

The United Nations Concept of Water as a Human Right: A New Paradigm for Old Problems?¹

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ABSTRACT Water history reveals millennia-old struggles over the ownership of water, the pollution and depletion of water sources, and conflicting water uses. What is new is the scale of these problems, particularly access to water for the poorest of the poor. This paper discusses the various conceptual responses to the water problématique, including the commodity, public and social approaches. The human rights aspects of the latter are analysed in some detail in light of the recent General Comment on the Right to Water by a United Nations body. The paper argues that countries have international legal obligations, to respect, protect and fulfil this right without discrimination, that carry clear implications for policy and practice. While the report does not argue that this human right requires the complete decommodification of water or that it provides a 'magic bullet' solution, it seeks to show the benefits of a human rights approach and provides some suggestions for implementing the right at the local, national and international levels.

Introduction

The water issues being faced today are not novel. A cursory glance at water history reveals millennia-old struggles over the ownership of water, the pollution and depletion of water sources, and conflicting water uses. What is new is the scale of the problem.

The current situation is depressingly well known. Over 1 billion individuals lack access to a basic supply of clean water (of whom 80% live in rural areas) (WHO & UNICEF, 2000, p. 1). Over 2 billion each year suffer from diseases linked to water (UN Commission on Sustainable Development, 1997, p. 39) and approximately 3900 children die each day from a lack of clean water and sanitation. Moreover, the poor in informal settlements often pay water vendors exorbitant prices for water, while women and children are denied opportunities for work and education since they are commonly assigned to water-carrying responsibilities.

Why are we here? Some of the immediate offending causes are as follows:

- Insufficient and decaying infrastructure for water delivery, particularly in deprived urban areas and rural areas.

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- Insufficient funding and capacity for the maintenance and expansion of water supply systems.
- Pollution of traditional water sources, particularly from human and animal waste, agricultural run-off and industrial waste.
- Reduced access to, and depletion of, water resources due to drought, population growth, armed conflict, and the dominance of commercial agricultural and industrial activities.²

Hence, the international community was prompted to confirm and set the Millennium Development Goals. By 2015, the proportion of people without access to safe drinking water and basic sanitation is to be halved (World Summit on Sustainable Development, Plan of Implementation, 2002, para. 7).

Different Approaches

In response to these various crises, a number of policies have emerged, which can be termed the 'Commodity Approach', the 'Public Approach', the 'Community or Local Approach' and the 'Social/Human Rights Approach'. The approaches are certainly not mutually exclusive, but all possess a different starting point.

Commodity Approach

From the late 1980s, the dominant paradigm in the water sector has been the economic or commodity approach.³ Economic and market tools are to be used to ensure the efficient provision of water. This approach has been strongly pushed by organizations such as the World Bank and the International Monetary Fund (IMF), a number of donor agencies and European multinational water companies. It has three different features:

- Water should be priced. The costs of providing water for drinking, agriculture and industry should be recovered. This view has qualified support from environmentalists concerned over the wastage of water and development practitioners who note that water utilities often lack sufficient finance to expand coverage.
- Water delivery should be opened to the market. Private provision of water services purportedly increases efficiency and provides capital for under-funded water utilities. While over 90% of the world's water is still supplied publicly, there is strong pressure for this to change. Many highly indebted countries have had no choice but to undertake some form of privatization of their water sector in order to secure debt relief.
- Water resources should be privately owned. This dimension has much less support, but the experience of the North American Free Trade Agreement (NAFTA) shows that under international trade law, governments may be limited in their ability to control water resources. Recent World Bank efforts to increase private ownership of land are also a cause for some concern, since access to land usually determines access to water. Further, in many countries, water laws are tilted in favour of private landowners.

Public Approach

Many advocacy groups and some social movements argue that all aspects of water need to be firmly under the control of government (Hall *et al.*, 2001). The public should therefore

be making decisions over the pricing of water (if it is to occur at all); water utilities should remain under government ownership; and all water resources should be subject to public ownership or, at minimum, efforts to privatize such resources should cease.

Community or Local Approach

Another response to the commodity approach is to emphasize the roles of communities and, partially, local governments and non-government organizations (NGOs) in water supply. This approach emphasizes the important roles that local communities, including indigenous peoples, can play in the sustainable management of water and the efficient provision of water through inexpensive systems.

Social/Human Rights Approach

Finally, there is social or consumer approach that has been increasingly framed in human rights terms. It is partly consistent with the public and community approaches, but not always. It emphasizes that human dignity comes first, and that universal access to sufficient water for basic needs is an absolute and non-negotiable priority. Governments and other actors must be made accountable for ensuring water is available, clean and affordable.

