PRISONERS’ HUMAN RIGHT TO WATER: LOST AND FOUND

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1. INTRODUCTION

Prisoners’ rights receive varying amounts of publicity and attention depending on public perceptions and policy trends. Most attention that prisoners receive in international law relates to the prevention of cruelty and little attention is paid to guaranteeing those prisoners’ basic human rights. Water has been explicitly left out of several international human rights agreements. Treaties and other international instruments granting human rights to prisoners and implicitly granting the human right to water are insufficient, alone and combined, to protect prisoners from state derogation of what should explicitly be a core guaranteed human right. While Canadian domestic law also lacks an explicit right to water for prisoners, it does provide for an imperfect complaint system which offers several avenues for remedy should prisoners’ rights be violated. An international binding and enforceable agreement explicitly protecting prisoners’ right to water, an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights\(^1\) whereby complaints can be made and prevention of derogations by State parties are needed.

This paper will discuss the sources of prisoners’ rights and where the human right to water has been interpreted to be found, followed by a brief discussion on examples of violations of prisoners’ right to water. It will then evaluate the means of protection afforded to prisoners’ right to water under various international and Canadian domestic human rights instruments and initiatives. The primary international instrument for the protection of the human right to water is the ICESCR, accompanied by the General Comments put forward by its committee and the recently drafted Optional Protocol. The

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mechanisms for complaint under the ICESCR are compared to those mechanisms of the International Covenant on Civil and Political Rights. The primary mean of Canadian domestic prisoner human rights protections are through federal legislation, the judiciary and national human rights institutions, namely the provincial and federal ombudsman. Finally, this paper will suggest several recommendations for improvements on both an international and Canadian national level that can be made with respect to protecting prisoners’ access to what is a basic human right, the right to water.

2. DEFINITIONS AND SOURCES OF PRISONERS’ RIGHTS AND THE HUMAN RIGHT TO WATER

a) Definition of Prisoner and Scope of the Human Right to Water

Defining Prisoners and the Rationalization for Prisoners’ Rights

A “prisoner” can be anyone who is in detention against their will or anyone who is “lawfully detained in prison after a fair trial”. For the purposes of this discussion it is not necessary to define “prisoner” rigidly.

By virtue of losing their right to liberty, prisoners do not lose all other rights. Four arguments for the rationale of maintaining prisoners’ human rights are mentioned here. Firstly, international and Canadian instruments as well as experts in the field of human

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4 Supra note 2 at art. 10; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 9 December 1988, GA res. 43/173 at Principle 1[Body of Principles]; Basic Principles for the Treatment of Prisoners, 14 December 1990, GA res. 45/111 at Principle 1[Basic Treatment]
5 Corrections and Conditional Release Act, S.C. 1992, c. 20 at s. 4. [CCRA]
rights and civil liberties express the recurrent theme that inmates retain the inherent dignity shared by all human beings and as a result prisoners should be treated with the humanity and respect in accordance with their inherent dignity. Furthermore, prisoners may claim that due to their “dependence and vulnerability to prison authorities” they should be provided with greater rights while in detention. Secondly, the rule of law requires that the state and those that derive their authority from the state, such as prison officials, are accountable and able to justify their use of power. Thirdly, it is believed that treating prisoners with dignity and respect aids in rehabilitation and ensures that upon release prisoners will be more compassionate members of society. Finally, prisoners are entitled to equality and should not be the subject of discrimination based on their incarceration. Although incarceration is not an explicitly enumerated ground of discrimination, the international community has expressed concern for the guaranteeing of rights for those vulnerable and marginalized sections of the population, within which prisoners can be included. In particular, the Committee on Economic, Social and Cultural Rights [CESCR] found, based on pacta sunt servanda, that prisoners should be given special attention by state parties as a group which has “traditionally faced difficulties in exercising” the right to water.

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6 Supra note 3 at 180.
7 Ibid. at 181.
8 Ibid. at 181.
9 Ibid. at 181.
10 Ibid. at 180.
11 Committee on Economic, Social and Cultural Rights General Comment No. 15 (2002) The right to water (arts. 11 and 12 of the ICESCR) at paras. 13 & 16. [General Comment 15]
12 Ibid. at para. 16
Defining the human right to water

As important as defining the subject of the right, is knowing what the right is. In the opinion of the CESCR the “human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses”.

Prior to General Comment 15, domestic uses of water were explored by Peter Gleick. He proposes that there are five basic human uses for water (1) “drinking water for survival” (2) “water for human hygiene”, (3) “water for sanitation services”, (4) “modest household needs for preparing foods” and (5) a special category relating to water required to grow the food necessary for human survival. Given their incarceration, inmates do not generally need all of these uses of water, however they do need the first three.

b) Main Sources of Rights

Primary Sources of Prisoners’ Rights

There are many international instruments that provide protection for prisoners’ rights. The six main instruments are the ICCPR, the Geneva Convention relative to the Treatment of Prisoners of War, United Nations Standard Minimum Rules for the

13 Ibid. at para. 2.
15 Supra note 2 at art. 10.
Treatment of Prisoners\textsuperscript{17} (in relation to water namely articles 15 and 20(2)), Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,\textsuperscript{18} UN Rules for the Protection of Juveniles Deprived of their Liberty\textsuperscript{19} and Basic Principles for the Treatment of Prisoners.\textsuperscript{20} These instruments vary in their scope according to which category of prisoners they apply to. The Geneva Convention applies to prisoners of war\textsuperscript{21}, whereas the Standard Minimum Rules has several parts which have different applicability varying by category of prisoner.\textsuperscript{22} The Protection of Juveniles\textsuperscript{23} applies to those persons who have been deprived of their liberty and are under the age of 18. International instruments protecting prisoners’ rights vary in the level of obligations imposed on State parties. Rather than imposing obligations on states, some instruments serve as interpretive guides to other treaties which contain the obligations.

