

Human Rights-Based Approaches and Managing Water Resources

Exploring the potential for enhancing development outcomes



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About the Water Governance Facility (WGF)

The UNDP Water Governance Facility at SIWI (WGF) provides strategic water governance support to developing countries to advance socially equitable, environmentally sustainable and economically efficient management of water resources and water and sanitation services to improve the livelihood of poor people.

WGF supports developing countries on a demand basis to strengthen water governance reform implementation through:

1. Policy support and technical advisory services;
2. Developing and disseminating water governance knowledge and strengthening capacities
3. Developing and applying water governance assessments at national and global levels

WGF works with water governance in multiple thematic areas such as, integrated water resources management, transboundary water, water supply and sanitation, climate change adaptation, gender and water integrity. It works in several countries in regions such as Central and South Asia, East and Southern Africa and the Middle East.

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Many governments as well as multilateral organisations are increasingly emphasising human rights-based approaches as critical to mainstream in countries' development policies and donor strategies. Among many water professionals and decision-makers there is generally little understanding of human rights-based approaches (HRBA) and how to apply them. There have been ample debates and writings on drinking water as a human right, but much less so on rights-based approaches to water resources management and allocation.

The purpose of this report is to lay out the issues and establish if, how, and under what circumstances taking a human rights-based approach might improve the management of water resources, especially with regard to equity aspects. The focus is on water as a resource for development (for instance, as an input to agriculture or industrial production); the report does not primarily deal with household water supply or the Right to Water. The report lays-out and disentangles human rights-based approaches in relation to governance and explores synergies and disparities with integrated water resources management approaches.

The report concludes that HRBA can be very useful to advance equity aspects of distribution of water rights and non-discrimination of water resources management and allocation,

but also that we need more knowledge as well as capacities among water managers to better understand how HRBA can be applied in various socio-economic and legal contexts.

The report is the product of interdisciplinary collaboration among water resources management policy-makers and practitioners; lawyers specialising in national and international water law; and international civil servants charged with ensuring that all their programs take a human rights-based approach. Though they share a concern for equity in water resources allocation, particularly in support of sustainable, human-centered development, these three groups of stakeholders have divergent perspectives on the utility of the human rights-based approach and speak different “languages.”

There is a need for increased knowledge on the applicability of rights-based approaches to water resources management and dialogue to foster cross-disciplinary understanding, to build consensus, and to assess (through case studies and analysis of the practical application of the approach on the ground) if, how, and under what circumstances the human rights-based approach can help in the development of practical ways to manage and allocate water – especially in situations of increased competition and conflict over shared and increasingly scarce water resources.

Introduction

Development's purpose is to improve people's well-being, give them a say in the decisions that affect their lives, and expand their freedoms, choices and opportunities. From this perspective, the way in which water resources are allocated in countries around the world is deeply problematic. Water resources allocation for a range of productive purposes, from agriculture to industry to ecosystem services, is typically inequitable; generally speaking, comparatively powerless groups tend to be shut out not just of access to water resources but also of the processes whereby allocation decisions are made. Although integrated water resources management (IWRM) approaches are ostensibly guided by a balanced concern for economic efficiency, environmental sustainability, and social equity, in practice, the social equity goal is often given less priority when water allocation decisions are made.

How can water resources allocation be made more equitable? How can the social equity aspect of water resources management receive greater priority? Many stakeholders are concerned with these questions. Despite a shared concern with more equitable outcomes, however, different stakeholders have divergent views about how best to bring about the equity that all of them seek.

The purpose of this report is to explore if, how, and under what circumstances incorporating a human rights-based approach into water resources management in developing countries might make water allocation more equitable and, in so doing, further nationally determined development goals as well as the progressive realisation of internationally recognised human rights. The report does not seek to tackle the discrete question of providing water supply and sanitation services to households, nor does it address the “Right to Water” pertaining to personal and domestic water uses as set out in ECOSOC General Comment 15 (2002); these topics have been explored in depth elsewhere. Recently, the United Nations Special Rapporteur on the Right to Safe Drinking Water and Sanitation published “On the Right Track” (2012), which contains a number of case studies on how to work with human rights-based approaches to water services (see also COHRE et al., 2007; and Kirkemann Boesen, et al., 2007). Interestingly, Comment No. 15 explicitly acknowledges that access to water resources is a “...prerequisite for the realisation of other human rights”, such as food and health.

The report is designed to be exploratory and serves as a conceptual input among water development practitioners about

the utility of taking a human rights-based approach to water resources management. The report is the product of an exercise that sought to create a common understanding among distinct stakeholders with well-developed perspectives, conceptual frameworks, and vocabularies: policy-makers and practitioners concerned with water resources management and development; lawyers who focus on national and international water law; and international civil servants mandated to take a human rights-based approach to their development activities. Over the course of a year, professional staff from the UNDP Water Governance Programme in collaboration with experts from the Global Water Partnership Technical Committee and the UNESCO Center for Water Law at the Dundee University, with the help of students and consultants, held several face-to-face meetings as well as on-line dialogues about the questions this report explores. There are many differing assumptions, perspectives, and viewpoints of a group united in their wish to promote equity. But often they

are at cross-purposes as to how best to do it, pointed clearly to the need for an unpacking of the concepts and cross-disciplinary platform for knowledge generation and dialogue.

This report thus defines various key concepts, including human rights-based approaches, integrated water resources management, and water governance, and explores how they relate to one another. The report then sets out the current landscape of national water governance and its implications for the equitable allocation of water resources, looking in particular at the range of existing legal and institutional frameworks at the national level. It then explores ways in which both procedural and substantive aspects of the human rights-based approach might make water allocation more equitable. The report concludes with an examination of the implications of taking a rights-based approach, including its practical implementation and potential limitations.

Setting the Scene

In 1997, the UN Secretary-General initiated a process to mainstream human rights in the UN's development programming. This process resulted in the adoption of human rights-based approaches by many UN agencies (United Nations, 2003). On 26 July 2010 the UN General Assembly adopted a resolution on the human right to water and sanitation declaring 'the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.' The United Nations Conference on Sustainable Development in 2012 reaffirmed the commitments regarding the human right to safe drinking water and sanitation, to be progressively realised and also underscored the importance of advancing an integrated approach to water resources management (UN Rio+20 conference, 2012). This further stresses the need of understanding the linkages between human-rights approaches and water resources management.

