Meeting 9: Rights to water: strengthening the claims of poor people to improved access

Speakers: Lyla Mehta, Institute of Development Studies
Bruce Lankford, University of East Anglia

Chair: Peter Newborne, Overseas Development Institute

Meeting Summary

The first speaker, Lyla Mehta, opened by emphasising that a large number of poor people lack access to rights, including economic and social rights such as the right to water, and provided a number of reasons for this. She argued that the human right to water, and the nature of water itself, remained controversial. Mehta used South Africa's Free Basic Water Policy to discuss the trade offs, challenges and lessons that arose from the implementation of the right to water, particularly emphasising the difficulties associated with an attempt to reconcile rights and markets. She concluded by arguing that financial allocations are the result of social choices and that the Millennium Development Goal on water and sanitation could therefore be met if governments and their citizens chose to prioritise it.

The focus for the second speaker, Bruce Lankford, was the use of rights to allocate water between different users. He discussed a World Bank programme that had supported the introduction of a formal (paper) rights system in southern Tanzania. Lankford argued that this system had failed to manage water allocation in practice and highlighted ten reasons for this. He then suggested how the system might be improved, stressing the need for a three-phase view of water management that recognised the different functions of water and attempted to manage its allocation between different sectors in different seasons. He concluded by distinguishing between rights as a guiding principle and the role that rights took on in practice, suggesting that the objective should be a process that distils water rights into manageable operational strategies.

The question of whether rights or development discourses generate greater social and political change was posed during discussion. It was felt that the MDG framework might have a higher international profile but that the rights framework is more able to support local struggles. The difficulties associated with poor people claiming their rights through formal judicial processes were acknowledged but it was suggested that rights can be a force for social mobilisation nevertheless. It was less clear how the human rights machinery can be used to prevent macroeconomic processes impinging on economic, social and cultural rights.

Lyla Mehta

Today I will address two issues. Firstly, I will talk about the human right to water and what this means in terms of implementation. Secondly, I will discuss access to economic, social and cultural rights and, in particular, the reasons why so many marginalised and poor people lack access to them. I will be focusing on formal, rather than customary, rights.

Access to economic and social rights

So why is this important? People who are concerned with human rights and a rights-based approach to development would usually acknowledge that large numbers of people, and particularly the poor and the marginalised, do not have access to rights. The poor often lack access to positive rights, such the right to water or food. Often this is because governments do not prioritise the imperative to provide education, food, water and housing to all. They may also lack the necessary resources and institutional capacity to do so. Furthermore, as in the case of South Africa, even where such rights are given priority, there can be many implementation problems. These could be called the sins or acts of omission that prevent economic, social and cultural rights from being realised.

The realisation of economic and social rights, such as the right to food, water or education, is clearly fundamental to the achievement of the Millennium Development Goals (MDGs). However, as my case study demonstrates, paradoxes and contradictions arise on the ground for a number of reasons. Firstly, there is often a dual commitment to both markets and rights that compromises basic rights. Secondly, rights violations can be a result of poor institutional capacity, particularly at local level. Thirdly, low resource allocation can impede the realisation of social and economic rights. Fourthly, a lack of effective accountability mechanisms can mean that duty-bearers are not held to account. Finally, states could knowingly put rights as risk as a result of macroeconomic policies that promote cut offs and disconnections. These could be called sins or acts of commission on the part of states (Mehta and Ntshona, 2004).

'... in dominant framings and global policy debates, the notion that water is an economic good is paramount ...'

I will now focus on three subjects. Firstly, I will examine whether there is a human right to water. Secondly, I will provide a more detailed case study of South Africa, the research for which was done together with ODI as part of the 'Sustainable Livelihoods and Southern Africa' project.1 Finally, I will conclude with lessons and challenges.

The human right to water

That there should be a human right to water seems obvious because water is so fundamental to life. It is not explicitly mentioned in the 1948 Universal Declaration on Human Rights, however. Many people have asked why. Is it because the drafters thought that it was so obvious that it did not need to be explicitly mentioned? Many commentators now conclude that it was implicitly mentioned, because it was acknowledged and because water is fundamental to other basic rights, such as food, health and development. Where it is explicitly mentioned is in the Convention on the Rights of the Child. In 2002 the UN Committee on Economic, Social and Cultural Rights provided a legal interpretation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), one of the two covenants of the 1948 Declaration. In its General Comment 15, the Committee explicitly recognised the human right to water and stressed its importance in realising other human rights. The responsibility for the realisation of this right was laid on the state, which was seen to have an obligation to progressively realise the right to water, defined as the 'provision of sufficient, safe and affordable water for everyone'.

However, despite this legal basis, the right to water is still controversial for two reasons:

i. There is a problematic division between civil and political rights and economic, social and cultural rights. Whilst, in theory, human rights are indivisible, in practice the belief remains that civil and political rights need to be realised before the rights to food, water, etc. Time constraints mean that I cannot go into the debates here but suffice it to say that a lot of these assumptions are flawed because all rights require commitment, political will and resources.
ii. There is an ideological tussle and contestations about what water is – is it a right, a commodity or a good? Of course, in the village context, it is a bit of everything. However, in dominant framings and global policy debates, the notion that water is an economic good is paramount and powerful players, such as the Word Bank or the International Monetary Fund, do not acknowledge the human right to water.

