

The Social and Environmental Equity Problems of the Chilean Water System from the Perspective of Fundamental Rights

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1. Introduction

This piece will take on the social equity problems that are posed by Chile's water system, designed to safeguard the Fundamental Rights of all human beings to water, environmental protection, and the rights of indigenous peoples. We observe that these problems of social equity arise due to the fact that the Chilean model, supported by a robust regime of private water rights traded freely in the market of goods and services, has deprived of access to water those who cannot compete in the market -- disadvantaged sectors in particular -- and has debilitated the administration's regulatory capabilities to secure environmental, social, and economic equality in the use and administration of hydro-resources.

Thirty-two years after taking effect, it is a fact contested by a diverse array of international courts and subject-matter experts,¹ that this model of administration presents serious structural weaknesses in terms of concentration of wealth, social equality, environmental protection, administration of watersheds, prioritizing and/or coordinating multiple water uses, and conflict resolution.

There is ample consensus that the problems of equality posed by the Chilean water model are most critical in zones of hydro-stress such as those that are found in the country's northern

¹ BANCO MUNDIAL (2011 y 2013).

macro-zone.² Nevertheless, as a consequence of the problems posed by the concentration of ownership of the resource, the scarcity generated by persistent drought in wide zones throughout the national territory due to the impact of climate change and environmental deterioration of the watershed and its associated eco-system – itself a result of over-exploitation of the resource -- the aforementioned problems of equality and sustainability of the water system have become extensive throughout practically all the regions of Chile.

The importance and relevance of the article to the Chilean legal debate is unquestionable, as it will allow for and provide input for the parliamentary debate in which the reform of the water system is being argued. This is happening at the statutory (bulletin 7543-12) and constitutional (bulletin 6124-09, 6141-09, 6254-09, 6697-09, 7108-07, 8355-07, and 9321-12) levels. And in the center of the debate is the correction of the problems of social equality posed by the water system, and the protection of the environment and indigenous rights.

1.1 Theoretical Framework

Applying the notion of Fundamental Rights³ to the Right to Water, in line with Ferrajoli, allows us to: First, differentiate it from inherited rights, the latter concept being that which underlies the model of private rights to water and which is a characteristic of the Chilean model. While the former concept refers to all human beings as subjects endowed with the status of persons, inherited rights allude to their individual ownership, exclusive of others.⁴ Second, in belonging to everyone, Fundamental Rights form the foundation and parameters of legal equality in the distribution of and access to social goods, as is the case with water, because of which they are a substantive condition of democracy. Third, the super-national character of these rights which are conferred independently of a citizen's entitlements, and the enshrinement of those rights into international law by international conventions to which States have adhered, are beginning to form normative foundations of at least the idea of an international democracy which has chosen to recognize the Right to Water among other human rights. And fourth, by conceptualizing it as a Fundamental Right, a logical relationship is implied between the right and

² DIRECCION GENERAL DE AGUAS (2010).

³ FERRAJOLI L. (2004 [1999]) p. 37.

⁴ Respecto a la extensión del concepto a los pueblos se pronuncia explícitamente el autor. FERRAJOLI L. Ibídem, 154.

its guarantee which assures its justiciability, but which, at the same time, poses the idea that from the absence of the corresponding guarantees one would not deduce the inexistence of the right, but rather, the failure to observe affirmatively stipulated rights, in our case, the Right to Water, which creates a kind of metaphorical illegally dry reservoir, which must be filled to over-flowing by means of legislation.⁵

2. Policies and the legal basis of the Chilean Water System

The legal framework of water regulation in Chile is established in the Political Constitution of the Republic (PCR),⁶ in D.L. N° 2.603 de 1979⁷, in the Water Code⁸ and in the Civil Code.⁹

This system of water regulation is structured based on a system of very robust rights to enjoyment of water (REW), on ownership of entitlement to the right and the administration of a water market to assign its uses to the greatest value, and on limited regulatory mechanisms and an active role for judicial power to resolve controversies and make decisions concerning the distribution of water.¹⁰ This model maintains the general declaration of *publification* or public *demanialidad* of terrestrial waters, notions that the doctrine has assigned to the legal condition of water as a “national good for public use.” Nevertheless, in the practice, the work of administering the water system, a role which belongs to the General Director of Water (GDW), has been reduced to construing or recognizing those REWs which sustain the system of water administration in Chile. The principles which guide this system of regulating water in Chile are the free circulation of REWs in the market of goods and services, and the legal security granted to them as the mechanism of assignment and exercise of the exclusive rights of entitlement to use, enjoyment, and disposition of a certain volume of water.

This regulatory framework has been complemented by other norms, some tasked with the regulation of specific spheres of water policy and the assignment of water to certain productive

⁵ Ibídem, 42.

⁶ Artículo 19 N° 23 y 24 inciso final, Constitución Política de la República (CPR).

⁷ Esta norma modifica y complementa el Acta Constitucional N° 3, que establece normas sobre derechos de aprovechamiento de aguas y faculta al Presidente de la República para que establezca el régimen jurídico general de aguas.

⁸ D.L. 1.122, de 1981 y sus posteriores modificaciones, efectuada a través de la Ley N° 19.145 de 1993, sobre protección de vegas y bofedales en la I y II Región, la Ley N° 20.017 de 2005, que modifica el Código de Aguas, modificada a su turno por la Ley 20.099 de 2006.

⁹ Artículo 595, Código Civil.

¹⁰ BANCO MUNDIAL (2013) p. 10.

sectors, such as: agriculture,¹¹ mining,¹² geothermal energy,¹³ aquaculture,¹⁴ forestry,¹⁵ and hydroelectricity,¹⁶ or to correct the gaps in the Chilean water market, specifically by eliminating some barriers to access in the most overlooked sectors of the population by way of instituting subsidy mechanisms.¹⁷ Others are tasked with safeguarding the rights of certain vulnerable groups, as in the case of indigenous peoples, whose rights are protected by a specific statute on fundamental rights;¹⁸ in this same vein, there are also norms of environmental protection.¹⁹

These corrections notwithstanding, the State, in accord with its privatized orientation, has predominantly abdicated its role as an intervener [regulator and planner] charged with maximizing social wellbeing and guaranteeing the benefits of development to all. It is worth mentioning that this goal of integration is a constitutional principal derived from the Social

¹¹ Ley N° 18.450 de Fomento al Riego, modificada por la Ley 20.705 de 2013.

¹² Ley N° 18.248 de 1983, que establece el Código de Minería; la Ley N° 18.097, Orgánica Constitucional sobre Concesiones Mineras.

