

THE HUMAN RIGHT TO WATER IN RELATION TO PESTICIDE POLLUTION IN SOUTHERN LEYTE, THE PHILIPPINES

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ABSTRACT:

This essay examines to what extent the newly-endorsed right to water is appreciated and used in either/both the rhetoric and working methods of local stakeholders and actors who have an interest in limiting pesticide usage to protect surface water and sanitation in Southern Leyte, the Philippines. By using theoretical frameworks, such as legal positivism and new legal pluralism, the essay also attempts to answer how legal failures related to the right to water and freshwater protection can be explained.

In order to answer these questions the essay also explores some of the legal and social background factors related to pesticide usage and pesticide pollution in the local context. Such factors include the following: the extent to which existing national regulations encompass the right to water; to what extent these regulations are implemented; possible reasons for implementation failure and local perceptions about how pollution problems could be remedied. The extent to which the right to water is appreciated and used has been measured by looking at how respondents describe the human right to water, whether they mention it as a motivating factor for their engagement with water issues, and whether they think it is useful for them in their work to prevent pollution. The results from the field research is also compared to earlier research carried out by A. Russel about the way in which the human right to water is perceived by practitioners within the development sector.

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LIST OF ABBREVIATIONS:

CEDAW:	Convention on the Elimination of All forms of Discrimination Against Women
CESR:	Committee on Economic, Social and Cultural Rights
CRC:	the Convention on the Rights of the Child
CRPD:	the Convention on Rights of Persons with Disabilities
EMB:	Environmental Management Bureau, Philippines
General comment 15:	Committee on Economic, Social and Cultural Rights' general comment no. 15
ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Convention on Economic, Social and Cultural Rights
NWRB:	National Water Resource Board, Philippines
UNEP:	United Nations Environmental Programme
UNGA:	United nations General Assembly
UNHCR:	UN Human Rights Council
UNHCHR:	United Nations High Commissioner for Human Rights
WHO:	World Health Organisation

1. INTRODUCTION

1.1 BACKGROUND

From the 1950s and onwards Asia came to see what has since been called “the green revolution”. Starting in the 1960s, India, Indonesia and the Philippines independently, but simultaneously, began to use new seed varieties that were more resistant to insect pests, fertilisers, and pesticides aimed at limiting insect attacks on crops. These measures, in combination with infrastructural and irrigation improvements as well as remunerative price policies, lead to a new positive developmental trend according to many.¹ However, during this process little thought was spent on the links between pesticide usage and health. Today, the usage of pesticides is a global concern. More than 800 substances and over 10 000 formulations of pesticides are used in agriculture, forestry, health care and households with the purpose of controlling organisms that can threaten human health and/or property.²

Several of these substances are also highly poisonous to human beings. Western countries have strict regulations for how pesticides should be used, but such regulations are often either lacking or not applied in major parts of the global south. One example where this is the case is among rice farmers on Southern Leyte, the Philippines. Forty-five percent spray their fields with insecticides two to three times a year at a minimum and as much as seven times a year. These pesticides are not only poisonous for the insects they are aimed at but can also have adverse health effects for the farmers, agricultural workers and the local population living in the area. Recorded temporary health effects on humans from the pesticides used in the area are in the milder cases rashes and burning sensations on the facial skin and on the hands. Nausea, vomiting, stomach pains, muscle twitches and cramps have been reported in cases where pesticides have been used for a longer time without proper protective gear.³ Yet

¹ G. Djurfeldt and M. Jirström "The puzzle of the policy shift – the early green revolution in India, Indonesia and the Philippines" in G. Djurfeldt et al. "The African food crisis: lessons learned from the Asian Green revolution" CABI Publishing 2005 p. 43

² L. Elfman, unpublished "Ansökan om medel från Stiftelsen Indvelops U-landsfond, Projekt: Användning av pesticider vid odling av ris på ön Leyte i Filippinerna - fortsatt monitorering av pesticider i närliggande vattendrag och biomonitorering hos sprayare och barn", 2010 s. 1

³ Ibid s. 3 and C.D Klaasen eds., "Casarett & Doull's Toxicology, the basic science of poisons, international edition", 1996, p. 667

unpublished research carried out by researchers from Uppsala University and the Swedish Agricultural University in Uppsala show high levels of residual pesticides in fresh water sources in the vicinity of rice fields in San Francisco, Southern Leyte, Philippines during the spring of 2010. Pesticides residues came from the spraying activities themselves, but also from incidents where sprayers had washed their equipment in the rivers or where people had poured pesticides directly into the rivers as a means of fishing fresh water shrimps used for food. The local population often collect water from the same fresh water sources for domestic purposes such as washing themselves, and cleaning dishes and laundry.⁴ The local authorities in San Francisco, Southern Leyte are making efforts to regulate the usage and handling of pesticides and increase awareness of the local population on the need for such regulative measures.⁵

In August 2010 the United nations General Assembly (UNGA) confirmed the right to water and sanitation as a basic human right through resolution 64/292.⁶ Before and after this, the right to water and sanitation had also been established by resolutions in the UN Human Rights Council (UNHCR). In 2002, it was also accounted for in general comment 15 by the Committee on Economic, Social and Cultural Rights (CESR), providing input on the interpretation of the International Convention on Economic, Social and Cultural Rights of 1966 (ICESCR).⁷ These resolutions, as well as the general comment, provide the right to water and sanitation with important soft-law authority and constitute strong sources for the formation of customary law on the area. They also reaffirm the right's standing within several legally binding international conventions such as the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC), as well as a further extension of articles 11 and 12 of the ICESCR. Article 11 refers to the right to an adequate standard of living and article 12 to the right to health. Finally, the human right

⁴ This behaviour was observed at several occasions during the field study for this essay and also confirmed by many of the respondents for the interview survey carried out during field studies.

⁵ Interview with civil servant 4. A concrete example of this is also that researchers from Uppsala who measured pesticide levels in some of the rivers around San Francisco have been welcomed back to report back to the local municipality, local politicians and local health workers.

⁶ A/RES/64/292

⁷ A/HRC/15/L.14

to water is also specifically mentioned in a number of regional treaties and conventions⁸, none of which, however, concern South East Asia.

The prevailing paradigm is that international law and human rights primarily remain legally binding on states. Nevertheless, hope, and sometimes even certainty, has been expressed within the human rights sector and academic literature that a clarification of the legal status of the right to water will lead to a sense of obligation in policy makers, states and the international community regarding the provision of adequate fresh water.⁹ However, recent empirical research carried out by Anna Russel, shows that while work related to the water sector in international development organizations increasingly adapt a rights-based language, there is frequently little understanding or application of the right of water as a legal or even quasi-legal right . Furthermore, its application is often seen as problematic since targeted countries might perceive more direct human rights rhetoric related to water issues as politicised critiques instead of general rights-based efforts of poverty alleviation and development.¹⁰ Others have contended that there is traditional opposition between concerns for environmental protection and human rights. This is a view that is based on the often individualistic and anthropocentric outlook of human rights, especially those of the first generation, in contrast with the more collective and multi-species centred approaches taken on by the environmental movement.¹¹ Such opposition might be overcome through increased dialogue and cross-sectored learning between environmentalist and human rights professionals. Here, the right to water could possibly play an important role.

By using the situation described above regarding San Francisco in Southern Leyte, this essay attempts to examine how local actors within civil society as well as the private and the public sectors perceive the right to water. To what extent is the right to water

⁸ Such as the African Charter on the Rights and Welfare of the Child (1990), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2005), The Protocol on Water and Health 7 to the 1992 Convention on the Use of Transboundary Watercourses and International lakes, European Commission of the United Nations for Europe (1999),

⁹ See e.g. T. Kiefer and C. Brölmann "Beyond State Sovereignty: The Human Right to Water", *Non-State Actors and International Law* 5, pp. 183-208, 2005 p. 184 and C. de Albuquerque UN Independent Expert on human rights obligations related to access to safe drinking water and sanitation, press release 1 October 2010

¹⁰ A. F. S. Russel, "International Organizations and Human Rights: Realizing, Resisting or Repackaging the Right to Water?", *Journal of Human Rights*, 9:1-23, 2010

¹¹ C. Gearty, "Do Human Rights help or hinder environmental protection", *Journal of Human Rights and the Environment*, Vol. 1 No. 1, March 2010, p. 7

understood by these actors? Does it provide them with a sense of obligation? Is it somehow seen as a useful tool for the regulation of pesticide usage or for raising awareness about fresh water issues? Or, is the human right to water perceived as awkward and too sensitive due to political reasons? Finally, could the right to water possibly be an aid for actors that work with the sustainable protection of both the local environment and population, and thus bridge the gap between human rights and environmental concerns?

1.2 PURPOSE

The purpose of this essay is to examine to what extent the newly-endorsed right to water is appreciated and used in either/both the rhetoric and working methods of local stakeholders and actors who have an interest in limiting pesticide usage to protect surface water and sanitation in Southern Leyte, the Philippines. By using theoretical frameworks, such as legal positivism as well as Chiba and Tamanaha's new legal pluralism, the essay also attempts to answer how legal failures related to the right to water and freshwater protection can be explained.

To be able to answer these questions, it has been important to also explore some of the legal and social background factors related to pesticide usage and pesticide pollution in the local context. Such factors include the following: the extent to which existing national regulations encompass the right to water; to what extent these regulations are implemented; possible reasons for implementation failure; local perceptions about how pollution problems could be remedied. The extent to which the right to water is appreciated and used has been measured by looking at how respondents describe the human right to water, whether they mention it as a motivating factor for their engagement with water issues, and whether they think it is useful for them in their work to prevent pollution.

1.3 DELIMITATION

While the right to water and the right to sanitation are sometimes mentioned together, this essay mainly concerns the right to water. This essay will not deal with any comparisons between how the right to water is perceived at the local level at various geographical locations. Such a comparison might be an interesting topic for future research as little previous research seems to have been done on the implications of the

right to water on the local level, especially since the passing of the recent resolutions in the UNHRC and the UNGA of 2010. The essay's main objective is not to provide any specific recommendations for how the right to water can be better implemented at the local level, nor on how it could be used in a more fruitful way in awareness raising. The goal is rather to present what local actors already do and/or think about these possibilities, and draw general conclusions about the implementation of the right to water from this¹². Finally, this essay will not attempt to answer any questions about the general time span between the confirmation of a human right on the international level and its breakthrough at the local level. Such research would certainly be interesting but difficult considering the variety and fluctuation in both applicatory challenges and solutions that would appear on different locations and over time.

1.4 DISPOSITION

Chapter 1.5 and its various subchapters aim to describe the methodology used as well the research problems that were faced during the field research. Most of this chapter will be based on Kvale and Brinkmann's book "Den Kvalitative Forskningsintervjun"¹³ as well as on Denscombe's book "Good Research Guide"¹⁴; both books are very good sources of information and guidance for anyone wishing to do qualitative research based on interviews. Chapter 1.6 outlines previous research within the subject area of the human right to water and its implementation. Of the works presented here, the empiric research carried out by Russel¹⁵ as well as the report on the human right to water delivered by the World Water Council in 2010 will be of greatest importance for the discussion carried out later on. Chapter 2 has been divided into two major parts. The first part presents the human right to water within the setting of international law. The second describes the main jurisprudential theories that will be referred to in the ensuing discussion of the field research findings. Three major concepts will be presented here. The first is legal positivism as developed by Bentham, Hart, Austin, Watson as well as others following in their steps. The second will be new legal pluralism as it has been

¹² However, to the extent that specific recommendations, with relevance for the improvement of fresh water source protection in San Francisco, can be derived from the interviews they will be shared with the relevant local authorities.

¹³ S. Kvale and S. Brinkmann, "Den Kvalitative Forskningsintervjun" Studentlitteatur, 2009

¹⁴ M. Denscombe, "Good Research Guide", Open University press, 2007

¹⁵ Supra 10

described by Chiba Majisato and Tamanah. Finally, the concept of legal failure as defined by Galligan will be introduced in order to be applied later in relation to implementation failures of relevant national law pertaining to pollution of freshwater sources in the Philippines.

