

# Key Messages

- The provision of water and sanitation services needs to be based on a holistic view, in order to reflect the multifaceted nature of inadequate water access.
- The resilience and functioning of ecosystems must be ensured in order to secure the human right to water for present and future generations.
- Incorporating the human right to water in national legislation is an important tool especially in countries with a certain level of rule of law and institutional capacity.
- Institutional capacity must be a priority for successful planning and implementation of the human right to water and sanitation. Measures to improve accountability and transparency in the water sector must be promoted, and capacity-building on water governance must be pursued at all levels of society.
- Women's knowledge and experience must be central to all projects and plans to address a lack of safe access to water and sanitation. Because of women's central role as water providers for households in many developing countries, their knowledge and experience are critical to any successful measure to address the lack of access to water.
- Land law and policies must be reviewed to ensure that they support the realisation of the right to water and sanitation. This includes mandating the provision of water and sanitation to all persons, irrespective of their housing and land status, ensuring the allocation of public land for the construction of water and sanitation infrastructure, providing for secure tenure, and guaranteeing access to traditional sources of water for indigenous people.
- Subsidy and tariff policies must be revised to remove any inconsistencies with the human right to water and sanitation. It is particularly important that the price paid by the poor is not disproportionate to the price paid by the wealthy.
- Subsidies must reach the right target groups and tariff regulations must apply to all suppliers, whether public, private, community-based, small-scale or large-scale. National regulation authorities must find the means to oversee the fees levied on the poorest.



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A policy brief for central governments, sub-sovereign national bodies, aid donors, universities and research organisations, NGOs, advocacy organisations and professionals working with water and development

# THE HUMAN RIGHT TO WATER AND SANITATION

Securing access to water for basic needs

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## Note to the Reader:

Millions of lives are still claimed every year, and human development is held back on a massive scale by unsafe water, inadequate sanitation and the lack of hygiene. Recent estimates by the World Health Organization and UN-Water indicate that improvements in sanitation and drinking water could reduce the number of children who die each year by 2.2 million (WHO and UN-Water, 2010). It is urgent to change the perception of these foundations for human life, from basic needs to entitlements. Access to water and sanitation – as human rights – has gained growing attention over the last few years at a global level, increasingly engaging the water sector and the international community in discussions regarding its content and implications.

In 2007 the Swedish Water House put together a Cluster Group on Water and Rights, comprising a variety of actors interested in understanding the implications for policy and practice of the right to water. This policy brief has been prepared by the Cluster Group, consisting of members from the Church of Sweden, KTH Royal University of Technology, the Swedish Society for Nature Conservation, the Swedish University of Agricultural Sciences, Åland Islands Peace Research Institute, GeWa Consulting, and the Swedish Women's Lobby. The brief aims to identify basic challenges in implementing the human right to water and sanitation, and to guide decision-makers in some of the priorities that need to be agreed to secure safe, acceptable and accessible water for domestic purposes for everyone, notably for marginalised and vulnerable groups in society.

In 2008 the UN Human Rights Council appointed an Independent Expert, Catarina de Albuquerque, with a mandate to further clarify and define the obligations of states related to the right both to water and to sanitation. Furthermore, a new milestone was recently reached as the UN General Assembly adopted a resolution recognising access to clean water and sanitation as a human right essential for the full enjoyment of life and all human rights. A recent trend has evolved towards recognition of sanitation as a distinct right. Safe water is not possible without functioning and sustainable solutions for sanitation. In this sense, water and sanitation are inextricably linked. But sanitation issues reach far beyond its linkages to water. We want to emphasise that this policy brief was prepared to deal mainly with access to water, and therefore its coverage of sanitation issues is limited to cases where they relate directly to water access.

The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. (...) 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.

*United Nations Committee on Economic, Social and Cultural Rights (2002). General Comment No. 15: The right to water*



Photo: Annika Börje, STWI

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## The Human Right to Water and Sanitation

Living without access to safe and reliable water is a reality shared by almost one billion people around the world, mainly in rural and peri-urban areas and informal settlements of developing countries (WHO & UNICEF, 2008). It is known that this situation reduces life expectancy, adds extra burdens to domestic work (mostly undertaken by women), and denies people a life of dignity, especially where sanitation is also poor (UN, 2005). In fact, the impact of diarrhoeal disease on children is greater than the combined impact of HIV/AIDS, tuberculosis and malaria (WHO & UNICEF, 2010).