South Africa and the Free Basic Water policy

As the only country that recognises the constitutional right to water, South Africa stands out and should be commended because it goes against the grain of international debates and discourses. Since 2000, the South African Department for Water Affairs and Forestry has been investigating providing a basic level of water free to all citizens and, in 2001, the Free Basic Water (FBW) policy was declared. This policy basically means that all households will get 6000 litres of safe water free per month, assuming that the household size is eight people. This translates to about 25 litres per person per day. This right is legally enshrined in the Constitution and the Water Services Act 107 of 1987 and is funded through 'equitable share', which is Rand 3 billion a year and is transferred from central to the various lower levels of government.

As it is such a progressive policy, many South African bureaucrats understandably become defensive when it is criticised. I would like to state up front that, even though I may be talking about

problems in the FBW policy, I think the fact that this exists is very good. I am just trying to highlight some of the issues.

There are some contradictions in South Africa's water domain. Even though the FBW goes against the grain of conventional wisdom in the water sector, which would rather see water as an economic good rather than as a human right, I would argue that they are trying to dance to the dual tune of rights and markets. This may be fine in some contexts but what does it mean in the context of providing water to rural areas? In South Africa, as everywhere, there have been 'behind the border' policy convergences, that is, influence from the IMF and the World Bank in support of shifting the role of the state from provider to regulator and the promotion of measures such as privatisation, cost recovery and user fees privatisation. This is not unusual, as anyone who keeps track of the water sector knows.

The South African case is quite interesting because there has been a clear shift from the Reconstruction and Development Programme (RPD) commitments to infrastructure and services for all based on the assumption of universal entitlements towards a cost recovery approach in the Growth, Reconstruction, Employment and Redistribution (GEAR) policies. This has partly led to some controversial measures in the water sector, such as the disconnection of customers and massive price hikes, which can seriously impinge on the right to water. These have also been linked to cholera outbreaks and other problems.

Another problem has arisen when households have used more than the basic amount and then found that they are facing disconnection because they are unable to pay. Often the free amount has not been enough for large families. Moreover, the billing system is often inconsistent and confusing. As a result, there are many legal cases in South Africa examining what has happened when the court found that certain people, usually women and Africans, could not pay, with some commentators arguing that such disconnections are justified and other claiming that these violate their constitutional right to water because there is a right to the basic level of water supply irrespective of the ability to pay.

Something else that happened as a result of the GEAR policy was a decrease in grants and subsidies to local municipalities and city councils. This forced many cash-strapped local authorities to turn towards partnerships, privatisation and the contracting of consultants to maintain water service delivery. There were also a number of increases in the cost of water, with some researchers claiming increases by as much as 300% in several towns as a result of water privatisation.

Implementing Free Basic Water in the Eastern Cape

Let me know turn to the research that I undertook with Zolile Ntshona in the Eastern Cape. This research was part of the DFID funded Sustainable Livelihoods in Southern Africa Programme. We did research in two district municipalities in the Eastern Cape, which is the poorest of South Africa's nine provinces. These district municipalities were part of the former Transkei – the homeland areas – and have very high unemployment and poor access to basic services. The two districts only provide acceptable access to safe water for 13% and 15% of its population respectively.

The FBW policy was conceived at the national level but its implementation largely rests with local authorities and service providers who can interpret the policy according to their capacity and financial resources. When I interviewed bureaucrats from the Eastern Cape in 2002, there was much confusion about the FBW policy and many expressed the feeling that they could not cope with the municipal responsibility because the municipality did not have sufficient financial resources.

'... people were not aware of their basic right to water .... If an individual is not aware of their right, how can they mobilise around it?'

Difficulties also arose from the need to monitor water usage under cost recovery programmes. It was expensive to install meters and the 'build, operate, train and transfer' scheme relied on outside consultants and experts and expensive technology. In many cases, it was decided that these difficulties meant that it did not make sense to try to recover costs. As one consultant commented, it is like giving a Rolls Royce to someone who can barely manage with a bicycle.

I will now look at some of the impacts and trade offs. It is clear that there have been positive benefits, such as the improvement in the lives of many women. For example, if we take the case of one 61-year old widowed pensioner, she used to walk to the stream to collect water but she is now able to get water from a tap and use the free basic water for washing, drinking, cooking, etc. On the other hand, many people have argued that 25 litres is at the minimum of what is recommended (the WHO standards range between 50-100 litres, with an absolute minimum of 20) and that it does not provide for vital livelihoods activities. For instance, many people require water to grow their subsistence crops and the 25 litres is not enough to also provide for farming activities during periods of scarcity. In this sense, therefore, the FBW fails to support the right to food.

Another problem was that many people were not aware of their basic right to water and the FBW policy and one could ask whether this then constitutes a right. If an individual is not aware of their right, how can they mobilise around it? These were some of the tricky questions that we encountered.

