

**ADOPTING A HUMAN RIGHTS-BASED APPROACH TO ACCESS TO
WATER IN NIGERIA: LESSONS FROM SELECTED JURISDICTIONS**

BY

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2 NOVEMBER 2016

DECLARATION

I declare that this thesis is my original work. It has never been presented to any other University or Institution. Where other people's works have been used, references have been provided, and in some cases, quotations made. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LL.D Degree.

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DEDICATION

This thesis is dedicated to the memory of my late father, Prof. Albert Adeyomola Ogunsanya. As the only member of my family that embarked on such academic journey, only he would have understood wholly, my pains and gains.

However, I am consoled by this: his legacy lives on!

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The enthusiasm with which I began this academic journey is not the same as that with which I finished it for indeed there is a depth to every phase in life, more than the eyes can see. Soon the excitement withered and I became sober to the reality set before me as it became clear that I needed more than excitement and wishful thinking to complete the task before me. I was told “swim or drown.” Drowning was not an option! And so with faith and determination, I rode on the encouragement of the people around me, those who jeered or cheered.

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LIST OF ABBREVIATIONS

AHRLR	AFRICAN HUMAN RIGHTS LAW JOURNAL
ATPS	AFRICAN TECHNOLOGY POLICY STUDIES
CC	CONSTITUTIONAL COURT
CEDAW	CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN
CFRN	CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA
CRC	CONVENTION ON THE RIGHTS OF A CHILD
CRPD	CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND OPTIONAL PROTOCOL
DFID	DEPARTMENT FOR INTERNATIONAL DEVELOPMENT
ELRI	ENVIRONMENTAL LAW RESEARCH INSTITUTE
EMA	ENVIRONMENTAL MONITORING ASSESSMENT
ESCR	ECONOMIC SOCIAL AND CULTURAL RIGHTS
FCT	FEDERAL CAPITAL TERRITORY
FEPA	FEDERAL ENVIRONMENTAL PROTECTION AGENCY
FMWR	FEDERAL MINISTRY OF WATER RESOURCES
HRBA	HUMAN RIGHTS-BASED APPROACH
ICCPR	INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS
ICESCR	INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS
ICSID	INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
ICWE	INTERNATIONAL CONFERENCE ON WATER AND THE ENVIRONMENT
IIDH	INSTITUT INTERNATIONAL DES DROITS DE L'HOMME
IJHR	INTERNATIONAL JOURNAL OF HUMAN RIGHTS
IJRBM	INTERNATIONAL JOURNALS OF RIVER BASIN MANAGEMENT
IJWRD	INTERNATIONAL JOURNAL OF RESOURCE DEVELOPMENT
JICA	JAPAN INTERNATIONAL COOPERATION AGENCY
JWRP	JOURNAL OF WATER RESOURCE AND PROTECTION
MDG	MILLENNIUM DEVELOPMENT GOALS
NESREA	NATIONAL ENVIRONMENTAL STANDARDS AND REGULATIONS ENFORCEMENT AGENCY

NHRC	NATIONAL HUMAN RIGHTS COMMISSION
NWA	NATIONAL WATER ACT
NWLR	NIGERIAN WEEKLY LAW REPORT
NWRI	NATIONAL WATER RESOURCES INSTITUTE
PANEL	PARTICIPATION, ACCOUNTABILITY, NON-DISCRIMINATION, EMPOWERMENT AND LEGAL REDRESS
PPP	PUBLIC PRIVATE PARTNERSHIP
RBDA	RIVER BASIN DEVELOPMENT AUTHORITY
SAHRC	SOUTH AFRICAN HUMAN RIGHTS COMMISSION
SERAC	SOCIAL AND ECONOMIC RIGHTS ACTION CENTRE
SERAP	SOCIO-ECONOMIC RIGHTS AND ACCOUNTABILITY PROJECT
SPDC	SHELL PETROLEUM DEVELOPMENT CORPORATION
UDHR	UNIVERSAL DECLARATION OF HUMAN RIGHTS
UISP	UPGRADING OF INFORMAL SETTLEMENT PROGRAMME
UNCED	UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT
UNDG	UNITED NATIONS DEVELOPMENT GROUP
UNDP	UNITED NATIONS DEVELOPMENT PROGRAMME
UNEP	UNITED NATIONS ENVIRONMENT PROGRAMME
UNESCO	UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANISATION
UNICEF	UNITED NATIONS CHILDREN EMERGENCY FUND
WCOSL	WATER CORPORATION OF OYO STATE LAW
WHO	WORLD HEALTH ORGANISATION
WRA	WATER RESOURCES ACT
WRM	WATER RESOURCES MANAGEMENT
WSA	WATER SERVICES ACT

SUMMARY

Based on the assumption that water is a human right that the Nigerian government is obliged to fulfil, this thesis begins with a historical overview of the development of a human right to water. This description provides the background against which a human rights-based approach to water is conceptualised. I argue that the Nigerian government supports the human right to water on the international stage but has failed to maintain a legal and institutional framework that supports a human right to water domestically. A legal analysis of the current state of access to water in Nigeria shows that there are inadequate laws that contribute to the poor access to water in Nigeria. I, therefore, propose the recognition of the human right to water and the adoption of a human rights-based approach to water in Nigeria. I identify South Africa and Kenya as comparators having constitutionalised the human right to water in addition to having developed promising practices of a human rights-based approach to water with implications for Nigeria. Although past studies on access to water in Nigeria have been examined from an environmental perspective, I argue that an environmental perspective to access to water does not consider all the necessary elements, which may guarantee access to water. I address the challenges of access to water from a human rights perspective since Nigeria is a signatory to all the international instruments that recognise water as a human right. I suggest recommendations that may help realise access to domestic water in Nigeria.

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CHAPTER ONE

INTRODUCTION

1.1 RESEARCH PROBLEM

Desiring to address the problems of water for domestic use in Nigeria, the Nigerian government, through the Federal Ministry of Water Resources¹ (FMWR), developed the National Water and Sanitation Policy² and the National Water Policy.³ These policies were aimed at addressing the inadequacies of the Nigerian Water Resources Act,⁴ which made no provision for water for domestic use. In spite of these policies, many Nigerians still do not have access to sufficient water for domestic use.⁵ This study argues for the recognition of a human right to water and the adoption of a human rights-based approach to water in Nigeria. It examines the ways in which the adoption of a human rights-based approach to water would be useful in resolving the problems of access to water in Nigeria, by analysing: (i) international instruments showing the importance of incorporating a right to water on water provision; (ii) selected jurisdictions that have incorporated a human right to water in their domestic laws and have adopted a human rights-based approach to access to water; and (iii) how civil society in these jurisdictions has been able to secure gains on the basis of having a right to water.

1.2 ASSUMPTION

I proceeded in this study on the assumption that water is a human right and that a human rights-based approach provides a viable legal and policy prospect for addressing the challenges of inadequate access to water in Nigeria.

¹ Hereafter referred to as FMWR.

² National Water Sanitation Policy (draft final) Department of Water Supply and Quality Control Nov 2004 at http://www.nwri.gov.ng/userfiles/file/National_Water_Sanitation_Policy-Final_Draft.pdf accessed 12 March 2014.

³ National Water Policy July 2004 Federal Republic of Nigeria at <http://awdrop.org/uploads/3/1/7/8/3178681/national-water-policy.pdf> accessed 6 June 2013.

⁴ Act 101 of 1993 (WRA).

⁵ According to their 2012 update on the progress on drinking water and sanitation, UNICEF and WHO reported that approximately 66 million Nigerians (47% of the population) do not have adequate access to potable water at www.unicef.org/media/files/JMPReport2012.pdf accessed 21 May 2013. Furthermore, 83% of Nigerians source their drinking water privately (see Nnodim, 2013) at www.punchng.com/business/industry/47-of-nigerians-lack-access-to-clean-water-report/ accessed 18 February 2014.

1.3 RESEARCH QUESTIONS

This study examines whether the recognition of a human right to water and an adoption of a human rights-based approach to water would be useful in resolving the problems of access to water in Nigeria. This objective was guided by the following five research questions:

1. What is a human right to water and how does this right relate to a human rights-based approach to water?
2. What does a human rights-based approach to water entail, and in what ways is it a useful approach in facilitating access to water?
3. What are the challenges of access to domestic water in Nigeria?
4. Which laws, policies and civil society mobilisation exist in other jurisdictions that offer guidance to Nigeria to realise universal access to water?
5. What promising foreign practices relating to a human rights-based approach to water exist from which Nigeria may learn?

1.4 BACKGROUND AND MOTIVATION FOR STUDY

Water is a basic necessity of life.⁶ This necessity of water to human life is what is sure to have compelled states to afford it recognition as a human right. Despite this recognition, the inaccessibility of safe potable water for domestic use has continued to bring about immeasurable hardship for humanity.⁷ Women and children bear the brunt of the brutality that can be observed to be associated with this hardship, as the responsibility of ensuring there is water in the family is cast on them.⁸ Nigeria is one such country where access to water remains a crisis.⁹

The national law provision on access to water in Nigeria¹⁰ falls under sections of the law that is non-justiciable.¹¹ Even though water is a socio-economic right,¹² the

⁶ As O'Regan has put it "water is life. Without it, nothing organic grows. Human beings need water to drink, to cook to wash and to grow our food. Without it, we will die." See the case of *Lindiwe Mazibuko and Others v. City of Johannesburg and Others*, Case CCT 39/09 (2009) ZACC 28 Para 1 (hereafter *Mazibuko CC*).

⁷ See http://www.un.org/waterforlifedecade/water_cities.shtml accessed 15 January 2014.

⁸ In Africa, 90% of the work of gathering water is done by women. See www.un.org/waterforlifedecade/gender.shtml, accessed 12 January 2014.

⁹ Akpor & Muchie (2011) 4 *JEST* 480.

¹⁰ Chap II Constitution of the Federal Republic of Nigeria 1999 No.24 (hereafter CFRN) provides for issues that cannot be addressed in Court. Sec 6 under this chapter refers to water.

justiciability of these rights (socio-economic rights) seems limited by sections of the Nigerian Constitution.¹³ These rights are embedded in the 1999 Constitution as “fundamental objectives and directive principles of state policy.”¹⁴ Fundamental objectives and directive principles are objectives towards which the nation strives, while directive principles lay down the policies to help realise these objectives.¹⁵ Although the courts are beginning to find a way around the non-justiciability of socio-economic rights, access to water is not a human right in Nigeria. Access to water is also not sufficiently protected under any Nigerian law.¹⁶ Water as a socio-economic right or a human right and access to water as a right has never been adjudicated by any court in Nigeria, except in cases where rivers or wells were being polluted.¹⁷

Discussions on access to potable water as a human right in Nigeria are quite recent, and as such, there are very few articles on this area of law in Nigeria. Academic research on the issue of access to water in Nigeria is written from an environmental perspective with a focus on pollution.¹⁸ While some suggest methods of acquiring water for domestic use, which include rainwater harvesting,¹⁹ others have conducted research and written on the quality of groundwater in

¹¹ Non-justiciable is a term used for issues that courts refuse to adjudicate upon. These issues may include socio-economic rights such as water and education. See Ibe (2007) 7 *AHRLJ* 230.

¹² Brand in Brand & Heyns (2005) (Eds) 3 described socio-economic rights as those rights which create entitlements for human welfare, such as the right to education, food, housing and health. Water is not excluded.

¹³ Sec 6 (6) (c) of the CFRN 1999 states that “the judicial powers [...] shall not [...] extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.”

¹⁴ See Chapter II CFRN 1999.

¹⁵ Le Roux-Kemp (2014) 2 *African Nazarene University Law Journal* 119-at 132; See generally Okere (1983) 31 *International and Comparative Law Quarterly* 214-228.

¹⁶ An example is found in the case of *AG Ondo State v AG Fed* (2002) 9 Supreme Court Monthly 1. The Supreme Court (which is the highest court in Nigeria) held that “...the directive principles can be made justiciable by legislation.” Furthermore this position was maintained in the case of *Gbemre v. Shell Petroleum Development Company Nig. Ltd.* (2005) *AHRLR* 151 (hereafter *Gbemre v SPDC*). The court took the African Charter into cognisance, having observed that the Charter is domestically enforceable in Nigeria. The Supreme Court held in *Ogugu v State* (1994) 9 *NWLR* pt. 366 1 that the African Charter is applicable and enforceable in Nigeria through the ordinary rules of court and in the same manner, as set out in Chapter IV of the CFRN 1999, which houses the Nigerian bill of rights. See Olowu (2009) 172-176.

¹⁷ An example is the case of *Gbemre v SPDC* (2005) *AHRLR* 151.

¹⁸ *Mombeshora et al* (1983) 9 *Environment International* 81-84; *Ojukwu-Ogba et al* (2009) 3 *Malawi LJ* 273-302; *Omalu et al* (2010) 9 *OJHAS* 1-3; *Longe et al* (2010) 12 *JSDA* 35-44; *Eruola et al* (2011) 1 *Res J Chem Sci* 1-5.

¹⁹ *Ishaku et al* (2011) 3 *JWRP* 598-606.

