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Human Rights Council

Independent Expert

on the issue of human rights obligations related to
access to safe drinking water and sanitation

Consultation on Private Sector Participation
in the delivery of water and sanitation services
and the Right to Water and Sanitation

**Private Water Operators
contribute to making the
Right to Water & Sanitation real
AquaFed's submission**

Part 4

Synthesis

The Right to Water and Sanitation does not justify restrictions on development of access to water/sanitation

26 March 2010

Submission by AquaFed, the International Federation of Private Water Operators, as a contribution to the Consultation on *Human Rights to Water and Sanitation and Private Sector Participation in the provision of water and sanitation services*, organised by Ms. Catarina de Albuquerque, Independent Expert on the issue of human rights obligations related to safe drinking water and sanitation.

http://www2.ohchr.org/english/issues/water/iexpert/private_sector_participation.htm

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Important note on Private Water Operators:

The private sector is involved in delivering water and sanitation services directly or indirectly through a number of different mechanisms. The appendix describes a variety of different operators, including privately-owned ones. In this document the term "Private Water Operators" means private companies that deliver water supply or sanitation services through contracts or licenses under the direction of public authorities. Other private providers of water/sanitation are named differently.

1. Acronyms

CBO	Community-Based Organisation
CESCR	UN Committee on Economic, Social and Cultural Rights
GC15	General Comment 15 to the International Covenant on Economic, Social and Cultural Rights
HR	Human Rights
HRC	UN Human Rights Council
ICESCR	International Covenant on Economic, Social and Cultural Rights
IERTWS	Independent Expert on the RTWS
MDG	Millennium Development Goal
NGO	Non-Governmental Organisation
OHCHR	Office of the UN High Commissioner on Human Rights
PPP	Public-Private Partnership
PSP	Private Sector Participation to the delivery of water or sanitation services
PWO	Private Water Operator
RTWS	Right to Water, including Right to Safe Water and Right to Sanitation, as in GC15
SPSP	Small-Scale Private Service Provider

