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RIGHT TO WATER AND ACCESS TO WATER: AN ASSESSMENT

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Abstract: This paper examines the scope for a rights-based perspective on the Millennium Development Goals (MDGs) by focusing on right to water. The paper adapts Hohfeldian framework of elements of a right developed by Wenar. According to this, a right should be interpreted in terms of powers, privileges, claims and immunities. This framework highlights the inter-connections between various aspects of governance and the effectiveness of a right to water. The conjecture whether the poor are more likely to have access to water when there is a right to water is examined with data (from WHO–UNICEF Joint Monitoring Programme) pertaining to a small sample of countries where a right to water has been promulgated and some others where such right has not been promulgated. The impact of governance on improving access to water is examined using indicators from Governance Matters V (Kaufman *et al.*, 2006). This analysis suggests that mechanisms of governance may be more important in improving access to water than a formal articulation of a right to water. Some challenges to operationalising a right to water are discussed. Copyright © 2007 John Wiley & Sons, Ltd.

Keywords: Millennium Development Goals; right to water; poverty; justice; good governance

1 INTRODUCTION

The aim of this paper is to examine the potential contribution that a right to water can make to improving access to water, considered to be crucial to well being and quality of life. Target 10 in the Millennium Development Goal (MDG) Seven is a global commitment to halve by 2015 the proportion of people without access. Improving access to water is neither easy nor without trade-offs. Contested entitlements to water resources and intense competition can trigger local-level conflicts between different uses of water. Rights-based approaches appear to be invoked in this context, mainly as mechanisms to help resolve the

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allocation of water for different uses and with reference to multiple values, including economic, social, environmental and cultural factors.

Though MDGs were not specifically formulated from a rights-based perspective, there have been attempts to appeal to the links between MDGs and human rights. To set the context, Section 2 provides a brief summary of the potential links between MDGs and rights. In Section 3, the bases of a human right to water are discussed. In Section 4, an attempt is made to explore the issue of whether a right to water can help in achieving the MDG target, based on data from a small sample of countries that have introduced a right to water and from another small group of countries that do not have such provision. In Section 5, some potential problems in implementing a right to water are discussed. Conclusions and some issues for further research are discussed in Section 6.

2 HUMAN RIGHTS AND MDGs

A link between MDGs and human rights is highlighted in the Millennium Declaration, subsequent annual reports of the Secretary General and the Human Development Reports (UNDP, 2003, 2006). Seven of the eight MDGs concern reducing poverty, confronting gender inequality, improving access to education, health, water and sanitation; improving housing conditions for slum dwellers, and tackling specific disease burdens. These can be interpreted as emanating from a broader interpretation of a right to life (Article 3 of the Universal Declaration of Human Rights (UDHR)) or flowing from the rights specified in Articles 22, 25 and 26. For instance, clause 1 of Article 25 of the UDHR (1948) is relevant to many of the MDGs:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Another source of a rights-based view of developmental goals such as the MDGs is the Declaration on the Right to Development (DRD, 1986) and the two preceding covenants, namely, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). Clause 1 of Article 8 of the DRD states:

States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.

It is apparent that a number of MDGs are relevant to this clause.

Alston (n.d., 2005) suggests that the first and most important step is for MDGs to simply acknowledge human rights obligations and then to state (and demonstrate) that the implementation of MDGs is consistent with the principles of equality and non-discrimination. I have summarised some of the many international human rights provisions relevant to the 8 MDGs in Table 1.

Table 1. Millennium Development Goals and various international human rights provisions

| Millennium Development Goals | Universal Declaration of Human Rights, 1948 | International Covenant on Economic, Social, and Cultural Rights, 1966 | International Covenant on Civil and Political Rights, 1966 | Declaration on the Right to Development, 1986 | Other significant sources |
|---|--|--|---|--|--|
| Goal 1: Eradicate extreme poverty and hunger | Right to life with dignity (Articles 1 and 3) | A right to adequate standard of living (Article 11) | Right to life with dignity (Article 6 read together with preamble) | Fair distribution of income (Article 8(1)) | Right to adequate food: under General Comment 12, 1999 |
| Goal 2: Achieve universal primary education | Right to education (Article 26), along with others concerning participation, freedom of thought (Articles 18, 19 and 27) | Right to education (Articles 13 and 14) | As being instrumental to enjoyment of right to freedom of thought and opinions (Articles 18 and 19) | Equality of opportunity for education (Article 8(1)) | Convention against discrimination in education, 1960; Convention on the Rights of the Child, 1989; General Comment 11 of 1999 |
| Goal 3: Promote gender equality and empower women | Provisions dealing with equality and against discrimination (Articles 2, 16, 18, 19, 22) | Equal rights of men and women (Article 3) | Equal rights of men and women (Article 3) | Rights of women to participate in development (Article 8(1)) | Convention on Elimination of All forms of Discrimination Against Women (CEDAW), 1979; Declaration on Elimination of Violence against women, 1994 |
| Goal 4: Reduce child mortality | Right to life with dignity (Articles 1, 3, 25 (2)) | Protections for children (Article 10(3)), right to health (Article 12) | | Equality of opportunity for access to health services (Article 8(1)) | Convention on the Rights of the Child, 1989 (especially, Article 24); right to health in General Comment 14 of 2000 |

