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## DEVELOPMENT AND HUMAN RIGHTS

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● **César Rodríguez Garavito,  
Juana Kweitel and Laura Trajber Waisbich**  
Development and Human Rights:  
Some Ideas on How to Restart the Debate

● **Irene Biglino, Christophe Golay and Ivona Truscan**  
The Contribution of the UN Special Procedures  
to the Human Rights and Development Dialogue

● **Luis Carlos Buob Concha**  
The Right to Water: Understanding its Economic, Social and Cultural  
Components as Development Factors for Indigenous Communities

● **Andrea Schettini**  
Toward a New Paradigm of Human Rights Protection for  
Indigenous Peoples: A Critical Analysis of the Parameters Established  
by the Inter-American Court of Human Rights

● **Serges Alain Djoyou Kanga and Siyambonga Heleba**  
Can Economic Growth Translate into Access to Rights?  
Challenges Faced by Institutions in South Africa in Ensuring  
that Growth Leads to Better Living Standards

● **Interview with Sheldon Leader**  
Transnational Corporations and Human Rights

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● **Aline Albuquerque and Dabney Evans**  
Right to Health in Brazil: A Study of the Treaty-Reporting System

● **Linda Darkwa and Philip Attuquayefio**  
Killing to Protect? Land Guards, State Subordination  
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## CONTENTS

### DEVELOPMENT AND HUMAN RIGHTS

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CÉSAR RODRÍGUEZ GARAVITO, JUANA KWEITEL AND LAURA TRAJBER WAISBICH	<b>5</b>	Development and Human Rights: Some Ideas on How to Restart the Debate
CHRISTOPHE GOLAY, IRENE BIGLINO AND IVONA TRUSCAN	<b>15</b>	The Contribution of the UN Special Procedures to the Human Rights and Development Dialogue
LUIS CARLOS BUOB CONCHA	<b>39</b>	The Right to Water: Understanding its Economic, Social and Cultural Components as Development Factors for Indigenous Communities
ANDREA SCETTINI	<b>59</b>	Toward a New Paradigm of Human Rights Protection for Indigenous Peoples: A Critical Analysis of the Parameters Established by the Inter-American Court of Human Rights
SERGES ALAIN DJOYOU KAMGA AND SIYAMBONGA HELEBA	<b>83</b>	Can Economic Growth Translate into Access to Rights? Challenges Faced by Institutions in South Africa in Ensuring that Growth Leads to Better Living Standards
CONNECTAS HUMAN RIGHTS	<b>107</b>	Interview with Sheldon Leader Transnational Corporations and Human Rights
ALINE ALBUQUERQUE AND DABNEY EVANS	<b>115</b>	Right to Health in Brazil: A Study of the Treaty-Reporting System
LINDA DARKWA AND PHILIP ATTUQUAYEFIO	<b>141</b>	Killing to Protect? Land Guards, State Subordination and Human Rights in Ghana
CRISTINA RĂDOI	<b>163</b>	The Ineffective Response of International Organisations Concerning the Militarization of Women's Lives
CARLA DANTAS	<b>187</b>	Right of Petition by Individuals within the Global Human Rights Protection System



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## ABSTRACT

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This article demonstrates the economic, social, and cultural values and meanings given to water with a focus on the relationships between this natural resource and indigenous communities. As vulnerable groups in today's society, indigenous communities often find that official approaches do not necessarily reflect their ways of life and worldviews and, in turn, limit their freedom and threaten their rights.

The author presents case studies in three countries, which were specifically selected to illustrate different ways to manage water resources. By analyzing the impacts that these regulatory systems have on indigenous people, these cases demonstrate the need to address water rights holistically, taking into consideration the need for sustainable and efficient use of the resource, as well as respect for the needs of indigenous communities.

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## KEYWORDS

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# THE RIGHT TO WATER: UNDERSTANDING ITS ECONOMIC, SOCIAL AND CULTURAL COMPONENTS AS DEVELOPMENT FACTORS FOR INDIGENOUS COMMUNITIES\*

Luis Carlos Buob Concha

## 1 Introduction

The words *Aqua Vitae* sum up the fundamental value of the natural element that has been most important to humanity through the ages: water. This resource transcends its simple chemical composition to support the survival and development of humans—not just from an organic-biological perspective—but also as part of the history, worldview, and essence of humankind.

As such, water has shaped the development of the earliest human communities near water sources, especially with the advent of agriculture. In addition to serving as a trade path and a communication network, water has facilitated the expansion of the human horizon, enabling commerce as well as the sharing and dissemination of knowledge (including culture, language, and practices) for centuries.

Water is also necessary for the development of various productive activities, such as fishing, tourism, mining, textiles, and refineries. It also serves as a power generator through dams and hydroelectric plants.