The efforts to reach the targets of the Millennium Development Goal to increase the number of people with access to water and sanitation have been more successful in some parts of the world than in others. The main progress towards the MDG water target has occurred in Asia, Latin America, the Caribbean and Europe rather than in Sub-Saharan Africa, and in many rural areas there has been no progress, or conditions have actually worsened (UN, 2008 and Gleick et al., 2009, p 65), implying that it is not the poorest that have been favoured.

Human rights standards help orient policy-making towards focusing on the poorest and most marginalised groups in society

and towards ensuring fair and equal access to water. The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. By establishing a legal framework, defining who is responsible for fulfilling the right, and promoting pro-poor and non-discriminatory service provision, human rights standards can effectively strengthen poverty reduction efforts. In situations of competition for water resources, human rights standards give priority to the basic needs of all humans. A crucial aspect of the human right to water and sanitation is that not only does it entitle people to the water itself, but also to accountable institutions, access to information, non-discrimination, and meaningful participation in decision-making over water and sanitation.

We know that access to water is primarily determined by governance and the way water is managed, not by natural runoff patterns. Technically and physically there is sufficient water to handle most of the present and foreseen problems. The problem is access. Access involves political and economic issues: equity, affordability, and the role of the state in either providing services or ensuring services are provided. In short it requires political will. So to ensure that the right to water is

implemented it needs a legal instrument, supportive national policies, and actions at national as well as local level – all parts are equally important.

We also know that in global average terms, water for household consumption only accounts for less than 10 per cent of the overall human water use. Therefore it does not pose any major threat to natural freshwater availability. As a

comparison, agriculture and industry accounts for a combined 90 per cent of human water use (UNESCO, 2009, p 99). However, ultimately the state of the ecosystems replenishing and purifying the planet's water will also determine our possibilities for realising the right to water. In the long run, protecting the right to water for future generations requires sustainable water resources.



Photo: Jimmy Mohlin

### Box 1: Definitions of “sufficient, safe, acceptable, physically accessible and affordable water”.

**Sufficient:** While the amount of water required for the right to water to be met varies according to different conditions, 20 litres per capita per day (lcd) is considered a minimum quantity by the World Health Organization and in the 2006 UNDP Human Development Report, although it will not allow laundry and/or bathing on-site. 50 lcd is a quantity where most basic consumption and hygiene requirements are met. Some individuals and groups may also require additional water due to health, climate, and work conditions. The UN Independent Expert de Albuquerque urges states to aim for at least 50 to 100 litres per capita per day to ensure the full realisation of the right.

**Safe:** Free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health.

**Acceptable:** Of an acceptable colour, odour and taste for each personal or domestic use.

**Physically accessible:** Sufficient, safe and acceptable water must be accessible within, or in the immediate vicinity, of each household, educational institution and workplace. It must be within safe physical reach for all sections of the population.

**Affordable:** The direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the realisation of other Covenant rights.

Source: UN Committee on Economic, Social and Cultural Rights, General Comment no. 15, para. 12 a-c; WHO, UNDP, OHCHR





## Basics About the Right to Water

### Are we entitled to piped water supply and water for free?

The answer to these questions is no. The United Nations Committee for Economic, Social and Cultural Rights states in its General Comment No. 15 that the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. These uses include drinking (consumption through beverages and foodstuffs), personal sanitation (removal of human excreta when water-based sanitation is used), clothes washing, food preparation (including food hygiene), and personal and household hygiene (CESCR, 2002, para 12 a). It is not said that any specific service level, such as household connections, is required to fulfil the right. In fact, low cost technical solutions are recommended as a measure to keep the service affordable for the poor (CESCR, 2002, para 37 h). Solutions need to be context-specific.

All rights come with duties. While striving for universal access to water and sanitation, everyone should use water responsibly and be mindful of the need to protect this precious resource by avoiding overuse and pollution. Beyond that, in order to secure the economic viability of water and sanitation services, everyone who is able to should contribute to the financing of water services. States are not obliged to provide access to water and sanitation free of charge – but it should be affordable for all. This means that they may need to be free of charge for those unable to pay.