¹³ Ley N° 19.657 del año 2000 sobre Concesiones Geotérmicas.

¹⁴ Ley N° 18.892, Ley General de Pesca y acuicultura, de 1989 y sus modificaciones (Decreto Supremo 430 de 1991, del Ministerio de Economía, Fomento y Reconstrucción, que fija el texto refundido, coordinado y sistematizado de la Ley 18.892, Ley 19.713 de 2001, que establece como medida de administración el límite máximo de captura por armador a las principales pesquerías industriales nacionales y Ley N° 20.632 de 2012, que modifica la Ley General de Pesca y Acuicultura, sobre Asociación de Pescadores Artesanales, Inscripción de Recursos Marinos y Extensión de Área de Operación Artesanal). Para los efectos de la regulación de los cuerpos de agua dulce, ámbito de estudio de esta tesis, tienen particular importancia las modificaciones al régimen que regula la acuicultura y que están establecidos en los siguientes cuerpos legales: Ley N° 20.091 Modifica la Ley General de Pesca y Acuicultura en Materia de Acuicultura; Ley N° 20.434, Modifica la Ley General de Pesca y Acuicultura, en Materia de Acuicultura. (F.D.O. 08/04/2010); Ley N° 20.583 Modifica la Ley General de Pesca y Acuicultura en Normas Sanitarias y de Ordenamiento Territorial Para las Concesiones de Acuicultura; Ley N° 20.597, Modifica la Ley General de Pesca y Acuicultura en Materia de Fondo para la Pesca Artesanal, crea la Comisión Nacional de Acuicultura y los Consejos Zonales de Pesca que indica, y otras Materias y Modifica otros Cuerpos Legales Relacionados. (F.D.O. 03/08/2012).

¹⁵ Decreto Ley 701 de 1974, sobre Fomento Forestal y sus modificaciones y la Ley N° 20.283 sobre recuperación de Bosque Nativo y Fomento Forestal de 2008.

¹⁶ Decreto con fuerza de ley N°1, de 1982, del Ministerio de Minería, Ley General de Servicios Eléctricos, cuyo texto refundido, coordinado y sistematizado fue fijado por el decreto con fuerza de ley N°4, de 2007, del Ministerio de Economía, Fomento y Reconstrucción decreto con fuerza de ley N°4, de 2007, del Ministerio de Economía, Fomento y Reconstrucción. Modificado por la Ley 20.701 de 2013, que fija el procedimiento sobre concesiones eléctricas.

¹⁷ En efecto, se ha establecido un sistema de subsidios para garantizar el acceso al agua potable y al saneamiento, regulado en la Ley de Subsidios N°18.778 y su Reglamento fijado por Decreto Supremo N°195 de 1998 del Ministerio de Hacienda. Complementariamente, la ley N° 19.949 estableció un sistema de protección social para familias en situación de extrema pobreza denominado "Chile Solidario", existe una cantidad adicional de subsidios al consumo de agua potable y alcantarillado, que cubren el 100% de los primeros 15 metros cúbicos de consumo.

¹⁸ Ley N° 19.253 de 1993, sobre Protección, Fomento y Desarrollo de los Indígenas y Convenio 169 sobre Pueblos Indígenas y Tribales de la OIT.

¹⁹ Artículo 19 N° 8, CPR y la Ley N° 19.300 de 1994, sobre Bases del Medio Ambiente, modificada por la Ley 20.417 de 2010.

State,²⁰ and that it is explicitly recognized in Article 1° of the CPR, which recognizes that all persons possess freedom and equality in dignity and rights and explicitly that “ ... [t]he State is at the service of the human person and its end is to promote the common good, for which it should contribute to the creation of social conditions which permit to each and every one of the members of the national community the best spiritual and material realization possible, with ample respect to the rights and guarantees that this Constitution establishes. It is the duty of the State to safeguard the national security, give protection to the population and the family, tend to its strengthening, promote the harmonious integration of all the Nation’s sectors, and assure the right of the people to participate equally in the opportunities of national life.”

This principle should direct the interpretation of the whole Constitution; the legal consequence of this constitutional norm, read conjointly with the norms of recognition of fundamental rights, requires (not just permits) minimal actions directed at avoiding social exclusion.²¹

The national doctrine circumscribes the study of water rights to the CPR’s norms which codify private property REWs,²² in D.L. 2.603 of 1979 and the Water Code of 1981, cited above, which are recognized as the sole sources of the right to water.²³ Having as an analytic base the epistemological foundations of said laws, it attempts to examine the “dogmatic nucleus”²⁴ of the Chilean right to water, to both offer, “[...] a more coherent and rational interpretation and application of the right that is in force,” and provide dogmatic autonomy in this branch of law,²⁵ that which in the end justifies the neoliberal orientation of the Chilean system of water regulation.

Under this conception it is sustained:²⁶ first, that the Right to Water in Chile is an autonomous discipline that responds to a specific structure of guiding principles that form its institutional bases; second, that even if there is a permanent intersection of the public right and the private right in the dogmatic development of the discipline, that distinction would be

²⁰ ESCOBAR ROCCA G. (2012)

²¹ Ibídem, 369.

²² Artículo 19 N° 24, CPR.

²³ VERGARA BLANCO A.(2011) p. 57; ROJAS C. (2011) p. 12 – 13; RIVERA D. (2013) p. 33,

²⁴ VERGARA BLANCO A. (2011) p. 57.

²⁵ Ibídem, 57

²⁶ Ibídem 61 – 66. V. t., ROJAS C. (2011) p. 19 – 21 y RIVERA D. (2013) p. 38 - 39.

superseded by the principle of constitutional supremacy which assures, by means of the constitutional guarantee of rights to property²⁷ and the guiding principles and the institutional bases of the Right to Water, that that which conforms to constitutional text also conforms to the neoliberal economic model; and third, that in conforming to these principles, the dogmatic nucleus of the Chilean Right to Water would be codified by “[...] the *publicate which operates in the sector*, of the ulterior application of the institution of the *concession*, of that which leads to a legal relationship and a specialized *right to enjoyment of water* in favor of individuals.”²⁸

For our part, we hold that the right to water forms a part of the broader national legal universe, whose normative contents we analyze below, and also a part of international law, in particular those norms and principals which emanate from the international law of human rights, which offer a distinct perspective on the dogmatic interpretation of the Right to Water, in conformity with those principles which emanate from the focus on Fundamental rights and the notion of the Social State, which we have developed above.