(Continues)

Table 1. (Continued)

| Millennium Development Goals | Universal Declaration of Human Rights, 1948 | International Covenant on Economic, Social, and Cultural Rights, 1966 | International Covenant on Civil and Political Rights, 1966 | Declaration on the Right to Development, 1986 | Other significant sources |
|--|---|--|--|--|--|
| Goal 5: Improve maternal health | Right to health and standard of living (Articles 3, 25) | Protections related to maternity (Article 10(2)), right to health in Article 12 | | Equality of opportunity for access to health services (Article 8(1)) | Right to health in General Comment 14 of 2000 |
| Goal 6: Combat HIV/AIDS, malaria and other diseases | Right to health and standard of living (Articles 3, 25) | Right to health (Article 12) | | Equality of opportunity for access to health services (Article 8(1)) | Right to health in General Comment 14 of 2000 |
| Goal 7: Ensure environmental sustainability | Right to life with dignity and responsibility, and a decent standard of living (Articles 3, 25, 29) | Access to natural resources (Article 1), right to safe and healthy working conditions (Article 7(ii)), a right to adequate standard of living (Article 11) | Access to natural resources (Article 1) | Equality of opportunity in access to basic resources and housing (Article 8(1)) | Right to adequate housing- General Comment 4 of 1991; human right to water- General Comment 15 of 2002 and right to health in General Comment 14 of 2000 |
| Goal 8: Develop a Global Partnership for Development | A just social and international order (Article 28) | International obligations (Article 23), but also Articles 16-22 | International obligations to protect human rights (Articles 40-42) | Universal responsibility (Articles 2 and 3) and duty to co-operate internationally (Articles 3, 4, 6, 7) | |

Source: Compiled by author.

According to Khoo (2005) the main implication of adopting a human rights perspective on the MDGs is the obligation to act. Taking the example of hunger (MDG1), Khoo argues that halving the proportion of population suffering from hunger and malnutrition is a means to realisation of the right to food. This obligates nations to take steps necessary to progressively move towards the attainment of the goal. Alston (n.d.) recapitulates the 1993 Vienna Declaration of the World Human Rights Conference on the link between extreme poverty and human rights: since extreme poverty is incompatible with human dignity which is the foundation of human rights, extreme poverty is tantamount to violation of human rights. A human rights perspective both legitimates the MDGs and highlights taking action as an obligation and not as charity. A rights perspective requires a positive and pro-active pursuit of protecting and promoting the rights, not merely the negative and passive role of avoiding violation (UNDP, 2003).

Besides these services that a human rights approach may offer to the MDGs project, Alston (n.d.) argues that the MDGs are in turn important for human rights thinking, where he highlights the need to be selective and prioritise: '... If every possible human rights element is deemed to be essential or necessary, then nothing will be treated as though it is truly important' (*Ibid.*). He urges that we limit the use of human rights terminology to where it is appropriate. According to him (*Ibid.*):

... the crucial issue is not whether a more integrated approach should be sought, but rather how such an approach might best be fashioned. In particular, two questions need to be answered. How can the MDG process be made more human rights friendly? And how can human rights standards and procedures be mobilized so as to enhance the effectiveness of the MDG initiative?

The MDGs themselves have been formulated at the level of 'global community'. This centralised and top-down approach is then mirrored by nation states as the main implementers of the MDGs. This can result in empowering (and thus centralising) the state and legitimising a top-down development agenda. A human rights perspective can be helpful in challenging such attempts and to provide transparency guarantees and improve the process aspect of freedoms.

3 THE RIGHT TO WATER IN THE CONTEXT OF MDG7¹

Ensuring environmental sustainability is the focus of MDG7. Target 10 of the goal is a commitment to reduce by one half the proportion of population without access to improved access to water and sanitation. While access to water is directly referred to in Target 10 under the MDG7, water allocation is also relevant to reducing hunger (Target 2 under MDG1). It can also contribute to reducing child mortality² (MDG4), improving maternal

¹As Calaguas (1999) has noted, discussions on water rights tend to be dominated by issues related to water alone, and sanitation tends to be relegated to lesser importance [0]. This paper has the same conventional balance of attention. Yet access to sanitation is perhaps particularly closely related to the concept of human dignity (hence it is highlighted in the Millennium Task Force report, see UNDP, 2005). To some extent, right to sanitation is essentially an instrumental right that supports the right to life with dignity, right to adequate standard of living, right to a clean environment and a right to be free from disease (right to health). It needs to be interpreted like a side constraint.