Water is also crucial for the realisation of many other rights. Examples are food production (the right to adequate food); ensuring environmental hygiene (the right to health); securing livelihoods (the right to earn a living by working); and enjoying cultural activities (the right to take part in cultural life) (CESCR,

#### Box 2: The legal basis for the right to water

Various international legal documents recognise the human right to water, either explicitly or implicitly. Water is mentioned explicitly as a human right in three main treaties:

- Convention on the Rights of the Child (1979)
- Convention on the Elimination of all forms of Discrimination Against Women (1979)
- Convention on the Rights of Persons with Disabilities (2008)

Some of the best-known legally binding treaties on human rights make implicit mention of the human right to water when stating the right to life or the right to an adequate standard of living:

- Charter of the United Nations (1945)
- International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR)
- International Covenant on Political and Civil Rights (1966)

UN General Assembly:

- In 2010, although not legally binding, the UN General Assembly adopted a resolution recognising access to clean water and sanitation as a human right essential for the full enjoyment of life and all human rights.

The following are examples of regional instruments that contain explicit mention of the human right to water:

- African Charter on the Rights and Welfare of the Child (1990)
- Protocol on Water and Health 7 (1999) to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1992)



Photo: Annika Börje, SIVT

2002, para 6). While it is important to take all uses of water into account when planning for sustainability, a human rights-based approach to water governance will assist in prioritising the small amounts of water needed for personal and household uses over all other uses.

## Focus on the most vulnerable and marginalised

*“Water and water facilities and services must be accessible to all, including the most vulnerable or marginalised sections of the population.”*

Committee on Economic, Social and Cultural Rights (2002), General No. 15, para. 12 c iii

Non-discrimination is an inherent feature of human rights thinking and thus also of the human right to water. Although all human beings are entitled to safe water at a reasonable distance from their home, special attention should be given to marginalised and vulnerable groups who are most often those who lack access to improved water and sanitation or who are affected worst by an inadequate water supply.

## Provision of water – by whom?

States parties to the International Covenant on Economic Social and Cultural Rights (ICESCR) have obligations to respect, protect and fulfil the rights set out in the Covenant. The main duty to realise the human right to water therefore lies with national governments.

**Respect** refers to governments’ responsibility to ensure that existing access to water is not obstructed; **protect** means that governments have an obligation to make sure that no actors, including local, national, international, private or public companies engage in activities that influence water resources, or interfere with the right to water; **fulfil** means that governments have a duty to gradually

ensure that everyone has access to water, for instance by ensuring that sufficient funds are allocated to the water and sanitation sector and through policy reforms regarding water supply and sanitation and water resources management.

For many governments, providing water, sanitation and other economic, social and cultural rights is a substantial challenge. This is why the ICESCR accepts a progressive implementation of the rights. This means that a state is not violating the human right to water if only part of its population has adequate access to water, as long as it is making every effort and using its maximum available resources to progressively realise the right.

Other actors also have a responsibility to at least not hamper or obstruct the realisation of rights in other countries. Companies small or large and whether local, national or international must ensure that their activities do not harm water resources and impede access to water for local populations. The extra-territorial obligations for the international community, donors, the UN, and international financial institutions in relation to the right to water include ensuring that sufficient financing (including aid) is provided for projects aimed at meeting basic needs to water, and that their projects do not violate the right to water.

## Transboundary water

The obligation of governments to fulfil the right to water applies only to their own citizens, but water moves across national borders. If an upstream country manages a transboundary river in a way which decreases the flow downstream, it can create conditions under which it is difficult for downstream countries to fulfil the right to water of their citizens. Citizens of one country cannot claim the water resources of another country to fulfil their right to water, but equitable and reasonable use are important principles of transboundary water conventions (UN, 1992b, Art. 2, para 2 (c) UN 1997, Art. 6, and ILA, 1966, Art. 4 and 5).

### Box 3: The right as part of the International Covenant on Economic, Social and Cultural Right

The United Nations Committee on Economic, Social and Cultural Rights (CESCR) is the body of independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR) by its States parties. The human right to water has been increasingly recognised in many countries after the adoption by the Committee of the **General Comment No. 15: The right to water** in 2002. Although General Comment No. 15 is not itself legally binding, it is an authoritative interpretation of the provisions

of the ICESCR. In 2006, the Sub-Commission on the Promotion and Protection of Human Rights adopted **Guidelines for the Realisation of the Right to Drinking Water Supply and Sanitation**. Also placing the rights squarely under the ICESCR is Catarina de Albuquerque, the first **Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation** appointed by the UN Human Rights Council in 2008.





## Practical Challenges to Implementing the Right to Water

### The many faces of inadequate water access

Many people deprived of their human right to water do in fact have some kind of access to water. Their access may be inequitable, ineffective, unsustainable or restricted to insufficient or unsafe water, as the result of a number of circumstances. This section will provide an overview of such circumstances, with the aim of highlighting the variety of obstacles that may need to be dealt with for the full implementation of the right to water. The lesson to be learnt is that access to water depends on a range of economic, political, technical, cultural, financial, organisational, social and managerial issues. Because of the multi-faceted nature of the problem a holistic view on water service provision is imperative.

