

Water law and the right to a basic water supply

by Peter Howsam

Although there is no shortage of government rhetoric about the importance of providing clean drinking-water, nowhere is an individual's basic right to an adequate water supply enshrined in law. Peter Howsam calls for a global rethink on what constitutes this right — and emphasizes that it comes with responsibilities.

LAW HAS AN important but often poorly understood function in the implementation of water supply and sanitation policy. National and international policy statements frequently contain references to the importance of basic water supply and sanitation for all people. At the international level, current thinking on water policy can be illustrated by the four guiding principles set out in the 1992 'Dublin Statement on Water and Sustainable Development':

- *Fresh water is a finite and vulnerable resource, essential to sustain life.* This section goes on to state that priority should be given to the provision of water to those without, but emphasizes that a holistic approach is required for effective water management. Whilst this, by implication, stresses the issue of basic individual human water needs, its justifiable emphasis on an holistic approach risks relegating this issue to one amongst many of varying importance;

- *'Water development and management should be based on a participatory approach involving users' and advocates the taking of decisions '... at the lowest appropriate level.'* (i.e. ultimately the individual or community);

- Principle No. 3 talks of *'... the pivotal role of women as providers and users of water'*; and

- Principle No. 4 states *'Water has an economic value in all its competing uses and should be recognized as an economic good.'* This is a relatively new concept which is growing in acceptance. It argues that *'...managing water as an economic good is an important way of achieving efficient and equitable use ... of water.'* This may be so but it does not necessarily preclude the idea of basic individual water rights. Indeed the Statement goes on to say *'Within this principle, it is vital to recognize first the basic right of all human beings to have access to clean water ...'*; although this is

qualified by the words *'... at an affordable price'*. The question here, of course, is: affordable to whom? Millions of people simply do not have the financial resources to pay for water supply, and neither have their local or national governments, although this picture is often distorted by political prioritization.

But if we look at the global level of financial resources, it seems abundantly clear that the cost of ensuring basic water needs could be easily met — if the political will existed. In most societies, only a small fraction of water is used for drinking and preserving life. In a recent review of water supply and sanitation development in Africa, experts agreed that water supply and, in some cases, sanitation, enjoyed a high political priority — but not one which was being translated into adequate budget allocations and government implementation.

It is sad to reflect that the ambitious but apparently worthy policy objectives of the UN's 1980s Water and Sanitation Supply Decade were only partly implemented. At the start of the Decade, 1.8 billion people lacked a safe and adequate water supply. Ten years later, 1.4 billion were in the same position.

The consequences are serious. Figures from UK agency WaterAid suggest that 9 million children die every year from water-related diseases, largely because 1000 million people in the developing world do not have access to an adequate and safe supply of drinking-water. Even where there is some form of provision, as in urban slum areas, the poor often have to pay a lot more per unit for their water (from private water vendors) than wealthier people, with house connections. The rich tend to benefit most from subsidized water services, with the poor paying out as much as 40