Nigeria.²⁰ These sources, rainwater and groundwater, are the major sources that many Nigerians rely on for their domestic use.²¹ Research conducted on the quality of groundwater has shown that these waters are polluted.²² In their research, Ojukwu-Ogba et al. observed and concluded that there are not adequate laws protecting the use and abuse of groundwater under Nigerian pollution legislation and policy.²³ Longe et al. observed that the most important law on water in Nigeria is the Water Resources Decree of 1993.²⁴ These researchers have argued that the Water Resources Act (WRA) does not address the present challenges of access to water for domestic use; nor does it mete out appropriate punishment to water polluters.²⁵

Nigerians depend largely on surface water and groundwater for their domestic use.²⁶ The WRA of Nigeria also endorses the use of surface water for domestic use.²⁷ Many of these surface waters are, however, polluted, and not fit for human consumption.²⁸

Mombeshora et al., in their study of surface water in Ibadan, Oyo State Nigeria, state that it would be unwise to use this water for drinking.²⁹ Eruola et al. also studied hand-dug wells in two areas in the Ogun State of Nigeria, and concluded that the pollution in these hand-dug wells are unfit for human consumption.³⁰ Furthermore, the Ogunpa River in Ogun State was examined over two weather seasons, where results showed that the river is polluted along the river course,

²⁰ Jaji *et al* (2007) 133 *EMA* 473-482.

²¹ Ojukwu-Ogba & Enabulele (2009) 3 *MLJ* 278. They buttress this position when they stated that ground water is the largest portion of water supply for domestic use. They gave an example of Benin City in Nigeria, the capital of Edo State, where the majority of the populace have resorted to boreholes.

²² Jaji *et al* (2007) 133 *EMA* 473-482.

²³ Longe *et al* (2009) 3 *MLJ* 282.

²⁴ This decree was put into effect by the then military government of Nigeria. Under this decree the right of ownership and power of administration of water resources was tied to land ownership. See sec 2 (iii) of this decree and Longe *et al* (2010) 12 *JSDA* 38. It should be noted that by virtue of section 315 of the 1999 Constitution of the Federal Republic of Nigeria (CFRN), existing laws (military) were deemed to be an Act of the National Assembly. The Water Resources Decree is hence referred to as the Water Resource Act (2004). See also Olowu (2009) 113 *FN* 548.

²⁵ See sec 18 (i) WRA. This section punishes anyone who fails to comply with the provision of the Act with a fine of 2000 Naira, which is the equivalent of approximately 100 rands at the time of writing.

²⁶ Ojukwu-Ogba & Enabulele (2009) 3 *MLJ* 278.

²⁷ Sec 2 (1) WRA.

²⁸ Jaji *et al* (2007) 133 *EMA* 481.

²⁹ Mombeshora *et al* (1981) 5 *Environment International* 53.

³⁰ Eruola *et al* (2011) 1 *Research Journal of Chemical Sciences* 4.

which poses health risks to several rural communities who rely on this river as their primary source of domestic water.³¹ Unfortunately, the Nigerian WRA provides that these waters may be abstracted and used for domestic purposes.³²

The international understanding of the human right to water is that water for domestic use must be adequate, accessible, affordable and of good quality.³³ These characteristics of a human right to water, I contend, are what form the minimum acceptable standard when a human right to water is recognised by a nation, and a human rights-based approach to water is adopted. Although all these characteristics of the right to water will be addressed, the quality of water is of particular relevance in Nigeria. This is because with the abundance of water in Nigeria, the quality of the water endorsed for domestic use by the Federal government (such as the rivers), are largely polluted.³⁴

Desiring to address adequately the issue of access to water in Nigeria, the Nigerian government is revisiting the current Nigerian water laws with a view to improving access to water in the country.³⁵ One major issue with the laws and policies in Nigeria is that there is no synergy between the national water laws and the state laws on water. This gap is addressed in Chapter Four of the thesis.

The Nigerian government has tried (unsuccessfully)³⁶ to improve access to water supply in Nigeria, especially in the northern part where lack of potable water seems to be most crucial.³⁷ The measures put in place by the Nigerian government have not served sufficiently or efficiently, as some of the wells and boreholes

³¹ Jaji *et al* (2007) 133 *EMA* 481.

³² See Sec 2 (a) (i) WRA.

³³ Cano (1981) 51 *Journal of Hydrology* 385-387.

³⁴ Jaji *et al* (2007) 133 *EMA* 481.

³⁵ This desire is found in the attempt to address the issues of access to water through the Water Policy of 2004 and Water and Sanitation Policy of 2000. See National Water Policy 2004/5. The problem however with these policies is that none of them address adequately domestic access to water. It is my argument that if these policies and bill is eventually passed to law, the issue of access to water would still not have been addressed.

³⁶ Unsuccessfully, since the only provision of the Nigerian government are hand-operated boreholes and wells. There is usually no follow up to these provisions of wells and hand-operated boreholes, which eventually break down in mere months, where people are usually found to revert back to their previous ways of sourcing for water. Ishaku *et al* (2011) 3 *JWRP* 295.

³⁷ Ishaku *et al* (2011) 3 *JWRP* 295.

provided yield little to no water during the dry season, and some of these machines even break down, where usually no repairs are carried out on them.³⁸

Although the Nigerian government has tried in numerous ways to ensure access to water to Nigerians for all, 47% of the Nigerian population still do not have access to water.³⁹ This is evidenced in Nigerians sourcing their water for domestic use individually and privately.⁴⁰ This access to water sometimes leads to disease, and even death, in extreme cases.⁴¹ One of the measures the Nigerian government has put in place to contribute to access to water in Nigeria is a creation of boreholes in rural parts of the country. When these machines break down, people resort to the unimproved surface waters such as the rivers and stream. A majority of these streams have been reported to be polluted and unfit for human consumption. Polluted water too has been known to cause a variety of illness in Nigeria, and even death. It has been reported that about 97000 children die yearly from diarrhoea caused by unsafe water and poor sanitation.⁴²

Furthermore, there was a decrease in the water and sanitation budget from 112 billion naira in 2010, to 62 billion naira in 2011, and 32 billion naira in 2012.⁴³ This decrease in water budget has shown that government has not prioritised devising a solution to the challenges of access to water in Nigeria.

Debates as to whether access to water is a fundamental human right have raised various opinions and reservations.⁴⁴ However, since water is a basic need for all and life and good health is dependent on access to sufficient potable water,⁴⁵ the

³⁸ Ishaku *et al* (2012) 26 *WRM* 298.

³⁹ According to their 2012 update on the progress of drinking water and sanitation, UNICEF and the WHO reported Nigerians without access to potable water to number approximately 66 million. At www.unicef.org/media/files/JMPReport2012.pdf accessed 21 May 2013.

⁴⁰ Nnodim (2013) At www.punchng.com/business/industry/47-of-nigerians-lack-access-to-clean-water-report/ accessed 18 February 2014.

⁴¹ Gleick (2002) at http://www2.pacinst.org/wp-content/uploads/2013/02/water_related_deaths_report3.pdf accessed 17 March 2017.

⁴² Black *et al* (2003) 361 *Lancet* 2226-2234 also at www.who.int/maternal_child_adolescent/documents/pdfs/lancet_child_survival_10mill_dying.pdf accessed 8 April 2016. Also about 111 million people, which is about a two third of the population of Nigeria, do not have sanitation at www.wateraid.org/ng accessed 18 February 2014.

⁴³ At <http://www.businessdayonline.com/NG/index.php/analysis/features/35265-president-promises-water-slashes-budget> accessed 9 October 2013.

⁴⁴ Tully (2005) 23 *NQHR* 35; Langford (2006) 24 *NQHR* 433; Bulto (2011) 12 *MJIL* 290.

⁴⁵ Conant (2005) *UNDP* 4.

recognition of water as a human right by the United Nations General Assembly is justified.⁴⁶

According to Gleick's interpretation of the international law's meaning of rights⁴⁷ where states have the duty to promote and protect individual rights,⁴⁸ water is a fundamental human right.⁴⁹ Gleick is also of the view that a state should not provide the actual water for individuals but rather should provide the institutional, economic and social environment necessary to help individuals realise this right.⁵⁰ He affirms this by stating that states ought to provide only the actual right for individuals who otherwise cannot access this right as a result of age, poverty, disaster or economic deprivation.⁵¹ His argument leans towards a rights-based approach (the principle of non-discrimination), which emphasises that "water and water facilities and services should be accessible to all and especially the poor and vulnerable should be considered."⁵²

Recognising water as a human right does not provide the water or make water accessible to everyone. It, however, is a first step towards ensuring everyone has access to water. The recognition of a human right to water under a national law empowers the people since they are aware of their right to water and have the tool (law) to demand the enforcement of this right when it is made a law. Recognising water as a human right and finding a place for it in national laws enhances a human rights-based approach. The principle of accountability in a rights-based approach helps everyone to identify the duty-bearers, the right-holders and the functions or duties attached. Where a right to water is recognised in a national law, such a law would state clearly the duties of water providers as well as the consumers.⁵³

⁴⁶ On 28 July 2010, the United Nations General Assembly declared clean drinking water and sanitation as a human right through Resolution A/RES/64/292.

⁴⁷ Conant (2005) *UNDP* 4.

⁴⁸ Gleick (2003) 9 *Water Nepal* 119.

⁴⁹ Gleick (2003) 9 *Water Nepal* 117.

⁵⁰ Gleick (2003) 9 *Water Nepal* 117 at 123.

⁵¹ Gleick (2003) 9 *Water Nepal* 123.

⁵² General Comment 156; see also Miller (2010) 14 *IJHR* 917.

⁵³ South African Water Services Act 108 of 1997 (hereafter WSA).

Cano analysed water conferences held by the United Nations in the 1970s.⁵⁴ The recommendations adopted at the 1977 conference forms part of the principles of a human rights-based approach.⁵⁵ One of the principles of a human-rights based approach to water is legal redress. For an aggrieved party to seek legal redress there must be laws on which he relies on to show that he or she has suffered damages or a violation of some sort. The 1977 water conference recommends that there should be legislation enacted towards a coordinated approach to water planning, and all provisions on water resources management should be combined in a unitary legal instrument, namely, the Constitution.⁵⁶

In Nigeria, the WRA does not guarantee domestic water supply, nor does it recognise water as a human right. The various states laws on water also do not recognise water as a human right; rather, water is considered from an economic perspective. Considering water as a human right in a Constitution is the highest level in which a government of a nation can show its commitment towards ensuring the right to water. This I argued in line with the provision of the Nigerian Constitution, which states that any law incompatible with the provisions of the Constitution is ruled as void.⁵⁷ Furthermore, the Constitution is the supreme law to which all other laws are required to conform.⁵⁸ Unlike the South African Constitution (and its water laws), the Nigerian Constitution has not aligned itself with this recommendation of the United Nations conferences,⁵⁹ nor the provisions of General Comment 15, which expansively discusses the human right to water and states four elements of the right to water which are quantity, availability, quality and affordability.⁶⁰

⁵⁴ Cano (1981) 51 *Journal of Hydrology* 381; Valencia Conference of 1975; Caracas Conference of 1976; and Mar del Plata Conference of 1977.

⁵⁵ See International Environmental Law Research Centre at <http://www.ielrc.org/content/e7701.pdf> accessed March 16 2017.

⁵⁶ Cano (1981) 51 *Journal of Hydrology* 385; Recommendations also at <http://www.ielrc.org/content/e7701.pdf> accessed March 16 2017

⁵⁷ Sec 1 (3) of the CFRN states that other laws found inconsistent with the provisions of the law shall be void.

⁵⁸ See Bilchitz in Woolman & Bilchitz (eds) (2012) 269.

⁵⁹ There are several water laws in Nigeria and the only section in the 1999 CFRN, which talks about water, is Section 20. It provides that “the state shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.” There are other Federal laws on water to which the Constitution does not make reference. In other words, there is no harmonisation of Nigerian water laws.

⁶⁰ General Comment 15 E/C.12/2002/11 5-6; see also Cano (1981) 51 *Journal of Hydrology* 385-387.

South Africa is considered an important jurisdiction in this study, because of the proliferation of scholarship available. The experience of South Africa ranges from the legal and regulatory framework, to case law and implementation, as well as monitoring mechanisms of a human rights-based approach to water. South Africa has a laudable legal and regulatory framework when it comes to the realisation of access to water.⁶¹ The 1996 Constitution is anchored in human rights, and guarantees the right of everyone to have access to water.⁶² Subsequently the National Water Act⁶³ and the Water Services Act⁶⁴ were adopted by the South African parliament. These laws spell out in clear terms the expectations of duty bearers and right holders.⁶⁵ The provisions of South African water law are anchored on a human rights-based approach to water. Section 27(1) read with section 27(2) of the Constitution states that “everyone has the right to have access to water and the state must take reasonable legislative and other measures within its available resources to achieve the progressive realisation” of the right to water.

There may be wide failures in the actual delivery of water, especially in many poor urban areas; however it cannot be denied that South Africa has made remarkable progress in realising access to water.⁶⁶ Although the failure in actual delivery shows that there is a divide between the provisions of the law and the actual access of the people to water in South Africa, this does not mean that the law recognising the human right to water is insufficient to address water challenges, rather, a monitoring and implementation framework is necessary to address this issue. A human rights-based approach mitigates these failures by bringing to fore a monitoring and implementation framework.

⁶¹ Dugard in Langford *et al* (eds) (2014) 275.

⁶² Sec 27 1996 Constitution.