Lack of access to sufficient water can be due both to **non-availability** of water and to non-coverage of services. Water scarcity caused by seasonal fluctuations, with natural shortages in dry seasons, may be further exacerbated by climate change as predicted by the Intergovernmental Panel on Climate

Change (IPCC). However, the main problem of water access is not the physical lack of water resources. As the UNDP points out in the 2006 Human Development Report: "There is more than enough water in the world for domestic use, agriculture and for industry. The problem is that some people – notably the poor – are systematically excluded from access by their poverty, by their limited legal rights or by public policies that limit access to the infrastructures that provide water for lives and for livelihoods." (UNDP, 2006b, p 11) **Flawed water management policies** exacerbate scarcity. In some areas access to sufficient drinking water is currently hampered by an over-exploitation of groundwater resources for other uses, such as irrigation and industry. Also, illegal connections and unrestricted use may leave less water for those at the "end of the pipe". **Corruption** affects all aspects of the water sector with direct and profound effects on the lives and livelihoods of billions of people (Transparency International, 2008). Non-coverage of services can be due to corruption, lack of resources or in some cases, the exclusion of marginalised groups from the jurisdiction of public utilities. Non-existent tariff regulation can also lead to





Photo: Anna Norström

inequitable access, as has been the case in many countries where the poor are charged higher water prices than the rich (see section on finance below).

Lack of access to safe water can be due to problems of **water quality**. The primary health risk is from pathogenic organisms, which can normally be eliminated quite simply (COHRE, 2007, p 92). But in a number of areas large populations are now exposed to the risks of consuming groundwater with high levels of naturally-occurring contaminants, posing considerable health risks. For example, in India alone as many as 77 million are at risk of either fluorosis or arsenicosis caused by high levels of fluoride and arsenic in groundwater (Meinzen-Dick & Rosegrant, eds., 2001; World Bank/WSP, 2005). Also, in many areas surface water is becoming increasingly polluted by discharges of untreated sewage, agricultural and industrial effluents. While it is imperative to safeguard future water quality, it is important to note that water for basic needs constitutes less than 10% of overall water consumption and so causes a very small part of the total wastewater produced.

Inequitable access can be due to social features of a society such as **discriminatory practices** and the consequent exclusion of vulnerable and marginalised groups from shared safe water sources (Singh et al., 2005). **Culturally assigned gender roles** also determine access to water and sanitation. Women and girls face particularly severe obstacles to their human development and dignity as a consequence of the lack of improved sanitation facilities. However, many times, programmes and strategies to address the lack of water and sanitation do not consider the particular knowledge and experience of women derived from their central role as domestic water managers in many countries. It is urgent to address this inadequacy. Because of women's central role as water providers for households in many developing countries, not only is their knowledge and experience critical to any successful measure to address the lack of access to water, but they are also needed to design programmes that are effective, equitable and sustainable in local community contexts.

Ineffective access can be due to **cultural beliefs**. Culturally defined attributes of "good-quality" water can determine the water-fetching behaviour of women in local communities, even when the water in fact is not safe. Consequently, they may not use water from improved sources for drinking and cooking (Singh, 2006). Therefore excluding women from programme design and implementation may increase the risk of continued use of unsafe water even after improved water sources have been installed. Water not only needs to be safe, it needs to be regarded as such.

Unsustainable access can be due to **mismanagement** leading to breakdowns. Ensuring sustained access to water requires institutional, financial and technical capacities and a good coordination between them. Experience has also shown that unless water services are demanded and supported by the end-users, they are not likely to function in the long run. This



can be remedied to a large extent by information sharing and true participation by the end-users in planning, management and evaluation of water services. Strengthening water governance by clarifying the roles of government, civil society and the private sector and their responsibilities regarding ownership, management and administration of water resources and services is crucial to ensure sustained and equitable access to water.

