

# HYBRID GOVERNANCE AND THE HUMAN RIGHT TO WATER

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## ABSTRACT

Identifying how and to what extent the poor and most vulnerable in society are able to demand and access safe water as they define it is the practical realization of the human right to water. The explicit international recognition of the right to water and sanitation in 2010 is significant in that it obligates nations to recognize safe water for human consumption primarily as a social good, a significant point of contention after decades of global water politics. However, there remains a large gap between the international human right to water and on-the-ground determinants of water access and reliability. How can the right to water turn from being an abstract legal principle into policies and interventions that can be implemented and measured? This paper contributes to the considerable literature on the right to water and basic services delivery by assessing three critical mechanisms that inhibit the ability of the urban poor to exercise their right to water. Of particular concern in this paper is the prevalent role of small-scale providers and household co-production, the so-called non-state actors on whom much of the world's poor depend to provide water and other basic services. Drawing from the normative content of the rights framework and literature on rights-based approaches to development against evidence of how states are undertaking water sector reforms and implementing the right to water and sanitation, this paper argues for the need to reconsider the concept of third-party duty bearers. Governments have an explicit role in maintaining dual systems of sanctioned and unsanctioned urban spaces and forms of service delivery that result in inequitable access to water and sanitation in violation of human rights.

## INTRODUCTION

In 2010, the United Nations passed resolution 64/292 recognizing the human right to water and sanitation (UNGA 2010). This historic event was the culmination of years of work by individuals and groups, both inside and outside of the UN system, to recognize water as a fundamental human right after four decades of global activism for the hundreds of millions who lack of access to safe drinking water and more than two billion who live without adequate sanitation. Explicit recognition of basic human right to water and sanitation shifts the conversation about delivery of water from being merely a development challenge or a privilege enjoyed by those who can pay (and, by extension, charity if provided for those who cannot) to an entitlement, for which individuals should be able to hold actors accountable when their rights have been violated.

The right to water and sanitation is equal to all other rights, and legally binding for all member nations under international law (Barlow 2011). This is mainly enforced through periodic reports that nations are required to submit to the UN Human Rights Council, as well as the complaint mechanisms for individuals and groups who claim their rights have been violated. Before 2013, when the Optional Protocol<sup>1</sup> to the International Covenant on Economic, Social and Cultural Rights went into force, there was no means by which aggrieved parties could claim violations of such rights at the international level (Biglino and Golay 2013).

Recourse to the Human Rights Council is supposed to occur after all domestic options have been exhausted. In practice, countries have wide discretion in how rights can be interpreted and translated. For policymakers, planners, local stakeholders, and scholars a critical question is what a human rights-based approach to water and sanitation provision would look like in practice. In examining the normative principles of human rights and rights-based approaches to development against evidence of how states are implementing the right to water and sanitation, a critical question is how to address

<sup>1</sup> The Optional Protocol to the ICESCR (A/63/435) was adopted by the United Nations General Assembly in 2008 and went into force in 2013. Optional Protocols are supplements to international treaties.

the disconnect between an international human right to water and on-the-ground determinants of water access and reliability. This paper serves as an overview of the challenges of implementing the right to water, pointing to the need for more research that focuses on three critical areas: the lack of data for monitoring, the role of state actors in producing underlying social inequality, and the responsibilities of providers classified as non-state actors.

The next section begins with an overview of the human right to water with respect to normative principles, how it is being implemented by countries, and the complications presented by third parties and the accepted principle of progressive realization. This is followed by an assessment of three fundamental challenges to implementing a rights framework to achieve improved water and sanitation in practice.

### **WATER AS SOCIAL GOOD VS. ECONOMIC GOOD: THE TRIUMPH OF RIGHTS?**

While the right to water establishes a legal framework for individuals to claim their rights, the structure of water governance in many locales has been driven by an entirely different principle, one that treats water primarily as an economic good. This section traces the history of global water politics, which have set the stage for real-world reforms that impact realization of rights in practice. The push to keep the right to water on the global agenda reflected the push by activists fighting localized struggles against corporatization and commodification of water. The right to water movement has largely been an anti-globalization and anti-privatization movement (Bakker 2007). High profile privatization failures in Argentina, Bolivia, the Philippines, and other places around the world provided steam for the movement. In response to political resistance and financial problems, many multinationals have pulled back from private investments in public services. In fact, Public Services International Research Unit (PSIRU), and the Multinational Observatory and Transnational Institute (TNI) have kept track of “re-municipalizations” where water supply has reverted back to the state.

Still, the orthodoxy of World Bank, International Monetary Fund, and other international financial institutions (IFIs) means continued emphasis on providing subsidies and guarantees to promote public-private partnerships, the new face of privatization. This activity could represent a massive, stealth transference of accountability to third parties, with various levels of state oversight and regulations. Regulating privatized services requires strong, accountable government oversight. A comprehensive study of structural adjustment and privatization in 2004 by the Structural Adjustment Participatory Review International Network (SAPRIN) carried out by The World Bank and citizen groups from the Global South found that privatization of public utilities was pushed in countries least able to manage the process effectively, resulting in elite capture of public assets and other negative outcomes (SAPRIN 2004). Scholars note that the real problem for water, whether private or public, is failed governance of the sector (Bakker et al. 2008; Bakker 2010).