Chapter 3 presents, in depth, the local context in the Philippines with regards to relevant national law, pesticide usage and its effects in San Francisco, Southern Leyte. It also discusses the results of the interview survey that has been carried out. Apart from the research results, chapter 3 is based on information gained from various Filipino state agencies, Greenpeace, and research done within the area of toxicology. Chapter 4 includes a discussion of the research results in relation to the research questions presented in the introduction of this essay, and the jurisprudential background provided for in the second part of Chapter 2. Conclusions are presented in Chapter 5.

1.5 METHODOLOGY

Several methods have been used during the research for this essay. Firstly, a review of relevant literature and the relevant legal frameworks on the international and national level has been made. This provided a background and an overview of existing research within the area and of the current standards within relevant international and national law and policies. Secondly, semi-structured, qualitative face-to-face interviews were made with individuals in and around San Francisco on Southern Leyte, the Philippines. Among the respondents were people working with fresh water and sanitation issues for the local authorities, representatives from relevant civil society organizations, landowners and a local politician. The purpose of these interviews was to enable an empirical study of the local context that could be linked to the theoretical background provided in the literature review. An analysis of the interview results provided evidence of how relevant existing legal and policy frameworks are for the various local actors.

The location for the field interviews was chosen mainly because it provided a good opportunity to link up with an ongoing research project within Uppsala University concerning pesticide usage and its effects. There are also three other reasons for why the Philippines is a suitable location for research about the local understanding and application of the right to water as described above. Firstly, the Philippines is very dependent on rice production combined with a relatively high usage of pesticides that

easily enter various freshwater sources. Secondly, access to clean water for both internal and external consumption remains limited. Thirdly and finally, while the track record of human rights within the Philippines has improved since the 1980s it remains problematic.¹⁶ In parts of the country, there are continued occurrences of political violence targeted at human rights activists, anti-mining activists, union representatives and indigenous people.¹⁷ These factors could potentially give rise to situations where water as a human right could be perceived as politically sensitive.

The field research was carried out during three weeks on Southern Leyte followed by a week in Tagbilaran for primary analysis and transcription of interviews. Qualitative and semi-structured interviews were chosen as an appropriate method as they allow respondents to provide their input in a more spontaneous and immediate manner than structured interviews or surveys do. Literature on qualitative research interviews states that the more spontaneous and open the semi-structured interview, the more vivid and in depth answers the respondents are likely to provide. At the same time it is important to provide the interview with enough structure to ensure that the respondent keeps to the given topic and to facilitate the researcher's analysis of interviews.¹⁸ The method also allows the researcher to add further questions to clarify, expand, or validate aspects as the interviews proceed.¹⁹ Thus the interview itself provides an opportunity for both the researcher and the respondent to learn more.²⁰ In cases where the respondents did not speak English, a translator translated between the local language of Visayan and English. The need for interpretation and further clarification highlighted the suitability of semi-structured interviews as a research method. Sometimes, questions had to be reformulated as the interviews proceeded in order to overcome barriers of culture, social background or language between the researcher and the respondents.

The interviews were based on pre-developed interview guides. The guides departed from six thematic research questions that in turn were developed from the general purpose of this essay and a thematic background question. These thematic questions

¹⁶ The Swedish Foreign Ministry, "Mänskliga rättigheter i Filippinerna, 2007", 2007, p. 1

¹⁷ Amnesty International, "Amnesty International Report 2010; The state of the world's human rights", 2010, pp. 261-262

¹⁸ Op Cit. 13, p. 147

¹⁹ Op. Cit. 14, p. 176 and Op. Cit 13, pp.149-150

²⁰ Op. Cit. 13, pp. 34, 70-71

were then used as a basis for the development of operationalised interview questions more adapted to the target group for the interviews and the interview situation. The operational interview questions allowed for a less academic and technical language in the actual interviews and thus facilitate communication between the researcher and the respondents.²¹ The thematic background question was used to inspire operational interview questions that would ensure that the research questions and the interviews as a whole were related to the local context. The background question and the research questions that have been developed from the more general purpose for this essay are shown in table 1.1. The operationalised interview questions have not been included here but are available in appendix A.

Background question
1. To what extent is the usage of pesticides in Southern Leyte seen as a problem?
Research questions:
1. How deep/detailed is the local knowledge about the right to water?
2. To what extent does the right to water provide a sense of obligation?
3. Is a human right to water perceived as awkward for political reasons?
4. Is the human right to water regarded as a useful tool for the regulation of pesticide usage?
5. Is the human right to water regarded as a useful tool for awareness raising about the need to regulation pesticide usage?
6. Can the human right to water be of assistance in the environmental protection of local ecosystems?

Table 1.1

A combination of purposive sampling and snowball sampling²² was used to select the respondents from all of the relevant categories. This means that respondents from local

²¹ Op. Cit. 13, pp. 147-148

²² Op. Cit. 14, p. 17

authorities and civil society organisations were first chosen among those working with regulatory and awareness-raising efforts regarding pesticide usage, who then were asked whether they could suggest other respondents. Given the researcher's limited local contact network, this combination of purposive and snowball sampling generated the basis for sufficient qualitative face-to-face interviews for this project. The combination also worked as a potential safeguard against the risk that the researcher, throughout the interview survey, might select individuals without the presumed knowledge, expertise or interest in the relevant topics. When deciding on the number of respondents it would have been preferential to apply the idea of theoretical saturation used within grounded theory²³ to ensure that relevant conclusions can be drawn from the interview data. However, the limited time for both the field research and analysis made such an approach problematic. Therefore the number of interviews was limited to a maximum of ten respondents. Four respondents were civil servants from San Francisco local municipality who, in one way or another, worked with issues related to water or agriculture. One of these interviews failed to be recorded and has therefore been omitted from further analysis. Three respondents came from civil society organisations: one was a local staff member of a non-Filipino NGO working with the mapping and protection of the marine life in Sogod Bay, and the other two had leading positions in local water and sanitation associations. Due to factors that are explained in the section on research problems, only one sprayer could be interviewed. This person was also a landowning farmer. Instead of interviewing two additional sprayers as planned, a land-owning farmer who employed sprayers and a leading local politician on the barangay²⁴ level were both interviewed. The length of the interviews was 20 to 50 minutes depending on whether an interpreter was involved and the extent to which each respondent chose to develop certain themes during the interview.

Once collected, the data from the interviews were subjected to contents analysis through and summarised interpretations of the interview results were made. Such an analysis facilitate a succinct understanding of the intentions of the respondents and thus also of the survey results. ²⁵

²³ Ibid. p. 100

²⁴ A barangay is the smallest administrative unit in the Philippines

²⁵ Op. Cit 13, p. 219,223

1.5.1 ETHICAL CONSIDERATIONS AND THE INTERVIEWER EFFECT

The qualitative research interview has sometimes been depicted as a more ethical form of research as it allows respondents to be freer and more open in their responses than they could in a survey. Given the relational aspects of a qualitative research interview, some have argued that this would ensure a more balanced dialogue between the researcher and the research subjects.²⁶ Kvale and Brinkmann, however, refute this assumption. Instead they point to the structural inequality that is built into the qualitative interview situation. Throughout the interview, it is the researcher who sets the agenda for the interview. Most of the time, the interviewer has more knowledge than the respondent/s. Furthermore, the researcher has a monopoly in interpreting the respondents' answers and can, if sufficiently skilled, use manipulative interview techniques to achieve the results he or she wants. All of these factors might, in fact, lead some respondents to withhold important information from the interviewer in an attempt to offset the unequal power balance. To counter this structural inequality in qualitative research interviews, Kvale and Brinkmann suggest that the researcher needs to adopt a cooperative attitude towards the respondent.²⁷ In the current research project, there was little risk of knowledge-based superiority since the researcher had a limited knowledge of the local situation, making her more dependent on local informants. Another counter measure consciously applied by the researcher was an approach of well willing curiosity and eagerness to learn from the local respondents. Thus an interview atmosphere was hopefully created where respondents felt encouraged to open up and share information. While these countermeasures carried with them the risk of the researcher receiving biased, or even false, information, the interviews with three target groups potentially harbouring quite different interests have helped to increase the validity of information.

Kvale and Brinkmann have developed a framework consisting of 17 questions to facilitate ethical examination of qualitative research interviews.²⁸ The questions range from the purpose and integrity of the research itself to estimation of the possible consequences for the respondents participating in the interview survey. This

²⁶ Ibid. p. 92

²⁷ Ibid. pp. 48-49

²⁸ Op. Cit. 13, pp. 84-85

framework has been applied during the preparations of the interview guides used in the field research. All respondents were fully informed about the purpose of the research and measures were taken to maintain their confidentiality, either orally or in writing, before they were interviewed. Based on this information, they could then decide whether they wanted to participate in an interview or not. No respondents were forced or pushed into partaking in the interviews. In most instances, interviews were booked through face-to-face meetings, which provided an opportunity to present the purpose of the research project and answer any questions before the actual interviews took place. All interview recordings, field notes and transcriptions of interviews have been stored without the identities of the respondents being traceable on a password-protected computer to which only the research team has access. Back-up copies have been saved on folders in the researchers USB stick and MP3 player to which no others have had access since the time they were saved. All quotes from respondents in this essay have been de-identified in order to prevent traceability to the exact respondent from which the quote came from.

1.5.2 RESEARCH PROBLEMS

In general, the field research ran smoothly and according to plan. Nevertheless, there were some specific problems related to three factors that affected the possibility to carry out interviews with certain respondents, the quality of the interviews themselves, and the recordings of the same. The first and most important of these challenges was the language barrier. In spite of having two local interpreters it soon became clear that their interpretation skills not always sufficed to bridge language differences. Often, the translation of a Visayan answer to English would be a summary of what had been said. At other times, respondents would want to answer questions according to their understanding of what had been said rather than wait for a translation. In the first case, some information might have been lost as an answer was interpreted. In the second case, it sometimes meant that larger or smaller parts of interviews became more or less incoherent as respondents provided answers to questions as they understood them, rather than as they were asked. For the choice of respondents this also meant that some possible respondents were excluded from the interview survey as it was thought that the language difficulties would be insurmountable. This specifically concerned the choice to interview only one sprayer.

The second challenge was connected to the environment in which most interviews were carried out. San Francisco is rural and most respondents lived or worked in environments typical of a rural environment in a development country. In practice, this meant that interviews often took place where it suited the respondent best, rather than in conditions ideal for an interview. Consequently, the sound recording often consisted of barking dogs, cuckooing roosters and hens as well as passing traffic or thundering rain. Despite having well-functioning sound-recording equipment, such interferences made transcription difficult. However, in most cases those problems were only temporary and limited to small sections of the interview.

The third, and most minor, challenge was related to El Nino and a change in weather patterns. The trip was planned to take place just before harvest season when spraying activities should have been quite intense on the rice fields. Due to heavy rains in January and a delayed dry season, some farmers had been forced to replant their rice. This postponed the harvest in most of the area by two weeks or more. Consequently, spraying activities during the time for the field research was much lower than anticipated and only two sprayers were active in the vicinity of San Francisco while the interview survey was carried out. This limited the range of respondents from this group even more than the language barriers had done.

Finally, as was stated above, one interview was not properly recorded. Most of the information provided in this interview has however been repeated or confirmed by the other respondents. For these reasons, this interview has been excluded from the analysed material.