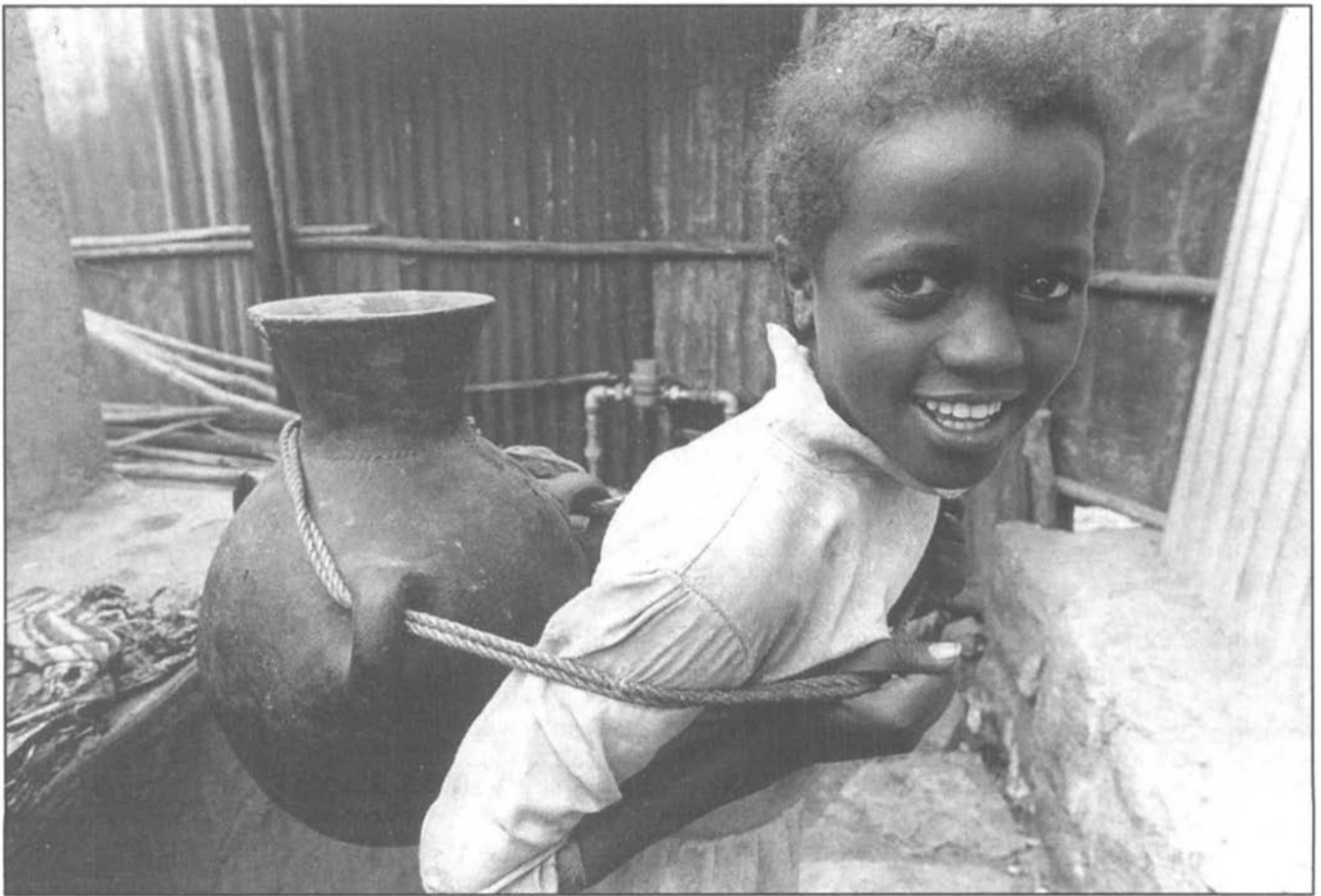
per cent of their meagre incomes.

The problem of cost must be put into context. Although the UN predicted that the cost of basic provision to all would be US\$300 billion over the 10 years, actual spending never exceeded \$10 billion in any one year. It is pertinent and perhaps poignant to remind ourselves that, compared to the less than \$27 million/day spent on providing the basic water-supply needs of those without, in the same period we spent an average of \$240 million/day on cigarettes and \$1200 million/day on armaments.

Water supply is a right

Listening to politicians, one might assume that being a basic human need, access to water would be a basic human right. A review of the literature, however, suggests otherwise. Indeed, there is some confusion over what are water rights. To most people, a water right, if it means anything at all, means a riparian right — rights to water related to ownership of land. Surely such a situation — a consequence of historical evolution — should be challenged. Certainly, the basic principles behind water rights as developed under common law and customary law, and described by some as 'first come, first served', cannot be regarded as sustainable for a common resource needed at a basic level. These principles, applicable to the doctrines of prior appropriation and riparianism, are principles of polity rather than fundamental legal principles which, based on notions of equity and rights and duties, might aim to secure basic needs and the right to life.

It should not be difficult to defend the concept that basic water-supply and sanitation needs are a basic human right. Yet, when human rights declarations are examined closely, there is little or no reference to water. The 1948 UN Universal Declaration of Human Rights does not specifically mention water. Article 25 comes closest, declaring: *'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, medical care etc.'* Article 2 states that *'Everyone is entitled to all rights... set forth in this Declaration, without distinction of any kind, such as ... property ...'*. This latter point is important in that, in many cases, water rights have traditionally been taken as



Neil Cooper/Panos Pictures

Cost in context — while less than \$27 million/day was spent on providing water to those without, \$240 million went up in smoke.



Mark Hakansson/Panos Pictures

riparian rights. Thus this Article suggests that water (or more precisely access to an adequate supply of safe water), if it were declared a basic human right, should be equally applicable to everyone and not just, or preferentially, to those who own, or have rights to, land.

It also states in the Preamble that

rights '...should be protected by the rule of law'. This confirms the relationship between policy and law if a declared right is taken as a principle of policy. While the human nature of most people allows them to identify moral rights, human history shows that they cannot be sustained without enforcement by law.