The issue of access to safe, clean water for drinking or domestic use has not lacked for attention. Dozens of large, high-level meetings have been held with various declarations emerging, focused on engendering political mobilization for policies to deal with social and environmental water crises (see Table 1.) These various meetings embody diverging and converging ideas about water delivery, including who has rights to receive and deliver water and how much. Some of the more visible debates concern whether to treat water as an economic good (emerging from the Dublin conference) or a social good (the Delhi principles). Others debate the merit of global goal- and target-setting as exercises in reductionism, use of Western or inappropriate standards, and First World definitions and technocratic efficiency that make it difficult to monitor sustainability and impacts on the most poor and vulnerable at the subnational level.

This represents the gap between the high-level politics of international law and agreements vs. the practical realities of implementation on the ground. What is defined as an “improved” source (e.g., a borehole, a protected spring) is up for debate. Such categories correspond very little with local perceptions of “improved” water supply. Fieldwork in western India and in Vietnam has shown that people prefer local sources of water, or “dirty” water, over government sources that would be considered improved due to perceptions

of taste, quality, use, and cost (Mehta 2005, 2007; Spencer 2008). The World Health Organization (WHO) and UNICEF Joint Monitoring Programme and UN Special Rapporteur on the Human Right to Water and Sanitation have proposed to disaggregate coverage statistics by income, location, settlement type, and social status for post-2015 monitoring (JMP 2015). While that would be a considerable improvement, progress on capturing other critical dimensions of inequity, access, and water quality on a global scale has yet to be realized.

**TABLE 1**  
**MAJOR INTERNATIONAL INITIATIVES ADDRESSING THE RIGHT TO WATER (1977 - 2010)**

1. Mar del Plata Water Conference (1977)
2. UN International Drinking Water and Sanitation Decade (1981-1990)
3. New Delhi Statement (1990)
4. World Summit for Children (1990)
5. Dublin Statement (1992)
6. United Nations Conference on Environment and Development (UNCED), Rio (1992)
7. World Summit for Social Development (1995)
8. Fourth World Conference on Women, Beijing (1995)
9. Global Water Partnership (1996)
10. The First World Water Forum (1997)
11. World Commission for Water in the 21st Century (1997)
12. World Commission on Dams (1997)
13. Convention on the Law of the Non-Navigational Uses of International Watercourses (1997)
14. The Second World Water Forum, Ministerial Conference on Water Security in the Twenty-First Century, The Hague, Netherlands (2000)
15. Millennium Declaration and Millennium Development Goals (2000)
16. International Conference on Freshwater (2001)
17. The Abuja Declaration (2001)
18. World Summit on Sustainable Development, Rio + 10, Johannesburg (2002)
19. International Year of Freshwater (2003)
20. UN Committee on Economic, Social and Cultural Rights General Comment No. 15: The 21. Right to Water, Arts. 11 and 12 of the Covenant (2003)
22. International Decade for Action, "Water for Life 2005-2015"
23. World Panel on Financing Water Infrastructure (2003)
24. Third World Water Forum, Kyoto (2003)
25. Marrakech Declaration on South-South Cooperation (2003)
26. Fourth World Water Forum, Mexico (2006)
27. Fifth World Water Forum, Istanbul (2009)
28. UN Resolution 64/292, The Human Right to Water and Sanitation (2010)

Sources: (Mehta 2007; Nicol, Mehta, and Allouche 2012; Gleick 1998; Salman 2003, 2004)

## ***NORMATIVE PRINCIPLES OF THE HUMAN RIGHT TO WATER***

As early as 2002, the UN issued General Comment 15, which recognized the role that water and sanitation play in realizing all human rights. Citing articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights, General Comment 15 linked water to the existing right to health under article 12, paragraph 2 (b) of the Covenant. The right encompasses taking steps, without discrimination, to prevent threats to health from using unsafe and toxic water as well as ensuring that water sources are protected from microbial or chemical contamination. After the UN passed the 2010 resolution, the Human Rights Council affirmed that water and sanitation was a fundamental human right, linking it to the rights established in existing treaties to which all nations are legally bound. The standards for the right to water also require that water be treated as a social and cultural good first, not as an economic good (paragraph 11). This is a direct reversal of the Dublin Principles, established in 1992 leading up to the Rio Earth Summit, which called for treating water as an economic good in all its uses. The Principles were used in policies pursued by international finance institutions (e.g., the World Bank) to push for cost recovery and private-sector intervention in public water supplies around the world.