2.1 The *propertification* of the Right to Enjoyment of Water in the Chilean Constitution and the guarantees of constitutional supremacy

The Chilean constitution discusses water in the framework of regulation of Fundamental Rights²⁹ which are established in Chapter III, titled, “Of constitutional rights and duties.” Consistent with the neoliberal orientation which makes up the ideological ceiling of the Constitution,³⁰ the constitutional text limits itself to recognizing the right of particular individuals to access water and guarantees the stability and supremacy of this right by means of the fundamental right to property.

This institutional model, as has been signaled in the previous passages, was established by Article 19 N° 24, in the final part of the CPR in the following terms:

“The rights of individuals to water, recognized and constituted in conformity with the law, grant to their holders ownership over them.”

²⁷ Artículo 19 N° 24, CPR.

²⁸ VERGARA BLANCO A. (2011) p. 67.

²⁹ FERRAJOLI L., (2004 [1999]) p. 37 y 42.

³⁰ ZUÑIGA F. (2006) p. 406. V. t., BAUER C (2004) p. 62 – 65; BUSTOS R. (2012) p. 52 – 57.

In this way the Chilean constitution configures the legal framework for a model of a market of water rights, defining an individual property right which permits owners of the right access to water – a right which, with the legacy of the issuance of the Water Code, becomes the REW.

It has to do with a type of right to property over an intangible thing³¹ -- the REW -- , and enjoys all the guarantees that the Constitution confers on the right to property, a right which under the ideological framework of the Fundamental Charter of 1980 is a guarantee of utmost protection, extending the scope of the protection of property to all classes of subjective ownership. Thus, the concept completely permeates judicial reasoning and the constitutional doctrine of privatization, divorced entirely from the principles of equality and solidarity which are more typical of the legal nature of this type of right, as much in its formulation as an economic right as in its formulation as a social right.³²

We should keep in mind that the right to property in the Constitution has a more robust dimension than that assigned to the other Fundamental Rights,³³ in particular those of a social nature, and this is clear from the model of judicial protection of rights, guaranteed by way of the recognition of the Resource of Protection.³⁴

Moreover, the PCR, in applying the right to property as a guarantee to REW, bestows ownership of a legal carve out that protects the right to commit whatever arbitrary or illegal act which involves privation, disturbance, or threat, so long as it is in legitimate exercise of the right to property and to the guarantees that form the essence of one's REW. This applies equally to the methods of acquiring property and the use and enjoyment of property, as it does to the regulation of the authority of expropriation.³⁵

The “no affectation of rights in their essence” requirement imposed by the Constitution of 1980 in Article 19 Number 26 is an attempt to provide a constitutional guarantee superior to the right to property. An analysis of the true history of the establishment of the norm shows that those who were responsible for the text’s composition were persistent in establishing a limit to

³¹ Artículo 19 N° 24, CPR; Artículo 583 del Código Civil.

³² BUSTOS R. (2012) p. 67.

³³ El derecho ha sido reconocido y ampliamente regulado en el Capítulo de los derechos fundamentales en tres preceptos constitucionales, artículo 19 N° 23, 24 y 25, CPR.

³⁴ BUSTOS (2012) p. 58.

³⁵ Artículo 19 N° 24, inciso 2 y 3, CPR.

the authority granted to the legislature to regulate the methods of acquiring property, and its use and enjoyment; thus we have its configuration in a separate article.³⁶ In constitutional dogma, this principle acts as a limit to sovereignty, such that it prohibits the constituent power and the legislator from violating the essential nucleus of fundamental rights. Moreover, it acts as a parameter of constitutionality and as a basic norm of interpretation of the rights enshrined in the Constitution. An adequate interpretation of the essential nucleus of the right to property, nevertheless, must consider that the PCR recognizes the social function of property and authorizes the legislature to impose, in the achievement of this superior value, limitations and obligations on property that support the general interests of the Nation, national security, utility, and public health and the conservation of environmental heritage,³⁷ all of which – save for the reference to national security – give insight into democratic values of the Social State.

A pragmatic example of the limitations imposed on property for the sake of social utility are those which come from environmental regulation. The tendency is not to consider this type of regulation to be expropriation, and therefore it requires no indemnification.³⁸ Nevertheless, it continues to be a point of debate, this so-called, “indirect expropriation” as a consequence of the regulations derived from the social utility of property in other spheres.³⁹

The Constitution does not expound on the legal nature of water. Nevertheless, Article 19 Number 23, recognizes the freedom to acquire dominion over all classes of goods, except those which nature has made common to all men or which must belong to the whole Nation, and the law declares it so. This conception allows one to maintain the position that the notion of *demanialidad* of water that is touched upon in the Civil Code and, later, in the Water Code of 1981, which we analyzed above, is consistent with the concept of the nature of water as a national good of public use, ownership of which belongs to the nation, and therefore, is outside

³⁶ CELUME T. (2013) p. 147 – 158.

³⁷ Artículo 19 N° 24, inciso 2º, CPR.

³⁸ Así, se estipula en el Tratado de libre comercio suscrito por Chile con EE.UU., capítulo X sobre Protección de Inversiones, artículo 10.12.

³⁹ El tema ha cobrado relevancia en los últimos años en el plano internacional. Una expropiación indirecta, también denominada “expropiación regulatoria” se da en los casos en que el Estado priva a una persona del aprovechamiento de su propiedad mediante la aplicación de regulaciones que no producen un cambio en la titularidad del dominio. El primer precedente en torno al concepto de expropiación regulatoria se atribuye al magistrado de la Corte Suprema de EE.UU. Oliver Wendell Holmes que en 1992 redactó la decisión del caso “Pennsylvania Coal Company v. Mahon” (260 U.S. 393 (1922), quién señaló que si una normativa regulaba en forma tan restrictiva que el propietario era privado del aprovechamiento económico de su tierra, esta normativa equivalía a una expropiación de acuerdo a la quinta enmienda de la Constitución de los EE.UU.

human commerce so that it is dedicated to the service of the superior interests that emanate from its particular legal condition.

Even so, the rights that emanate from the *demanialidad* condition of water and those interests that are hidden within this legal category, do not fit within the Chilean constitutional framework of safeguards which protect the REW of individuals.