⁶³ Act 36 of 1998 (NWA).

⁶⁴ Act 108 of 1997 (WSA).

⁶⁵ The WSA is focused on potable water and sanitation services. It also contains rules about how municipalities should provide water supply and sanitation. Also, the WSA under sec 3 states that every person has a right to basic water supply and every water services institution must take reasonable measure to realise these rights. It also provides that all water services authority must set out the development plan and measures to realise the right to water. The NWA deals with water resources such as rivers dams and groundwater. It contains rules about how these waters are protected used and controlled in an integrated manner. The Act ensures that water for basic human need is reserved before water is allocated for other uses. For a detailed explanation see generally the Guide to the National Water Act published by the Department of Water Affairs and Forestry (DWARF). See also The Right to Water and Sanitation in National Law at <http://www.righttowater.info/progress-so-far/national-legislation-on-the-right-to-water/> accessed on 15 June 2013.

⁶⁶ Dugard in Langford *et al* (eds) (2014) 275-276.

South Africa is a pioneer country in Africa on the right to water, and has an enviable legal framework, as well as extensive scholarship and judicial pronouncements, all of which form strong reasons for choosing South Africa as a jurisdiction for comparison, from which Nigeria might learn.

Like many African countries, Kenya is not exonerated from the problems of access to water.⁶⁷ In view of these problems, Kenya has also adopted a human rights-based approach to access to water following the recognition of a human right to water in the Kenyan Constitution.⁶⁸ Kenya is presently undergoing reforms in its water sector.⁶⁹ Chapter Five of this study identifies the current reforms channelled towards the realisation of access to water in Kenya, including discussions with water officials conducted during an academic visit to Kenya in 2015. The study focuses on the mechanisms the Kenya government has put in place to realise access to water in Kenya.

The study explores the usefulness of a human rights-based approach to water as an adoptable approach in Nigeria for two reasons. Firstly, because access to water raises human rights concerns, such as the right to health and the right to life,⁷⁰ and secondly because a human rights-based approach provides the basic principles against which a sustainable access to water may be analysed. The key principles of a human rights-based approach (or PANEL principles of participation, accountability, non-discrimination, empowerment and legal redress) establishes the claims and the obligations to ‘respect, protect and fulfil’,⁷¹ commits all water management systems towards the guarantee of the basic human need for water, and provides water users with the instrument to enforce this interest. I explored the usefulness of a human rights-based approach, because it considers the steps or range of systems necessary, both at the national and international level, to

⁶⁷ Marshall (2011) 2 *Global Majority E-Journal* 31-45 at 31-32.

⁶⁸ Art 43 (1) (d) 2010 Kenya Constitution.

⁶⁹ Stower (2008) at

http://www.wsp.org/sites/wsp.org/files/publications/Kisima_Newsletter__Issue_5.pdf accessed 11 November 2014.

⁷⁰ It has been variously established that no human being can survive without a substantial amount of clean water. Furthermore access to water can promote a life of human dignity UN doc E/C 12/2002/11 Para 1; see also Heleba (2009) 10 *ESR Review* 7.

⁷¹ On the obligations to respect protect and fulfil, the laws and policies must harmonise with human right law, there must be no violation by non-state actors and adequate provision for redress but be provided. Also, adequate measures such as legislative, judicial and budgetary must be developed and implementable.

protect, respect and ensure the enjoyment of a human right to water by all people, since water is a basis for human development.⁷² This approach also incorporates human rights standards into national law, and integrates human rights principles into public administration and education in human rights and responsibilities.⁷³ Human rights are interrelated, and access to water is related to a number of other rights.⁷⁴

I argued that although water has been resolved to be a human right under international human right law, water is not considered to be human right in Nigeria (even though the Nigerian government has an obligation under international law to recognise such a right).⁷⁵ I argue that a human rights-based approach that incorporates the PANEL principles ought to “form the basis of policies and actions of government and development agencies.”⁷⁶ I therefore canvassed available arguments for the recognition of water as a human right in Nigeria, forwarding that this recognition ought to be backed up by the adoption of a human rights-based approach, which involves implementation and monitoring of the actual access. I also contended in Chapter Four of this thesis that for the problems of access to water to be sufficiently reduced and progressively realised, there is a need to take a step further than an ordinary legislative provision. Arguably, legislative provisions anchored on a human rights-based approach may improve access to water in Nigeria. Recognising water as a human right, incorporating these four elements and adopting a human rights-based approach with the application of the PANEL principles, would guarantee access to water.

1.5 METHODOLOGY

The discussion on access to water is vital, and particularly sensitive, where a variety of conflicting reports exist on what pertains in jurisdictions like Nigeria, as statistics and data records are inconsistent, or not easily accessible to the public. A proposal for the adoption of a human rights-based approach to water in Nigeria, which is both theoretical and practical, would involve a combination of approaches

⁷² Hausermann (2003) 9 *Water Nepal* 131.

⁷³ Hausermann (2003) 9 *Water Nepal* 131.

⁷⁴ Access to water can promote a life of human dignity UN doc E/C 12/2002/11 Para 1; see also Heleba (2009) 10 *ESR Review* 7.

⁷⁵ United Nations General Assembly Resolution A/RES/64/292 28 July 2010.

⁷⁶ Hausermann (2003) 9 *Water Nepal* 131-132.

that would include the analytical and the comparative. This study thus combines approaches of a ‘desktop’ study and an academic visit.⁷⁷

Generally, a review of literature was adopted wherein books and articles on the human right to water and human rights-based approaches to water were analysed. Significant scholarship in this area of law was available in South Africa, compared to the dearth of such literature available in Nigeria and Kenya. I specifically examined those international law instruments, declarations, general comments and resolutions that contributed to the emergence of a human right to water. I also examined national laws of Nigeria, South Africa and Kenya, as well as a few other countries outside of Africa, pertaining to a human right to water, or implying a human rights-based approach to water. Some of these laws are available on the internet, while others were retrieved on academic visits to Kenya and Nigeria.

I adopted a comparative approach to evaluating the Nigerian water laws and the various national laws of the selected jurisdictions, as these relate to access to water, so as to ascertain the contribution these laws have made towards such access, where primary and secondary sources on the human right to water in the selected jurisdictions were identified and analysed. I adopted a comparative method to determining the usefulness of a human rights-based approach to water, as adopted by various selected jurisdictions, and to establish the role a human rights-based approach has played in an improved access to water in the respective countries considered. A comparative approach was also adopted to ascertain what legal and social practices exist in jurisdictions beyond those mentioned above, as this might relate to a human rights-based approach to access to water.

Research was conducted in both Nigeria and Kenya, mainly to retrieve documents not readily available online. The visit made involved discussion with water officials in their official capacity as custodians of water, who are cited where relevant in subsequent chapters of this thesis.

⁷⁷ This visit was undertaken mainly to retrieve documents that were not readily available in the library or online, and also to discuss with water officials in their official capacity as water custodians in Nigeria and Kenya.

1.6 LIMITATION AND JUSTIFICATION FOR THE STUDY

This study pertains to access to water for domestic use and not other uses of water, such as for fishing or industrial purposes. I limited my examination to the countries of Nigeria, South Africa and Kenya, and examined the available water laws, policies and case laws in these selected jurisdictions up to 2015.

1.6.1 INTERNATIONAL HUMAN RIGHTS LAW

In my examination of the international human right to water, I examined only the core international conferences, covenants and documents that aided the recognition of the human right to water. I examined the contents of General Comment 15, and showed how the human right to water links to a human rights-based approach to water. I did not examine all possible regional systems; rather, I limited my examination to the African human rights system as it pertains to the jurisdictions explored.

1.6.2 NIGERIA

Because there are inadequate laws pertaining to access to water at federal level, I examined the most important national water law in Nigeria, the WRA, to analyse the current law, and the position of the Nigerian government on access to water in the country.

As a result of the inadequate laws on access to water at federal level in Nigeria, I examined the laws of those states visited during my research visit there.⁷⁸ I consider only the state laws currently in use in the various states in question. The years in which these laws were established vary from state to state.

1.6.3 SOUTH AFRICA AND KENYA

I have in this thesis considered South Africa and Kenya as having promising practices on the human right to water. I examined in these jurisdictions the national laws that recognise the human right to water, and the national laws that showcase a human rights-based approach to water.

In South Africa, I examined three major laws, the 1996 Constitution, the WSA and the NWA. I also examined the Free Basic Water Policy and the role it plays in

⁷⁸ Kwara State, Oyo State, Ogun State, Delta State, Edo State and Lagos State.

access to water. South Africa has a robust judicial interpretation of the human right to water and the human rights-based approach. I analyse some of these cases and the interpretation of courts, which has contributed to the realisation of access to water.

In Kenya, I examined the provision of the human right to water in the 2010 Constitution. I also examined the Water Act of 2002. I examine the Water Bill of 2014, which although not yet in force, is currently undergoing deliberations and is expected to replace the Water Act of 2002. The review of the 2002 Water Act has become necessary since the recognition of the human right to water in the 2010 Constitution. I however limit my analysis of this bill to discussions I had with water officials in Kenya, and available scholarship in this regard.

1.6.4 INDIA AND COLOMBIA

Inasmuch as I desired to limit my examination of promising practices of a human rights-based approach to access water to African jurisdictions of South Africa and Kenya, I also consider Colombia and India for their promising practices of the human rights to water. Colombia and India have been commended for the way in which these countries have respectively pursued access to water, which involve activities of civil society organisations in securing access to water.

I limited my examination of the human right to water and a human rights-based approach to water in these two jurisdictions to the promising practices, which may be instructive in the Nigerian case. I examined only those Constitutions and court cases that contributed to the human right to water. Lacking Spanish proficiency, an in-depth study of access to water in Colombia was precluded.

India has not constitutionalised the human right to water, but the India courts have recognised the human right to water as a derivative of the right to life. I considered these jurisdictions necessary to determine alternative means of addressing the human rights to water, and the way in which a human rights-based approach may be adopted, without a concomitant recognition of the human right to water. My examination of the human right to water in these jurisdictions is

therefore limited to their current Constitution, interpretation by the courts and available literature, which discuss these laws and cases.⁷⁹

1.7 PURPOSE OF THE STUDY

The purpose of this study was to examine the ways in which the challenges of access to water in Nigeria may be addressed, by considering positive factors in selected jurisdictions that have progressively sought to improve domestic water supply.

It is a known fact that access to water is a global concern. Of concern here are the challenges of access to water in Nigeria specifically, as a country that it ought to be noted has water resources in abundance. This study examines whether the national recognition of the human right to water and the adoption of a human rights-based approach to water in Nigeria would address the challenges of access to water in the country. Nigeria was amongst those countries that assented to the international recognition of water as a human right, and despite having water in abundance; Nigeria has inadequate laws, an inadequate institutional framework and a population without adequate access to improved water sources.

1.8 STRUCTURE/CHAPTERISATION

Chapter One introduces the thesis. It contains the research problem, presents assumptions and sets out the research questions to be answered in the substantive chapters. In Chapter Two, I adopted a historical and descriptive approach to discussing the emergence of the human right to water. I examined applicable United Nations instruments, resolutions and conferences that gave rise to the human right to water. I argued that it is impossible to realise other human rights without access to water. This chapter aimed to clarify the assumption that water is a human right, despite counter-arguments.

I also distinguished between a human right to water as understood under international law, and the right to water as understood under national laws of a country like Nigeria. This chapter clarifies the assumption made in this study that water is a human right, which bestows certain obligations on the Nigerian

⁷⁹ Constitution of Colombia 1991 and Constitution of India 1950.

government, and it sets out the foundation on which a human rights-based approach is to be discussed in subsequent chapters.

In Chapter Three I identify and discuss the various approaches to access water for domestic use. I argue that these various approaches constitute only a small part of a human rights-based approach to water. I juxtapose these approaches with a human rights-based approach, to highlight the similarities and differences. I then focus analysis on a human rights-based approach. I note that there are various terms such as ‘human rights framework’, and ‘rights-based approach’ used to describe the human rights-based approach. I also provide a counter-argument to that forwarded by Eyben between a human rights-based approach and ‘rights-based approach.’⁸⁰ For clarification purposes and a uniform understanding of the word, I provide a definition, and maintain the usage ‘human rights-based approach’ consistently across the study, except in cases where I refer to particular author’s use of the term. I trace the evolution of a human rights-based approach, which I identify as beginning with development. Associating access to water with a human rights-based approach to development is not strange, as without access to water, there can be no reasonable discussion on development. The aim of this chapter is to conceptualise a human rights-based approach to water and to consider how this approach may play out in different contexts and what guidance it may offer to Nigeria going forward.

In Chapter Four I consider the state of water governance in Nigeria by identifying and evaluating Nigerian water laws and policies. This is done to ascertain the legal background put in place towards ensuring access to water in Nigeria. I examine the factors that have inhibited the realisation of access to water in Nigeria, and criticised the existing Nigerian laws as being inadequate in the guarantee of access to water for Nigerians, where I argue that the national water law is a contributory factor to the challenges of a human right to water in the country. I thereafter argue for the explicit recognition of a human right to (access to) water in Nigeria and the adoption of a human rights-based approach to water.