²In Anand (2006), the issue of the link between access to water and sanitation and reducing child mortality was examined with 2002 data from some 71 countries. The results indicated that child mortality is significantly and negatively associated with access to water and access to sanitation. It was also found that access to sanitation was significant in explaining variation in maternal mortality [9].

health (MDG5), achieving universal primary education (MDG2) and promoting gender equality (MDG3). Some of these have been highlighted in the report of the Millennium Project's Task Force on Water and Sanitation (UNDP, 2005) and the Human Development Report 2006 (UNDP, 2006).

Globally, the proportion of population with adequate access to water has increased from 77 per cent in 1990 to 83 per cent in 2002 (WHO–UNICEF, 2004). However, there is considerable variation from one country to another: in six countries, namely, Afghanistan, Ethiopia, Chad, Cambodia, Somalia, Lao PDR, more than 60 per cent of the population did not have adequate access to water in 2002 (Anand, 2006). Though the national-level statistics suggest that the proportion of population with adequate access significantly increased between 1990 and 2002 in a number of countries (such as Tanzania, Myanmar, Namibia, Ghana, China and India), micro-level evidence indicates that inequality in access to water persists (Anand, 2007a; Anand, 2007b). It is highly likely that the poor bear the brunt of the consequences of inequality in terms of direct costs as well as impacts on health (UNDP, 2005; UNDP, 2006). Further, the definition of access is subjective and this can hide the fact that some of the 'improved sources' can be up to 1000 metres away.

3.1 Why a Right to Water? Why Now?

Rights are interpreted variously as constraints designed to protect the citizens from arbitrary exercise of power by the state, as rules for allocation of domains of freedom, as principles to further the interests of citizens or simply as morally recognisable claims.³ Sen (2004) points out that human rights are essentially ethical demands and that the appeal of considering something to be a human right is that it is inherent and a person can make a claim merely by virtue of being a human, without recourse to any specific law. On the question whether economic and social rights can be included among human rights, Sen (2004) points out that: '... Human rights can include significant and influenceable economic and social freedoms. If they cannot be realised because of inadequate institutionalisation, then, to work for institutional expansion or reform can be a part of the obligations generated by the recognition of these rights. The current unrealisability of any accepted human right, which can be promoted through institutional or political change, does not, by itself, convert that claim into a *non-right*.'

A human right to water is not specifically included in the UDHR. It is also not defined in the 1966 covenants, namely, the ICESCR and the ICCPR nor in the DRD issued in 1986. The predominant human rights thinking until the early 1990s appeared to be that emphasis needs to be placed on the 1st generation rights (such as right to life) rather than on economic and social rights. However, in recognition of the impact of water and sanitation on infant and child health, the Convention on the Rights of Child (1989) made a specific reference to water in Article 24 dealing with the right of the child to the highest attainable standard of health.

Possibly in response to an increasing trend towards privatisation of water institutions and water resources in the 1990s, and possibly to reiterate the importance of improving access to water for the achievement of MDGs, the General Comment 15 of the Economic and Social Council was issued in 2002.

³For a discussion on the nature of rights, see Wenar (2005) and Rainbolt (2006); for discussions of various aspects of human rights, see Steiner and Alston (2000), O'Neill (2002), Donnelly (2003), Pogge (2002), Sen (2002, 2004, 2005), Mahoney (2007).

According to this Comment, Article 11 of the ICESCR does imply a human right to water. Paragraph 1 of that article states:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, **including** adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent (emphasis added).

The core argument of the General Comment is that the human right to water is ‘... indispensable for leading a life in human dignity’. The word ‘including’ in paragraph 1 of Article 11 quoted above is interpreted broadly to argue that the list of rights mentioned there is not exhaustive, and that a right to water falls within the category of guarantees essential to secure an adequate standard of living. The General Comment⁴ recognises that the right to water contains both freedoms and entitlements: freedoms to continue to use existing sources of water and freedom from interference; and entitlements relating to equality of opportunity essential to the enjoyment of the right to water. Three factors are highlighted, namely, availability (‘... water supply for each person must be sufficient and continuous for personal and domestic uses’), quality and accessibility (including physical and economic accessibility, non-discrimination, and access to information).

A human right to water means giving priority to drinking water supply, particularly to those who do not have access to the basic level of service (Khalfan, 2005; World Water Council, 2006). A right to water highlights that providing water services is not charity but that governments are responsible to ensure that the human right of those who do not have access is not violated (Calaguas, 1999; WHO, 2003; UNDP, 2006). A human right also emphasises that (a) discrimination and inequality on the grounds of economic or other criteria cannot be tolerated and (b) the responsibility to address violations is also universal (Amnesty International, 2003).