2.2. The human right to water as a fundamental right in the Chilean Constitution

Nevertheless, from the *propertification* of the right of individuals to access water in the PCR, as analyzed in the Charter of 1980 with a focus on fundamental rights, we can sustain that the charter recognizes the Right to Water, like the right to life, as a right derived from the general guarantee of environmental protection, and as a specific right of indigenous people and other traditional users, as well as an Economic, Social, and Cultural (ESC) right, in conformity with the formulation of the right bestowed by the international human right instruments that Chile has ratified. The recognition of the Right to Water as a Fundamental Right in the PCR is supported by the constitutional bloc of fundamental rights, as a rule of recognition of the sub-system of fundamental rights.⁴⁰

The concept is taken up in articles 1, 5, and 19 of the constitutional text.⁴¹ In particular, we base our analysis in article five, section 2, and in doing so assume that treaty-based international human rights law, validly incorporated in domestic law by means of its ratification, codified in article 54 of the PCR, constitutes a binding normative body of preferential application in domestic law,⁴² which sets itself up as a limit on the Chilean system of water regulation and, since it has constitutional standing,⁴³ radiates throughout the entire legal system.⁴⁴

With respect to the validity of these rights in Chile, all international human rights instruments that make up the right to water have been ratified and are valid in the Chilean legal system.⁴⁵

⁴⁰ FERRAJOLI L. (2004 [1999]) p. 65 y 66.

⁴¹ NOGUEIRA H. (2012) p. 223.

⁴² Ibídem., 233. V. t. RUIZ TAGLE P. (2009) p. 32.

⁴³ NASH C. (2012) p. 20 – 23. V. t., BERTELSEN R. (mayo-agosto 1996) p. 211 - 222; PFEFFER E. (2003) p. 471; GAETE E. (1996) p. 266; RIBERA T. (2007) p. 89 – 118.

⁴⁴ NOGUEIRA H. (2012) p. 223.

⁴⁵ Cabe reiterar que el único instrumento de derechos humanos relevante en la materia que no ha sido ratificado por el Estado de Chile es el Protocolo Adicional a la Convención Americana sobre Derechos Humanos en materia de

These international agreements are a complement⁴⁶ to the catalogue of fundamental rights in the Chilean Constitution which make up a “Constitutional Bloc,”⁴⁷ the clause which Dulitzky has dubbed the “[...] recognizer of implicit or un-enumerated rights.”⁴⁸

The Supreme Court has ruled along this line,⁴⁹ as has the Constitutional Tribunal,⁵⁰ which has recognized in the constitutional bloc those rights which are implicit among fundamental rights and which accord with the doctrine that, “[...] there can be deduced values, principles, ends, and historical reasons that feed into positive rights in constitutional and international law.”⁵¹

The jurisprudential analysis evidences a clear tendency in favor of the incorporation of international human rights norms into the constitutional text,⁵² and, similarly of their use as a hermeneutic element for the interpretation of the constitutional catalogue of fundamental rights.⁵³

Derechos Económicos, Sociales y Culturales “Protocolo de San Salvador”, que entró en vigor el 16 de noviembre de 1999, que reconoce a toda persona el derecho a vivir en un medio ambiente sano y a contar con servicios públicos básicos, artículo 11 (1). Chile ha suscrito la mayoría de los Tratados Internacionales que ser pronuncian explícitamente sobre el derecho al agua potable y saneamiento: la Convención sobre los Derechos del Niño, artículo 14; la Convención sobre la eliminación de todas las formas de discriminación contra la mujer, artículo 14 (2); la Convención sobre los derechos de las personas con discapacidad, artículo 28; el Convenio N° 161 de la Organización Internacional del Trabajo (OIT) sobre los servicios de salud en el trabajo, 1985, artículo 5. Además, ha suscrito y ratificado el Pacto de Derechos Económicos, Sociales y Culturales, (PDESC) de 1966, por medio del cual la Comunidad Internacional ha reconocido el Derecho al Agua como derecho social. Así en el año 2002, el Comité de Derechos Económicos., Sociales y Culturales, encargado de la adopción del PDESC, adoptó una Observación General sindicada con el N° 15, que se sustenta en lo dispuesto en los artículos 11 y 12 del PDESC y que especifica el contenido sustantivo del derecho y las obligaciones que en la materia impone el tratado a los Estados suscriptores. También ha ratificado el Convenio 169 sobre Pueblos Indígenas y Tribales de 1989, que reconoce el derecho de los pueblos indígenas a la integridad de su medio ambiente, artículo 4. Este derecho de los Pueblos Indígenas a la integridad de sus ecosistemas también han sido reconocidos en el artículo 8 j) de la Convención sobre Biodiversidad y en la Agenda 21, Capítulo 18 y 26, ambos instrumentos adoptados en el marco de la Conferencia Mundial sobre el Medio Ambiente y el Desarrollo, celebrada en Río de Janeiro en 1992.

⁴⁶ Sobre la relación de complementariedad entre el Derecho Internacional y Nacional, véase CANCADO TRINCADE A. (2001) p. 273.

⁴⁷ NASH C. (2008) p. 179; UPRIMNY R. (2006) p. 31.

⁴⁸ DULITZKY A. (1996) p.145. NOGUEIRA H. (2012) p. 226.

⁴⁹ Corte Suprema, causa rol N° 469 – 1998, sentencia de 9 de septiembre de 1998; Corte Suprema, causa rol N° 559 – 2004, sentencia de 13 de diciembre de 2006, considerando 22°; Corte Suprema, causa rol N° 2506 – 2009, sentencia de 9 de junio de 2009.

⁵⁰ Tribunal Constitucional, causa rol N° 226, sentencia de 30 de octubre de 1995, considerando 25°; Tribunal Constitucional, causa rol N° 815, sentencia de 14 de agosto de 2008, considerandos 9° a 11°; Tribunal Constitucional, causa rol N° 1340, sentencia de 29 de noviembre de 2009.

⁵¹ NOGUEIRA H. (2012) p. 228.

⁵² NOGUEIRA H. (2012) p. 228.

⁵³ Corte Suprema, causa rol N° 876 – 2008, sentencia de 4 de mayo de 2008, considerando 2°; Corte Suprema causa rol N° 9758 – 2009, sentencia de 13 de abril de 2008, considerando 18; Corte Suprema, causa rol N° 6811 – 2008, sentencia de 11 de noviembre de 2008, considerando 3°; Corte Suprema, causa rol N° 696 – 2008, sentencia de 25 de mayo de 2009, considerando 11°.

In the area of the recognition of indigenous rights, the Appellate Court of Temuco has explicitly adhered to the doctrine of the constitutional bloc, incorporating into it the process of constitutional interpretation and legal argument in order to define the content of fundamental rights, the norms, values, and principles that make up imperative principles of international law, *ius cogens*, and implicit rights, recognized in article 29(c) of the American Convention of Human Rights.⁵⁴ In so doing, the precepts of international instruments that constitute imperative principles of international law are made applicable even before their ratification and/or their taking effect, as occurred with Convention 169⁵⁵ in the case mentioned in this paragraph.⁵⁶ The court recognized as an imperative principle of international law equality and non-discrimination which creates the obligation to protect indigenous peoples in the specificity of their cultural manifestations.