In Chapter Five I examine the human right to water in South Africa and Kenya. I examine their national laws and case laws, in line with a human rights-based

⁸⁰ Eyben’s position as analysed in Nyamu-Musembi & Cornwall (2004) *IDS working paper 234* 14

approach to water. I also examine the challenges of a human rights-based approach to water in these jurisdictions, and highlight the promising practices identified, after which I also examine India and Colombia for the same.

In Chapter Six, I provide a summative assessment and show how the research questions were answered in each chapter. I give my recommendations in this chapter and present a conclusion for the study.

CHAPTER TWO

THE EMERGENCE OF THE HUMAN RIGHT TO WATER

2.1 INTRODUCTION

One of the assumptions this study rests upon is that water is a human right, one which the Nigerian government is obliged to fulfil. Although the United Nations General Assembly has since affirmed water to be a human right, this right is non-existent in Nigeria.¹ Even though resolutions of the United Nations General Assembly are not binding,² countries that have resolved to address the challenges of access to water have taken concrete steps, by recognising the human right to water in their Constitutions, and by making efforts to realise access to water ‘progressively’, through the adoption of a human rights-based approach.³

In this chapter, I conduct a chronological analysis of the development of the human right to water under international human rights law. I conducted this analysis so as to endorse the assumption that the human right to water confers enforceable obligations on the Nigerian government, irrespective of the fact that water is not considered a human right in Nigeria. To do this I examined United Nations instruments and selected United Nations water conferences, in order to establish that access to water has always been a human right, despite the omission of the right to water in earlier international human rights instruments, such as the UDHR,⁴ the ICCPR⁵ and ICESCR.⁶ I justify this assertion by highlighting the essence of water to the existence of other human rights, especially the right to life.

¹ On 28 July 2010, by a recorded vote of 122 in favour, none against, and 41 abstentions the United Nations General Assembly Resolution GA/10967 (hereafter General Assembly (A/65/254)) recognised access to clean water and sanitation as a human right. See <http://www.un.org/News/Press/docs/2010/ga10967.doc.htm> accessed 10 June 2014; See Resolution on the human right to water and sanitation adopted by the United Nations General Assembly at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/64/292 accessed 6 April 2015 (hereafter Resolution A/64/L.63/Rev. 1 and Add. 1).

² Oberg (2005) 16 *European Journal of International Law* 879-906.

³ Examples of which are South Africa and Kenya, which are the identified comparators in this study, and are discussed in Chapter Five of this thesis.

⁴ Universal Declaration of Human Rights (hereafter UDHR), adopted 10 December 1948. United Nations General Assembly Res 217 A (III). See http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf accessed 13 May 2013.

Although the current study concerns the adoption of a human rights-based approach to water in Nigeria, I argue that it is nearly impossible to adopt a human rights-based approach to water without recognising water as a human right, or putting into consideration the characteristics and basic requirements of the human right to water. To this end, I have discussed the emergence of the human right to water in some detail, and identified the elements that form crucial parts of a human rights-based approach to water. To do this, I examined international human rights instruments and United Nations conferences that played a role in the recognition of the human right to water, or formed parts of the requirements for adopting a human rights-based approach to water. I also discuss in some detail General Comment 15, which is the interpretation of Articles 11 and 12 of the ICESCR by the Committee on Economic Social and Cultural rights.⁷ The interpretation of the Committee is what established the human right to water and key elements of a human rights-based approach to water. This chapter therefore provides background information, and sets out the foundation from which the thesis then proceeds.

Since my argument in this chapter is that it is impossible to adequately understand and adopt a human rights-based approach to water without first recognising water as a human right or understanding what this logistically entails, I set out in a chronological order the development of the human right to water. I highlight the normative content of General Comment 15, and emphasise the link between the normative content of the human right to water and a human rights-based approach to water. I contend the normative content of the human right to water to be that which is applied under a human rights-based approach to water.⁸ I highlight the distinction between the right to water as recognised under certain national laws,

⁵ United Nations General Assembly *International Covenant on Civil and Political Rights* 16 December 1966. United Nations Treaty Series vol. 999 171
<http://www.refworld.org/docid/3ae6b3aa0.html> accessed 23 May 2016 (hereafter ICCPR).

⁶ International Covenant on Economic, Social and Cultural Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 (hereafter ICESCR).

⁷ United Nations Committee on Economic Social and Cultural Rights (CESCR) *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)* 20 January 2003 E/C.12/2002/11 at <http://www.refworld.org/docid/4538838d11.html> accessed 12 June 2014) (hereafter General Comment 15). General Comment 15 is an interpretative document by the CESCR, who are human rights experts. Their interpretations are persuasive but not legally binding. See also Bulto (2011) 12 MILJ 2 FN 1.

⁸ This link is further examined in Chapter Three of this thesis.

and the human right to water as understood under international human rights law. I conclude that national governments have an obligation under international law to recognise the human right to water, and to work towards the progressive realisation of this right. To this end, I argue that the national recognition of the ‘right’ to water in Nigeria cannot be likened to the ‘human right to water’ as understood under international human rights law.

I conclude that water is a human right, which confers on the Nigerian government the basic obligations to protect, respect, fulfil and promote this right.

2.2 THE RIGHT TO WATER AS A CONTEMPORARY HUMAN RIGHTS ISSUE

Water is the most important good in the history of humankind, as without water, there can be no life and no development or civilisation.⁹ Historically, finding a place for water is difficult, as the various meanings attributed to water vary according to culture and time.¹⁰ However, water is a need upon which every life depends, and the United Nations has hence given it a place amongst other human rights.¹¹ Water spans a variety of essential uses that are agricultural, industrial, hydroelectric, recreational and domestic in nature.¹² While these various uses of water are self-explanatory, a discussion of the domestic use of water is necessary here.

Domestic water covers a variety of water uses in the home. These are for drinking, for cooking, laundry, sanitation and personal hygiene,¹³ as well as gardening to produce food, which is not for commercial purposes.¹⁴ There are other domestic uses of water such as gardening (for aesthetic or commercial purposes); these however do not fall within the domestic scope of the human right to water.¹⁵ The

⁹ Biswas (1981) 51 *Journal of Hydrology* 369.

¹⁰ Templehoff *et al* (2009) 1 *Water History* 3.

¹¹ General Assembly (2010) A/65/254; See also General Assembly (2016) A/RES/70/169.

¹² See Ladan (2013) at SSRN 2358884 accessed 2 June 2014 6; Biswas (1981) 51 *Journal of Hydrology* 370.

¹³ See Howard & Bartram (2003) at http://www.who.int/water_sanitation_health/diseases/en/WSH0302.pdf accessed 28 October 2014; Ladan (2013) at SSRN 2358884.

¹⁴ General Comment 15.

¹⁵ United Nations Fact sheet 35 (2010) (hereafter factsheet 35) at <http://www.ohchr.org/documents/publications/factsheet35en.pdf> accessed 14 October 2013; See also Howard and Bartram (2003).

human right to water refers to water that human beings depend on for their survival (to avoid dehydration) and to live a life of human dignity.¹⁶

The human right to water evolved from a series of conferences and a gradual recognition and acceptance that the human right to water cannot be separated from other rights. This right thus developed from a deeper interpretation of other rights, and the understanding that those rights would not exist without access to water itself.¹⁷

Human rights are rights inherent to all human beings, whatever their nationality, origin, language, colour or any other status. These rights are said to be interrelated, interdependent and indivisible.¹⁸

Added to this, human rights are inalienable, which means that they belong to individuals, and are not granted or conferred upon them by the state or by means of their citizenship.¹⁹ Human beings are fundamentally entitled to them by the virtue of being human beings. For example, everyone has a right to life as recognised both under international human rights law and under various national laws; no-one can survive without water to drink, so it therefore follows that water is a basic need which is essential for human survival, as well as to live a dignified life.²⁰

The fact that water was not considered expressly as a human right in the UDHR does not in fact make it inferior to other human rights.²¹ Perhaps the reason why water was not considered a human right explicitly at first, was because the purpose of the UDHR was to prevent another tragic and devastating occurrence as a result of the world wars, where the provisions of the UDHR are stated to address issues of war.²² Conceivably, if water was the cause of war, it would have occupied

¹⁶ Factsheet 35 8.

¹⁷ Arguably, the right to life is dependent on adequate water. See Alvarez in Picolotti & Taillant (eds) (2003) 72.

¹⁸ United Nations Office of the High Commissioner at www.ohchr.org/en/issues/pages/whatarehumanrights.aspx accessed 21 June 2014.

¹⁹ United Nations Population Fund (2005) <http://www.unfpa.org/resources/human-rights-principles> accessed 8 April 2015; See also Art 1 UDHR.

²⁰ WHO/WSH/WWD/TA.10 (Feb. 2001) World Water Day 2001: water health and human rights 1. Found at http://www.who.int/water_sanitation_health/en/humanrights.html accessed 9 October 2013.

²¹ Bray (2014) 29 *ICSID Review* 476.

²² Morsink (1993) 15 *Human Rights Quarterly* 357.

a grand place in the UDHR. The fact that it was not stated expressly, meant that it was not the reason for the UDHR, and that it was not considered to be a problem as at the inception of the UDHR. Interpretation has however cleared the air, namely that it was implied all along.²³ Secondly the mention of water in the CEDAW showed that water is one of the core areas of life in which women suffer discrimination.²⁴ By this time, water had become a human rights issue, and found its way gradually into other United Nations documents, through interpretation and express provision in specific documents such as the CRC,²⁵ and the CRPD,²⁶ as is to be further discussed.

An important issue such as water being ‘a human right’ cannot but have its critics. For example, it has been argued that if water was a human right in the first place, it would not have been excluded from the United Nations treaties.²⁷ Certain researchers have expressed concern over the absence of the human right to water under the UDHR, and subsequent United Nations documents, such as the ICESCR, where it was only interpreted by General Comment 15, under Articles 11 and 12 of the ICESCR. Researchers have stated such omissions to be ‘disquieting’,²⁸ and ‘odd’.²⁹ Strong arguments arose refusing the existence of a human right to water and even the very idea that water is considered a human right having been derived from other rights. This stance has been criticised by Tully,³⁰ McCaffrey³¹ and Bulto.³² Despite these criticisms, the human right to water seems to have only grown stronger under international human rights law, and national legislation (which is evident in interpretations of courts at national levels, and an inclusion in national constitutions).

²³ Discussed in a later section is the relationship of the human right to water with other rights and the derivative argument.

²⁴ Art 14 (h) CEDAW.

²⁵ The United Nations Convention on the Rights of the Child (CRC).

Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990.

²⁶ The United Nations Convention on the Rights of Persons with Disabilities (CRPD) and Optional Protocol 2008 adopted by the General Assembly by resolution A/RES/61/106 in 2006. The CRPD came into force in 2008.

²⁷ Bulto (2011) 12 *MJIL* 2.

²⁸ Bulto (2011) 12 *MILJ* 2.

²⁹ McCaffrey in Weiss *et al* (eds) (2005) 94.

³⁰ Tully (2005) 23 *Neth Q Hum Rts* 35-64.

³¹ McCaffrey (1992) 5 *Geo Int'l Env'tl L R* 1.

³² Bulto (2011) 12 *MILJ* 2.

If the very essence of human rights is to ensure human survival and living a life of human dignity, then the right to water cannot be excluded from the spectrum of human rights, as it is a necessity to life and furthermore, a realisation of other human rights.³³ The human right to water can be linked to several other socio-economic rights, such as the right to sanitation, and the right to health, as well as civil and political rights such as the right to life. This interrelatedness of water to other human rights has no doubt given it a place amongst other rights as a self-standing right.³⁴

If human rights could be classified in order of importance, perhaps the right to water would be given priority over other rights, as the sustenance and existence of all humans depend on water.³⁵ Whereas there have been classifications of human rights into generations, human rights are indivisible irrespective of the class to which they belong as the improvement of one right facilitates the advancement of the others.³⁶

If water is not recognised as a human right, discrimination will thrive, because water is unevenly distributed, and clean water is difficult to access and expensive for the poor. It is probably safe to say that the human right to water became a contemporary human rights issue because it is found to address core human rights concerns which are related to life and human dignity.

2.3 THE MEANING OF THE HUMAN RIGHT TO WATER UNDER INTERNATIONAL HUMAN RIGHTS LAW

Before examining the chronological development of a human right to water, I will in this section explain what is meant by a human right to water under international human rights law. There are two questions posed and answered in this section. These are; is there a human right to water under international law and what does the human right to water mean?

³³ Gleick (2003) 9 *Water Nepal* 118.

³⁴ Thielborger (2014) 95.

³⁵ Christians hold water to be one of the very first creations of God, which sustains human life Genesis 1: 27. Water existed before man Genesis 1:2 and Genesis 1:27. See also 2 Peter 3: 5 “...earth was formed out of water and by means of water.” Muslims believe also that Allah created every living thing from water. See Quran 21:30.

³⁶ United Nations Office of the High Commissioner at <http://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx> accessed 21 June 2014.

First and foremost it should be understood that the human right to water under international law has a specific meaning and specific requirements which make it distinct from an ordinary 'right to water,' particularly as may be understood under national laws of countries like Nigeria.³⁷ It is necessary that this is established earlier in this chapter as the entire thesis rests on the human right to water.

It has been argued and analysed that water is not just a basic need but a fundamental human right based on international declarations such as the UDHR, that protect the right to livelihood under Article 25.³⁸ Article 25 of the UDHR is an implicit recognition of the human right to water as the provisions of the UDHR does not mention water in any of its provisions.