\textit{How to Find the Right to Water}

Any state obligation to provide a human right to water under the basic instruments of international human rights law must be inferred.\textsuperscript{24} Although not explicitly contained in the ICESCR, the right to water can be inferred from article 11,\textsuperscript{25} which is the counterpart

\begin{itemize}
\item\textsuperscript{18} Body of Principles, supra note 3.
\item\textsuperscript{19} UN Rules for the Protection of Juveniles Deprived of their Liberty, 14 December 1990, GA res. 45/113 of [Protection of Juveniles].
\item\textsuperscript{20} Basic Treatment, supra note 4.
\item\textsuperscript{21} Supra note 16 at arts. 4 & 5.
\item\textsuperscript{22} Supra note 17 at para. 4 and Part II (headings A to E).
\item\textsuperscript{23} Supra note 19 at para. 11.
\item\textsuperscript{25} Supra note 1 at art. 11.
\end{itemize}
to article 25 of the *Universal Declaration of Human Rights*.\(^ {26}\) Article 6 of the ICCPR, which states, in part, that “[e]very human being has the inherent right to life [and t]his right shall be protected by law”\(^ {27}\) was originally thought not to be able to impose a right to water.\(^ {28}\) However, the Human Rights Committee [HRC] has decided that the ICCPR should no longer be interpreted so narrowly.\(^ {29}\) Further to this, the HRC has taken the view that “it would be desirable for State parties to take all possible measures to… increase life expectancy”.\(^ {30}\) As water is an “underlying determinant of health”,\(^ {31}\) ensuring access to water and sanitation is one of the measures necessary for State parties to increase life expectancy.

Article 24(c) of the Convention on the Rights of the Child [CRC] is one of two international instruments which explicitly includes a right to clean drinking water.\(^ {32}\) The Convention on the Elimination of All Forms of Discrimination against Women [CEDAW] gives women the right to a water supply in order to enjoy adequate living conditions.\(^ {33}\) The *Geneva Convention* is the only international instrument with an explicit guarantee that prisoners have a right to water, including both adequate drinking water and water for sanitation and hygiene.\(^ {34}\) However, as its scope is limited to prisoners of war and the application of the CRC and CEDAW are also restricted, there is a gap in the

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\(^ {27}\) *Supra* note 2 at art. 6(1).
\(^ {28}\) *Supra* note 24 at 9.
\(^ {29}\) Human Rights Committee General Comment No. 6 (1982) The right to life (art. 6) at para. 5.
\(^ {30}\) *Ibid.* at para. 5.
\(^ {33}\) Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, GA res. 34/180 at art. 14(h). [CEDAW]
\(^ {34}\) *Supra* note 16 at arts, 20, 26, 29 & 46.
protection of inmates’ human right to water, so that if there is a general right to water it must be inferred from a more general human rights treaty text. A generally applicable right to water has recently been inferred as the CESCR finally recognized the right to water in Articles 11-12 of the ICESCR formally by adopting General Comment 15 on the subject.\textsuperscript{35} Though not legally binding, through this General Comment the ICESCR’s provisions were interpreted by an authoritative body which found that “water clearly falls within the category of guarantees essential for securing an adequate standard of living”.\textsuperscript{36}

c) Violations of Prisoners’ Right to Water

There can be no derogation from basic human rights, which the CESCR has found to implicitly include such core rights as the right to access the minimum essential amount of water.\textsuperscript{37} There are many examples of ICESCR State party violation of prisoners’ core right to water, including by developed nations.

For example, in 2005 the state of Virginia in the USA experienced a drought which caused prison officials at Wallens Ridge State Prison to impose severe water limitations on inmates.\textsuperscript{38} The limitations included not meeting minimum daily quantities of drinking water and the reduced ability of inmates to flush cell toilets, causing them to be left in

\textsuperscript{35} Supra note 11.

\textsuperscript{36} Ibid. at para. 3; see also Khalfan, Ashfaq & Thorsten Kiefer. “The Human Right to Water and Sanitation: Legal basis, Practical Rationale, and Definition” (2008) Centre on Housing Rights and Evictions at 3 [Khalfan & Thorsten]

\textsuperscript{37} Supra note 11 at paras. 37 & 40.

close proximity with their own, or their cellmates’, fecal matter for several hours.\textsuperscript{39} Water for hand washing was also compromised.\textsuperscript{40} These steps are retrogressive in nature contrary to findings of the CESCR that state parties are prohibited from taking any reverse measures “in relation to the right to water”.\textsuperscript{41} As Virginia is part of a developed nation expected to have the infrastructure capacity to respond to the consequences of such a natural disaster “it might be found not to have exercised due diligence” despite not being held legally responsible for the drought itself.\textsuperscript{42}

In Canada, it seems that the most frequently breached and litigated aspect of the human right to water for prisoners is to use for human hygiene. This is discussed in \textit{R. v. Jones} where Justice Hill refers to several unreported similar Ontario Superior Court of Justice cases where the Court had issued orders in attempts to force prison officials to provide showers to inmates.\textsuperscript{43}

\section*{3. EVALUATION OF LEADING INTERNATIONAL HUMAN RIGHTS AGREEMENTS AND TREATY COMMITTEE STRUCTURE FOR PROTECTING THE HUMAN RIGHT TO WATER OF PRISONS}