General Comment 15, articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights states that the normative content of the right to water embodies five categories: availability, accessibility, affordability, quality and safety, and dignity and acceptability (ECOSOC 2002; Cahill 2005). Quality means that water must be safe for people in all life stages, including the fetus, and free of contaminants. Embodied in this standard are perceptions about quality, in that water must be of an acceptable color, odor, and taste. The quantity standard calls for the provision of sufficient water for drinking, hygiene, sanitation, and food preparation. The norm asserts that personal and domestic needs are higher priority than agriculture, livestock, and industry. Water should be accessible to households, health and public institutions, and workplace, and should not be a disproportionate burden on the time and resources of individuals. The right also means that land ownership should not inhibit access. Affordability is calculated as less than three to five

percent of household income, and should not hinder the individual's ability to pay for food, housing, and healthcare. The human rights framework does state that rights holders can claim free water, but only in cases of extreme poverty and homelessness.

Like all human rights, these must be implemented indiscriminately and equally. All nations must demonstrate progress towards complying with rights obligations. This includes obligations to respect, protect, and fulfill. "Respect" refers to maintaining the integrity of existing water sources, keeping them pollution free and avoiding over extraction that would deplete water supplies. "Protect" requires states to prevent third parties from compromising equal, affordable, and physical access to sufficient, safe, and acceptable water through an effective regulatory system. Under the core obligations, "fulfill" specifies state-provided access to minimum essential amounts for personal and domestic use, on a non-discriminatory basis, and details obligations around safety, avoidance of waiting times, distance to household, personal security, equitable distribution, sufficient water points, and more.

In terms of rights enforcement, the human right to water recognizes states as duty bearers and individuals as rights holders. With respect to the role of government, fulfillment of the right means there must be a national water action plan and programs in place to protect the most vulnerable and to address water-related illnesses. Implementation nationally should take the form of legislation, strategies, policies, indicators, benchmarks, and processes for accountability and remedies for those whose rights have been violated. For rights holders, there are a number of ways to claim rights and remedies for rights violations. During her term as UN Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque published a handbook on the realization of the human right to water that offers guidance in numerous areas, from legislative and policy frameworks to financing supply and making justice accessible (de Albuquerque 2014). The module on justice specifies four ways that rights claimants should be able to hold duty bearers accountable. These include effective channels of complaint and redress at the level of service provider, administrative unit of the state, or national human rights commission.

Alternatively, rights holders should be able to litigate their rights in court, although this approach is not as desirable as the ability to hold duty bearers accountable as a matter of practice (de Albuquerque 2014). Increasingly, activists and social movements are using legal strategies to force states to fulfill their obligations. As a last resort, rights holders that are not able to seek remedy for violations within their countries can utilize the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. This mechanism allows individuals to bring claims directly to an international body.

### ***IMPLEMENTING RIGHTS AT THE NATIONAL LEVEL***

As a member nation, passage of the right to water and sanitation legislation requires that member nations develop a plan for realizing the right in a manner that meets the obligations to respect, protect, and fulfill as described in the previous section. Beyond having a plan, a number of countries have taken formal steps to recognize the rights. This has taken a variety of forms, from constitutional amendments to national or subnational legislation to judicial rulings that have established the right. Much of this action has been the result of grassroots mobilization. Table 2 shows how many countries have established formal precedents for recognizing the right to water and/or sanitation.

Among legal scholars, debate over rights center on what constitutes a right. For example, is a right without the ability to enforce it more of a norm or goal than an actual right (Nickel 1987)? However, rights exist whether or not there is a law to enforce them and states have wide discretion in how they can fulfill their obligations under the right to water and sanitation. For rights to become institutionalized, there should be widespread awareness and understanding of the right in question. Because a court case is a last resort for those whose rights have been violated, justiciability of the right to water is only one indication of how well the right is being implemented. The difficulty of implementing a right to water is enormous in the absence of capacity, resources, and well-defined responsibility to implement. There is danger that invocation of the right could be used to divert water to favored groups in society. And numerous scholars

note that even constitutional rights, such as in South Africa, do not put an immediate end to inequities in service provision or halt massive service disconnections (Bakker 2007; Bond 2002; Ruiters 2005).

Ultimately, we should be able to measure rights implementation as norms and expectations of behavior for rights holders, service providers, and duty bearers. For individuals, we could observe rights in practice by assessing the ability of individuals without access or who face threats in accessing safe water to negotiate their rights, articulate and advance their interests, and hold actors accountable. Resorting to litigation is seen as a last step when it comes to rights enforcement as opposed to complaint mechanisms (de Albuquerque 2014). However, numerous cases in the ESCR-Net Caselaw Database of decisions involving economic, social and cultural rights demonstrate how litigation has been successfully used in compelling states to address inequality and structural poverty to protect vulnerable, marginalized groups. In Kenya, over 1,000 plaintiffs sued a provincial municipality for unlawful eviction and destruction of their homes, which had been located on public land since the 1940s. The Kenyan High Court sided with the plaintiffs, citing the county's new constitution as well as Articles 11 and 26 of the International Covenant on Economic, Social and Cultural Rights and Articles 16 and 18 of the African Charter on Human and People's Rights. The court declared that the eviction had violated numerous human rights, including the right to water and sanitation, which was national law in Kenya (as is any other treaty ratified by the Kenyan government). While a victory for the implementation of international rights norms in a domestic context, enforcement of the decision and remedies imposed by the court remains to be seen (Okoth 2011a, 2011b).

