition of the right such as in the case of Guatemala, Chile and Venezuela.

At the same time, different cases relating to access to water have risen in the case law of judicial and arbitration bodies and resulted in various landmark rulings. Some of these cases have been highly controversial, such as the construction of a hydroelectric dam in the Chilean Patagonia, the privatization of water and increased water prices in Cochabamba (Bolivia), economic crisis and rising water rates (Argentina), and the Baba dam project in Ecuador. The hydroelectric project by Enel/Endesa in the Panguipulli region (Chile) affects not only water rights but also Mapuche territories and sacred sites. In 2000, the increase in water tariffs in Cochabamba after the privatization of water supply gave rise to a social turmoil. During the economic crisis, many users in Argentina could not afford to pay the water tariffs which led to various controversial cases as discussed below. The dam project in the Baba river (Ecuador) which threatened the access to water of communities living in the area, was finally stopped after years of struggle (FIAN International, 2007).

¹⁰ 2009 Constitution of Bolivia, “Article 16. I. Everyone has the right to water...” available at <http://pdba.georgetown.edu/Constitutions/Bolivia/bolivia09.html>. 2008 Constitution of Ecuador, “Article 12. The human right to water is essential and cannot be waived. Water constitutes a national strategic asset for use by the public and it is unalienable, not subject to a statute of limitations, immune from seizure and essential for life”, available at <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>. 2004 Constitution of Uruguay, “Article 47. (...) water is an essential resource for life’ and that ‘access to water and sanitation’ are human rights””, available at <http://pdba.georgetown.edu/Constitutions/Uruguay/uruguay04.html>. Author’s translation.




These cases show how common environmental legal principles and norms in national, international and transnational levels converge to protect the right to water. Besides, these cases reflect the fragmentation of the litigation as a salient feature of the settlement of environmental disputes (Romano, 2009: 1036). In other words, the conflicts over water resources are dealt with not only before national courts but also on the international level in forums where the main focus is investment protection or trade, like in the disputes before the North American Free Trade Agreement (NAFTA) *ad hoc* tribunals and before the International Centre for the Settlement of Investment Disputes (ICSID).

On the one hand, cases have been litigated under NAFTA that have involved water rights, such as *Methanex v United States* (1999-2005). Methanex produced methanol, a key component of MTBE (methyl tertiary butyl ether), which is used to increase oxygen content and to act as an octane enhancer in unleaded gasoline. Even if the complaint was withdrawn, the first ever *amicus curiae* submissions in investor-state arbitration were filed by civil society actors stressing the protection of the right to water.¹¹ On the other hand, the trend towards the reversal of the privatization of water supply operating in many Latin American countries led to different arbitration procedures (Bakker, 2007: 430). An example is the *Aguas del Tunari* (2005) case, which was initiated in the context of the attempt to privatize the water service in Cochabamba, the third largest city of Bolivia (*Aguas del Tunari SA v Republic of Bolivia*). Trouble arose in the local community shortly after the concession was awarded because of a substantial increase in the rates. This caused protest and violent demonstrations against the privatization, and Bolivia rescinded the concession agreement.

It is also interesting to mention the Latin American Water Tribunal (LAWT), as a non-governmental initiative for water justice.¹² The LAWT's wide scope includes issues such as privatization of water utilities, mining and access to water, water pollution. At the time of writing, the LAWT has dealt with 58 and received more than 250 complaints. Despite this, the LAWT's "verdicts" are not judgements strictu sensu, but instead they contribute to raising awareness, create public pressure on states and

¹¹ The *amicus curiae* briefs were submitted in March, 2004, by the International Institute for Sustainable Development, and the following United States-based NGOs: Bluewater Network, Communities for a Better Environment, and the Centre for International Environmental Law.

¹² Despite the name, the LAWT is not a tribunal *strictu sensu*, it is a grass-root initiative. The LAWT was established in 1998, at the same time that water claims were increasing in Latin America. Initially focused on the Central American area, the Tribunal extended its scope in order to deal with cases from other Latin American countries. The LAWT is open to receive complaints related to water resources in Latin America. It relies on relevant international environmental law norms concerning natural resources. For an in-depth analysis, see: M.B. Olmos Giupponi, *The Latin American Water Tribunal: An alternative for the resolution of environmental conflicts?*. Paper presented at the Seminar: *People's Tribunals and International Law*. Rome, Italy.



increase the “visibilization” of environmental conflicts over water resources in Latin America (Olmos Giupponi, 2013: 1).