The mystical or even sacred attributes that different cultures give to this natural element endows it with such spiritual richness that it often ceases to be merely a symbol and becomes part of a group's deepest feelings and beliefs. For example, in Peru's highlands, they celebrate the "*Yarqa Aspi*" or "*Apu yaku pagapuy*," or the "festival of water." The worship of water in Andean culture has persisted through the ages and is manifested through offerings, rituals, songs, performances, and dances that pay homage and pray for rain and fertile land. Water's presence defines the communities and is closely linked to their worldview,

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\*The perspectives in this article are the sole responsibility of the author and are not representative of any institution.

their interpersonal and community relationships. According to a study by Ossio Acuña on the population of Andamarca in the Ayacucho region, the festival of water is like a fertility ritual, where the water from higher altitudes impregnates “mother earth” through irrigation canals. According to Acuña, there is a set of complementary opposites reflected at the festival in terms of values like fertility and unity, which is the Andean way of expressing the recreation of the social order (OSSIO ACUÑA, 1992, p. 312 y 315).

Meanwhile, population growth and the expansion of economic activities exert constant pressure on the ecosystems of coastal waters, rivers, lakes, wetlands, and aquifers. The use of water resources is complex because the way it is used for a particular need or activity can lead to disputes and hostilities that vary in the type and degree depending on the situation.

Water has a strategic value from an economic, social, and cultural point of view and this makes it a potentially contentious resource that can affect rights, freedoms and even the use of violence. This is especially relevant when different agents compete for control, access, enjoyment or possession of water and its various attributes, including quantity, quality, and opportunity (PEREYRA, 2008, p. 85). To this, we should add the complexity of its administration and the consequences originating therein. As an element that runs and flows through different territories and is used for different activities, water administration can benefit or harm entire populations.

For all these reasons, water temporally, spatially, and functionally cuts across people’s lives and has done so in different ways since time immemorial. It is no exaggeration to say that water provides for us from start to finish and takes on such importance that the future of humankind largely depends on the actions taken with regard to this resource. In addition, there has been a growing recognition in recent years of water access’s implications and its use for the achievement of a decent standard of living, as evidenced by the trend to frame water as a human right.<sup>1</sup>

Indeed, using a human rights<sup>2</sup> approach to address the problems of water access and use, particularly with regard to indigenous communities’ own water management systems, allows for the acceptance of an innate human right to water, which not only informs the formulation and implementation of public policies related to water, but also transforms different conflicts into legal cases to fight for the protection, respect, and enforcement of that right at the national and international level.

Human rights, as positive categories, make normatively concrete and imbue with judicial security those values that are inherent to the human person and those that result from current ideas and power relations as well as from the conditions that demand their recognition as a basis for a dignified life. In this sense, human rights may be defined as the rights that every individual has before the State with the aim of preserving their dignity as a human being – not only excluding the possibility of State action in certain spheres of their lives, but also warranting actions that contribute for a dignified life.

In this respect, the juridical nature of water as a human right has gradually been defined in the past few decades. General comments from ECOSOC (in particular GC 15), international official documents (such as the ones released

by the United Nations special rapporteur on the right to safe drinking water and sanitation, Catarina de Albuquerque), as well as national and international sentences on the matter provide us with guidelines to understand the development of its normative content.

Although this article does go into great depth on the economic, social, and cultural aspects of water, it offers insights into these concepts through three water management case studies, with particular emphasis on their effects on indigenous communities. Normative systems should not remain oblivious to these fields, because they operate in relation to them and affect them directly or indirectly. How water regulation affects indigenous communities is critically important, not only because water is so valuable and important to society, but also because water is an emerging human right that is fundamental to the development of human beings.

## 2 Economic, social, and cultural aspects of water

This article defines the right to water as ECOSOC has defined it in GC 15:

*The right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.*

(CDESC, 2002, párr. 10).

Along this line of reasoning, water is understood as a vital, strategic resource for human beings and for their development, inclusion, and prosperity. In other words, water is understood as a good that, as a transversal and holistic element, affects different aspects and areas of human life. Depending on the contexts, uses, and demands for water, water resources fulfill certain functions and, in turn, lead to the attribution of certain values. As such, the use of this resource represents the combination of economic, social, and cultural interests that become concrete through regulation. Thus, there needs to be a comprehensive approach that takes into account the particularities of each context.

Although water resources are renewable in theory—that is, the natural cyclical physical process that produces water gives it reasonable permanence and stability, the constant pressure on the resource makes it a good that is sensitive to the ways it is accessed, used, and managed globally. Thus, water is not free from biased defenses or conflicts. The first thing to note is the relative scarcity of water in general terms, because it is a finite resource whose natural renewal process is highly vulnerable to the impacts of different human activities. As a limited resource, it is subject to being assigned an economic value in order to satisfy the different needs and interests that arise. In other words, water has an economic value as a natural resource.

Principle Four in the Dublin Statement on Water and Sustainable

Development<sup>3</sup> states this in the following way: “Water has an economic value in all its competing uses and should be recognized as an economic good”<sup>4</sup> (CIAMA, 1992, principle 4). Recognizing this economic component is a first step towards understanding the implications of regulation, because the decisions made about allocation in turn determine the rules under which this natural resource will be used.<sup>5</sup> The way water is regulated also affects the status of water as a human right, since the prioritization, allocation and use of water will limit or allow, depending on the case, the effective enjoyment of the normative content of the right to water.