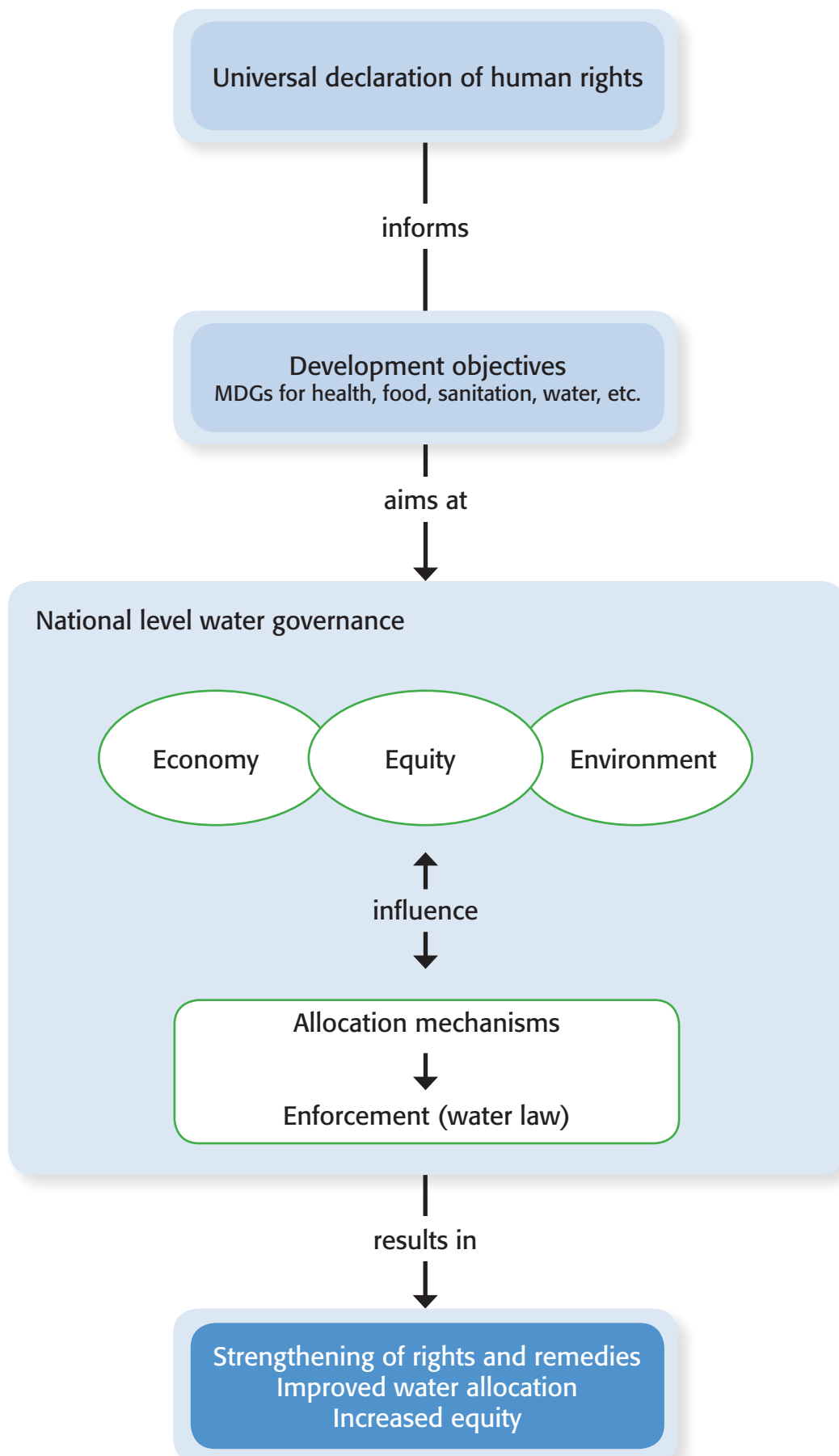
The purpose of this report is to explore if, how, and under what circumstances incorporating a human rights-based approach into water resources management in developing countries might make water allocation more equitable and, in so doing, further nationally determined development goals as well as the progressive realisation of internationally recognised human rights. (This idea is represented in figure 1.) It is designed to serve as a conceptual platform for knowledge generation and dialogue among practitioners and policy-makers about the utility of taking a human rights-based approach to water resources management. The report is the product of an exercise that sought to create a common understanding among distinct stakeholders with well-developed perspectives, conceptual frameworks, and vocabularies: policy-makers and practitioners concerned with water resources management and development;

Skeptics and ideologues

The topic of human rights can provoke heated debate. There are those who look upon the human rights-based approach to development as a cure-all for problems of inequality. Others view the idea with considerable skepticism. Some argue that taking a human rights-based approach is no different than good programming practice or good governance. Some worry that an emphasis on human rights distracts from a poverty or human development focus. Others view the term itself as just the latest feel-good development buzzword. Still others think that the international human rights regime lacks teeth and thus adds little to people's ability to claim their rights in practice or to seek recourse for violations of those rights.

While some points of contention are rooted in well-informed differences of opinion, others stem from an inaccurate understanding of the goals or terminology of people in the "other camp." The objective of this exercise is to lower the heat and increase the light around this topic, thus helping professionals from various disciplines and perspectives work together more effectively toward common goals of equitable and sustainable development.

Figure1: Human rights-based approach to development



lawyers who focus on national and international water law; and international civil servants mandated to take a human rights-based approach to their development activities.

The focus of this report is the management and allocation of water as a resource for a range of development purposes. It does not seek to tackle the question of providing water supply and sanitation services to households, as set out in ECOSOC General Comment No. 15.

The General Comment No. 15 is pre-occupied with “personal and domestic” water use, but it explicitly acknowledges that access to water resources is a “...prerequisite for the realisation of other human rights.” For example, water is necessary to produce food (right to adequate food) and ensure environmental hygiene (right to health). Water is essential for securing livelihoods (right to gain a living by work) and enjoying certain cultural practices (right to take part in cultural life). Even though, priority in water allocation is given to the right to water for personal and domestic uses, priority should also be given to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the Covenant rights. It further states that: “Attention should be given to ensuring that disadvantaged and marginalised farmers, including women farmers, have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology.”

The report will first define terms. Then, using examples from developing countries, the report will:

- set out the current landscape of national water governance and its implications for the equitable allocation of water resources, looking in particular at the range of existing legal and institutional frameworks at the national level;
- explore ways in which both procedural and substantive aspects of the human rights-based approach might make water allocation more equitable; and
- explore the implications of taking a rights-based approach, including its practical implementation and potential limitations.

Why does this issue matter now?

Most vulnerable in a world of greater water insecurity are poor people living in informal urban settlements and those in rural areas whose livelihoods are dependent upon rainfed agriculture or the availability of grasslands and water for grazing animals. Protecting the rights of such people and avoiding elite capture of the resource and the benefits derived from it require tools that facilitate a more equitable allocation of scarce water resources.

The convergence of two particular global trends almost certain to intensify the water insecurity of poor and marginalised people in low-income countries adds to the urgency for new approaches to the allocation of water resources for development: climate change and worldwide economic instability sparked by banking and credit crisis.

The World Water Development Report (2012), which focused on water related risks warns of the grave threat that climate change poses to global water security and therefore to human security and human development more broadly – famine, mass migration, the collapse of already fragile states, and violent conflict over increasingly scarce water resources, to name just a few. Most of the developing world already experiences a high degree of water stress and variability. It is exacerbated by

a variety of factors, among them demographic changes such as population growth, urbanisation and migration, increasing consumption and dietary changes fuelled by economic growth, changing farming practices, and industrialisation.

Climate change will make things worse. It will alter the world’s hydrological patterns, making currently water-stressed parts of the world drier still, seasonal rainfall patterns less predictable, and extreme weather events more frequent and severe. Temperatures are expected to rise and rainfall to decline in East Africa, the Sahel and Southern Africa, leading to significant productivity losses in agricultural staples like millet, sorghum and maize and threatening the food security of at least 75 million people. Rising sea levels threaten the safety of coastal populations and imperil the supplies of freshwater upon which they depend. South Asia will experience changing monsoon patterns, leading to more rain overall but, paradoxically, also to a greater likelihood of spells of drought (UNDP, HDR 2006).

Adapting to the impacts of climate change will be expensive and will require difficult and contentious policy shifts. Not only are integrated water resources management strategies and frameworks required; the investment costs for infrastructure projects, such as wastewater treatment facilities and structures for water storage and flood control, are likely to increase. The global economic recession may impede the necessary investment. On the other hand, the crisis arguably presents opportunities. Many governments are looking to increase investment in public works to stimulate the economy and provide employment, and the water sector is an ideal vehicle for such investment. Water infrastructure also has long-term development benefits and helps the poor.

Competition for water increases as demand grows from urban centres, industry, and agriculture. As water becomes more scarce and its availability more variable, these wealthy and powerful sectors will have greater incentives and influence to capture larger shares of water resources to secure a reliable supply. The voices and demands of the marginalised, the powerless, and the poor in rural and peri-urban areas are not likely to be heard, and they will be further disadvantaged.