All these recent developments raise the issue of the “justiciability” (also referred to as implementation or enforceability) in the Latin American context. As L. Martin points out, the salient feature of the right to water in Latin America is “the lack of effectiveness of both social and human rights may be considered as structural and not even more as temporary, as it is conceived in developed countries discourse (sic)” (Martin, 2011: 153). Different “models” exist for the “justiciability” of the right to water in Latin America. In some countries, the right to water is protected in the constitution, and directly enforceable before the courts. In other countries, the right is not enshrined in the constitutions, but their courts have nevertheless upheld the right to water. This second group includes countries such as Argentina, in which the right to water was successfully made justiciable by courts.

The role of courts is crucial for guaranteeing the equal access to water and contributing to social progress (Gargarella, Domingo & Teroux, 2005). Overall, the active role played by national courts with regard to the right to water, has strengthened the equal access to water as in the cases of Argentina and Colombia (Olmos & Paz, 2012). The bulk of the case law deals with lack of access in vulnerable situations (poverty, discrimination). In cases where there is no explicit recognition in the constitution, the right to life or healthy environment is interpreted as overarching rights including the right to water.

As for the future scenario of climate change, it is estimated that in Latin America between 12 and 81 million people will experience water stress in the 2020s and from 79 to 178 million in the early 2050 (IPCC, 2007).¹³ According to the 2007 report on Inter-governmental Panel on Climate Change (IPCC)’s, the current vulnerabilities observed in many regions of Latin America will increase due to the negative effect caused by a growing demand for irrigation water and domestic uses due to population growth and drought conditions in several hydrological basins (IPCC, 2007).

Thus, the problems related to water access will be associated with climate change. As for the lack of access to drinking water, climate change will adversely impact the water and sanitation infrastructure and increase the number of pollution cases. With respect to affordability, climate change will provoke increases in water tariffs for water consumers. This will affect the most vulnerable groups in the region such as in general low-income families, women and children living in big cities and high-

¹³ Water stress is defined as the situation that occurs when “the demand for water exceeds the available amount during a certain period or when poor quality restricts its use”. Green Facts Glossary available from <http://www.greenfacts.org/glossary/wxyz/water-stress.htm>.



risk regions (Samaniego, 2009: 63-64). A significant proportion of the population in Latin America is expected to be affected by the shortage of water (UNFCCC, 2007).

Given these challenges, the central issues are those regarding the extension of access to water for most of the population and the means to ensure such access in the future. One of the main difficulties in Latin American countries is the definition of a clear strategy to implement the right to water taking into account the forecasts on the negative impacts of climate change and adopting appropriate preventive measures for future scenarios of shortages in their national adaptation plans.


In the context of climate change, guaranteeing the access to safe drinking water becomes crucial. In particular, in Latin America and the Caribbean, the access must be facilitated in order to avoid further inequalities in the access to water. In some of the cases examined, there is emphasis on the current situation of scarcity and a vague reference to the impact of climate change. As noted above, there are recent cases in which the incipient effects of climate change on the right to water are underlined, as seen in the claims brought before the Supreme Court of Costa Rica.

In the following sections, the main landmark rulings relating to the access to water in Argentina are analyzed. The remarks are followed by a summary of the main substantive points and the contribution that the findings make to the case law in this field. Issues of broader importance to the evolution of international environmental law are also highlighted (Bodansky, 2009: 565).

THE IMPLEMENTATION OF THE RIGHT TO WATER IN ARGENTINA

Green Cross Argentina, an environmental organization, has estimated that 11 per cent of the population still does not have access to potable water in that country (Green Cross Argentina, 2009). Furthermore, access to safe drinking water and sanitation faces various challenges such as; internal disparities among the different provinces and districts and the lack of appropriate infrastructure and water management, like in the case of the metropolitan area of Buenos Aires (CELS, 2009).