Ignoring the social and cultural value of water in the context of a policy or evaluation is dangerous because the unrestricted confidence that could be given to a single focus area is actually only a partial understanding and leaves aside the possible consequences and impacts that it could have in other areas. Therefore, it is appropriate to highlight the statement of the United Nations Educational, Scientific and Cultural Organization (UNESCO) that says: “considering water as a cultural good should indeed be understood as the recognition of the diverse socio-cultural dimensions of people’s engagement with water, such as identity, heritage, and sense of belonging” (UNESCO, 2009, p. 4).

We contend that water management should not only focus on economic efficiency, but also water’s social significance as a strategic element for human life, such as the environmental implications of water management or its impact on social structures and relationships within indigenous communities. Water management should also consider the underlying cultural values in order to better assess the impacts that a state action or omission could have on this human right, and thus whether or not the right has been violated.

The next sections will provide an overview of the case studies that look at how these components are interwoven and the impacts they have on indigenous communities.

### **3 Property and market rights: The case of Chile**

The Chilean case is interesting because it is a country that is recognized around the world for having granted transferable water rights to individuals. The model implemented in Chile through the Water Code in the early 1980s has primarily focused on creating a water market, strengthening it through constitutional recognition of private property rights over water use, and through subsequent limitations on state intervention and regulatory authority (DOUROJEANNI y JOURAVLEV, 1999, p. 15-66; DOUROJEANNI y BERRIOS, 1996, p. 6-14; PEÑA, 2004, p. 13-24; DONOSO, 2004, p. 25-48; BAUER, 2002, p. 57-80; GENTES, 2006, p. 255-284).

The model was developed from the argument that legal regulations should favor private operators in the market, which would increase economic efficiency by directing the resource to the most valuable uses through a process of free market transactions and exchange. This has been made possible through information on market prices, which facilitates the comparison and coordination of scattered data (BAUER, 2002, p. 16).<sup>6</sup>

The Chilean regulations emphasize the private property rights related to

water use in order to create more legal certainty in the system. Yet, because the market system is based on private exchanges, the property rights must be exclusive, individual, and tradable to ensure efficient use and increased investment. Segerfeldt characterizes this system in the following way: “The introduction of clearly defined and tradable water rights is not only conducive to greater efficiency, it also results in the water going where it does the most economic good, which in turn spells greater prosperity.” He continues: “Property rights over water have a very positive effect on its consumption and its protection. The possibility of trading helps to get the maximum output possible” (SEGERFELDT, 2006, p. 54 y 57).

The last part of Article 19, paragraph 24 of the Chilean Constitution states: “[T]he rights of individuals over water resources, recognized or constituted in accordance with the law, will grant the rights holders ownership over them” (CHILE, 2005). Based on this premise, the Chilean Water Code focuses on creating a market for water rights, emphasizing the need to recognize property rights as a way to guarantee the former under the assumption that this would lead to efficiency in their allocation (DOUROJEANNI y BERRIOS, 1996, p. 6; BAUER, 2002, p. 57-80).

It is important to point out, however, that the 1981 Water Code originally considered water to be a public good<sup>7</sup> with the state in charge of establishing property rights. That means that once the process to grant water rights was completed, ownership over these rights makes the asset the exclusive property of the right holder who can use the market as a way to reassign the good.

This unrestricted freedom in the use of the water resources under this model makes it possible for rights holders to: “i) use them or not, and direct them to the ends or uses that they wish; ii) transfer them separately from the land, to use them in any other location; and iii) trade them through typical market negotiations (sell, lease, mortgage, etc.)” (DOROUJEANNI y JOURAVLEV, 1999, p. 13). Thus, in practice, use of the rights granted corresponds to full property rights over the resource.

Therefore, this model favors the economic value of water, ensuring its ownership in order to achieve economic optimization. Studies have shown that the main consequences of this type of regulation in Chile has included the speculation and hoarding of water rights, which distort prices through monopolies and unequal negotiations; the presence of particular rights holders with extra power in the market; the existence of inadequate use—or non-use—of the resource; the generation of conflicts; the emergence of social problems; and impacts on environmental and cultural heritage that are often irreversible (BOELENS, 2007, p. 59-60; CASTRO, 2007, p. 240-260; GENTES, 2006, p. 255-284; DOROUJEANNI y JOURAVLEV, 1999, p. 31-62; BAUER, 2002, p. 171-178).

It should be noted that the establishment of water rights and their transfer in the market can also have negative impacts on those who are not involved in the transaction and thus are not part of the private exchange as well as on the environment and on societies’ social and cultural stability. If the effects of a particular inter-party transaction—or the use that it brings about—are not considered in a water allocation system, there is a risk that society will suffer a loss due to the high costs incurred by the erroneous and partial allocation and use of this natural resource.