\textbf{a) Introduction: No Broadly Applicable, Explicit Human Right to Water}

Within the extensive body of international human rights instruments there is no broadly applicable right to water or state obligation to provide access to safe, adequate water in

\textsuperscript{39} \textit{Ibid.} at para. 3.
\textsuperscript{40} \textit{Ibid.} at para. 3.
\textsuperscript{41} \textit{Ibid.} at para. 19; and Committee on Economic, Social and Cultural Rights General Comment No . 3 (1990) The nature of State parties obligations (Art. 2, par. 1 of the \textit{ICESCR}) at para. 9
\textsuperscript{42} \textit{Supra} note 24 at 14.
\textsuperscript{43} \textit{R. v. Jones}, 2006 CanLII 32995 (ON S.C) at para. 4.
general. With the exception of prisoners of war covered under the *Geneva Convention*, the right to water is certainly not extended to prisoners, leaving most inmates lacking such a right. “Given... its importance to human life and civilization, it is surprising that water is not mentioned by either of the 1966 United Nations covenants on human rights [ICESCR and ICCPR] or in the Universal Declaration of Human Rights”. Rights to water, although limited in scope, are explicitly given to children under the CRC and to women under CEDAW while men are left unprotected. Considering that the largest proportion of those currently incarcerated is composed of adult males, it is clear that they are missing a right to water, regardless of enforceability. Despite access to clean water being a precondition to many of the rights espoused within the other international human rights treaties, including “the rights to life, to the enjoyment of a standard of living adequate for health and well-being, to protection from disease and to adequate food” which are broadly applicable to all individuals including prisoners, it is unacceptable that only the CRC contains an explicit right to drinking water.

**b) Interpretation of the ICESCR & Committee to Provide Protection of Prisoners’ Right to Water**

Article 11(1) of the ICESCR asserts that State parties “recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food,

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44 Supra note 16 at arts. 20, 26, 29, & 46.
45 Supra note 24 at 7.
46 U.S. Department of Justice, Office of Justice Programs, *Department of Justice Statistics, Summary Findings, June 2007* (page last revised Oct 2, 2008) last accessed online 24 November 2008 at <http://www.ojp.usdoj.gov/bjs/prisons.htm> at 1, which says that approximately nine out of ten prison inmates are adult males.
cotton and housing”. Water is conspicuously absent despite being fundamental to the realization of many of the core human rights contained within this and other international human rights covenants. The human right to water was not given proper recognition until thirty-six years after the ICESCR was created by way of General Comment 15. It is possible that some of the delay was caused by the difficulties surrounding the creation and maintenance of a functional treaty committee for the Covenant. Gleick raised the question of whether water was thought to be so fundamental a resource that, like air, it was considered “unnecessary to explicitly include reference to it at the time these agreements were forged” or if it was the intent of the authors of the 1966 United Nations human rights instruments “to exclude access to water as a right, while including access to food and other necessities?” Stephen McCaffrey asserts that “adequate amounts of safe, useable fresh water should be recognized as a human right” and is mystified over the lack of an explicit human right to water. Gleick ultimately concluded that the “drafters implicitly considered water to be a fundamental resource” to rights that are specifically guaranteed by international instruments, many of which “cannot be attained or guaranteed without also guaranteeing access to basic clean water.” It is unfortunate that this expert opinion cannot create an obligation. A decade after McCaffrey published his opinion, the experts on the Committee wrote their General Comment 15 on the subject.

Although it is now the opinion of the CESCR that the ICESCR should contain a human right to water, to date there is no complaint mechanism under the Covenant. Whether a

48 Supra note 1 at art. 11(1).
49 Supra note 47 at 490.
50 Supra note 24 at 7.
51 Supra note 47 at 490.
right is implicitly or explicitly contained in the ICESCR, without a complaint mechanism, those seeking to enforce their proclaimed rights are handicapped in their ability to effect change and seek help when confronted with state derogation of their rights. An Optional Protocol for the ICESCR [ICESCR-OP] has been drafted, but it is uncertain whether it will provide the protection and accessible complaint mechanisms to be sufficiently effective.\footnote{This paper was originally written in November 2008; the draft ICESCR-OP was adopted by the General Assembly in December 2009 and was to be open for ratification in March 2009. It requires ten ICESCR state parties to sign it before it comes into force; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 10 December 2008, GA res. 63/117 at art. 18(1).} It is the hope that the ICESCR-OP will provide increased state accountability as well as assistance to individuals in claiming the rights which are to be protected under the Covenant. In order for individuals to seek protection of the rights contained in the ICESCR through a complaint mechanism, state parties will have to be contracting parties to both the ICESCR and the ICESCR-OP. In the meantime, the CESCR feels that State parties have a good faith obligation to act in accordance with their recognition of the existing rights created by the ICESCR (\textit{pacta sunt servanda}).\footnote{Supra note 11 at para. 40; Khalfan & Thorsten, \textit{supra} note 36 at 4.} The CESCR believes that a failure to act in good faith to take feasible steps towards the realization of the right to water amounts to a violation of such right.\footnote{Supra note 11 at para. 40.} However, the standard for what these feasible steps would be is exceedingly vague, especially given that State parties to the Covenant are given such flexibility in the realization of Covenant rights. It is recognized that full implementation of the ICESCR by State parties is constrained by their available resources, leading to the impossibility of creating a single set of standards for all State parties to meet and maintain.\footnote{Chapman, Audrey R. "A ‘Violations Approach’ for Monitoring the International Covenant on Economic, Social and Cultural Rights” (1996) 18 Hum. Rts. Q. 23 at 31 to 32.}
One of the obstacles to the establishment of an enforceable human right to water is the CESCR’s own mandate. The CESCR’s current mandate is largely to meet twice annually to examine the reports submitted by State parties to the ICESCR and then make recommendations to the state parties on necessary improvements.\(^{56}\) It will then request that the State party show what steps it has taken on the Committee recommendations in its next report. State parties are not legally bound to uphold any recommendations as they are considered expert opinions only. As a result, “only public condemnation has an impact on state behaviour”.\(^{57}\)

c) **Interpretation of the ICCPR to Provide Protection of Prisoners’ Right to Water**