3.2 Elements of a Human Right to Water

In a Hohfeldian scheme, the exercise of rights can involve four types of ‘incidents’, namely, privileges, claims, powers and immunities.⁵ Wenar (2005) begins by pointing out that most rights are complex; however, these can be examined in terms of assertions that ‘A has a right to phi’ or ‘A has a right that B phi’ where phi is a verb. As per Wenar’s framework,⁶ powers and privileges are ‘active rights’ (that can be exercised) while claims and immunities are ‘passive rights’ (that are not exercised but merely enjoyed). An attempt is made in Table 2 below, to adapt the framework suggested by Wenar to a human right to

⁴Paragraph 10 of the General Comment states: ‘The right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.’

⁵Reference is made to Hohfeld (1919). Mahoney (2007) points out that privileges (bare liberties) focus on the individual possessor of the rights and her freedom to act; claims focus not so much on the individual’s freedom to act but what others are morally required to do to help her. Wenar (2005) develops Hohfeldian scheme into a framework of various elements of rights.

⁶Wenar (2005) points out that: ‘All Hohfeldian incidents are rights so long as they mark exemption, or discretion, or authorization, or entitle their holders to protection, provision or performance. Therefore, rights are all those Hohfeldian incidents that perform these several functions’.

Table 2. Adaptation of Wenar's (2005) framework of rights to the case of right to water

| | Active rights | Passive rights |
|------------------------------|---|---|
| 2nd order rights over rights | Privileges A has a right (not) to use the water according to cultural values, preferences Related issues: Responsibilities associated with privileges | Immunities A has a right (not) to be consulted on decisions that affect A's enjoyment of her water Related issues: Participatory processes and accountability mechanisms Voice and accountability |
| 1st order rights | Powers A has a right to access a certain amount of water essential for survival and to lead a life with dignity Related issues: Protections for 1st generation rights (the source of special purpose rights such as a right to water) Rule of law | Claims A has a right that Water providers do certain things, or Actions of others do not interfere with or diminish A's ability to use water Related issues: Quality of government and public services |

Source: Author's adaptation of Wenar (2005) framework.

Note: Wenar suggests that this framework should be read from bottom-right corner. Thus, powers and claims 1st order rights on which depend privileges and immunities.

water. However preliminary, it suggests that a right to water cannot be a 'quick fix' for achieving the MDG7 targets and that complex interactions between different aspects of governance need to be taken into account. The framework also suggests that a right to water is not merely a formal instrument specifying or recognising powers and claims (1st order rights) but involves also other institutions (formal and informal constraints, including norms and values) that influence privileges, immunities, duties and responsibilities.

4 DO THE POOR BENEFIT FROM A RIGHT TO WATER?

It appears that to date, constitutional provisions for a formal right to water exist in only a small number of countries, namely, South Africa, Ethiopia, Uganda, Gambia, Uruguay and Panama (COHRE, 2006). Based on data available from the WHO-UNICEF Joint Monitoring Programme, we can draw some conclusions about conjecture (C1) that *a right to water helps improve access of the poor to water*. In Table 3, various aspects of information on the proportion of households having access to water is presented for some countries with a 'right to water' and a sample of other countries where such right has not been promulgated (including some countries neighbouring those with a 'right to water').

In South Africa, the proportion of population with access to water was already 84 per cent in 1995, that is 2 years prior to the introduction of the right to water in the Water Services Act of 1997. It appears that in South Africa, the right to water may not have had much impact in the proportion of people with access but it may have had some qualitative impact in diminishing a sense of water insecurity and formalising a commitment to avoid all forms of inequality. In Ethiopia and the Gambia, a right to water does not seem to have made an impact on the proportion of population with access to water (*wat_tot* in Table 3). Uganda seems to be an exception where a right to water co-exists with a significant increase in population with access to water. On the other hand, in Namibia, Eritrea and Tanzania,