The only significant example of the right of access to water being specified is in the 1989 UN Convention on the Rights of the Child. Article 24 talks of the '... right of the child to the enjoyment of the highest attainable standard of health...' and to ensure full implementation of this right, measures should be taken to '...combat disease and malnutrition, ... through the provision of ... clean drinking-water.'

Although often referred to and incorporated in other conventions, the Declaration is, unfortunately, little more than its name suggests. It has, for example, taken 45 years for the UN to establish the office of UN Commission of Human Rights. Surely, such circumstances can only be regarded as a sad reflection of the neglect of individual rights by central agencies and authorities and perhaps indeed by society and individuals? Binding rules for the effective protection of human rights do not yet exist.

Water rights and water laws

Despite policy statements supporting basic human rights, the reality is that the water and sanitation needs of the poor are neglected and barely supported by existing legislation. These laws are often neither effective, enforceable nor accessible to those that need them most. Water rights and legal issues are frequently neglected or ignored by governments, funders and the implementers of community water-supply projects. History shows how we have recognized the need to consider and incorporate other important elements — the beneficiaries, the environment and economic value — in order to achieve proper and sustainable water provision, so why do we fail to do the same for water law and water rights?.

A stable legislative system is important, as the ever-increasing need for water conflicts with limited resources. The poor need access to effective and enforceable water laws to ensure that their basic needs are met and not marginalized by more powerful interests.

In the short to medium-term, what we need is increased awareness and a clearer understanding of the constraints or enabling conditions provided to community water-supply and sanitation project implementation by local and national water laws and prevailing water-rights issues. These should not

just be in the domain of lawyers and civil servants; water users, communities, project implementers (managers and engineers) should contribute to better administrative and regulatory controls which will in turn facilitate rather than impede water-supply provision. But there is little information on water rights and water laws in relation to community water-supply provision. An enlightened public consultation exercise as part of water-law reform in South Africa is a notable exception.

Following the collapse of apartheid, South Africa has a unique opportunity to review its water laws. The Government believes water law is central to ensuring a just and fair society. 'For too long, too many people have been excluded from basic rights and the field of water is no exception'. The new Constitution focuses heavily on basic individual human rights. The Government appreciates the complexities and sensitivities involved and has adopted a cautious, step-by-step approach to changing the law, which includes widespread programmes of public awareness and consultation; 'a new water law will only be effective if it reflects the wisdom, and enjoys the support of, the majority of South Africans, and is well understood by them'.

India's legislation

A more typical scenario can be seen

theory. control over water resources placed a heavy burden of duty on the Government to provide water to its citizens, but the Water Supply Acts provide no evidence of a correlated duty which binds the Government, and makes it accountable, in providing water to people, a situation common in many other countries.

In its 1987 National Water Policy the Government of India declares that it gives the highest priority to drinking-water. But, argue Indian legal observers, because of conflicting policy and legislation, in the absence of wholesale law reforms, this is merely a vacuous statement of intent. Local Authority (Municipal and *Panchayat*) Acts dictate that potable water supply is a prime obligation. Specifically, every house should have a sufficient supply of wholesome water for domestic purposes. The story at the local level mirrors that at the national level; the *Panchayat* Acts transferred control of water resources from the villagers to local authorities who have failed to provide communities with proper supplies.

In 1986, the Indian Government established a National Drinking-Water Mission, with water supply regarded as 'a matter of survival not development' in the poorest rural areas and urban slums. While such policy is to be applauded, the reality is that the individual citizen has little or no legal remedy if he or she does not have a

Power and wealth

While criticism may be laid at the door of national and local politicians for failing to ensure basic provision, individuals do contribute, albeit unwittingly, to the problem. Attitudes towards authority, misconceptions, and simple ignorance mean that insistence on basic water needs is weak. In India, the situation is complicated by traditional systems of class, caste and gender, which perpetuate discrimination and an acceptance of deprivation.

In practice, wealth and power play, universally, an important if not dominant part in who has access to water and who goes without. The situation is summed up well by a Navajo tribal leader: 'When I was a kid in Geography class, I was taught that water always flows downhill. What I've learned since, is that water flows to money and power wherever they may be'.

