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Recent Waves of Water Governance: Constitutional Reform and Resistance to Neoliberalization in Latin America (1990-2012)

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Abstract

This article critically investigates recent water governance shifts, particularly constitutional changes implemented in several Latin American countries that highlight a 'right to water' as well as recent efforts that invoke such a right in conjunction with bans on private water provision (e.g. Uruguay, Ecuador, and Bolivia). Drawing on legal research, document review, and interviews, the article investigates the historical, political and discursive scaffolding of these constitutional changes in several case study contexts, including attention to implementation issues and ongoing challenges following the reforms. Placing these shifts within the broader context of neoliberalization of water governance of the past several decades, the analysis attends to both the specific historical-contextual formations that are important to understand the constitutional reforms, as well as the ways these changes might be usefully understood as connected to broader political and discursive shifts and movements. Highlighting similarities and differences across the cases allows us to make conceptual contributions to debates on variegation of neoliberalized natures, as well as to discussions of alternatives to neoliberalism and postneoliberalism. We argue that although many of these reforms are partial, and not wholly resistant to neoliberalism, they are nonetheless significant for politics and debates related to 'alternatives.' Apart from resisting particular aspects of earlier neoliberal reforms, they are also important to stake new discursive and policy terrain on alternative priorities and uses of water. Further, the reforms also offer points of resistance to the influence of international financial institutions, transnational corporations.

Keywords: water privatization; constitutional reforms; Latin America; human right to water

1. Introduction

Over the past several decades, the neoliberalization of water governance has continued apace. This includes varied policies and reforms, from devolution and participatory approaches, to increasing privatization, marketization, and commodification (see Bakker, 2005, 2007; Harris, 2013; Goldman, 2007). Some of the overarching issues concerning neoliberal environmental governance have been well covered elsewhere (Bakker, 2010a; Budds, 2004; Heynen et al., 2007; Mansfield, 2007), including the need to move beyond constructs of neoliberalism as an ideal type and to attend more fully to

processes of neoliberalization as well as variegation across contexts (Castree, 2008a, 2008b; Bakker, 2010a; Harris, 2013; Brenner et al., 2010). Our aim in this article is to document and analyze recent water governance trends observed in several Latin American countries, highlighting the cases of Uruguay, Ecuador, and Bolivia (with some reference to the case of Colombia). Specifically, we are interested in recent constitutional changes and consider them in light of earlier eras of increasingly neoliberalized water governance (in the 1980s and 1990s, Bakker, 2010a; Harris, 2013; Goldman, 2007). We suggest that these new socio-legal frameworks directly target elements of 'neoliberal'

water governance, with language that institutes bans on privatization, that substantiates water for nature as well as water as a human right, as well as adopting priority allocation schemes that deemphasize water uses for productive purposes. We consider the character and evolution of these shifts in each of these case country contexts, and analyze the potential lessons from these examples in relation to broader debates concerning neoliberalism, neoliberal natures, and (post)neoliberalism.

To begin, we provide a very brief discussion of neoliberalism and neoliberal natures, and move fairly quickly to consider (post)neoliberalism and ‘alternatives to neoliberalism’ debates. In section 3, based on the literature as well as interviews with academics and analysts in Bolivia, Colombia and Ecuador, we document the recent constitutional and water governance shifts in these sites, tracing key connections and differences between them. Finally, we analyze these shifts in light of the broader debates outlined. Specifically, we argue that while not full shifts away from ‘neoliberalism’ and certainly with some key implementation challenges, nonetheless, these constitutional shifts appear to be a key mechanism to stake out discourses and practices that represent alternatives to strong neoliberal and market logics of earlier policies (emphasizing instead rights to water, public roles for water provision, and so forth). Importantly, these socio-legal shifts also offer a basis to potentially resist the influence of the International Financial Institutions (IFIs) and transnational corporations (TNCs) in water governance affairs of these countries. As such, while others have critiqued these changes for being largely ineffective, for being only changes ‘on paper’, or for reinscribing powerful state institutions and instituting new citizen governmentalities, we consider that these changes

are nonetheless significant. This is particularly so if we read these changes against the relative power of international institutions who have been so influential in establishing water governance norms and hegemonies of the prior decades (for Latin America, and elsewhere, Sneddon, 2013; Goldman, 2007; as discussed further below). Thus, while certainly not wholly resistant or alternative to ‘neoliberalism’, the reforms of the past decade might nonetheless offer important pathways to challenge dominant water governance institutions, practices and ideologies—making careful analysis of these changes important for theories of ‘post-neoliberalism’ and for water governance more generally.

2. Starting points: Neoliberalism, Neoliberal Natures, and Post-neoliberalism

Neoliberalism has been variously defined and remains notoriously difficult to pin-down (Ferguson, 2009; Peck et al., 2009). In a basic sense, neoliberalism refers to a “politically guided intensification of market rule and commodification” (Brenner et al., 2010, p. 184). Recent work has also emphasized the concept of *variegation*, referring to the ways that neoliberalism as a set of policy prescriptions and idealized political or economic relations necessarily articulates with diverse geo-institutional landscapes (i.e. dependent on history, or specific institutional forms). The concept of variegation invites us to attend to the fact that ‘neoliberalism’ is not the same everywhere—‘actually existing neoliberalisms’ are historically and geographically specific. Attention to this varied actually existing forms is crucial for any approach to neoliberalism, as well as essential for any discussion of ‘alternatives’ (Brenner et al., 2010; Bakker, 2010b).