Table 3. Right water and access to water

| Indicator | Year | 'Right to water' countries | | | | | | Countries without a formal 'right to water' | | | | | |
|---|------|----------------------------|----------|----------|--------|----------|---------|---|--------|-------|-------|--|--|
| | | Uganda | S.Africa | Ethiopia | Gambia | Tanzania | Namibia | Eritrea | Guinea | India | China | | |
| 1. <i>wat_tot</i> (Percentage of all households with access to water) | 2004 | 60 | 88 | 22 | 82 | 62 | 87 | 60 | 50 | 86 | 77 | | |
| | 2000 | 55 | 87 | 22 | 82 | 58 | 80 | 54 | 49 | 82 | 76 | | |
| | 1995 | 49 | 84 | 23 | 82 | 52 | 69 | 46 | 47 | 76 | 74 | | |
| 2. <i>wat_tot_hc</i> (Percentage of all households with house connection) | 1990 | 44 | 83 | 23 | 83 | 46 | 57 | 43 | 44 | 70 | 70 | | |
| | 2004 | 1 | 64 | 5 | 12 | 18 | 48 | 9 | 11 | 19 | 69 | | |
| | 2000 | 1 | 62 | 4 | 12 | 15 | 43 | 8 | 10 | 19 | 65 | | |
| 3. <i>wat_urb</i> (Percentage of urban households with access to water) | 1995 | 2 | 58 | 1 | 13 | 12 | 36 | 7 | 9 | 19 | 57 | | |
| | 1990 | 3 | 55 | 0 | 13 | 10 | 29 | 6 | 9 | 19 | 48 | | |
| | 2004 | 87 | 99 | 81 | 95 | 85 | 98 | 74 | 78 | 95 | 93 | | |
| 4. <i>wat_urb_hc</i> (Percentage of urban households with house connection) | 2000 | 85 | 99 | 81 | 95 | 85 | 98 | 70 | 77 | 94 | 94 | | |
| | 1995 | 82 | 98 | 81 | 95 | 85 | 98 | 64 | 76 | 91 | 97 | | |
| | 1990 | 80 | 98 | 81 | 95 | 85 | 99 | 62 | 74 | 89 | 99 | | |
| 5. <i>wat_rur</i> (Percentage of rural households with access to water) | 2004 | 7 | 87 | 32 | 39 | 43 | 77 | 42 | 28 | 47 | 87 | | |
| | 2000 | 11 | 87 | 25 | 39 | 40 | 78 | 42 | 29 | 49 | 86 | | |
| | 1995 | 17 | 87 | 6 | 39 | 37 | 80 | 41 | 30 | 51 | 83 | | |
| 6. <i>wat_rur_hc</i> (Percentage of rural households with house connection) | 1990 | 24 | 87 | 2 | 39 | 33 | 83 | 40 | 31 | 53 | 81 | | |
| | 2004 | 56 | 73 | 11 | 77 | 49 | 81 | 57 | 35 | 83 | 67 | | |
| | 2000 | 51 | 71 | 12 | 77 | 45 | 72 | 50 | 35 | 78 | 66 | | |
| 7. <i>wat_tot_hc</i> (Percentage of all households with house connection) | 1995 | 45 | 69 | 14 | 77 | 40 | 57 | 42 | 35 | 70 | 63 | | |
| | 1990 | 40 | 69 | 15 | 77 | 35 | 42 | 39 | 34 | 64 | 59 | | |
| | 2004 | 0 | 32 | 0 | 3 | 3 | 33 | 0 | 1 | 8 | 57 | | |
| 8. <i>wat_rur_hc</i> (Percentage of rural households with house connection) | 2000 | 0 | 30 | 0 | 3 | 3 | 27 | 0 | 1 | 8 | 54 | | |
| | 1995 | 0 | 25 | 0 | 3 | 3 | 19 | 0 | 1 | 8 | 45 | | |
| | 1990 | 0 | 24 | 0 | 3 | 3 | 10 | 0 | 1 | 8 | 36 | | |

Source: Based on WHO-UNICEF Joint Monitoring Programme (online query).

there has been some significant increase in the proportion of population with access, without a right to water legislation.

Given that in many developing countries, a large proportion of poor households are in rural areas, the proportion of rural households with access to water (*wat_rur*) can be considered a proxy indicator of pro-poor orientation. This may be a more relevant statistic with regard to the conjecture (whether the poor would benefit). Thus, one could argue that water policy is pro-poor if during the period under study (i.e. between 1990 and 2004) disparity between urban households and rural households (i.e. figures in rows *wat_urb* and *wat_rur*) is decreasing. On this basis, it is plausible that South Africa, Uganda, Tanzania, Namibia, India and China have a pro-poor orientation in water policies and programmes.

The proportion of households with a house connection (HC) is another indicator of whether water services are pro-poor or not. Given that HCs entail significant up-front costs, if improvement in access is mainly happening in the segment of the population with HCs, we might conjecture that water services are biased in favour of the better-off. The proportion of HC households has increased significantly between 1990 and 2004 in South Africa, Namibia and China. From these discussions there is no clear evidence to say that a right to water is the best way to improving access to water for the poor.

To consider the role of governance factors, information available from *Governance Matters V* database of the World Bank (Kaufman *et al.*, 2006) is considered. In that study, information is available on six indicators,⁷ namely, voice and accountability, political stability, government effectiveness, regulatory quality, rule of law and control of corruption. Data pertaining to the sample countries is reported in Table 4.

It appears that in general access to water is positively correlated with most of these indicators. Reading from both Tables 3 and 4, two preliminary conclusions can be drawn about conjecture C1:

- (a) A right to water by itself may not help the poor to gain access to water and thus is not a magic bullet for the MDG7 target (as seen from Ethiopia). It is likely that, in many instances, such formal rights are narrowly defined and various elements in the Wenar framework in Table 2 have not been fully developed in policy and practice. It appears that South Africa is an exception in that efforts to operationalise a right to water have continued (as seen for example, in clearly identifying the Department of Water Affairs and Forestry as the duty-bearer for monitoring free basic water; and in the Strategic Framework for Water Services, see DWAF, 2003).
- (b) High levels of voice and accountability (South Africa, Namibia, India) seem to be important in making water policy more pro-poor. On the other hand, significant progress in improving access to water has been made in countries such as China (reported in Table 3) and Myanmar (not reported in the tables here). Further investigation with a sample of 49 countries (from Asia, Africa, Latin America and the Caribbean) for 2002 reported in Figure 1 below indicates a positive association between voice and accountability and access to water.⁸

⁷Each of these indicators is measured on a scale ranging from -2.5 to +2.5. Higher values indicate better performance on that indicator.