## Degrading ecosystems

*“We need to recognise that water belongs to the earth and all its species and that we are only the trustees of this precious resource.”*

Koïchiro Matsuura, Director-General of UNESCO (2008)

Natural ecosystems provide services that help humans maintain a balance with the earth’s environment and protect us from harm. Preserving these ecosystems aids populations with flood control, filtering nutrients and pollutants, mitigating the effects of climate change, sustaining biodiversity, and providing people living downstream with water. Protecting and restoring the ecosystems that naturally capture, filter, store and release water is crucial to increasing the availability of water of good quality (UN Water, 2006). The damage to such ecosystems is in some cases very severe due to humans’ inability to replicate the services the ecosystems provide. As we are an integral part of ecosystems, and their functioning provides a resource base that among other things helps us to meet our basic needs, their sustainable management should ensure the foundations on

which to build a human right to water (UNESCO, 2006).

When managing competing demands for water, ecosystems as “water users” also need to be considered (UNESCO, 2003, p 295; MA, 2005, p 177). However there is no great conflict between water for basic human needs and for ecosystems. In general water use for domestic purposes constitutes the smallest share of total extractive water use and its conflict with ecosystem water use is therefore also small. Globally, water for household use accounts for less than 10 per cent of overall human water use, compared with 20 per cent for industry and between 70–80 per cent for agriculture (UNESCO, 2009, p 99). However, in ecosystems that are considered vulnerable, it would be useful to establish their “sustainability boundaries”, beyond which human use of water would be in conflict with the environmental flows (King et al., 2000; Postel & Richter, 2003; MA, 2005).

It is not argued here that protection of ecosystems will automatically result in the realisation of the human right to water. Issues of governance, financing and technical solutions are more direct determinants of someone’s access to water. Also, water as a natural resource and water supplied to users are governed by different laws and institutions. However, in the long run, healthy ecosystems are a fundamental prerequisite for making the realisation of the human right to water possible. If ecosystems are not taken care of, water quality will deteriorate and treatment costs increase. In other words, ensuring a safe and affordable water supply will become even more difficult. Therefore, while safeguarding the right to water for all, engaging both rights-holders and water providers in environmental sustainability is crucial.



Photo: Melinda Thyren



## Land tenure and water rights

The realisation of the human right to water can be complicated by domestic laws governing land tenure and water rights. This pertains particularly to rural areas and urban informal settlements. But it is important to note that everyone is entitled to water for their basic needs regardless of their ownership or land status.

Water rights under domestic law concern specific sources of water, often adjacent to a piece of land under the tenure of somebody who has the right to use the water from this source. Water rights may conflict with the human right to water if holders of water rights do not share their water source with their neighbours, since this may force them to fetch water from further away than the immediate vicinity. In many countries policies have protected such water rights for the use of water in agriculture (Appleton & Smout 2003, p 41). Further, in cultures where men traditionally are the land owners women may consequently face restricted access to water.

In informal settlements, service providers are often reluctant to extend their services into the settlements, either because they see difficulties in charging people who are not formally registered residents, or as a result of government policy that prohibits service provision in these areas, since it could be

considered as legitimising them (COHRE, 2006, p 125). It is also common for national policies establishing domestic water use as the highest priority to fail to include informal ways of accessing this water (in rural and slum areas) (Subramanian, Jagannathan, & Meinzen-Dick, 1997, p 139).

States must prevent third parties who control rivers, wells etc. from hindering water access for personal and domestic uses (CESCR, 2002, para 24). No household should be denied the right to water because someone else owns the land where the water source is located or where water facilities need to be installed. This is especially relevant for people living in informal settlements, where they do not have formal land tenure – their right to water exists nevertheless (CESCR, 2002, para 16 c).

General Comment No. 15 also acknowledges the need to protect water resources on the ancestral lands of indigenous groups. Indigenous peoples have a unique spiritual and cultural relationship to the land they have traditionally inhabited and know how to manage land and water sustainably. This is acknowledged and should be taken into account, according to the UN Convention on Biological Diversity (Art. 8 j). An example of how the human right to water of an indigenous group was defended in court is found in Box 4.



Photo: Håkan Tropp, SVAI

### Box 4: Yakye Axa v. Paraguay

The case of the indigenous community of Yakye Axa v. Paraguay at the Inter-American Court of Human Rights concerns the indigenous peoples' property rights over ancestral land. The Yakye Axa indigenous community had been denied access to their traditional lands, forcing them to live outside the fence of their territory, on a roadside under extreme conditions. As a result of this 16 members of the community died.