According to the Statute of the International Court of Justice, four things can be applied to determining disputes submitted before it; these are international conventions, international customs accepted by law, general principles of law recognised by civilised nations and judicial decisions and teachings of highly qualified publicists of various nations.³⁹ These four, forms the sources of international law and provisions of these declarations or conventions, are therefore recognised as sources of international law.⁴⁰

Declarations such as the UDHR and Conventions such as the ICESCR and CEDAW (analysed in this chapter) are sources of international law which recognise water implicitly and explicitly and as such make it convenient to establish water as a human right under international law.⁴¹ Furthermore, this right is recognised under international documents, treaties and declarations.⁴²

The human right to water has no precise definition. Although the United Nations General Assembly through Resolution 64/292 only just recognised water as a human right in 2010, this right was originally deduced from the interpretation of the Committee on Economic Social and Cultural Rights in 2002 and describes the

³⁷ See Section 2 of the Water Resources Act of Nigeria which describes the right to water as the right to take water from rivers and streams for domestic use.

³⁸ Mehta (2005) in Kabeer (ed) 235

³⁹ Art 38 Statute of the international court of justice available at http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf accessed 3 April 2017.

⁴⁰ Art 38 Statute of the International Court of Justice

⁴¹ See Art 38 Statute of International Court of Justice.

⁴² General Comment 15 para 4.

human right to water under General Comment 15 as ‘sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.’⁴³

The human right to water as understood under international law is further discussed in subsequent sections of this chapter and under the various international documents, treaties and declaration as recognised implicitly as a derivative right and explicitly under specified documents.

2.4 THE HUMAN RIGHT TO WATER AND OTHER HUMAN RIGHTS

The human right to water relates to other rights found in the international bill of human rights.⁴⁴ As asserted by scholars, water is indispensable where food, health and a clean environment is concerned.⁴⁵ The human right to water is primarily an inherent part of the right to life⁴⁶ and human dignity.⁴⁷

In Trindade’s interpretation of the right to life, the right to life, broadly interpreted, means that one must not be deprived of his life and all that is needed to sustain and preserve it, and this he termed as the right of living.⁴⁸

Article 11(1) of the ICESCR includes the right to food as part of the right to an adequate standard of living.⁴⁹ The right to food as defined by the Committee on Economic Social and Cultural rights is that:

The right to adequate food is realised when every man, woman and child, alone and in community with others has physical and economic access at all times to adequate food or means for its procurement.⁵⁰

⁴³ General Comment 15 para 2.

⁴⁴ International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Social Economic and Cultural rights (ICESCR) 1966.

⁴⁵ Kok & Langford in Brand & Heyns (eds) (2005) 191.

⁴⁶ Art 6 ICCPR provides that “everyone has the inherent right to life which must be protected by law.”

⁴⁷ See Para 3 General Comment 15.

⁴⁸ Trindade (1991) 13 *Revista IIDH* 51-52 at

<http://www.juridicas.unam.mx/publica/librev/rev/iidh/cont/13/dtr/dtr3.pdf> accessed 23 June 2014.

⁴⁹ Art 25 UDHR.

⁵⁰ Para 6 General Comment 12.

Water and food cannot be separated. Foods are derived from agricultural and industrial production. Both products require adequate water, as crops cannot grow without water, either by means of irrigation or rainfall. Also some of these crops are processed for preservation purposes, this also requires adequate water. In other words, in realising the right to food, water plays a dominant role. Invariably, there is no way the right to food can be achieved without the right to water, as growing more crops requires more water.⁵¹

McCaffrey, in arguing that a human right to water exists through the right to food, states that since food gives life-sustaining nourishment, it should include the right to potable water, since potable water itself also helps to sustain life.⁵²

Water is also associated with the right to health. Article 25 of the UDHR and article 12 of the ICESCR states that everyone has the right to the highest attainable standard of health. The World Health Organisation (WHO) defines health as the absence of diseases, infirmity and a state of physical and social wellbeing.⁵³ General Comment 14 further states that the right to health encompasses socio-economic factors that promote healthy conditions, which can help people live a healthy life, and as such, extends the determinant of health to food and nutrition, housing, access to potable water and sanitation, and a healthy environment.⁵⁴

It has been posited that everyone has a right not to suffer from disease or birth defects as a result of drinking polluted water.⁵⁵ When polluted or unclean water is ingested and inadequate water is used for sanitation and personal hygiene purposes, health becomes an issue of concern, as polluted water has been known to be the source of many diseases, which has also caused the death of many.⁵⁶

⁵¹ Hofwegen & Svendsen (2001) VI at http://www.hubrural.org/IMG/pdf/waterfor_foodvision.pdf accessed 21 October 2014.

⁵² McCaffrey (1992) 5 *Geo. Int'l Env't L Rev* 23.

⁵³ Preamble to the Constitution of the World Health Organisation, New York 10-22 June 1946.

⁵⁴ Para 4 General Comment 14 (22nd session 2000 UN Doc. E/C.12/2000/4 also reprinted in *Compilation of General Comments and General Recommendations adopted by Human rights Treaty bodies UN Doc. HRI/GEN/1/Rev.6 at 85 (2003)*. See also Para 11 & 12 General Comment 14.

⁵⁵ Juss (1997) 5 *Ind J Global Leg Stud* 121 at 150.

⁵⁶ The WHO in 2002 estimated that approximately 1.5 million people died as a result of diarrhoea, attributed to unsafe water, sanitation and hygiene. See Factsheet no. 31 at <http://www.ohchr.org/documents/publications/factsheet31.pdf> accessed 17 October 2014.

Unquestionably, the right to health cannot be fully achieved without the right to water.⁵⁷ Clean water aids good health and a removal or lack of clean water can cause diseases, which impede good health.

The right to water has been interpreted both at the national and regional levels to be part of the right to a healthy environment.⁵⁸ The environment, when related to health, suggests an absence of pollution.⁵⁹ Furthermore, related to the right to water are the rights to education,⁶⁰ development⁶¹ and sanitation.⁶²

The realisation of these rights is to a large extent dependent on access to water.

2.5 THE DEVELOPMENT OF THE HUMAN RIGHT TO WATER

In this section, I analyse the development of the human right to water chronologically. I analyse this development under three headings, namely: international human rights instruments, United Nations conferences, and interpretations of and resolutions relevant to the human right to water.

Under international human rights instruments, I examine the UDHR (which was the first human right instrument and which omitted the right to water) and the ICESCR (from which the human right to water evolved). I examined the three subsequent human rights instruments CEDAW, CRC and CRPD that were selective in their recognition of the human right to water. I conclude that even though earlier international instruments made no provision for the human right to water, nothing

⁵⁷ Kirschner (2011) 15 *Max Planck UNYB* 456.

⁵⁸ Kok in Feyter & Isa (eds) (2005) 259 FN 5; See also *Social and Economic Rights Action Centre (SERAC) and Another V Nigeria (2001) AHRLR 60 (ACHPR 2001) (hereafter SERAC v Nigeria)*.

⁵⁹ NGLS Roundup (2002) <http://www.un-ngls.org/orf/pdf/ru90hrsd.pdf> accessed 16 October 2014 5.

⁶⁰ Art 26 of the UDHR, Arts 13 and 14 of the ICESCR and Art 17 of the African Charter are examples of international and regional document, which recognise the right to education. Education is compulsory at the elementary level. The right to water promotes the right to education, where adequate water is available at home, children who assist their mothers to fetch water would be able to go to school without being saddled with the task of searching for or trekking long distances for water. Although there are other rights, enhancing the right to education such as sanitation, access to water also plays an important role in the right to education. It is a known fact that many children drop out of school, for lack of food and water. See the case of *Xákmok Kásek Indigenous Community v Paraguay* Inter-American Court of Human Rights Judgment of August 24, 2010 Para 209 at http://www.corteidh.or.cr/docs/casos/articulos/seriec_214_ing.pdf accessed 30 September 2015.

⁶¹ Art 1 Declaration on the right to development (1986) A/RES/41/128.

⁶² Sanitation is a means of promoting health by maintaining proper hygiene and disposal of sewerage and other forms of dirt or waste. See Langford *et al* (2014) at <http://www.jus.uio.no/smr/english/people/aca/malcolml/Draft%20Sanitation%20Chapter.pdf> accessed April 15 2014.

prevents an interpretation of parts of the provisions to include the right to water. I also argued that, since subsequent international instruments were selective in their recognition of access to water, that a possible reason for this is to fortify the principle of non-discrimination under international human rights. The first explicit provision on the human right to water considered access to water for rural women.⁶³ This United Nations instrument is a selective document, as the provision of water is restricted to women. Like CEDAW, the CRC and CRPD also recognised the right to access water for children and persons with disabilities. These two instruments are also selective. Even though these instruments are selective, there is nothing deterring the interpretation of a human right to water in previous international human rights instruments, such as the right to life, provided for under the ICCPR,⁶⁴ or the right to a decent standard of living, and the right to health under the ICESCR.⁶⁵ Even though the human right to water has always been a subtle right under other international human rights instruments, the United Nations General Assembly has since declared access to water to be a human right.⁶⁶

I limit discussion here to three of these United Nations conferences, which I considered to be ground-breaking conferences on the right to water, as the right to water had been initially recognised and broadly discussed under them.⁶⁷ These three conferences were in fact recalled, and decisions realised at these conferences were incorporated into the eventual declaration of the human right to water in 2010.⁶⁸ I find that they contributed not only to expatiating the human right to water, but also had underlining elements of what constitutes a human rights-based approach to water. I also analyse General Comment 15 and discuss what the human right to water entails. Under this section, I show the obligations required of national governments to fulfil the human right to water. I also identify the elements that constitute a human rights-based approach to water.

⁶³ Art 14 CEDAW.

⁶⁴ Art 6 ICCPR.

⁶⁵ Art 11 & 12 ICESCR.

⁶⁶ United Nations General Assembly (2010) Resolution 64/292.

⁶⁷ Para 4 General Comment 15. See also footnote 5 General Comment 15.

⁶⁸ United Nations General Assembly (2010) Resolution 64/292; United Nations General Assembly (2010) A/HRC/15/L.14 at http://www.internationalwaterlaw.org/documents/intldocs/UNGA-HRC_Resolution-HR_to_Water_and_Sanitation.pdf accessed 4 July 2016.

Under the resolution, I analyse the actual recognition and declaration of the human right to water in 2010. I emphasise that even though not every nation signed this declaration, no nation disagreed with it. This, I argue, contributes to a persistent awareness of water as a right, and the efforts nations are exercising to make the right realisable in their different jurisdictions.

2.5.1 INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

In this section, I consider international human rights instruments starting with the UDHR of 1948. Documents recognising the human right to water, implicitly and explicitly as well as provisions of international law documents, which include the human right to water, are analysed. I consider the UDHR, the ICESCR, the CEDAW, CRC and CRPD in this section.

2.5.1.1 Universal Declaration of Human Rights (UDHR)

The Universal Declaration of Human Rights in 1948 was the first international document to recognise the human right to water, although implicitly.⁶⁹ The adoption of the UDHR occurred due to the devastating events of the Second World War and the desire to live in peaceful coexistence in order to prevent such devastating occurrences.⁷⁰ The 30 articles of the UDHR apply both internationally and nationally.⁷¹ The UDHR made no provision on access to water. An inference of the human right to water derives from the provision of the right to dignity and a better standard of life.⁷² Conceivably, the dignity of the human person cannot be fully achieved without access to clean water.⁷³ The UDHR states that:

Everyone has the right of living adequate for the health and well-being of himself and of his family, including food,

⁶⁹ Universal Declaration of Human Rights (hereafter UDHR) adopted 10 December 1948 United Nations General Assembly Res 217 A (III). See http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf accessed 13 May 2013.

⁷⁰ History of the UDHR document at <http://www.un.org/en/documents/udhr/history.shtml> accessed 12 June 2014.

⁷¹ Preamble to the UDHR.

⁷² See the preamble to the UDHR. There has been an identified link between water and human dignity. Ahmed has stated that a “right to dignity is pointless without water”. He argues that if a government fails to acknowledge that the right to dignity is connected to access to sufficient food and water, then it fails in other words to recognise the interconnectedness and indivisibility of all human rights. Available at <http://mg.co.za/article/2013-03-15-right-to-dignity-is-pointless-without-water> accessed 10 October 2014.

⁷³ Report of the United Nations Water Conference Mar del Plata, 14-25 March 1977 3; General Comment 15; Heleba (2009) 10 *ESR Review* 7; for socio-economic rights and human dignity see Bratiloveanu (2013) 4 *Intl Journal Juri Sci*.

clothing, housing and medical care, necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.⁷⁴

Sieghart considers this provision to be perfect for good living and argues that many nations are too poor in natural resources, skill and capital to harness the resources available for the benefit of all.⁷⁵ According to him, article 25 of the UDHR cannot cure any of the problems recognised.⁷⁶ Even though the provision of Article 25 of the UDHR cannot in itself ‘cure’ the problems it recognises, no provision of any law can ‘cure’ the problems recognised by such laws except if such law is made active. In other words, what is the purpose of law and provisions such as that of Article 25 of the UDHR? Tobi analysed the definitions given by jurists like Austin, Salmond and Bentham, before giving his own definition of the law as “a body of rules accepted by a people as binding on them in terms of sanction but which may not always or invariably have the element of force of sanction upon breach”.⁷⁷ Although I agree that law is a ‘body of rules’, I argue however that this ‘body of rules’ is incomplete without court interpretation and institutions set up for its implementation. As such, the provisions of law and a provision such as that of Article 25 of the UDHR, serve as a guide for an acceptable ‘standard of living’. The fact that nations are too poor or without skills does not mean they should live a life without dignity or they should not have laws. The provision of law should motivate government and the people into setting out frameworks under which the law can become active.