To allocate water in ways that are efficient, equitable and sustainable in a world of increasing demand and more variable water supplies, the following issues must be addressed:

- Market mechanisms (trading systems and/or full cost pricing through valuation) excel in the efficiency arena, but can fall short when equity is a goal or when externalities that impact environmental sustainability are not taken into account.
- From an efficiency perspective, when markets do not fully capture the total value of water, other mechanisms have to be used to allocate water to the highest value uses and users. Yet what constitutes “efficiency” and “highest value uses and users” needs a closer look. People living at the margins seldom qualify as “high value” users, yet good development practice demands that their needs are given priority.
- Conflict resolution mechanisms and rubrics for making trade-offs are often needed to facilitate water-sharing among competing users such as upstream and downstream stakeholders. Ensuring that powerful interests do not capture the process requires robust safeguards to ensure that poor people can participate meaningfully, can hold officials to account, and have access to information.

Can taking a human rights-based approach help to resolve these issues? More specifically:

- Can the procedural rights embodied in the human rights-based approach – including the rights to information, to participation in decision-making, to accountability and the rule of law, and to remedies for discriminatory treatment – guide and inform the water allocation process, particularly when it comes to trade-offs, in ways more likely to result in equitable outcomes?
- Can the substantive rights embodied in the human rights-based approach – namely, those rights protected in the Universal Declaration of Human Rights (1948), the Covenant on Civil and Political Rights (1966), and the Covenant on Economic, Social and Cultural Rights (1966) – orient water management toward meeting the needs of the underserved, help prioritise water resources management objectives, or be used as a framework to address conflicting rights and interests?

Procedural rights: Going beyond water resources

Rights-based approaches to water resources allocation go beyond questions of accessing the actual water itself. The approach is just as much about how stakeholders can exercise their procedural rights, such as participation in decision-making processes; access to information pertaining to hydrology, water quality, water permits, and the like; and access to judicial redress mechanisms to safeguard the rule-of-law, fairness, and non-discrimination (Laban, 2007). In short, water resources allocation is also about how stakeholders can exercise procedural rights that ultimately may influence the outcomes of water allocation decisions.

Current water reforms in many countries grant stakeholders opportunities to participate in decision-making. But in reality, implementation is often weak, and poor people and other vulnerable groups like indigenous people lack voice in decision-making processes. In cases where access to redress, information, and participation depends on personal relations, poor people lack the right connections and the social clout. It is apparent that this threatens the rule-of-law, as different citizens are endowed with different resources to access decision-making processes, redress, and information.

Detailed information on surface and ground water quantity (as well as records on water permits) and quality is difficult to obtain in many countries, and there is no active dissemination of data to the public. In some countries, data is not found at all; in others, it can only be obtained through a personal contact. But there are also positive examples. Under the 1996 amendments to the Safe Drinking Water Act, the United States requires that water suppliers provide customers with annual reports on surface water quality. These reports are usually mailed with bills; many are also posted on the Internet (WWDR, 2006).

Many water stakeholders do not have effective access to judicial systems to seek redress or to resolve water disputes. Local power elites tend to grab resources, and other stakeholders are sidelined at economic and political margins. Small farmers

in remote rural areas, for example, can face practical difficulties (they cannot leave work, or transportation is too costly) to access judicial systems in urban centres, as well. Redress and justice can in many places also be sought through informal customary systems of redress and dispute resolving. There are many examples where such customary systems provide effective means of resolving disputes and allocation decisions in fair and acceptable ways to stakeholders (Tropp, 2006; and Koppen, 2007). But customary systems can also provide basis for inequitable water allocation by merely reflect local power relations and by shutting out women and the poor.

At the international level, the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters¹ was a new kind of environmental agreement. It links environmental rights and human rights. Interestingly, it goes beyond existing generations and acknowledges the obligations that we have to future generations. It establishes that sustainable development can be achieved only through the involvement of all stakeholders. The Convention is an elaboration of Principle 10 of the Rio Declaration, which stresses the need for citizen's participation in environmental issues and for access to information, justice, and participation.

The Aarhus Convention goes to the heart of the relationship between people and governments. The Convention is not only an environmental agreement, it is also a Convention about government accountability, transparency, and responsiveness and the relationship between governments and their citizens. It grants the public rights and imposes on Parties and public authorities' obligations regarding access to information and public participation and access to justice.

The Convention has been ratified by the European Community, which has acknowledged principles of the Convention in the EU Water Framework Directive (Directive 2000/60/EC). The Directive notes the need to "... encourage the active involvement of interested parties."

Integrated water resources management and human rights-based approaches

Integrated Water Resources Management (IWRM) is an approach that promotes the coordinated development and management of water, land and related resources with a view to maximising economic and social welfare in an equitable manner without compromising the sustainability of vital ecosystems. The term IWRM incorporates actions required to manage and control freshwater to meet human and environmental needs. Such actions include investments in both physical and social infrastructure for storage, abstraction, conveyance, and control, as well as for hydropower, flood control, irrigation and drainage, water harvesting, and so on; investments and actions undertaken to protect groundwater resources, control salinity, and promote water conservation; and an array of governance and management measures, including the development and strengthening of institutional and regulatory systems and policy

¹ The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted on 25th June 1998 in the Danish city of Aarhus at the Fourth Ministerial Conference in the 'Environment for Europe' process. The Convention entered into force on 30 October 2001.

A note about human rights language

Some people are put off by the language of human rights. Human rights regimes identify “rights-holders” – those who can legitimately claim a right – and “duty-bearers,” almost always government bodies, who are responsible for not getting in the way of the realisation of the right (respecting the right), not allowing others to interfere with the realisation of the right (protecting the right), and facilitating the realisation of the right (fulfilling the right). (See for example Filmer-Wilson, 2005).

Some critics find it problematic that human rights language is silent on the responsibilities of the rights-holder. The idea that one party has rights but no responsibilities, whereas another has responsibilities, but no rights, strikes them as unfair. They ask questions like this: What if a subsistence farmer freely chose to move from a verdant part of the country to a desolate, barren desert; would he or she be able to claim a right to water or a right to food, and would the state be obliged to respect, protect and fulfill this right? Where does the question of that farmer’s responsibility for making prudent choices fit in? In the case of the right to water, what are the responsibilities of rights-holders to avoid wasting water or polluting the water source?

Human rights experts counter that this line of questioning is based on a misunderstanding of the terms “right holders” and “duty bearers.” No human rights convention states that individuals do not have responsibilities; of course they do. However, the term “duty bearer” strictly means the entity that has a duty by law and is therefore legally accountable, and human rights law clarifies the nature of that duty. When it comes to economic and social rights, the state only has a responsibility to “progressively realise” rights. In the case of the person who moves to barren land, the state can easily argue that it has spent the maximum resources to allow for the maximum number of people to enjoy the right to water, and that serving that one person would cause a large proportion of people to go un-served. The state would only have a responsibility if, for instance, the person had been forced to live in the desert rather than freely choosing to do so.

Of course, the overwhelming majority of people who can avoid it do not try to farm in a desert. But these sorts of examples pose interesting theoretical questions about rights, many of which are best addressed on a case-by-case basis resolved according to local norms and values. The fact that the human rights paradigm does not address all potential questions or is silent on responsibilities of rights-holders does not mean that it is without value, any more than believing that because national laws sometimes result in unjust outcomes means that the rule of law is useless

reforms to promote wise stewardship of freshwater resources (Lenton, et al., 2008). IWRM is about the management of the water resource, as distinct from the use of this resource to provide services, such as domestic water supply.

The UN Conference on Water and Development in Dublin in January 1992 consolidated the four "Dublin principles" which lay the foundation for IWRM approaches:

1. Fresh water is a finite and vulnerable resource, essential to sustain life, development and the environment.
2. Water development and management should be based on a participatory approach, involving users, planners and policymakers at all levels.
3. Women play a central part in the provision, management and safeguarding of water.
4. Water has an economic value in all its competing uses and should be recognised as an economic good.