Lessons and challenges

I will now talk about some of the lessons and challenges. One key lesson was that, in cash-strapped provinces that had a massive backlog, such as the Eastern Cape, it was difficult to combine the provision of free water with cost recovery programmes. The dual commitment to

rights and markets may have been workable in urban areas where there are bulk consumers of water, making cross-subsidisation possible, but it was difficult in rural areas. However, even in urban areas, cost recovery often ran counter to realising economic and social rights because it led to disconnections. Such disconnections have been the subject of legal interpretation in South Africa. Social policy experts have also joined the debate arguing that markets, as social institutions, may provide more efficient services. This can be at the cost of realising economic and social rights, however.

There has been much mobilisation around rights in the South African case, including the contestation of water disconnections within townships, leading to the involvement of the constitutional court. However, it is clear that the utilisation of legal redress is dependent on the ability to mobilise, access lawyers and present a persuasive case and there have been variable outcomes. It is also clear that there are many difficulties with this course of action in rural areas, such as the Eastern Cape, where people are not even aware of their rights and where the mediators of justice are not really present.

'... cost recovery often ran counter to realising economic and social rights because it led to disconnections.'

There is also ambiguity about who the duty-bearers actually are in relation to the right to water. The state is still viewed as the primary duty-bearer, despite the proliferation of new actors resulting from economic globalisation. However, if a private actor is responsible for executing a disconnection or refuses to fulfil economic and social rights, who do we hold accountable? The state's attempt to fulfil multiple roles – as enforcer, regulator and facilitator – leads to schizophrenia.

A final point about the implementation of the human right to water is that it largely rests on political will. South Africa has gone a long way in actually enshrining the right to water in its constitution. However, where it needs to pay more attention is in relation to the resource and institutional implications of this obligation. It also needs to address the poverty and livelihood implications in respect of the claim that 25 litres per person per day is not sufficient and the state should be providing 50-100 litres.

Let me conclude by saying that, in order to promote the human right to water and avoid some of the sins of omission and commission that I mentioned earlier, we must look at several issues, such as resource implications, institutional capacity and the issue of politics and political will. Financial allocations are the result of social choices that states, local government and people make. The Water Supply Collaborative Council claims that, through low-cost technology, it would cost US$9-15 billion to achieve the MDG on water and sanitation. This is a lot of money but we should remember that just one of the cruise missile that is being used in Iraq costs about $2.5 million and that the US government spends this amount on defence every 10-15 days.

Endnotes

1 http://www.ids.ac.uk/ids/env/SLSA/index.html

Bruce Lankford

I am going to switch the discussion in two ways: from domestic water rights to productive and environmental rights issues and from a discussion about providing the right to water to how rights are involved in reallocating water between sectors.

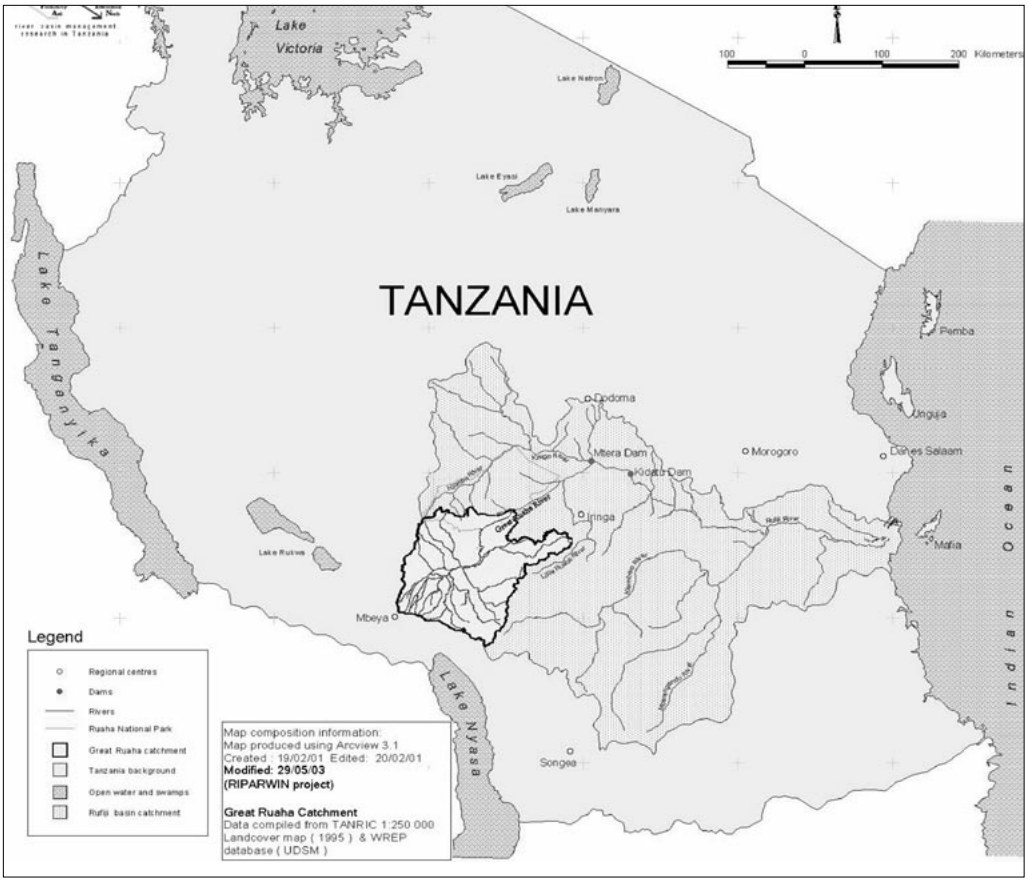
Water usage in South Tanzania

I am going to use a case study that I have been involved with Tanzania for 5-6 years.[1] It began with the SMUWC (Sustainable Management of the Usangu Wetland and its Catchments) project, which I helped to design and which led to another DFID-funded project called RIPARWIN (Realising Irrigation Productivity and Releasing Water for Intersectoral Needs) that is coming to the end of its fourth year.