Specific to the environmental realm, the

considerable body of work on ‘neoliberal natures’ offers evaluation of the diverse and uneven social and ecological consequences of ‘neoliberalization,’ whether the increased use of market instruments to regulate environmental services, or the commodification and privatization of water, mining or wetlands (e.g. Bauer, 2004a; Bakker, 2010a, 2010b; Harris, 2009b; Budds, 2004; Bury, 2005; Castree, 2008a, 2008b). Neoliberal water governance has been defined to include practices of marketization, commodification, privatization, as well as devolution and participatory governance—all of which became increasingly dominant in water governance circles in the previous several decades (Sneddon, 2013; Harris et al., 2013; Boelens et al., in process). The International Financial Institutions (i.e. The World Bank - IBRD, and International Monetary Fund- IMF) played a particularly strong role in fomenting these shifts, with diverse modes to promote the uptake of these policies in diverse contexts (*ibid*; Goldman, 2007; Bakker, 2010a, 2013). As summarized by Bauer (2010, p. 45), throughout the 1990s, “The World Bank was pushing a crude ideological version of neoliberal water reform in countries throughout Latin America, Asia, and Africa, despite the fact that plenty of people in within the Bank disagreed with that version. ...by the end of the 1990s, water privatization, pricing and market approaches were the headline acts at huge international water conferences... ” As the set of authors cited above aptly document, the ongoing neoliberalization of water governance proceeded through the specific types of development projects funded by these entities, through loan conditionalities, as well as through ideological shifts and training materials offered by these entities (see Goldman, 2007; Bakker, 2013; Smith, 2008). A recent contribution by Sneddon (2013) has further argued that specific

practices of privatization or participation, as well as the linked institutions, ideas, and concepts that support these shifts (i.e. notions of efficiency, or ideas of water crisis or failed state provision) can all be usefully understood as ‘hegemonic’ in contemporary water governance, particularly as this analytic emphasizes the degree to which these ideas and practices have become generally accepted, and thus normative, in a range of policy and governance contexts (see also Goldman, 2007). Latin America is no exception. In fact, Sader (2008, 2009, 2011) offers specifics of the Latin American context to explain why the region was at the forefront of neoliberal experimentation as well as one of the sites where neoliberalism took some of its most radical forms (given histories of authoritarian rule or the considerable influence of the IFIs in the region). It was these aspects of the political economic and institutional context that gave rise to the particular neoliberalized water governance forms that emerged in Chile, often considered the flag bearer in this regard. Characterization of the reforms as ‘successes’ came to be particularly influential in proffering this model throughout the region and globally (as discussed at length in diverse works by Bauer, e.g. 2004a, 2004b, 2005, 2010).

Just as the last several decades were characterized by the rapid uptake of neoliberal water governance, it is also clear that we have witnessed strong and sustained political. Indeed, there has been considerable challenge to the idea that water provision should be handled by private companies, or that full cost recovery is appropriate, especially for low-income populations. Witness the ‘water wars’ of 2000 in Cochabamba, Bolivia, to oppose the hand-over of water sources to a subsidiary of a TNC, the protests against the World Bank requirement to privatize water in Ghana’s capital city of Accra

in the early 1990s (Amenga-Etego and Grusky, 2005), or the expulsion of British water purveyors from Tanzania in 2005 (Bakker, 2010a). More conceptually, it has been suggested that these examples might be suggestive of the ways that ‘nature’ represents an important ‘limit’ in terms of where market ideals confront direct challenge and opposition given the importance of resources such as water for livelihoods, well being, or cultural practices (Harris, 2009a; Bakker, 2010b). Other examples that have been evaluated as ‘resistant’ to neoliberal water governance include the global water justice movement, including efforts to institutionalize the human right to water (culminating with the passage of the Human Right to Water and Sanitation in the United Nations General Assembly in 2010, see Sultana and Loftus, 2012; Miroso and Harris, 2012). Other critiques of neoliberalized water governance have highlighted the ways that marketized or commodified water provision may exacerbate impoverishment and socio-political inequalities (Goldin and Kibassa, 2009; McDonald, 2002), or similarly ways that participatory or devolved governance may augment the burden for marginalized communities (e.g. women or low income communities, Harris, 2009b; O’Reilly, 2010).

While the empirical evidence with respect to the performance of neoliberal policy instruments in the water realm remains mixed (with evidence both of efficiencies and improvements as well as aggravated inequalities and worsened water quality, for instance, e.g. see Bauer, 2004b, 2010; Harris, 2013; Fisher, 2009), commentators, policy makers and activists have increasingly called for a discussion and exploration of ‘alternatives.’ Particularly given the sense that neoliberalized water governance has become hegemonic to the degree that there is a sense that ‘there are no alternatives’ (Sned-

don, 2013)—the need to imagine, articulate, and analyze ‘alternatives’ and counter-movements has been hailed as particularly crucial (Ferguson, 2009; Bakker, 2010b). The need to move beyond dominant frameworks is also suggested by the considerable narrowness of the policy debate of the past several decades. As Bakker (2010a) and others have suggested, the over-focus on public versus private provision has yielded inadequate consideration of other important water governance concerns such as institutional capacity, the form and function of participatory frameworks, or what more ecologically-focused water governance might entail.

This context has yielded increasing interest in the meanings and possibilities of ‘postneoliberalism’ – with much of this theoretical and empirical discussion focused on Latin America (Marston and de Freitas, 2012; Sader, 2009; Escobar, 2010). Analysts are engaging this term not as a descriptor of an era, nor as a wholesale departure from neoliberalism, but rather as a conceptual tool that might allow us to evaluate the stabilities of neoliberal configurations, or the pathways through which specific ‘alternative’ concepts or practices might emerge (Brand and Sekler, 2009). Just as Latin America has been a particularly intense site for neoliberal experimentation (Sader, 2008, 2009, 2011), it has also emerged as a focal region with respect to political and intellectual ‘resistance’ and the articulation of alternatives (given recent resistance to U.S. influence, as well as varied social and ecological crises that have emerged in the wake of neoliberal policies of past decades, see also forthcoming special issue of *Geoforum* on ‘not-quite-neoliberal natures in Latin America’).

