



Water Integrity Brief

Providing a concise overview of different themes related to water integrity

Human rights

A human rights-based approach to tackling corruption in the water sector

by Aline Baillat

BOX 1 Background

The objective of this brief is to introduce a human rights framework for water integrity and transparency. This will strengthen the capacities of public authorities and civil society organisations to address water transparency effectively, while fulfilling a mandate on the human right to water and complying with human rights obligations. The right to safe drinking water and sanitation was recognised in 2010 by the General Assembly of the United Nations and the Human Rights Council. The resolutions of these two institutions serve as a reminder to states that equal access to safe drinking water and sanitation for all is a national priority.

A rights-based approach has also sharpened the lens through which corruption and its negative impact on water and sanitation can be evaluated. The issue of corruption has become an increasing concern among UN human rights mechanisms, such as treaty bodies, special procedures and the Universal Periodic Review. Currently, water transparency and water integrity on one hand, and the realisation of the human right to water and sanitation on the other, are pursued along parallel tracks. Combating corruption and realising human rights are, however, mutually reinforcing. Eliminating corruption is essential for the full realisation of human rights principles in water and sanitation, and can drastically reduce the space in which opportunity for corrupt practices may occur.

This brief is the outcome of a research study undertaken jointly by WaterLex and WIN in 2013 to show how pursuit of the human right to water and sanitation can help in the fight against corruption. A human-rights perspective can guide the design of a framework to monitor corruption, and promote the development of human rights-based anti-corruption policies in the water sector.

1. LINKING CORRUPTION AND THE HUMAN RIGHT TO WATER AND SANITATION

1.1 Defining the human right to water and sanitation

The international community recognised the human right to safe drinking water and sanitation in Resolution 64/292 of the General Assembly of UN in July 2010. Appointed member states at the Human Rights Council underlined this international commitment two months later in a resolution

affirming that “the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity” (HRC 15/9). Reinforcing the interpretation of the Committee on Economic, Social and Cultural Rights (CESCR 2002), this resolution recognises that the human right to safe drinking water and sanitation is implicit in both the International Covenant on Civil and Political Rights

(ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). As of 2013, 167 states are party to the first covenant and 160 to the second¹. Although there is no international convention specifically designed for the human right to water, access to safe drinking water is explicitly mentioned in various international human rights conventions².

For a long time, the scope and implications of the human right to safe drinking water have been subject to debate. This has been settled around core components: “the human right to safe drinking water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses” (CESCR General Comment 15, §2, 2002). The recognition of safe drinking water as a human right means that states have to respect a number of principles inherent in all human rights, specifically: non-discrimination³, access to information, participation, accountability and sustainability.

Over the last decade, several countries have included and specified in their constitutions and water laws the right to water and sanitation, as recognised in international human rights law. The definition of the human right to water and sanitation in international law sharpened the lens through which corruption and



Carrying water home.
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BOX 2 Corruption and human rights

The issue of corruption has become an increasing concern among UN human rights mechanisms, such as treaty bodies and special procedures. A milestone in this evolution was the decision in 2002 of the then Sub Commission on the Promotion and Protection of Human Rights to appoint a “Special Rapporteur on corruption and its impact on the full enjoyment of human rights”. The Office of the High Commissioner for Human Rights (OHCHR) also organised two important conferences, one in 2004 in Seoul on “good governance practices that promote human rights” the other in 2006 in Warsaw on “anti-corruption measures, good governance and human rights”. More recently, in March 2013, at the occasion of a panel discussion organised by the OHCHR on the “negative impact of corruption on the enjoyment of human rights”, Navy Pillay, High Commissioner for Human Rights, said: “Corruption is an enormous obstacle to the realisation of all human rights – civil, political, economic, social and cultural, as well as the right to development. Corruption violates the core human rights principles of transparency, accountability, non-discrimination and meaningful participation in every aspect of life of the community. Conversely, these principles, when upheld and implemented, are the most effective means to fight corruption.” She also stressed the urgent need to “increase synergy between efforts to implement the United Nations Convention against Corruption (UNCAC) and international human rights conventions”.

1.2 Corruption as a violation of the human right to water and sanitation

The term “corruption” encompasses very different realities whose impacts on access to water and sanitation among vulnerable populations should be carefully assessed. From the human rights perspective, corruption is usually closely associated with discrimination, although this needs to be documented in more detail. According to a 2010 report by the International Council on Human Rights Policy: “At all these levels, corruption reinforces exclusion and discrimination and tends to magnify and exacerbate pre-existing human rights problems”

¹ <http://treaties.un.org>

² The Convention on the Elimination of All Forms of Discrimination Against Women (in force since 1981, Art 14 (2)(h)), the Convention on the Rights of the Child (in force since 1990, Art 24(2)(c)), and the Convention on the Rights of Persons with Disabilities (in force since 2008 [Art 28(2)(a)]) all explicitly refer to this right.