Using the ICCPR to guarantee prisoners’ right to water is not as evident as the CESCR deeming the right to water being a part of the ICESCR. However, using the ICCPR may be more useful as it has a complaint mechanism in place under its HRC through its Optional Protocol.\(^{58}\) In order for an individual to come within the jurisdiction of the complaint mechanism a state party must be a contracting party to both the ICCPR and its Optional Protocol. By combining Article 10 of the ICCPR, which specifies that prisoners are to retain their dignity and are to be treated with humanity,\(^{59}\) with the notion that the right to water is a basic core right, necessary for the realization of such rights as to be

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\(^{58}\) Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, GA res. 2200A (XXI) at arts. 1 & 2.

\(^{59}\) *Supra* note 2.
treated with humanity, it is possible that the ICCPR could offer some protection to inmates whose right to water has been violated. The obscure combination of Article 10 of the ICCPR and a belief held by the CESCR may be sufficient for a prisoner to bring a complaint to the attention of the HRC. However, the ability to complain is tenuous and the HRC is not responsible to uphold or honour the beliefs of a committee for a separate covenant.

It is the opinion of the HRC that Article 6 of the ICCPR, which contains the right to life, should be interpreted broadly, but not so broadly as to create a right to sustenance. It is unfortunate that the ICCPR does not contain a right to water such as the one implicit in the ICESCR, as the ICCPR imposes significantly higher burdens on State parties to meet their obligations under the ICCPR.

Although they are not legally binding, the Standard Minimum Rules serve as a guideline for the treatment of prisoners. This guideline stipulates that all categories of prisoner “shall be provided with water” necessary for personal hygiene and drinking water whenever a prisoner is in need of it. The Standard Minimum Rules suggest that prisoners should be allowed to make complaints to the prison director. Although the Standard Minimum Rules do explicitly refer to prisoners’ right to water and addresses a complaint procedure, this creates neither a state obligation nor a complaint mechanism. The only formal international complaint mechanism is under ICCPR Article 10 through

\[60\text{ Supra note 29 at para. 5.}\]
\[61\text{ Supra note 24 at 11.}\]
\[62\text{ Ibid. at 9.}\]
\[63\text{ Supra note 17 at arts. 15 & 20(2).}\]
\[64\text{ Ibid. at art. 36(1).}\]
the HRC by simultaneously employing the *Standard Minimum Rules* and other UN principles, to obtain a more detailed interpretation of what is included within Article 10. Other UN non-binding documents, such as the *Body of Principles* and *Basic Treatment* do not provide any protection for inmates’ right to water, but Principle 7 of the *Body of Principles* finds that States should conduct investigations on receipt of complaints of rights violations.\(^{65}\) *Protection of Juveniles* does provide that water should be given to juveniles in detention.\(^{66}\) However this document, like many other UN documents, merely expresses desirable standards and does not impose obligations on States.

4. **Effectiveness of Canadian Domestic Protection of Prisoners’ Right to Water**

Canadian domestic law uses three avenues to protect prisoners’ rights, statutes, the judiciary, and non-judicial institutions.

**a) Protection by Legislation**

The *Constitution Act, 1982*\(^{67}\) is often thought of as offering the most protection to the rights of members of Canadian society; however, it is not helpful for prisoners seeking enforcement of their right to water. The *Charter* has been charged as “not meaningfully penetrat[ing] the walls of Canadian prisons,”\(^{68}\) as it focuses on procedural fairness and *habeas corpus*, which limits its usefulness to inmates suffering other human rights

\(^{65}\) *Body of Principles*, supra note 4 at principle 7.

\(^{66}\) *Supra* note 19 at art. 37.

\(^{67}\) *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [the *Charter*]

violations. It is not surprising that most claims by inmates under the Charter are for procedural, not substantive, rights. The Canadian Human Rights Act is also relatively unhelpful in obtaining a human right of water for federal prisoners. Its preamble describes that the Act is designed to extend the laws in Canada to ensure that they condemn discrimination. There is no guarantee of rights other than those related to discrimination.

The Correctional Services Act gives inmates “the right to appeal any discipline charge as well as the placement in” segregation. However, neither of these areas assist inmates who wish to assert a claim for human rights, such as the basic right to water. On the other hand, the CCRA has rights which are more specifically orientated towards prisoners than the rights enumerated in the Charter, although neither contains a right to water. Part III of the CCRA allows for the appointment of the Correctional Investigator, who is the Federal “ombudsman” for prisoners. The CCRA also “requires that federal corrections be administered according to a set of principles, a number of which are particularly important to a discussion of prisoners’ rights”. Examples of the most important rights given to prisoners are contained in section 4 of the CCRA which ensures that inmates’ rights are the same as those given to the rest of society and that prisoners should have access to “an effective grievance procedure”. Further to this, sections 90 and 91 of the CCRA guarantee access to grievance procedures without negative consequences. The

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69 Parkes, Ibid. at para. 12.
70 Canadian Human Rights Act, R.S.C. 1985, c. H-6
72 Supra note 5 at Part III.
73 Parkes, supra note 68 at para 10.
74 Supra note 5 at subsections 4(e) and 4(g).
regulations of the CCRA provide for the complaint and grievance process as well as allowing inmates to seek a legal remedy and the pursuance of alternative grievance procedures.\textsuperscript{75} One such alternative procedure is to seek a remedy from the Canadian Judiciary.