Although the Chilean legal framework has given some recognition to local and indigenous rights,<sup>8</sup> it has not adequately resolved the conflicts and damages that are caused by this system of water regulation, nor has it adequately protected the rights in question. This is basically because the local indigenous norms are counter to the value granted to water as a purely economic good. According to Boelens:

*In Chile [...] empirical field studies indicate the disintegration, in particular, of indigenous systems: the individualization of water rights has increased insecurity and disorganization [...] decision-making rights are now tied to the economic purchasing power of individuals; [those with] more 'water actions' have more decision-making power, which contrasts with the collective interests of management in indigenous and peasant communities.*

(BOELENS, 2007, p. 59).

For example, in a study on the interaction between local indigenous water rights and Chilean law, Ingo Gentes concludes: “The projects to transfer water from impoverished areas to economic centers, or the free exploration of groundwater, ignore borders, customs, practices and social and environmental damages” (GENTES, 2006, p. 278). This is reflected, for instance, in the impacts on marshes and Aymara communities in Lauca National Park that has resulted from the implementation of agricultural development policies that do not take into account the rights of the aymara communities settled in the area.. It is also evidenced in the conflicts between Colla communities and various actors over the use of water resources in the Copiapó river valley. These communities also have land tenure problems that affects their ability to access the lands and waters their ancestors used, which has led to the progressive loss of their water usage rights and has affects their subsistence activities (GENTES, 2006, p. 264-274).

Likewise, the former Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous People made the following remarks after his official visit to Chile:

*The issue of the right to land becomes more complicated when it concerns access by indigenous people to underground resources and other resources such as water and maritime resources, which are vital to their subsistence economy and traditional cultural identity. Various sectoral laws, such as the 1981 Water Code, despite a number of reforms made to them, facilitate and protect the registration of private property rights over resources that have traditionally belonged to indigenous communities. In the arid northern region, for example, access to water is vital to the lives of the Aymara, Atacameño and Quechua rural communities, but is often denied to them because the resources have been appropriated by mining companies. Along the coast of Araucanía, many Lafkenche families have had what used to be free access to their traditional fisheries and coastal resources restricted by the registration of vast stretches of coastline in the name of huincas, or non-indigenous persons, in accordance with the provisions of the Fisheries Act and to the detriment of the Mapuche communities.*

(STAVENHAGEN, 2003, párr. 26).

He recommends to the Chilean government that “[b]oth in law and in practice, access by indigenous communities to the water and maritime resources on which they have traditionally depended for their survival should take precedence over private commercial and economic interests” (STAVENHAGEN, 2003, párr. 66).

Furthermore, despite the results of some legal cases,<sup>9</sup> the recognition of cultural diversity and indigenous rights have been obstructed by dominant politics and economic power, both of which hinder ancestral community management practices and real community participation in decision-making about water resources. This limits the autonomy and cultural identity of indigenous communities, affecting their development and decreasing the availability of the resources they need for survival (BUDDS, 2007, p. 157-174; GENTES, 2007, p. 175-198).

#### **4 The effective and beneficial use of water: The case of the Western United States**

The experience of the western United States is also worth mentioning, because it is similar to the Chilean model in terms of the use of market incentives for resource allocation. In the United States, there is a long history of market-based systems to exchange water rights. However, in those states, the principle of effective and beneficial use of the resource prevails, which means that in order to exercise and maintain the right, the right holders must identify an intended use that is not contrary to the public interest (DOROUJEANNI y BERRIOS, 1996, p. 21).

Doroujeanni and Berrios, citing Gould, explain:

*The incorporation of public interest in the transactions that take place under the water law of the western United States is expressed, according to Gould, in terms of the water management authority preventing the adverse effects of a use (or non use) of the resource from falling on other users. It goes beyond just damages to third parties, although they are of course covered. It includes indirect effects (like the social impact in a community if water is reallocated from agricultural use to mining, for example) and direct effects (such as environmental damages).*

(DOROUJEANNI y BERRIOS, 1996, p. 15).

Importantly, the United States recognizes indigenous persons’ water rights. However, that recognition, according to Getches, continues to be an “imperfect model” that has “produced more paper than water that they [indigenous people] can actually use” (GETCHES, 2006, p. 227).

Since independence, indigenous rights under United States law were part of the development of national policies. Even though these policies recognized the right of indigenous peoples to occupy and govern their own territories, they sought the integration of native communities and allowed for wide intervention of Congress to limit and extinguish many of their rights. As a result, these communities were pushed into smaller and smaller spaces, called reservations, as settlers expanded across the west (GETCHES, 2006, p. 230).

However, in 1908, the United States Supreme Court issued the “doctrine

of reserved water rights” to ensure a sufficient source of water for reservations where indigenous people lived. This doctrine emerged from the *Winters v. United States* case, which used the experiences at the Fort Belknap Indian Reservation in Montana to determine that communities could use the water that was necessary to fulfill the purpose for which their reservations were created. Nevertheless, the precarious situation of these communities put them at a clear disadvantage in the competition with the settlers, so much so that the settlers—with the support of the federal government—built dams or diverted rivers, thereby impacting these indigenous rights (GETCHES, 2006, p. 234). For example, according to the National Water Commission in 1973: “In the history of the United States government’s treatment of Indian tribes, its failure to protect Indian water rights for use on the reservations stands out as one of the sorrier chapters” (GETCHES, 2006, p. 235).