The IWRM approach to the water management thus emphasises the importance of stakeholders in the decision making process (principle 2) and gender equity (principle 3) which both are important procedural elements of an HRBA approach.

The objective of applying the IWRM approach is to achieve sustainable management and development of water resources by realising the so-called “Three E’s”: environmental and ecological sustainability; social equity; and economic efficiency in water use. IWRM ideally balances these three “E’s” through a

variety of mechanisms, building on three basic pillars: an enabling environment of proper water resources policies and legislation; an institutional framework of capable institutions at national, local, and river basin levels; and a set of management instruments for these institutions. We use the term socially equitable development to mean improving people’s well-being and expanding their freedom, choices and opportunities over time.

Though in the public imagination the word “water” typically brings to mind drinking water from the tap, providing water for household use, though vital, consumes a small fraction of freshwater resources, about eight per cent. (Globally, the lion’s share of water goes to agriculture, 70 per cent, with the rest going to industry and other uses). Thus providing water for household use is just a part of water resources management; applying the IWRM approach is about water as a resource for fundamental human and ecosystem activities – agriculture, industry, transport, recreation, the provision of ecosystem services – as well as protection of people from water and water-borne contaminants, as in flood control and wastewater management.

One critique of the way in which water allocation issues have been considered within the IWRM framework is that concern for the economic efficiency “E” and the environmental “E” has dwarfed concern for the social equity “E.” And, indeed, evidence in support of this view can be found in much of the work on applying an integrated approach to water resources management. For example, water resources management reform in developing countries has tended to overlook community-based ways of

managing the water resource by the majority of rural, small-scale water users, including poor women and men (Koppen, 2007). The economic and environmental aspects tend to dominate any debate or action related to water resources management and development. Might taking a human rights-based approach offer a concrete way to institutionalise processes that advance social equity in water allocation decision-making as well as to orient the management and development of water resources towards meeting the needs of those who are socially excluded or marginalised? This report and the larger process of which it is a part seek to answer this question.

Countries that have sought to improve the way in which they allocate their scarce water resources among competing uses have taken different approaches to the three “E’s”. South Africa has sought to pursue all three simultaneously, whereas Chile has opted for a sequential approach that focused first on economic efficiency. See boxes 1 and 2. In addition to the three “E’s”, IWRM offers:

- A holistic approach applicable to policy and legislation, institutional capacity and frameworks, financial and operational instruments, social development, and scientific research;
- A response to traditional failures of fragmented and sectoral water management regimes; and
- Several guiding operational concepts, among them subsidiarity, participation, the user- and polluter-pays principles, precaution, prevention, transparency, accountability, river-basin management, and sound scientific assessment.

IWRM rests on a foundation of policies and legislation, institutional frameworks, and financial and operational management instruments. The IWRM approach is reflected in global agreements, such as those emerging from UNCED (1992) and the Millennium Summit (2000).

Improving the allocation of scarce water resources within an IWRM framework entails sound water governance. The term water governance encompasses the political, economic, and social processes and institutions by which governments, civil society, and the private sector make decisions about how best to use, develop and manage water resources. Water governance is more than national-level water legislation, regulations and institutions, though these are important components. Effective water governance builds institutional capacity at all levels and empowers stakeholders with the ability to take part in decision-making that directly affects them and to hold decision-takers accountable. It promotes the equal participation of women and men in decision-making.

The human rights-based approach to development

The Office of the United Nations High Commissioner for Human Rights (2006) defines the human rights-based approach to development in the following way:

A rights-based approach to development is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.

Essentially, a rights-based approach integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development.

Box 1: Chile’s sequential approach to allocating water for the three “E’s”

Chile’s water policy shows an evolving “E” emphasis in the last 30 years. The 1981 Water Code relied on market forces to allocate the resource, and thus reduced regulator’s powers and did not consider social and environmental issues. Once democracy was reinstated in 1990, the incoming and subsequent governments modified to some extent the Water Code to cater to greater equity and more efficiency, and introduced new legislation on indigenous people and environmental protection. This sequential approach does not stem from long-term planning, but from Chile’s political history. The Chilean water market has induced efficiencies in mining and export sectors (e.g. wine, forestry, fruits, etc.) to the benefit of the country; nevertheless, equity is still an unsolved question for peasants and poor farmers.

By framing development in terms of human rights, the human rights-based approach posits the existence of claims and corresponding obligations. Programming thereby focuses on building the relationship between individuals and groups with valid claims (rights-holders) and state and non-state actors with correlative obligations (duty-bearers). The HRBA identifies substantive rights (such as the rights to life, food, and housing) and procedural rights (such as the right to information, the right to participation and the right to judicial redress).

Human rights-based approaches support the view that people have the right to actively participate in development. The norms and values embodied in international human rights instruments and reflected in the human rights-based approach support the empowerment of the poor, the sine qua non of development. People are not regarded as having mere needs, but rather legal entitlements; where national legal systems allow, this construct puts disadvantaged groups in a position of greater agency as people claiming their legal rights rather than as objects of charity or passive beneficiaries of the development process. Importantly, rights also come with responsibility to respect the rights of others.

Framing development in terms of human rights instead of needs can be a useful advocacy tool for

galvanising collective action. Publicity, advocacy, and mobilisation can push governments to implement policies and allocate resources in ways that further the implementation of rights. In addition, the rights apparatus outlines the obligations of governments to respect, to protect, and to fulfil the progressive realisation of rights.

Proponents of the human rights-based approach argue that it adds value to development processes for several reasons:

- Human rights, sustainable development, and the Millennium Development Goals (MDGs) are mutually reinforcing; for instance, sound water management for development supports the realisation of human rights, such as the rights to food, health and life, and the achievement of MDGs, particularly

the hunger, poverty, and environment goals; a human rights framework that encourages accountability and transparency contributes to sound water management as well as to MDG achievement.

- The international human rights framework can help to set development priorities and provide a way to address conflicting rights and interests that is transparent and emphasises redress when rights are violated. Invoking fundamental human rights such as the rights to life, health, self-determination, food, and housing (substantive human rights outlined in the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, and the Covenant on Economic, Social and Cultural Rights) can provide a conceptually coherent and morally powerful basis from which to argue for state accountability.
- Attention to procedural rights – the rights to participation, non-discrimination and equality, information, accountability, and judicial redress – can help to ensure that the processes whereby development decisions are made and resources are allocated takes into account the needs of the poor and have safeguards against elite capture.
- It provides a framework that decisively clarifies rights, responsibilities and respective roles of rights-holders and duty-bearers. Hence, it can be an effective methodology to empower water consumers and users to exercise their rights, as well as enabling public and private agents to meet their obligations, such as the delivery of public services and implementation of policies and legislation.

All UN organisations are required to take a human rights-based approach as outlined in the UN Common Understanding.

HRBA and good governance

The HRBA and good governance can both inform analyses of water allocation systems. A glance at the literature on both reveals that they are, in fact, startlingly similar in many respects. The objectives of each are subtly different, however.

A HRBA asks us to focus on the relationship between the state (duty-bearer) and its citizens (right-holders), with the objective of safeguarding the integrity and dignity of the human person. It has been established for use as a tool for integrating human rights into development programming. A HRBA uses the substantive and procedural human rights set out in international human rights instruments, the former being used to define the goals of development programming, and the latter governing the ways in which development is done. Procedural rights include non-discrimination, participation and inclusion, accountability and access to information.

Good governance seeks to achieve equitable and sustainable development through ensuring that decisions reflecting economic, social and environmental priorities take account of the views of all stakeholders, including the most disadvantaged. It encompasses the inter-relationships between individuals and the state, and also their relationships with private sector organisations and non-state authorities, as governance operates at many geographic, political and social levels, from the village to international basins. Its principles are generally recognised as being accountability, transparency and participation (Tropp, 2006).