**TABLE 2**  
**LEGAL ACCESS TO THE RIGHT TO WATER AND SANITATION IN SELECTED COUNTRIES**

COUNTRY	QUASI-JUDICIAL BODY	JUDICIAL BODY	CONSTITUTION/LAW
Albania	Republic of Albania People's Advocate		
Argentina		National Supreme Court of Justice, Provincial Court of Appeals	
Australia	Australian Human Rights Commission		
Bolivia	Defensor del Pueblo		
Botswana		Court of Appeal at Lobatse	
Cameroon	National Commission on Human Rights and Freedoms		
Canada		UN Human Rights Committee	Canadian Charter of Rights and Freedoms
Chile		Supreme Court of Chile	
Colombia		Colombia Constitutional Court	
Costa Rica	Defensoria de los Habitantes		
Democratic Republic of the Congo			Constitution – Right to Water and Sanitation [2006]
Denmark	Danish Institute for Human Rights		
Ecuador	Inter-American Commission on Human Rights	Constitutional Tribunal	
Egypt	National Council for Human Rights		Constitution – Right to Water and Sanitation [2014]
Ethiopia			Constitution – Right to Water and Sanitation [1995]

COUNTRY	QUASI-JUDICIAL BODY	JUDICIAL BODY	CONSTITUTION/LAW
France	Commission Nationale Consultative des Droits de l' Homme		
India		High Court, Supreme Court	Constitution – Right to Life; Right to Information Act (2005)
Kenya		Kenyan High Court	Right to Life, Right to Water and Sanitation (2010)
Korea	National Human Rights Commission of the Republic of Korea		
Mexico			Constitution – Right to Water and Sanitation (1917)
Mongolia	National Human Rights Commission		
Nicaragua	Procuraduria para la Defensa de los Derechos Humanos		
Nigeria	National Human Rights Commission of Nigeria		
Pakistan		Supreme Court	Constitution – Right to Life; Right to Information Act (2005)
Paraguay		Inter-American Court of Human Rights	
Qatar	National Human Rights Committee		
Scotland, UK	Scottish Human Rights Commission		
South Africa	South African Human Rights Commission	South Africa High Court, Constitutional Court	Constitution – Right to Water and Right to Housing (1997)
The Republic of the Sudan	African Commission on Human and People's Rights		
Uganda			Constitution – Right to Water and Sanitation (1995)
Venezuela	Defensoria del Pueblo		

Source: ESCR-Net Caselaw Database, Global Health and Human Rights Database

### ***DUTY BEARERS AND THIRD PARTIES***

Officially, member nations are the duty bearers under international human rights law, and are thus responsible for implementation. They do so by passing new laws or adapting existing laws to be in compliance, addressing administrative and financial mechanisms to realize the right, launching national initiatives, providing a legal means for rights holders to assert claims, and putting in place monitoring and evaluation systems. There are also formal mechanisms such as the UN Human Rights Council and its Universal Periodic Review, established in 2006, which provide a process for reviewing the human rights records of every member nation. However, locally, does the right to water translate into better access, along with improved health and development outcomes? And if so, how does it work?

Generally speaking, the human rights commitments of States can be classified as obligations to respect existing access, including not withholding water due to inability to pay; to protect from third-party interference (e.g., pollution); and to fulfill their obligations through social policies and safety nets in order to provide water to individuals and communities without access. Countries may be able to deliver on the obligation to respect (i.e. refrain from interfering with) existing water sources more easily than the other obligations. For example, in 2011 the high court in Botswana overturned an earlier decision denying Kalahari Bushmen rights to their traditional water sources on ancestral lands. The justification for the reversal was made with reference to the UN right to water and sanitation (Barlow 2011). When it comes to obligations to protect and to fulfill, what are the barriers? Even under progressive realization, countries are required to develop a plan of action for realization of the rights and report to UNCESCR. This is now done through the process of Universal Periodic Review (UPR), established by the Human Rights Council. It provides for a regular review of the human rights records of all 193 members of the UN.

Documents put out by the UN Special Rapporteur highlight best practices and tools such as performance standards, monitoring, and regulations. However, there is recognition that, when it comes to the human right to water and sanitation, there are challenges related to

transparency and democracy in decision making, power asymmetry, actually delivery to the poorest and most vulnerable, affordability of services and disconnections, delivery of quality water, establishment of complaint mechanisms, corruption, and the capacity to regulate, enforce and monitor progress towards any policies designed to comply with international rights law. For third-party providers, whether the formal private sector or informal cartels of vendors, these issues can arise.