\textbf{b) Protection by the Judiciary}

An obstacle between inmates and their obtaining a remedy of a breach of human rights from the Canadian judiciary is that the courts do not generally like to interfere with the inmate grievance process. However, this hesitancy may be evolving as recent court decisions show a changing perspective on the issue of prisoner rights cases. The Supreme Court of Canada in \textit{May v. Ferndale Institution}\textsuperscript{76} may have finally grasped the plight of prisoners “in challenging the actions of authorities who hold all the power and much of the relevant evidence”.\textsuperscript{77} The decision by the majority is seen to have strengthened the case for increased judicial protection of inmates.\textsuperscript{78}

The jurisdiction of the judiciary to hear cases relating to prisoner claims of violations by prison authorities is usually challenged by the Attorney General of Canada in cases brought forward by inmates. This was a preliminary issue decided in \textit{Gates v. Canada (Attorney General)}\textsuperscript{79} Here, the Federal Court found that a rights-based dispute results in a decreased likelihood that the inmate is restricted to pursuing internal prison grievance

\textsuperscript{75} Corrections and Conditional Release Regulations, S.O.R./92-620 at ss. 74 to 82.
\textsuperscript{76} \textit{May v. Ferndale Institution} 2005 SCC 82. [\textit{May v. Ferndale}]
\textsuperscript{77} Parkes, \textit{supra} note 68 at para. 58.
\textsuperscript{78} \textit{Ibid.} at para. 58.
\textsuperscript{79} \textit{Gates v. Canada (Attorney General)}, 2007 FC 1058.
procedures prior to seeking resolution from the judiciary. The Court also found that there are circumstances which produce “actual physical or mental harm or clear inadequacy of the process” where the courts find that a departure from the usual grievance procedure is warranted.

c) Non-Judicial Means of Protection

The two major forms of national human rights institutions [NHRIs] in Canada are ombudsmen and human rights commissions. The CESCR has expressed the view that “[n]ational ombudsmen, human rights commissions, and similar institutions should be permitted to address violations of the right” to water.

In May v. Ferndale, the Supreme Court of Canada criticized the internal prison grievance procedure as being a process where the “decisions made by prison authorities” are reviewed “by other prison authorities”. This succinct observation demonstrates the importance of an inmate grievance process which is independent of the prison authorities. Such a means of obtaining a more independent and objective review process is via a human rights commission or an ombudsman.

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80 Ibid. at para. 19.
81 Ibid. at para. 26.
82 Supra note 11 at para 55.
83 Supra note 76 at para 63.
Canadian Human Rights Commissions

Human rights commissions can receive complaints from persons against both private- and public-sector entities and most commissions have the “power to launch own-motion investigations”.84 Despite decisions and recommendations being non-binding, commissions do have the option of referring a dispute to the courts or other binding tribunal.85 Unfortunately, most of the Commissions within Canada have a discrimination focus, and thus are not particularly useful to prisoners who wish to lodge complaints. The commissions in Canada are unlike the office of the ombudsman which has a mandate to promote and protect rights from state conduct, yet are similar to ombudsmen in that they are also soft-law mechanisms.86 Human rights commissions in Canada generally have a mandate that is restricted to discrimination. This leaves ombudsmen as the only non-judicial mechanism for the protection of prisoners’ right to water.

Provincial Ombudsmen

Canadian ombudsmen have strong powers of investigation which are used to conduct independent investigations and make recommendations on the “conduct relating to public administration on the grounds of… wrong or unjust conduct standards”.87 The investigative scope of the ombudsman is typically limited to administrative actions taken

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86 Ibid. at 3.
87 Supra note 84 at 472.
by the executive branch, as it is the legislative branch who appoints the ombudsman, necessarily so the judiciary is beyond the investigative scope; however some private sector entities may fall into the jurisdiction of an ombudsman if so specified by the enabling statute of the ombudsman.\(^{88}\) Should a provincial government fail to follow a recommendation made by its ombudsman, the ombudsman may take the recommendation to the legislature or to the media.\(^{89}\) The Ombudsman Saskatchewan, who is appointed by the legislature, expects prisoners of the provincial corrections system to contact Corrections prior to making a complaint to the Ombudsman.\(^{90}\) Provincial ombudsmen also do not have jurisdiction over complaints of conduct which occurred in a Federal corrections institution.

_Federal Ombudsman_

The primary function of the Correctional Investigator, created by the _CCRA_, is to “investigat[e] complaints on receipt of a complaint by federal offenders, or on own-motion, about the conduct of federal corrections officials and mak[e] recommendations”.\(^{91}\) The Correctional Investigator also reviews and makes recommendations on the policies and procedures of the correctional service. Similar to the soft mechanism provided by the CESCR recommendations, the _CCRA_ contains a provision noting that the commissioner and other government corrections authorities are

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\(^{88}\) _Ibid._ at 472; see also Ombudsman Saskatchewan, _Questions & Answers_, last accessed online 27 October 2008 <http://www.ombudsman.sk.ca/questions-answers.html> at paras. 5 & 6. [Ombudsman Saskatchewan]

\(^{89}\) _Ibid._ at para. 8. [Ombudsman Saskatchewan]


\(^{91}\) _Supra_ note 84 at 473.
Prior to seeking the aid of the Correctional Investigator, inmates are expected to exhaust the internal grievance procedure as laid out in the *Corrections and Conditional Release Regulation*. These regulations provide the hierarchy of decision makers to whom prisoners must submit a complaint regarding their dissatisfaction of actions or decisions of a prison staff member; the process starts with the inmate filing a complaint to the supervisor of the staff member, then a complaint may go on to the institutional head, followed by the head of the region. Prior to appealing the complaint to the regional head, the inmate or institutional head may refer the complaint to the inmate grievance committee should the penitentiary have one, or to an outside review board. Finally, if the prisoner continues to be dissatisfied with the decision of the regional head, the complaint can be appealed to the Commissioner of Corrections prior to being referred to the Correctional Investigator.