It is this last methodology that will be examined here, particularly in light of developments at the United Nations. It will be asked what are the consequences of the human rights approach for arguments that water is a commodity and the attainment of the Millennium Development Goals.

Human Right to Water

Legal Background

In November 2002, the United Nations Committee on Economic, Social and Cultural Rights adopted a General Comment on the Right to Water. It provides an authoritative, but not a legally binding, interpretation of the right to water under the International Covenant on Economic, Social and Cultural Rights. The Covenant has been ratified by 151 countries.⁴

This General Comment may be of some surprise. The word ‘water’ does not appear in the Covenant. Recent international *declarations*, including the recent Kyoto World Water Forum Ministerial Declaration, also do not mention the right to water.⁵ However, Article 11 of the Covenant states that everyone has the right to an adequate standard of living, including food, clothing and housing. The open-endedness of this wording—in particular the word ‘including’—permitted the Committee the interpretative freedom to recognize comparable basic rights.⁶ In undertaking this interpretative exercise, it is important to note that the Committee did not view the right as a frilly luxury: it is not the right to a swimming pool. Rather, it noted that it is one of the most fundamental conditions for survival, and thus necessary for the right to life.

Furthermore, the 1977 Mar Del Plata Declaration of the United Nations Water Conference clearly recognizes the right to water; likewise, Agenda 21 and the declaration of the 1994 Cairo Population conference. Other human rights treaties refer to water,

including the almost-universally ratified Convention on the Rights of the Child⁷ and the Convention on the Elimination of All Forms of Discrimination Against Women.⁸

Content of the Right to Water

It is one thing to recognize a human right, it is another to define what it means. One of the issues that arose late in the drafting process of the General Comment was the *collective nature* of the right. Some members of the Committee stated in public sessions that water not only was an individual right, but also it was also a public good. This position is now reflected in the sentence session of the General Comment.⁹ Technically, water is not a public good since it is divisible, unlike, for example, light emitted from streetlights. However, it is clear that the Committee was endeavouring to state that the preciousness of water demands that it not be treated as simply another resource. There is a strong public interest in water: it is a common good.¹⁰

The second issue was ‘water for what’? Most experts agree that everyone requires approximately 50 litres of water per day for personal and domestic needs, 20 litres at a minimum (e.g. Gleick, 1996). But water is also needed for food, for work and for environmental protection. The problem is that some people do not require water for these latter purposes, while others require large quantities. It is therefore difficult to determine the exact entitlement for these uses. Moreover, in water-scarce countries, there are often conflicts between such uses.

The Committee settled on a relatively narrow definition—water for personal and domestic uses: consumption, cooking, hygiene and, where necessary, sanitation (Committee on Economic, Social and Cultural Rights, 2002, para. 12(a)). However, the General Comment does briefly address other uses of water, e.g. water needed by poorer groups for growing food, relevant to rights to food and livelihood. The Committee emphasized that the right to food meant that efforts should be directed towards ‘ensuring that disadvantaged and marginalized farmers, including women farmers, have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology’ (Committee on Economic, Social and Cultural Rights, 2002, para. 7).

In countries such as Ethiopia, access to such technologies would certainly increase protection of subsistence farmers against threats of famine.

Key Elements of the Right

What does the right mean in concrete terms? The Committee identified five key elements (Committee on Economic, Social and Cultural Rights, 2002, para. 12). The first three are relatively straightforward. First, water must be available in sufficient quantity for personal and domestic needs; second, it must be of adequate quality; and third, it must be accessible to people within or in close proximity to their homes. In relation to quality, the Committee referred to the importance of the World Health Organization (WHO) Guidelines and the overwhelming importance of providing adequate sanitation; the widespread lack of sanitation is a prime cause of water contamination.

The fourth requirement is equal access. This is one of the benefits of the human rights approach; it goes beyond averages to look at the groups that are suffering, or likely to be suffering: those at risk of discrimination. The Committee referred extensively to the duty of government to confront the obstacles faced by an extensive range of groups in accessing

water, including women, people with disabilities, children, refugees, prisoners and nomadic communities.

The fifth element is the price of water. The Committee declined to state that water should be free, but stated that it should be affordable. While Agenda 21 states that water for basic needs should be free and other international documents indicate water should be priced, the Committee kept to its ends-oriented middle approach, which it has taken on almost all economic and social rights. Individuals should have sufficient income to purchase water and other basic goods and services necessary to realize their human rights.