While the aforementioned court ruling was important, indigenous rights depend on a whole set of judicial decisions in order to be truly protected. Given that it is a common law system, progress was made based on the particulars of each case. In addition, it should be noted that the same approach leads to conflicts with other users of the same resource, because if indigenous water rights are not clearly established, this can create uncertainty for external agents that use the same water source (GETCHES, 2006, p. 235-251)<sup>10</sup> and the process ends up being “mediated by the influence of extralegal factors” (GUEVARA GIL, 2009, p. 124).

Citing Getches once more:

*Although reserved water rights [in the United States] are not meant to protect tribal cultural values, the water uses that are secured through those rights can promote them anyway. Cultural value systems sometimes create “demands” for water that can be satisfied through legally-recognized water rights.*

(GETCHES, 2006, p. 251).

Finally, the case of the Pyramid Lake Paiute Tribe in Nevada provides an example of the community irrigation system (*acequia*) that developed in New Mexico and Colorado in the southwestern United States. Indigenous communities’ water rights, which had already recognized through the doctrine developed at the beginning of the last century, started to gain meaning and more effective protection as a result of long legal battles in the courts, pressure on legislators and rights advocacy strategies. This case also illustrates the conflicts between the Paiute tribe’s traditional water use for fishing and the competing uses of the dominant society. The reservation’s water was specifically diverted by irrigation projects, which had devastating effects on the culture and sustenance of the tribe. According to Wilkinson:

*The story of the Pyramid Lake Paiute Tribe in Nevada, US, illustrates the difficulty of enforcing legal rights to water by indigenous people who competes with non-Indian water users and must use the legal system of the dominant society. The struggle of these people has resulted in success, but only after decades of legal and political maneuvering and nearly a century of being deprived of water.*

(WILKINSON, 2010, p. 213).

The second case shows how the traditional use of water in community irrigation systems in New Mexico and Colorado has survived as a civil and social institution over the years. Even though the two states regulated water rights differently (HICKS, 2010, p. 225-226) and the official approach prevails (RIVERA y MARTINEZ, 2009, p. 323), respect of traditional norms—where cultural identity and social relationships are reflected—as well as the formal agreement allowing for local management, now allow a reevaluation and respect for the use that indigenous communities make of water. According to Rivera and Martínez:

*[...] applications to transfer water to uses outside the acequia communities are often protested with fierce intensity by the acequia irrigators. From the time of first settlement, and intrinsic to the community value of water in the contemporary period, land, place and identity are interdependent and not severable one from another.*

(RIVERA y MARTINEZ, 2009, p. 324).

Citing Glick, they add:

*[...] [the defense of the] protection of the acequia culture of New Mexico and southern Colorado as a viable development policy [is] important to the indigenous rights of traditional people around the world and [shows] how this direction also recognizes their role as repositories of local knowledge about the environment and agricultural sustainability.*

(RIVERA y MARTINEZ, 2009, p. 329).

## 5 Vertical administrative policies: The case of Peru

The case of Peru presents a different picture, not in terms of guarantees of the local rights and traditional practices of indigenous people relative to water resources, but in terms of the permanence of an official model used for the access, use and transfer of those resources.

For forty years, the regulatory framework related to the policy and management of water resources was primarily governed by the General Water Act, which was approved through Decree 17.752 in 1969 and repealed by the Water Resources Act or law number 29338 in 2009. This Act reaffirms the inalienable, imprescriptible nature of domain over the resource, and the absence of private ownership rights over it.

Although there was great diversity in local realities and multifunctional water use, the official approach was to ignore those practices and be guided by references that were only applicable to certain interests. By decoupling formal legislation from the realities of water users and their water management systems, this approach generated conflicts and made it difficult to apply the laws because they were inconsistent with social interests and values (GUEVARA, 2009, p. 113-122; 2008, p. 147-162; 2007, p. 153-162). In contrast to Chile and the western United States, the allocation model used in Peru's 1969 Water Act was centered on the state and gave it direct administrative power by strictly limiting the ability of users to make decisions about water resources.

On topics ranging from the way to obtain water usage rights to the criteria used to allocate the resource (such as through the Crop Plan for agricultural uses), rates and contributions, water use transfers, and the organization of irrigators, many studies have shown inconsistencies between regulations and reality (HENDRICKS y SACO, 2008, p. 139-146). Thus, the inability to apply the complex regulations affects juridical security, which leads to the loss of collective rights and autonomous water management by indigenous communities. This impacts their identity, responsibilities and social structure; and, due to the inadequate responses to address this and the absence of integral solutions, it leads to the resurgence of conflicts.(BOELENIS et al., 2006, p. 142-154).