The discussion below further explores these issues, highlighting potential for resistance to neoliberalization, yet also cognizant of the need for caution about the overly

facile celebration of ‘alternatives’ (particularly from a perspective that privileges the need to foreground more just socio-ecological relations, see Gudynas, 2009a, 2009b, 2010, 2011; Roa-Garcia et al., in process). Such caution is critical given the continuing legacies and continuities of extractive industries that remain central in many of these contexts (Acosta, 2012; Gudynas, 2009b; Kaup, 2008), as well as given the retrenchment of state forms or of particular ‘governmentalities’ in these contexts (see Boelens et al., in process for details on the case of Ecuador). Responding to the range of issues related to recent water governance reforms in Latin America, we suggest: first, that these recent constitutional and legislative shifts, while not wholly new in terms of political economies or human-environment relations, do show evidence of resisting to specific features of earlier neoliberal water governance reforms. As we detail, the specific contexts of these reforms are particularly important to appreciate the ways that these socio-legal changes directly target elements of water’s neoliberalization. Second, in line with the above, these reforms, while not always transformative in practice, do offer the potential to stake novel discursive terrain that is potentially important given broader issues related to the exploration of alternatives or ‘counter-hegemonies.’ Third, and importantly, features of the reforms potentially offer points of resistance to continued or enhanced IFI or TNC involvement. This point is critical given the history of such influence in the region, including ways that these countries have frequently been subjected to Structural Adjustment Policies (SAPs) and other modes of developmental intervention (Sader, 2011). All told, while some are rightly skeptical regarding the outcomes of these reforms, we find that reading these constitutional shifts in light of the specific geo-institutional con-

texts of these countries, as well as in relation to broader regional and global shifts, power relations, and developmental-institutional dynamics is crucial to understand their importance, including their potential imprint and legacy for water governance futures.

3. Constitutional politics and Water governance in Latin America: patterns and shifts

3.1 Neoliberalization of Water Governance throughout Latin America

It has frequently been noted that Chile was one of the first adopters of neoliberal reforms in the water realm, with the 1981 water law that constituted a near wholesale embrace of privatization and commodification. Among the issues that have been analyzed with respect to these reforms, Carl Bauer has highlighted the ways that the changes were characterized in academic and policy circles. Summarily stated, the successes of the reforms were frequently exaggerated, and relatively little emphasis was placed on the impacts of the new code for social equity, river management, environmental protection, or water conflicts (2004b, see also 2004a, 2005; Budds 2004, 2009). Such uncritical characterizations contributed to a more widespread embrace of pro-market reforms throughout Latin America (and elsewhere), often proceeding hand in hand with Structural Adjustment Policies and other reforms as required by IFIs (The World Bank, International Monetary Fund, and Inter-American Development Bank). With widespread political and economic instabilities throughout the region, the overall trajectory of much of the 1990s was the adoption of neoliberal water reforms in other contexts (including in Bolivia and Mexico, though not to the degree of Chile), as well as increasing openings for involvement of

transnational water corporations (Goldman, 2007).

As already previewed, this era of neoliberal entrenchment and diffusion often proceeded with widespread political resistance. Several notable examples included the Bolivian ‘Water War’ in Cochabamba (Bustamante, 2004) and protests in Tucuman, Argentina (Bennett et al., 2005). This resistance has often been characterized as ‘successful’, given cancelled contracts in Bolivia (of Bechtel subsidiary Aguas del Tunari in Cochabamba or Suez linked Aguas del Illimani in La Paz) and in Argentina (of Agua Del Aconquija, subsidiary of Compagnie Generale des Eaux). Not only did these companies withdraw, but the associated financial and public relations losses served to quell the appetite to further extend their markets throughout the global South (Bakker, 2010a).

3.2 Towards post-neoliberalism?

Rather than more of the same, new types of responses have characterized the most recent decade (since the early 2000s). Popular resistance has given way to broader legislative and political changes, including important shifts in the electoral realm. Several countries have voted in radical new left and socialist leaders (referred to as Latin America’s “Left Turn”, see Cameron and Hershberg, 2010; with specific efforts such as the ‘Citizen Revolution’ in Ecuador). Relevant for our analysis, new constitutional language has emerged in several of these countries (Uruguay, Bolivia, Ecuador) highlighting water as a human right as well as specifically outlawing privatization (Table 1). While these types of changes are not specific to Latin America—it has been estimated that there are over 90 countries with some legal language related to the human right to water (Conca, 2008)—the region nonetheless stands out

for the rapid uptake and extension of these types of reforms (suggesting either ‘neighborhood’ effects, or something powerful about the symbolic, material, or political content of these reforms).

Below, we offer more details on the specific cases of Uruguay, Ecuador, and Bolivia. We are particularly interested in offering a sense of the context in which these changes are unfolding (in line with the notion of geoinstitutional *variegation* per Brenner et al., 2010, also discussed in Bakker, 2010b), as well as situating these shifts in relation to broader political economic shifts and debates (including in relation to the pronounced legacies and inequalities that have been important given IFI influence and SAPs of the 1980s and 1990s).

3.3 “Post Neoliberal’ Water Governance Changes in Context

The shifts we are characterizing as the ‘post-neoliberal phase’ in Latin American water governance began in Uruguay in 2004, largely inspired by civil society movements from across the region. Other innovative constitutional changes were achieved in Ecuador in 2008 and in Bolivia in 2009. These constitutional changes included water as a human right and made provisions that water and sanitation services must remain an exclusive and direct responsibility of the state—explicitly outlawing privatization (Table 1). Other countries saw political movements that aimed to include similar provisions, but were less successful, such as the failed referendum in Colombia.