³ Article 2.2 of the International Covenant on Economic, Social and Cultural Rights: 2.2. “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” ICESCR, art. 2.2).

(ICHRP, 2010). De Beco suggested that “because human rights focus on non-discrimination, bringing a human rights perspective to corruption monitoring would result in more attention being paid to the way in which corruption affects vulnerable groups differently” (De Beco, 2010). For this reason, it is important to “unpack” corruption into specific types of interactions (Plummer and Cross 2006). The human rights general obligations framework, “Respect, Protect and Fulfil”, can be used as a way to classify the impacts of corruption (See Box: The Respect, Protect, and Fulfil Framework). Beyond weaknesses due to the simplification of a complex topic, such a system offers the advantage of unpacking corruption into specific corrupt acts and realities. It is hoped that this framework will contribute to the work of human rights monitoring mechanisms regarding corruption issues.

BOX 3 The Respect, Protect, and Fulfil Framework

As with other economic, social and cultural rights, the human right to safe drinking water and sanitation entails three types (or levels) of obligation, i.e. to respect, protect and fulfil. The obligation to respect requires states not to take any measures that would result in preventing individuals from enjoying their right to safe drinking water and sanitation. The obligation to protect requires measures by the state to ensure that third parties do not interfere with the enjoyment of the right to safe drinking water and sanitation. The obligation to fulfil essentially requires states to adopt the necessary measures for the full realisation of the human right to safe drinking water and sanitation (CESCR, General Comment 15).

1.2.1. Corruption and the obligation to devote the “maximum available resources” to realising the human right to water and sanitation

As defined under article 17 of the UNCAC, “Embezzlement, misappropriation or other diversion of property by a public official” can in some circumstances be qualified as violations of the obligation to fulfil the human right to water. As noted by Nihal Jayawickrama in an expert paper prepared for the OHCHR for the 2006 Conference:

“When substantial national resources are diverted from public use into private benefit, or development aid is mismanaged, misused or misappropriated, the development process is aborted. The government is no longer in a position to fulfil its minimum

human rights obligation, namely, ‘to take steps’, individually and through international assistance and cooperation, ‘to the maximum of its available resources’, to achieve progressively the full realisation of the social, economic and cultural rights of its citizens”

(Nihal Jayawickrama, 2006, §10, referring to article 2 of the ICESCR).

1.2.2. Corruption and the obligation to respect

In General Comment 15 on the human right to water, the CESCR explicitly mentions that violations of the obligation to respect include “(i) arbitrary or unjustified disconnection or exclusion from water services or facilities; (ii) discriminatory or unaffordable increases in the price of water”.

Abuse of functions by water and sanitation service officials usually involves violation of the obligation to respect the human right to water. Article 19 of the UNCAC explains that “abuse of functions refers to a public employee or public office holder that is doing something which is illegal or something that the official has no legal authority to do, in order to obtain a personal economic benefit or cause an illegal damage to others”.

This obligation is usually violated in the case of petty corruption, where low-level officials abuse their functions to extract small bribes and favours from water users. These situations are particularly frequent when public officials meet the public directly. One Chief Economic Adviser of India’s Finance Ministry defined “harassment bribes” as bribes that people often have to give to get what they are legally entitled to⁴.

1.2.3. Corruption and the obligation to protect

General Comment 15 mentions “Violations of the obligation to protect follow from the failure of a State **to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to water by third parties.** This includes, inter alia: (i) failure to enact or enforce laws to prevent the contamination and inequitable extraction of water; (ii) failure to effectively regulate and control water services providers; (iii) failure to protect water distribution systems (e.g., piped networks and wells) from interference, damage and destruction” (44.b, emphasis added).

In this regard, the case on the Milan Aqueduct, Costa Rica (see Box: Corruption impact on the human right to water, Milan Aqueduct, Costa Rica), which was presented at the first global Water Integrity Forum

⁴ Kaushik Basu, currently Senior Vice President and Chief Economist of the World Bank.

in June 2013, highlights how weak coordination and accountability by state authorities can hamper efforts to fulfil this obligation, and ultimately prevent the enjoyment of the human right to water.