1.6 PREVIOUS RESEARCH

Due to their largely non-analytical nature, the resolutions and comments issued by various UN bodies will not be included in the following account of previous research. Such documents, it is argued, constitute the object, rather than the subject of research. There is quite a lot of material written on the various aspects of the human right to water, both in the form of academic papers and more 'hands-on' manuals for development practitioners and policy makers. Notable among these is a distinct difference in tone between those produced before, and those produced after, the issuance of general comment 15 of the CESCR (from now on called general comment 15)

in 2002²⁹. Those written before or simultaneously with the issuance of general comment 15 tend to be vaguer as to whether the human right to water is, in fact, legally sanctioned in international law. General comment 15 went a long way to clarify the legal status of the right and therefore materials produced after its issuance tends to be more decisive on this aspect. While some of the works written before the issuance of general comment 15 are interesting from a historical point of view, this essay will be mainly based on research and reports written after 2003. Some of the most important works among these are included below. Salman Salman has written a very good and often quoted account of the history as well as the policy dimensions of the right to water³⁰. A very thorough and more technical presentation of the legal aspects of the human right to water within international law has been made by T Kiefer and C. Brölmann³¹. COHRE has written a rather hands on and thorough guide on the right to water for policy makers, listing among other things the common misunderstandings associated with the right to water³². In a similar fashion, in one of its reports, the World Water Council has covered various aspects of the implementation of the human right to water, including challenges to implementation, such as lack of resources, political will, and awareness of the right's existence³³. The World Water Council includes brief presentations of a number of case studies in South Africa, Belgium, Hungary, Uruguay, Morocco, Brazil, India, Argentina, Ukraine and Nigeria, among other countries. Several of these cases show how the inclusion of a human right-to-water in international and national legal frameworks is only a preliminary step towards its guarantee. Such legislation must be accompanied by finances to implement, monitor and increase awareness of its existence in order to be useful. It has, however, been hard to find any more in-depth case studies of a more jurisprudential nature that focus on how well the human right is implemented and actually referred to within the practical realm of development and judicial work at the local and international level. Russell has produced some very interesting research on how, and to what extent, the human right to water is understood and referred to by

²⁹ An important observation here is that while general comment 15 is dated to the end of 2002 it was published in January 2003. Consequently there is a slight delay in the extent to which reports and academic papers picked up on the new analysis provided by general comment 15.

³⁰ Salman, Salman M. A. McInerney-Lankford, Siobhan Alice, "Human Right to Water: Legal and Policy Dimensions", World Bank Publications, 2004

³¹ T Kiefer and C. Brölmann, 2005

³² COHRE, AAAS, SDC and UN-HABITAT, "Manual on the Right to Water and Sanitation", 2007

³³ Céline Dubreuil, "The Right to Water: from concept to implementation" World Water Council, 2006

water sector practitioners in some of the bigger international development organisations. As mentioned in the introduction, this research has showed that there is not only rather shallow understanding of the right to water, but also a lot of scepticism as to its real operational relevance for water issues among practitioners³⁴.

2 THEORY

2.1 SOURCES OF INTERNATIONAL LAW AND THEIR RELEVANCE TO THE RIGHT TO WATER

Below a very brief presentation of the sources of international law will be provided. This will help to situate the different sources mentioning the right to water within a grander legal and political framework. The presentation will also serve as a basis for the distinction between hard law and soft law sources for the right to water. Throughout this essay hard law sources will refer to sources that have a binding legal effect within public international law. Soft law sources will refer to documents that have a great political influence and might serve as emerging evidence of international customary law, but never the less remain non-binding legal documentation. The distinction between these two kinds of sources has a major importance on the obligations that can be perceived as binding on state actors in relation to a human right to water.

The current paradigm states that international law and international human rights law primarily are binding on nation states. The major authority for the sources of public international law is generally perceived to be the 38th article of the statutes of the International Court of Justice.³⁵ The article lists five different sources of international law. The most important ones in general, but also for the specific context of the right to water, are conventions and customary law.³⁶ Conventions have to be ratified by a state

³⁴ Supra 10

³⁵ I. Brownlie "Principles of Public International Law", Oxford University Press 2003, p. 5

³⁶ In order to not get lost in unnecessary technical detail focus has here been maintained on the most important sources relevant to the overall and general discussion on the right to water and its legal obligations. The other sources mentioned by the ICJ statute's art. 38 are general principles of law as recognised by civilised nations, judicial decisions and the teachings of the most highly qualified publicists of the various nations. The latter two are referred to by the statute itself as subsidiary means by which the law is to be defined and therefore not of the greatest importance to our discussions here. On the same note the general principles referred to are, according to e.g. Brownlie, mainly referring to a number of

in order for them to be binding on that state. Customary law will be binding on all states, but only after a general, uniform and continuous custom has a) been proved to exist (*usus*) and b) has been proved as perceived to be legally binding on states by the states themselves (*opinio juris*), or c) is regarded as necessary due to social, economic or military reasons (*opinio necessitatis*).³⁷ Evidence of a custom can be found in a broad range of material sources such as e.g. “diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions... comments of governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organisations”³⁸, conclusions of international conferences³⁹ and “judicial decisions and the teachings of the most highly qualified publicists of the various nations”.⁴⁰ The weight of these different evidential sources will largely depend on the circumstances.⁴¹

While not necessarily (or possibly unfortunately) being very important to our discussion on the right to water, the legally binding effect of UN Security Council resolutions on members of the UN should at least be mentioned here in order to provide a full picture of binding sources of international law.⁴²

Resolutions of the UNGA are generally not binding on state parties to the UN, but have great weight politically and can be used as proof of customary law, especially when they relate to issues of law.⁴³ According to some commentators UNGA resolutions will in fact be such a strong proof of customary international law that when accepted with an unanimous vote and explicitly legal in their nature they give rise to immediately binding customary law.⁴⁴

internationally accepted legal norms such as consent, reciprocity, good faith and the legal validity of agreements.

³⁷ A. Cassese “International law”, Oxford University Press 2001, pp. 119-121

³⁸ Op. Cit. 35, p. 6

³⁹ Op. Cit. 35, pp. 12 - 15 and Op. Cit. 37, pp. 121, 161

⁴⁰ ICJ statute art. 38 (d), for a more in depth discussion on whether this should be seen as a formal or a material source of public international law see I. Brownlie, 2003, p. 5

⁴¹ Supra 38

⁴² Op. Cit. 37, p. 278 and UN charter (1945) chapter V, art. 25

⁴³ Op. Cit. 37, pp 160-161, 278 and Op. Cit. 35, pp. 14-15

⁴⁴ O. Bring, “FN stadgan och världspolitiken”, Norstedts Juridik 2001, p. 27

In a similar fashion resolutions of the human rights council are not legally binding but should be considered as recommendations to the general assembly on human rights issues.⁴⁵ They can, however, in that effect be seen as proof of emerging customs within public international law and as such have the potential to have great political impact.

2.1.1 THE HUMAN RIGHT TO WATER

The following section of this essay will look into the history and the status of the human right to water in international human rights law. The human right to water has a far from clear cut status within international law and is mentioned in a number of documents, resolutions, action plans and declarations, all with varying legal authority. A categorization of those sources into “soft law”, “hard law sources explicitly mentioning the right to water” and “hard law sources with implicit inclusion of the right of water” will therefore be made below. As a general conclusion about all of these sources it could be stated that the human right to water is not fully described in any binding conventions or treaties. An ever growing body of soft law documentation, including documents from very influential bodies such as the UNGA and the HRC, does, however, constitute an increasingly strong argument for the existence of a human right to water in customary international law. As we shall see, the ICESCR in its general comment No. 15 has provided the most detailed formulation of such a right.

SOFT LAW SOURCES FOR THE RIGHT TO WATER

References to a universal right to water first appeared on the international agenda in 1977 when the Mar Del Plata UN water conference declared it a right to all peoples regardless of their stage of development or socio-economic conditions.⁴⁶

Ever since the exact scope and legal status of the right to water has been debated. From the 1970s to the beginning of the new millennium the right to water was treated and mentioned in several declarations and resolutions of international conferences.⁴⁷ These documents were, however, often ambiguous as to its status as a right or a basic human

⁴⁵ UN General Assembly resolution 60/251 establishing the mandate of the UN human rights commission A/RES/60/251

⁴⁶ Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977 (United Nations publication, Sales No. E.77.II.A.12), Resolution II on Community Water Supply available on <http://www.ielrc.org/content/e7701.pdf>

⁴⁷ E.g. the International Conference on Water and Development in Dublin 1992, The Rio Summit on Agenda 21 in 1992, the UNGA resolution on the Right to Development in 1986, and the UNGA resolution establishing the UN Millennium Goals in 2000

need. They seldom provided sufficient exploration of what a right to water would entail in practice.

The most recent soft law sources on the right to water are the UNGA resolution 64-292 of July 2010 and the HRC resolution 15/L.14 of September 2010. In resolution 64-292 the general assembly recognized the right to safe drinking water and sanitation as a human right that “is essential for the full enjoyment of life and all human rights”.⁴⁸ Furthermore, it calls on states and international organisations to provide financial resources, capacity-building and technology transfer in order to scale up efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all. This should be done through international assistance and cooperation, in particular to developing countries.⁴⁹ The HRC in its resolution reaffirms that human rights instruments such as the ICESCR, CEDAW, CRC and the Convention on Rights of Persons with Disabilities (CRPD) entail obligations for state actors in relation to access to safe drinking water and sanitation. It then goes on to affirm that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living. Thus it is also inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity.⁵⁰

The UNGA resolution on the Right to Development and the subsequent UNGA and HCR resolutions have made it clear that the right to water should be seen as a human right. None of the declarations or resolutions mentioned above does, however, give rise to legally binding obligations as they are all soft law policy statements.⁵¹

HARD LAW SOURCES EXPLICITLY MENTIONING THE HUMAN RIGHT TO WATER

The Geneva Conventions and its protocols make several references to the rights of prisoners of wars and civilians to sufficient amounts of water for drinking and sanitation purposes during war times.⁵² The first legally binding text for peace times explicitly

⁴⁸ Op. Cit. 6, p. 2

⁴⁹ Op. Cit. 6, p. 2

⁵⁰ Op. Cit. 7, p. 2

⁵¹ Op. Cit. 30, pp. 8-15

⁵² See arts. 20, 26, 29 and 46 of the Geneva Convention relative to the Treatment of Prisoners of War (1949); arts. 85, 89 and 127 of the Geneva Convention relative to the Treatment of Civilian Persons in Time of War (1949); arts. 54 and 55 of Additional Protocol I thereto (1977); arts. 5 and 14 Additional Protocol II (1977). It is important to note that these conventions do not state anything about the need for

mentioning the right to water is CEDAW. The convention was adapted in 1979 and became valid in 1981. In its 14th article and 2nd paragraph it obliges state parties to take all appropriate measures to eliminate discrimination of rural women through ensuring their participation in, and enjoyment of, development through among other things “...adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply...”.⁵³ In relation to CEDAW and the right to water one can note that the way in which the right is described here is far from universal. Rather the convention limits the subjects of the right to rural women and avoids making any further specifications of the meaning of an “adequate water supply”.

The next binding convention that specifically refers to the right to water is the CRC adapted in 1989 entering into force 1990. CRC’s 24th article paragraph 2 states that state parties shall pursue full implementation of children’s right to health by combating “disease and malnutrition ...through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution”. It is probable that the provision of clean drinking water to children also to some extent safeguards the provision of the same to their parents. Like CEDAW, the CRC only refers to drinking water and avoids further specification of the meaning of “adequate”.

The last convention to be mentioned here is the CRDP. It entered into force in 2008 and has been ratified by 99 nations grants the access to clean water to persons with disabilities.⁵⁴ With regards to definitional limitations it is in parity with the CRC.

HARD LAW SOURCES INDIRECTLY INCLUDING THE HUMAN RIGHT TO WATER – GENERAL COMMENT NO. 15

The first step taken to approach the right to water in a more universal manner and at the same time grant it with a stronger legal characteristic was made in 2002 when the UN Council for the ICESCR issued its General Comment No. 15. After its issuance the comment has been widely quoted whenever the human right to water is to be defined in

the water provided to be fresh, in fact e.g. art. 20 of the Geneva Convention relative to the Treatment of Prisoners of War (1949) specifically mention potable water and not fresh water.

⁵³ CEDAW (1981) Art. 14(2)(h)

⁵⁴ CRPD art. 28 and www.un.org/disabilities/

more detail⁵⁵. One example confirming its status as a definition of the human right to water is e.g. the report of the United Nations High Commissioner for Human Rights (UNHCHR) on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation from 2007.⁵⁶ Even if the UNHCHR's report to a certain extent derives a right to water from the right to life and the prohibition of torture in the International Covenant on Civil and Political Rights (ICCPR), it largely bases itself on the conclusions of general comment 15. In general, reference to the ICCPR as a source for the human right to water is less elaborated within most of the studied literature.⁵⁷ For this reason the focus of the remainder of this chapter will be limited to the ICESCR and general comment No. 15.