⁸Among the six governance indicators of Kaufman *et al.* (2006), two indicators, namely voice and accountability and regulatory quality seem to be particularly significant for access to water. This was evident from simple linear regressions where the dependent variable was access to water in 2002 and the independent variables were one of the governance indicators and a dummy variable for a formal right to water. Since the six governance indicators are associated with each other, including more than one of them in the same regression results in collinearity problem.

Table 4. Governance indicators

| Governance indicator | Year | 'Right to water' countries | | | | | Countries without a formal 'right to water' | | | | | | |
|--|------|----------------------------|-----------|----------|--------|----------|---|---------|--------|-------|-------|--|--|
| | | Uganda | S. Africa | Ethiopia | Gambia | Tanzania | Namibia | Eritrea | Guinea | India | China | | |
| Voice and accountability | 2005 | 31 | 71 | 19 | 28 | 38 | 58 | 3 | 16 | 56 | 6 | | |
| | 2004 | 30 | 72 | 20 | 31 | 38 | 59 | 1 | 17 | 56 | 8 | | |
| | 2000 | 22 | 78 | 17 | 18 | 42 | 56 | 10 | 16 | 57 | 6 | | |
| Political stability/ lack of violence | 1996 | 27 | 66 | 28 | 10 | 23 | 62 | 16 | 15 | 57 | 11 | | |
| | 2005 | 10 | 42 | 8 | 51 | 33 | 63 | 26 | 17 | 22 | 39 | | |
| | 2004 | 10 | 38 | 13 | 56 | 29 | 63 | 29 | 22 | 16 | 41 | | |
| Government effectiveness | 2000 | 9 | 34 | 11 | 55 | 31 | 23 | 36 | 9 | 28 | 44 | | |
| | 1996 | 11 | 13 | 18 | 43 | 37 | 64 | 52 | 7 | 15 | 40 | | |
| | 2005 | 37 | 76 | 16 | 31 | 42 | 58 | 14 | 13 | 52 | 52 | | |
| Regulatory quality | 2004 | 38 | 77 | 19 | 33 | 40 | 63 | 15 | 14 | 57 | 58 | | |
| | 2000 | 49 | 68 | 37 | 52 | 42 | 66 | 40 | 43 | 55 | 64 | | |
| | 1996 | 39 | 74 | 33 | 44 | 7 | 67 | 45 | 9 | 38 | 64 | | |
| Rule of law | 2005 | 53 | 67 | 14 | 39 | 34 | 56 | 3 | 19 | 41 | 45 | | |
| | 2004 | 55 | 69 | 16 | 41 | 35 | 65 | 7 | 14 | 36 | 39 | | |
| | 2000 | 50 | 47 | 22 | 44 | 49 | 58 | 28 | 40 | 35 | 47 | | |
| Control of corruption | 1996 | 54 | 55 | 8 | 5 | 31 | 46 | 38 | 48 | 42 | 41 | | |
| | 2005 | 30 | 57 | 28 | 46 | 41 | 53 | 26 | 13 | 56 | 41 | | |
| | 2004 | 26 | 59 | 24 | 46 | 39 | 57 | 28 | 14 | 52 | 41 | | |
| Control of corruption | 2000 | 34 | 58 | 42 | 44 | 48 | 76 | 52 | 12 | 58 | 45 | | |
| | 1996 | 17 | 64 | 46 | 61 | 23 | 65 | 49 | 11 | 55 | 35 | | |
| | 2005 | 20 | 70 | 25 | 30 | 29 | 59 | 46 | 22 | 47 | 31 | | |
| Control of corruption | 2004 | 20 | 70 | 22 | 28 | 31 | 58 | 38 | 11 | 45 | 33 | | |
| | 2000 | 20 | 70 | 57 | 51 | 10 | 84 | 59 | 40 | 47 | 44 | | |
| | 1996 | 31 | 79 | 10 | 68 | 7 | 83 | N/A | 68 | 45 | 60 | | |

Source: Based on data from Kaufman *et al.*, 2006.

Note: Data are percentile scores and rounded up to nearest integer.