A cursory look at Article 25 of the UDHR will probably lead to the conclusion that water is not important. However, a thorough examination of Article 25 will suggest that water is inclusive of the other provisions, such as food and housing. This is because without water, food cannot exist. Water is requisite for food to grow, it is used in food processing, it is used to cook, and to consume while eating for ease of digestion. Alvarez argues that the word “including” used in Article 25 of the UDHR

⁷⁴ Art 25 UDHR.

⁷⁵ Sieghart (1985) 118.

⁷⁶ Sieghart (1985) 118.

⁷⁷ See Tobi (1996) 10-15 at 14-15.

implies that there can be other components of the right to an adequate standard of living.⁷⁸ The right to water is seen as a component of the right to health, the right to food, or as an autonomous right. It is a fundamental component of the right to an adequate standard of living.⁷⁹

It is not particularly disheartening that the UDHR did not provide for water as a human right, because the purpose for which the UDHR came into existence in the first place was to set straight the immediate issue of war, and to seek to put guidelines in place that would enhance a peaceful co-existence amongst people.⁸⁰

2.5.1.2 International Covenant on Economic Social and Cultural Rights (ICESCR)

The ICESCR was one of the earliest covenants of the United Nations.⁸¹ The ICESCR and the ICCPR were the first two covenants after the 1948 UDHR. While the ICCPR made provisions for civil and political rights, the ICESCR made provision for economic, social and cultural rights. Although the ICCPR addresses civil and political rights, Article 6 (the right to life) of this covenant was surmised to include the right to water;⁸² I however limit my analysis to the ICESCR, which implicitly concretised the human right to water.

In this section, I discuss only the ICESCR because articles 11 and 12 of this covenant were what gave rise to the eventual explicit recognition of the human right to water. Like the UDHR, the ICESCR also omitted the human right to water; however Articles 11 and 12 of the covenant were interpreted to include the human right to water. This interpretation by the Committee on Economic Social and Cultural rights in the General Comment 15 made the human right to water a

⁷⁸ Alvarez in Picolotti & Taillant (eds) (2003) 73.

⁷⁹ Alvarez in Picolotti & Taillant (eds) (2003) 73; see also McCaffrey (1992) 5 *Geo. Int'l Envt. L. Rev.* 8.

⁸⁰ The UDHR statement was adopted after the war to prevent such tragic and senseless losses in the future. Although water, it has been argued, would very well soon be a reason for people to go to war again (Kofi Anan 2001, 2002 in Dabelko & Aaron (2004) *ECSP Report Issue 10* 60-66), there are adequate laws at present to address such issues. The United Nations has further devised documents realising the human right to water and has stated the methods to be taken towards the realisation of this right.

⁸¹ Adopted and opened for signature, ratification and accession by general Assembly resolution 2200A (XXI) of 16 December 1966.

⁸² See Trindade's interpretation of the right to life. The right to life here also brings to mind the prayer of Ezeulu in Achebe's 'Arrow of God', wherein the chief priest stated that life is not enough, but that having the things with which to live it well, because living without certain resources to live well, is living a slow and weary life, which is worse than death (1964) 95.

derivative right, and not a stand-alone right, like the right to health,⁸³ and the right to life.⁸⁴ Like the provision of Article 25 of the UDHR, Article 11 of the ICESCR states that:

The states parties to the present covenant recognize [sic] the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The state parties will take appropriate steps to the realization [sic] of this right, recognizing [sic] to this effect the essential importance of international co-operation based on free consent.⁸⁵

Sieghart again comments on Article 11 of the ICESCR, where he makes a distinction between the provision of the UDHR in Article 25 and the ICESCR.⁸⁶ His argument is that the government should do something where they can, and to the maximum of its available resources, and that however it goes about it, it must be for the benefit of all.⁸⁷ Perhaps Sieghart's argument lies in the inconclusiveness of the provision of article 25 of the UDHR, since it only provided that “everyone has a right to a standard of living” without adding that “states should take appropriate steps to realise the right” with international cooperation. Of course, enacting a law such as that of Article 25 of the UDHR, without the provision as to how same (that is, the standard of living) would be realised, raises more questions as to how such a right would be realised, and who would be responsible for the basic provisions. It should, however, be noted that provisions of law are inconclusive without interpretation; and that adequate measures or procedures set out to realise the effectiveness of such laws.⁸⁸ The interpretation of Articles 11 and 12 by General Comment 15 ‘gave life’, as it were, to the human right to water.

⁸³ Art 12 ICESCR.

⁸⁴ Art 6 ICCPR.

⁸⁵ Art 11 (1) ICESCR.

⁸⁶ Sieghart (1985) 119-120.

⁸⁷ Sieghart (1985) 120.

⁸⁸ See generally Tobi's analysis on the concept of law. Tobi (1999) 10-15.

2.5.1.3 Convention on the Elimination of all forms of Discrimination against Women (CEDAW)

There are not many international documents that give express provision to access to water.⁸⁹ However, some instruments have been interpreted to give meaning and recognition to access to water implicitly. Amongst the United Nations instruments, CEDAW is the most widely accepted.⁹⁰

CEDAW is the first United Nations instrument to recognise explicitly the right of access to water, which it accorded to rural women, as a result of the hardship they went through in the search of water for their families. The aim of the CEDAW is to grant to women human rights on an equal basis with men.⁹¹ CEDAW specifically mentions water and refers to it as an element of an adequate standard of living.⁹² It provides that:

state parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure on a basis of equality of men and women, that they participate in and benefit from rural development and in particular shall ensure women the right to enjoy adequate living conditions particularly in relation to housing, sanitation electricity and water supply, transport and communications.⁹³

As stated in the provision above, the aim of CEDAW is to grant to women human rights on an equal basis with men.⁹⁴ CEDAW specifically mentions water and refers to it as an element of an adequate standard of living.⁹⁵

⁸⁹ Kok in Masahava (ed) (2005) *ESR Series* 7 1.

⁹⁰ Nigeria and South Africa are both signatories to this covenant. See the United Nations Treaty Collections at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en accessed 29 May 2014.

⁹¹ Winkler (2012) 55 & 60.

⁹² It seems the phrase “adequate standard of living” as earlier used in Art 25 of the UDHR 1948 and Article 11 of the ICESCR 1966 (both of which did not explicitly mention water), is being interpreted as including access to water under Article 14 of CEDAW.

⁹³ Art 14 (2) CEDAW.

⁹⁴ Winkler (2012) 55 & 60.

⁹⁵ It seems the phrase “adequate standard of living” as earlier used in Art 25 of the UDHR 1948 and Article 11 of the ICESCR 1966 (both of which did not explicitly mention water), is being interpreted as including access to water under Article 14 of CEDAW.

2.5.1.4 Convention on the Rights of a Child (CRC)

The purpose of the CRC may be traced to the UDHR, in which the inherent dignity and equal rights of all members of the human family is recognised.⁹⁶ Furthermore, considering that children, by virtue of their physical and mental immaturity, cannot by themselves make certain basic provisions for themselves, the CRC finds that there is the need to provide and ensure adequate drinking water, amongst other provisions. The CRC provides for access to water as a part of the right to health.⁹⁷ This is related to principle two of the Declaration of the Rights of the Child, which states that a child is to be given facilities by law and other means to enable him develop in a healthy manner and in conditions of human dignity.⁹⁸ The CRC provides that:

State parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. State parties shall strive to ensure that no child is deprived of his or her right of access to such health care services and in particular shall take appropriate measures to combat disease and malnutrition, including within the framework of primary health care through inter alia the application of readily available technology and through the provision of adequate nutritious foods and clean water, taking into consideration the dangers and risk of environmental pollution...⁹⁹

Adequate water of good quality is a prerequisite to living healthily, as polluted water, for example, leads to diseases that can eventually lead to permanent disabilities in some cases. In addition, Article 27 of the CRC refers to the standard of living. Standard of living under Article 11 of the ICESCR includes access to water.¹⁰⁰

⁹⁶ See the preamble to the UDHR; CRC.

⁹⁷ Art 24 CRC.

⁹⁸ See the Declaration on the Rights of a Child proclaimed by General Assembly Resolution 1386(XIV) of 20 November 1959 found at <http://www.unicef.org/malaysia/1959-Declaration-of-the-Rights-of-the-Child.pdf> accessed 25 October 2014. This was the basis of the Convention of the Rights of the Child adopted by the United Nations General Assembly 30 years later on 20 November 1989.

⁹⁹ Art 24 (1) (2) (c).

¹⁰⁰ See General Comment 15.

Water pollution is detrimental to the health and the lives of children. The World Health Organisation (WHO) has stated infectious diseases from water to be the greatest killer of children under five years of age, reporting that four billion cases of diarrhoea are caused annually by water diseases, with 2.2 million deaths recorded yearly from this disease, a large number of which are children.¹⁰¹

As is the case with CEDAW, when the provisions of Article 24 of CRC is considered, access to water is only taken as a means to achieving good health.¹⁰² However, articles or provisions protecting or enhancing the right to the health of a child ought to be read as protecting the right of access to water also.¹⁰³

Furthermore, CRC also recognises the right to life of a child,¹⁰⁴ and the duty of state parties in this case is to ensure to the maximum extent possible, the survival and development of the child.¹⁰⁵ These rights can, invariably, not be fulfilled without access to clean water.¹⁰⁶

2.5.1.5 Convention on the Rights of Persons with Disabilities and Optional Protocol (CRDP)

The United Nations was convinced that a comprehensive Convention such as the CRPD was necessary to promote the rights and dignity of persons with disability.¹⁰⁷ The CRPD also expressly recognises the right of access to clean water for persons with disabilities. It provides in Article 28 that:

States parties recognise the rights of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability and shall take appropriate steps to safeguard and promote the realisation of this right, including measures: to ensure equal access by persons with disabilities to clean water services and to ensure

¹⁰¹ Pacific Institutes at <http://www.pacinst.org/wp-content/uploads/sites/21/2013/02/water_quality_facts_and_stats3.pdf> accessed 10 June 2014; Pruss et al (2002) 110 *Envir H Pers* 537-542 also at http://www.who.int/quantifying_ehimpacts/global/en/ArticleEHP052002.pdf accessed 10 June 2014.

¹⁰² Winkler (2012) 56 62.

¹⁰³ Kok in Mashava (ed) (2005) *ESR Series* 7 1.

¹⁰⁴ Art 6 (1) CRC.

¹⁰⁵ Art 6 (2) CRC.

¹⁰⁶ Winkler (2012) 56; Kok in Masahava (ed) (2005) *ESR Series* 7 2.

¹⁰⁷ Para (y) of the Preamble to the CRPD.

access to appropriate and affordable services, devices and other assistance for disability-related needs.¹⁰⁸

Accessibility is an important characteristic of the human right to water, which was recognised under Article 28 of the CRPD. Accessibility under this provision refers to the measures and devices put in place to ensure access to a continuous supply of water for persons with disabilities. The express provision is that “states should take appropriate step to ensure” access to clean water services for persons with disabilities.¹⁰⁹

2.5.2 UNITED NATIONS CONFERENCES

By the early 1970s, the issue of access to water became a social, environmental, economic and political concern.¹¹⁰ These concerns were first reflected in the mid-1970s, when conferences on water were held.¹¹¹ This section of the thesis considers only three of the water conferences of the United Nations, particularly the water conferences that suggest a human right to water and were referred to by General Comment 15 in its interpretation of the human right to water¹¹² and the United Nations General Assembly’s consideration of these conferences in its recognition of the human right to water.¹¹³

The United Nations held several conferences, some of which were either on water or were related to water. An example is the conference on Human Settlement that raised the issues of access to clean water and sanitation.¹¹⁴ The Vancouver Declaration was adopted at this conference. The Vancouver Declaration urges the creation of policies to improve the quality of life of human beings and these

¹⁰⁸ Art 28 (2) (a) CRPD.

¹⁰⁹ Art 4 CRPD.

¹¹⁰ Biswas in Biswas *et al* (eds) (2008) 3.

¹¹¹ Biswas identified conferences that preceded the water conferences such as the conference on the Human Environment in Stockholm held in 1972, the conference on Population in Bucharest in 1974 and conference on Food in Rome held in 1974. He submits that water is the major link that influences directly all other subjects of these world conferences. Subjects such as environment, population, food, human settlement, and more recently renewable energy, cannot all be fully discussed without discussing access to water. Biswas (1988) 4 *IJWRD* 149.

¹¹² Para 4 FN 5 General Comment 15.

¹¹³ United Nations General Assembly (2010) Resolution 64/292 1.