Without access to land, the indigenous community were also deprived of access to traditional means of livelihood, which in turn led to, among other things, a scarcity of water. Forbidden to use the water sources on their ancestral territory, the community members were forced to collect rainwater, which led to serious health problems during drought. In its sentence in favour of the community, the Court referred to the General Comment on the right to water. The Court established that "the State did not guarantee the right of the members of the Yakye Axa Community to communal property. The Court deems that this fact has had a negative effect on the right of the members of the Community to a decent life, "(...) to obtain clean water and to practice traditional medicine to prevent and cure illnesses." "Furthermore, the State has not taken the necessary positive measures to ensure that the members of the Yakye Axa Community, during the period in which they have been without territory, have living conditions that are compatible with their dignity (...)"

Source: Inter-American Court of Human Rights (2005)

## Pricing and financing of water services

Installing and managing water services involves substantial costs. Although states or governments, under the “obligation to fulfil” in the CESCR, are to ensure water services, whether privately or publicly owned, this does not mean that governmental bodies should fully cover the costs of water supply and sanitation services. In fact, in all countries, water services are financed through a combination of tariffs, taxes and transfers (grants and loans from other governments) (OECD, 2009).

The challenge to governments is to find the combination of these sources of finance that works best in their country and to manage them so that the poor do not bear a disproportionately large burden of water and sanitation costs (CESCR, 2002, para 27). It is also a challenge to ensure the sustainability of finances, meaning that there should be enough money to cover the costs of construction, operation, maintenance, extension, rehabilitation, capacity building and water resources management. Unsustainable finances are likely to lead to unsustainable access to services.

Important instruments in the work towards equitable pricing of water are subsidies and tariff regulation. Unfortunately, neither of these has so far shown itself to be very effective in reaching the marginalised and vulnerable groups that are the centre of attention for the human right to water (see box 5). One important reason for this is that both subsidy schemes and regulation practices often focus on utilities that provide services through large-scale network systems. Since a large part of the poorest are supplied by small-scale water vendors, wells, communal taps or small, community-managed systems, these instruments most often fail to include them.

South Africa provides interesting examples of the balance between affordability and sustainable financing. It is a country that has taken bold steps towards the realisation of water for all, but its experience also shows the complexity of the issue. The free basic water policy in South Africa has not completely succeeded in reaching all the poorest and only the poorest, but it must be deemed relatively successful, considering that it also promotes environmental and financial objectives (Muller, 2008). In 2001, when the policy was introduced, 29 per cent of the population did not have adequate access to water, while in 2008 this number was only 12 per cent (Department of Water and Environmental Affairs, South Africa, 2009). A recent case in the Constitutional Court supported the use of prepaid water supply in Johannesburg, a contested measure for distributing a basic, free amount of water and at the same time ensuring revenues for water volumes above that amount (box 6). In conclusion, it is important to highlight innovative new practices to ensure subsidies and tariff regulation reach the poor.

### Box 5: Do current water subsidies reach the poor in south Asian countries? A study in Bangalore, India and Kathmandu, Nepal

Large subsidies for the water sector are typical in South Asian countries. Still, a high proportion of poor people does not have private water connections and are thus unable to benefit from the extensive subsidies. An analysis based on two city-level household surveys conducted in Kathmandu (Nepal) and Bangalore (India), shows that about three quarters of the subsidies available to water utilities in the cities are delivered in a way that completely fails to reach the poor. The vast majority of subsidy resources are spent on lowering tariffs for private connections through an Increasing Block Tariff, even though many poor people do not use water from these types of connections. Subsidised public taps would be a more effective way to channel resources but also suffered from serious disadvantages. Barely half of the poor have private taps, so most are excluded altogether from this type of subsidy. And due to the low volume delivered by the public tap network, the implicit subsidy received by each poor household is very low. The average non-poor household receives 44% more subsidy than the average poor household in Kathmandu, and 15% more in Bangalore.

*Foster, Pattanayak and Stalker Prokopy (2003)*

### Box 6: Mazibuko et al. v. City of Johannesburg et al. in the Constitutional Court of South Africa

Five residents of Phiri township, Soweto, Johannesburg, brought before the Constitutional Court the water institutions of Johannesburg, claiming a) that the amount of free basic water provided to each household per month (6000 litres) was inappropriate, since it did not take account of the number of persons living in each household and b) that it was unlawful to install pre-paid water meters in this area.

The Court held that the decision on how much water should be supplied for free (“sufficient” water) is better made by the legislative and executive branches of the government, rather than by a court, since sufficiency varies with context and should be a matter of democratic accountability. Further, the Court referred to the element of progressive realisation contained in the right to water when refusing to fix the amount of free water at 50 litres/person/day (as demanded by the applicants). [46>]

Installing pre-paid meters was seen as reasonable by the Court in view of the problems with unpaid water bills in the area, especially since the residents also agreed that the previous situation was unsustainable and needed remedying. The suspension of the water service that occurs when the pre-paid credit runs out was not considered an unlawful cut-off from the water service, since residents are never cut off from the basic amount of 6000 litres per month.