For example, the case of the community of Cabanaconde, located in the lower part of the Colca valley in the Arequipa region, shows how local communities' rights were affected by the development of the Majes project in the 1970s and 1980s. This project channeled water from the mountains to the coast and turned thousands of hectares of desert into productive land. It also led to problems in the indigenous community's social, cultural and ecological fabric, significantly reducing access to and use of water resources while increasing the occurrence of famine and instability in the region (GELLES, 2007, p. 52-57).

Thirty years later, the development of another project, now called Majes Sigwas II, is generating new protests and social conflicts. This time, the project has pitted the provincial Espinar government from the Cusco region and the Cusco regional government against the Peruvian Private Investment Promotion Agency (Proinversión) and the Arequipa regional government. This agro-industrial project is one of the largest in the area, and it aims to build the largest dam in the country to capture water in Cusco and transport it to Arequipa in order to irrigate thousands of hectares of barren land. The dam would also generate electricity through hydroelectric plants that they plan to build. Meanwhile, the peasant communities in Espinar would see a dramatic decrease in the supply of drinking water, and it would hurt their ability to subsist in that region.

The provincial government of Espinar and the regional government of Cusco filed two appeals on this conflict, which were later merged. One demanded an end to the violation of the Espinar population's rights to life, health and the environment, while the other demanded the annulment of the feasibility decision for the Majes Sigwas II project. After the judiciary upheld the complaint in two courts, the Peruvian Constitutional Court heard the case when the national government filed a constitutional tort action arguing that the *res judicata* principle would have been violated when the sentence was executed.

The Constitutional Court issued its decision on November 8, 2011, siding with the national government and stating that the constitutional tort action was justified. Among other things, it also nullified the judicial resolution that had indefinitely suspended the Majes Sigwas II project, ordered that a Comprehensive Water Balance Study be undertaken, and validated the Environmental Impact Assessment that had been under scrutiny (TC, 2011).

While there are assessments and critiques that could be made about this decision, the goal here is to show the impacts that this kind of decision has on the parties involved in terms of water use and the respect and guarantees afforded to

water as a human right. Rather than looking for a “peacemaking” resolution to a conflict, the judges should assess whether or not the rights of the indigenous communities in question are being threatened or protected. The right of indigenous communities to safely access and manage their own water systems is crucial not only to their material sustainability but also to their existence as a social and cultural structure. Failing to consider these aspects could generate harmful consequences that are difficult or even impossible to reverse.

These omissions are evident in the recommendations given to Peru by the Committee on the Elimination of All Forms of Racial Discrimination (CERD) in its 2009 report:

*The Committee expresse[d] its concern at the conflicts that may arise as a result of the lack of consensus with regard to national policy on the part of Peruvian society as a whole, in all its multicultural and multi-ethnic diversity, in particular in the areas of education, development projects and environmental protection.*

*The Committee recommends that the State party conduct a participative, inclusive process aimed at determining which vision of the Nation best represents the ethnic and cultural diversity of a country as rich as Peru, since a shared and inclusive vision can guide the State party in drawing up public policies and development plans.*

(CEDR, 2009, párr. 41.23).

Despite this recommendation, we actually observe a rejection of the diversity of indigenous conceptions in the development of public policies, legislative initiatives and large-scale projects that significantly impact their resources and livelihoods as well as their traditional cultural practices. Indigenous uses for water are part of a social and cultural setting that is distinct from the official one and the relationships that are developed through the management of this resource, such as those cultivated through celebrations and local customs, can help support the life of these people. This sense of identity that ties them to the land fuels the demand for respect, participation, and physical access to the water resources in their territories.

Although the current Peruvian regulatory framework<sup>11</sup> has made some important advances, its operation, legitimacy and dynamics in practice remain to be seen. It is important to highlight the priority that this framework gives to integrated water management and watershed management (as geographic units in the hydrological cycle) rather than to individual sectors, which fragment the resource as if there weren't a number of different users and uses that depend on the same water source. This framework also recognizes water uses in peasant and indigenous communities by explicitly referencing ILO Convention 169 and recognizes water resources as a social, economic, cultural and environmental good. Finally, the framework focuses on greater empowerment to oversee the use and exploitation of this resource, through a National Authority as the lead agency as well as to providing water resource information in order to facilitate its management.

Nevertheless, it would be inaccurate to say that this regulatory framework is in line with the real plurality of uses and rights assumed by the different water users. The duplication of functions, the contradictions, and the gaps that emerge

in practice will generate the same problems as long as the changes that are made do not emerge as a result of the comprehensive and participatory consideration of tasks and responsibilities. In other words, institutional arrangements need to reflect the diverse local realities in Peru.

Taking this into account would strengthen the use of water in ways that fulfill the goals of sustainability, efficiency and equity, in addition to responding more appropriately to the economic, social and cultural aspects of water. If water management is not comprehensive, it will fracture the coexistence of its multiple and diverse uses and have with negative repercussions on its substance as a human right.