According to general comment No. 15 the human right to water “entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses”.⁵⁸ The comment recognises that water is important for several of the rights within the ICESCR such as e.g. the right to adequate food, the right to health, the right to work and the right to cultural life. Priority should, however, be given to water resources needed to prevent starvation and disease as well as to fulfil the core obligations of the rights within the ICESCR.⁵⁹ The comment goes on to describe the normative aspects of the right to water in more detail. Of importance here is the view that what constitutes an adequate water supply not can be limited to volumetric quantities only. Rather it has to be constructed in accordance to what specific situations demands in order to safeguard human dignity, life and health in a sustainable manner. Guidelines from the World Health Organisation (WHO) are mentioned as a suitable guidance for the appreciation of a sufficient amount available for consumption with personal and hygienic purposes. Such purposes are said to include “drinking, personal sanitation, washing of clothes, food preparation, personal and household

⁵⁵ See e.g. T Kiefer and C. Brölmann, 2005; COHRE et al 2007 and C. Dubreuil, 2006. For an example of literature that poses itself doubtful as to whether there exists a binding human right to water within international law but still suggest a human right to water fashioned very much along the lines of what is suggested in General comment 15 see J. Scanlon, A. Cassar and N. Nemes “Water as a Human Right?”, IUCN, Gland, Switzerland and Cambridge, UK, 2004

⁵⁶ A/HRC/6/3

⁵⁷ An interesting exemption to this trend is J. Scanlon, A. Cassar and N. Nemes, 2004

⁵⁸ Op. Cit. 7, p. 2

⁵⁹ Ibid.

hygiene”. With regards to the quality of water, general comment 15 states that it needs to be safe and “therefore free from micro-organisms, chemical substances and radiological *hazards* that constitute a threat to a person’s health”. The water should also have an acceptable colour, odour and taste for the purpose of each area of usage.⁶⁰ With regards to accessibility the comment emphasizes the need for both physical and economic accessibility to water without any discrimination towards anyone within the jurisdiction of state parties to the ICESCR. Important to note here is that economic accessibility not equals free water, but rather affordable water through the use of low cost techniques, appropriate pricing policies and/or income supplements⁶¹. Furthermore, the right to water is also said to include elements of information accessibility related to water issues in the sense of the right to seek, receive and impart information concerning water⁶².

The socioeconomic nature of the rights contained in the ICESCR and the sometimes cost intensive need they impose on state parties to act in a positive manner, rather than abstain from certain actions, has meant that the rights in the ICESCR traditionally has been seen as progressive rather than immediate rights⁶³. Arguably, such an understanding is backed up by formulations referring to progressive rights and maximum available resources in the ICESCR itself⁶⁴. Accordingly state parties, while under an obligation to fulfil these rights as speedily as possible, would still be free to do so in a pace adapted to their economic development. Understandably, critique has come to be directed towards this narrow understanding of economic, social and cultural rights. An alternative understanding has been developed through the concept of the rights’ “core content” as a reference to a right’s essential aspects, “without which it loses its significance”.⁶⁵ To guarantee a right’s core content thus becomes a state party’s immediate obligation from which it cannot opt out⁶⁶. In the same vein a tripartite concept of states’ obligations with regards to such rights have been developed. It is

⁶⁰ Ibid. p. 5

⁶¹ Ibid. pp. 5, 10

⁶² Supra 60

⁶³ Op. Cit 31, p. 191-194

⁶⁴ See e.g. ICESCR (1976) article 2(1) and (3)

⁶⁵ Op. Cit. 31, p. 194 referring to P. Alston, “Out of the abyss: the challenges confronting the new U.N. Committee on Economic, Social and Cultural Rights”, 9 *Human Rights Quarterly* (1987), pp. 333–381

⁶⁶ See e.g. T Kiefer and C. Brölmann, 2005, p. 194 and their reference to General comment no. 3 of the Committee of the ICESCR

widely applied and stipulates states to *respect, protect* and *fulfil* various aspects of social, economic and cultural rights.⁶⁷ Both the tripartite and the 'core content' concepts are adapted in General comment No. 15's description of the right to water.

Among state parties' immediate obligations with regards to the right to water falls the need to⁶⁸:

- ensure access to the minimum essential amount of safe water for personal and domestic usage;
- ensure non-discriminatory access to water and water services;
- ensure physical access to water facilities and services that provide safe water on a regular basis without risking threats to personal safety during water collection;
- ensure equitable distribution of all available water resources;
- adopt and implement national water strategies and plans of action addressing the whole population with periodic reviews;
- to monitor the realization or non-realisation of the right to water;
- to adopt relative low cost targeted water programmes for the protection of vulnerable and marginalized groups;
- to take measures to prevent, control and treat water linked diseases.

Furthermore the comment states a strong presumption of prohibition against retrogressive measures taken in relation to the right to water.⁶⁹ The obligation to respect the right to water means that states must abstain from either direct or indirect interference with the enjoyment of the right, in peacetimes as well as in times of armed conflict⁷⁰. The obligation to protect brings upon states a duty to prevent third parties from interfering with the enjoyment of the right to water. This includes the adaptation of necessary and effective legislative and restrictive measures⁷¹. According to the comment the obligation to fulfil can be divided into the three aspects of facilitation, promotion and provision. Facilitation requires states to take action to assist individuals and communities access to water. Promotion refers to the provision of appropriate education about water hygiene, the protection of water sources and minimization of

⁶⁷ Op. Cit. 31, p. 191

⁶⁸ Op. Cit 6, p. 12-13

⁶⁹ Op. Cit 6, p. 8

⁷⁰ Ibid, p. 9

⁷¹ Ibid

water wastage. Provision concerns state parties' duty to provide water for individual or communities who by their own means and due to reasons beyond their control are unable to ensure their enjoyment of the right to water. State parties should also adopt strategies to ensure that there is a sustainable supply of safe and fresh water for both present and future generations.⁷²

2.2. THE RELEVANCE OF THE HUMAN RIGHT TO WATER AS LAW AND JURISPRUDENTIAL FRAMEWORKS

The findings of the World Water Council and Russel will in this chapter serve as an entrance point to a more in depth jurisprudential discussion. The World Water Council does an impressive attempt to bring together the human rights and the development aspects of the right to water in their report on the topic from 2006, i.e. before the latest UNGA and HCR resolutions. Their departure point is that the upholding of the human right to water first of all is a moral obligation, including both rights and duties for states as well as for users.⁷³ The report goes on to mention lack of understanding with regards to the rights contents, priorities, politics and economics as reasons for why the right is not implemented in many countries. Legislative measures, accountability mechanisms, community advocacy and implementation approaches, political solidarity measures and monitoring are then mentioned as methods for the implementation of the right.⁷⁴ While the report concludes that the creation of legislative frameworks and awareness raising about the existence and the contents of the human right to water is among the first things that needs to be done, it also emphasises that such legal measures are far from enough if the right is to be implemented. In addition a range of more development oriented efforts must also be carried out. Such efforts range from financial aspects to the involvement of key actors and the most disadvantaged in the whole process of providing water; from planning and implementation to monitoring.⁷⁵

Russel focuses more on the perception of the legal aspects of the human right to water within the development sector. She departs from the observation that international development organisations since the middle of the 1990s increasingly have applied a

⁷² Ibid p. 10

⁷³ Op. Cit. 33 pp. IV, 11

⁷⁴ Ibid. pp. 14 - 39

⁷⁵ Op. Cit. pp. 43

human rights based approach. The aim of this approach has been an increased accountability and the enablement of “right-holders” to claim their rights in relation to “duty-bearers”.⁷⁶ This goes in line with the assumption mentioned in the introduction to this essay that a legally binding human right to water will give rise to a sense of obligation among those institutions that can be labelled as “duty-bearers”. According to Russel’s field research the legal status of the human right to water was, however, seen as highly irrelevant for practitioners working for international development organisations operating within the water sector. Such practitioners were instead found to be uncomfortable talking about water provision from a perspective of legally binding human rights. The legal aspects of the right was either seen as too technically complicated and without any guarantees of enforcement, or as having potential negative political implications on relationships with development partners. Most practitioners therefore rather preferred a more general rights based rhetoric rather than one actually anchored in a legally binding human right to water.⁷⁷ According to Russel there is a risk that such an application of a simplified rights based rhetoric will lead to failed integration between the human rights and development regimes. The possible end result would be an undermining of the human rights regime through dilution and misconceptions of legally binding human rights norms including, when relevant, their progressive nature. She would therefore prefer a future development moving away from the rights based approach and instead rely on international human rights norms and development standards as two separate entities.⁷⁸

Russel could be said to describes a gap between law and its, perceived and/or actual, real world relevance that is well known to most jurisprudential thinkers. How this gap is perceived and how we relate to it is connected to how we perceive the nature of law in the first place and what explanations we find for its failure. In order to later be able to discuss these issues and relate them to the findings of the World water Council, Russel and the field research from the Philippines more profoundly, the concepts of legal failure, legal positivism and legal pluralism are introduced below.

⁷⁶ Op. Cit.10, pp. 1,3

⁷⁷ Ibid. pp. 6, 12

⁷⁸ Op. Cit 10, p. 15- 16

2.2.1 LEGAL POSITIVISM ⁷⁹

Most of us are rather well familiarised with the basic presumptions of legal positivism and it will suffice to say that they are based on the sole recognition of the sovereign as the enactor of law as well as the division between law and morality stemming from the work of Bentham, Hart, Austin and others⁸⁰. From the perspective of the legal positivist the creation, enforcement and application of law becomes a top down endeavour. Law is seen as a formal structure, its basic functional needs being internal cohesion and good legal infrastructure and institutions to back it up. The solutions to legal failure are then to be found either in alternating the text of the law, imposing new laws or improving the institutions responsible for the implementation and application of the law.

2.2.2 LEGAL FAILURE

Numerous writers have discussed the problem of legal failure.⁸¹ Seidman and Seidman note the common exclamation among developing country legislators: "We have good laws, but poor implementation".⁸² This, they argue, is a contradictory statement, how can you say that you have good laws, if they in fact are not followed?⁸³ Galligan points at two ways of defining legal failure. The first would be when the law fails to cover certain areas and therefore necessitates informal practices to lay down the rules. This however ought to be seen as a legal lacuna rather than a failure. The second is when a certain topic or area is covered by the law but due to different reasons the law is not implemented or followed. This failure might have a number of explanations. First the law might be badly drafted, second it might not be implemented because there are insufficient judicial institutions, e.g. police, courts and judiciary, to safeguard its implementation. Third the law might be contradicting local social norms and therefore

⁷⁹ Paragraphs 2.2.1-2.2.3 are adapted versions of chapters in an earlier essay of mine called "On legal positivism's and legal pluralism's perceptions of legal failure, their respective solutions and their general importance for current trends in legal assistance and reform" for a course on the Rule of Law with Prof. Claes Sundberg at Stockholm University in 2005

⁸⁰ M. Tebbit, "Philosophy of law: an introduction", Routledge 2000, chapters 1-4

⁸¹ E.g. D.J. Galligan, "Legal failure: Law and Social norms in Post-Communist Europe" in Law and informal practices. The Post-communist Experience, eds. D.J. Galligan and M. Kurkchian, New York 2003; A. Seidman and R. Seidman "Assessing a Bill in terms of the public interest, the legislator's role in the law-making process" in the World Bank Legal Review: Law and justice for Development, World Bank Publications 2003; Tamanaha, "A General framework of Law and Society", Oxford University Press 2001, Fogelklou, 2003

⁸² Op. Cit. 30, p. 212

⁸³ Ibid, p.224

lacking legitimacy in the eyes of the public. In this third case it does not matter how good the institutions are, there will still be legal failure⁸⁴. Due to its strong belief in law as a formal structure and the capability of judicial infrastructure as a means to resolve legal failure, provided enough capacity, legal positivism has a tendency to fail whenever this third reason for legal failure appears⁸⁵.