Water availability in the country is 22.500 m³/hab with an irregular spatial water distribution (FAO Aquastat, 2005). Several provinces of the country are under the PNUD water stress index and approximately, 2/3 of the country is under arid or semi-arid climate conditions. With regard to water usage, it is important to take into account that 30% of the total water in Argentina for the different usage has groundwater origin. Approximately 70,5% of it is used for irrigation, 13% for human water supply, 9% for cattle- raising and 7,5% for industrial use (FAO Aquastat, 2005).




In Argentina water security-related problems affect both rural and urban areas. In urban areas, in big and middle-sized cities many people have little or no access to safe drinking water. The displacement from the countryside to cities has created poverty belts in the big and medium cities. In these outskirts, there are serious problems related to access to reliable drinking water and safe means of sanitation. In rural areas, the main problems are associated with the irrigation and the absence of land use planning, as a consequence of this, some lands had to deal with imbalances (World Bank, 2000). For instance, in many areas the ground's absorption capacity is exhausted due to crops that do not cause evaporation like in the case of soy-beans which is Argentina's leading export and covers half of the country's cultivated area. Among the different aspects of water security, the following are crucial in the Argentine context: management of shared watersheds, protection against flood and droughts, appropriate water governance, adequate water infrastructure, treatment and adequate disposal of waste urban water and water pollution in poor areas (World Bank, 2000). Furthermore, the country is extremely dependent on the water regime for electricity production. According to the IPCC Report, Argentina is a potential vulnerable country because of its particular productive profile which relies mainly on agriculture and commodities export (IPCC, 2007).

As in other Latin American countries, the implementation of the right to water mostly depends on the state's "political attitude that may be modified by other aleatory (sic) accessory factors like economic resources availability, abundant hydric resources, arbitral awards or by its localization down/upstream" (Martín, 2011). In Argentina the right to water and sanitation as such has no explicit recognition. However, this is envisaged as part of the right to a healthy environment protected in Article 41 of the Constitution. Additionally, under Article 75 inc. 22 of the Constitution, the main international human rights treaties have a constitutional hierarchy.¹⁴ Thus, the right to water is implicitly recognized in the universal and regional human rights instruments.¹⁵ Consequently, the right to water

¹⁴ Article 75, inc. 22. (...) The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Pact on Economic, Social and Cultural Rights; the International Pact on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Woman; the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments; the Convention on the Rights of the Child; in the full force of their provisions, they have constitutional hierarchy and do not repeal any section of the First Part of this Constitution (...). See Argentine Constitution available at <http://www.senado.gov.ar/web/interes/constitucion/english.php>.

¹⁵ American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969, in force since 18 July 1978, available at <http://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>. Additional Protocol to the American Convention on Human Rights in the area of economic, social and cultural rights ("Protocol of San Salvador"), adopted 17 November 1988 and in force since



is made justiciable through ordinary and special remedies (*acción de amparo*) before domestic courts and the Supreme Court, as guardian and interpreter of the Constitution, and through the appropriate procedures before international bodies such as the Inter-American Commission of Human Rights.¹⁶

The cases selected reflect different obstacles observed in accessing water such as economic constraints, the fulfillment of minimum requirements in terms of quantity and quality and the protection of indigenous rights. The main outcome of the different rulings has been the effective access to water as interpreted in the case law of the national courts, mainly the highest court: the Supreme Court (Olmos Giupponi, 2013a). Also, the judgments have contributed to the protection of the rights of local communities and indigenous people. In certain cases, indigenous communities (such as Kaxipayiñ Paynemil Communities and Colonia Valentina Norte), the courts upheld their rights and therefore helped these communities to overcome obstacles of access to water and protection of their collective rights.

The following sections discuss the major milestones in the justiciability (as defined above) of the right to water in the case law of national courts in Argentina.


The recognition of the access to water as a human right

In the last ten years there has been cases in which equal access to water was protected as a human right and in particular with regard to vulnerable groups (children, women, low-income families, indigenous communities).¹⁷ In the case by Quevedo et al (2001), which concerned water cuts for

16 November 1999, article 11(1) “[e]very person shall have the right to live in a healthy environment and to have access to public services”, available at <http://www.oas.org/juridico/english/sigs/a-52.html>.