Although there are clearly significant areas of overlap between HRBA and good governance, their respective aims are different, and good governance is in some ways broader than the HRBA as it takes account of a wider variety of relationships, it is more geared toward decision-making processes, and allows us to draw attention more explicitly to politics and questions of power. A HRBA could be seen as a subset of good governance because it concentrates primarily on the interactions between the state and the individual only. It is also true, however, that the means by and principles through which both seek to achieve their goals are very similar indeed, and the HRBA brings a particular focus that can assist in the prioritisation of development goals.

In summary, HRBA, IWRM and governance approaches correspond in many ways. They are all rooted in concern for equity and consider procedural rights, such as participation, access to information and accountability critical for improved

Box 2: South Africa: Allocating water in simultaneous pursuit of economic efficiency, environmental sustainability and social equity

When South Africa transitioned to democracy in 1994, a top priority was allocating the country's scarce water resources to ensure access to safe water by those that had been denied it in the past. This required addressing the entrenched interests of the white agricultural community – the country's largest water user. The 1996 Constitution established a right of 'access to sufficient food and water' and provided the legal framework for the needed reforms.

New policies and legislation ensured that water resource allocation would be guided by social goals, while safeguarding environmental sustainability and promoting economic efficiency. The concept of water rights was transformed from what were perceived to be permanent property rights to temporary use rights, subject to regulation. Two forms of allocation were introduced: one for individual applications for water use rights, for which clear criteria were established, and another for catchments with significant competition among users, for which a periodic allocation process was introduced. Transfers from one user to another were allowed. Water to meet basic human needs, and also to meet environmental needs, was 'reserved'. For economic uses, user-pays and polluter-pays principles were promoted. Allocation and financial support mechanisms to allow formerly excluded communities to gain access to water resources were designed.

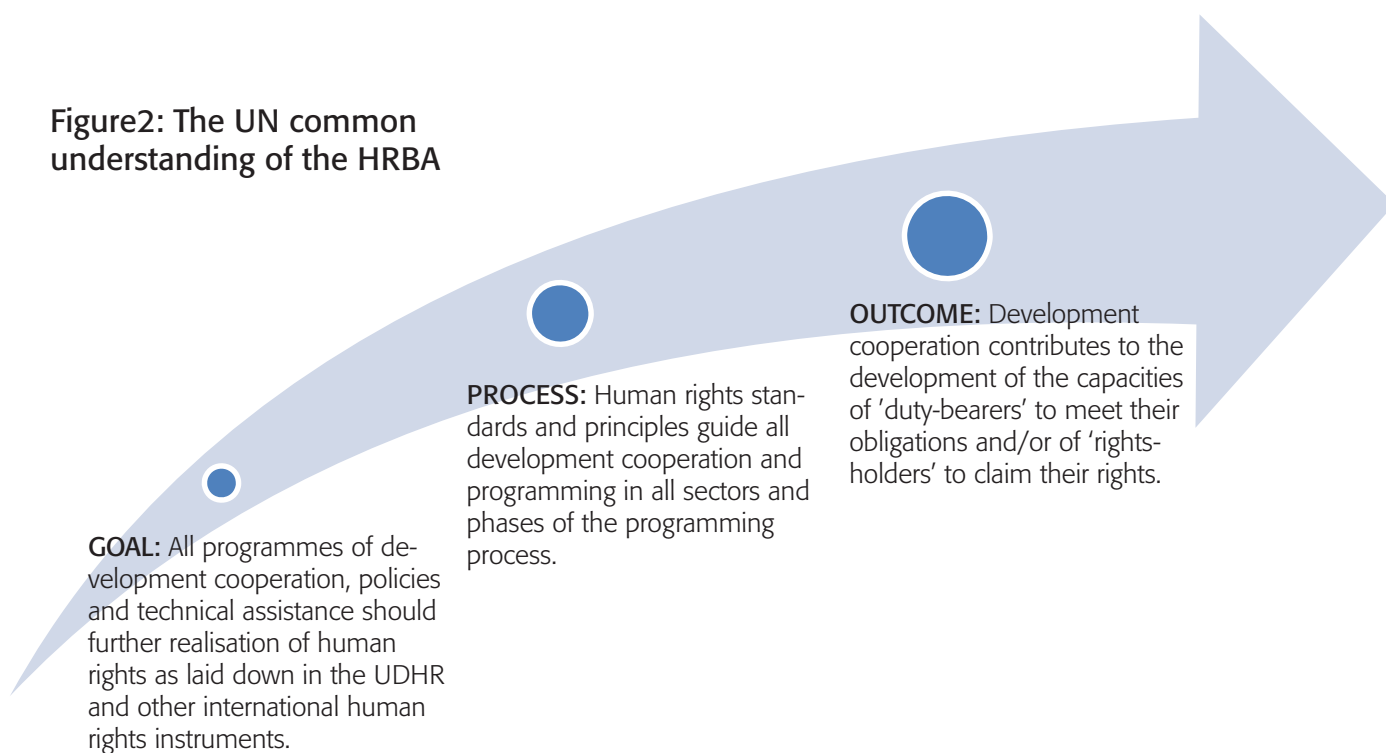
water resources management. IWRM rests upon policies and legislation, institutional frameworks, and financial and operational management instruments, the very areas that rights-based approaches advocates seek to influence to enable people to exercise their internationally guaranteed human rights. In addition, questions of governance feature prominently in each.

The human rights implications of poor water management are more than equity and extend beyond water access to health, environmental, social and economic spheres. For example, exposure to pollution, inadequate water for a healthy environment and reduced water for food production breach basic human rights. The economic issues surround opportunities for development (individually and socially) as well as the burden for subsidised water, pollution impacts falling on all taxpayers to the benefit of the few. IWRM approaches put strong emphasis on integrated decision-making and there is thus strong interaction with the HRBA.

But there are also differences, the HRBA puts substantive rights at forefront and emphasises that such rights are: Universal to protect individuals and groups against actions and omissions that affect their freedom and human dignity, hence the focus on non-discrimination and; indivisible and interdependent, meaning that all rights are equally necessary for human life and dignity. Another difference is that the IWRM approach is spatially based at the river basin level as the primary unit for decision-making. The HRBA approach is not spatially or systems oriented in this way.

Despite conceptual correspondences and discrepancies HRBA and IWRM approaches should be seen as mutually supportive. In practice IWRM has to a large degree neglected to directly address social equity issues and HRBA can be seen as a methodology to strengthen such work (Tremblay, 2010). Moreover, can the HRBA benefit from more systems oriented and integrated approaches that are provided through IWRM.

Figure2: The UN common understanding of the HRBA



Water Rights Regimes and their Implications for Water Allocation

The application of HRBA does not take place in an institutional vacuum. Principles of water allocation already exist. Due to multiple water uses water rights often comes in bundles (irrigation, hydropower, households, religion, tourism, ecosystem services etc). Many times, particularly in developing countries, water legislation is highly pluralistic, such as through formal or constitutional and customary water rights.

The purpose of this section is to briefly outline some of the legal and institutional elements that make up the national context in which a HRBA might be implemented. The questions that this section raises will be explored in greater depth later in the report as well as through examination of cases in developing countries.

The extent to which national legal frameworks can adapt to and accommodate a HRBA will largely determine how successful the HRBA can be in promoting greater equity in water allocation. This section seeks to identify those elements of national law that will be most conducive to a HRBA and those that will present the greatest challenges.

The role of legal frameworks in water resources allocation

Water rights in national water law refer to the right of a user to use water from a water source, e.g., a river, stream, pond or source of groundwater. Water rights stipulate who can use water, when and how and under what conditions it can be polluted. Where the rule of law exists, water law is the chief means for mediating competing societal interests over water resources. The balancing of these opposing interests may be more or less favourable to broader issues of equity and the sustainability of water resource availability. Clashes between sectoral administrations of water are not uncommon, especially where water use allocation (including abstraction and pollution control) is not coordinated across the resource as a whole. This section will look in particular at four distinct types of national water rights, each of which has different implications for equity, sustainability and economic efficiency in the allocation of water resources.