5. RECOMMENDATIONS FOR IMPROVEMENT OF THE PROTECTION OF PRISONERS’ BASIC HUMAN RIGHT TO WATER

a) International law

*ICESCR Optional Protocol*

The lack of an ICESCR-OP has been a serious detriment to the protection of prisoners’ right to water. The new optional protocol should provide for swift reaction to a

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92 Supra note 5 at s. 179(3).
93 Supra note 75.
94 Ibid. at ss. 74 to 75 & 80.
95 Ibid. at ss. 77 & 79.
96 Ibid. at s. 80(2).
complaint. The draft of the ICESCR-OP allows for individual and inter-state complaints to be made to the CESCR.\textsuperscript{97} There are several foreseeable problems with the proposed ICESCR-OP, perhaps most important is that it will not provide for a swift reaction to complaints of violation. The draft ICESCR-OP gives State parties accused of a violation half a year to submit an explanation or clarifying statements and another six months is given for States to share what actions have been taken since receiving the recommendations from the CESCR.\textsuperscript{98} Making the CESCR the adjudicative body for complaints under the ICESCR-OP may lead to additional tribulations, as the CESCR already has problems reviewing the present flow of periodic state reports, though even these are missing much of the detail requested by the report preparation guidelines.\textsuperscript{99} If the CESCR is given the responsibility to investigate and adjudicate claims of State party violations, “the additional workload would potentially undermine the Committee’s ability to perform its existing functions.”\textsuperscript{100}

Despite being a State party to the covenant, there is little incentive to compel any nation to give its citizens a mechanism for complaint once the ICESCR-OP has been approved. This highlights another serious problem with the international human rights instruments in that the strongest form of complaint is via the optional protocols of the various human rights covenants. Unfortunately, the very nature of the optional protocols is that they are optional; State parties are not obliged to adopt them.

\textsuperscript{98} Ibid. at arts. 6(2) and 9(2).
\textsuperscript{99} Supra note 55 at 34.
Enforcement of Periodic State Party Reports

State reports serve an important role in ensuring that State parties are aware of the status afforded to human rights within the states’ territory and subject to their jurisdiction, including achievements and impediments in the establishment of rights contained in the ICESCR. The obligation on State parties to submit reports to the CESCR is not respected. Several countries remain overdue in submitting reports, including some who have never even filed an initial report. Although State parties are to submit their initial periodic report “within two years of the entry into force of the Covenant for a particular State party”, Monaco, which signed the ICESCR in the summer of 1997 did not submit its initial report until 2004. When countries fail to respect the reporting guidelines of a covenant, they are less likely to respect any recommendations based on those reports or, more importantly, the other obligations contained within the covenant relating to the preservation and improvement of human rights. It has been found that few State parties take their responsibilities [and obligations under the ICESCR] seriously. The lack of adherence to the timing requirements of periodic state reports may stem from the fact that to follow the guidelines fully is “unrealistic and virtually impossible”.

Many countries lack not only the sophisticated statistical databases required for the in-

101 Committee on Economic, Social and Cultural Rights General Comment No. 1 (1989) Reporting by State parties. [GC 1]; see also supra note 56.
102 Supra note 55 at 28.
103 GC1, supra note 101; see also supra note 56 at 12.
106 Supra note 55 at 27.
107 Ibid. at 34.
depth analysis requested by the CESCR, but also the willingness to share what statistical data they do have, as part of the periodic reports.  

*Immediate Obligation of Covenant Rights* (Progressive Realization/Implementation)

The ICESCR requires that a State party take steps “to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized”.

However, State parties should be under an immediate obligation to implement rights involving basic or essential needs, which would include the fundamental right of all individuals to potable water. It is disappointing that the ICESCR is not as forceful as the ICCPR in requiring more positive obligations on states to guarantee a core basic human right, such as the human right to water. As there is no obligation for parties to implement any provision of the ICESCR immediately, any right to water, regardless whether it is implicit or explicit, is only required to be implemented by State parties progressively. Contrary to this slow requirement for implementation, the ICCPR imposes an immediate obligation on State parties to ensure rights by requiring them to take whatever measures may be necessary to “give effect to the rights recognized in the… Covenant” if there is no measure already in place. There may be concern that the ICESCR was designed to account for the different economic capacities of State parties and their available resources. However, the flexible understanding would not be compromised by requirements for immediate implementation of the right to water, as

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109 *Supra* note 1 at art. 2.
110 *Supra* note 24 at 9
111 *Supra* note 24 at 9.
112 *Supra* note 2 at art. 2(2).
there is flexibility within the implementation requirements of the ICCPR. The standard of “due diligence” often used to examine the obligations of the states under the ICCPR takes into account the capabilities of the state concerned.\textsuperscript{113} As a result there is no need to worry that imposing an immediate obligation would be unfair and impractical as the obligation is still flexible in what it considers necessary from each State party and understands that some States are in more stable positions, both financially and developmentally, such that they can be expected to abide by higher standards.