Finally, it should be emphasised that the state's obligation to protect has an extraterritorial dimension, meaning that states should "take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction" (CESCR 2011). In General Comment 15, the CESCR mentions that "steps should be taken by States Parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries" (§33). Synergies with international anti-corruption legal frameworks are possible in this regard as well. The UNCAC has a specific article on the criminalisation

BOX 4 Corruption impact on the human right to water, Milan Aqueduct, Costa Rica

Following many years of disputes around water contamination caused by the intensive pineapple industry, the highest Court of Costa Rica finally ruled in 2009 that specific authorities and ministries had the obligation to clean the area and restore safe drinking water. Despite this, communities are still deprived of their right to clean water, as relevant authorities have failed to address the situation. Moreover, corrupt acts such as trading in influence (defined in the UNCAC in article 18) often result in the non-enforcement of laws designed to protect the right to water.



Pineapple Plantation in Costa Rica.
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of bribery of foreign officials (Art 16). In 1997 OECD Members adopted a specific convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

1.2.4. The obligation to fulfil, in relation to appropriate legislative measures against corruption

According to the 2008 report by Transparency International on corruption in the water sector, general corruption in developing countries is estimated to "raise the price for connecting a household to a water network by as much as 30 per cent". Given this negative impact of corruption on the right to water and sanitation, states have a legal obligation under Article 2.1 of the ICESCR to adopt and implement strategies to tackle corruption in the water sector. The obligation to adopt measures to prevent and combat corruption clearly falls under the obligation to fulfil – understood as the obligation to take appropriate legislative and other measures for the realisation of the human right to water. General Comment 15 says: "The obligation to fulfil requires States Parties to adopt the necessary measures directed towards the full realization of the right to water" (§26).

1.3 Beyond criminalisation: the complex realities of corruption

Corruption in the water and sanitation sector goes well beyond specific acts as defined in the UNCAC. Clientelism and other forms of political corruption, alongside scientific data manipulation or systemic petty corruption, are challenges to the realisation of the human right to safe drinking water and sanitation. To address these challenges and the resulting general lack of trust that sometimes exists in water and sanitation services, it is important to strengthen the procedural components of the human right to water and sanitation. In other words, strengthening the synergies between human rights and anti-corruption legal frameworks in the water and sanitation sector requires a focus on prevention strategies resting on increased transparency, accountability and participation (TAP). Human rights give "teeth" to the concepts of TAP. They are fundamental rights, not just charitable gestures.

2. HUMAN RIGHT TO WATER AND SANITATION: A LEGAL FRAMEWORK FOR TRANSPARENCY, ACCOUNTABILITY AND PARTICIPATION (TAP)

The human right to water and sanitation encompasses procedural rights such as the right to access information (transparency), the right to participate in decision-making processes and the right to ask for remedy (accountability). For human rights advocates, access to information, participation and accountability are rights-based obligations and may trigger human rights protection mechanisms. The right to water and sanitation therefore leads to the empowerment of right-holders and has the potential to transform the balance of the power between right-holders and duty-bearers – which is fundamental for effective access to information, participation and accountability.

BOX 5 Access to information, participation and accountability in the human right to water

The Committee on Economic, Social and Cultural rights specifies in General Comment 15 on the right to water: “The formulation and implementation of national water strategies and plans of action should respect, inter alia, the principles of non-discrimination and people’s participation. The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water. Individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties” (§48). Moreover, General Comment 15 on the human right to water listed “information accessibility” under the various dimensions of the accessibility criteria included in the human right to water. This includes “the right to seek, receive and impart information concerning water issues” (§12(c) iv, GC15, see also §48). In Resolution 15/9, the Human Rights Council calls on states “to ensure full transparency of the planning and implementation process in the provision of safe drinking water and sanitation and the active, free and meaningful participation of the concerned local communities and relevant stakeholders therein” (§8 (b), HRC 15/9, 2010).

The rights to access information, to participation and to justice are not specific to the water sector. These “procedural” rights are linked to fundamental civil and political rights included in the ICCPR. As demonstrated elsewhere, the realisation of these fundamental civil and political rights is a central element of a general human rights-based anti-corruption strategy (ICHRP 2010). In this regard, it is important to note the importance of all efforts toward strengthening the capacities of parliamentarians and democratic institutions, political party financing, an independent media, an independent judiciary and the protection of whistle-blowers.

Having underlined these general links between the anti-corruption TAP measures and the human rights framework, there is a need to analyse the various challenges linked to these procedural rights in the water and sanitation sector. To do so, it is important to distinguish between various public service delivery models and various levels of decision-making.