Discretion is thus left to the government about the choice of the best means to make water affordable. The Committee noted governments could provide water for free or provide social assistance to the poorest groups. As a matter of policy, this open approach may be beneficial, as the following two case studies demonstrate. Each country situation should be appreciated in terms of its institutional structure and history before an appropriate policy on pricing is determined.

Some countries have provided water for free in accordance with the right to water. In South Africa, each person is to receive, without cost, 25 litres of water per day free, but is obliged to pay for any excess used. Unfortunately, the implementation of this policy has not been a complete success. Deprived areas were not provided the necessary funds to implement the policy, and the free amount of water is calculated on a household not an individual basis, which tends to disadvantage larger and poorer black families.

In Chile, with World Bank guidance, water was charged at the full price, but subsidies were provided to water companies in order to provide a free basic amount to low-income groups (Gómez-Lobo & Contreras, 2000). While this approach has been held up as a model for other countries, it has not always been successfully put into practice in Chile. Only 60% of the low-income groups benefited, while many middle-income families gained access to the scheme.¹¹ In contrast, Colombia provided subsidised water to all persons living in *low-income neighbourhoods*.

The other hidden issue of cost recovery is privatization. It is arguable that the motivation for the introduction of cost recovery in many countries was not water conservation or the raising of local capital to finance the expansion of water infrastructure. Rather, it was to make the system attractive for foreign investors. In Ghana, the price of water doubled overnight as the public water utility was being prepared for privatization.

Government's Domestic Obligations

The obligations of governments, at the domestic level, to realize the right to water can be broken down into three simple duties: respect, protect and fulfil (Committee on Economic, Social and Cultural Rights, 2002, Part III).

Respect. The duty to respect means that governments must not interfere unjustly with a person's access to water. This is an overlooked area in the water sector. Governments have the power to frustrate people's existing access to water and sanitation. In Europe, local and national authorities frequently deny Roma and Traveller communities equal access to water;¹² while the Government of Israel has severely restricted the access of Palestinians to water in the Occupied Territories (Center on Economic and Social Rights, 2003).

A related problem is disconnections. Households are often disconnected, in some cases for justifiable reasons, but often arbitrarily. When a household cannot pay for water,

disconnection should only proceed if there is an alternative adequate and appropriate water source.¹³ It is notable that some countries have banned outright disconnections of water services. Water utilities must use other means to recover payment.

This restriction on disconnections has important consequences for the realization of the Millennium Development Goals. We may successfully connect half the unserved population, but if there is no protection against disconnection, progress may be significantly negated. In South Africa, up to 10 million people have been connected to water systems since the end of apartheid. But the Minister for Water Affairs and Forestry in his 2003 budget speech acknowledged that the monthly rate of disconnections in the three largest municipalities was 17 800 households. While the Minister argues that many of the disconnections were only for short periods and the method for extrapolating the figures nation-wide has been the subject of fierce debate, the number of disconnections is undoubtedly significant. Therefore, a strong legal framework must be instituted and enforced at the national and local levels to prevent unfair disconnections. Courts in countries such as South Africa, Brazil and Argentina have declared unfair disconnections a violation of constitutional human rights.¹⁴

Informal settlements face an additional problem. They are denied the right to connect to public (or private) water systems. Local authorities commonly worry that providing water legitimizes the informal occupation of the land. But the General Comment is clear: a person's housing status should not influence their right to access water.¹⁵ Since informal settlements are home to a substantial proportion of the world's urban population, creative solutions need to be found. WaterAid, for example, has frequently acted as an intermediary between communities and local councils (Calaguas & Roaf, 2001).

Duty to protect. The duty to protect means governments must ensure individuals or corporate bodies do not infringe the water rights of others (Committee on Economic, Social and Cultural Rights, 2002, paras 23–24). While the Covenant does not place legal obligations directly on private actors, it requires that governments take action, e.g. ensuring oil companies do not pollute water resources. There are a growing number of legal cases on this subject. The African Commission on Human and People's Rights, for example, found Nigeria violated human rights to food and environmental health by failing to prevent Shell Oil polluting water resources.¹⁶

A second issue is privatization. The Committee refrained from declaring that private sector participation in water provision is contrary to the right to water. From its beginning, it has interpreted the Covenant to mean that states have flexibility in choosing their economic system. As former Committee member Paul Hunt has stated: 'international human rights law is interested in the *destination*—the full realisation of all human rights—and is less interested in the *road* by which that destination is reached' (Hunt, 2002, p. 2).