¹¹⁴ The Conference (otherwise known as the Vancouver Conference) held in Vancouver in June 1976. See the preamble to the Vancouver declaration, especially the paragraphs on “inequitable economic growth” and “social, economic, ecological and environmental deterioration” at <http://habitat.igc.org/vancouver/van-decl.htm> accessed 31 October 2014.

policies should begin with the facilitation of basic needs, such as water.¹¹⁵ There are other conferences on water or related to water, but these three conferences, the Mar del Plata conference of 1977, and the two 1992 conferences, are the most detailed on domestic water, which are also closely related to the recommendations of the human right to water and the human rights based approach to water.

The Mar del Plata Conference of 1977 was one of the earliest water conferences of the United Nations. However, this conference was preceded by the Valencia Conference of 1975, and Caracas Conference of 1976.¹¹⁶ The Valencia Conference identified the important characteristics and areas in which the world was divided on water laws systems, and the Caracas Conference was declared by the Secretary-General of the United Nations to be a United Nations Water Conference expert's preparatory meeting.¹¹⁷ These two conferences ushered in the Mar del Plata conference of 1977.

Other significant conferences relating to water include the 1992 Dublin Conference, and the Earth Summit. Although these were not water conferences, they discussed salient issues relating to water. These issues have added up to the present discourse of water, which is also discussed in this section.

2.5.2.1 Mar del Plata Conference

The Mar del Plata Conference was probably the beginning of the recognition of the human right to water, as the preamble to the declaration states that:

All peoples, whatever their stage of development and their social economic conditions, have the right to have access to drinking water in quantities and a quality equal to their basic needs.¹¹⁸

Apart from the content of this declaration, suggesting a human right to water, there is further suggestion of the principle of non-discrimination under a human

¹¹⁵ Para 1 Vancouver Declaration <http://habitat.igc.org/vancouver/van-decl.htm> accessed 31 October 2014.

¹¹⁶ There are not sufficient details to adequately discuss or analyse the Valencia and Caracas Conferences.

¹¹⁷ For an overview, see Cano (1981) 51 *Journal of Hydrology* 382-384.

¹¹⁸ United Nations Water Conference 1977 (resolutions) 1 at <http://www.ielrc.org/content/e7701.pdf> accessed 22 October 2014.

rights-based approach to water. The Mar del Plata Conference espoused the importance of water and the need to recognise and include it as a human right at both international and national levels.¹¹⁹ It also states the need to gradually accept and adequately promote access to water in the various states across the world.¹²⁰

One of the goals of the Mar del Plata Conference was to ensure that an adequate supply of quality water was available to meet socio-economic needs, increase efficient water use and promote preparedness to guide against water crises both nationally and internationally.¹²¹

At this conference, a series of recommendations that covered water management holistically evolved as the Action Plan.¹²² The most relevant to this thesis is the policy aspect that emphasised providing potable water and accelerating political will and investment in the water sector. Furthermore, the Mar del Plata Conference declared 1980-1990 as the International Water Supply and Sanitation Decade.¹²³ This declaration recommended that the period between 1980 and 1990 be devoted to implementing national plans for drinking water supply and sanitation in accordance with the Action Plan.¹²⁴ Cano identified and discussed the recommendations of the Mar del Plata Conference, based on water policy and law.¹²⁵ One of such recommendations was that the adoption of water policies must have the public interest in mind, and must protect the reasonable interests of individuals.¹²⁶ Another recommendation of the Conference is the prioritisation of the populace in greatest need of water for their basic use.¹²⁷ The Mar Del Plata Conference identified the problems associated with water legislation and suggested recommendations to address these issues. One of these

¹¹⁹ Report of the United Nations Water Conference Mar del Plata 14-25 March 1977 at <http://www.ircwash.org/sites/default/files/71UN77-161.6.pdf> accessed 30 September 2015.

¹²⁰ Biswas (1988) 4 *IJWRD* 151.

¹²¹ Bandaragoda & Babel (2010) 8 *IJRBM* 217; See generally the Report of the UN Water Conference Mar del Plata.

¹²² Biswas (1988) 4 *IJWRD* 149; Falkenmark (1977) 6 *Ambio* 222-227.

¹²³ The resolution reaffirmed the goals and objective of providing safe water and sanitation for all. General Assembly A/RES/40/171 17 December 1985 available at <http://www.un.org/documents/ga/res/40/a40r171.htm> accessed 17 June 2014.

¹²⁴ Falkenmark (1977) 6 *Ambio* 222.

¹²⁵ Cano (1981) 51 *Journal of Hydrology* 381-392.

¹²⁶ Cano (1981) 51 *Journal of Hydrology* 384; Report of the UN Water Conference Mar del Plata 110 Para 95.

¹²⁷ Biswas (1981) *Foreign Affairs* 154.

recommendations was that “comprehensive national legislation for a coordinated approach to water planning” be enacted, and ought to be combined in a unitary legal instrument (with the constitution so permitting) containing all provisions on water resources management.¹²⁸ Although the conference did not mention a “human rights-based approach”, this recommendation however fits into the framework of a human rights-based approach to water as discussed in Chapter Three of the current study.¹²⁹

The Mar del Plata Conference prioritised community water supplies and water for agricultural purposes. Biswas stressed that the Mar del Plata Action Plan provided an excellent road map for water resources in general, but that nations have not been successful in following it to a significant extent.¹³⁰ It seems that nations merely analysed the road map, making provisions for what they felt was a priority. A country like Nigeria (as shown in a later part of this thesis) has tried to promote ‘water resources’ in general, with little or no significant mention of water for domestic use. The Mar Del Plata Conference of 1977 states:

Realizing [sic] that the accelerated development and orderly administration of water resources constitute a key factor in efforts to improve the economic and social conditions of mankind, especially in the developing countries, and that it will not be possible to ensure a better quality of life promote human dignity and happiness unless specific and concerted action is taken to find solutions and apply them at the national, regional and international levels...¹³¹

“Water resources” do not refer only to inter-boundary waters or water for agricultural use, but include all the uses of water.¹³² Promoting one use of water, such as for agriculture and irrigation, does not do justice to the suggestion in the Mar del Plata Action Plan, as community water supplies ought also to be

¹²⁸ Report of the UN Water Conference Mar del Plata 33 Para 50.

¹²⁹ Chapter Three of this thesis discusses in detail the conceptual and theoretical framework of a human rights based-approach to water.

¹³⁰ Biswas (1997) in Proceedings Mar del Plata 20 year anniversary seminar Stockholm http://www.siwi.org/documents/Resources/Reports/Report1_Mar_del_Plata_1997.pdf accessed 13 June 2014.

¹³¹ Report of the United Nations Water Conference Mar del Plata Action Plan 25 March 1977 3.

¹³² The term ‘water resources’ is addressed in Chapter Four of this study.

prioritised. Much of the discussion at this conference also leant towards the realisation of access to domestic water.

2.5.2.2 The 1992 Conferences

Two conferences in 1992 explicitly recognised the importance of water, and gave recommendations and guidelines towards ensuring a sustainable supply of water resources especially water for domestic use. These conferences are the International Conference on Water and the Environment,¹³³ and the United Nations Conference on Environment and Development.¹³⁴ These 1992 conferences came up with ‘principles’ and ‘action plans’ directed towards developing a better approach to water management. These two 1992 conferences adopted declarations, principles and guidelines towards achieving a human right to water. I discuss separately these two conferences and their outcomes, as well as their implications for the human right to water.

2.4.2.2.1 *International Conference on Water and the Environment (ICWE)*

The International Conference on Water and the Environment was held in Dublin, Ireland to identify a new approach to access develop and manage water resources.¹³⁵ This new approach was to involve political commitment involving the highest level of government, through to the smallest communities. Such commitment requires the support of a significant investment, public awareness, legislative and institutional changes, technological development and capacity building. This entire ‘commitment’ sums up the entirety of a human rights-based approach to water. These commitments also form part of the obligations as required under Article 2 of the ICESCR.¹³⁶

In addition to the statement by the ICWE regarding the placement of a reasonable level of commitment, there has been the institution of four guiding principles for

¹³³ International Conference on water and the environment (hereafter ICWE) Dublin, Ireland 26-31 January 1992.

¹³⁴ United Nations Conference on Environment and Development (hereafter UNCED), Earth Summit Rio de Janeiro, 3-14 June 1992.

¹³⁵ International Conference on Water and Environment (hereafter ICWE) 26-31 January 1992 at http://docs.watsan.net/Scanned_PDF_Files/Class_Code_7_Conference/71-ICWE92-9739.pdf accessed 19 June 2014.

¹³⁶ Art 2 ICESCR urges states parties to take appropriate steps towards a realisation of the rights it sets out inclusive an adoption of legislative measures.

the application of water resources at all levels of government.¹³⁷ Firstly, these principles emphasise that water is a finite and vulnerable resource that is essential to the sustenance of life, development and the environment.¹³⁸ As stated earlier in Chapter One of this thesis, water itself is a constituent of life, as it sustains life of both fauna and flora. Secondly, the principles hold water development and management to be participatory, involving everyone from the users to the planners and policy makers at all levels.¹³⁹ This, as would be shown subsequently, is one of the principles of a human rights-based approach to water, namely that everyone ought to participate in addressing the issue of access to water. This can only be possible where there are adequate laws and identifiable duty bearers. Third is the principle that women play an indispensable role in the provision, management and safeguarding of water.¹⁴⁰ Naturally, in Africa, women are the custodians of water, because the responsibility of acquiring water for the use of the family is placed upon them.¹⁴¹

The fourth principle holds that water has an economic value in all its various uses.¹⁴² This is also an attribute of the human right to water, which people generally have failed to accept. The fact that water is a human right does not mean it ought to be free. All water uses, even water for domestic use, has an economic value.¹⁴³ The human right to water suggests that water should be affordable, and free to the poor. Here there exists a clear distinction between ‘free’ and ‘affordable.’ The understanding of a human right to water is that those who are so poor such that they cannot afford to pay for their water should have access to a basic free amount.¹⁴⁴

¹³⁷ The Dublin Statement on water and sustainable development (hereafter Dublin statement) at <http://www.wmo.int/pages/prog/hwrrp/documents/english/icwedece.html#agenda> accessed 19 June 2014.

¹³⁸ Principle No.1 Dublin Statement.

¹³⁹ Principle No. 2 Dublin Statement.

¹⁴⁰ Principle No. 3 Dublin Statement.

¹⁴¹ Barau available at <http://www.ciesin.columbia.edu/repository/pern/papers/jenda.pdf> accessed 24 October 2014.

¹⁴² Principle No. 4 Dublin Statement.

¹⁴³ Dublin Statement (p 3).

¹⁴⁴ One of the important aspects of the right to water is that it contains an entitlement to a minimum amount of water for drinking towards sustaining life and health Factsheet 35 7.

Guided by the four principles discussed above, the ICWE developed recommendations known as the Action Agenda.¹⁴⁵ This Action Agenda was set up to assist countries to confront the challenges of access to water in their various jurisdictions. As a way of recommendation, the ICWE suggested the prioritisation of water resources development and management in such a way that food, water and sanitation can benefit the populace, especially those who lack basic human needs.¹⁴⁶

Also, ensuing from the ICWE Action Agenda is the issue of rural water supply.¹⁴⁷ The ICWE asserts that the adoption of appropriate policies and programmes at all levels would enhance access to a potable water supply and sanitation services.¹⁴⁸

2.4.2.2.2 *The United Nations Conference on Environment and Development*

The United Nations Conference on Environment and Development held in Rio de Janeiro¹⁴⁹ is notable for expanding the relationship between water and the environment.¹⁵⁰ The human right to water (although not officially pronounced as at this time), can also be traced to the outcome of the UNCED Conference as it affirmed the awareness and concern over the scarcity of water and notes that water pollution - amongst other environment issues - was the more pronounced.¹⁵¹ The UNCED resulted in two major documents - Agenda 21 and the Rio Declaration on Environment and Development, which I examine for their suggestion of the human right to water.

Agenda 21 is an extensive document, containing 40 chapters, all channelled towards ensuring a sustainable environmental development by meeting the need of the present, without compromising the ability of future generations to meet their own needs.¹⁵² The Agenda 21 document has four sections. These sections address

¹⁴⁵ Dublin Statement (p 3).

¹⁴⁶ Dublin Statement (p 2).

¹⁴⁷ Dublin Statement (p. 3).

¹⁴⁸ Principle No. 3 Dublin Statement (p. 3).

¹⁴⁹ United Nations Conference on Environment and Development was held between 3-14 June 1992 (Earth Summit) at <http://www.un.org/geninfo/bp/enviro.html> accessed 18 June 2014.

¹⁵⁰ Kubiszewski & Cleveland (2012) United Nations Conference on Environment and Development (UNCED), Rio de Janeiro, Brazil at <http://www.eoearth.org/view/article/156773/> accessed 1 October 2015.

¹⁵¹ Rio Declaration on Environment and Development at <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163> accessed 3 October 2014.

¹⁵² Para 33.3 Agenda 21.

social and economic dimensions,¹⁵³ conservation and management of resources for development¹⁵⁴ strengthening the major groups,¹⁵⁵ and the means of implementation.¹⁵⁶ Section one pertains to poverty, and the promotion and protection of human health.¹⁵⁷ Access to water is one of the determinants of good health, where without access to clean water, water-borne diseases would thrive.¹⁵⁸

Section Two of Agenda 21 addresses the protection of the environment. Under this section, drinking water is a basic requirement for health and human dignity, to which a large number of people do not have access.¹⁵⁹

Section Three of Agenda 21 identifies persons and group of persons that can make a difference in this area of development. Under Section 23, sustainable development is noted to be the responsibility of every government. Chapter 24 considers the needs of women and urges a full participation in social, cultural and public life. Chapter 30 encourages business and industrial contribution to ensuring and protecting human health and environmental quality.