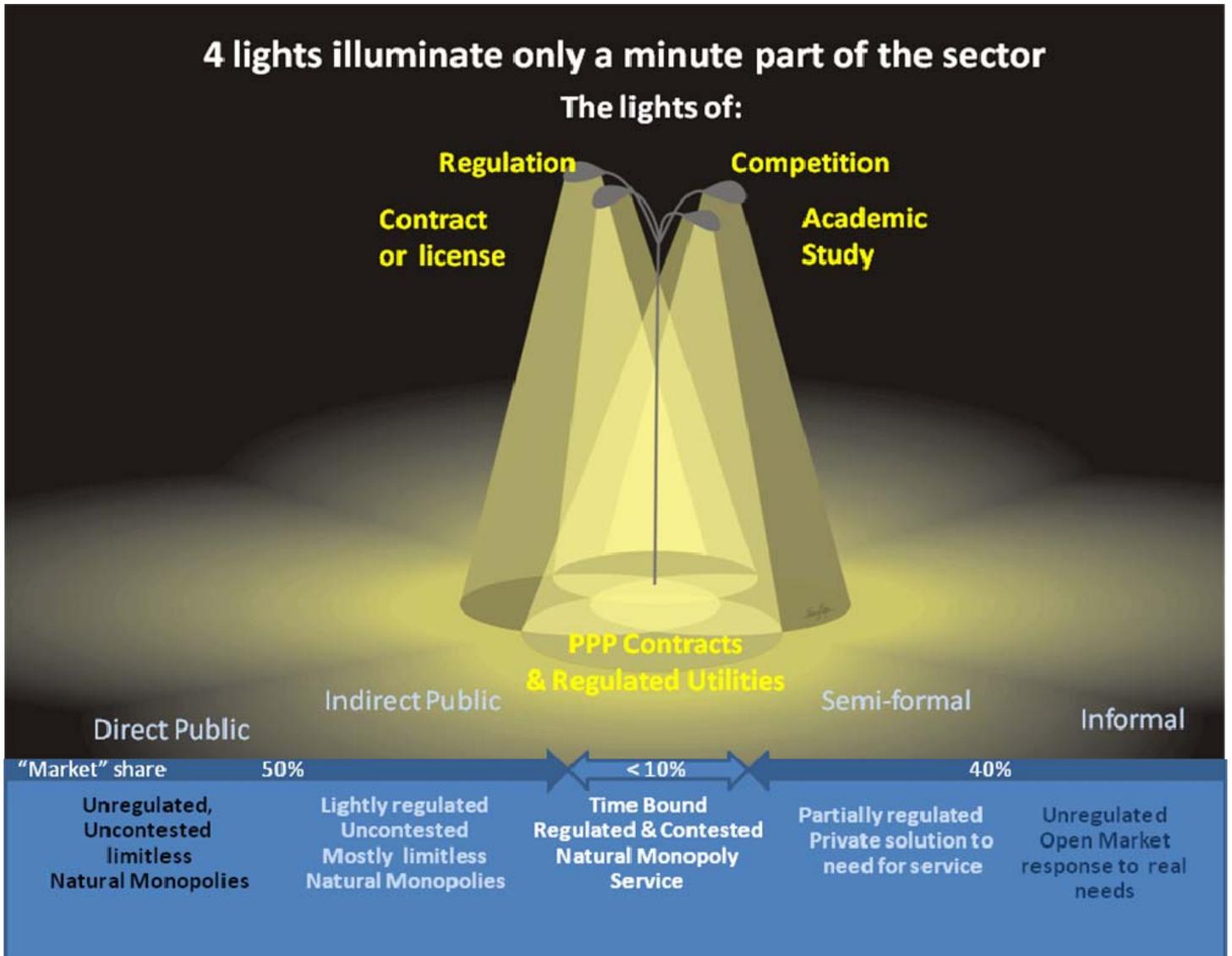


Figure 1. The lamp-post brings additional light on regulated private operators

2. Executive summary:

Private Water Operators contribute significantly to the recognition and to the implementation of the Right to Water and Sanitation. Implementing the Right to Water and Sanitation [RTWS] is an integral part of their core business.

The obligations of water operators and those of public authorities with respect to operators in relation to the Right to Water and Sanitation do not depend on the ownership of the operator. We trust that the conclusions of the Independent Expert's report will be applicable to all kinds of operators that are mandated by public authorities (public, private, CBO, NGO) and not restricted to the case of Private Water Operators only. We also trust that any instrumentalisation for ideological reasons will be exposed.

Any specific requirement related to the Right to Water and Sanitation on a private operator for the sole reason that it is private would have neither foundation nor justification and would be discriminatory.

Decision-makers that want to make the Right to Water and Sanitation effective should avoid restricting its practical implementation by imposing unnecessary conditions. They should recognise the priority that needs to be given to satisfying the rights of the rights-owners and facilitate all options that deliver concrete results in the field.

3. Introducing AquaFed and Private Water Operators

AquaFed¹, the International Federation of Private Water Operators, represents private companies that deliver water supply or sanitation services under the direction of public authorities.

Members of the Federation are water services providers of all sizes, operating in around 40 countries, as both locally or internationally owned businesses. The members of our Federation serve the majority of people who get water from private companies that are mandated and regulated by governments. Our members' business is to be the operators of public services entrusted to them by governments (central government, local government, water authority), through PPP contracts or licenses, to supply drinking water and to provide sanitation services to their populations.

In this way, private operators are used by governments as a tool to implement the Right to Water - that includes the Right to access to Drinking Water and the Right to Sanitation - as described in the General Comment 15 to the International Covenant on Economic, Social and Cultural Rights (GC15). Implementing the Right to Water is an integral part of their core business.

As practitioners of this Right they have contributed, and are continuing to contribute in many ways, to the works of the Office of the UN High Commissioner on Human Rights [OHCHR] and of the UN Human Rights Council [HRC] on the recognition, the definition and the *implementation* of this Right.

¹ www.aquafed.org

Regulated Private Water Operators, the water companies that are mandated by central and local governments, serve less than 4% of the population in developing countries².

4. Introducing this submission by Private Water Operators

Private Water Operators [PWOs] have contributed to the 2007 OHCHR report on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments³. In particular they drew the attention to the lack of content of the Right to Sanitation and to the need to identify the obligations of Local authorities to make the Right to Water and Sanitation real. These two remarks were conveyed by the OHCHR in its list of 5 issues for which it concluded that detailed practical advice was required (art.67 of the report).

In common with many other observers, the PWOs noticed the strong action of anti-private lobbies that resulted in the inclusion in this list of *“the regulation of the private sector in the context of private provision of safe drinking water and sanitation”* as if the private sector created specific problems and as if the public sector did not need any regulation.