The case study is in South Tanzania in the Great Ruaha river basin, which is well known in Tanzania because it is where about 50-60% of its hydropower is generated, 14% of its rice grown and because it also contains the Ihefu wetland that feeds water though the Ruaha National Park. This river changed from being a perennial river in the 1980s to being a seasonal river in the 1990s and one of the big issues is how to reverse this.
The project that we are studying is essentially about allocation of water between different and competing sectors. There is the Ihefu wetland, which gives rise to a single river that is now seasonal. A series of seasonal and perennial rivers feed into this wetland and the overflow gives rise to the Ruaha River. There is therefore an allocation of water between rice irrigation, the wetlands, the National Park and then downstream to Mtera/ Kidatu hydropower generating stations.

The watershed of the Usangu escarpment generates the water from rainfall and that run off is shared by many sectors as it moves through the river basin. So, for example, we see irrigation intakes trapping water and, at the same time, there has been a switch from traditional to modern intakes as a result of technological change. This is critically important because they are closely associated with donor-funded programmes that I am going to talk about which has overseen the shift from informal to formal water rights. Furthermore, the switch from traditional to modern intakes has resulted in a transformation of their form and function.

Water is also required for other purposes, such as for domestic use, livestock and grazing. It is also used by fisher-people and for the Ihefu wetland, the Ruaha National Park and downstream hydropower. So here we can see six sectors that share this water and the aim of the water rights programme implemented by the World Bank has been to try to manage this allocation. In doing this they have, in a sense, presided over a switch from domestic water rights to one where water rights have become a command and control tool with which to manage allocation. As I will explain, this has been problematic in Tanzania.



'The paper water rights system appears to have increased conflict.'

Using formal water rights to manage allocation

Inter- and intra-sectoral allocation has been managed mainly through formal water rights issued by the Basin Water Office. These rights attempt to curtail upstream irrigation abstraction to provide an overflow downstream so water is shifted from so-called low- to high-productive uses. However, in reality, abstraction has been affected more by the shift in technology from traditional to modern intakes than by the water rights themselves. The paper water rights system appears to have increased conflict.

In the mid-1990s, water rights were implemented by the World Bank through a large (about US$21 million) programme called the RBMSIIP (River Basin Management and Smallholder Irrigation Improvement Programme). This was essentially experimental integrated water resource management (IWRM). Water rights were expressed as formal flows (e.g. 200 litres per second) that users could purchase. An application cost US$40 and there was a flat rate of $35 per year and a pro rata rate of $0.035 per m3. The rationale, which can be found on the World Bank's website, is the 'enhancement of water fees ... as an incentive for water conservation ... and as a source of funds for water regulation activities, catchment conservation and water resources monitoring' and that 'economic instruments include water pricing, charges, penalties and incentives ... [can] be used to stimulate marketing mechanisms and serve as an incentive to conserve water'. In other words, farmers would somehow derive value from having paid for a water right and, according to the World Bank, this would mean that they would then use less water and more water would therefore shift downstream.

This failed in many ways. It is interesting that some of the programme's objectives could be considered in the first place because they are so ill-designed given the dynamics of the hydrology found in that part of the Tanzania. I will take you through ten fault-lines:

i. the programme did not recognise existing customary water rights;
ii. it failed to accommodate variations in water supply owing to rainfall and seasonality and therefore failed to take into account what happened during the dry season. This meant that, for example, 200 litres/second could be given to one intake, 200 litres/second to another and 500 litres/second to another, etc. but that during the dry season there may only be 200 litres/second available, which could then be legitimately taken by the first upstream intake;
iii. there could be no relationship between the paper water rights and the water that was actually taken because there were no measuring structures in place;
iv. it was not related to the actual discharge capacities of the new intakes;
v. it was not related to the demand of irrigation systems;
vi. when cumulatively added to other water rights, it bore no relation to the overall supply in the river system during either the wet or dry season;
vii. government could not provide a guarantee for the rights;
viii. it was not related to the services that were provided by government;
ix. it could not be requested and 'bought' by those who could not abstract water such as fisher-people and cattle keepers; and
x. it is very difficult to update the system to reflect the constantly changing situation.

'... the need to distinguish between rights as a guiding principle ... and the other roles that rights take on in practice ...'

It also created a situation in which users negotiate with the government rather than each other. The outcome of this was that it: legitimised increased abstraction upstream intakes; reduced water for downstream users; was associated with a much higher incidence of conflict; made it much more difficult for local people to rearrange their water supplies during the dry season because some upstream uptakes had claimed water rights; and it cost more to administer the scheme than was received in income. It therefore failed as a cost-recovery, water management and registration tool and it is now a very complex system to refine and retune.