3.3.1 Uruguay

The Uruguayan referendum to reform the constitution was clearly motivated by strong opposition to past and potential interven-

tions of the IFIs, particularly loan conditionalities and similar efforts that were geared towards facilitating the direct involvement of the private sector in water and sanitation (Dugard and Drage, 2012). The referendum was promoted by the National Commission for the Defense of Water and Life (CNDAV), which included FFOSE - the trade union representing workers in the publicly owned water and sewerage company Obras Sanitarias del Estado (OSE), in addition to several other civil society organizations. The campaign for the referendum was motivated in part following a letter of intent that was signed between the International Monetary Fund and the government of Uruguay. The letter staked out an understanding related to increasing financial support as part of an adjustment program that was already in place. Also included in the letter were specific conditions related to the introduction of a regulatory framework for the water sector by September 2002; as well as the introduction of new standards and controls to facilitate private sector investment (IMF, 2002). With dissemination of the letter in the press, a strong and widespread reaction followed. The IMF representative for Uruguay then published a follow-up response in a national newspaper to dispel the claims being made by CNDAV (La República, 2002). This visible attempt to stem off the resistance was interpreted by many as indicative that the IMF was serious about privatization and would not back down. Highlighting the letter, the response, as well as the situation of raised tariffs and unsatisfactory service in Maldonado (a region where the water service had been previously privatized to a company subsidiary of Suez Lyonnaise des Eaux) CNDAV redoubled its effort, with intensified public debate until the referendum was passed in 2004 (CNDAV, 2011). The referendum included several notable additions to

the constitution: that access to potable water and sewage are fundamental human rights; public utilities for water and sanitation will be operated exclusively and directly by state organizations; and water users and civil society organizations will actively participate in all instances of planning, management and control of water resources (Table 1). The referendum and related changes required that the Uruguayan state purchase the shares held by the two private corporations for water distribution systems in the province of Maldonado. Five years later, in 2009, a National Water Policy was adopted, with key features cementing elements of the earlier referendum, including the prioritization of social benefits over economic ones for the provision of potable water and sanitation; the transversalization of the water policy principles to other public policies; the prioritization of potable water provision to the population above any other uses (whose prioritization would be established according to the conditions of regions, watersheds and aquifers); and the responsibility of the state in creating capacity for social participation in planning, management and control of water resources. In line with our discussion below on some of the contradictory tendencies of these types of reforms, it is also notable that the language of the new constitution also called for the use of water tariffs for the purpose of encouraging environmentally sustainable and efficient water uses.

3.3.2 Ecuador

In Ecuador the constitutional reform similarly was preceded by intense opposition to water privatization. In this case, opposition grew following the initial authorization to privatize Quito's water supply in 2002,ⁱ and continued until the privatization scheme was ultimately eliminated in 2007 (Buitrón,

2008). The national constitutional assembly pushed forward a reform, focused on returning the state to a more central role in the control and management of natural resources, in the provision of public services, and for the investment in strategic development sectors such as water distribution, hydropower and irrigation (Hoogesteger, 2010). The reform, once implemented, has been interpreted as a movement away from the strong neoliberal bases of the 1998 constitution (FRH, 2008), although commentators have also pointed to the ways that these reforms also solidify elements of state and elite power, introducing novel forms of governmentality, particularly for indigenous or peasant water users (Boelens et al., in process). Other notable features of the new constitution include the definition of water and food as basic human rights as well as specific language making the state responsible for guaranteeing access to water by all citizens (the language is largely consistent with the sentiment expressed by the 2010 UN statement on water and sanitation as a human right). Further, providing specificity beyond the Uruguayan example, the new constitution establishes an explicit priority order for water allocation: 1) water for domestic use 2) irrigation for food sovereignty 3) ecological flows and, lastly 4) productive activities. As may be apparent, this language is quite provocative in a neoliberal or capitalist context in that 'productive activities' are last. This can perhaps be understood as responding to implicit and explicit neoliberal policies of previous decades, as well the pro-capitalist fervor that had characterized much Latin American developmentalism from the 1960s onwards (cf. Wainwright, 2008). Seemingly responding directly to critics who suggest that state-or rights-centric language can undermine the ability of communitarian responses and collective governance in the

water realm (Bakker, 2007), it is also of note that Ecuador's new constitution further states that the administration and management of water can be undertaken by state or community organizations (Table 1), although the state is ultimately responsible for ensuring that service is provided following a list of guiding principles (responsibility, generality, uniformity, efficiency, universality, accessibility, regularity, continuity and quality). The new constitutional language further establishes a link between water and food security/sovereignty, and also maintains that tariffs must be guided by equity principles. Along with outlawing all forms of privatization (full or partial), it is also clearly stated that a single water authority will plan, regulate and control water resources in collaboration with the authority responsible for natural resources to ensure a broad ecosystem approach. With this focus on a sole centralized authority, the constitutional changes also appear to take a firm position on another key environmental governance debates of the past decade—centralization versus devolution. Again, this entails a direct response to elements of neoliberalization that frequently entail devolution of authority and responsibility to local communities (again, see Boelens et al., in process for specifics in terms of the water governance changes that resulted in this context). Even with some critical evaluations, the constitutional changes have often been interpreted as an important victory for social and environmental movements, although carrying this language through the adoption of a new water law remains a significant challenge (Buitrón, 2009).

3.3.3 Bolivia

The changes to the Bolivian constitution came soon after the pressure from social movements forced president Evo Morales to

withdraw Bolivia from the International Court for Settlement of Investment Disputes (ICSID), the World Bank trade court in 2008 (Spronk and Crespo, 2008). This move was motivated by the claim made by Bechtelⁱⁱ through ICSID for 50 million dollars (US) as compensation for damages and for the loss of future revenues associated with the cancelled contract following the Cochabamba water war (see Assies, 2003; Crespo, 2003 for further details on the conflict and its aftermath). The agreement between Aguas del Tunari (subsidiary of Bechtel) and Bolivia was not entitled to make use of ICSID, but in the wake of conflict, Bechtel changed Aguas del Tunari's residence to the Netherlands in order to be covered by the 1992 Bolivian – Dutch bilateral investment agreement, which had designated ICSID as the mechanism for dispute resolution. This generated an atmosphere of indignation among many Bolivians and ultimately precipitated Bolivia's withdrawal from ICSID in a moment of intense political upheaval.