PWOs appreciate that the UN Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation has been mandated to make a report on their activities with respect to the Human Right to Water and Sanitation [RTWS].

The necessity for detailed contracts, strict monitoring and detailed regular reporting, means that public knowledge of the work of private water operators is far more extensive than knowledge of any other type of water supply in both developing and developed countries. Private Sector Participation in water and sanitation services **highlights the challenges that are faced by all water operators**, public or private. We would be gratified that this experience with the Private Sector helps the United Nations to promote the Human Right to Water and Sanitation in a way which enables all operators to accelerate the development of access to drinking water and sanitation to the billions of people who need these public services.

As the work of the Independent Expert focuses on our industry we believe that it is important to provide information on our activities, our contributions on the Right to Water and on misconceptions about our work. This is why our submission to the Independent Expert is structured in different parts.

Part 1 provides information on the many ways through which PWOs contribute to the Right to Water and Sanitation.

Part 2 provides information on the different types of water operators and the different ways public authorities interact with them. It shows that for the implementation of the RTWS public authorities should not discriminate against private operators as opposed to the other types of operators. They should differentiate 3 types of interaction between themselves and their operator, irrespective of the nature of the ownership of the operator.

² 7% of the urban population according to World Bank (see ref E6, page 1, 13 & 64 in Part1 of AquaFed's submission). This estimate does not include the Small-Scale Private Service Providers who, on the contrary, are very numerous. 'Overall, it is estimated that up to a quarter of the urban population in Latin America and nearly half of urban dwellers in Africa rely on SPSPs for at least a portion of their water supply.' (Source: ref E2 in part1 of AquaFed's submission, page 6)

³ OHCHR report to the Human Rights Council. A/HRC/6/3-16, August 2007

Part 3 provides information on the many misconceptions about the work of PWOs which have been suggested by some to create the impression of specific RTWS issues when there is a PWO. This section shows that, when related to the RTWS, these issues are not specific to PWOs and exist for all kinds of operators. It also explains that most of these issues fall under the responsibility of public authorities and that operators, public or private, do not have the legitimacy to make the appropriate decisions.

This Part 4 is the synthesis of our submission.

5. Private Water Operators contribute to the Right to Water and Sanitation

Private Water Operators, contribute significantly to the Right to Water and Sanitation. These operators are private companies that deliver water supply or sanitation services through contracts or licenses under the direction of public authorities. They do this in many ways that are detailed in Part 1 of this submission:

- Private Water Operators contribute to the recognition of the Right to Water and Sanitation in the international community through research, advocacy and participation to the work of global institutions. Through AquaFed, they have supported the Right to Water and Sanitation publicly in the international community for many years.
 - *Research.* They make research and release documents about the RTWS. These are about the content, the misunderstandings, the challenges and obstacles to be overcome, the practical field processes and results.
 - *Legal framework.* They contribute to the work of governments and the United Nations, including the Human Rights Council, with respect to the legal framework of the RTWS with a view to making these effective and operable
 - *Identification of the lack of defined content for the Right to Sanitation.* In 2007 AquaFed brought the attention of the UN High Commissioner on Human Rights to the lack of practical content for the Right to Sanitation to help the implementation of this important and neglected Right.
 - *Advocacy.* They advocate for the recognition and the implementation of the Right to Water and Sanitation so that it makes a difference for the millions of people who suffer from lack of these services.
 - *Knowledgeable stakeholders.* They work with others and contribute to many public debates on the RTWS by bringing their experience and their knowledge of both the Water Sector and the Human Right to Water and Sanitation.
- Private Water Operators implement the Right to Water in the field and are aware of the related challenges. In the past fifteen years they have provided sustainable access to affordable safe water to tens of millions people, mostly poor, in the areas designated by the responsible public authorities. They have increased the quality and the availability of the water used by hundreds of millions of people. They have provided connections to sewerage systems to tens of millions of people. Implementing the Right to Water and Sanitation is an integral part of their core business.

6. The lamp-post syndrome

The necessity for well defined contracts, strict monitoring and detailed regular reporting means that public knowledge of the work of private water operators is far more extensive than knowledge of any other type of water supply in both developing and developed countries.

This availability of data facilitates academic work. This is much more developed on PSP than on other types of operation when compared to their respective presence in the field.

Private Sector Participation in water and sanitation services [PSP] highlights the challenges that are faced by all water operators, public or private. Many opportunities, challenges and problems in the water sector have been made visible thanks to PSP. However this raises the risk of looking at these issues in a very limited range of cases where they are the most visible or well documented and of missing the majority of cases where the magnitude of these problems is much greater.