Aside from the incorporation of this fundamental principal cited above, the Court develops a broad conceptualization of the environment, which permits the protection of Mapuche water sources -- or *Menoko* in the vernacular of this people – of the territorial spaces where ancestral medicine originated, of the land and its particular importance for indigenous peoples, and of the simple realization of dignity and liberty for the indigenous community and its members. Consequently, it holds the cutting down of forests to be illegal and arbitrary, when the forests are adjacent to these territorial spaces, where medicinal herbs used in cultural practices can be found, and which are spaces of indigenous religiosity.⁵⁷

Additionally, the Supreme Court applied Convention 169 prior to its entry into force in the case of the indigenous community of Chusmiza Usmagama,⁵⁸ and in doing so overturned its previous jurisprudence.⁵⁹ In Article 19, Number 24 of the PCR, it is recognized as a fundamental guarantee, “(...) as much the rights to water created by an act of authority as those whose origins

⁵⁴ C. Temuco, Causa Rol N° 1773-2008, caratulados Francisca Linconao con Forestal Palermo, Considerando 10.

⁵⁵ Cabe consignar que la Corte de Apelaciones de Temuco citó como fundamento de su argumentación el Convenio 169 de la OIT y también la Convención sobre la Eliminación de Todas las Formas de Discriminación Racial vigente en Chile desde el año 1971. C. Temuco, Francisca Linconao con Forestal Palermo, Causa Rol N° 1773-2008, Considerando 7.

⁵⁶ AYLWIN J., “et al”, 2013: 327.

⁵⁷ Ibídem, 250.

⁵⁸ Corte Suprema, causa rol 2840-08, Sentencia de 25 de noviembre de 2009, caratulados Agua Mineral Chusmiza con Comunidad Aymara Chusmiza-Usmagama.

⁵⁹ Corte Suprema, causa rol N° 986 - 2003, Sentencia de 22 de marzo de 2004, caratulados Comunidad Atacameña de Toconce vs. ESSAN S.A,

are in common law,”⁶⁰ thus widening the idea of property in two senses: one, recognizing as simple property that which is created as a consequence of the age-old use of indigenous community of the existing water in their territorial and ancestral space; and two, superseding the individualized concept of the right by way of recognizing the collective ownership of the indigenous communities in the same manner as the collective dimensions of the right’s exercise.⁶¹

2.2 The right to life as a guarantee of the protection of the human right to potable water and sanitization

The right to potable water and sanitization as an expression of the right to life serves as the justification for article 35 of the D.F.L. N° 382 of 1998 of the Ministry of Public Works, which established the General Law of Sanitation Services. The law obliges service providers of potable water and sanitization to guarantee the continuity of the service, except in cases of an act of nature.⁶²

In accordance with this interpretation, the jurisprudence has held that the norms of Articles 36(d), and 38 of the same legal text cited above, which authorize sanitation businesses to suspend the provision of potable water to users who have overdue accounts on one or more utility bill, cutting off or interrupting an indispensable element of life, are a violation of Article 19 off the Constitution.⁶³

This reasoning is based on the following considerations:

- In the essence of the constitutional guarantee, potable water is a good necessary for the development and existence of the right to life, so that cutting off the supply would affect

⁶⁰ Corte Suprema, causa rol N° 2480 - 2008, confirmando sentencia de la C. Iquique, causa rol N° 817- 2006, considerando 3º.

⁶¹ AYLWIN J. “et al”, 2013: 349.

⁶² HENRIQUEZ I. (julio, 2012).

⁶³ Tribunal Constitucional, Rol N° 2039-11-INA, requerimiento de inaplicabilidad por inconstitucionalidad deducido por la C. San Miguel, en la causa sobre recurso de protección, caratulada Pablo Segundo Reyes Barraza con Aguas Andinas S.A., Rol N° 101-2011, considerando 5.

the essence of the right recognized by Article 19 N° 1 in relationship to Article 19 N° 26° of the PCR.⁶⁴

- In Article 11 of the International Covenant on Economic Social and Cultural Rights, which recognizes the right of all persons and their families to an adequate standard of life, including nutrition, clothing, and an adequate living, and a continual improvement of the conditions of existence.⁶⁵
- In General Observation Number 15 of the Committee of Economic, Social, and Cultural Rights, which in the introduction affirms that under Articles 11 and 12 of the Covenant cited above, water is a limited natural resource and a public good fundamental to life and health.⁶⁶

Nevertheless, this jurisprudential tendency is as of yet still incipient. In the case that we have analyzed, in the end, they rejected the petitioner's claim due to the fact that the utility company in question had reinstated water service prior to the ruling.⁶⁷

2.4 The guarantee of protection of the Environment as a vector of protection of water

The constitutional framework of environmental regulation in Chile is established in the constitutional guarantee enshrined in Article 19 N° 8 of the Constitution, which endows all persons with the right to live in an environment free of contamination and the right to protection of nature. These environmental guarantees are safeguards on the General Environmental Basis Law (GEBL)⁶⁸ and its regulations.⁶⁹

⁶⁴ Tribunal Constitucional (TC), Rol N° 2039-11-INA, requerimiento de inaplicabilidad por inconstitucionalidad deducido por la C. San Miguel, en la causa sobre recurso de protección, caratulada Pablo Segundo Reyes Barraza con Aguas Andinas S.A., Rol N° 101-2011, parte resolutiva numeral 3.

⁶⁵ Op. Cit., parte resolutiva numeral 4.

⁶⁶ Op. Cit., parte resolutiva numeral 5.

⁶⁷ Op. Cit., parte resolutiva numeral 6.

⁶⁸ Ley 19.300 sobre Bases del Medio Ambiente de 1994, modificada por medio de la Ley 20.173 de 2007 y por la Ley 20.417 del año 2010.

⁶⁹ DS 40 de 2013.

From the analysis of this norm it can be inferred that the environment in Chile constitutes a fundamental right and, as such, is a governing principle of the regulatory system of natural resources, which obviously includes water as a natural resources essential for the existence of ecosystems.

Article 19, N° 8 of the Constitution assures to all peoples the right to live in an environment free of contamination and it imposes on the State the obligation to safeguard against this right being infringed and to be the guardian of the preservation of nature. It authorizes the legislature to establish specific restrictions on the exercise of certain rights or freedoms, including concessions with regard to natural resources, with the goal of protecting the environment and preserving nature. In this vein Article 19, N° 24 contains legal limitations that cover the conservation of the country's environment, and among them are limits which specifically allow the imposition of legal limits on the right to property, limits which are derived from the concept of social utility.⁷⁰

This conception of the law gives tangible, specific content to the constitutional concept of social utility as a limit on rights, expressly determining that the right to property, just like other rights and freedoms, admits to restrictions when the national environmental welfare is involved.