## 6 Final considerations

The three cases illustrate conflicts over the uses, meanings, and appropriation of water, as well as decisions about these issues and participation in water management. While it is not this paper's goal to analyze the theoretical political and economic models for the regulation of water resources, understanding and considering the effects of legal standards on water management and the different values and components that it is afforded is necessary for the development of the human right to water. This is because the normative systems that are implemented should not be alien to the human rights field when they operate in relation to those rights and directly – or indirectly - affect them. The lack of this kind of assessment in the construction of legal standards concerning the right to water means ignoring the components that make up the right and renders its protection incomplete.

The analysis of these three case studies demonstrate the relevance of water for human activities and needs, as well as the different kinds of relationships that have been established with regard to water, and its multifunctional nature, all of which make it a highly strategic and contentious resource. These case studies also present evidence for the threats to indigenous populations' enjoyment of and access to water due to the lack of a comprehensive approach, even when there is some kind of legal recognition of indigenous groups' particular needs regarding water. A piecemeal approach to water not only leads to global inefficiencies, but also affects fundamental rights and liberties, depending on the externalities and damages that are generated. If a court, legislator, or public policymaker does not consider these things, they will even more significantly affect the exercise of the right to water.

The cases presented show that the recurring problem of implementing universal solutions and models in a top-down, biased fashion ignores the way these policies impact people and communities in often lamentable and tragic ways. The cases also highlight the contradictions that arise when policies are applied without understanding the nature and dynamics of local rules governing water management in indigenous communities. As the Committee on Economic, Social and Cultural Rights (CESCR) stated:

*The elements of the right to water must be adequate for human dignity, life and health [...] The adequacy of water should not be interpreted narrowly, by mere reference to volumetric quantities and technologies. Water should be treated as a social and cultural*

*good, and not primarily as an economic good. The manner of the realization of the right to water must also be sustainable, ensuring that the right can be realized for present and future generations.*

(CDESC, 2002, par. 11).

This articulation of the right to water is based on the application of the respect for and the promotion human rights, a concept that shall always be complex and incomplete, to human development, which results in a collective and individual expansion of people's freedoms and abilities for their improved welfare.

In arguing that human rights are based on the dignity of the person, these rights are always fluid and dynamic because they are part of an open, unfinished, evolving and historical product based on human dignity. In other words, indigenous rights to water will gain strength as awareness of ethical arguments and legislative and judicial protection increase.

As a result, we believe that raising awareness of traditional practices and social relations—as well as water management decisions—in indigenous communities will help to establish more effective protections for water rights and promote a regulatory framework that brings growth and development opportunities that are appropriate to their context. This does not mean idealizing the practices that are traditionally used, but rather critically and objectively studying them without taking them out of context or pulling them apart to apply to some development model or policy.

Until now, we have argued that, in evaluating the development dynamics and the different things that affect the legal protection and regulation of water, it is critical to keep in mind its economic, social and cultural components in order to balance the different rights and demands. Imposing regulations without considering the philosophy and perspectives of the indigenous groups can have devastating effects on their social structures, their economic relationships and their cultural interdependence.

To better understand this, we can turn to Boelens, when he writes: “water in Andean communities is often an extremely powerful resource. [It is] a foundation for productive, social and religious practices, and local identity [...]” (BOELENS, 2007, p. 51). He adds:

*[...] However, the neo-liberal water laws (in, e.g. Chile) or top-down instrumental water policies (in, e.g. Ecuador and Peru) have not only neglected customary and indigenous water-management forms but have also had concrete, often devastating, consequences for the poorest people in society.*

(BOELENS, 2007, p. 56).

By identifying the economic, social and cultural attributes of water and adding environmental and even political analyses, one can see how the diversity of values ascribed to it can lead to competing demands for the use of the same water resource that can have harmful effects on its users.

Water is also related to poverty, especially because access to drinking water

and adequate sanitation as necessities to achieve a minimum living standard for human dignity. This is evidenced by the concern expressed by the Human Rights Council:

*[...] that approximately 884 million people lack access to improved water sources as defined by the World Health Organization and United Nations Children's Fund in their 2010 Joint Monitoring Program report, and that over 2.6 billion people do not have access to basic sanitation [...].*

(CDH, 2010, p. 2).

Obviously, this deficit also has tragic consequences for life by leading to a proliferation of diseases related to water scarcity, the use of contaminated water or a lack of basic sanitation infrastructure, impeding development of those who have no access to it; and, even worse, raising mortality rates. Segerfeldt states, “water shortage accounts for 12 million deaths annually. In other words, every minute of every day, 22 people die because they cannot get enough safe water” (SEGERFELDT, 2006, p. 28).

By considering the economic, social and cultural components of water, we can no longer ignore concepts and externalities related to the use of water for all of the different activities. A comprehensive understanding of the forms water takes will help to design more complete systems that are adequate to protect the right to water as a sensitive natural asset and to create platforms for human development.