Monitoring implementation of the right to water requires new measures that track the normative content. Indicators of improved and unimproved access are inadequate. Questions of affordability defy easy categorization when households do not earn a formal wage and engage in various livelihood strategies and complex uses of available assets for survival (Chambers 1994; Moser 1998). Physical accessibility is more than proximity, particularly in areas where terrain is eroded or compromised, facilities are overcrowded, physical safety is a concern, and the like. The quality and safety of water supplies is another area that requires mechanisms for accountability, and is further complicated by the reality of unplanned and haphazard urbanization, where populations dependent on groundwater are vulnerable to contamination from poor sanitation facilities and environmental regulations. Acceptability, dignity, and privacy are the fifth component of the normative content— notions of which, again, cannot be measured externally, and must be the result of open mechanisms for communicating preferences and accountability.

### ***PROGRESSIVE REALIZATION AND IMPLEMENTATION***

The long-established principle in international human rights law of progressive realization recognizes that some member states may have limited resources to fully meet their obligations (Luh, Baum and Bartram 2013; Fukuda-Parr, Lawson-Remer, and Randolph 2008). The lack of clarity about what constitutes the “maximum available resources” a state is obligated to commit towards the realization of water and other human rights has given rise to new research focused on developing human rights metrics (i.e. an Economic and Social Rights Measure) to track progressive realization (Fukuda-Parr, Lawson-Remer, and Randolph 2008).

A key part of the debate over progressive realization is how the principle relates to different categories of human rights, i.e. economic, social, and cultural rights or political rights, also known as positive and negative rights. Negative rights refer to so-called “first generation” political rights, such as the right to life and the right to be free from torture, while positive rights, dubbed “second generation,” are the economic, social, and cultural rights that address the material basis of human rights violations (Rajagopal 2003, 247). Negative rights require duty bearers to refrain from rights infringement, while positive rights require duty bearers to “provide goods, services and opportunities” (Donnelly 2013, 42). The Universal Declaration of Human Rights makes no moral or hierarchical distinction between rights, whether positive or negative, or by generation, declaring them “interconnected and interdependent” (UNGA Resolution 421 (V), sect. E, 1950).

In practice, however, there are four negative rights that form the set of rights dubbed non-derogable<sup>2</sup>, in that they cannot be suspended under any circumstances (Hoag 2011). Other rights, however—including positive rights—are subject to progressive realization. The concept could be a loophole that perversely allows unjust discrimination to persist. In fact, in attempts to develop metrics for economic and social rights, the rights to non-discrimination and equality are proving tricky to measure (Fukuda-Parr, Lawson-Remer, and Randolph 2008). Legal scholars have noted that positive and negative distinctions are dubious, given that even negative rights require positive action (e.g., administrative system, courts, programs to curb police powers) and are not “easy” or “cheap” to implement in non-democratic societies (Donnelly 2013, 40-41). Moreover, the right to water and sanitation and the right to be free from hunger are indispensable to the right to life. State actions are equally immoral, whether they result in the loss of life and liberty due to direct and deliberate action or passive, cruel inaction on economic, social, and cultural rights (Donnelly 2013; Gupta 2005; Watts 1983).

What complicates the notion of progressive realization is the right to non-discrimination. Discrimination is absolutely prohibited under

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<sup>2</sup> Human Rights Council, General Comment No. 29 on Derogations (art 4) (2001).

human rights law, as well as within the Charter of the United Nations and in the major human rights treaties. However, what does this principle mean in practice when people suffer discrimination by race, gender, or as a child, due to living in conditions of extreme poverty? How is the principle of non-discrimination paired with progressive realization when the very act of withholding infrastructure and services is the discrimination in question, whether based on the legacy of racialized segregation or the classification of people based on their location within the city (e.g., residents of informal settlements or slums) that closes off the possibility of access and realization of their rights? When it comes to the right to water, class and identity are front and center, even when high courts have issued pro-rights rulings that in practice have continued to be biased against the poor (Rajagopal 2007).

## CRITICAL CHALLENGES OF IMPLEMENTATION

The language of the right to water states that, regardless of land claims or living in an informal settlement, all should have access; but what recourse do citizens have? The legal process is long and arduous; movements are powerful but not always successful. Formally, the pathway to the right is circuitous, varying in interpretation and application by state. While every state must have a plan of action, not every state is required to pass specific legislation on the human right to water and sanitation. This makes for an alphabet soup of formal approaches to implementing the right, dependent on how courts draw on international law, the standing that individuals and groups of people have to bring cases in their country, or the presence of a regional rights court. Implementation is further complicated by the lack of data on implementation, and institutional barriers to both delivering the right and collecting data by government practices that classify both residents and service providers as formal or informal, obscuring the state's role in creating disparate systems of service delivery.