The most important issues are not necessarily where there is the most illumination. Decision-makers should be aware of the dangers of the “lamp-post syndrome” (see Figure 1) and be careful to avoid the consequences.

Furthermore, the body of knowledge of PSP in the water sector is heavily influenced by anti-private lobbies. These issue many biased reports on PSP. Some of these reports draw general conclusions from exceptional or unsubstantiated facts. Academic researchers do not always detect this anti-private bias, even when the “facts” reported are systematically unfavourable to the PWOs.

7. Potential misconceptions on private water operators in relation to the Right to Water and Sanitation

The respective roles of public authorities and Private Water Operators in the delivery of water / sanitation services are often poorly understood outside the water sector. For example, contrary to what many people believe, consumption tariffs and connection charges are set by the authorities and not by the private operators.

In all PPP contracts the private water operator is instructed to supply all existing customers of the water utility plus to develop access progressively to un-served people. Private action is about developing ways to include new areas and un-served people not about excluding any segment of the population as is often insinuated.

These misconceptions have induced some people to imagine that private management of public water services creates specific challenges with respect to the RTWS. In practice, although these issues may be related to real problems of the water sector they are not specific to private operation alone.

Part 3 of AquaFed’s submission discusses many misconceptions and explains why there is no justification to challenge PSP or the role of PWOs with respect to the RTWS. In particular this applies:

- a) for important matters with respect to the RTWS such as conflicts with landowners’ rights, geographical priorities, tariff setting, defining connection charges and pro-poor mechanisms, organisation of economic sustainability, etc., the challenges are identical for public and private operators. Finding solutions falls under the direct responsibility of public authorities;

- b) for the important matter of the quality of service with respect to the RTWS, including water quality, for which the targets are fixed by the public authorities, and the compliance of the work of the operator. The challenge is the same for all types of operators, public or private;
- c) for several challenges that are linked to PSP but that do not impact the implementation of the RTWS such as investment funding or procurement procedures;
- d) for alleged issues which do not exist in practice, such as power differentials in favour of PWOs or impossibility for governments to respect their international obligations and their obligations under the RTWS simultaneously.

Therefore all the criticisms raised about potential issues with private operation in relation to the RTWS are irrelevant. Some are not related to the RTWS at all. Many are real human rights issues; however, they are faced by all operators, both public and private. In most cases their solution lies with the public authorities, not with the operator.

8. The roles of governments in relation to the different water operators with respect to the Right to Water and Sanitation

In each territory, there is normally a public authority responsible for the delivery of general water / sanitation services to the public. Its primary role is to set up local regulations, to decide a policy, to fix targets and priorities and to ensure that these services are delivered effectively to end-users. Obviously, this authority has to respect the Right to Water and Sanitation.

Depending on individual country circumstances, the public authorities that are responsible for protecting and fulfilling the Right to Water and sanitation may be different from the authority responsible for service delivery.

As explained in Part 2 of this submission there are many different types of water / sanitation operators. In many areas, the population gets services through a combination of several of them, for example a public utility that mandates another operator to undertake part of the service or that sells water in bulk to another operator.

Depending on the geographical area, the authority responsible for delivery of the services falls into three categories with respect to the effective supply of water / sanitation services:

- a) either it delivers these services directly to water-users
- b) or it mandates a third party, public or a private, to deliver the service to water-users and provides it with the appropriate instructions
- c) or the service is delivered by operators whose activity is not organised by the public authority

Service delivery by Private Water Operators is a minority case that must not be distinguished from the other types of operators mandated by public bodies. It does not require a specific framework with respect to the obligations of the State on the Right to Water and Sanitation because:

- o whilst the role the public authority responsible for delivery of the services in the territory differs from one category to another, its role within each of the three categories is the same with respect to its interaction with operators and the Right to Water and Sanitation. The ownership of the operator (public, private, CBO, NGO) has no impact.

- the other public bodies have the same role with respect to all kinds of water suppliers
- Private Water Operators may fall in category a) if this body is a public utility or in category b) if this body is the public authority responsible for services delivery in the territory.

9. Obligations of all operators

All water operators (public, private, NGOs, CBOs) have obligations with respect to human rights in general and to the Right to Water and Sanitation in particular.

Their obligations with respect to human rights are to comply with the related laws and regulations that apply to all organised bodies within the country.