2.2.3 LEGAL PLURALISM

It is important to note at the outset that the concept legal pluralism function as an umbrella for a number of different forms. This passage will only deal with some of these forms and conceptual understandings. First we have what Twining has called state legal pluralism.⁸⁶ In short this means that a nation might have a number of equally strong legal systems operating at the same time within a general framework. The most clear cut cases of state legal pluralism are operating as the norm in many parts of the Arab world and South East Asia. Jordan⁸⁷, Palestine, Lebanon, Sudan and Syria⁸⁸ as well as India, Pakistan and Bangladesh all have personal laws operating for a range of minority groups with regards to matter of family, inheritance (in some cases property) and religion at the same time as there is a general body of law that lay down e.g. the criminal, public and constitutional law.⁸⁹

Secondly legal pluralism is a jurisprudential school in its own right, having its roots in the discipline of legal anthropology.⁹⁰ It takes an oppositional stand to legal positivism's idea of the law of the sovereign. According to legal pluralists law will rather always be a

⁸⁴ D.J.Galligan, 2003, pp. 2-3

⁸⁵ One might argue that in a democracy where the legislature is chosen to represent the people the risk for this third kind of legal failure ought to diminish. However, such an argument, while in part valid, misses two important points. First, most of the countries that suffer from problems related to legal failure usually also have problems related to the lack of democracy. Second, even in countries that we today perceive as well functioning democracies there will be cases of legal failure due to discrepancies between the opinions of law makers and the opinions of bigger or smaller parts of the public about social norms. Examples of the latter could be e.g. differential socio ethnic values held by socio-ethnic minorities in any given society; or a perception of the majority of the general public that what the law maker thinks is wrong really is not that bad, such as e.g. illegal downloading of music from the internet in a well functioning representative democracy such as Sweden.

⁸⁶ W. Twining, 2004, "Diffusion of law: a global perspective", p. 14

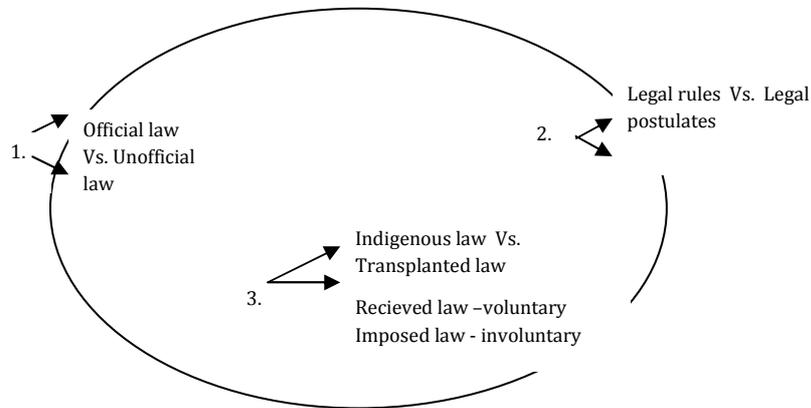
⁸⁷ L. Welschman, "Jordan, capacity, consent and underaged marriage in Muslim Family law", pp. 243-265 in The International Survey of Family Law 2001 Edition, The International Society of Family Law p. 244

⁸⁸ www.undp-pogar.org/publications/judiciary/nbrown/tstatus.html

⁸⁹ W. Menski, "Indian Legal Systems Past and Present", 1997, Occasional papers, SOAS, Law Department, pp. 45, 48, 55

⁹⁰ B. Z Tamanaha, "A General framework of Law and Society", Oxford University Press 2001

product of the interaction between state and society. Majisato Chiba has developed a detailed tripartite model that attempts to describe how these different spheres interrelate in the creation of the law. His model consists of the three dichotomies⁹¹ shown in the diagram.



According to Chiba the law matrix is constantly formed by the interaction between these dichotomies, the result being the specific identity postulate of a certain legal culture⁹². While the first and the third dichotomies are rather straight forward, the second is worth expanding on. This dichotomy singles out specific legal rules of state law from the whole body official law mentioned in dichotomy number one. These individual rules are then placed in a position where they co-function with legal postulates that embodies the values and norms of a social group or even a nation.⁹³ As such, legal postulates form the fundamental justification of both official and unofficial law.⁹⁴ Too much conflict between legal postulates and official or unofficial law might lead to instability and an unhealthy society.⁹⁵ Due to their deep cultural roots legal postulates, as compared with legal rules, are neither easy to change nor easy to isolate from their cultural matrix. Due to this they will, most of the time, take the upper hand over legal rules in the case of a conflict.⁹⁶

⁹¹ T. Kitamura "Un Autre Regard." in "Une introduction aux cultures juridiques non occidentales", Autor de Masaji Chiba, European Academy of legal theory, Bryllant, Bruxelles, 1998 p. 109

⁹² Ibid

⁹³ M. Chiba, "Conclusion" in Une introduction aux cultures juridiques non occidentales", Autor de Masaji Chiba, European Academy of legal theory, Bryllant, Bruxelles, 1998 p. 264

⁹⁴ M.Chiba (1986: 6-7), quoted in W. Menski, "From Dharma to Law and Back? Postmodern Hindu law in a Global World- working paper 20" 2004, p. 5

⁹⁵ M Chiba, "Legal Pluralism: Toward a General theory through Japanese Legal Culture", Tokyo, Tokai University Press, 1989, pp. 173-174

⁹⁶ Ibid. p. 178

The contribution of legal pluralism to debates about legal reform is that if one wants to change society through official law, one has two options. The first is to change the legal postulates of a society so that they come to agree with the new law one wants to impose. This can be done through information, education, boosting of civil society and other forms of awareness generation. A process which takes time and effort but which is recognised by most legal reform theorists within the development sphere of legal reform, even if the language in these cases are couched in terms of political will or support⁹⁷ rather than legal postulates. The second is to formulate the official law reform in tones and nuances which find their basic foundation in the legal postulates of the society one is trying to change. Any other path than that offered by these two will according to legal pluralists lead to nothing but a declaratory change and an even more hollow concept of the rule of law as the law. Thus its claim on authority and egalitarianism will lack legitimacy in the eyes of the public.⁹⁸ It might be said that this is what Tamanaha embodies when he says that “law is whatever people identify and treat through their social practices as ‘law’”⁹⁹ i.e. law is what people perceive to be valid law, regardless of what sphere of society it emanates from. Thus disharmony between official law and legal postulates will lead people to follow their legal postulates, i.e. their norms, rather than the official law and legal failure will be a fact. The reason for failure in this context being that the official law lacks legitimacy. Harsher stipulations often only cause the same behaviour to be carried out in silence rather than inducing real change.¹⁰⁰ Legal pluralism in this sense could thus be described as taking a bottom up perspective on the creation, enforcement and applicability of law.

3. THE PHILIPPINES AND THE FIELD RESEARCH CONTEXT

So far this essay has largely dealt with the different theoretical frameworks for the right to water on the one hand and possibilities to deal with legal failure on the other. The purpose of this essay does, however, demand that we relate these frameworks to the local context and the real lives of people. Arguably such relevance is what largely

⁹⁷ P. Bergling, “Rule of law on the international Agenda: international support to Legal and Judicial Reform in International Administration, Transition and Development Cooperation”, Intersentia, 2005, p. 42

⁹⁸ W. Menski, 2004, p.18

⁹⁹B. Z Tamanaha, 2001 p. 194

¹⁰⁰ Op. Cit. 98, p.9

determines the weight of the theoretical frameworks we have dealt with. Consequently, the coming chapter will begin with an account of the relevant regulative framework for pesticide usage and water pollution in the Philippines. It will continue with a description of pesticide usage in relation to rice cultivation and its effects on fresh surface water in Southern Leyte, the Philippines. Finally, it will present the results of the interview survey.

The Philippines in general is marked by substantial differences in living standards between various islands and regions.¹⁰¹ Differences that becomes obvious as one travels from one island to another or between different parts of islands. The results from the research that will be presented here therefore only reflect the situation in a rather small part of the Philippines. They should not be used as a basis for conclusions about the Philippines as a whole.

3.1 THE RELEVANT NATIONAL REGULATIVE FRAMEWORK

The Philippines have signed and ratified CEDAW¹⁰², CRC¹⁰³ and the CRPD¹⁰⁴ as well as the ICESCR¹⁰⁵. A substantive Filipino body of law on water protection and management has also developed for more than a century. Currently at least 14 existing laws regulate water management, quality and pollution.¹⁰⁶ Not all of these laws are of relevance to the issues of pesticide usage and the pollution of fresh water systems which is why only a few will be mentioned here. First of all, it should be noted that according to the Filipino Constitution of 1987 the state shall protect and promote the right of the people to health. It should also protect and advance the right of the people to a balanced and healthful ecology.¹⁰⁷ Finally, the constitution stipulates that all waters within the Philippines belong to the state.¹⁰⁸ The waters of the Philippines are classified according to their water quality and suitable types of usage by the Environmental Management

¹⁰¹ <http://www.ruralpovertyportal.org/web/guest/country/home/tags/philippines> accessed 2011-04-29

¹⁰² http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en ratification took place in 1981

¹⁰³ http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en ratification took place in 1991

¹⁰⁴ <http://www.un.org/disabilities/countries.asp?navid=12&pid=166> ratification took place in 2008

¹⁰⁵ http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en ratification took place in 1974

¹⁰⁶ The World Bank, "The Philippines Environment Monitor 2003", The World Bank, 2003 p. 21

¹⁰⁷ The Constitution of the Philippines 1987, Article II, sections 15 and 16

¹⁰⁸ Ibid, Article XII, section 2

Bureau (EMB).¹⁰⁹ Water usage is further regulated through water permits issued for the different types of usage to which the water is put by the National Water Resource Board (NWRB).¹¹⁰ Owners of land may use water on their land for domestic purposes without any permit provided that the usage has been registered with the NWRB.¹¹¹ Water from natural sources may also be used without a permit for various domestic usages such as bathing, washing, watering domestic animals or any other purpose as long as appropriated in a hand carried receptacle.¹¹² At the most local level the barangays are responsible for the provision of basic services such as water and sanitation. In practice this often happens through community based water associations.¹¹³

The usage of pesticides and fertilisers for agricultural purposes is regulated by the Fertilizer and Pesticide authority created in 1977.¹¹⁴ The authority has among its various tasks to protect the public from risks inherent in the usage of pesticides, educate the agricultural sector in the use of pesticides and to establish and enforce tolerance levels and good agricultural practices for the use of pesticides.¹¹⁵ Only the production, importation and commercial dealings with pesticides are regulated by the authority. Actual handling and usage by farmers remains largely unregulated.¹¹⁶ With regards to pollution and the misuse of pesticides at least four different overlapping laws are of relevance. These are the national water and air pollution control commission act (1964), the already mentioned water code, the Philippine environmental code (1977) and the clean water act (2004). In addition to this republic act no. 10068, which provides for the development and promotion of organic agriculture in the Philippines, should also be mentioned in the context due to its potential indirect effects on pesticide usage and misuse.

¹⁰⁹ Greenpeace, "The state of the water resources in the Philippines", October 2007, p. 13 and Presidential decree 1152 the Philippine environmental code (1977), section 15

¹¹⁰ www.nwr.gov.ph accessed 2011-05-04

¹¹¹ The water code of the Philippines, Presidential decree 1067 (1976) art. 10

¹¹² Ibid. art. 14

¹¹³ The local government code of the Philippines Section 391 (23) and The World Bank, "Philippines, Meeting Infrastructure challenges", 2005, pp. 107, 112

¹¹⁴ Presidential decree 1144.