## DATA AND HUMAN RIGHTS

Globally, the issue of transparency of data from the state has been identified as a major barrier to realizing rights in practice, in turn correlated with better access to water (Langford and Winkler 2013). The pilot Rapid Assessment of Drinking Water Quality (RADWQ) conducted by the JMP in five pilot countries showed that so-called "improved sources" often do not meet microbial or chemical standards set by the WHO for safe drinking water (WHO/UNICEF 2010). The task force following the RADWQ noted that few studies track the safety of unimproved sources, and that some might actually meet WHO safety criteria if tested.

Outside of urban and rural trends in water and sanitation coverage, and formal water sector reforms (especially corporatized privatization), a review of existing urban indicators available for water and sanitation shows the lack of systematic data analysis on who is covered by alternative systems, or how alternative, informal service delivery systems work in African cities. Most studies either focus on public sector reform or document the existence of informal providers, and do not focus on types of informal service delivery or the intersection between parallel systems of provision. In addition, most places lack basic maps showing the reach of prevalent hybrid infrastructure networks in water and sanitation. International agreements targeting water and sanitation provision have had a blind spot when it comes to documenting inequality in access by gender, income, and other forms of social vulnerability (Langford and Winkler 2013). Except in central Asia and eastern Europe, there is little data on quality of service delivery (Banerjee et al. 2009). As a result, significant gaps exist in the development literature when it comes to systematic analyses of how hybrid systems function and reliable cross-city data on their reach and quality. The information deficit is particularly large in African countries, and specifically for second- and third-tier cities.

Having baseline information on the factors affecting the governance and management of state-owned or regulated infrastructure providers, as well as the organization of alternative providers, is crucial background knowledge for designing effective development interventions in infrastructure sectors. Data on these operators are also relevant for thinking about the extent to which findings from evaluations of specific interventions are likely to travel to other locations and inform potential policy interventions to improve state efficacy in providing and managing infrastructure. Tracking water use by source (current practice) does not allow us to track the provider, whether multiple providers are used to meet daily needs, or whether water is obtained from a safe source then stored in unsafe ways. Also, the focus on drinking water leaves out the whole discussion of domestic water, critical to human rights. Domestic water is essential for hygiene, cooking, cleaning, livelihood pursuits, and dignity—and access to domestic water is linked to drinking water access. Moreover, levels of aggregation (urban vs. rural) mask deep disparities within metropolitan areas. In a given city, household sources for water and sanitation services vary by residential location within the city, proximity to the piped infrastructure, household socioeconomic status, residence in blighted areas where land tenure is questionable, and population density (leading to overcrowding and excessive demand).

### ***SOCIAL EQUITY AND A RIGHTS-BASED APPROACH TO DEVELOPMENT***

A number of scholars who focus on rights-based approaches to development consider human rights law as more than a specialized division of law or international relations and examine how community development principles can be used to implement rights in practice (Ife 2009). A rights approach requires us to examine the many water sector reforms countries have undertaken in terms of their impact on fulfilling the state's obligation to protect, respect, and fulfill its obligations on the human right to water and sanitation. Most of Africa's citizens are dependent on alternative services provision in water, sanitation, and other basic services (Bannerjee et al. 2009). Alternative, small-scale providers now service large segments of city populations not connected to networked infrastructure. The result

is a gendered, divided system in which the poorest households are not covered by centralized services. Somewhat surprisingly, there is a relative scarcity of scholarship (not only in Africa, but across low- and middle-income countries) on local, small-scale providers—how they operate and the quality of services they provide (Spencer 2008).

Households reliant on alternative, and often informal, providers pay more for lower-quality services than do centralized, networked services. In Africa, household water coverage has been declining over time (Bannerjee et al. 2009). In the most comprehensive assessment of water sector reforms to date, the data show that the restructuring aimed at decentralization and corporatized privatization, which started in the mid-1990s, have not had the expected results in improved access (Herrera and Post 2014). In this scenario, where and how can cities improve access in such hybrid systems, while ensuring high-quality and equitable services?

While measures of social and spatial inequality have been lacking in global indicators, a large body of scholarship has critically examined how informality is socially produced, actively defined, embraced, or resisted by state and non-state actors to suit their own needs (Ahlers et al. 2014; Roy 2005, 2011). Many have sought better labels and definitions for the diversity of water provision. The hybrid nature of water and sanitation governance has been variously described as splintered, archipelagos, parallel, disaggregated, and co-produced (Ahlers et al. 2014; Bakker 2003; Graham and Marvin 2001). This complements the work of other scholars who advance concepts linked to subaltern urbanism and new conceptual categories of urban spaces (and what produces them) grounded in local understandings that challenge hegemonic framings of cities in the Global South as slums or somehow deviating from a normative standard of urbanization (Alsayyad & Roy 2006; McFarlane 2012; McFarlane & Robinson 2012; Myers 2011; Roy 2009, 2011; Watson 2009).