¹⁶ According to Article 43, Argentine Constitution, any individual could file “a prompt and summary proceeding regarding constitutional guarantees, provided there is no other legal remedy, against any act or omission of the public authorities or individuals which currently or imminently may damage, limit, modify or threaten rights and guarantees recognized by this Constitution, treaties or laws, with open arbitrariness or illegality”.

¹⁷ See, for instance: *Menores Comunidad Paynemil s/ acción de amparo*, Expte 111-CA- Sala Civil, Cámara de Apelaciones en lo Civil, Neuquén, 19 May 1997; *Colonia Valentina Norte, Defensoría de Menores N3 v Poder Ejecutivo Municipal s/ acción de amparo*, Expte. 46/99, Acuerdo del Superior Tribunal de Justicia de Neuquén, 2 March 1999; *Quevedo, Miguel Angel et al. v Aguas Cordobesas SA Amparo*, Córdoba, Juez Sustituto de Primera Instancia en lo Civil y Comercial N 51, 8 April 2001; *Asociación Civil por la Igualdad y la Justicia (ACIJ) v Ciudad de Buenos Aires*, Cámara de Apelaciones en lo Contencioso Administrativo y Tributario de la Ciudad Autónoma de Buenos Aires, Sala I, 18 July 2007; *Defensoría de Menores N° 3 v Poder Ejecutivo Municipal* (“Colonia Valentina Norte Rural”) 02 March 1999, Tribu-



non-payment during the 2001-2002 severe economic crisis, a circuit judge ruled that the cuts were unjustified and violated constitutional rights and adopted a protective measure.¹⁸ In another case involving water pollution in 1999, different courts of the Province of Neuquén stressed the importance of effective protection of the human right to water for Kaxipayiñ Paynemil Communities. The claim was made to safeguard the right to health of children from indigenous communities after a pollution incident and as a result requested the immediate provision of adequate water. In addition, the case by Colonia Valentina Norte (1999) the High Court of Justice in the Province of Neuquén dealt with the fundamental right to water of children who drank water contaminated by hydrocarbons.

In a leading case before the Supreme Court, Mendoza 2008 (also referred to as “Matanza-Riachuelo”), argued on the access to water and sanitation focusing on water pollution in a specific watershed in Buenos Aires (Matanza-Riachuelo).¹⁹ The Supreme Court referred to the protection of the environment, stressing the need to defend the collective “common and indivisible use” of the environment (CSJN Mendoza, 2008). The Court established the obligation of the watershed authority to meet a strict comprehensive sanitation program of the basin, which included “the expansion of the drinking water supply (...), sewage and sanitation systems (...)” (CSJN Mendoza, 2008).

Equitable access to water and sanitation

Several judgments considered the effective access to water, guaranteeing equal access when economic obstacles or poor living conditions made such access impossible or extremely difficult. The case by Quevedo (2001) focused on socio-economic difficulties that existed during the economic emergency in 2001 and prevented unemployed applicants from paying tariffs. The judge emphasized that access to water is “... a collective need that cannot be interrupted (...). The service must be equal and in uniform conditions, since the provision is mandatory and enforceable by users” (Cordoba Circuit Judge 51, Judgement Quevedo, 2001). In the case of the Kaxipayiñ Paynemil Communities, the state court took into account the severity of the situation, the urgency in protecting the rights at stake, and the vulnerability of the affected group to determine the responsibility of the authorities in the adoption of measures.

nal Superior de Justicia de la Provincia del Neuquén; *Urriza, María Teresa v ABSA s/ amparo* 21 March 2005, Juzgado Contencioso-administrativo N° 1 de La Plata and *Usuarios y consumidores en defensa de sus derechos v Aguas del Gran Buenos Aires* 21 August 2002, Juzgado de Paz de Moreno (Buenos Aires).

¹⁸ *Quevedo, Miguel Angel y Otros v Aguas Cordobesas SA Amparo*, Córdoba, Juez Sustituto de Primera Instancia en lo Civil y Comercial N 51, 8 April 2001.