A workable water management system?

As it is highly unlikely that the Tanzanian government is going to throw out this confusing system of paper water rights, the Basin Water Office and I have attempted to think of ways in which it can be built on and improved. I will briefly take you though some ideas that have come out of this discussion based on the three-phase view of water management.

I see water as being divided into three phases:

i. Critical water, which involves very small volumes of water that are needed for domestic uses.
ii. Scarce or medial water, which, in places like southern Africa, usually covers relatively small amounts of water.
iii. Bulk water, which is quite rare and occurs only in wet seasons or years.

I think there is a need to think about the way water has different functions in these three phases and to base any water management system on this. In other words, the rationale of such a system is to manage the trade offs between these different sectors, including domestic usage, in the wet and dry seasons. It is therefore about managing small critical amounts of water in the dry season and bulk water in the wet season.

We have also devised a river basin conflict management tool, which is a game where users fight over glass marbles in the upstream to get all the marbles downstream. Using the tool we could consider three principles to facilitate a meaningful dialogue at catchment level and move forward from the World Bank-instituted rights system:

i. Engage with water users in ways that support and develop water arrangements at the catchment level, and match river basin

allocation challenges.

ii. Allocate water permits to match the hydrology, and revised capacity, of all the intakes on the catchment not individual intakes.

iii. Re-design irrigation intakes so they help support allocation of water during the bulk phase (based on maximum intake capacities and formal rights) and allocation of water during the scarce phase (based on adjustment and informal rights). This is the framework for the revision of intakes and for designing the role of formal permits and informal arrangements in wet and dry seasons. The key thing here is, of course, to redesign the intakes so that they match the ability to control abstraction.

Translating principles into practice

An interesting discussion point is the need to distinguish between rights as a guiding principle, which is the characterisation of rights that we often see in texts about IWRM, and the three other roles that rights take on in practice, that is, as a: delivery goal, a water management tool (and in particular how we allow customary rights to play their role in scarce-water phases), and as a formal tool to manage bulk water. I see a disjuncture between rights as guiding principle and rights as they operate within water management and I think that this World Bank case study shows up those varying deficiencies, which meant that the rights on paper could not make sense of what was occurring on the ground.

To my mind, the question is how to translate the IWRM principles, which represent water as human, environmental and economic rights, into interventions that actually solve problems. How do we work with a continuum of rights, policy, strategy, legislation and, critically, field operations that make a difference and solve problems? The process of distilling water rights into operational strategies is key and I think that we should be guided by principles but focus on the question of ease of manageability. Intakes in Tanzania did not relate to the paper water rights so they were not easing manageability. If those intakes are redesigned, this will assist the paper water rights system, improve manageability and allow us to address the problems that arise in the three phases: critical, scarce (or medial) and bulk.

Endnotes

1 For further details see Lankford and Mwaruvanda (2005); van Koppen et al. (2004).

Right to water: legal forms, political channels‡

*Peter Newborne**

A recent initiative of the UN has raised to prominence the right to water. Framed in General Comment no. 15, a non-legally binding document, the right as thus interpreted by the UN Committee on Economic, Social and Cultural (ESC) Rights was nonetheless designed to promote binding and enforceable rights under national laws, as a step towards filling the gaps in water services. Whilst this goal is generally accepted, responses to the General Comment have been widely divergent, and discussion of the human right to water mixed with argument over private *versus* public services and pro- and anti-'commodification' of water.

Analysis of three principal legal forms of a right to water – respectively, as a human right, contractual right and property right – helps to understand these divergences. All three legal forms are intended to give rise to legally binding and enforceable rights of access. All are in process of conversion into practice, somewhere. Yet, at the same time as proponents of the latter two quite commonly disregard the human right, or place it as a distant third, advocates of a human right approach criticise – some bitterly – the manner of application of property and contract law in the water sector.

Below, each of these three types of legal construction of rights of access is presented in turn, together with reference to supporting development discourse. A comparison is then made of their key characteristics, to identify common ground, and issues for debate.

Civil and political (CP) aspects are important in all three undermining equitable allocation. Whilst the focus of General Comment 15 is on extending individual access to domestic water supply, it is frequently at the water source that fundamental competition for water resources is played out. More attention should, therefore, particularly be paid to 'upstream' processes of assessment and grant of rights, including permissions for abstraction or diversion from water sources 'in bulk'.

1. Right to water – as a human right

The formulation of the right to water as an ESC right represents a double challenge. As the President of the World Bank has recently commented, to some any talk of 'rights' is inflammatory. Even among development practitioners, there is widely differing familiarity with, and use of, rights discourse. Further, despite the 'indivisibility' of human rights in principle, and the ratification by many States on paper of the two international covenants on ESC rights and CP rights, the reality is that ESC rights have yet to win an equivalent degree of recognition as that attained by CP rights.