The guidelines for filling out substantive content in this constitutional guarantee are in the GEBL, specifically in article 2(b), (p), (q), (y), and (m).⁷¹

In the area of environmental regulation, Article 10 (o) of the GEBL states that certain projects should be submitted to the system of Environmental Impact Evaluation, and lists among them any projects for water treatment plants or solid waste plants that treat household waste. In its turn, Article 11 of the same law establishes that: The projects or activities enumerated in Article 10 will require that an Environmental Impact Study be conducted, if the proposed project

⁷⁰ GUZMAN R. (2010 2^a edición [2005]) p. 37.

⁷¹ La doctrina no es pacífica en orden a establecer si estas normas irradian a la Constitución, hay autores que consideran que tienen un rango jurídico inferior y, por tanto, no irradian la interpretación del texto constitucional, GUZMAN R., (2010 2^a ed. [2005]) p 29. El Tribunal Constitucional, si bien negó el carácter interpretativo de estas normas respecto a la garantía constitucional preciso que la labor de interpretación del derecho al medio ambiente no puede prescindir de los conceptos que formula la LGBMA, Tribunal Constitucional, sentencia de 26 de abril de 2001, Rol N° 577 – 2006, Considerando decimotercero. Esta posición es la que sostiene la C. Santiago, sentencia de 3 de noviembre de 2006, Rol N° 12.004 – 2005, caratulados Comité de Agua Potable Rural de Caimanes y otros con Dirección General de Aguas, Considerando 39.

creates or poses at least one of the following effects, characteristics or circumstances, among which are indicated any risk to the health of the population, adverse effects to renewable natural resources, and the significant alteration of systems of living and the customs of human groups in sites of anthropological value.

Apart from the adoption of the GEBL, a broad concept of the environment has been adopted, which we have already made mention of in the section above, which includes not just natural elements, but also social and cultural elements. Behind this, at least on the legal level, there remains a restrictive concept of the environment limited to just the preservation of the elements of the natural world, a concept taken up by the judicial ruling analyzed above.

The legal definition contained in the GEBL stipulates that the environment is:

“The global system which is comprised of natural or artificial elements of a physical, chemical, or biological nature, sociocultural elements and their interactions, modified permanently by natural or human action and which controls and determines the existence and development of life in its multiple manifestations.”⁷²

Despite the fact that the literal content of the law is clear, the jurisprudence on the subject has not been uniform. On occasion, it has made pronouncements concerning a restrictive conceptualization of the environment, limited to a definition which includes only the natural elements of the environment.⁷³ Nevertheless, it sketches out, as we have confirmed in this analysis, a tendency to incorporate sociocultural elements in the definition, of the type found in the legal definition coined by the GEBL and in the case to which we referred above.⁷⁴

It is not our intention in this article to delve into the substantive content of environmental rights in the Chilean legal system, but nevertheless, it seems relevant to us to make note of the form in which this constitutional guarantee and environmental norm have allowed for the protection of water and hydrographic watersheds, from an eco-systematic perspective, including biophysical and socio-cultural variables.

⁷² Artículo 2, letra ll), LGBMA.

⁷³ GUZMAN R. (2010 2^a edición [2005]) p. 28.

⁷⁴ C. Temuco, sentencia de 16 de septiembre de 2008, causa rol N° 1773 – 2008, caratulados Linconao Huircapan, Francisca con Sociedad Forestal Palermo Ltda.

In its verdict ordering the suspension of the extraction of water from Lake Chungará in the Arica and Parinacota Region,⁷⁵ the Supreme Court made use of international law as a hermeneutic element to interpret the constitutional guarantee which enshrines environmental rights,⁷⁶ and in consideration of Article 12° it adhered to a concept of sustainable development that holds as an ethical imperative the sustainable use of resources and the protection of the interests of future generations in the preservation of nature, principles which were taken up by the 1972 Stockholm Declaration.⁷⁷

Chilean jurisprudence has specifically made judgements on the protection of hydrographic watersheds on the basis of the constitutional guarantee contained in Article 19 N° 8, in a case that took up the issue of the construction of the relief reservoir “El Mauro” in the Estero Pupío Watershed. This verdict created as a rule of law the concept that the construction of these water deposits must be evaluated in light of the fundamental guarantee of environmental rights, considering the environmental and social implications of the measure and not just the utility of practicability and low cost.⁷⁸

The precise holding in this case was that water administration officials should have applied not just the norms contained in the Water Code,⁷⁹ but also other norms contained in Chile’s legal system. These other norms would have allowed for a response to the legal dilemmas posed by an intervention of these dimensions in a hydrographic watershed, an intervention which involves the rights and interests of a multitude of persons, local organizations, and interest groups who are stakeholders in the matter.

The Court held that “[...] the stated difficulties have arisen, according to the feeling of this Court, due to the fact that the Regional Water Director granted the authorization of the stated work adhering only to the legal norms in the Water Code at article 294 and following, without considering that the execution of the project implicated other aspects, such intervening in a natural irrigation bed by the name of Estero Pupío, and moreover that the project requires the

⁷⁵ Corte Suprema, sentencia de 19 de diciembre de 1985, caratulados Palza Corvacho, Humberto con Director de Riego y otros. Revista de Derecho y Jurisprudencia, T. LXXXII (1985), N° 3 (septiembre-diciembre), sección 5.

⁷⁶ Artículo 19 N°8, Constitución Política.

⁷⁷ AYLWIN J. “et al” (2013) p. 263.

⁷⁸ C. Santiago, sentencia de 3 de noviembre de 2006, Rol N° 12.004 – 2005, caratulados Comité de Agua Potable Rural de Caimanes y otros con Dirección General de Aguas.