1. Rights deriving from land ownership

The riparian rights system forms the basis of many water law regimes. Fundamentally based on the system developed by the Romans, it exists around the world, but is most closely associated with common law jurisdictions (e.g. England and the eastern USA).

The right to use water in a riparian rights system derives from land ownership: those who own land abutting on to a body of water have a right to use a share of that water. As a result landless will not be able to access water and thus be a limiting factor for poor people both regarding household water use and for more productive purposes. Each riparian land owner will have an equal right to that share, irrespective of the length of the border between their land and the water and regardless of their position on the river. They do not own the water, however, as they possess only the right to use and benefit from it. Normally each riparian owner will have a right to the

reasonable use of the resource, although in some jurisdictions, downstream landowners are entitled to receive the river water unaltered in quality or quantity (the “natural flow” doctrine). During periods of scarcity, larger scale or commercial uses will be the first to be reduced, with domestic uses being protected to a greater degree.

Defining what constitutes reasonable use can be tricky. Reasonableness may be broadly synonymous with domestic uses, but is usually defined in the context of the watercourse and all other users. In such cases, determination of reasonableness needs to be done in the courts, which is time-consuming and expensive. What is regarded as reasonable changes over time as other users, uses and resource availability vary, further complicating matters.

While the above describes the situation with respect to surface waters, in some jurisdictions landowners have rights of unlimited use of the groundwater underlying their property. Potentially, this right may be exercisable even if it adversely affects other landowners over the same aquifer.

2. Established uses – customary / prescriptive

The term “customary” water law is a catch-all expression; it broadly describes systems derived from customary practices that administer water use rights. Customary systems exist all over the world – indeed custom normally forms the kernel of legal systems in general. These systems typically exist at the local and regional levels and tend to be overlaid by formal written laws that apply nationally. The relationship and degree of mutual recognition between these parallel systems can be problematic, and, along with questions of scale, has profound consequences for the national application of a human rights-based approach.

Customary systems are typically concerned with the allocation of water use rights for irrigation, domestic use and for the watering of livestock. They may also be based on religious tenets, as systems such as the Islamic system are. They normally establish priorities of use rights, normally protecting human needs above animals’, and the oldest uses above more recent ones. Many customary systems contain established procedures and priorities for the allocation of water among users during periods of scarcity. Customary systems also resolve conflicts over water use. A high degree of social cohesion is required to maintain and sustain these regimes. This cohesion demands certain standards of behaviour and imposes stark consequences in terms of social ostracism. This results in compliance levels that may be far more effective than in formal systems at this level. The focus of customary systems on the protection of human needs has a clear connection with a human rights-based approach.

In other ways, however, customary systems may not be conducive to the HRBA. Customary systems tend to be conservative, protecting existing social hierarchies and the interests of society’s most powerful –leading to discrimination against women and other less powerful groups. In addition, the problem of scale is potentially significant where, for example, upstream development of a watercourse has a detrimental

impact on quantity or quality of the resource used by downstream societies governed by locally-based customary systems. This problem may be exacerbated by the influence of the formal systems in place nationally, which are likely to be either riparian rights- or permit-based.

In addition to the customary rights outlined above, in some jurisdictions it is possible to obtain legally enforceable rights to use water through sustained use over a set period. If for example, a farmer has been irrigating a known area of crop for a long time, but without any formal authority, he can establish his rights by proving that he has indeed been using the water continuously over the required period (typically around twenty years, or within living memory).

3. Rights of free use

In some states, rights to use water are available to those who do not otherwise have legal authorisation. This occurs where permit systems are in place, for example, but where certain minimal levels of water use do not require authorisation. Such free rights of use are by their nature limited – permits will not be required as long as the user is taking the water only for domestic use, stock-watering or gardening, or where non-mechanical techniques are used for abstraction. There is a clear interface with customary systems of water allocation: these regimes will take over the allocation of a water resource when the bounds of the permit system have been reached. Customary law may also set out the details of access rights over land.

4. Administrative permits / authorisations

The most administratively burdensome systems for water allocation are permit systems, in which certain water uses are allowed only if an appropriate permit or authorisation has been issued from a central authority (at the national, state or basin level usually). The physical permit normally specifies the amount of water that may be abstracted or the quantity of a particular pollutant that may be discharged, the geographical location, the identity of the holder of the right and its duration. Permit systems generally cover large-scale abstractions for agricultural, industrial or municipal use. They may also incorporate emission authorisations for pollution control.

Permits are normally time-limited, but perpetual rights are possible in some areas. This is problematic especially because it may be very difficult to vary these rights in the light of reduced resource availability. The degree to which the rights obtained through permits are absolute is variable – in the South African case again, the legislation specifically states that possession of a right to use water is no guarantee of supply. The inviolability of a right will be dependent on the extent to which it is possible to vary rights during periods of scarcity. Variation, where users have to reduce the amount of water they use, for example, can take place through regular review processes (normally every 5 or 6 years) or through application of provisions that are only triggered in extreme circumstances. In a few jurisdictions, it is possible to sell or lease water use rights independently of land. These transfers may only be allowed between irrigators, but in some cases inter-sectoral transfers are possible. Systems of exchange rates are in place in some irrigation contexts, to reflect the differing impacts on resource quantity and quality resulting from transfers changing the location of the abstraction

point. This aids protection of the environment and might also potentially include a social equity “buffer”.

One particular variety of permit system, the prior appropriation system, imposes a strict hierarchy of rights-based on time; the oldest uses are accorded highest priority, with recent uses bearing the brunt of scarcity. Beyond this, all uses are of equal value, as long as they are deemed to be beneficial uses, irrespective of whether they are used for domestic use in municipalities, irrigation or mining. Permits in such systems are transferable, and this means that where the rights held by a municipality for domestic supply purposes are ranked very low (and thus potentially vulnerable to small reductions in water availability), the municipality is compelled to buy higher ranked rights if it is to fulfil its obligations.

Interface between different allocation systems and the human rights-based approach: where is there potential to enhance equity?

Some water allocation regimes are more conducive to human-rights-based approaches than others, and offer greater potential for making water allocation more equitable.

Riparian rights: The most important aspect of the riparian rights system with respect to the HRBA is that only riparian land owners are entitled to water use rights. Those who own land that is within the watershed but not directly contiguous to the watercourse have no rights with respect to the resource. In situations where water is taken out of a watercourse by way of a riparian right, but used to provide water to others, such uses could be vulnerable during periods of scarcity because of the requirement that only reasonable uses in the context of the river will be protected. Where unregulated groundwater use is permitted, large-scale users could potentially exhaust aquifers if recharge rates are low, and consequently damage surface water resources and dependent ecosystems, or drive the water table down to levels that make access impossible for the poor. Sustainability and equity are therefore at risk in such systems.

Administrative permits and rights of free use: Ultimately free rights of use have value only if users have physical and legal access to a water source. Those without such access will have to find other sources of water. Where access is available, those relying on free rights are subject to variability in the quality and quantity of the water source. However, the question of access masks the issue of distance to a water source – access rights take no account of distance between user and source. Those dependent on free rights are therefore completely exposed to resource fluctuation and to problems with access. Their rights are, in effect, to the water remaining in system after authorised uses have been satisfied: they do not have enforceable rights to a particular amount of water of a prescribed quality. Water quality will also be dependent to some extent on both regulated upstream uses and on sanitation practices, both of which would restrict the use of free rights in heavily populated areas.