General Comment no. 15 interprets Articles 11 and 12 of the International Covenant on Economic and Social Rights (ICESCR) referring, respectively, to the right to an adequate standard of living and the highest attainable standard of health. Consistent with this, the right to water as so interpreted applies primarily to water of acceptable quality 'for personal and domestic uses' – in effect a focus on water supply and sanitation (WSS). The need for access to water for farming and other productive uses is referred to, but, whilst 'water is required for a range of different purposes', to realise many other rights, e.g. to secure livelihoods … 'nevertheless, priority in the allocation of water must be given to the right to water for personal and domestic uses'.

Integrating the obligation under ICESCR Article 2, the General Comment provides for 'progressive realization' of the right, acknowledging 'constraints due to the limits of available resources'. Obligations with immediate effect are to take steps *towards* full realization – and to guarantee non-discrimination. It also refers to a 'special responsibility' on 'the economically developed States parties' to assist the 'poorer developing States' e.g. by 'provision of financial and technical assistance and necessary aid'.

Some sceptics of the human right seem to have misinterpreted it as a right to free water, but an important feature is 'economic accessibility' of water and water services, defined as 'affordable'.

Publication of the General Comment was timed for the sector's biggest international event, the *World Water Forum*, most recently held in March 2003 in Kyoto. The World Health Organisation was among supporters of this innovation, on the basis that, by constituting a human right, governments would better target resources to those lacking WSS facilities and those least served would be more able to claim them: 'a rights-based approach integrates the norms, standards and principles of the international human rights system into the plans, policies of development' (as stated in the WHO publication at the Forum).

The human right to water also forms a central plank of advocacy by non-governmental organisations for extension of improved WSS services in developing countries. The international NGO, *WaterAid*, has recently created, with partners, a special website

on the Right to Water in which it states that: '…recognising water as a human right' is 'a further tool for citizens and states to use to ensure that there is universal enjoyment of the right to water. This does not mean that overnight all people will gain access to water' or that 'the other routes currently being used to access water should cease; the right to water is simply a further tool' which 'is only powerful if governments and civil society recognise and publicise the right'.

According to a recent study (COHRE, 2004), as yet only South Africa has matched an explicit right to water in its constitution with an explicit right in implementing legislation. COHRE does cite other domestic jurisdictions where issues of accessibility or affordability of water for domestic use are addressed in existing laws. The list of countries to-date incorporating in domestic law either explicitly a human right to water or corresponding obligations on the State to ensure its provision is at present short – but the process is still young.

That it will take considerable time is suggested by the World Bank's World Development Report 2004, 'Making Services Work for Poor People'. Its treatment of health and nutrition services is markedly different from that for drinking water and sanitation. Whereas the WDR recognises that most countries have constitutions that express some commitment to universal access or rights to health care, in relation to water and sanitation there is no mention of such protection and no reference to the human right to water.

So, whilst significant variation between countries in resource availability is no doubt a major issue and governments do not want to be sued for failure to meet obligations which they consider they are presently unable to discharge, it seems that the Bank will not officially recognise a right until a critical mass of its member countries have done so.

2. Right to water – as a contractual right

A second legal means for legitimising a right to water is by contract – under contracts for supply of water services, between a service provider (public or private) and a user, or household of users. The nature of the rights (and obligations) arising depends on each contract's specific terms in the country context – including terms prescribed by regulation. A key term will generally be that the services are supplied in consideration for payment. Cost-recovery from users is seen as an essential means of financing water facilities.

Another high-profile document at Kyoto was the report by the 'World Panel on Financing Water Infrastructure'. The task of the panel of financial experts, chaired by Michel Camdessus, former Director of the International Monetary Fund, was 'to address the ways and means of attracting new financial resources' for 'Financing Water For All' (thus, at least in principle, acknowledging the importance of universality).

In the Camdessus Report there is one mention only of the human right to water. The General Comment is referred to in a preliminary section, but is clearly not seen as setting an agenda, or even a framework, for action. There is no place in the Report's more than 80 recommendations for steps of any kind relating to its realisation (e.g. monitoring of its observance). The goal is seen in terms not of a right of the poor but the 'enabling environment' in which the poor will be able to pay for their own water. The 'matrix of rights and obligations' referred to is of those contractual and legal ones 'that make up a bankable project' including 'its commercial and funding structure'. So, the 'dream' (Chairman's Foreword) of provision of pure water to all will become reality when the necessary financial mechanisms are put in place in all countries.

The Report, however, explicitly recognises limits on affordability. The 'ideal long-term aim' for WSS is 'full cost recovery from users' although in the short term grants are needed, since 'some subsidy is inevitable' for 'poor, isolated or rural communities' where 'affordability is a distant prospect'. 'Tariffs will need to rise in many cases, but the flexible and imaginative use of targeted subsidies to the truly poor will be called for to make cost recovery acceptable, affordable and so sustainable'.

Targeted subsidies may of course include cross-subsidies between those who can and those who cannot pay. An example is the recent amendment to law and practice in England, which removes the right of water companies to disconnect the supply for residential premises and other premises such as schools, children's homes, hospitals, etc. (Box 1).

Box 1: Example of the Right to Water Supply

In the words of a public official at the UK Department of Environment, Food and Rural Affairs (DEFRA) describing this provision of the Water Industry Act 1999 (amending Section 6, WIA 1991): 'The Government believes that water is essential for life and health and it cannot be right for anyone to be deprived of it simply because they cannot afford to pay their bill. The industry regulator … monitors the debt situation and, where the water companies' customer debt increases greatly, it may take this into account in setting companies' price limits. Higher price limits mean that the cost of a company's bad debt will be spread out over their whole customer base.'