¹¹⁵ Ibid. section 6 and Presidential decree 1152 (1977) The Philippines environmental code, section 33

¹¹⁶ Interview with civil servant 1, interview with civil society 1, interview with landowner/farmer 2

The national water and air pollution control commission act pronounces it a national policy to maintain reasonable standards of water purity.¹¹⁷ It further prohibits pollution of Philippine waters by any organic or inorganic matter or substance.¹¹⁸ Pollution is here defined as an alteration of the physical, chemical and/or biological properties of the water likely to render it harmful, detrimental or injurious to public health, safety or welfare or to domestic uses, livestock, wild animals, birds, fish or other aquatic life.¹¹⁹ Any person in violation of this prohibition can either be liable to a fine of maximum 50 Filipino pesos per day for each day of the violation, imprisonment between 2-6 years, or both. Any person who in violation of the act causes the death of fish or aquatic life or damages the natural habitats shall also be liable to pay damages to the government for the fish or aquatic life that has been destroyed.¹²⁰ The water code basically repeats the above prohibitions, if yet in more general terms. It applies a more subjective definition of water pollution relating it to the standards and usage set for each body of water. When the application of pesticides or fertilisers within agriculture can cause pollution it is to be regulated or prohibited.¹²¹ Punitive actions range from fines of 3000 to 6000 Pesos, imprisonment between 3-6 years or both. The Environmental code of the Philippines allocates responsibility to contain, remove and clean up any water pollution incidents to polluters at their own expense. The relevant government agencies are to carry out such clean up operations in case of a failure from the polluter to do so. Costs for such operations shall be charged to the polluter.¹²² The clean water act (2004) broadens the allocation of responsibility for water protection and management from state agencies to other non state actors through the encouragement of cooperation, self-regulation and education among citizens and industries.¹²³ The clean water act also stipulates for the preparation of an integrated water quality management framework bringing together all water quality frameworks prepared by all concerned agencies into one policy guideline.¹²⁴ Finally, a large attempt to motivate farmers to use organic pest controls, rather than chemical pesticides, has also been done through republic act 10068

¹¹⁷ Republic Act no. 3931 (1964): The national water and air pollution control commission Act, section 1

¹¹⁸ Ibid., section 9

¹¹⁹ Ibid., section 2a

¹²⁰ Ibid., section 10

¹²¹ Presidential decree 1067 (1976), the water code of the Philippines, art. 78

¹²² Presidential decree 1152 (1977) The Philippines environmental code, section 20

¹²³ Republic Act 9275 (2004) The Clean Water Act, section 2 (f), (h) and (j)

¹²⁴ Ibid. section 19 (b)

(2009). The act does not only make the promotion of organic agricultural practices a state policy, but it also introduces a number of financial incentives such as e.g. a seven year break from all forms of income tax for all registered and accredited micro to medium sized enterprises producing organic foods or agricultural inputs.¹²⁵

Approximately thirty different agencies and offices with their own sectoral concerns are responsible for the implementation of the above mentioned, and other, laws relating to water quality and management in the Philippines. In addition NGOs are increasingly involved in the provision of water services. At the most local level politically elected barangay captains and conciliation panels are in charge of barangay law enforcement in general, as well as in relation to pollution and environmental protection.¹²⁶

Needless to say, the sheer number of agencies involved in the implementation of the existing regulations leads to a very fractioned situation with low efficiency and accountability gaps. In addition the whole sector for water provision is characterised by severe underinvestment.¹²⁷ The absence of an integrated water resources management system has also meant challenges when it comes to the adaptation of a holistic view on the whole hydrological cycle or multi-sectoral approach. ¹²⁸ In 2005 a World Bank report estimated that less than half of the population and less than 20 percent of the rural population had access to piped water or household taps. ¹²⁹ The integrated water quality management framework stipulated for in the clean waters act was prepared and published by the NWRB through funding from the United Nations Environmental Programme (UNEP) in 2006¹³⁰. No nationwide progress report on its implementation is available as of yet.¹³¹ The existing framework does, however, recognise the above mentioned problems related to fractionalisation, differentiating interpretations of relevant laws by various agencies as well as the human right to water.¹³²

¹²⁵ Republic Act 10068 (2010), The Organic Agriculture act of 2010, section 2 and section 24

¹²⁶ Republic Act 7160 (1991)The local government code of the Philippines, Section 389 (b)(1) and (9)

¹²⁷ The World Bank, 2005, p. 118 - 124

¹²⁸ The National Water Resource board, "Working together to secure sustainable water for all; the integrated water resources management Plan Framework, summary document", November 2006, pp. 10-11

¹²⁹ Op. Cit. 127, p. 107

¹³⁰ Op. Cit. 128, acknowledgements

¹³¹ www.nwr.gov.ph

¹³² Op. Cit 130, pp. 10-11, 21,34

3.2 RICE PRODUCTION, PESTICIDE USAGE AND SURFACE WATER UTILISATION IN THE VICINITY OF SAN FRANCISCO, SOUTHERN LEYTE

San Francisco is a local municipality in Southern Leyte, a province located on the island of Leyte in the eastern Visayas, the Philippines. According to the 2007 census Southern Leyte has a population of approximately 390,847 people while the island of Leyte as a whole has an approximate population of 2, 112 883, with a growth rate of 1.13 per cent during 2000 - 2007.¹³³ San Francisco in itself has an approximate population of 12 000 living in 22 barangays.¹³⁴ The main means of support over the whole island of Leyte is agriculture with coconut, rice, sugar, corn and abaca as principal crops.¹³⁵ According to the most recent available statistics from the international rice research institute 99, 934 metric tonnes of rice was produced on the island in 2008, all of it for domestic consumption.¹³⁶ Of the 9000 Ha of agricultural land used for rice cultivation in Southern Leyte 8000 Ha are irrigated, 1000 Ha have their water provision from rainfall.¹³⁷ The sea surrounding Southern Leyte has a varied marine life with frequent whale shark sightings and Eco-tourism is a pronounced part of the vision for San Francisco municipality.¹³⁸ Irrigation water from the rice fields pass on to creeks, rivers and the sea through irrigation and drainage channels. Pesticides used on the rice fields, or otherwise added to the surface water; pass through the same water ways where they continue to affect the ecological systems. The presence of pesticide residues in the water ways also risk resulting general health problems among people using the water in the rivers and creeks for bathing or domestic shores.

On several occasions during the field visit to Southern Leyte people was observed swimming or washing in rivers passing by areas used for rice cultivation. The same

¹³³ <http://www.census.gov.ph/data/sectordata/2007/province.pdf>

¹³⁴

[www.nscb.gov.ph/activestats/psgc/province.asp?provcode=086400000®Name=REGION%20VIII%20\(Eastern%20Visayas\)](http://www.nscb.gov.ph/activestats/psgc/province.asp?provcode=086400000®Name=REGION%20VIII%20(Eastern%20Visayas))

¹³⁵ K.L. Heong, M.M. Escalada and A.A. Lazaro, " Misuse of pesticides among rice farmers in Leyte, Philippines", pp. 108 - 122 in I Prabhu L. Pingali and Pierre A. Roger "Impact of pesticides on farmer health and the rice environment", The international rice research institute, 1995, p. 108 and http://fida.da.gov.ph/Templates/abaca_production_and_market_scenario.htm

¹³⁶ <http://geo.irri.org:8180/wrs/> or alternatively <http://irri.org/world-rice-statistics>

¹³⁷ http://web.evis.net.ph/evonline/index2.php?option=com_content&do_pdf=1&id=3582

¹³⁸ San Francisco municipality vision: "San Francisco is a premier eco-tourism destination in Region 8, with God-loving, healthy, educated and empowered citizenry living in a safe environment and progressive economy under a strong, dynamic and transparent leadership" as presented at Public community hearing of Politicians and civil servants in San Francisco, Santa Paz, Southern Leyte, Philippines 2011-03-17

behaviour was confirmed by the majority of the respondents in the interview survey. On one occasion a young girl was seen drinking from the water in one of the rivers. All major settlements did, however, receive their drinking water through piped water systems provided for them either by the local authorities in San Francisco or by barangay based water and sanitation associations. Only a few households in the area where the interviews took place were unable to afford membership in those associations and therefore referred to collecting drinking water from open springs.¹³⁹ In case the local water systems broke down, people would either purchase potable water or collect water from open springs until maintenance had been carried out by the local water and sanitation association.¹⁴⁰ San Francisco municipality assisted the local water associations with chlorination of water systems, emergency medication and provision of bottled water in cases of severe endemics of diarrhoea.¹⁴¹

There are no recent available statistics about the exact amount of pesticides used by farmers for rice cultivation in San Francisco¹⁴². Research done in 1995 by Heong, Escalada and Lazaro state that 45 percent of the farmers in Leyte as a whole sprayed their fields two to three times per season, while 33 percent sprayed more often.¹⁴³ Several farmers are known to spray seven times per season or more.¹⁴⁴ Several studies as well as observations during the field work for this essay confirm that Filipino farmers and agricultural workers often apply the pesticides without using recommended protective equipment such as goggles, protective glasses, gloves or boots.¹⁴⁵ Knapsacks used for the spraying of pesticides are also commonly washed and rinsed directly in the

¹³⁹ Interview with civil society 2

¹⁴⁰ Ibid. and observation carried out during field visit when the water pump for the water system in Napantao, Southern Leyte broke down for four days during March.

¹⁴¹ Interview with civil society 2-3 and Interview with civil servant 4

¹⁴² None of the interviewed civil servants responsible for agriculture, development or sanitation in Southern Leyte could provide any such statistics.

¹⁴³ K.L. Heong, M.M. Escalada and A.A. Lazaro, 1995, p. 109

¹⁴⁴ L. Elfman, N. Took and J. Patring "Detection of pesticides used in rice cultivation in streams on the island of Leyte in the Philippines", unpublished, awaiting review for publication in *Agricultural Water Management*, 2011, p. 3 (Used with the permission of the authors).

¹⁴⁵ J.M. Antle, and P.L. Pinglai "Pesticides, productivity and farmer health: A Philippine case study", *American Journal of Agricultural Economics*, 76 (August 1994), pp. 418-430, p. 418 and all interviews carried for this field research.

river and it happens that people pour pesticides directly into the river in order to kill fresh water shrimps used as food.¹⁴⁶

The active chemicals in the most commonly used pesticides used in the area today are λ -cyhalothrin, cypermethrin and deltamethrin.¹⁴⁷ These substances are neurotoxins classified as pyrethroids aimed at destruction of insects' neurological systems. They are in general considered less dangerous to mammals.¹⁴⁸ They are absorbed by the body either through skin contact, through inhalation or orally, and have today replaced many pesticides that have been banned due their high toxicity to mammals. Even if less dangerous to mammals than to insects the pyrethroids are also toxic to mammals. Over-exposure in humans during shorter periods of time have been reported to give rise to rushes and burning sensations on the facial skin and on the hands in the milder cases. Nausea, vomiting, stomach pains, muscle twitches and cramps have been reported in cases where pesticides have been used for a longer time without proper protective gear.¹⁴⁹ Recent research has also suggested that pyrethroids might have negative effects on male fertility rates.¹⁵⁰ The pyrethroids have lower water solubility than most of the now banned pesticides. This means that they bind easier to soils and sediments, while their traceability in surface water can be low. Once they are bound in sediment and soil they can leach for a long time causing continuous low level contamination of affected water ways, in some cases for as long as ten years or more.¹⁵¹ Exposure should, however, not exceed ordinary background levels within 4-6 months from their application in cases of proper pest control.¹⁵² Once pyrethroids are absorbed the human body breaks them down in a couple of days.¹⁵³

¹⁴⁶ Interviews with land owner/farmer 1 and 2 and interview with local civil society 3, interview with barangay captain

¹⁴⁷ Op. Cit 144 p. 4

¹⁴⁸ John B. Sullivan, Jr., Gary R. Krieger eds. "Clinical environmental health and toxic exposures", Philadelphia, Pa.: Lippincott Williams & Wilkins, 2001, p. 1130

¹⁴⁹ Supra 3

¹⁵⁰ J. S. Taylor, B. M. Thomson, C. N. Lang F. Y. T. Sin and E. Podivinsky "Estrogenic Pyrethroid Pesticides Regulate Expression of Estrogen Receptor Transcripts in Mouse Sertoli Cells Differently From 17 β -Estradiol", *Journal of Toxicology and Environmental Health, Part A: Current Issues* Volume 73, Issue 16, 2010, Pages 1075 - 1089

¹⁵¹ Op. Cit. 144, p. 10 and J.H. Kolaczinski, C.F. Curtis, "Chronic illness as a result of low-level exposure to synthetic pyrethroid insecticides: a review of the debate", *Food and Chemical Toxicology* 42, 2004, pp. 697-706, p. 703

¹⁵² J.H. Kolaczinski, C.F. Curtis, 2004, p. 704

¹⁵³ Op.Cit.148, p. 1128

During the spraying season of spring 2010 water samples were taken in rivers close to the rice fields as well as at the river mouth at the sea and tested for the three types of pyrethroid based pesticides commonly used in the area. 47percent of the samples showed pesticide levels higher than recommended hygienic levels. The highest levels detected for each of the compounds were 7000, 215 and 12 times above the recommended hygienic values in Sweden. In the first case the sample was taken after a sprayer had rinsed his equipment in the river.¹⁵⁴ Seen in a national perspective, however, the water ways in Southern Leyte and the region in which it is situated remain relatively unpolluted.¹⁵⁵

3.3 RESULTS OF THE INTERVIEW SURVEY

Below the results of the interview survey will be presented according to thematic areas related to each of the research questions.