Implementation based on progressive realization represents a challenge in the CESCR’s ability to monitor implementation. “[W]ithout effective monitoring, states cannot be held accountable… or made liable for violation of” the rights itemized in the ICESCR.\textsuperscript{114}

\textit{Violations Monitoring Approach}

The current standard of progressive realization is difficult to monitor as it is vague and requires the development of an array of performance standards for each specified right which will vary by State parties’ abilities.\textsuperscript{115} While continuing to encourage progressive realization of the ICESCR in addition to promoting the immediate positive obligation to provide the basics for human living including clean water, the CESCR should adopt a violations approach to monitoring state obligations. Under this approach, the CESCR would seek to identify and rectify state violations, which are defined as “failures by a state party [either by commission or omission] to comply with an obligation” contained in

\begin{flushleft}
\textsuperscript{113} \textit{Supra} note 24 at 13.
\textsuperscript{114} \textit{Supra} note 55 at 23.
\textsuperscript{115} \textit{Ibid.} at 23 and 28 to 30.
\end{flushleft}
the ICESCR. 116 Monitoring violations requires fewer resources (academic, financial, time) than the attempt at monitoring progressive realization 117 and can help to produce more immediate results as progressive realization is a slow process for the implementation of rights.

b) Canadian Domestic Law

Financial Accessibility of Complaints

Despite the CESCR’s recognition that inmates are to be given “legal assistance for obtaining legal remedies” when their right to water is compromised by a State, 118 Canada continues to fail to meet this requirement. Most provinces do not provide legal aid funding for prison cases, and as a result there are fewer lawyers who represent inmates and “[f]ewer still have developed expertise in the area.” 119 Providing legal aid to prisoners in order for them to bring legitimate complaints to the judiciary would help develop and enhance prisoners’ human rights protection by both giving prisoners an immediate voice as well as developing valuable jurisprudence in the area. Despite Canada’s lack of funding of legal aid for prisoner cases, both federal and provincial governments provide funding to NHRI s. NHRI s, which include ombudsmen and human

116 Ibid. at 42.
117 Ibid. at 34.
118 Supra note 11 at para. 56.
119 Parkes, supra note 68 at para. 49.
rights commissions, play a valuable role in the protection of rights for those “individuals who cannot afford to litigate the problems they experience”\(^\text{120}\)  

**National Human Rights Institutions**

Six factors have been identified as indices of the effectiveness of NHRI\(\text{s}\); these are independence, defined jurisdiction and adequate powers, accessibility, cooperation, operational efficiency, and accountability.\(^\text{121}\) Critiques of Canadian NHRI\(\text{s}\) include their independence, their mandates or accessibility, and the enforceability of recommendations or adequacy of powers. It is required that human rights institutions be established by law and as such are tied to a government which, through their enabling statute, they may have to investigate; they are also linked to the government by their financial dependence on government funding.\(^\text{122}\) “[T]he degree of independence of the [national human rights] institution from government” is one of the most important factors relating to its effectiveness,\(^\text{123}\) which leads to a criticism of Canadian human rights commissions. It has been said that the Canadian Human Rights Commission lacks independence by way of being appointed by the executive branch.\(^\text{124}\) In order to be more effective, not only do national human rights commissions need to gain greater independence, but they also require broadened mandates to cover more than discrimination. Thankfully the various Canadian ombudsmen have more independence as they are appointed by the legislature,  

\(^{120}\) *Supra* note 85 at 3.  
\(^{122}\) *Ibid.* at 10.  
\(^{123}\) *Supra* note 85 at 24; see also *Ibid.* at 10 to 17.  
\(^{124}\) *Supra* note 84 at 469; see also *supra* note 65 at ss. 26(f) & 6(f)
so their power cannot be eliminated arbitrarily after, for example, a critical report on the actions or inactions of the executive.

To effect real change, NHRI$s need real power. Unfortunately these institutions are restricted to being soft-law mechanisms, meaning they are unable to make decisions which can be enforced and “are confined to giving non-binding recommendations, advice and reports”.

Threats to submit reports to legislatures and media may not entice the swift or immediate change necessary to protect inmates from derogation of the right to a necessity of life. Resolution time may be especially slow given the internal grievance procedures that inmates must first exhaust prior to an ombudsman finding merit in their complaint against the conduct of a prison authority.

**Speed of Resolution**

Ombudsmen, although a great source of aid for the protection of prisoners’ rights within Canada due to their affordability, broad mandates, and relative independence, have one large downfall, which is their lack of expediency. The Alberta Ombudsman projects that most investigations take from 6 to 12 months, and the Ombudsman Saskatchewan projects that it takes 3 months to complete the work for a complaint. This period of investigation usually follows the exhaustion of internal avenues of complaint, which is a requirement prior to seeking the aid of the office of the ombudsman. The right to water can mean the difference between good health and bad. A mechanism with a faster

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125 *Supra* note 85 at 28.
resolution time is needed. Canada requires “a process for ‘prompt’ action on complaints”.  