An emergent body of research examines the hybrid nature of water and sanitation provision, exploring how so-called informal providers are intertwined with and produced by the formal, state-owned or operated system of pipes in countries such as Bangladesh, India, Indonesia, and Nigeria (Acey 2010; Burt and Ray 2014; Cheng 2014; Hossain 2012; Kooy 2007). Assessing the evolution of small-scale

providers in Manila, Cheng (2014) describes how privatization has led to tiered informality, sanctioned and unsanctioned, ultimately blurring the boundaries between formal and informal. The distinction is often a matter of what practices are considered legitimate and authorized (Ahlers et al. 2014; Kombe & Kreibich 2000; Roy 2009). For example, residents of informal settlements in Cochabamba, Bolivia, strategically find ways to integrate community-run water systems into formal municipal water plans (Marston 2014). Such practices could be seen as forms of planning from below or insurgent planning by otherwise impoverished or marginalized groups in society (Appadurai 2001; Miraftab 2009).

Historically, the international institutions involved in development and the ones involved in international rights law operated in separate worlds and spheres of influence (Rajagopal 2003; Russell 2010). As the rise in sustainability thinking was used by some international actors to reframe water as an economic good in the early 1990s, another major shift was happening in the field of international development. Starting in the mid-1990s, there was a deliberate push to integrate human rights into the activities of development organizations. In fact, the UN began to mainstream international human rights norms throughout all of its activities and programs starting in 1997 (UN 2003). Numerous agencies adopted a variety of human rights-based approaches to development, which were codified under the UN Development Group in their published Statement of Common Understanding on Human Rights-Based Approaches to Development Cooperation and Programming (2003). The Common Understanding requires all development programs to embody rights norms and contribute to the capacities of duty bearers to meet their obligations and rights holders to claim rights (UN 2003).

Most of this integration has operated remotely, at the level of international organizations employing technical and political language. In practice, however, development practitioners have seen little use in the rights frameworks—interpreting rights approaches as calls for more participation and access to information, which are already in line with principles and best practices of community-based development. In pointing out this disconnect, Russell (2010) notes the lack of associating rights approaches to development with the actual legal obligations and normative standards imposed by the in-

ternational human rights framework, arguing that doing so would become an important tool for realizing local development goals. McIntyre (2012) finds that the norms embodied in the human right to water and sanitation already reflect global standards of acceptable governance and have influenced a variety of actors and institutions, even without specific enforceable claims to water as a human right (654). However, McIntyre notes the challenges in extending human rights law norms to non-state actors in practice (McIntyre 2012; de Albuquerque 2014). The reality is that power is cruelly connected to the flow of water in cities (Gandy 2004; Swyngedouw 1997, 2004, 2009).

### ***TOWARDS HYBRID GOVERNANCE: THIRD PARTIES AND NON-STATE ACTORS***

Even as countries are expanding coverage, the persistent level of unserved and underserved populations has created an opportunity for small-scale and alternative providers (regulated and unregulated) to step in. However, there is little systematic data on the reach, quality, and function of the hybrid forms of service delivery that have evolved. The policy literature on water reform has been preoccupied with the performance of the state, as well as cost recovery, privatization and decentralization of utilities, and other dimensions of water governance. Hybrid infrastructure provision is where state and non-state services connect, overlap, and transform each other, to extend services beyond centralized, networked water provided by the municipal or state-run water utility.

Some of the most significant gaps in the literature in infrastructure investments, access, and governance concern the operations and scope of alternative providers (and how they interact with state services), what factors affect infrastructure investments and inequalities in quality and access, and approaches to solving the problem of data collection and information management for users, communities, and local governments to better govern hybrid infrastructure services to equitably meet the needs of rapidly growing populations. While some countries, such as Kenya, have sought to not recognize or even outlaw informal vendors (de Albuquerque and Roaf 2012; K'Akumu and Appida 2006), other countries have found ways

to incorporate small-scale, alternative providers into official policy, though not without persistent challenges (de Albuquerque and Roaf 2012; Spencer 2008).

Where those systems function, it is likely that coverage statistics include more than the centralized network. For example, in Kenya and Nigeria, independent water providers sell water from boreholes and wells (K'Akumu and Appida 2006; Acey 2011, 2010). However, there is no standard typology for describing these arrangements, quality standards, or how states might be guided to build on the services provided by small-scale providers effectively.

We know that the absence of universal access has led to the continued and even increased reliance on informal water vendors and other types of small-scale, non-state water provision. However, there is no systematic tracking of these providers, or the quality of services they provide. Numerous studies show that households reliant on such providers pay an enormous price per liter of water obtained. While piped water may increase happiness in some contexts (Devoto et al. 2011), many households have rational reasons for refusing to connect to piped or public water services (Whittington and Mu 1991). Moreover, while willingness to pay studies has been used to justify cost recovery and private sector participation in the water sector, consumers treat water providers differently. The lack of trust in the state, combined with the ability of small-scale providers to customize delivery amount and payment, have increased the low-level performance equilibrium of many water utilities.<sup>3</sup>

The gap in delivery of piped water by utilities (whether state-owned, corporatized, or mixed) has led to the well-documented (in case studies and periodic compilations, if not databases) prevalence of small-scale or informal third-party providers. Water is big business in many cities, with implications for livelihoods (of providers and those who depend on these sources), equity, and gender (Acey 2010). Understanding the types of governance structures in the water sector, delivery models, and reforms that have resulted in actual improvements in water and service quality would be important fac-

<sup>3</sup>See Burt and Ray 2014 on trust and payments in India and Nickson and Franceys 2003 for discussion of the low-level performance equilibrium in water supply.

tors in designing and funding water interventions, or even cataloguing good practices (de Albuquerque and Roaf 2012).