# Institutional Capacity and the Role of Courts

In the previous section a number of practical challenges to the implementation of the right to water were identified. Although these challenges are likely to be manifest in many countries where the right to water is not realised, it is important to acknowledge that the most effective measures for facing them will depend on the level of governance and the institutional capacity of each country. Also the extent of the rule of law in terms of formal judiciaries will affect the possible ways for implementing the human right to water. Especially for donor countries, UN organisations, INGOs and others who assist developing countries in the implementation of the human right to water, it is important to consider these factors.

Incorporation of the human right to water in national law allows citizens to ask for court decisions if they believe that their right has been violated. In several cases this has been an avenue for ensuring better water access. In many places, however, customary law prevails. There, the number of citizens claiming their right to water in court is not likely to increase, even if the right to water is incorporated in national law (see box 7). Beyond that, are all aspects of the human right to water best settled in courts? The Mazibuko et al. case (see box 6) from South Africa is interesting in this respect. On the one hand, citizens wanted to be granted what they saw as a sufficient amount of water for free. On the other, the concept of "sufficient" is meant to be dynamic and contextual, since needs vary, depending for

example on health status and whether you have water-borne sanitation or not. The constitutional court of South Africa did not want to render this concept static. It argued that it could only tell the government to revise its policy regarding what was a sufficient amount of free water if it was deemed unreasonable (which it was not in this case), but held that it could not prescribe any specific new policy. This point of view stresses the importance of accountable and democratic policy-makers for the implementation of the human right to water.

Another important reason for incorporating the human right to water in national laws is that it facilitates implementation through a policy approach. Human rights impose obligations on states; therefore they need to be translated into specific national legal obligations and responsibilities. Obligations by states can only be executed if there is an understanding of them in the national context. It is also more likely that the water sector will get priority in budget allocations if the right to water is stipulated in national law.

The particular features of each country and society determine which measures are most effective in that setting. In a society with well-established institutions, the passing of laws and policies has been shown to be a useful tool to extend access to water and sanitation. But in a society with a high level of corruption, lack of good governance and inefficient judiciaries, the road from legislation to implementation will be

## Box 7: Legitimacy of judiciary systems

Existing side by side with many formal judicial systems are informal and traditional justice mechanisms. Very simple in outlook, substance and procedure, these institutions constitute the only means of obtaining justice for millions of people. Their flexibility, simplicity and cheapness allow them to deal with cases quickly, but concerns exist over their respect for natural justice and principles of equity. In some countries, traditional/informal justice mechanisms have been made subject to statutes and broad principles of human rights to ensure some degree of certainty, but this has not dealt with the fact that customary rules are often unwritten and fluid, subject to the interpretation of the person in charge at any given moment.

From a human rights perspective, there are helpful as well as degrading customary rules. Depending on which is in play at the time, their application may enhance or erode formal guarantees. And as this is the only means of justice for many people in their lifetime, the reality is that some may never know that they are for instance entitled to more water than the tribal or village elder allocated to them.

*Contributed by Sonkita Conteh, Legal Officer, Right to Water Programme, COHRE Africa Office*

## Box 8: Water sector reform in Kenya

In 2002 Kenya launched a major reform of its water supply sector by adopting a new Water Act. Mainly, the reform separated the functions of policy formulation, regulation and service provision, so that the two latter should be independent from politics. It also included decentralisation of service delivery. Human rights principles and the MDGs were to guide the reform process, according to the Ministry of Water and Irrigation.

The reforms have led to the introduction of new features, such as stakeholder participation in decision-making, information sharing, and complaints mechanisms to fight corruption. These measures are all positive when seen from a human rights-based approach, but few of them work as intended in practice. Important policy documents are only available when paid for, and even if people make complaints about corrupt practices, little happens (UNDP/WGF 2007).

Despite the creation of new, autonomous bodies, politicians still have influence over various aspects of water supply; from the local level service providers to the national regulator (Nilsson & Nyanchaga, 2008).



much longer. In such situations institutional capacity-building will be a vital ingredient. In parallel, it is important to work with a community approach and raise awareness of the human right to water among people at all levels in society.

