

Book review

Farhana Sultana and Alex Loftus (eds), *The Right to Water: Politics, Governance and Social Struggles* (Earthscan, London and New York 2012) 288 pp.

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The Right to Water has assumed increasing importance as a rhetorical signifier for many social and political struggles, but also as a potential means for achieving more substantive governance outcomes when pursued through discrete legal and regulatory frameworks. The edited collection by Farhana Sultana and Alex Loftus makes a significant contribution to interdisciplinary scholarship in this field in presenting an assemblage of papers that canvasses the many dimensions of the right to water. A key aspect of the collection is that it provides a grounded, yet theoretically informed account of how, 'universal calls for rights articulate with local historical geographical contexts, governance, politics and social struggles, thereby highlighting the challenges and possibilities that exist'.¹ The book is very diverse in its contributors, geographical case studies and approaches. It has been skilfully organized under the guiding hand of the editors into a coherent discussion; even if many individual authors take disparate views on the subject of the right to water and at times there is some overlap in the consideration of themes.

Accordingly, the origins of the collection in a conference designed to, 'create space for dialogue and debate among scholars, activists and practitioners'² remain evident in that this 'conversation' is well expressed in the final book form. Generally speaking, the conversation in the first half of the book contains critiques and theoretical exploration of the rights discourse, while the discussion in the second half is anchored by specific voices and locales that exemplify questions concerning the utility of, and problems in, implementation of water rights. The book contains contributions by leading scholars in the field, (for example, Barlow, Bakker) and also emerging scholarship that deconstructs issues around the right to water from geographical, political economy, legal, activist and cultural perspectives. The coverage of the collection spans: the emancipatory possibilities of water as a human right; the legal architectures at an international and national level that may either facilitate or inhibit the achievement of rights to water; the impacts of neoliberal conceptions of the right to water; the potential for subversion of dominant paradigms such as privatization that structure and produce the spectrum of rights to water. The second half of the book provides a series of case studies that align rights to water with political and cultural struggles in countries and regions as diverse as New Zealand, Mexico, India, the US, Latin

1. Farhana Sultana and Alex Loftus (eds), *The Right to Water: Politics, Governance and Social Struggles* (Earthscan, London and New York 2012) Preface.

2. *Ibid.*, at xii.

America, South Africa, the West Bank and the European Union. Too often the Right to Water is seen as unproblematic in principle – in sum, this book gives the lie to that, confirming that the impulse to create a universal human right is necessary but simultaneously demonstrating why critical examination of it is required.

In this context, the edited collection traverses many areas of long standing scholarship on water governance in the social sciences, and it provides a window to emerging areas of research from a legal perspective. To date much of the scholarship on water from a legal perspective has focussed principally on jurisdiction specific descriptions of relevant laws supplemented by some comparative analyses.³ The recent strong interest in examining transnational water laws, for example, captured by the idea of governing trans-boundary harm or resolving inter-jurisdictional conflicts over water, offer some indication of more ambitious emerging approaches.⁴ Legal scholarship though has most clearly engaged with the question of the human right to water,⁵ but perhaps less holistically than in this collection.

1 THE CONTEXT FOR A HUMAN RIGHT TO WATER

The introductory sections are glossed over in many publication reviews, but in this edited collection, they perform a vital function, giving insights into the rationales that informed the orientation of the book. These sections detail an impressive list of contributors – marking the collection as one of the most comprehensive treatments of water justice in recent years. The Foreword by Maude Barlow serves as an important reminder of the landmark resolution by the United Nations in 2010 in recognizing the human right to safe and clean drinking water and sanitation as, 'essential for the full enjoyment of the right to life'.⁶ This conceptualization, building on the universal rights platform painstakingly constructed through the United Nations process over many years, marks a considerable achievement. It aligns the right to water with the formal processes of law and governance that nations must adhere to within the overarching United Nations framework. In step, many contributions in the book recognize the significance of defining water as fundamental to life especially in contested political arenas (for example, Giglioli). Indeed, Bywater, informed by Indian legal approaches to the issue,⁷ strongly asserts the resilience and effectiveness of the human right to water as a bulwark against privatization. Careful expositions of the legal and governance structures giving effect to rights for water are given in the chapter on the EU by van Rijswick and Keesen, while the chapter by Clark on South Africa interestingly aligns water and community participation rights.

3. See for example, Douglas Fisher, *The Law and Governance of Water Resources: The Challenge of Sustainability*, New Horizons in Environmental and Energy Law (Edward Elgar & IWA Publishing, Cheltenham and London 2009).

4. Phillipe Sands and Jacqueline Peel, 'Freshwater Resources', *Principles of International Environmental Law* (Cambridge University Press, Cambridge 2012, 3rd edn) 303–41.

5. Paula Gerberand and B Chen, 'Recognition of the Human Right to Water: Has the Tide Turned?' (2011) 36(1) *Alternative Law Journal* 21.