¹⁹ Supreme Court, *Mendoza, Silvia Beatriz et al / National Government and other s/damages (damages resulting from pollution of the River Matanza - Riachuelo)* (08/07/2008) 331:1622

Quality and quantity of drinking water supply

The qualitative and quantitative parameters that must be met in the provision of drinking water were also analyzed by Argentine courts. In terms of water quality, the Food Code (Law 18248) determines the chemical characteristics of drinking water: “it is expected to be suitable for food and home use; not contain substances or bodies strange biological, organic, inorganic or radioactive tenors that make it dangerous to health (...); and should be almost colorless, odorless, clear and transparent. Drinking water for home use is the water from a public supply (...) located in reservoirs or tanks at home (sic)”. With respect to the quantity, as the UN Special Rapporteur highlighted in 2004, “in Argentina, courts have ordered the government and service providers to provide a minimum amount of water (between 50 and 100 liters per person per day) regardless of the person’s ability to pay”.²⁰ In order to comply with these requirements, the regulatory frameworks have included direct obligations for water suppliers.

The Kaxipayiñ Paynemil case involved the consumption of water contaminated by lead and mercury. The state’s court ordered the province’s authorities to: provide 250 liters of water daily per capita; determine whether there was contamination; make the necessary health treatments and adopt the necessary measures to stop the pollution. In Colonia Valentina Norte, the High Court upheld the decision of the circuit appellate court that required the state to provide 100 liters of drinking water per day to each member of the families living in the colony and to guarantee that the poorest members could store water safely.

In Quevedo, the judge found that the concessionaire “(...) in exercise of powers under the regulatory framework (...), proceeded to restrict water supply to around 80 liters per day, despite being entitled to reduce it to 50 liters” (Cordoba Circuit Judge 51, Judgement Quevedo, 2001). Similarly, the Supreme Court of the Province of Buenos Aires in the case of Boragina and Iudica (2009), referring to the quality parameters of drinking water and the protection of the right to health, stated: “up to the date (...) the respondent in charge of water supply continues to provide lower quality than expected (...) the compliance with legal limits on carcinogens cannot be postponed indefinitely” (Judgement Boragina).

²⁰ Final Report of the Special Rapporteur on relationship between the enjoyment of economic, social and cultural rights and the promotion of the right to drinking water and sanitation, E/CN.4/Sub.2/2004/20, 14 July 2004. Available at: <http://www.cetim.ch/en/documents/rap-2004-20-ang.pdf> .

Right to water and access to justice for vulnerable communities


In the case of Kaxipayiñ Paynemil Communities, the protection was granted to children belonging to the Mapuche indigenous community living in a precarious situation. As a protective measure, the court ordered the state to provide drinking water and appropriate medical care. In the Matanza-Riachuelo case, citizens were located in a marginal urban area, resulting in a vicious circle between waste pollution, lack of resources and denial of adequate access to safe water and sanitation. In another case, “Defensor del Pueblo de la Nación c. Estado Nacional y otra” (2007), the Supreme Court referred to access to safe water for Toba indigenous people, who found themselves in a vulnerable situation. The Ombudsman’s Office decided to initiate a protective action against the province of Chaco and the federal government, to proceed urgently to “modify the current living conditions of indigenous people that (...) due to repeated and systematic omissions incurred by the defendants to provide adequate humanitarian and social assistance, were in a state of silent, progressive, systematic and inexorable extermination” (sic).²¹ The Supreme Court decided to adopt different measures to improve the living conditions, including access to safe water and sanitation. Also, in Colonia Valentina Norte, the state court upheld the decision of the court of appeal, affirming the state’s duty to provide access to water in sufficient quantity and appropriate quality conditions.

Privatizations and the responsibility of private parties to protect the right to water

Most cases concerning access to safe water and sanitation questioned the arbitrary omission of the state to act with due diligence to protect the right to water. In Matanza-Riachuelo, the Court urged the federal government, the province and city authorities to submit an integrated plan comprising of environmental planning, control over human activities, an environmental impact assessment and environmental education programs.