In the case of Kenya (see box 8), a water sector reform with a human rights-based approach took place before the governance structures of the country were entirely prepared for it. Even if human rights thinking has started to spread in

the country, it will take time before it has real effects on water access for the poorest. Table 1 presents our suggested actions that may be effective in advancing the implementation of the human right to water in countries with different levels of institutional capacity.

Finally, it should not be forgotten that, even if the human right to water is not enshrined in national law, it is no excuse for different actors not to work towards the implementation of the right.

Level of government effectiveness and rule of law	Examples of countries	Suggested actions to ensure the right to water and sanitation (RTWS)
High	Botswana Namibia South Africa Uruguay Malaysia	Make budget allocations for the implementation of RTWS Increase coordination between institutions Strengthen independent regulation Revise tariff policy Develop multi-stakeholder dialogue on policies
Medium	Uganda Indonesia Rwanda Armenia Argentina	Identify marginalised and vulnerable groups Start multi-stakeholder dialogue on policies Capacity development of local-level institutions and service providers Broad awareness campaigns on RTWS Support communities in demanding their RTWS Capacity development of institutions at all levels
Low	Cambodia Haiti Bolivia Pakistan	Broad awareness campaigns on RTWS Support communities in demanding their RTWS Capacity development of institutions at all levels

Table 1: Implementation of the human right to water at different levels of institutional capacity. Source for indicators of government effectiveness and rule of law including examples of countries: World Bank Group, 2009.





Photo: Anna Nosström

## Key Messages and Recommendations

This policy brief stresses the importance of acknowledging and implementing everyone’s human right to water and sanitation, and of focussing efforts to ensure access to water and sanitation for the most vulnerable and marginalised groups in society. It makes it clear that the water quantity and service levels covered by the human right to water are only basic; just enough to cover personal and domestic needs. The brief also concludes that even if water for domestic purposes constitutes only a limited amount of the freshwater resource, long-term thinking in the form of ecosystems management is crucial, along with strategies on water and sanitation services provision in order to secure sustainable access to water and sanitation for future generations.

- **The provision of water and sanitation services needs to be based on a holistic view**, in order to reflect the multifaceted nature of inadequate water access. There is a need to evaluate the effectiveness of existing water and sanitation supply programmes and to develop context-specific solutions by involving water and sanitation professionals from government and donor agencies, experts from multilateral finance institutions and people at the local level.
- **The resilience and functioning of ecosystems must be ensured** in order to secure the human right to water for present and future generations. Awareness-raising among rights holders and water providers on the links between sustainable use of ecosystems and clean water is needed.
- **Incorporating the human right to water in national legislation** is an important tool in countries with a certain level of rule of law and institutional capacity. In countries where legal enforcement and governance capacity is low, empowerment and awareness-raising activities, community support and capacity development are more efficient tools.
- **Institutional capacity must be a priority for successful planning and implementation** of the human right to water and sanitation. Measures to improve accountability and transparency in the water sector must be promoted, and capacity-building on water governance must be pursued at all levels of society.
- **Women’s knowledge and experience must be central to all projects and plans to address a lack of safe access to water and sanitation.** Because of women’s central role as water providers for households in many developing countries, their knowledge and experience are critical not only to any successful measure to address the lack of access to water but also to design programmes that are effective, equitable and sustainable in local community contexts.
- **Land law and policies must be reviewed** to ensure that they support the realisation of the right to water and sanitation. This includes mandating the provision of water and sanitation to all persons, irrespective of their housing and land status, ensuring the allocation of public land for the construction of water and sanitation infrastructure, providing for secure tenure, and guaranteeing access to traditional sources of water for indigenous people.
- **Subsidy and tariff policies must be revised** to remove any inconsistencies with the human right to water and sanitation. It is particularly important that the price paid by the poor is not disproportionate to the price paid by the wealthy.
- **Subsidies must reach the right target groups** and tariff regulations must apply to all suppliers, whether public, private, community-based, small-scale or large-scale. National regulation authorities must find the means to oversee the fees levied on the poorest.

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\* COHRE has defined the following groups as either vulnerable or marginalised, or both: women, children, inhabitants of deprived areas, indigenous peoples, nomadic and traveller communities, refugees, asylum seekers, internally displaced persons and returnees, older persons, persons with disabilities and people with serious or chronic illnesses, victims of natural disasters and persons living in disaster-prone areas, people living in water-scarce regions, and persons under custody. COHRE (2007) p 55

\* Approximate division of developing countries based on the Government Effectiveness and Rule of Law indicators from the World Bank Group, 2009.