However, where free rights are available in the context of an administrative permit system, it may be possible to maintain the quantity and quality of water available to small users when water is scarce. Permit systems may be beneficial in such circumstances but only insofar as regulators are able to reduce the amount of water used by major users, and especially where they can limit pollution, as quality will become a greater concern when there is less water to receive controlled emissions.

Ultimately, this means that the capacity for the authorities to vary authorised uses is critical during periods where water availability is reduced – if quality standards are to remain consistent irrespective of quantity, water managers must be able to adjust the rights that are covered by permits. Consequently, it would be possible to structure a permit system so that it could take

account of small users who don't need to have permits (as the existing South African system does). In periods where water availability is normal, the amount of water available for permitted uses could be limited in recognition of the number of small users on a river, for instance.

Discussion

HRBA in the context of existing water rights regimes

One interface between the HRBA and existing legal regimes relating to water allocation will be through customary systems. Customary systems that exist at local levels will be the allocation regimes of default for most people, especially in the developing world. Where riparian rights systems are in place, the overwhelming majority of citizens will have no rights to use water unless legally enforceable access rights are in place and water sources are close enough to make this a practical possibility. Permit systems require the presence of a reasonably effective institutional framework to allow proper administration of the system, along with adequate compliance monitoring and enforcement capacity. Permit systems and market-based regimes relate in the first instance at least to water service provision and abstraction for the bulk water users such as agriculture and industry – they have no direct connection to individual users who take water from natural sources, although they are likely to recognise free rights of use for amounts of water that are sufficiently small to have no real impact on resource availability.

Permit systems may however have a potentially significant impact in relation to water quality and quantity. In relation to the former, if the abstractions and discharges of large users can be effectively controlled, this will have a beneficial effect on the quality of water available for free rights users, although the effects of diffuse pollution from agriculture may still be damaging. With respect to the question of quantity of water available, the abstraction rights included in bulk use permits should be variable by the issuing authority so that in periods of scarcity, the interests of both local users and the environment are protected as far as possible. This will have to accommodate short term or seasonal changes, but also longer term shortages caused by climate change, land use changes and population growth. This means that social and environmental equity will have to be protected in some way in the enabling legislation, and demands that monitoring and enforcement capacity is suitably robust. In many countries permits for water use are issued on a sectoral basis with no cross-checking between sectors, and this has potentially highly detrimental effects on the chances of there being enough water left in a system for small domestic

users downstream. This is a potentially significant area of interplay between the HRBA and IWRM – the latter demands that allocation be managed holistically across sectors, and only by doing this can the interests of other non-licensed users be protected. Implementing an HRBA in such circumstances could actually encourage the closer integration of permit issuing and consequently assist in the application of IWRM.

The effectiveness of a permit system depends to a large extent on the institutional capacity to enforce it, the quality of the monitoring system in place, and underpinning all of these, the overall governance regime that supports the water management regime. Here governance is taken to broadly mean the ways in which society manages its economic, political and social affairs through interactions within and among the state, civil society and private sectors, and in order for this to form a solid foundation for a water allocation system, it must allow for transparent decision-making, the ability to hold institutions and individuals accountable, and participation by stakeholders in decision-making processes. This requires a responsive and impartial judicial system, open availability of information and clear delineation of responsibilities, rights and powers. One problem, however, with regard to governance at the national or political levels and customary systems is that the two may never meet. Customary systems will be maintained within social, ethnic or religious groups, and the extent to which they exist will be a reflection of the penetration of more formal governance systems at the local level. From the HRBA perspective, this creates problems, firstly because the governance of customary systems may perpetuate social hierarchies and minimise the influence of women and marginalised groups. It also creates problems because it means that the application of an HRBA approach at the national level would not reach those customary communities, and the efforts must therefore be concentrated at community level, each community potentially requiring a different approach.

While the local systems may have little interaction with the national governance context, the degree to which the latter is transparent, accountable and participatory will be important from the perspective of ensuring that local users are aware of the rights they have at different levels.

Another aspect is that the role of private business has steadily increased in relation to water use and management. For example in the 1990s the number of private sector water supply concessions in developing countries and economies in transition exploded. Current trends of land acquisitions in developing countries by agri-businesses and even other countries are causing many questions regarding sustained access to water by subsistence farmers, indigenous people and other vulnerable groups. Box 3 outlines some recent international trends and achievements related to business and human rights that also should be closely linked to water business and HRBA issues.

In conclusion, implementing the HRBA in the context of existing water rights regimes is likely to be complicated, but may in fact enhance the implementation of the IWRM approach. In terms of positive legal regimes for water management, permit systems appear to be the best potential interface for HRBA. These are bureaucratically and physically demanding, however, due to the administrative capacity required for the evaluation and issuing of authorisations within a reasonable period, and the necessity for adequate monitoring and enforcement systems.

Although such systems may be difficult to put in place in the short term in developing countries, it may be possible to implement more limited systems that address only the largest abstractors or polluters of water. If such licensing systems can be established with appropriate coordination between the relevant sectoral authorities (e.g. the relevant ministries or authorities responsible for agriculture, water service provision, industry, energy and the environment), the interests of those who rely on drawing water from natural sources may be better protected and their interests taken into account directly in the allocation process. In addition to this institutional coordination, it will also be imperative for authorising bodies to be able to vary these licensed uses during periods where availability of water is low – by adopting an HRBA, it should be possible to incorporate more general humanitarian considerations into the factors taken into account for such variations. The relevant water allocation law will need to reflect this in order to vouchsafe both transparency and accountability.

Implications for Policy and Programming Priorities

Human rights-based approaches offer potential to strengthen equity in water allocation. However, the process of actually operationalising this approach in developing countries may have significant implications with regard to resources, capacity, legal and institutional frameworks, governance structures and political will.

Though low-income countries vary widely in terms of the environmental, political, financial, and security situations they face, all encounter challenges in implementing both human rights-based approaches in general and integrated approaches to water resources management. Not surprisingly, then, taking a HRBA to water allocation is difficult in most of the developing world, requiring a long time horizon for success as well as significant capacity building. This is true, of course, of social change more generally; democratisation, moves toward greater gender equality, and the like are lengthy and frequently yet-unfinished processes.

Challenges common to many developing countries include economic policy that does not encourage equity; lack of effective

voice and opportunities for meaningful participation among the poor; widespread clientelism and corruption and a commensurate absence of transparency and accountability; lack of resources; inadequate capacity for financial management; poor conditions of public service; “siloed” government ministries and departments; a strong executive unchecked by parliamentary oversight; a hierarchical, centralised government management structure; a legal framework that does not adequately safeguard the interests of the less powerful; and inadequate enforcement of laws and policies on the books. The human rights-based approach can function as a diagnostic tool to identify and address such deficiencies.

Impediments to equitable allocation of water resources within the water sector itself include limited awareness among politicians of water resources issues; water institutions with a strong supply-driven mindset and centralised structures; lack of local-level government ability to manage pressure on water resources or to resolve conflicts among water users; inappropriate pricing structures, resulting in foregone revenue, inefficiency, and misallocation of water resources; underinvestment in the water sector; lack of information; and inadequate economic, social and environment criteria for policy-making and project planning (Jøneh-Clausen, 2004).

The answer, however, is not to throw up one’s hands in the face of formidable obstacles. All areas of development face similar constraints. To strengthen equity in water allocation through a human rights-based approach, several areas are particularly critical:

- Country ownership and leadership – though this may seem obvious, there needs to be a general consensus among key actors within the country itself that a human rights-based approach adds value to water resources allocation, and that this consensus implies the need for new ways to allocate water.
- Enshrinement into national law – Without translation of human rights principles into national law, the impact of these principles will be felt primarily in the areas of advocacy and mobilisation – rather than providing legal recourse to those whose rights have been violated. If human rights principles are not part of national law, the national budget will be less likely to include resources required for a new approach.
- Capacity building – strengthening capacities of local civil society organisations, communities and local authorities to work with a human rights-based approach to water resources allocation is key, as is building the capacity of authorities to determine and meet local water needs by providing communities better access to decision-making and information.
- Increasing citizen awareness and oversight for improved transparency and accountability in decisions affecting the provision of and access to water resources. There is also a need for awareness-raising among consumers on their rights (as right-holders) as well as a commensurate awareness on the part of governments and service-providers (duty-bearers) on their responsibilities.