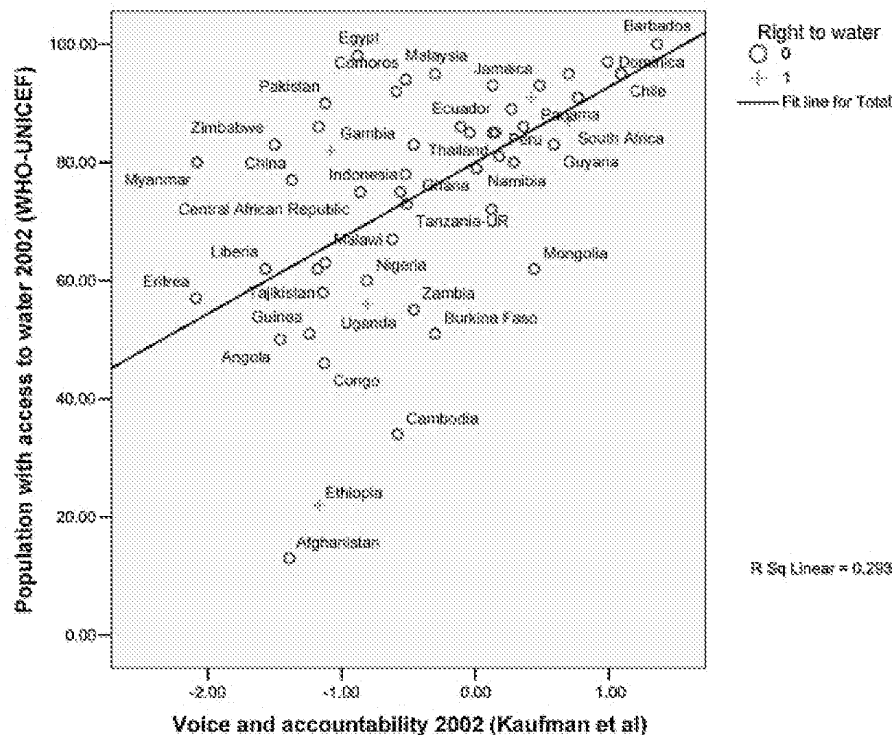


Figure 1. Access to water and voice and accountability

There is a need for further research to examine these issues. However, if the above results are an indication, it appears that accountability promoting mechanisms and guarantees related to participatory processes (such as right to information) may have an impact on access to water. In as much as a right to water contributes to enhancing such voice and accountability mechanisms, it can contribute to improving access.

5 CHALLENGES TO OPERATIONALISING A RIGHT TO WATER

The Wenar framework and the preliminary empirical analysis in the previous sections suggest that a formal right to water may not be essential (if other mechanisms of voice and accountability already exist) and may by itself have little impact on progress towards MDG targets (if such mechanisms are lacking). However, a right to water can add to the panoply of policy instruments and accountability promoting mechanisms. In the context of the so-called 'new public management', public services in many countries have been attempting to become more customer-focused and accountable. In the first instance, agency-led reforms usually tend to be minimal, top-down and prescriptive. Examples include publishing performance indicators in local media or on the internet or conducting stakeholder public meetings. Some water utilities have taken other more formal approaches such as 'citizen charters' or scorecards (Jenkins and Goetz, 1999; Ackerman, 2005). While

these are important tools, they cannot guarantee that the poor benefit from the reforms or that the rights of the poor are protected. The South African experience seems to suggest that the potential contribution of the processes and discussions leading up to and following on the creation of a right to water may be more important than the formal right itself. Therefore, operationalising a right to water does not mean a mere proclamation of a right but that the content and elements of such a right are rooted in a process of public argumentation for the creation of just institutions (O'Neill, 1996).

Second, it is important to ask *right to what* on the lines of Sen's question 'equality of what?' (Sen, 1979). A capability approach to water policy would suggest that the relevant subject of inequality is not the quantity or resource inequality but the inequality in capability to choose particular functionings that the individual has reason to value.⁹ While a right to a basic amount of water is a starting point (as in the case of South African legislation), given that the ability to use the commodity to translate into various functionings (doings and beings) varies from person to person, the focus of a right to water should be the outcomes, namely functionings, rather than inputs, alone (namely quantity of water). It is possible to distinguish rights governing access and rights that determine allocation. Suppose that there is a water resource such as a river or a lake. A right to water interpreted as a right of access does not discriminate between the ability of different individuals to use that water. It may be possible to draw up rules of allocation which take into account the different abilities. A meaningful right to water, therefore, should provide scope for determining both just access and just allocation (or distribution).

Related to questions about equality are issues related to balancing different uses. The instrumental aspects of use of water for various alternative functionings (to be hygienic, to avoid mortality or morbidity associated with diseases such as diarrhoea) are so major that they dominate welfare considerations, rather than the intrinsic aspects (or sustainability considerations). But water is useful for so many other things that difficult choices arise. Though the tensions in allocating water between drinking water requirements of a village upstream versus those of a far away large city are not as morally hazardous as those in the case of an *earthquake* (saving one person's leg versus saving another person's life) or a *lifeboat* (sacrificing one person's life to save those of five others), Parfit's (2002) analysis is quite relevant to these decisions too. A right to water even if it is derived from a first generation right to life with dignity, does not by itself help in resolving or prioritising between drinking water requirements of one group of people versus another or between one type of economic use of water versus another. But what it does provide is a sorely needed prioritisation of people's basic drinking water and domestic requirements as against other uses of water.