## DISCUSSION AND FUTURE DIRECTIONS FOR RESEARCH

Scholars are beginning to examine how and when governments use "rights language" as an administrative reform tool (Scanlon, Cassar, and Nemes 2004; Tani 2012, 2015). However, government invocation of human rights with respect to water can also be used as a weapon against claims to third-generation rights, such as communal or traditional rights to land and associated water rights, which has occurred in Bolivia (Mehta et al. 2014). Also troubling is that, at a time when water and sanitation have been declared human rights and social goods so essential that the state must ensure everyone has access, international finance institutions have not sought to support reforms that would strengthen the public sector (to deliver services directly or oversee the actions of third parties) or make water governance more transparent and accountable to the public.

We know that the emphasis of reforms focused on corporatization of the sector, cost recovery, and pricing have not worked as expected or in increasing access when the goal has been to isolate public utilities from political manipulation (Herrera and Post 2014). Multinational water corporations have publicly embraced the human right to water, touting privatization as a way to deliver on the right, while promoting their own business interests (Sultana and Loftus, 2012; Bakker 2007). However, both privatization and public provision, in the absence of democratic governance and without a strong public sector that can regulate or deliver, will continue to fail the millions worldwide who do not enjoy a right to safe water and sanitation. At the same time, policies of full-cost recovery for long-term projects focused on 24/7 piped water systems and universal connections, without regard for acceptability and quality of services, affordability, preferences for service delivery (that informal, communal, and co-provision often fulfill), indigenous and group rights, and other dimensions of the right to water and sanitation are also flawed in practice.

This paper sought to contribute to the debate about the human rights framework as an approach to advancing global justice and meeting basic needs by identifying critical barriers to and mechanisms for realization of the right in practice. This was done through a review of the literature on human rights implementation and gathering data on how countries have been implementing the right to water. The findings call attention to three critical barriers: data, social equity, and a need to reassess the notion of third parties or so-called non-state actors, given their role as duty bearers in delivering human rights.

Established practices and customs, otherwise known as social institutions, are the outcome of power struggle in society (Knight 1992). When it comes to water and other social, economic, and cultural rights, power asymmetry becomes institutionalized as disparities, enforced by disciplinary mechanisms that inhibit or amplify voice and accountability. How are these systems reconciling water governance with the emerging international recognition of water as a fundamental human right?

One argument that has been advanced here is a call to treat the water delivery systems in much of the Global south as hybrid in/formal forms of infrastructural services provision. Categorizing service providers as state and non-state obscures the real nature of how such systems operate. Understanding how the government and other actors in the sector form a whole system, in which some gain access to particular types of service, helps illuminate areas for reform where a rights-based approach becomes very relevant.

Envisioning the practical implementation of the right to water requires translating rights from abstract legal principles into policies and interventions that can be implemented and measured. As human rights activist Maude Barlow writes, "the right to water and sanitation are living documents waiting to be used for transformational change around the world" (Barlow 2011, xvi-xvii). However, doing so requires going beyond the stated normative principles and formal declarations to wrestle with the political and social implications of employing a deeply political tool to effect improvements in service delivery in very different local contexts with respect to power, histo-

ry, marginalization, identity, and class. Some of these mechanisms are state practices that do not recognize how space is produced and planned by urban citizens themselves and alternative models of delivering water and other basic services in those spaces (Osaghae 1999; Irazábal 2008; Mirafteb 2009; Myers 2011; Andersen, Jenkins, and Nielsen 2015).

Of particular concern in this analysis is the question of how states meet their obligations with respect to rights given the prevalent role of third-party actors on whom much of the world's poor depend to provide water and other basic services. Strategies to incorporate hybrid, informal, small-scale, alternative providers into formal systems of obligations and accountability are urgently needed. Simultaneously, the state's role in creating and often maintaining extremely unequal tiers of basic service delivery must be recognized. Understanding how the government and other actors in the sector form a whole system, in which some gain access to particular types of service, can illuminate areas for reform where a human rights-based approach becomes very relevant (Sultana and Loftus 2012). We need to re-conceptualize the notion of "third parties" and "non-state providers" in rights frameworks, when government-systems create and sanction multiple forms of service delivery, with different levels of legitimacy that allow discrimination and act to frustrate the ability of people to hold rights violators and duty bearers accountable.

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