The new Bolivian constitution approved via referendum in January 2009 gathers from proposals of diverse social movements, including those that struggled against the privatization of water in Cochabamba and elsewhere (Fundación Solón, 2010). The constitutional referendum declares water access a fundamental right and names the state as responsible for guaranteeing and protecting water, giving priority to 'life' (Art. 373). Further, the language clarifies that access to potable water and sanitation cannot be subject to concession or privatization and will be subject to registries and licenses according to the law (Table 1). The regulatory framework for the water sector in the Bolivian case is quite complex, particularly given that some priorities created direct conflict with other laws. For instance, the new framework is in tension with elements of the previous

land reform law, the exports law, the electricity law, and the mining code—all of which entail certain 'priorities' and allocation schema that are in direct conflict with a notion of the human right to water. Since 2000, there has been a visible participatory movement promoting equity in access to water and conflict resolution mechanisms, with the creation of the Inter-institutional Water Council CONIAG (Consejo Interinstitucional de Agua) and the approval of several related laws: the law of promotion and support of irrigation for agriculture and forestry (law 2878) which established a water rights regime and a model for decentralized participatory management of water; the law of potable water and sanitation (law 2066) which also incorporates a mechanism to acknowledge water rights and recognizes the traditional ways of using water (*usos y costumbres*, see Perreault, 2008); and law 2704 which explicitly prohibits water exports following another law (law 2267) that had previously defined priorities for prospecting, quantification, evaluation and use of water in Potosí to be exported to neighboring Chile (Perreault, 2005; Fundación Solón, 2010).

It is anticipated that elements of these laws will be adapted to be made compatible with the text of the new water law, but it is not yet clear how this will proceed (Bustamante, 2011b, personal communication). Again, while many commentators are positive about these changes—considering them as among the most progressive legal instruments existing from environmental, indigenous and human rights perspectives—many are not as celebratory. Bustamante (2011a), for instance, sees these developments as a potential loss of independence by the organizations that have traditionally used and managed water according to their own rules and principles. By normalizing and legalizing water rights and organizations, including

those rules defined by the direct participation of indigenous and peasant organizations, the changing relationship between these entities and the state carries risk of political cooptation. The vulnerability of the legal system to influence by ruling elites further poses a risk of diluting the diverse contributions and goals of social movements (Bustamante, 2011b, personal communication).

3.3.4 Colombia

Social movements in Colombia have met with several setbacks to include water as a human right in the constitution. In 2009, approximately 60 civil society organizations were behind a constitutional referendum effort that proposed: the inclusion of water as a human right; the provision of potable water and sanitation as the responsibility of the state or not-for-profit community organizations; that community organizations should be autonomous and that they should receive state support to ensure coverage and quality of service; and that a minimum amount of water should be delivered free of charge to all citizens. As with the other countries documented above, this referendum directly targeted privatization of the water sector but did so in a quite different context. The participation of the private sector (PSP) in the water and sanitation sector in Colombia was already in a relatively advanced stage (Krause, 2009). In several medium to large Colombian cities, the delivery of water by private operators is viewed as having contributed to a situation of continuous service, modernization of infrastructure and favorable tariffs, all of which is particularly notable following on years of ineffective public provision (Patiño-Guzmán, 2010). Rather than staking their movement on failures in the realm of private water provision (as was cen-

tral to the resistance elsewhere), promoters of the referendum in this case based their suggestions on critiques of Law 142 (1994 law of public utilities) that introduced the liberalization of public services that until that time had been exclusively the responsibility of the state (Urrea and Cárdenas, 2009). They also criticized the intervention of the World Bank, which in 2004 introduced the potable water and sanitation program for Colombia to improve coverage in urban and rural areas. The implementation of this program implied institutional and political reforms favoring a shift to more commercial and entrepreneurial forms. Critics contested that this ultimately led to the exclusion of community organizations that had been integral to water governance in Colombia, as many such entities (including those along the Caribbean coast) were forced to hand over management and existing infrastructure to private enterprises. This has been done through authorizations to enterprises providing water to large cities to expand their distribution networks to peri-urban areas where community organizations had been operating for decades, often successfully providing consistent and satisfactory services (Urrea and Camacho, 2007). Another source of discontent relates to the treatment of the non-profit organizations that operate and serve the largest number of water users in the country (an estimated of 12,000 such community organizations operate in rural areas and closer to 1,500 in urban centers). A current requirement to receive government subsidies requires that entities operate as a registered concession and with a tariff system. This effectively means that these organizations—many of which have long provided effective service to users—are unable to receive governmental support.

Despite a context that appeared somewhat more favorable from a privatization

standpoint, these sorts of tensions nonetheless led to the collection of 2,100,000 signatures in support of the reform, well above the 5% of the electoral census (equivalent to 1,400,000) required for a referendum to be evaluated by Congress. Those associated with the movement attribute the success of their campaign not to the water situation specifically, but rather to the general deterioration of the quality of life among average Colombians that had accompanied the broader remit of neoliberal economic policies. Even as water services had improved in compelling ways, the price index for the water and sanitation sector had increased approximately 200% between 1998 and 2008, while inflation had increased 98% during the same time (Colmenares, 2009). Ultimately, the changes proposed with the referendum did not find support in Congress. It has been suggested that referenda of this type are meant to be a vehicle for democratic participation, yet the process, and specifically the need for Congressional approval, has also been interpreted as significantly limiting their potential in this regard (Urrea and Cárdenas, 2009; Dugard and Drage, 2012).

In sum, the failed Colombian referendum of 2009 can be understood as having sought to achieve several quite distinct objectives: to dismantle established PSP (Private Sector Provision) in the water sector; to bring greater attention to the quality of life and affordability challenges facing middle income and impoverished Colombians (especially following on a broad suite of neoliberal reforms), and to foster recognition and support for the thousands of not-for-profit organizations (estimated to be 12,000 in the country) that had long been involved in water provision. By combining these somewhat distinct goals, it failed to achieve any of them (beyond, arguably, the recognition related to quality of life and affordability challenges for

many Colombians). Even with the failure to achieve reform, this social movement exhibits strong similarities with the Ecuadorian, Bolivian and Uruguayan cases. This is the case not only due to the language used and the strategies deployed, but also arguably, through the direct resistance to the elements of prevailing neoliberal water governance norms and linked political economic conditions, as well as the specific role of the IFIs in having prompted structural adjustment policies and linked policy shifts in the previous several decades. We turn to this issue more fully in section 4 below.