⁷⁹ Artículo 294 y siguientes del Código de Aguas.

sealing or blocking off of some of its sources, which made it necessary to resort to look to other legal regulations and procedures, which were inappropriately ignored or omitted.”⁸⁰

The holding is evidence of the breadth of the environmental destruction which the project gave rise to and the impaction on the national⁸¹ and local⁸² community. It protects a national interest which involves the whole community and as such has a collective dimension; in itself, the interest of the watershed’s many users (citizens, entities, or businesses), put over the individual interest of the challenged project’s executor.⁸³

Alluding to other high impact industrial projects, the Court refers to the preventative principle inspired by the constitutional guarantee of Environmental Protection, and which requires the adoption of environmental safeguard measures in cases where the potential environmental impacts are extremely grave, such as when the disappearance of a hydrographic watershed is at risk as a consequence of the fact that it will be buried under the residue of a mining process, residue which will be deposited in the watershed.⁸⁴ The holding also emphasizes that the project which hoped to build over the reservoir alters the normal path of waters and runs them off their natural flow, waters which support the Pupío valley. It pinpointed how running the waters below creates negative effects on third parties, on the local and national community, as has been indicated above,⁸⁵ compromising the valley’s sole source of nourishment by this vital element.⁸⁶

The holding calls into question the process of evaluating the environmental impact, suggesting that it has risked the integrity of the environment due to inadequate measures of harm mitigation or inconsistent technical reports.⁸⁷

A protective approach can be observed in the reasoning of the tribunal, which integrates a wide spectrum of norms and principles, in order to put the contemplation of Fundamental Rights at the center of analysis when the exercise of administrative authority concerning a utility will authorize the construction of a hydraulic project – in this case a reservoir for the accumulation of

⁸⁰ C. Santiago, sentencia de 3 de noviembre de 2006, Rol N° 12.004 – 2005, caratulados Comité de Agua Potable Rural de Caimanes y otros con Dirección General de Aguas, considerando 14.

⁸¹ Op. Cit., considerando 33.

⁸² Op. Cit., considerando 34.

⁸³ Op. Cit., considerando 34.

⁸⁴ Op. Cit., considerando 29.

⁸⁵ Op. Cit., considerando 30.

⁸⁶ Op. Cit., considerando 40.

⁸⁷ Op. Cit., considerando 37.

mining waste – and could implicate the violation of fundamental rights. The approach considers the right to preserve the integrity of hydrographic watersheds and the regular supply of water to all who benefit from the hydro-resources of the watershed, whether or not they own REWs.

3 Analysis of the legal reform of the water system

To conclude we analyze the project of legal reform of the Water Code, which is currently being undertaken, Bulletin 7543-12,⁸⁸ and we do so with a focus on Fundamental Rights and the notion of the Social State as a metric of constitutionality, limited exclusively to those aspects which imply the recognition of the right to water as a human right, the environmental protection of water and associated ecosystems, and, finally, the recognition and/or restriction of indigenous rights to water and its constituent uses.

3.4 Water as a Human Right

Among the core functions of water are recognized, “the human consumption and sanitization of the substance for subsistence, preservation of the ecosystem or for production.”⁸⁹

There is an established order of preference in favor of human consumption, domestic use of the substance, and sanitation, as much to effect the granting of a REW as to limit the exercise of the right which cannot be granted to other uses.⁹⁰

The actual function of the ecosystem, nevertheless, does not achieve said prioritization. It only grants the powers of authorization to watch over the harmony and equilibrium between the function of preservation of the ecosystem and the productive function performed by water.⁹¹

Omitted are the cultural and social functions of water. The ancestral property right to water of indigenous peoples remains outside the preferential ordering of the rights, as does the related constituent rights.

⁸⁸No abordaremos en este análisis los proyectos de reforma constitucional pues responden a distintas iniciativas que se contraponen entre ellas y cuyo debate parlamentario ha sido postergado por el Congreso, probablemente en espera de generar un proyecto unificado (boletín 6124-09, 6141-09, 6254-09, 6697-09, 7108-07, 8355-07 y 9321-12).

⁸⁹ Artículo 5 bis, boletín 7543-2012.

⁹⁰ Op. Cit.

⁹¹ Op. Cit..

To assure the exercise of distinct functions of the substance and the preservation of the ecosystem, the State could build, exceptionally, available water reserves, above-ground or subterranean – that is to say, water which has not been construed as a REW. This water could be granted to private business and sanitation services to guarantee human consumption and sanitation, which the sole reservation that endowment of water never be considered for purposes of tax calculation.⁹²

3.5 The Protection of Indigenous Waters

Indigenous waters are regulated by articles 5, 129 bis 9 and provisional 2. The proposed norm imposes both the authority and the obligation to protect indigenous territories, obligating the state to watch out for and safeguard the integrity between earth and water. Because of this, it will be required to protect existing waters for the benefit of indigenous communities in accordance with the laws and international treaties that have been ratified by Chile and are currently in force.⁹³

The proposal does not exclude the indigenous territories of the private regime as does the Chilean model. It maintains the mechanism of regularization of water for the constituent use by indigenous peoples which is established in provisional article 2 of the Water Code, by means of which indigenous communities and their members can lay claim to a REW regarding the waters they have peacefully used without interruption for more than five years.⁹⁴

This right to the regularization of constituent uses of water that is recognized with regard to indigenous peoples is in contrast to the right that in under the same conditions is recognized with regard to other traditional uses and rural communities, who tally up period of 18 months and five years, respectively, to regularize their constituent user rights. That is to say, the proposed system discriminates against non-indigenous traditional uses and rural communities.⁹⁵

⁹² Artículo 5 ter., boletín 7543-2012.

⁹³ Artículo 5, inciso final, boletín 7543-2012.

⁹⁴ Artículo 2 transitorio, boletín 7543-12.

⁹⁵ Artículo 2 transitorio, boletín 7543-12.

The reform exempts indigenous people from the obligation to pay for patents for the non-use of water, so that they can exercise their REW over water which fulfills environmental or cultural functions, without having to pay a patent fee for not taking productive advantage of the water or being under threat of the expiration of the right for the same reason.⁹⁶

3.3. Protection of the environmental functions of water

The project of reform reiterates that water is a “national and public good” and extends this notion to water in all its states (liquid, solid, and gas). In this framework, it confers a special protection to glaciers, with respect to which is it prohibited to claim an REW.⁹⁷

In article 129bis 2, added to the project of reform, the prohibition on granting and REW extends to “... those protected areas that are declared National Parks and Reserves in Virgin Regions.”

Nevertheless, in other categories of protected areas, such as National Reserves, Nature Sanctuaries, National Monuments and Wetlands of International Importance, laying claim to a REW is permitted inasmuch as it is possible to maintain consistency with the goal of the category of the protected area and with its respective management plan, a circumstance which will be determined by prior report of the Biodiversity and Protected Areas Service.⁹⁸

These areas, all without exception, require hydro-resources to guarantee their sustainability and the preservation of the ecosystems that have motivated their addition to a regime of special legal protection. The goal of these protected areas is precisely to preserve the biodiversity of these spaces and to limit the extractive use of those natural resources, prioritizing their environmental function in a way that is consistent with the international treaties that regulate the protected areas⁹⁹ and consistent with a broad concept of protected areas.¹⁰⁰

⁹⁶ Artículo 129, bis 9, boletín 7543-12.