Judicial Empowerment

As the complaints process in Canada is “woefully inadequate” and unlikely to receive the financial support necessary to institute an increase in legal aid funding and increased resources for completing investigations in a more time sensitive manner, prisoners need the hope of knowing that there is a remedy available to them for violations of their human right to water. One suggested remedy is likely to receive public outcry if adopted by the judiciary as viable. A former justice of the Supreme Court of Canada found that where the conditions of “a sentence renders the sentence harsher than that imposed by the court, a reduction of the period of imprisonment may be granted, such as to reflect the fact that the punishment administered was more punitive than the one intended.” Although Justice Arbour made a compelling case for the reduction of sentences as a remedy for human rights violations available to prisoners through the judiciary, a 2007 investigation of such cases demonstrated that this is not a remedy which the judiciary is eager to employ. Reducing sentences after finding a violation of the right to water or other human right is a remedy that might receive greater attention from those officials inflicting the violations of human rights more so than monetary compensation, which is likely to be paid by the government. Monetary awards to inmates who are victims of state violations

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127 Supra note 77 at para. 30.
128 Parkes & Pate, supra note 68 at 276.
130 Parkes, supra note 68 at 60.
do not deter the prison officials perpetrating the violations, nor would this remedy be
desired by the various levels of Canadian government.

Incorporation of International Law Obligations

International treaties are not national law and therefore require legislation to give them
force in Canadian domestic law.\textsuperscript{131} As Canada is a federal system, there would therefore
also need to be implementation at both the federal and provincial levels.\textsuperscript{132} When
ratifying an international human rights agreement, Canada relies on its existing
legislation and measures to meet the implementation requirements of the treaty instead of
creating specific legislation.\textsuperscript{133} There exists a strong need for greater incorporation of
international human rights treaties into Canadian domestic legislation in order for the
rights of prisoners to have a more binding effect on provincial and federal governments
and their agents. The CESCR has made several recommendations that the human rights
enumerated within the ICESCR “be given more explicit recognition in Canadian federal,
provincial, and territorial human rights legislation”.\textsuperscript{134} A greater inclusion of international
human rights law into domestic legislation would give greater recourse to courts and
tribunals to prisoners; there would exist more numerous domestic avenues for prisoners
to exhaust before making complaints via the forthcoming ICESCR-OP. There needs to be
more than mere pressure from the media through publication of ombudsmen reports and
suggestions from the human rights commissions, as that has not shown substantial or

\textsuperscript{131} Eid, Elisabeth and Hoori Hamboyan, “Implementation by Canada of Its International Human Rights
Treaty Obligations: Making Sense Out of the Nonsensical” in Fitzgerald et al., eds., The Globalized Rule of
\textsuperscript{132} Supra note 57 at 178.
\textsuperscript{133} Supra note 131 at 449.
\textsuperscript{134} Supra note 84at 477.
effective results thus far in making Canada accountable for human rights violations suffered by prisoners.

It is important to note that Canadian legislation, whether federal, provincial or territorial, may already implement the nation’s international treaty obligations. Unfortunately, the method adopted by Canada to implement its international human rights agreement obligations is by the reliance upon existing legislation which is investigated prior to adherence.\textsuperscript{135} Although federal, provincial and territorial legislation and policies are investigated to ensure they conform to the treaty obligation, there is no “public record listing the legislation, programs, and policies that were relied upon for the purposes of treaty adherence”.\textsuperscript{136} Having a compilation of the legislation relied upon for adherence available to the courts may assist them in an adjudicative process dealing with the rights which Canada has explicitly agreed to protect and promote through international agreements.

6. CONCLUSION

Other than the right to liberty, prisoners are deserving of the same human rights as other members of society. Although there are many sources of human rights and prisoners’ rights, there is no explicit human right to water in any international instrument relevant to inmates. “Without access to safe drinking water, many other human rights, such as the

\textsuperscript{135} Supra note 131 at 450.
\textsuperscript{136} Ibid. at 459.
right to life and the right to food, become academic”. Thankfully, an implicit right to water exists within the ICESCR. However, any right to water granted under the ICESCR is ineffective for a number of reasons, including problems associated with the requirement of progressive realization and lack of an effective complaints mechanism. A core human right, such as water, that is essential for the fulfillment of other rights contained in the ICESCR and other international instruments, should not be left to progressive realization. The ICESCR could be put to immediate use in protecting the human right to water if there was a shift in the CESCR’s focus. This shift would be from assessing what is progressive realization to identifying what constitutes a violation of the ICESCR. The CESCR, although charged with monitoring the implementation of the ICESCR rights, is unable to quantify state performance in any meaningful way due to the vagueness of what progressive realization means for each State party and for each right. By adopting a violations approach to monitoring the realization of rights, the CESCR would have an easier time assessing state implementation of covenant rights.

Another obstacle to prisoners' realizing a right to water is that the ICESCR lacks an effective complaint mechanism, such as those available under Canadian domestic law via ombudsmen. Using the existing international treaty and grievance system to make a complaint would be an ambiguous argument to make as there are only implicit rights under the ICESCR and hopeful, but imaginary, rights provided by the ICCPR. Although the draft ICESCR-OP will allow for individuals to communicate violations, the entire process is far too lengthy for a prisoner in need of clean drinking water and water for

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sanitation. Not only is the process inherently slow, but the CESCR, which acts as the investigative body for such complaints, already has difficulty managing its current workload.

Unlike the international system, the obstacles within Canadian domestic law are not caused by a lack of institutions and mechanisms designed to protect human rights, but rather with the implementation of those systems. Canadian legislation, like international law, does not contain a human right to water for prisoners, but it does provide inmates with several avenues of redress by both judicial and non-judicial means. These grievance procedures, while still slow, are faster than the proposed process provided under the ICESCR-OP and while seeking formal judicial remedies may not be financially accessible to inmates the various ombudsmen are.

Overall, the absence of recognition and grievance procedure internationally under the various treaties and instruments is disappointing, especially given proclamations stating the United Nations support for the protection of human rights.
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