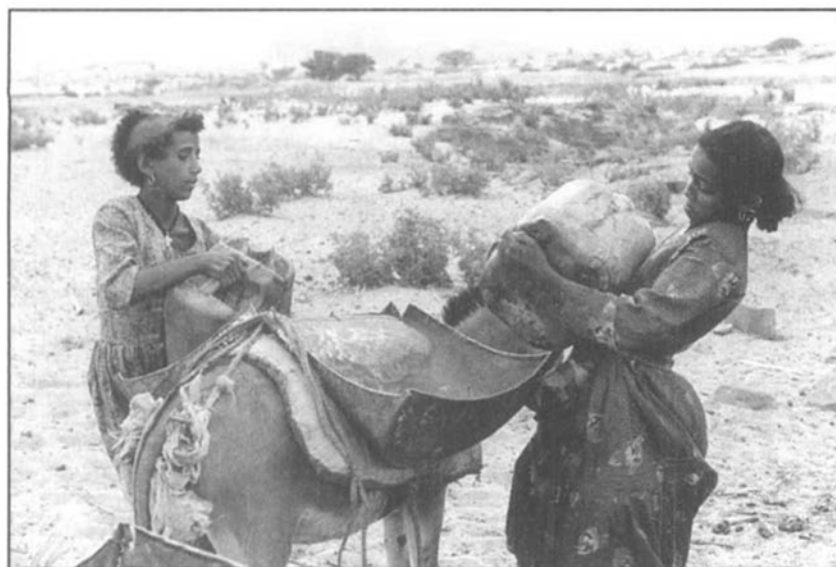
Redefining water rights

An individual's right to basic water should be a universal principle, for all people, communities, societies, and states. This can be argued for on moral and humanitarian grounds, particularly for the millions of people currently without an adequate and safe supply of water. For those in the North, it can be argued on democratic grounds — despite relatively good access to water, both current and old systems have tended to be biased towards economic gain, and the individual is ignored.

The ancient and widely practised principle of riparian water rights has not served us well. It is time both for a new definition to be formulated, and for individual water rights to be formally recognized as one of the most fundamental of basic human rights. If water is a vital resource for life, to deprive people of this resource is to violate their human rights.

The simplest definition of basic water needs would be that for consumption. It would also be appropriate to include an amount adequate for basic hygiene and sanitation. It should be stressed that basic water needs and, therefore, rights, relate not only to an adequate quantity but also an adequate quality.

It has often been argued that the common good should override the needs of the individual or, in some cases, classes of individuals or even communities. As considered elsewhere, policies and laws may abuse basic individual rights under a false justification of defending such benefits. Basic moral values should allow us to accept that there are absolute human rights and that their promotion can only be beneficial, even if universal application is never



Jan Hammond/Panos Pictures

in India. As with many countries in the twentieth century, moves were made to bring water under central control. In Uttar Pradesh, for example, all existing water rights were abolished in 1975, and all water was brought under state control. Whilst this brought better overall protection and resource conservation, it has had a negative effect on the principle of user participation. In

wholesome supply of water available. But there are signs that individuals are starting to find means of redressing water-related injustices by reference to India's Constitution, via what is being termed 'Public Interest Litigation'. Article 21 deals with the right to life, which, it could easily be argued, encompasses the right to clean drinking-water.

attainable. In particular cases, there will always be a compromise between the measures required to sustain such basic rights and their actual feasibility.