⁹⁷ Artículo 5, incisos 1°, 2° y 3°, boletín 7543-12.

⁹⁸ Artículo 129, bis 2, boletín 7543 -12.

⁹⁹ Convención de Washington, 1940; Convención Ramsar, 1971; Convención sobre Biodiversidad, 1992; y, Convenio 169 OIT, 1989.

¹⁰⁰ El artículo 22 letra f) de la Resolución DGA N° 425, de 2007, hoy modificado por el DS 206 de 2014, considera áreas de protección y restringidas para estos efectos de la constitución de DAA sobre aguas subterráneas: Zonas que alimenten áreas de vegas y de los llamados bofedales de las Regiones de Arica y Parinacota, de Tarapacá y de Antofagasta, previamente identificadas y delimitadas por la Dirección General de Aguas; Áreas protegidas

There are established norms of protection of meadows and wetlands in the north of the country, which are determined by the GDW. There are also additional norms of protection with respect to degraded wetlands or those in a situation of grave environmental risk, conditions which must be declared by the Ministry of the Environment.

The preeminence of environmental criteria is established to set ecological levels of water flow and arrange for the reduction of constituent REWs, even prior to the law's taking effect, to guarantee a minimal ecological level of water flow, Article 129bis 1.

3.6 The expiration of REWs and the limitations which result from the prioritized functions of water

The project of reform modifies the legal nature of the right to enjoyment of water (REW), eliminating ownership of the REW. The REW is transformed into a right to use and enjoyment of a temporary character, subject to a rule of expiration. It is explicitly stated that the construction of the right must conform to the “public interest” and that, notwithstanding, it can be limited in the exercise of its function in order to satisfy the prioritize functions of water.

With respect to the rule of expiration, the efficacy of this norm is limited, since it has been decreed in the reform that, “the duration of the right to enjoyment will always be extended, as long as the General Director of Water recognizes the genuine effective use of the resource.”¹⁰¹ This norm restricts the authority of the administrative body to impose a one-time expiration date after which the use of the water must be conceded to more beneficial uses or to the satisfaction of prioritized water functions, and it creates authority for the obligation to extend the concession of the right to use water unless it can be proven that there is non-effective use of the resource. The goal that the rule of expiration of the right is trying to achieve is precisely that the water authority would maintain management powers over waters in a way that is consistent with the *serviceability* or solidarity that the general public interest imposes with respect to public goods.¹⁰² Moreover, the imposed condition – genuine effective use of the resource – is not

correspondientes a alguna de las unidades o categorías de manejo que integran el Sistema Nacional de Áreas Silvestres Protegidas del Estado (SNASPE); Humedales inscritos o reconocidos en el listado de Humedales de Importancia Internacional de la Convención Ramsar; y, en general, cualquiera otra área que se encuentre bajo protección oficial de acuerdo a lo establecido en el artículo 10 letra p) de la ley 19.300 de 1994.

¹⁰¹ Artículo 6, boletín 7543 – 12.

¹⁰² PAREJO ALFONSO L, 1983: 2379 – 2422; V. t. PAREJO ALFONSO L 2001: 11 – 20.

sufficient to justify extending the period of the concession; and while there can be no doubt that under the current legislation the ownership of the right does not have the least obligation to make beneficial use of water, at least, in contrast to the proposed rule of expiration of the right, there is the requirement of payment of a patent fee for non-use. Considering this, it is easy to understand how the rule of prolonging the period of enjoyment of the right renders the rule of expiration entirely useless.

Moreover, the first provisional article of the same instrument declares that REWs recognized or constituted before the publication of the law will continue to be in effect and that although the exercise of said rights will be subject to the limitations and restrictions that, by virtue of this law, are declared to be in the public interests, will not take effect with respect to the rule of expiration. That is to say, the rule of expiration will not be imposed on any currently extant REWs, which transforms the law into lifeless words, since REWs have already been granted for the majority of available waters.

4 Conclusions

In analyzing the PCR through a focus on fundamental rights, we can sustain that in it there are legal bases for the argument that it recognizes the Right to Water as part of the right to life, as well as a right derived from the guarantee of environmental protection, and from the right to ancestral property of indigenous peoples. Moreover, in conformity with the broad formulation of the right that has been bestowed by international human rights instruments ratified by Chile, and that has been incorporated into the constitutional text as the basis of the conception of the constitutional bloc of fundamental rights, the Right to Water constitutes a rule of recognition of a sub-system of Fundamental Rights which makes up the structure of the Constitution.

Chilean jurisprudence has made pronouncements concerning the Right to Water in a broad formulation that we have developed in this article, but it must be stated that it is more robust when it refers to the recognition of environmental and indigenous rights. We conclude that this jurisprudence is consistent with the characterization of water as a national good of public use. Nevertheless, we also affirm that while this category does not enjoy the constitutional protection,

the individual property right to water will be superimposed on top of it, and transform it into lifeless words.

The reform of the Water Code maintains the declaration of the *demanialidad* of water and takes up in a limited way the focus on Fundamental Rights in order to define the prioritized functions of water. It recognizes potable water and sanitization as a human right and gives it priority of use. It does not grant a position of priority in the order of preference to environmental uses and it excludes social and cultural functions.

Although specific rights are granted recognized with respect to indigenous peoples, the reform of the Water Code does not touch upon the collective character of indigenous rights to water and the indigenous vision with respect to water. The reform discriminates against rural and agricultural communities, toward whom it does not recognize any specific right. If their traditional rights are not regularized within a period of five years, at the end of that period the rights expire, rights which they would not otherwise have acquitted. The project of legal reform conspires against rural forms of life.

There is an evident deference to the private model of water that it should be maintained without counterweight. Although the reform of the Water Code puts an end to REWs and establishes the temporary nature of the right, it creates legal mechanisms that ensure the perpetuity of the REW. The temporality is shut off by the imperative mechanism of extending the right in cases of effective use of the hydro-resource and the inapplicability of the rule of expiration to REWs which were constituted before the law takes effect. In this manner, it seeks to make the reform compatible with the constitutional guarantee that confers individual property rights to REW without incurring the need for constitutional reform.

In this scenario, the ways to overcome problems of equality, inequality, and discrimination that are posed by the Chilean system of water regulation seem to have more auspicious alternatives in the judicialization of water conflicts and the creation of a constitutional change with the direct participation of the citizenry by means of a Constituent Assembly which would allow for the effective modification of the prevailing market-based model of water regulation.

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