3.4 Water Governance Shifts Phase III: Post-Constitutional Implementation Challenges

Despite the achievements of constitutional changes that challenge certain dimensions of neoliberalism (privatization or prioritization of productive water uses), implementation remains a considerable challenge across these contexts. For instance, it is difficult to figure out how one responds to the interpenetrated logics of neoliberalism across a range of institutions and practices, or how one might generate sufficient finances to support called-for social programs—both key political challenges in the contemporary moment. Particularly interesting are the cases of Bolivia and Ecuador that have been considered to exhibit elements of post-neoliberalism—with the current presidents of both countries having been elected with strong support from social movements, with promises for a renewal of democratic process, and with pledges for radical opposition to neoliberal programs (Sader, 2009). As yet, the promises that led to these electoral and constitutional shifts have not fully materialized.

3.4.1 Ecuador

The election of Correa in 2006 in Ecuador, his more recent re-election, and the rise of his *citizens' revolution*, all have strong bases in intense criticism of traditional parties, including challenges to the anti-democratic, corrupt and anti-judicial practices of previous governments. The Ecuadorian constitution of 2008 marks a new phase delegitimizing old political actors and practices and carving out spaces for more active and meaningful participation of indigenous and peasant groups. Even with these significant changes, Correa's government has also demonstrated a willingness to make decisions that run counter to the constitutional mandates and to make alliances with some of the same traditional political forces that they had opposed (Basabe-Serrano et al., 2011). Thus, despite the post-neoliberal rhetoric of Correa's government, specific forms of repression, as well as specific policies related to water (Andolina, 2011) and even the endorsement of multicultural equality (Hale, 2008) all bear the imprint of their neoliberal predecessors. In terms of the broad democratization push, the charge has been levied that social protest has been increasingly criminalized under the current government (Aguilar-Andrade, 2010; Chicaiza, 2010). It has been suggested that more than 200 people who have participated in social movements for the defense of water rights and against the expansion of mining concessions have been jailed under accusations of sabotage and terrorism (Chicaiza, 2010). The current government has also increased media censorship (The Economist, 2011) and has failed to deliver laws within the guiding principles and timeframes of the 2008 Constitution. There have been suggestions that the reform of the Law of Hydrocarbons (approved in July of 2010) is incon-

gruous with other constitutional mandates (Almeida, 2010), and also that elements of the treatment of mining violate the rights of indigenous peoples, peasants, and other communities. The government has responded that such socio-environmental conflicts would not be justiciable (capable of being decided by a court) and that the specific arguments brought against the Law of Hydrocarbons were legally insufficient (Chicaiza, 2010).

In the water sector, yet other challenges with respect to realizing the aspirations of Ecuador's 2008 constitution are evident. The prohibition of privatized water services has not been observed—the city of Guayaquil is still served by Bechtel through its subsidiary Interagua. Some have explained this in terms of political influence of the city, where the agro-exporting elite is concentrated (Villaruel and Zambrano, 2010). Another realm where the constitutional aspirations have been truncated has been the approval of a new water law. The term of one year following the approval of the new constitution was not met and the content of the proposal of the new water law shows a lack of commitment to re-distribute water for irrigation, which was among the specific goals of the constitutional reform. The Water Resources Forum of Ecuador estimates that community irrigation systems of small landholders that produce the majority of food for internal consumption correspond to 86% of water users, but only have access to 22% of the land and 13% of the total water available. Large private landowners representing 1% of agricultural production units benefit from usage of 64% of the water currently available (Gaybor et al., 2008). As Alberto Acosta, the leader of the constitutional assembly says, the social movements were fatigued after the arduous battle for the text of the constitution, and believed that the constitution

was going to be automatically brought into force by the government. Learning from the lack of follow-through observable with these implementation challenges, Acosta believes that the future of the constitutional achievements lies in the struggle to make them a reality (2011, personal communication)—highlighting implementation issues as the forefront of ongoing water reforms and struggles.

3.4.2 Bolivia

Evo Morales, the first indigenous president of Bolivia, was elected in 2005 with similar promises of substantial political, economic and social reforms. Morales' rise to power however, in contrast to that of Correa, resulted from a much longer process of political mobilization. The movements in Bolivia can be traceable to the mining revolution of 1952 that served as a reference point and inspiration culminating with the transition to electoral democracy in 1982. At that time, Bolivia was facing a debt crisis, and neoliberal reforms inspired by the Washington Consensus (and agreed upon through mechanisms later established as corrupt) were being implemented. At the same time, political decentralization in the country opened up electoral victories for minority ethnic groups. The combination of these factors led to the massive social mobilization that erupted first with the Cochabamba water war in 2000 (Anria et al., 2011). The water war ignited popular social movements that put forward the demand to transform the Bolivian economy, as well as to reform state-society relations more in line with the interests of minority and indigenous populations. With this background, Morales and the *Movimiento al Socialismo* MAS came to power in 2005. As other have noted, instead of strengthening the revolutionary and par-

ticipatory demands that were foregrounded during the election, once in power MAS made overt efforts to appease the bourgeoisie (Webber, 2011). In line with these types of inconsistencies, the new constitution of 2009 has similarly lacked coherency and follow-through, with some of the divisions and implementation challenges originating directly from ambiguity in the constitution itself. While the constitution prohibits the privatization of water, it does not prohibit the privatization of provision—leaving the door open for public-private partnerships (PPPs). PPPs are currently being proposed by the international cooperation agencies (Inter-American Development Bank and German Development Banks, GIZ/KfW) which are the most important sources of funding for potable water and irrigation projects in the country. Further, while the constitution includes the concept of good living and the rights of nature, it is unfolding in a broader neoliberal context that severely limits its radical potential (Kennemore and Weeks, 2011). As Carlos Crespo (2010) suggests there are deep contradictions between elements of the constitution such as the right to water, and other policies and movements, including extractive economic policies for natural resources. The mining, hydrocarbons and hydroelectricity sectors all significantly impinge on water uses, both because of their considerable water usage, as well as their potential to negatively affect the most vulnerable segments of the population that are presumably the intended beneficiaries of 'right to water' type reforms.

