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RIGHT TO WATER: LEGAL FORMS, POLITICAL CHANNELS

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

cases. Rights regimes are prone to political capture, 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'.

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

Figure 1. Comparison of Legal Forms of the Right to Water

Characteristics	Human Right 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).

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.

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.'

Box 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 & Norton (2001)

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.

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-à-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...'

The Three Rights Compared

Figure 1 (page 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 Figure 1).

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.

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 (Box 2) for a range of types of citizen action which may be pursued in the water domain.

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.

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?

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