6. Maude Barlow, 'Foreword' in Sultana and Loftus (n 1) xv.

7. Krista Bywater, 'Anti Privatisation Struggles and the Right to Water in India' in Sultana and Loftus (n 1) at 206.

Indeed, the initial chapter by Sultana and Loftus begins with the proposition that 'water is life giving and non-substitutable'.⁸ Their analysis initially traces the architecture of the rights framework that culminated in the UN 'right to water' but they also explore how the apparent strength and stability of the rights infrastructure – 'do[es] not necessarily preclude marketization, privatization or dispossession. This ... underscores the need to rearticulate with political questions around democracy, justice and equity'.⁹ This position is a touchstone for many chapters, which recognize the utility (or perhaps the inevitability of the framing of water within the rights paradigm) but find such framing to be a necessary but not sufficient condition for exploring the more dynamic and holistic expressions of humanity that can be realized through water. In this way, the book is animated by some of the central tensions that are apparent in the literature on water research; and indeed in scholarship on human rights more widely.

The debates around universalism and cultural relativity that resonate across many examinations of rights frameworks,¹⁰ find pertinent expression in the chapter by Ruru, which explores the right to water as a right to identity for the Indigenous peoples of Aotearoa, New Zealand.¹¹ She begins with an illustration of how language, law and water are intertwined in Maori culture – and how water precedes human life – an interesting perspective inverting typical western rights conceptions that frame the individual as the holder of rights over 'things'. This point about the normative implications of prioritizing individual atomized 'control' over water is neatly made by Schmidt in his critique of constructions of water security and global governance.¹² Ruru though, is acutely aware of how Indigenous struggles for identity must confront non-Indigenous governance models prescribed through settler law in order for Indigenous peoples to govern, manage, and even own freshwater resources.¹³

Later chapters also highlight how the recognition of a legal right to water can serve as a touchstone for defining and promoting communal and customary 'rights to water' and as a rallying point for community. Drawing examples from Bolivia, Bustamante et al. discuss how the principle that water is a fundamental right for life has been adopted in the Plurinational Constitution of the State. They conclude that, '[t]he human right to water has been a useful discourse for some groups',¹⁴ but they question whether the laws giving effect to the fundamental right have served the interests of the poorest in the community.¹⁵ Perera, engaging with activist campaigns around water wars, endorses a rights view noting, 'I join the voices that

8. Farhana Sultana and Alex Loftus, 'The Right to Water Prospects and Possibilities' in Sultana and Loftus (n 1) at 1.

9. *Ibid.*, at 3.

10. See for example, Robert Churchill, *Human Rights and Global Diversity* (Pearson Prentice Hall, Upper Saddle River, NJ 2006).

11. Jacinta Ruru, 'The Right to Water as the Right to Identity: Legal Struggles of Indigenous Peoples of Aotearoa New Zealand' in Sultana and Loftus (n 1) at 110.

12. Jeremy Schmidt, 'Scarce or Insecure? The Right to Water and the Ethics of Global Water Governance' in Sultana and Loftus (n 1) at 105.

13. The literature on rights to water for Indigenous peoples is extensive and growing, see for example, Sue Jackson and Marcia Langton, 'Trends in the Recognition of Indigenous Water Needs in Australian Water Reform: the Limitations of "Cultural" Entitlements in Achieving Water Equity' 22 (2–3) (2012) *Journal of Water Law* 109.

14. R Bustamante, C Crespo and A Walnycki, 'Seeing the Concept of Water as a Human Right in Bolivia' in Sultana and Loftus (n 1) at 233.

15. *Ibid.*, at 233–4.

even while qualifying it, still understand the human rights to water as a fertile discourse and mobilising tool.¹⁶

2 COMMONS VERSUS COMMODITIES

Questions of distributive justice, concerning how the most disadvantaged in communities fare under water rights frameworks, is another strong theme resonating across the book. Many such contributions take as a starting point the chapter by Karen Bakker. This is a re-publication of an article on water and market environmentalism that first appeared over a decade ago.¹⁷ Her seminal analysis took general ideas around the neo-liberalization of nature, such as the adoption of economic models for valuing resources and the imposition of property rights, and carefully unpacked the varying governance and regulatory models that were taking effect in respect of water.

The work challenged conventional binaries around human rights versus communal resource models by revealing that rights frameworks could be aligned with privatization which operates to prevent access by communities. The corollary was that 'rights' were not necessarily an antidote to the demise of the 'commons'.¹⁸ In the postscript that appears in this book, Bakker does not retract her basic position, maintaining that a human right to water leaves many questions unanswered. Yet she comments that, '[t]he human right to water is a crucially useful tactic for those without to legitimize their struggles not only for water, but also for human dignity'.¹⁹ Another contribution which recognizes the limitations of rights models is that by Staddon, Appleby and Grant which traces the proliferation of rights based frameworks in a surprisingly wide range of contexts, countries and social milieu. Ultimately, they conclude, 'What is critical is to challenge the conflation of human rights with property rights, that is to say the fundamental Lockean solution to the problem'.²⁰ In this manner, the chapter engages with key debates about the extent to which property rights can ensure 'enough for all' as the fundamental premise upon which Locke proposed property as the basis of the social contract.