Even as the Morales government has been opposed to the policies and conditionalities of the IFIs, it has repeatedly demonstrated favorability with an extractive orientation for the country's oil, mineral, forest and water resources. Admittedly, extractive industries are publicly owned and the in-

come generated is used in social programs and infrastructure development; nonetheless, the rapid rate of extraction of oil and minerals and the continuation of corrupt practices have disappointed many of the new left. In this sense, neo-extractivism is seen in conflict with possibilities for a truly ‘post-neoliberal development’ (Humphreys-Bebbington and Bebbington, 2012; Marston, in process)

In line with these tensions, it is also clear that there is a lack of political will from the current government to implement other aspects of the 2009 Constitution. Changes that have been made regarding water are for the most part minor, perhaps being done to avoid making more transformative changes (Bustamante, 2011b, personal communication). These issues highlight some of the context specificities, and unevenness, with respect to achieving a right to water, or possibilities of ‘post-neoliberalism.’ While not the same, all of the examples discussed similarly show the complex landscape of water policy, and the ways that different aspects of the current regulatory and governance landscape proceed in tension and at times at cross-purposes. Even as we do not detail the Colombian and Uruguayan cases, again, the complexity of the situation is consistent in terms of ways different elements of reforms operate at cross-purposes, as well as the difficulty of achieving reform on the ground.

4. Analysis: Connecting Back and Moving Forward

With this somewhat ambiguous portrait of shifting water governance in Latin America, we move towards an analysis of these shifts in relation to the broader debates related to neoliberalism and post-neoliberalism. Our analysis suggests that

there is reason to understand these shifts as far from ‘resistant’ to neoliberalism, given the ways that they continue to articulate with, and even support elements of broader neoliberalization agendas. Yet, we find that even with clear implementation challenges, these constitutional reforms have notable ‘post-neoliberal’ potential: In all the cases the new reforms seek to counter specific elements of earlier neoliberal agendas; discursively, these shifts are expressions that articulate alternative visions of water needs, priorities, and delivery schema; and there is clear potential to resist transnational companies and IFIs. These insights and lessons are elaborated here.

First, all the movements discussed (‘successful’ or not) have commonalities in terms of the ways that they offer challenge to specific facets of earlier neoliberalization in the water realm. Whether it be resistance and regulation that counters the privatization of water services, that pushes back against reduced state roles in water provision, or aspects that seek to highlight the specific inequalities that were perpetuated under neoliberal water governance—recent constitutional shifts are powerful indictments of the ‘successes’ of the neoliberal model. Recall Bauer’s analysis where he forcefully argues that analyses cast those reforms as ‘successful’ often left aside other important elements, such as issues of conflict, or social inequality. By tracing the specific contextual and institutional lineages in each of these contexts, we are able to show the specific pathways that established the bases and rallied the support for these constitutional reforms. In many ways, ‘business as usual’ as it had been promoted by neoliberal reforms is directly confronted and challenged, finding concrete expression in the novel socio-legal instruments that followed.

As a second consideration, it is clear that even as elements of the recent waves of constitutional reforms in Latin America are at the forefront of resistance to water privatization and other elements of neoliberal water governance, significant hurdles remain. Indeed, the charge can be levied that neoliberal policies have persisted, or worse, that earlier policies now persist under a veil of democratic legitimacy. Among other issues, these constitutions are criticized because they are seen to contain a large number of promises that may be too ambitious or even impossible to achieve (the constitutions of Ecuador and Bolivia both have more than 400 articles, Nolte, 2009), or that presidents (e.g. Correa and Morales) have taken control of the judiciary, leaving little power invested in the constitutions themselves (Couso, 2011). Arturo Escobar (2010) has warned that the transformations that are seen in Latin America could be more rhetoric than reality, or as James Petras and colleagues have cautioned, ‘...the mass movements ... demand more than symbolic gratification and a sharp turn toward substantial socio-economic transformations’ (Petras and Veltmeyer, 2011, p. 161).

While we consider cautions of this type to be crucial, we also suggest that building a discursive response to neoliberal priorities and orientations may in and of themselves be significant. As Sneddon explains (2013), following Gramsci, hegemonic water governance has the effect of privileging certain ideas and management possibilities, leading to dissemination of those ideas, and marginalization of any discussion of other routes and pathways. As he and other authors in that volume suggest—crisis/scarcity, privatization/markets and participation have all become hegemonic—increasingly “perceived by governments, international financial institutions, international NGOs and scholars as

almost universally applicable to the water-related challenges of the 21st century” (p. 17). Viewed against an understanding of the hegemonies of neoliberal water governance that have solidified a focus on markets, privatization, or uses of water for productive uses as paramount concerns (or even the only possibilities), it becomes possible to understand the significance of the discursive terrain opened up by the recent the Latin American constitutional reforms. Consider as well that these same countries (e.g. the water minister from Ecuador) were especially significant to the process that led to the UN adoption of the Human Right to Water and Sanitation in 2010 (Sultana and Loftus, 2012). Paralleling the human right to water debates, even if not easy to implement, it is may be important to recognize such efforts and discourses for their strategic or aspirational value, including bringing voice to the issues they underscore (Miroso and Harris, 2012; Bakker, 2010a).

Third, and significantly, while these reforms may only be reforms ‘on paper’, they may have particular weight and importance in an international context where countries are repeatedly confronted with the undeniable influence of the IFIs and TNCs (and indirectly by the United States and other players that are key to these institutions). In the face of these institutions and the challenges they represent, a constitution that specifically outlaws privatization may be the strongest (or only) recourse (recall the move by Bechtel to challenge Bolivia in an effort to recoup lost earnings through the ICSID, or similarly the fact that countries throughout the global South have been required to adopt privatization agendas as part of loan conditionalities, Goldman, 2007; Harris, 2013). Just as water reforms need to be understood in the context of broader legal and political frameworks which demonstrate

their inconsistencies and tensions, similarly, in the context of the broader neoliberalization landscape, and hegemonies of these particular logics and institutions, the reforms in these countries take on different, and we suggest significant, meaning and import.