3.3.1 THE USAGE OF PESTICIDES AND THE PERCEPTION OF PESTICIDES

None of the respondents knew the amount of pesticides that were used annually in Southern Leyte. According to the civil servant in charge of agricultural issues at Southern Leyte municipalities some farmers used organic pest controls. Four of the nine respondents (the landowners, one civil society representative and one civil servant) referred to the fact that the government now is pushing for organic pest controls, but none of them mentioned any of the incentives mentioned in republic act 10068 (2009). The organic pest controls take longer to prepare and use than the chemical pesticides, a fact that together with hesitations about the possibilities to get high yield harvests with organic pest controls made the farmers hesitant to use them.¹⁵⁶

All the respondents were aware of the negative effects from pesticides even though the depth of this knowledge varied. Some respondents mentioned that pesticides might be bad for the skin and the environment.¹⁵⁷ Others made direct observations that there now were less fish in the rivers.¹⁵⁸ A few respondents had experiences of negative health effects in the form of increased sinus problems, stinging facial pains, and irritative eyes

¹⁵⁴ Op. Cit. 144, p. 9 and presentation by L. Elfman at Public Community hearing of Politicians and civil servants in San Francisco, Santa Paz, Southern Leyte, Philippines 2011-03-17

¹⁵⁵ See e.g. supra 106

¹⁵⁶ Interviews with civil servant 1 and 4 as well as land owner/farmer 1 and 2

¹⁵⁷ Interviews with civil servant 1, civil servant 2, civil servant 4, civil society representative 1, and barangay captain,

¹⁵⁸ Interviews with civil society 2 and landowner/farmer 2

after spraying¹⁵⁹ or itching from having used river water after suspected incidents of illegal fishing through the usage of pesticides.¹⁶⁰ Five of the respondents thought that these negative effects outweighed the positive effects of pesticides in the form of increased harvests, while the farmers and one of the civil servants saw it as unrealistic to not use chemical pesticides. As one of the respondents expressed it:

*"We have often been told, since we were in primary school that it [pesticides] is dangerous. But ...right now there is no alternative and the use of a biological alternative is, I mean, is hard to prepare, it is very time consuming and nobody uses that."*¹⁶¹

All of the civil servants highlighted the current limitations in the possibilities to establish causality between the possible leaching of pesticides into the rivers and any potential pesticide related cases of bad health. The local authority has no capacity to measure either the levels of pesticides in the rivers or to establish such links of causality.¹⁶² According to one of the civil servants no connection is currently made on the local level between water quality and possible pesticide pollution.¹⁶³ Another civil servant pointed out that the inability to establish such causality might contribute to relevant authorities not being informed in case people experienced major pesticide induced health problems, as there is no way to know whether people complains are caused by pesticide exposure or something else.¹⁶⁴ The effect of such a lack in capacity to establish linkages between possible pesticide pollution and water quality on the local level was possibly mirrored from another perspective by one of the farmers who pointed out that he had been told that the water in the river close by was clean as it was moving.¹⁶⁵ According to the research results delivered by Elfman and Patring this specific river receives the effluents from the irrigation channels containing some of the highest pesticide levels.¹⁶⁶ The disparity between the information the farmer had received about the cleanliness of the river next to his fields and the actual test results highlights some of the challenges in identifying problems relating to pollution in cases of low monitoring capacity with regards to water pollution. Two of the civil servants also pin pointed the need for

¹⁵⁹ Interview with landowner/farmer 2

¹⁶⁰ Interview with civil society 3

¹⁶¹ Interview with civil servant 1

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Supra 160

¹⁶⁵ Interview with landowner/farmer 1

¹⁶⁶ Op. Cit. 144,, p. 9

improved capacity to do baseline studies and continuous monitoring in order to be able to take any action against pesticide pollution either through more detailed regulations or through enforcement of existing laws.¹⁶⁷

3.3.2 LOCAL KNOWLEDGE OF THE NATIONAL LEGAL FRAMEWORK AND PERCEPTIONS OF ENFORCEMENT EFFICIENCY

None of the respondents knew exactly what laws regulated the usage of pesticides even if several of them mentioned the prohibition of fishing through pesticides and bans of certain types of pesticides. These references are in line with the national water and air pollution control commission act and presidential decree 1144. The local civil society representatives working for local water and sanitation associations both mentioned the Filipino water code as useful for their own work.¹⁶⁸ The civil servants and the barangay captain all saw it as the main responsibility of the local authorities and the national government to prevent pollution and ensure clean water through the development of information campaigns, regulations and regulatory enforcement. Two of them also thought such a responsibility should be shared with the manufacturers and in one case also with the farmers. The representatives for the local water associations on the other hand rather emphasised that training regarding water management and protection of water sources was a community responsibility that needed to be shared by everyone.¹⁶⁹ The fact that there is no real regulation of how much pesticides the farmers use were mentioned by many of the respondents, at one occasion as something negative.¹⁷⁰

What was regarded as more problematic by four of the respondents was the lack of implementation of those laws and regulations that do exist, especially in relation to the practices of using pesticides for fishing, rinsing spraying equipment in the river and also spraying without protection.¹⁷¹ Explanations for why the regulations were not implemented varied from lack of monitoring and enforcement capacity at the municipal level; the farmers' lack of understanding or "hard-headedness"; the difficulty in changing

¹⁶⁷ Interviews with civil servant 1 and 3

¹⁶⁸ Interviews with local civil society 2 and 3

¹⁶⁹ Ibid.

¹⁷⁰ Interview with local civil society 1

¹⁷¹ Interviews with civil servant 1 and 4, local civil society 1 and with landowner/farmer 1 and 2. While the latter behavior is not directly related to the issue of water quality and the human right to water and no laws have been accounted for that regulate this behavior above, it is mentioned here as it helps to provide a fuller picture of local perceptions related to the handling of pesticides. Perceptions that arguably also have an effect on water quality and the implementation of the human right to water.

people's habits to suspicions of political corruption. In the latter case it is important to note that most cases of pollution will first be dealt with within the barangay justice system before they are reported to the police. These suspicions thus concerned cases where elected members of the conciliation panels at the barangay level would not report people who were caught polluting the rivers to the police if they voted for, or belonged to the same party as, them. A fifth respondent also talked about the fact that laws and policies were not followed, but did not seem to think that it was so much of a problem as a matter of fact. According to him the sprayers' knapsacks need to be cleaned. To tell sprayers off for cleaning their equipment in one river would only mean that they would do it in one of the other rivers or creeks in the area.¹⁷² This opinion could be interpreted as reflecting either a lack of understanding or the difficulty in changing people's habits. It could, however, also be interpreted as a clue about the need to provide practical solutions for sprayers and farmers that would help them to follow regulations in their dealings with pesticides. One such practical solution could e.g. be to build or encourage the building of washing stands for spraying equipment on land situated away from the river as the pesticides will break down rather quickly in the ground.¹⁷³ Two of the respondents thought that the law would be implemented if they caught someone polluting the river and one respondent knew cases where the law had been enforced and polluters had been put in prison.¹⁷⁴

From the above it is clear that there is a great need for changed behaviour and perceptions in relation to how pesticides are handled if the situation is to change. This need was also directly mentioned by eight out of nine respondents who highlighted the need for continuous information and awareness raising campaigns about the effects of the pesticides, as well as the need for baseline studies and continuous monitoring of pesticide levels in order to enforce and possibly create new legislation. Information and awareness raising was more often mentioned as a solution to the problem with pesticide pollution than more or stricter regulations.¹⁷⁵ Responsibility to share such information

¹⁷² Interview with land owner/farmer 1

¹⁷³ L. Elfman, Presentation at Coral Cay Expedition Camp, Napantao, 21-03-2011

¹⁷⁴ Interviews with local civil society 2 and 3 and Interview with barangay captain.

¹⁷⁵ Seven out of nine respondents mentioned the need for information campaigns rather than stricter regulations. One of the respondents did not bring this issue up at all and one of the respondents suggested better cooperation between farmers, local authorities and the producers as the best way to deal with the problem.

was, by the respondents, mainly allocated to the government and the local authorities but also to the manufacturers of pesticides and the local water associations and barangays. According to two of the civil servants such information campaigns were already carried out by the local authorities, but were not attended by all farmers.¹⁷⁶ Lack of time on behalf of the farmers and possibly also lack of interest could according to the municipality workers be one explanation for nonattendance.¹⁷⁷ This picture was confirmed by one of the farmers who said that while there were information meetings held by the local authorities he perceived them as promoting the usage of organic pest controls rather than giving relevant information about how to handle pesticides correctly. He had therefore not attended the meetings as he was doubtful about the effects of organic pest controls, but would be very interested to attend meetings focused on the correct usage of pesticides and their effects. He also suggested that such meetings should be arranged at the barangay level as a complement to the municipal level. People at the barangay level were thought to be able to arrange meetings on weekends when farmers were free to attend, while there often were clashes between the weekday schedules of the farmers and the staff at the local authorities who generally did not work on weekends.¹⁷⁸

3.3.3 LOCAL KNOWLEDGE ABOUT THE HUMAN RIGHT TO WATER AND PERCEPTIONS OF ITS USEFULNESS

All of the civil servants as well as the representatives for the local water associations knew about the human right to water. The remaining four respondents had never heard of it and had to have it explained to them before they could provide any input on whether they thought it useful or not. Among those who were familiar with the human right to water two spontaneously linked it to the provision of drinking water and only thought about it as something concerning water for domestic usage once probed. The two most detailed descriptions of the human right to water was provided by one of the representatives for the local water associations and one of the civil servants.¹⁷⁹ Both of their definitions circled around the right to have access to clean water for both drinking and domestic issues but did not mention any of the more extensive immediate

¹⁷⁶ Interview with civil servant 1 and 4

¹⁷⁷ Interview with civil servant 4

¹⁷⁸ Interview with land owner/farmer 2

¹⁷⁹ Interview with civil servant 4 and local civil society 3

obligations directed at states in General comment 15. Interesting to note is that the representative for the local water association also saw it as a human right to protect the water from pesticides.¹⁸⁰

The idea that the human right to water concurred obligations to other actors than the state was expressed by most of the respondents when asked about whether they thought that the human right to water was useful. Only three of them said that it was useful as it provided an obligation for authorities to regulate the usage of pesticides in case current levels were proven to be dangerous, or could help in the regulation of pesticides.¹⁸¹ The usefulness of the human right to water as an awareness raising tool about the need to protect common water sources among the local population was highlighted by six of the respondents. To describe the need to keep water clean as a human right was for example said to be a useful way of helping people understand the importance and value of clean water.¹⁸² This once again underlines the perception of the human right to water as something that brought obligations to everyone. One respondent also thought that the human right to water would be useful as a tool to solve water related conflicts, while one respondent did not provide any detailed input on the usefulness of the human right to water. Eight out of nine respondents thought that the human right to water could be used also to protect the environment. The ninth respondent was more concerned about the dilemma of needing to use pesticides on the field and the need for clean water.

Most of the respondents motivated their work with water issues, or if they were farmers their attempts to keep the water clean, with a sense of obligation directed towards their neighbours, their community, and their clientele or fellow consumers. Thus the human right to water as such did not provide the main motivator, but rather the subjects of the right did. Two of the respondents thought that potential problems with the implementation of the human right to water could be related to the prioritisation of politicians but sometimes also to political “revenge” on electorates that had not been voting in favour of a certain politician on the local level. In such cases it might be possible that an area had problems with their water allocation if they had not voted for

¹⁸⁰ Supra 160

¹⁸¹ Interview with civil servant 1 and 4 as well as with barangay captain

¹⁸² Supra 160

the winning politician.¹⁸³ The farmers were both hesitant towards whether a human right to water was compatible with their need to use pesticides on their fields, while the barangay captain was concerned that a human right to water might lead to water wastage. Other problems that was highlighted was the low capacity of the local authorities¹⁸⁴ and the long change process that needed to take place before people's behaviour would change in such a way that pollution no longer would be a problem.¹⁸⁵

3.4 CONCLUDING REMARKS ABOUT THE HUMAN RIGHT TO WATER IN THE FIELD RESEARCH CONTEXT

The Philippines has an extensive, but piecemeal, legal framework aimed at the regulation of water access as well as the usage of pesticides and the pollution of water ways in general. While the state itself does not always function as the service provider of water it allows for local associations to do so and also provide certain forms of assistance to these associations. It could thus be said that the Philippines on the paper fulfil the formal aspects of the Human right to water as accounted for in the immediate obligations included in general comment 15.