3 RIGHTS VERSUS SOCIAL EQUITY

In a similar vein, although perhaps more critical of rights framings, Linton argues that, '[t]he rhetorical political and potentially legal power of the human right to water might be retained while formulating the right in a different way.' That different way is proposed as a social/relational model and Linton mounts a careful argument for how a right to water might be conceived as normative, rule governance. This analysis is an

16. Veronica Perera, 'From Cochabamba to Columbia' in Sultana and Loftus (n 1) at 243.

17. The article was influential in drawing attention to the trends towards water privatization and commodification in many parts of the globe.

18. This position contrasts with other very well known views that rights ARE the answer to the tragedy of the commons, see Garrett Hardin, *Living Within Limits: Ecology, Economics, and Population Taboos* (Oxford University Press, New York 1993).

19. Karen Bakker, 'Commons versus Commodities: Debating the Human Right to Water' in Sultana and Loftus (n 1) at 19, 38.

20. Chad Staddon, Thomas Appleby and Evadne Grant, 'A Right to Water? Geographico-Legal Perspectives' in Sultana and Loftus (n 1) at 61, 78.

interesting adoption in a water context of attempts to reframe real property rights as relational and as thereby governing the social or life world.²¹ This analysis is informed by Heidegger's philosophy, Marxist theories, and by more recent expositions that extend the life world to a species-world or ecosystem. The analysis seeks to recapture a sense of water beyond its physical properties and quantification in rights terms.

Other contributors do not necessarily agree that a water rights framework can be benign. Instead, they offer particular critiques of rights framings of water/human/environmental relationships and stress the need for activism that engages with alternative perspectives. Mitchell takes up that challenge in developing an argument based in political economy that, '[t]he struggle over the right to water takes place in a terrain of civil society where transnational corporate private property increasingly precludes all other forms of rights'.²² Thus the activist struggle over water is more than one of access to the physical resource. Similarly, Schmidt notes that, '[t]he right to water must take up a position that counters the prevailing norms that have led to the problems it seeks to address.'²³ One of the most intriguing analyses in this regard is the examination of illegality and of informal use in the water context as an example of differing normative constructions. Meehan uses Foucauldian theories around the change in the nature of criminality as it is linked to the development of capitalist economies and industrialization. She argues that informal and illegal uses of commons (such as water) were treated leniently until the rise of capitalism, which then created bifurcated models of privileges (liberal rights) and criminality; including property theft.²⁴ Meehan uses this theoretical position to investigate empirically the illegal and informal uses of rainwater in Mexico and in the US. In sum, the critiques in the first half of the book represent a useful platform for 'countering norms' around water governance; although just exactly how to develop alternatives to the prevailing rights model is not always as clearly explicated as the critique of existing models.

Overall, the book represents a thoughtful and timely body of scholarship fulfilling an important function in qualifying the belief that a right to water will necessarily deliver water justice. Indeed, Sultana and Loftus contend that many agree (including most contributors to the book) that a right to water is in principle useful but that 'the key challenge is to be able to fill the empty signifier with real political content. Such content must build on the historically and geographically specific practice of those seeking fair access to water...'.²⁵ The book succeeds in these aims. Accordingly, it will provide a useful collection to inform legal analyses of water that may take water rights as an unproblematic assumption. On the other hand, the examination of water rights and their implementation in many jurisdictions offers an understanding of water law that at times can be absent from social science approaches. More generally, the book will assist in bringing a contextual understanding to an area of legal scholarship that has often been seen as apolitical despite the growing acknowledgement of the

21. See for example, CA Arnold, 'The Reconstruction of Property: Property as a Web of Interests' (2002) 26 *Harvard Environmental Law Review* 281.

22. Kyle Mitchell, 'The Political Economy of the Right to Water: Reinvigorating the Question of Property' in Sultana and Loftus (n 1) at 78, 89.

23. Schmidt (n 12) at 105.

24. Katherine Meehan, 'Water Rights and Wrongs: Illegality and Informal Use in Mexico and the U.S.' in Sultana and Loftus (n 1) at 161.

25. Sultana and Loftus (n 1) at 9.

social dimensions of water; whether in terms of water security under climate change, fundamental 'rights' to drinking water and to sanitation or local community challenges for participation in decision-making about water in developed economies. The human right to water may be a contested term, but its significance for constituting politics, governance and social struggles is well demonstrated by this book.

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