In this list, we see the dualism in the HRBA approach – on the one hand, for the approach to function fully, it requires that certain conditions are in place, with the implication being that actions should be taken to put them into place where they

Box 3. Guiding Principles for Water Business and Human Rights

In response to globalisation, increased global trade and activity by transnational corporations in the 1990s, issues of business and human rights became permanent on the international policy agenda. In 2011, the United Nations Human Rights Council endorsed the Guiding Principles for the Implementation of the UN “Protect, Respect and Remedy” Framework. The UN Guiding Principles provide a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity.

For example, the Guiding Principles state that business enterprises should carry out human rights due diligence to identify, prevent, mitigate and account for how they address their adverse human rights impacts. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.

This may have very practical implications for private sector ethics and behavior, not only in relation to water services provisioning, but also for agri and bio-fuel businesses that normally claim large quantities of water and land resources. The Guiding Principles should also have important implications for land acquisitions linked to food and bio-fuel production and water use and management. A current trend in many developing countries in Latin America and Africa is that transnational agri-businesses and even other countries are buying up land. A large portion of investors in land come from regions, such as China, India, and the Arab Gulf countries, who face several water challenges to produce food and other goods to meet the increased consumer demands in these emerging economies.

Many have voiced concerns about these trends: Domestic food security in host countries may be under threat. Others fear that local populations with customary access to land and water are often evicted or excluded when large scale agricultural development projects are implemented. As land rights are being put into question, water rights are also coming to the fore. Typically, water is often presumed to be included without explicitly being mentioned in land lease agreements.

Sources: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 2011; and Jägerskog et al. 2012.

don't exist. On the other hand, the approach acts as a vehicle to identify weaknesses and strengthen the components e.g. transparency, access to justice etc. which in turn will have benefits on the equity aspects of water management. The HRBA both defines the goals of development programming and governs the way in which development is done.

Moving forward: Increase knowledge and capacity

Human rights-based approaches are seen as useful to address issues of equity related to water resources management and allocation issues. It can be used as a methodology to more explicitly address issues of distribution of water rights and non-discrimination in already established approaches to water governance. Conceptually, there is overlap with IWRM approaches but water sector reforms can be strengthened by more attention and commitment to HRBA and inversely a HRBA to water is more likely to be effective if water management systems are reformed in line with IWRM principles.

However, there is no one-size-fits-all answer to questions about the utility of human rights-based approaches for making water allocation more equitable. The utility of the approach depends upon the legal frameworks at the national level, as discussed in the second part of this report, as well as a host of country-level characteristics and capacities, from political will to the level of corruption to acceptance of the human rights framing in general to the abundance or scarcity of the water resource itself. Approaches that rely on procedural rights might

make useful contributions to the water resource allocation process in one country, but be a non-starter in another.

As evident in this report, there are yet very few cases that can inform us about the application of HRBA to water resources issues. There is thus a need to increase the knowledge as well as capacities to understanding how, and under what circumstances incorporating a human rights-based approach to water resources management in developing countries might make water allocation more equitable and, in so doing, advance nationally determined development goals as well as the progressive realisation of internationally recognised human rights.

References

- COHRE, AAAS, SDC and UN-HABITAT (2007). *Manual on the Right to Water and Sanitation*, Centre on Housing Rights and Evictions, Geneva.
- Filmer-Wilson, E (2005). The Human Rights-Based Approach to Development: The Right to Water. *Netherlands Quarterly of Human Rights*, Vol 23/2: pp. 213-241.
- Jägerskog, A., Cascão, A., Hårsmar, M. and Kim, K. (2012). *Land Acquisitions: How will they Impact Transboundary Waters?* Stockholm International Water Institute, Report Nr 30, Stockholm.
- Jönch-Clausen, T (2004). *Integrated Water Resources Management and Water Efficiency Plans by 2005: Why, What and How?* Global Water Partnership, TEC Background paper No. 10, Stockholm.
- Kirkemann Boesen, J., and T. Martin (2007). *Applying a Rights-Based Approach: An inspirational guide for civil society*. The Danish Institute for Human Rights, Copenhagen.
- Koppen, van B., M. Giordano, and J. Butterworth (Eds.) (2007). *Community-based Water Law and Water Resource Management Reform in Developing Countries*. CABI Publications, Vol. 5, Wallingford UK and Cambridge MA USA.
- Laban, P (2007). Accountability and Rights in Right-Based Approaches for Local Water Governance. *International Journal of Water Resources Development*, Volume 23, Issue 2: pp. 355-367.
- Lenton, R. and M. Muller (Eds.) (2008). *IWRM in Practice: Better Water Management for Development*. Earthscan, London.
- Office of the United Nations High Commissioner for Human Rights (2006). *Frequently Asked Questions on a Human-Rights Based Approach to Development Cooperation*. HR/PUB/06/8, Office of the United Nations High Commissioner for Human Rights, Geneva.
- Tremblay, H (2010). *A clash of paradigms in the water sector? Tensions and synergies between integrated water resources management and the human rights-based approach to development*. Working Paper. <http://ssrn.com/abstract=1661146>
- Tropp, H. (2006). Water Governance Challenges. *World Water Development Report 2006: Water a Shared Responsibility*. Berghahn Books and UNESCO Publishing, New York and Paris: pp. 42-85.
- UNDP Human Development Report (2006). *Beyond Scarcity: Power, Poverty and the Global Water Crisis*, United Nations Development Programme. Palgrave MacMillan Press, New York.
- United Nations (2003). *The Human Rights Based Approach to Development Cooperation: Statement on a Common Understanding of a Human Rights-Based Approach to Development Cooperation*. Agreed at the Stamford Workshop and endorsed by the undg Programme Group. Available at: http://www.undg.org/archive_docs/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf
- United Nations Economic and Social Council (2002). *General Comment No. 15 on the right to water*. UN Doc E/C.12/2002/1, Committee on Economic, Social and Cultural rights of ECOSOC, Geneva.
- United Nations General Assembly (2010). *Declaration on the human right to water and sanitation*. UN Doc A/64/L.63/Rev.1, New York.
- United Nations Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (2011). *John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. Human Rights Council, New York.
- United Nations Rio+20 Conference (2012). *The future we want*. United Nations A/CONF.216/L.1*, Outcome of the Conference, 20-22 June 2012, Rio de Janeiro, Brazil.
- United Nations Special Rapporteur on the Right to Safe Drinking Water and Sanitation (2012). *On the Right Track: Good Practices in Realising the Rights to Water and Sanitation*. United Nations, New York.
- World Water Development Report (2006). *Water a Shared Responsibility*. Berghahn Books and UNESCO Publishing, New York and Paris.
- World Water Development Report (2012). *Managing Water under Uncertainty and Risk*. UNESCO, Paris.

Human Rights-Based Approaches and Managing Water Resources

Exploring the potential for enhancing development outcomes

The report addresses how social equity aspects of water resources management and allocation can receive greater priority. Many governments and multi-lateral organisations are increasingly emphasising the critical importance of mainstreaming human rights-based approaches in development policies and donor strategies. The report is exploratory and serves as a conceptual input among water

development practitioners and policy-makers about the utility of taking a human rights-based approach to water resources management, especially concerning equity issues. Human rights-based approaches can be used as a methodology to more explicitly address issues of distribution of water rights and non-discrimination in already established approaches to water governance.



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