But the Committee is clear on three things. First, the involvement of the private sector must be consistent with *democratic principles*, particularly the right to participation. A close inspection of the privatization process in many countries shows a marked lack of participation. The government, often under international pressure, commences a process of privatization without consulting the public and communities on whether increased private sector provision will be of benefit. There is evidence that the World Bank appears willing to provide funding for promoting privatization, but not in helping governments conduct a proper public debate on solving water delivery problems (e.g. *Report of the International Fact-finding Mission on Water Sector Reform in Ghana*, 2003).

The second requirement is *regulation*. The Committee was clear that the private sector must be monitored independently and penalties are to be imposed for non-compliance. This is the strongest language yet from the Committee on this issue. During their process of periodically reviewing the performance of countries, the Committee has often been critical of governmental failure to regulate properly private actors operating in the area of social and economic rights.¹⁷

But one should not forget that the poorest groups do not rely on multinationals or even governments for water delivery. Excluded or unreached by the formal water supply system, the poor buy water from informal vendors or landowners with water resources, often paying excessive prices and subject to the vagaries of the supply system or access to land to water resources. Regulation and monitoring is urgently needed at this micro level, in addition to the need for the poor to gain access to formal water supply systems.

The third stipulation is that private actors ultimately must take the *necessary steps* to assist in the realization of the right to water, or at least not frustrate the objective. The debate over whether private, particularly multinational, companies are better or worse at ensuring everyone has access to water is heated and the gathering of evidence continues. But three observations can be made. First, there appears to be a serious problem with the economics. Exchange rate fluctuations can severely affect the financial models established for multinationals, as the recent cases of Manila and Argentina demonstrate.¹⁸ Second, multinationals often take the lucrative parts of the water system: the wealthier parts of urban areas. Rural areas, poorer urban areas and the more unprofitable delivery of sanitation can be excluded. Privatization is therefore not only a partial solution, but also it may divert resources away from assisting deprived sectors of the population. Lastly, there is an issue about whether privatization helps in the long run if all the expertise is developed within multinational water firms and no local capacity is developed.

Duty to fulfil. The final obligation is the duty to fulfil. According to the Covenant, this requires that governments use all available resources to implement progressively the right to water. The right to water does not have to be realized overnight, but the government must immediately take steps in the direction of ensuring universal access. According to the General Comment, this includes developing a plan and strategy on expanding affordable access as well as protecting the quality of the water supply. It means actively searching for the available resources, nationally and locally. It means implementing the plan and monitoring its implementation over time. It means providing systems of accountability so that citizens, NGOs and others can bring information or complaints about failures in the system.

As already shown, the popular solution has been to look to the private sector for financing. But the Committee also makes the point, as it does with all social and economic rights, that low-cost solutions can be found to provide water and sanitation. The World Bank estimates that an additional US\$30 billion a year are needed to meet the Millennium Development Goals, but the Water Supply and Sanitation Collaborative Council believes the goals can be achieved with US\$10 billion if low-cost technologies are used.

International Obligations

The duties with respect to the right to water do not stop at a country's borders. Governments can have significant positive and negative impacts on access to water in

other countries, and they are required to cooperate and provide technical assistance to eradicate the lack of access to water.¹⁹ The Committee first notes there is a duty to respect access to water, and it highlights the importance of preventing cross-boundary water depletion and pollution. Second, there is an obligation to protect foreign residents from actions of domestic residents. This means, for example, restraining the activities of multinationals, registered or located within the state party's jurisdiction, in other countries. Third, it means assisting other countries with the fulfilment of the right, e.g. providing adequate foreign aid for the realization of the right to water.

Since governments can take extra-territorial action through intergovernmental bodies such as the World Bank, IMF and World Trade Organization (WTO), the Committee notes that:

States parties should ensure that their actions as members of international organizations take due account of the right to water. Accordingly, States parties that are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should take steps to ensure that the right to water is taken into account in their lending policies, credit agreements and other international measures. (Committee on Economic, Social and Cultural Rights, 2002, para. 36)

Actions for the Future

New models come and go in the development sector. The human rights approach is valuable because it puts people first. It emphasizes the need for participation, systems of accountability, legal enforcement and a focus on marginalized groups. It also creates a common language in which all actors can work to solve the problems being faced. It provides an alternative framework for evaluating the commodity approach and the current emphasis on market solution.