Their obligations related to the RTWS have three different natures:

- They must comply with the obligations for water operators that are specified in national regulations with relation to the Right to Water and Sanitation.
- They must comply with the local regulations that are related to the RTWS
- They must satisfy the RTWS-related instructions given to them by the public authorities responsible for water and sanitation services that have mandated them.

The ownership of any operator, mandated by a public authority, should not impact its RTWS-related obligations in any way.

10. Avoiding discrimination and unnecessary restrictions

Some would like to impose preconditions on governments before they resolve to mandate a private company to deliver water / sanitation services on the ground. They claim that this would be necessary to respect their obligations in relation to the Right to Water and Sanitation.

Our submission shows that there are no grounds for imposing any such preconditions:

- The types of interaction between public authorities and water operators with respect to the Right to Water and Sanitation do not depend on the ownership of the operator. They fall into three categories:
 - a) either the authority delivers these services directly to water-users
 - b) or the authority mandates a third party, public or a private, to deliver the service to water-users and provides it with the appropriate instructions
 - c) or the service is delivered by operators whose activity is not organised by the public authority

Therefore, the obligations of public authorities with relation to the Right to Water and Sanitation when they interact with water service providers do not depend on the ownership of the operator (public, private, CBO, NGO). Where the services are organised by the authorities and delivered by one or several operators, their main obligation is to give appropriate instructions to these operators (public, private, CBO, NGO).

- The types of obligations of water operators with respect to the RTWS do not depend on the ownership of the operator

- The RTWS-related issues that have been alleged by some to be specific to Private Water Operators are either the same for all operators and mostly in the hands of public authorities not the operators, or are not real RTWS issues.
- It is not established that the risk of PSP for rights-owners is higher than the risk of public management of a utility that is unable to serve the whole population. Therefore, it is not in the interest of right-owners to restrict management options by imposing discriminatory preconditions on one type of operation⁴.

Therefore, imposing preconditions on governments before they resolve to mandate a private company would be illegitimate:

- it would discriminate against some operators relative to others without any justification.
- It would restrict unnecessary the options available to governments to improve access to water and sanitation and would be detrimental to many rights-owners.

11. Conclusion

Private Water Operators implement the Right to Water in the field and are aware of the related challenges. A few Private Water operators have been unable to achieve what was expected from them. This does not mean that all of them have failed in delivering important contributions to the implementation of the RTWS. On the contrary they have contributed significantly to the implementation of the Right to Water and Sanitation and this has been recognized by the UN, international organisations and governments. Because of this, there is a broad consensus that as a valuable tool for the implementation of public policies, including the delivery of the RTWS, private operators and their actions should be promoted and respected.

In the past fifteen years,

- they have provided sustainable access to affordable safe water to tens of millions people, mostly poor, in the areas designated by the responsible public authorities;
- they have increased the quality and the availability of the water used by hundreds of millions of people;
- they have provided connections to sewerage systems to tens of millions of people.

Implementing the Right to Water and Sanitation is an integral part of their core business.

We trust that the report of the Independent Expert will take account of the "lamp-post syndrome"⁵ and understand the misconceptions of the role of PWOs. We trust that the report will build on the realities of the field to improve the organisation of the delivery of water / sanitation where it is urgently needed.

⁴ The case of Kisumu (Kenya) is described in part 2, Chapter 3. In this city, water-users get water from private operators, community-based operators or directly from the public utility depending on the area they live in (see Figure 2). As their individual rights to water and sanitation are the same, it is evident that their interaction with PWOs, CBOs or public operators should be identical with respect to the RTWS.

⁵ See paragraph 5 and figure 1 above.

Obligations of water operators and obligations of public authorities with respect to operators in relation to the Right to Water and Sanitation do not depend on the ownership of the operator. The conclusions of the report of the Independent Expert should be applicable to all kinds of operators mandated by public authorities (public, private, CBO, NGO) and not restricted to the case of Private Water Operators only.

Any specific requirement related to the Right to Water and Sanitation on a private operator for the sole reason that it is private would have neither foundation nor justification. It would be discriminatory and would restrict the ability of public authorities to take advantage of private professionals.

Decision-makers that want to develop the Right to Water and Sanitation should avoid restricting its practical implementation by imposing unnecessary conditions. They should recognise the priority to be given to satisfying the rights of the billions of rights-owners and facilitate all options that deliver concrete results in the field.