Fourth, a right is of limited use if it is not actionable. Therefore, in the drafting of right to water legislation, it is important to clearly identify and define what that right means in practice. Along with rights, it is important to specify who bears correlated duties (as highlighted in Wenar framework of Table 2). There are also arguments that rights should not be considered in isolation from corresponding obligations and duties of the right-holders (O'Neill, 2002).

⁹Following Parfit (1997), an emphasis on inequality can mislead policy. For example, in some cities in arid regions, everyone, rich and poor alike, has access to a limited amount of water and they all suffer as they are all limited in some functionings related to water. From a welfare point of view, increasing the total amount of water available, even if it results in inequality, may well seem worth pursuing. An appropriate policy goal would be to follow the priority rule of Parfit and to focus on the least well-off or the most disadvantaged. Improving access therefore means improving the capabilities of the most disadvantaged, and specifically those freedoms that are dependent on water which are at present curtailed or unavailable to those persons.

Fifth, it is important to clarify whether human rights to water at the individual level can be collectively amalgamated and used by an agency on behalf of citizens to protect such rights. A human right to water (emanating from a right to life with dignity) is mainly related to water for personal consumption and not for economic uses. On the other hand, rights related to economic uses are mainly property rights. Within national and international law, when a reference is made to property rights related to international (or inter-state) water resources, usually, such right is conferred on a (national or state) government. An examination of inter-state river water disputes suggests that while governments make these claims on behalf of their citizens, this right is defined collectively as if it were a pure public good. Allocation of water resources flowing from such property rights is left to the state institutions. There is a need to clarify the human right to water and how this is distinct from a property right to water (in the sense of a riparian right) and second, how an agency may act on behalf of a collective claim emerging from aggregation of the human rights of various individuals. An examination of the Cauvery river water dispute in southern India (Anand, 2007c) suggests that when a right is exclusively and collectively exercised by the state, the state tends to focus on the property right dimensions rather than as aggregation of atomic rights of individuals. In such contexts, accountability mechanisms have dual roles, a direct role of safeguarding the rights of individuals through transparency guarantees and an indirect role to facilitate the development of conflict resolution mechanisms and institutions.

6 CONCLUSIONS

Rights are formal and informal constraints. The appeal of a human right is that it is intrinsic and applies to all human beings even without legal proclamation. From an initial recognition of the role of safe water as being part of a right to health in the Convention on the Rights of the Child in 1989, the idea of a right to water has gradually developed and is given a formal basis in the General Comment 15 issued in 2002. A right to water has now been recognised as an important policy instrument in the context of Target 10 of the MDG. Friends of the human development approach would no doubt welcome a right to water for the additional protections and guarantees it can offer. However, it is important to scrutinise how effective such a right has been so far in countries where it has been implemented. The research reported in this paper is an attempt to contribute towards this task.

Three main contributions of this paper can be highlighted. (a) An attempt is made to examine the elements of a right to water with reference to Wenar's framework of Hohfeldian incidents, namely, powers, privileges, claims and immunities. This framework suggests that for a right to water to make an effective impact on access to water, all these incidents need to be clarified. (b) The conjecture that the poor are more likely to have access to water when there is a formal right to water is examined empirically with data for selected countries for the period 1990–2004. There appears to be an association between the right to water and an increase in the proportion of population with access to water in Uganda and to a small extent in South Africa. However, while little improvement was noticed in some countries with a right to water, there were other countries where significant increase in the proportion of population with access to water was made without a formal right to water. (c) A further examination of these countries with regard to some indicators of governance suggests that a right to water may be ineffective in countries with poor governance. Voice and accountability among other things seems to be crucial.

These preliminary findings need to be further examined. National-level aggregate indicators of access to water and governance do not capture significant intra-country and local variations, including some positive influences by non-governmental organisations. For example, such statistics do not reflect the impact of initiatives such as MKSS in Central and Northern India, *Nijera Kori* in Bangladesh and public expenditure tracking surveys in Tanzania in improving accountability for public services and the resulting effects on improved access to water or other services. Also, it is important to recognise that formal rights are at best the means and side constraints in the form of the minimum standard of performance and should not become the ends or the target of performance. While a rights-based approach can become side-tracked towards a legal and formal articulation of rights (and duties); the role of values, norms and other informal constraints can be forgotten or under-estimated.¹⁰

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¹⁰As Sen (1984) points out: '... the ultimate guarantee for individual liberty may rest not on rules for social choice but on developing individual values that respect each other's personal choices'.

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