If a customer is struggling to pay, s/he will continue to receive water. The requirement of payment remains, but continuance of supply is not specifically conditional on payment, i.e. the duty is 'de-coupled' from the right. So, whilst the customer's arrears of water charges is a legally enforceable debt, water companies may decide not to take court proceedings to recover it. The loss of revenue will be recuperated by other means.

In principle, therefore, the issue of payment need not be a sticking point between proponents of the General Comment and the Camdessus Report. In practice, the reality is that subsidies are costly, and complex to administer, so their use, including their 'pro-poor' targeting, remains a key issue for debate.

3. Right to water – as a property right

A third legal form for assertion of a legal claim to access to water is as a property right, increasingly a right granted by the state to holders of official permits to abstract water from a water source. Such so-called 'formalisation' schemes are already operating or are being introduced in many developing countries. A particular challenge is how these state systems take account of the diversity of existing arrangements for sharing water, including allocation rules based on custom and tradition which are common in more remote – often poorer – areas.

Formalisation has been promoted by international development agencies. For example, in the World Bank's 'Water Resources Sector Strategy: Managing and Developing Water Resources to Reduce Poverty', published just before Kyoto, four countries are cited – Brazil, Mexico, South Africa and Chile – as examples of countries pursuing formalisation where 'there has been substantial progress in recent years'. Whilst recognising that '…there is no unanimity on the concept of water [property] rights, for some see it as an unhealthy commodification of a public good' and that it is not '…simple to introduce rights-based systems for a fugitive resource in administratively weak environments with deep cultural implications', the Bank nevertheless promotes formal registration. A key objective is to provide security and certainty of legal title so that rights-holders may defend and assert their water rights vis-a-vis third parties, may trade them, and use them as collateral for raising finance. For example, the Mexican water rights regime introduced by the 1992 *Ley de Aguas Nacionales* emphasises transferability.

Others question the wisdom of applying this approach unselectively. Whilst traditional systems are not always equitable (or sustainable), nonetheless, as a leading work expresses it (Bruns & Meinzen-Dick, 2000) where states move '…to encompass these local water societies into government systems…almost inevitably, this transformation has altered locally-constituted rules of access to water, often producing state water rights that are a mere parody of the original access rules… these [formalised] rights almost always are less attuned to the particularities of place and time…'.

4. The three rights compared

Table 1 compares key characteristics of these three legal rights to water. A common preoccupation is security: under all three forms the right to water is to be legally binding and enforceable, as a legal 'guarantee' of security (though different types of security, as per the Table).

Uniquely, under the *human right* (consistent with its intended role of setting a normative framework), the availability of affordable water *for all* is explicit, a necessary condition in all cases. Contractual models and accompanying regulation may slowly be moving in that direction, but in the meantime obligations of supply will tend to be carefully delimited in many countries, with only gradual extension of services to areas yielding the lowest rates of cost recovery.

The *contractual* right of access, typically for supply to (individual) households or premises at the 'pipe-end', will depend on the (bulk) permits accorded to service providers, i.e. on the property rights regime. The latter takes effect 'upstream' ('river-end') so is in practice prior in time/space to the former (if not actually in right). This makes the position of administrators to whom assessment and registration of property claims have been delegated (e.g. in a public water rights registry) powerful – and subject to political pressure. As one commentator expresses it, the administrative processes for disposition of the new water rights '…risk being heavily biased towards those who are wealthier, better educated and politically more powerful, perhaps increasing inequity and hurting those who are poorer and more dependent on secure access to water' (Bruns, 1997).

Under the *property* rights regime, protection of the right of access for all persons requires specific regulation. For example, the reforms instituted by the 1998 National Water Act in South Africa are designed to promote 'equitable access to water', and to ensure that institutions 'have appropriate community, racial and gender representation'. These aims are, however, listed amongst eleven 'factors' to be taken into account. These cover a wide range of situations and reflect economic, social, and environmental perspectives which may be conflicting. The question arises which of the declared purposes will be most served in implementation of the Act. As noted above, the preoccupation of many formalisation schemes lies in stimulating trading in water rights – following a market model; if protection for marginalised and vulnerable groups is not

built in, their property claims are likely to receive lower priority.

General Comment 15 foresaw these difficulties. Despite its focus on WSS, it sought to place the human right to water in the wider context of water resources management. It includes the obligation on States parties to 'ensure that there is adequate access to water for subsistence farming' and the obligation on States parties to 'respect' includes refraining from 'any practice or activity that denies or limits equal access to adequate water; arbitrarily interfering with customary or traditional arrangements for water allocation'. Indigenous peoples' access to water resources on their ancestral lands is to be protected from encroachment and unlawful pollution. States should provide resources for them to design, deliver and control their access to water.