The most commonly heard question is: What are the practical consequences of the right to water for development practice? Here are some suggestions. First, if privatization is opposed, then alternative public and community models must be clearly developed. Advocates will need to grapple with the corruption and inefficiency that impairs many public utilities and work to generate public support for reforming public institutions so that they better serve the poor. Unions, NGOs and institutes can make a difference by researching and promoting low-cost community-driven solutions. Second, citizens and communities need to be assisted to participate effectively in the decision-making process in the water and sanitation sector, particularly in discussions over water reform, and to ensure that any privatization processes are open and transparent. Clearer and more detailed standards on cost recovery and privatization are also needed. Third, there is an urgent need for effective monitoring of public and private provision of water, particularly as it affects marginalized and vulnerable groups (informal settlements are often excluded from data collection, for example). This will require greater mobilization around right to water. Fourth, communities not connected to the water infrastructure should be assisted to monitor their water quality (as well as accessibility), not only to avoid deadly diseases, but also to hold governments and other suppliers to account for their obligations. Fifth, legal and institutional frameworks at the national level to protect and promote the right to water

should be further developed. One additional option is an international convention on water or more specific and enforceable international conventions on specific aspects of the right to water. The WHO Framework Convention on Tobacco is an example of the latter. Lastly, negotiations over the General Agreement on Trade in Services and bilateral investment treaties to open water markets to foreign investment and competition, particularly in urban areas, needs to be continually monitored.

Conclusion

Ultimately, the United Nations' concept of a right to water is not decisive, although the level of awareness about the General Comment on the Right to Water is encouraging. What is critical, however, is that the idea is taken seriously in the public arena, within communities and within the private sector. The history of human rights shows that once people feel and experience something as a human right, it becomes a difficult force to restrain.

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Notes

1. The paper was first delivered as an Address at the Third Forum on Global Development Policy in cooperation with Bread for the World, 26–27 March 2004, Berlin, Germany.
2. These activities account for 88% of water uses.
3. The number of private water projects reaching financial closure in the period 1990 to 1997 increased 10-fold in comparison to the period 1984 to 1990. See Silva *et al.* (1998, p. 1).
4. As of 24 November 2004.
5. Efforts by NGOs to ensure its inclusion did not find unanimous government support. A compromise text was often adopted. For example, the Ministerial Declaration of the Hague on Water Security (2002, para. 3) stated, 'access to safe and sufficient water and sanitation are basic human needs'.
6. The right to water also appears to have been derived from the right to health (Article 12 of the Covenant).
7. Article 27.
8. Article 14(2)(h).
9. 'Water is a limited natural resource and a public good fundamental for life and health' (Committee on Economic, Social and Cultural Rights, 2002, para. 1).
10. This is also consistent with the collective right to self-determination in Article 1 of the Covenant, a collective right that includes the right of peoples—be it countries and possibly indigenous peoples—to pursue their economic, social and cultural development without interference.
11. The causes of this partial middle-class capture of the subsidy scheme are diverse and include the fact that many low-income Chileans, particularly those in informal settlements, lack the necessary documents or the knowledge of the system. Some may fear being stigmatized as poor.
12. Comments of the European Roma Rights Center and Centre on Housing Rights and Evictions (COHRE) on the occasion of the Article 16 Review of Greece, Hungary and Turkey under the European Social Charter Supervision Cycle XVII-1.
13. The Committee sets out a number of procedural safeguards that must be satisfied before disconnection can proceed (Committee on Economic, Social and Cultural Rights, 2002, para. 56). It concludes its prescriptions on due process by noting that 'Under no circumstances shall an individual be deprived of the minimum essential level of water'.

14. *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W); Bill of Review, 0208625-3, Special Jurisdiction Appellate Court of Paraná; and *Quevedo Miguel Angel y otros c/Aguas Cordobesas S.A. Amparo*, Cordoba City, Juez Sustituta de Primera Instancia y 51 Nominación en lo Civil y Comercial de la Ciudad de Córdoba (Civil and Commercial First Instance Court), 8 April 2002, respectively.
15. 'No household should be denied the right to water on the grounds of their housing or land status' (Committee on Economic, Social and Cultural Rights, 2002, para. 16).
16. *SERAC & CESR v Nigeria*, African Commission on Human and Peoples' Rights, Decision 155/96.
17. For example, 'The Committee recommends that the State party ensure that projects involving privatization of water supply provide for continued, assured and affordable access to water by local communities, indigenous people, and the most disadvantaged and marginalized groups of society' (Committee on Economic, Social and Cultural Rights, 2004, para. 60).
18. The recent move towards privatization in Ghana is of concern since it places the burden of exchange rate fluctuations on consumers.
19. Article 2(1) of the International Covenant on Economic, Social and Cultural Rights reads: 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'. In relation to water, see Committee on Economic, Social and Cultural Rights (2002), paras 30–36.

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