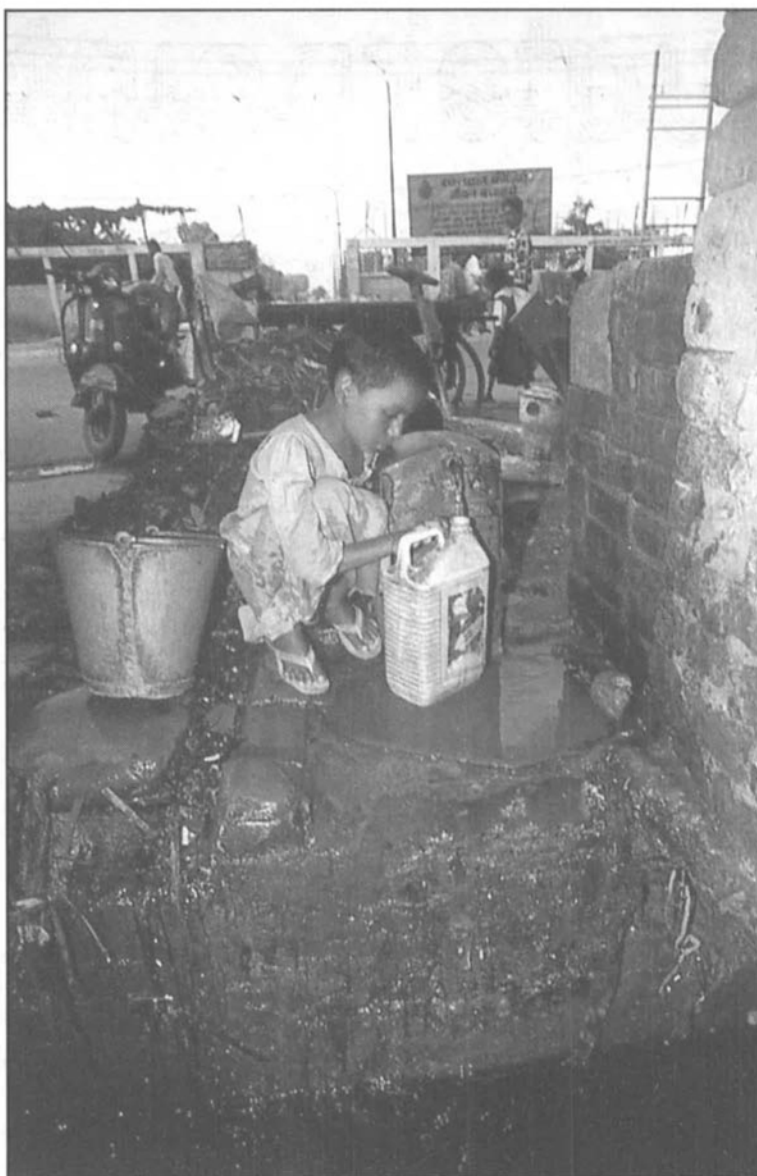
Global action

To some degree, therefore, this subject needs to be tackled at an international as well as a local and state level. Not only because — ideally — it should be a universal principle, but on a purely pragmatic level, because of the universality of the water cycle and the fact that water is limited in volume and variable in availability. If we question why such a situation does not exist today we may conclude that it is because, until relatively recently, most people have had access to an adequate quantity and quality of water and, as a consequence, have taken it for granted. Certainly, in communities in arid regions, where the shortage of water has been acknowledged for much longer, there are very clear codes of conduct. Perhaps hydrological circumstances and human needs will eventually dictate to increasingly larger proportions of society that water cannot and should not be taken for granted.

Water law will have to address the issue of the cost of providing or gaining access to basic water needs. In general, public perception of true costs is completely inadequate. While equitable and enforceable regulations to ensure cost recovery are required, the key will be to ensure that water for basic domestic needs is not valued in the same way as water used for economic purposes. There must be scope in some poorer countries for agricultural and industrial water users to subsidize domestic water supply. The cost of meeting basic water needs is not high compared to the cost of many other activities and can be afforded.

Enforceable and accessible (to individuals) legislation should be introduced. While defining the purpose of any new water legislation is relatively easy, ensuring how and why it would achieve its purpose would be more difficult, especially with regard to individuals. A law to achieve the protection of a water right would forcibly remind people of moral values, and focus attention on the rights of others. Furthermore, it could protect water rights by providing a mechanism — through sanctions — for individuals to defend their own right to water.

Dr Peter Howsam is Senior Lecturer in Groundwater Engineering and Law at Silsoe College, Cranfield University. He can be contacted at Silsoe College, Cranfield University, Silsoe, Bedford, MK45 4DT, UK. Tel: +44 1525 863288. Fax: +44 1525 863300. E-mail: p.howsam@cranfield.ac.uk



Paul Harris

Water — a human rights charter

- Water is a fundamental human need.
- In poor, less developed countries, too many individuals struggle to survive without an adequate and safe water supply.
- Policy declarations promoting the priority of basic human water needs are often not supported by effective implementation, even though such needs are only a small proportion of total water use and could be financially resourced.
- In practice, economic development and now, to some extent, the environment, dominate water-policy strategies, and basic individual needs have been neglected.
- Water laws have, in general, not supported basic individual water needs; instead, they have supported water rights related to land ownership and occupancy, and they have provided for state control of water.
- State control of water has not always been in the best interests of the water environment and has not always been able to provide for basic individual water needs.
- Water for basic domestic needs should be specifically declared a fundamental human right; and the term 'water right' should be refocused on, and redefined as, a right to basic individual water needs, to which there is a correlative duty not to waste water.
- Constitutions and/or water law should include provisions to protect this right and duty, and such provisions must be accessible to the individual.