2.1 Bringing a human rights perspective to current efforts on transparency in public affairs

The global financial crisis of 2008 revealed the necessity to reform financial institutions at the national, regional and international levels. The call for transparency received increased attention. In December 2012, member states at the UN General Assembly adopted an important resolution on “Promoting transparency, participation and accountability in fiscal policies”, endorsing the Global Initiative for Financial Transparency (GIFT) High Level Principles, and encouraging member states to intensify efforts to enhance transparency, participation and accountability in fiscal policies (A/RES/67/218). In 2013, the IMF drafted a new and strengthened fiscal transparency code of good practices. Other initiatives include the International Aid Transparency Initiative, launched at the High Level Forum on Aid Effectiveness in Accra in 2008. This provides information on projects which development agencies are funding or implementing.

However, information disclosure is not the end of the story. States disclose fiscal information for different reasons, e.g. to respond to international donor requirements, to face increasing political competition or to restore fiscal credibility domestically and on international financial markets. Budget information disclosure is rarely designed for anti-corruption goals. Moreover, in a recent publication on International Budget Partnership, the authors argue that fiscal transparency does not necessarily lead to increased participation and accountability. They say: “Simply

placing information in the public domain or opening up spaces for public participation does not ensure that these will be used or used wisely. People's responses to information are inseparable from their interests, desires, resources, cognitive capacities and social contexts" (Sanjeev Khagram, Archon Fung, Paolo de Renzio, 2013, p9).

Various studies have tried to identify the factors that contribute to increased public participation and accountability. These factors include the political will of public authorities, the availability of technical and financial support, and communities' organisation and structure. For transparency initiatives at all levels to bring concrete results, it is important to accompany this trend with civil society empowerment programmes resting on giving people a better understanding of their rights and tools to monitor the data. Awareness-raising programmes on the right to water and sanitation are necessary if access to information is to lead effectively to increased participation and accountability.

Moreover, for financial transparency to bring outcomes in terms of corruption prevention, there is a need to better articulate budgets at the various levels of decision-making. It is fundamental to trace the financial transfers occurring in ministries or at different levels of administration to the local level. It is also critical to work on the development of specific monitoring tools for civil society that can help people to understand, track and systematise analysis of financial flows.

2.2 Transparency in public procurement and access to information, in the context of private service providers

The UN Special Rapporteur on the human right to water and sanitation, Catarina de Albuquerque, underlined in her report on non-state service providers the transparency requirements in contracting procedures. She states:

"When deciding to delegate service provision, and once that fundamental decision has been taken, **the subsequent process of tendering, bidding and contract negotiation also must be transparent. The terms of reference and the final contract should be made available for public scrutiny and commenting.** Commercial confidentiality must not jeopardize the transparency requirements provided for under the human rights framework" (emphasis added, HRC 2010, §36).

In public procurement processes in the water and sanitation sector, striking the right balance

BOX 6 Private service providers and access to information laws

The status of private operators delivering public services such as water and sanitation raises a significant challenge for most national access to information legislation. The 1998 United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (or Aarhus Convention) offers a broad definition of "environmental information" and "public authorities". In a currently pending communication before the Aarhus Convention Compliance Committee (ACCC/C/2010/55 submitted by the NGO Fish Legal), the question is raised on the nature of private water and sewage companies and water-only companies in England and Wales, and how environmental information – including information relating to water – held by such companies may be treated. Access to the requested information had been denied on the basis that according to jurisprudence in England and Wales (Upper Tribunal case no. GI/2458/2010, Smart Source v. the Information Commissioner) these companies were not 'public authorities' for the purposes of the Environmental Information Regulations 2004 and therefore the Aarhus Convention. However, in light of the text of the Aarhus Convention, it is unlikely that these companies are excluded from scrutiny and access to information obligations, as they provide public services. The Compliance Committee has currently suspended consideration of the case, because of pending domestic remedies (at the UK and EU level).

between commercial confidentiality and the public interest is particularly complex. For that reason, Mova Al Afghani argues that "access to information legislation needs to be integrated into public procurement processes" (Al Afghani 2012).

Beyond this fundamental issue of transparent contracting in the water and sanitation sector, private sector participation raises other challenges regarding access to information legislation. Accesses to information laws have the potential to bring public scrutiny into the management of water resources and therefore prevent corruption. However, as illustrated in a pending case before the Aarhus Convention Compliance Committee (see Box: Private

service providers and access to information laws) and as developed by Al Afghani in his thesis, access to information legislation is usually inefficient in tackling the specific challenges of the water and sanitation sector, especially when it involves private operators. In this regard, he suggests reforming access to information laws so that they contain both a “definitional system”, which defines what “public bodies” are, and a “designation system”, which specifically lists public bodies (Al Afghani 2012).