Some cases also emphasized the responsibility of the concessionaires to provide adequate drinking water and sanitation. In the 1990s the water supply in the main Argentine cities, formerly provided by state-owned companies, was privatized. During the economic emergency that Argentina faced in 2001-2002, various water supply companies brought claims against the government’s decision to freeze tariffs and expropriation, which resulted in several international arbitration procedures before the International Centre for the Settlement of Investment Disputes (ICSID) and the termination of concession contracts. Argentina argued that its human rights obligations under the right to water should prevail over its obligations under the respective bilateral investment treaties. Notwithstanding this argument, in most of the cases, such as Aguas del Aconquija, Impregilo Spa (2011) and Suez/

²¹ *Ibid.* The quotation marks are excerpts from the opinion of the Attorney General’s Office.



Vivendi, the arbitration awards condemned Argentina for its non-compliance with core international investment standards (ICSID Case No. ARB/07/17 and ICSID Case No. ARB/03/17).

Overall, the private companies responsible for water supply must perform the duties in terms of water quality and quantity set out not only in the concession contract but also in the regulatory framework. In Quevedo, for instance, the judge established that the concessionaire had not complied with the obligation to provide 50 liters of water daily ignoring the regulatory framework. In other cases, private companies were held liable for water pollution that had led to a lack of access to drinking water. In Kaxipayiñ Paynemil, Mapuche communities filed action against the company Repsol-YPF for the damages they suffered in their territory as a result of the extraction of hydrocarbons.

Reparation measures in cases of violation of the right to water

In the Matanza-Riachuelo case, the Supreme Court stated that the protection of the environment is enforced through prevention and compensation measures and underlined the differentiated environmental liability that arises independently of the civil and criminal liabilities. The Court decided to implement a comprehensive sanitation program, including specific actions on the soil and water. The three simultaneous objectives of the program established by the Court included improving the quality of life of the inhabitants of the basin, restructuring of the environment in the basin in all of its components (water, air and soil), and preventing future damage. The Supreme Court determined that the compliance monitoring plan should include public hearings before the Court.

In the case of the Kaxipayiñ Paynemil Community, the court ordered the provision of drinking water in quantities and quality necessary for the survival of the affected population, diagnosis and treatment of affected children, and adoption of appropriate measures to prevent future groundwater contamination.

The access to international protection to uphold the effective access to drinking water

In the case of the Kaxipayiñ Paynemil communities, the applicants brought a claim before the Inter-American Commission of Human Rights following the partial compliance with the sentence. Thus, after the exhaustion of the internal remedies, the affected communities sued the Argentine state for its failure to obey the court's order of measures to ensure water supply. Argentina, as a state responsible for the standpoint of international law, opted for a settlement before the Commission on Human Rights and carried out the construction of a potable water plant and other health measures.



CONCLUDING REMARKS

In the Global South context, challenges in access to water has possible negative impact on climate change and the recognition of the right to water constitutes the first step in giving adequate and effective protection to citizens. Even if there is no specific and binding international human rights instrument that enshrines the right to water, there is an indirect recognition under various international and regional human rights treaties.

Since there are scarce or deficient mechanisms to ensure the enforcement at the international level, the enforceability of the right relies on national courts. As seen above, in the Global South there are different approaches to the right to water in the constitutions, with explicit or implicit recognition. Once the right is recognized in the Constitution, enforceability depends on the ability of the courts to adjudicate it. Where the access to water is only implicitly recognized as human right, national courts have to create and set forth criteria for the enforceability of the right to adequate water.

The cases that have risen in Latin America provide the international community with examples of the different manners in which the right to water can be effectively implemented. The contours of the right as protected by national courts demonstrate that there is a need for water justice that stems from the difficulties observed in the access.

In Argentina, domestic courts have upheld the right to water as implicitly enshrined in the right to environmental protection. In the case law, both state and private companies have been held responsible for guaranteeing an appropriate water supply, especially for those individuals in difficult situations. Also, the analyzed cases show some shortcomings of the current legal framework when it comes to guaranteeing the right to water in specific situations.

This judicial activism does not represent a straightforward solution for water scarcity, but it is a significant contribution to a new water management model. It can also provide useful insights for other developing countries. Although this effort is still in its early days, the progress made to ensure the access to adequate and sufficient water demonstrates the further possibility for it to be consolidated in the future.

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