We conclude that it is wrong to reduce the significance of water to just one of its components by ignoring the other meanings that societies—and especially indigenous people—attribute to this resource. For them, water is not simply a natural resource:

*It has important dimensions in the social structure and collective identity of indigenous people and communities. Thus, the debates and laws that do not consider the multiple meanings of water and other resources can have devastating effects on those people and communities, and lead to the emergence of opposition and resistance movements.*

(GUEVARA, 2009, p. 125).

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## NOTES

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1. The United Nations General Assembly first recognized the right to drinking water as a human right through resolution A/RES/64/292, issued during the July 28, 2010 session.
2. According to the Office of the United Nations High Commissioner for Human Rights, this focus is "a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. It seeks to analyze inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress" (OACDH, 2006, 15).
3. This Declaration was adopted as part of a technical meeting held prior to the United Nations Conference on Environment and Development, which took place in Rio de Janeiro in June 1992.
4. In developing this principle, it was said that it is essential to recognize the fundamental right of every human being to have access to clean water and sanitation at an affordable price. It was added that failure to recognize the economic value of water has led to wasteful and environmentally damaging uses of the resource. (CIAMA, 1992, principle 4).
5. Using the liberal political economy logic, for example, considering water as a scarce resource would require granting property rights in order to create an incentive scheme for rights holders, in such a way that it promotes the efficient use of this good and internalizes the externalities that could occur. Furthermore, under this model, those property rights should be embedded in a free market system to ensure that they are directed to the most valuable uses.
6. For some examples of cases where the operator of the drinking water distribution system was determined through a concession and the supply and quality improved as a result, see the description in SEGERFELDT, 2006, p. 83-103.
7. Article 5 of the 1981 Water Code states: "Water is a national asset for public use and the right to use it is given to private individuals according to the provisions of this Code" (CHILE, 1981).
8. See: i) Law number 19.253, which protects indigenous lands and their natural resources, prohibiting any action that degrades them or threatens their depletion, explicitly stating that new rights to water can not be granted for aquifers that supply water to the property of indigenous communities (CHILE, 1993); and ii) Law number 19.145 which modified the Water Code, and which protects the aquifers that feed the wetlands in the northern regions of Tarapacá and Antofagasta (CHILE, 1992). There is also legal decree 1.939 from 1977 which prohibits the implementation of projects that inhibit the conservation of ecosystems and the environment (CHILE, 1977).
9. In 2004, for example, the Chilean Supreme Court ruled in the case "*Toconce vs. Empresas de Servicios Sanitarios de Antofagasta, ESSAN S.A.*", recognizing the Toconce indigenous community's rights to water, and establishing as case law that indigenous ancestral ownership of water, derived from customary practice, constitutes full ownership (GENTES, 2006, p. 271).
10. The author notes that the hidden impacts on non-indigenous peoples' rights to water are reflected, for example, in the tribes' struggle to make use of their water resources for cultural needs, which may sometimes affect the investments of hundreds of users who have depended on and made use of the water source belonging to the American Indian reservation for quite some time.
11. See Water Resource Law number 29338, approved on March 23, 2009, as well as its accompanying regulations in Supreme Decree number 001-2010-AG, approved on March 23, 2010.

## RESUMO

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Este artigo tem por objetivo evidenciar os valores e significados atribuídos à água, sob o enfoque de três componentes – econômico, social e cultural – com ênfase na relação entre os povos indígenas e este recurso natural. A análise se desenvolve considerando que, por se encontrarem em uma situação de vulnerabilidade nas sociedades atuais, tais povos constataam que as abordagens oficiais não necessariamente respeitam seus respectivos modos de vida e suas concepções de mundo, limitando sua própria liberdade como grupos distintos e ameaçando o gozo de seus direitos.

Será realizado um estudo de três formas distintas de gestão do recurso hídrico em relação aos seus efeitos sobre os direitos dos povos indígenas. Esta análise contribuirá para a observação da necessidade de abordar o direito à água de modo integral, tendo em vista o uso sustentável e eficiente dos recursos e respeitando as particularidades que surgem dentre os povos indígenas.

## PALAVRAS-CHAVE

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Água – Gestão hídrica – Direitos humanos – Povos indígenas

## RESUMEN

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El presente artículo pretende evidenciar los valores y significados que se otorgan al agua a la luz de tres componentes: económico, social y cultural, enfatizando la especial relación existente de los pueblos indígenas con este recurso natural. Esta aproximación se realiza dado que al encontrarse dichos pueblos en una situación de vulnerabilidad en las sociedades actuales, las aproximaciones oficiales no necesariamente respetan sus particulares modos de vida y concepciones del mundo, limitando su propia libertad como grupos diferenciados y amenazando el disfrute de sus derechos.

Para ello, se estudiarán tres formas diferenciadas de gestión del recurso hídrico en relación a sus efectos con los derechos de los pueblos indígenas. Este análisis nos ayudará a observar la necesidad de abordar el derecho al agua de manera integral, teniendo en cuenta el uso sostenible y eficiente del recurso y respetando las particularidades que emergen con los pueblos indígenas.

## PALABRAS CLAVE

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Agua – Gestión hídrica – Derechos humanos – Pueblos indígenas

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