2.3 Holding duty-bearers accountable: the contribution of a multi-stakeholder platform to solve confusion over responsibility

In collaboration with UNDP, the Kenya Water for Health Organisation (KWAHO), a Kenyan NGO working in the water and sanitation sector, launched the “Water Dialogue Forum”, a local community-level platform where water and sanitation issues are discussed. Most importantly, it “serves as feedback and complaint redress mechanisms between right-holders (consumers) and duty-bearers (formal and informal water service providers)”. This programme resulted in consumers having greater confidence in service providers, as evidenced by an increase in

revenue collection and the number of connections to the water network. KWAHO also noticed more interest from rights-holders in local water and sanitation issues, and a higher level of reporting of unlawful behaviour⁵.

As documented by Plummer and Cross, TAP can be a central strategy of informal service providers (Plummer and Cross 2006). They give the example of the difficult position of small water providers in Nairobi in relation to the formal water utility that provides bulk water supply in exchange for big bribes. They note that “the small scale private providers are increasingly organised, and have formed an association and developed a code of ethics to ensure they all follow a set of agreed rules, and to create a platform with the capacity and weight to interact effectively with the utility. They see this as being a critical vehicle to counter the regular petty corruption of Nairobi Water Utility officials in meter reading, billing and collection”.

This kind of complicated situation illustrates the need for developing multi-stakeholder forums involving all duty-bearers and right-holders in a specific water and sanitation sector. Such platforms would help to identify clearly roles and responsibilities, therefore improving levels of accountability.



A village boy near a public water pump in Liberia.
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⁵ Email exchange with Irene Gai, Programme coordinator at KWAHO, May 2013.

3. CONCLUSIONS AND RECOMMENDATIONS

Developing synergies between anti-corruption legal frameworks and the human rights framework is fundamental for an effective fight against corruption. Human rights give “teeth” to the concepts of TAP. They are fundamental rights, not just charitable gestures. Yet a human rights approach to TAP is insufficient to combat corruption. Anti-corruption measures and policies defined in the UNCAC are essential, such as the criminalisation of corrupt acts, the creation of specialised, independent anti-corruption agencies and ombudsmen, or the protection of whistleblowers. The UNCAC offers a strong, coherent framework which human rights advocates should endorse in their activities.

However, petty corruption should be understood in a larger context of poverty and is sometimes a symptom of deficiencies in public service delivery, revealing a need for sectorial institutional reforms. It is in the understanding of these systems and the design of sectorial institutional reform that the human right to water and sanitation can make a significant contribution. A human rights-based approach consists in identifying with accuracy duty-bearers and rights-holders, and taking into account their specific institutional and regulatory environment. A human rights-based approach to corruption essentially means putting a human face to problems, and trying to understand the cause of a specific type of corruption, taking into account the social, political and economic context. Such a diagnostic would help identify entry points for anti-corruption programming.



Children at a water tap.
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RECOMMENDATIONS:

- » Efforts should consist first in explaining to donors, governments and service providers the gains that result from the introduction of public participation and accountability processes. Allocating resources for these programmes and prioritising the establishment and strengthening of such mechanisms can bring important positive outcomes for users as well as providers (as shown by the example in Kenya).
- » Recent findings show that improvements in transparency do not automatically lead to increased participation, and that the path toward accountability is even more complicated. If transparency initiatives at all levels are to bring concrete results, it is important to empower rights-holders, e.g. through awareness-raising programmes on the right to water and sanitation. These should be illustrated with positive stories where rights have been successfully claimed and people’s situations improved as a result. As elaborated in more detail in the full research paper (WaterLex, WIN 2013), a legal framework on transparency should focus on:
 - » Transparent recruitment processes in the water and sanitation sector
 - » Transparency in international aid flows
 - » Making TAP in budgeting and planning a reality at national and sub-national levels
 - » Transparency in public procurement processes and public-private partnerships
 - » TAP as a central requirement of service providers (at operational levels).
- » Develop initiatives such as the creation of social accountability mechanisms offering a space for right-holders and duty-bearers to discuss issues, and for water users to file complaints and report corrupt acts.
- » Conduct advocacy work to make private service providers subject to access to information laws. Private operators have transparency obligations under the human right to water and sanitation.
- » Develop tools to help civil society monitor public spending from a human rights perspective.

For a detailed list of references that this paper is based on, please contact us or refer to our website

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