Table 1: Comparison of Legal Forms of the Right to Water

Characteristics	Human rights (as per General Comment 15)	Contractual right (under contracts for water services)	Property right (as per typical formalisation scheme
Security	Emphasis on security of person (health & nutrition, under ICESCR Arts 11 & 12)	Emphasis on security and continuity of supply	Emphasis on security of property and its continuity, to give certainty of title
Water use(s)	Focus on personal and domestic uses of each individual user	Typically, focus on urban use (including personal and domestic uses) under individual contracts for supply to premises	Can relate to both domestic and productive uses, in urban/rural contexts; will tend to operate through bigger 'bulk' abstraction permits, to municipality, irrigation district, community group etc.
Priority	Priority of personal/domestic use above other uses	Priority between uses not addressed by individual supply contracts: instead issue of public policy for regulator in service providers' terms of reference	Existence of priority in principle depends on enabling law/ regulations and in practice mechanisms applying it, including for mediating competing claims (agricultural, industrial, urban etc.)
Location/time	Focus on pipe-end, 'downstream', but also aspires to protect access 'upstream' at 'river-end' (or borehole).	Takes effect 'downstream', at pipe-end	Takes effect 'upstream' at river-end
Economic/ social	'Water should be treated as a social and cultural good, and not primarily as an economic good'	Focus on commercial and financial aspect, but contract may also reflect social concerns e.g. through tariffs	Focus on economic and financial aspects (e.g. tradeability and 'bankability')
Payment	Not free water, but 'affordable' with freedom from arbitrary disconnection…	Not free water – subject to payment	Typically, fee for registration of rights and regular charges during permit term
Universality?	…*for all*, irrespective of race etc.	Not specifically universalised, but tariffs may be designed to provide subsidies for poor; careful targeting will be required to reach poorest.	Not specifically 'pro-poor': water users follow permit application procedure; typically, expressed aim includes recognition of existing uses (including customary).

5. Right to participate: pursuing political channels

Such management of water allocation is necessarily political. CP aspects of the human right to water are touched upon in the General Comment: 'The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water'. However, the right to participate, under Article 25 of the International Covenant on Civil and Political Rights (ICCPR), has been fully interpreted in another General Comment, no. 25 – issued in July 1996 by the Human Rights Committee.

In General Comment 25, the connection between the right to participate and other CP rights is noted: 'Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organise themselves. This participation is supported by ensuring freedom of expression, assembly

and association' with 'full enjoyment and respect for the rights guaranteed in [ICCPR] articles 19, 21 and 22, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticise and oppose, to publish political material, to campaign for election and to advertise political ideas'. As noted, 'the right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by article 25'.

It is exercise of these CP rights which will be critical in the process towards realisation of the goal of sufficient accessible water for all. In practice, this means that water users, in seeking to assert and defend their claims (under each or all of the three legal forms), may most effectively combine different modes of action (Table 2) for a range of types of citizen action which may be pursued in the water domain.

Table 2: Political Participation and Related Citizen Action on Water Policy/Management

National	Representation or direct participation in national elected assembly/bodies	Public hearings • Engagement in national policy and planning processes such as PRSPs, sectoral planning • Lobbying for change through representational system • Open advocacy: intermediate groups supporting rights claims • Interactions with water officials • Informal advocacy through contacts, e.g. interactions with sympathetic officials • Engagement in local governance planning e.g. on public service priorities • Informal negotiation over entitlements to resources • Meetings between water users • Use of media and campaigning
State/provincial	Representation or participation in state/provincial elected bodies	
Regional	Representation or participation at river basin level in management 'councils'	
Local	Representation or participation in: • River management 'committees' at sub-basin level • Irrigation districts • Other associations of water users • Municipal/local elected bodies • Community groups	

Adapted from Moser and Norton (2001).

An innovation in many countries – noted in Box 2 – is the introduction of river basin councils and committees with openings for public participation (for example, under the EU 'Water Framework Directive'). In terms of future benefits from participation in these, much will depend on the power (alongside responsibility) which is genuinely transferred to these hydrographically-defined entities from conventional political and administrative bodies – i.e. this is a political channel with potential, but which needs to evolve if its value is to be realised in practice.

All these types of citizen action entail processes of dialogue, confrontation and negotiation, to arrive at recognition of rights – rights which may be incorporated, and by iterative process consolidated, in law.

6. Research agenda

In contexts of increasing demand and intensifying competition for water access, systems of allocation of water rights are very important, particularly 'upstream' property rights. Research is required to take stock of evolving formalisation practice. Issues for investigation include the following. How may citizen action be best applied in the water domain, particularly under property registration schemes, e.g. a first hurdle may be access to information held at 'public' registries? How is water access for poor populations and customary users being assessed and reflected in official titles – part of the wider search for equity of water allocation under formal and informal systems alike? How appropriate in relation to water is the concept of 'certainty' of title, especially in situations of increasing uncertainty caused by climatic phenomena? Land is a much less 'fugitive resource' than water, yet land registration has proved to be a complex process – and a long one. For example, in England and Wales, registration of interests in land is over a century old and national coverage is still uncompleted. An alternative 'fast-track' approach, as adopted for example in relation to water rights registration in Mexico, raises doubts as to how competing rights claims are being assessed and prioritised (if at all). On the basis that institutions and mechanisms for flexible and adaptable water resource management are needed, how is formal registration of water rights helping to meet the challenge?

Endnotes

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