5. Conclusions: Postneoliberal, Neoliberal or Hybrid other?

In light of the somewhat ambiguous character of these reforms, it is useful or meaningful to consider these types of changes as 'post'neoliberal? We have suggested several ways in which the ongoing water related reforms in Latin America must necessarily be understood as oppositional to neoliberalism in certain respects. Post-neoliberalism as an analytic can help us to explore elements of resistance to neoliberalism, while also foregrounding the important ways that neoliberal ideologies or practices continue to structure the contemporary moment. In this way the term is akin engagements with 'post-colonialism', not as a neat break from an earlier period, but rather to highlight the ongoing legacies and imprint of colonialism (McClintock, 1992; Hall, 1996; as highlighted by the term 'the colonial present', see Gregory, 2004). We have traced recent constitutional reforms in a way that is very much attentive to the 'neoliberal present' – documenting the continuing ways that neoliberalism remains as central to the social, political and economic fabric of water governance contexts, even as there are clear struggles to define a pathway that more effectively deals with some of the challenges and losses that accompanied earlier neoliberalization agendas. The examples provided above, with respect to implementation challenges, inconsistencies across different sectors, or tensions between ideas such as *Sumak Kawsay* (good living) and longer de-

velopmental trajectories makes these sorts of persistent neoliberal legacies abundantly clear.

The tensions highlighted through these case studies also expose interesting issues regarding the broader context of legal-judicial reform, and its potential with respect to counter-hegemonic projects. We take some of the points of caution highlighted throughout this piece to suggest that it would be unrealistic to rely on these constitutional shifts as the only or the main leverage of social change (von Benda-Beckmann et al., 2009), particularly considering the way in which laws themselves are produced and effectuated (Bustamante, 2011b, personal communication). Yet, legal reforms of this type may be instrumental. Specifically, we have emphasized the broader context of institutions (international context of IFIs and TNCs) as well as the more difficult to pin down yet potentially significant symbolic importance of articulating goals that differ from the increasingly normative 'prescriptions of 'full cost recovery', 'efficiency' or 'productive uses'. Recent reforms clearly emphasize different goals and logics, including rights of nature, focus on good living, indigenous rights, or priorities for domestic water needs. As such, we agree with Bustamante (2011b, personal communication) that legal reforms of this type are best understood as only one strategy to counterbalance the advances of neoliberalism or other hegemonic agendas.

Our empirical findings related to recent waves of water reforms across Latin America also echo broader theoretical insights related to neoliberalism and its relationship to social struggles. As

Peck, Brenner, and Theodore (2009, p. 104) write there has been "a long history of social struggles and institutional transformations that have marked neoliberalism's

uneven ascendancy, consolidation, and crisis-driven adaption.” As such, there is “no crisp and clean divide between its “inside” and its “outside”; there is no iron curtain between neoliberalism and its others.” HOur discussion also clearly demonstrates the complex entanglements between resistance to neoliberalism and those practices and policies that at once cannot be thought of as ‘outside’ of neoliberalization trajectories.

We also find it provocative, and an important point of departure for future analysis, to consider the point made by Challies and Murray (2008) with respect to the continuing relevance of Latin American development theories to realities of the region at present. By highlighting the embeddedness of reforms within a complex and multifaceted developmental trajectory (e.g. one that emphasizes mineral exploitation, for instance) but also in relation to broader international institutions and developmental practices (the IFIs), we have offered some points of departure for such an analysis. These broader histories and trajectories (e.g. of capitalist developmentalism), as well as the broader institutions and pathways (of IFIs) are likely to be of strong and continuing relevance to conditioning water use and governance across Latin America. It is precisely with recognition of some of these broader processes that we have staked some of our claims related to these reforms. A constitutional ban against privatization may be one of the only mechanisms of resistance as countries negotiate future loans and agreements with IFIs. It is therefore important to evaluate constitutional reforms locally and nationally (e.g. in relation to oth-

er laws in those country contexts), but also internationally and institutionally (to highlight the situation of the countries in relation to other actors and realities on the world stage). Pushing such an analysis further to consider broader histories and theories of developmentalism is also likely to be crucial for this context.

We close with a final point of clarification and of caution. It is important to recognize that because neoliberalization itself is an ambiguous mix of ‘goods’ and ‘bads’, ‘resistance’ to neoliberalization must necessarily be understood as similarly multiple and complex, involving different actors, who may be opposed to, or supportive of different elements of neoliberalization at certain points of time (see Bakker, 2010a; Harris 2009b). Similarly, just as neoliberalism is not an ‘ideal type’ that is easily recognizable as a consistent or stable form, the more important aspect to grasp is to consider commonalities and differences in patterns of actually existing neoliberalisms—and what this implies, theoretically or empirically for discussions of ‘resistance’ (Bakker 2010b). Our work, we believe, has made some progress in this direction. We also take seriously the claim that environmental resources are one arena where neoliberal practices and policies continue to face intense scrutiny and reformulation. Issues of water quality, access, and security, particularly for the poor and vulnerable have been propelled to the forefront of Latin American politics. This is a critical development, and one that might only be the beginning of in terms of important other nascent political, economic, and social reformulations.

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ⁱ With support from the Inter-American Development Bank this authorization was given by EMAAP-Q (Empresa Metropolitana de Alcantarillado y Agua Potable de Quito) based on the argument that the city did not have the capacity to provide the service.

ⁱⁱ This company was the main shareholder of Aguas del Tunari, the corporation contracted for water provision in Cochabamba which raised tariffs by 400% prompting the “water war” in 2000 and forcing the Bolivian government to unilaterally terminate the contract.