A bigger problem for the Philippines in the fulfilment of the right to water is the implementation and monitoring of these formal regulations. Service provision is in general ineffective and the whole sector is underfunded. Using Galligan's typologies of legal failure it is clear that the Philippines is experiencing legal failure in relation to its own national laws. Based on the field research the factors behind the legal failure could be summarised as: a low financial and technical capacity for the monitoring of water quality; lacking in depth knowledge about existing laws and regulations on the national level; politically motivated corruption within the barangay justice system; little knowledge about the negative effects of pesticides and specific perceptions and behaviour related to pesticide usage and water protection. Thus the field research has shown that there are a number of extra judicial factors that need to be in place for the human right to water to be implemented, a finding that goes hand in hand with the observations of the World Water Council. Even if the field research does not provide any basis for statistical conclusions it still provides some ground for five more general

¹⁸³ Interviews with civil servant 1 and 4

¹⁸⁴ Interviews with civil servant 1

¹⁸⁵ Interviews with landowner/farmer 2 and local civil society representative 3

conclusions. The first conclusion concerns the causes for legal failure in relation to the national legal framework relating to water protection and management accounted for above. The second is that actors at this specific local level have a rudimentary understanding of the human right to water focused on the obligation to provide drinking water free from harm. The third is that it was not the human right to water that provided the respondents with a feeling of obligation in relation to water protection, but rather a sense of obligation towards their fellow community members at the local level. The fourth conclusion is connected to the third and concerns the perceived usefulness of the human right to water. While the right was seen as useful, it was usually not as a tool for increased state accountability in relation to water management and provision. Rather, the human right to water was seen as a possible tool to increase everyone's understanding of the high value of clean water as a common resource. It could thus be said that the main usefulness of the human right to water was perceived to be its potential pedagogical capacity to reinforce other community members' sense of obligation towards both the community as a whole and the environment. Whether the human right to water was encompassed in the law or not could thus be said to be regarded as less important. A perception that at least partly explains itself when one considers the legal failures identified in the national regulative framework.

4. DISCUSSION

The field research presented here and Russel's research results situate themselves on two different levels, the international and the national. There are both similarities and differences between the conclusions of Russel's research and those drawn from the field research in the Philippines. In both cases the human right to water was not seen to provide any primarily legal obligations. For Russel's respondents this was partly due to superficial understandings of the right to water, but also due to fears of politicisation in relation to development partners. In the case of the Philippine's, lacking knowledge also provides an explanatory factor, while fear of politicisation did not. At the local level one could perhaps say that the lacking sense of legal obligation rather came about due to the general failure of the legal system. The obligation to protect the water from pollution and ensure its cleanliness was imbedded in deeper laying norms about a shared responsibility for the welfare of the community. What hindered this obligation from

being realised was lacking resources and capacity for water monitoring and protection, not legal text.

Russel departs from the trend of applying rights based language within the development sector as an attempt to increase accountability. It could be argued that this trend is closely linked to the assumptions that rights, and preferably legally binding rights, will provide states with a larger sense of obligation. For such an assumption to hold there has to be some form of enforcement. International development aid could and already does, as the soft force of development aid with attached human rights requirements shows, provide a tool for such enforcement. At the same time Russel's research show that development practitioners within international organisations are slightly weary of taking the human rights based approach too far. There are concerns that if the rights become too legal in their nature this will lead to political problems in relations to development partners. Problems that, one could guess they are concerned, might lead to even less implementation of the concerned right. They therefore prefer a more general application of rights based approaches, a preference that according to Russel might lead to an undermining of the of the human rights regime as a whole. Legal norms should therefore be separated from the non-legal normativity of development standards.

The assumptions behind the adoption of a rights based approach can arguably be described as rather positivistic in the sense that they see legal norms as separated from other kinds of norms. Binding obligations are also seen as created through top down types of enforcement mechanisms. Little confidence seems to be provided to the possibility of either states' or locally situated individuals' ability to see obligations beyond the scope of the law and its enforcement. Russel's criticism of a too superficial construction of rights based approaches also includes concern that a dilution of rights will lead to misconceptions of the progressive nature of certain rights. Her demand for a separation between human rights standards and development standards does, however, become equally positivistic and unsustainable. It is here argued that a human right as that to water, due to its very content, must be attached to development standards if it is to have any meaning. The problem for legal positivism in relation to a combination of these two standards might, however, be that the basic premises of legal positivism does

not allow it to also include extra legal factors such as the moral obligations that come attached to the implementation of development standards.

The field research from the Philippines shows that, at the local level, such moral obligations are perceived to exist beyond the letter of the law. The problem in the Philippines is neither a lacking sense of obligation nor a lack of legal text, but rather lacking resources in relation to the human right to water. Regardless of whether human right is seen as legally binding or not a core question in the context is from where the moral, financial and material resources needed for its realisation should come from. This question is not answered by the positivistic stance that separate legal and non legal norms and demands top-down enforcement mechanisms. In fact, if development aid is to be the means through which enforcement is generated and at the same time as resources are lacking for the fulfilment of a right, such as that to water, one will prevent the fulfilment of the right through the very enforcement of the same.

The Water World Council by its emphasis on both extra-legal and legal aspects as important for the fulfilment of the law takes a more pluralistic point of view. It is argued here that such a pluralistic view might create a dynamic that facilitates the generation and growth of needed resources. The field research from the Philippines highlighted the need for increased technical capacity to monitor water quality in order to both enable more strict law enforcement and boost existing moral obligations in relation to water protection. Such increases in capacity are most likely both costly and dependent on factors on the national and even the international level generally perceived as being outside the control of the local municipality and the people living there. The field research did, however, also reveal that local actors appreciated the human right to water as a tool for awareness raising at the local level. It further revealed that much could be done to improve the situation and harness existing moral obligations through rather simple things. Some examples of such actions mentioned were information about how to properly handle pesticides in order to avoid their negative effects and the building of washing stands for sprayers on land so that pesticide residues can be degraded in the ground. These things can be promoted and worked for both on the municipal and the barangay level through already existing structures and without much need for additional resources. The respondents themselves provided some interesting ideas

about suitable arrangements for these, or similar, solutions and the results of now existing research about the effects of pesticide usage on the water quality in the area should constitute important input for such activities. It is true that the environmental effects from water pollution in southern Leyte are not as big as in other parts of the Philippines. Considering the vision of the local municipalities to become a centre for Eco-tourism and risks of long term leaching from pesticide residues and the effects that they can have on humans as well as on aquatic life in both fresh water bodies and the sea there are, however, plenty of incentives to do what is possible to improve the situation at an as early stage as possible. The field research showed the importance to do this in manners which are attractive to farmers, something that also will be of importance if one wishes to harness their sense of moral obligation and enthusiasm in relation to water protection.

While such simple activities as those suggested by the respondents can be legislated for it is probably more efficient to harness the existing moral obligations that people already feel towards their communities and the environment, in a country already suffering from extensive legal failure. A harnessing of such moral obligations could also increase the rate at which already existing laws are implemented in a similar dynamic to that described in Chiba's tripartite model. There is nothing saying that such initiatives would not be able to spread to other municipalities and eventually also help to put pressure for increased human and environmental protection through better implementation and consolidation of existing laws at the national level, even if it might be a long term process.

Chiba's tripartite model and legal pluralism as a basis for the human right to water and rights based approaches could possibly help us to balance the moral, legal and developmental standards that the right necessarily entails in a better way than legal positivism. Legal pluralism allows for moral and legal norms to coexist and work in a dynamic fashion with each other. It also allows for imported law (in this case the internationally recognised human right to water) to work in a dynamic fashion with indigenous laws, rules and legal postulates. Finally, legal pluralism allows for the development of pressure to be put on "duty-bearers" and "right-holders" from both the top and the bottom at the same time as people's legal postulates are activated or

challenged to both formulate the law and safeguard that law which already exists. Finally, its dynamic approach also helps us to see the possibilities for an increased implementation of the human right to water that lies latent in what legal positivism otherwise would simply describe as legal failure.

5. CONCLUSION

This essay has showed that the Philippines has a formal regulative framework which to a large extent encompass the immediate obligations of state in relation to the right to water as they are stated in general comment 15. There are, however, problems with implementation and legal failure on the local level. The field research showed that respondents had a basic knowledge of the human right to water but little knowledge about existing national laws. Respondents also thought that the human right to water could be a useful tool for raising awareness and advocacy work aimed at an improved situation for both humans and the environment, but not necessarily aimed at increased state accountability. Instead several respondents saw the human right to water as containing obligations shared by everyone. Legal pluralism has been suggested as an alternative to legal positivism for the provision of a theoretical framework for the harnessing of those moral obligations in order to increase the implementation of the human right to water and decrease pesticide related problems.

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APPENDIX A

Translation of research questions to operational interview questions for interviews Southern Leyte, field research¹⁸⁶:

Background questions	Operational interview questions:
1. Introductory questions	a) What is your position? b) How long have you been working with this?
2. To what extent is the usage of pesticides in Southern Leyte seen as a problem?	a) How much pesticides are used on the rice fields in Southern Leyte? b) How would you describe the usage of pesticides on the rice fields in Southern Leyte? c) What are the positive and negative effects of the usage of pesticides? d) Do you think that the positive effects out rule any possible negative effects? - why/why not? f) Do you think pesticide usage needs to be regulated further than what currently is the case or is the current forms of regulation

¹⁸⁶Following from S. Kvale and S. Brinkmann "Den Kvalitative Forskningsintervjun" Studentlitteatur, 2009, pp.147-148

	<p>that are in place enough?</p> <p>g) If agricultural workers or members of the local population have health problems caused by the usage of pesticides what can they do to change their situation?</p> <p>- will they have problems with their employers if they do that?</p>
Research questions:	Operational interview questions:
1. How deep/detailed is the local knowledge about the right to water?	<p>a) What laws regulate the usage of pesticides in the Philippines?</p> <p>b) Which actors do you think should have the main responsibility to minimize the negative effects of pesticide usage?</p> <p>c) What do you know about the human right to water?</p>
2. To what extent does the right to water provide a sense of obligation?	<p>a) What is done to minimize the negative effects of pesticide usage, in general and/or by the authorities?</p> <p>b) Do you think more could be done to minimize the negative effects of pesticide usage, if so what?</p> <p>c) What motivates your work with the regulation of pesticide usage? As a public servant and personally?</p> <p>d) Do you think that the human right to water have any impact on how pesticide usage is or should be regulated?</p>
3. Is a human right to water perceived as awkward for political	<p>a) Do you see any problems with a human right to water?</p>

reasons?	
4. Is the human right to water regarded as a useful tool for the regulation of pesticide usage?	<p>a) How are current regulations on pesticide usage implemented?</p> <p>b) Do you think the Philippine legal framework and judicial system helps in the regulation of pesticide usage?</p> <p>c) How do you think regulation of pesticide usage should be implemented? Is the law enough?</p> <p>d) Do you think that the human right to water could be useful to ensure that the water is kept clean from pesticides, how in that case?</p>
5. Is the human right to water regarded as a useful tool for awareness raising about the need to regulation pesticide usage?	<p>a) Would you be able to somehow use the human right to water in your professional role to further the regulation of pesticide usage?</p> <p>- Why/why not? <i>Further questions for follow up regarding regulatory framework.</i></p>
6. Can the human right to water be of assistance in the environmental protection of local ecosystems?	<p>b) Do you think that the Human right to water could also be used to protect the environment better? How?</p>