The final section of Agenda 21 addresses the starting point towards a realisation of all the UNCED has set out.¹⁶⁰ Chapter 36 under this section suggests that people ought to be educated, and public awareness ought to be created, as this will ensure the right skills and attitude needed for a sustainable development. One of the principles of a human rights-based approach to water, as discussed in this thesis, is the principle of participation, which demands that the people participate fully in issues of access to water through access to information, and participation in decision-making processes.¹⁶¹ This no doubt includes water education and the raising of general public awareness.

Agenda 21 had a lot to do with drinking water. In addressing poverty, the Agenda states that there should be improved access for the poor to safe water.¹⁶² When it

¹⁵³ Sec I Agenda 21.

¹⁵⁴ Sec II Agenda 21.

¹⁵⁵ Sec III Agenda 21.

¹⁵⁶ Sec IV Agenda 21.

¹⁵⁷ See Chap 3 & 6 of Agenda 21.

¹⁵⁸ Para 6.1-6.3 Agenda 21.

¹⁵⁹ Chapter 18 Para 18 & 47 Agenda 21.

¹⁶⁰ Section IV Agenda 21.

¹⁶¹ Chapter Three of this thesis highlights the principles of a human rights-based approach to water.

¹⁶² Para 3.1-3.12 Agenda 21.

came to sustainable human settlements, access to basic services of clean water was also addressed.¹⁶³

The Agenda also considered the increasing world population, and stated that water ought to be provided to all urban residents, in the quantity of at least 40 litres per person per day, and that rural people everywhere ought to have access to safe water and sanitation in order to lead healthy lives.¹⁶⁴ The Agenda sought to promote education training and public awareness in the area of safe drinking water for school children.¹⁶⁵

All the considerations in Agenda 21 relate to a human rights-based approach to ensuring access to water, even though at this time, water was not recognised as a human right. While it is possible to adopt a human rights-based approach to water without recognising water as a human right, it is impossible to recognise water as a human right, without being guided by the principle of a human rights-based approach.¹⁶⁶

2.5.3 UNITED NATIONS DECLARATIONS AND RESOLUTIONS RELEVANT TO THE HUMAN RIGHT TO WATER

The United Nations has made declarations and resolutions, which showed the importance of access to water to life. In this section, I discuss, in chronological order, some of these declarations, particularly those that contributed to the eventual pronouncement of a human right to water. First, I discuss the Geneva Convention, which affirms the importance of access to water for prisoners. I then examine General Comment 15, in which Articles 11 and 12 of the ICESCR were interpreted to include the human right to water. I conclude this section with an examination of the 2010 United Nations General Assembly's recognition of the human right to water.

2.5.3.1 Geneva Declaration

Even before the express affirmation of the human right to water under international human rights law, the United Nations, through declarations and

¹⁶³ Para 7.1-7.80 Agenda 21.

¹⁶⁴ Para 18.1-18.90 Agenda 21.

¹⁶⁵ Para 36.1-36.27 Agenda 21.

¹⁶⁶ See this argument in Chapter Three of this study.

resolutions, expressed the need for adequate laws and measure to ensure access to water. One such express declaration is found in the Geneva Convention of 1950.¹⁶⁷

Subsequently, after the World War II, and the coming into force of the UDHR, the Geneva Convention addressed the treatment of prisoners of war and states that sufficient drinking water shall be supplied to prisoners of war.¹⁶⁸ The Convention also understood that adequate water is needed for hygiene purposes, and provides that prisoners of war ought to be provided with sufficient water and soap for their personal laundry.¹⁶⁹ The Geneva Convention, under articles 85 and 89, states that sufficient water ought to be made available to internees for their domestic use. What is understood here is that nobody (even prisoners in this case), should be deprived of basic water. This provision can be linked to the principle of non-discrimination. Irrespective of the status of a person, there should be no deprivation of access to water for domestic use. As such, basic water deprivation should not be used as a tool for war, or punishment, against any human being.

Even in a time of war, certain actions are prohibited under international law. One such prohibition is the destruction or removal of drinking water installations and supplies, or any action which may leave the civilian population with inadequate water.¹⁷⁰ Perhaps the import of this is that wherever drinking water is an essential life-sustaining element, it should not be denied to anyone.¹⁷¹

2.5.3.2 General Comment 15

The United Nations Committee on Economic and Social Rights from time to time interprets the provisions of the ICESCR through General Comments. One of these interpretations is that of Articles 11 and 12, interpreted under General Comment

¹⁶⁷ See articles 20, 26, 29 and 46 of the Geneva Convention relative to the Treatment of Prisoners of war, adopted by the Diplomatic Conference for the establishment of international conventions for the protection of victims of war held at Geneva on August 12 1949, and entered into force October 21 1950. Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/TreatmentOfPrisonersOfWar.aspx> accessed 17 March 2017. (Hereafter Geneva Convention)

¹⁶⁸ Art 26 Geneva Convention 1950.

¹⁶⁹ Art 29 Geneva Convention 1950.

¹⁷⁰ Art 54 Protocol 1. Article 14 of protocol II also emphasises this. See also standard minimum rules for the treatment of prisoners adopted by the first National Congress on the Prevention of Crime and Treatment of Offenders, Geneva 1955, approved by the Economic and Social Council Resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 provides under section 15 and 20 that water for cleanliness and hygienic use shall be provided and made available to every prisoner whenever needed.

¹⁷¹ Ke Jian in Martin *et al* (eds) (2012) 220.

15 as the right to water. General Comment 15 in 60 paragraphs described the human right to water, analysed the normative content of the human right to water, and highlighted states parties' obligations and the implementation of the human right to water at national levels.¹⁷² In this section, I evaluate General Comment 15 under three headings: the normative content of the human right to water; obligations arising from the human right to water; and the implementation of the human right to water.

2.5.3.2.1 Normative content of the human right to water

By the interpretation of the ICESCR, General Comment 15 states that:

The human right to water entitles everyone to sufficient, safe, acceptable physically accessible and affordable water for personal domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, reduce the risk of water related diseases and provide for consumption, cooking, personal and domestic hygienic requirements.¹⁷³

General Comment 15 identifies entitlement and freedom as key aspects of the right to water.¹⁷⁴ The right to water contains freedoms, which mean maintaining existing water supply without interference, disconnection or contamination.¹⁷⁵

The human right to water includes the freedom to be free from interference and disconnection¹⁷⁶ or contamination of water supplies¹⁷⁷ and entitlements. General Comment 15 identified the overall application of the human right to water, irrespective of the status, age or condition varied amongst persons generally. These factors referred to the availability of the water, the quality of the water

¹⁷² General Comments No 15 at <http://www.righttowater.info/progress-so-far/general-comments-2/> accessed 10 June 2014.

¹⁷³ Para 2 General Comment 15.

¹⁷⁴ Para 10 General Comment 15.

¹⁷⁵ Para 10 General Comment 15.

¹⁷⁶ The *Mazibuko (cc)* case comes to mind here, where the applicants' domestic water supply was disconnected as a result of non-payment. Although the applicants won the case at the initial stage, the Constitutional Court overturned the decisions of the lower court, and the applicants (respondents) lost the case on their right to water.

¹⁷⁷ *Sudan Human Rights Organisation and another v Sudan* (2009) AHRLR 153 the poisoning of water wells by the Janjaweed constituted a violation of the human right to water. In addition, the African Commission held in the case of SERAC interpreting the right to water under the right to health. See also Viljoen (2012) 216 328.

and the accessibility of the water at all times.¹⁷⁸ In explaining the accessibility of water, General Comment 15 states that water must be accessible physically, economically, and without discrimination. It also includes that there must be access to information. From the above definition of the human right to water, I identify and discuss five characteristics of a human right to water below.

i. Sufficiency

This characteristic refers to the quantity of water to which a person is entitled. An adequate amount of safe water is necessary to prevent death from dehydration, and to reduce the risk of water-related disease.¹⁷⁹ Water supply for each person is also expected to be continuous,¹⁸⁰ such that it covers personal and domestic use for drinking, cooking, laundry and for personal and house hygiene.¹⁸¹

The term ‘sufficient’ under the definition of the human right to water is controversial, as the quantity of water would vary from one person to another, depending on their health status and work. Breastfeeding mothers have been stated to need more than 50-100 litres of water per day.¹⁸² Although the WHO posits that an acceptable basic minimum of 20-25 litres is acceptable, Howard and Bartram are of the opinion that this quantity is insufficient to meet basic hygiene and consumption requirements.¹⁸³ They argued that particular groups of people in a society needed more than the minimum requirement stated by WHO in order to sustain good health or even life.¹⁸⁴

In understanding what ‘sufficient’ implies, the WHO has stated that between 50 and 100 litres of water per person per day is needed to ensure basic needs and give less alarm over health concerns.¹⁸⁵ International guidelines have, however, defined

¹⁷⁸Para 4-6 General Comment 15.

¹⁷⁹ Para 2 General Comment 15.

¹⁸⁰ Para 12 General Comment 15.

¹⁸¹ Factsheet 35 8.

¹⁸² Factsheet 35 8.

¹⁸³ Howard & Bartram (2003) WHO/SDE/WSH/03.02 22.

¹⁸⁴ Howard & Bartram (2003) WHO/SDE/WSH/03.02 5-7.

¹⁸⁵ UN *Media Brief* at

http://www.un.org/waterforlifedecade/pdf/human_right_to_water_and_sanitation_media_brief.pdf accessed 12 July 2014.

sufficient quantity to be between 40 and 50 litres, stating that the very minimum should not be less than 20 litres.¹⁸⁶

The human right to water entails that water must be safe to drink, in order to sustain health and life. This suggests a dual meaning to ‘safety’ in the human right water. The water must be safe to drink, such that it does not cause ill health, and it must be safe in terms of the distance the user is required to travel to acquire the water for use. General Comment 15 has stated that water for domestic use must be free from micro-organisms, chemicals, and such substances that constitute hazard to a person's health.¹⁸⁷

ii. Acceptability

This refers to the colour, odour and taste of domestic water, which apply to all sources of the water supply; be it piped or from tanks, or provided by vendors, it ought to be well-protected.¹⁸⁸ The likely reason for this is to ensure that people do not resort to polluted alternatives, which may appear more accessible.

iii. Accessibility

Accessibility of water considers three forms of accessibility, namely physical accessibility, informational accessibility, and economic accessibility. Physical accessibility refers to water within safe physical reach.¹⁸⁹ There must be no threat to life during access to water facilities and service.¹⁹⁰ According to General Comment 15, the human right to water includes the physical accessibility of water.¹⁹¹ This characteristic requires the water source to be within safe reach, taking into account the needs of particular persons, such as persons with disabilities.¹⁹² Access to water means that the source of water relied on by a proportion of people is adequate, as well as safe in terms of its quality and

¹⁸⁶ UN *Media Brief* at

http://www.un.org/waterforlifedecade/pdf/human_right_to_water_and_sanitation_media_brief.pdf accessed 12 July 2014.

¹⁸⁷ Para 12 General Comment 15 (b); see also WHO's guidelines for drinking water quality (2011) at http://whqlibdoc.who.int/publications/2011/9789241548151_eng.pdf accessed 20 June 2014.

¹⁸⁸ General Comment 15; Factsheet 35 9.

¹⁸⁹ This may be within the household, the immediate vicinity of each household, educational institution and workplace. In describing household General Comment 15 referred to General Comment 4, 13 & 14. See footnote 16 General Comment 15.

¹⁹⁰ This refers to the assault of women and girls, who go in search of water at long distances.

¹⁹¹ Para 2 General Comment 15.

¹⁹² Factsheet 35 9.

distance to reach.¹⁹³ In an analysis by WHO, to have a basic access to 20 litres per day, the water source has to be within 1000 metres of the home, and collection time ought not to exceed 30 minutes.¹⁹⁴ A reasonable distance is one which allows everyone to collect sufficient water to cover personal domestic use.¹⁹⁵ Informational accessibility includes the right to seek, receive and impart information to people on issues concerning water.¹⁹⁶ Water must also be economically accessible, referring to the economy of water, as water that is neither affordable nor accessible. In addition, when the most vulnerable or marginalised in the society cannot access water because of their status or vulnerability, then there is a violation of their human right to water.

iv. Affordability

The human right to water does not mean that water must be free, as believed by many. The term 'affordable', as adopted by the definition in the General Comment 15, suggests that clean water comes at a price, and this must not be expensive.¹⁹⁷ This has been further explained to mean that no-one ought to be denied access to water because he or she cannot pay for it.¹⁹⁸ An affordable price, according to the United Nations, should not exceed five percent of household income.¹⁹⁹ The cost of water directly or indirectly, should not interfere with or compromise the enjoyment of other rights such as adequate housing.²⁰⁰ In considering the human right to water, the cost of water cannot be totally ruled out.²⁰¹ Water is said to be affordable when it does not affect the ability to buy other essential goods.²⁰²

¹⁹³ Charting the progress of populations: Access to safe water 67 at <http://www.un.org/esa/population/pubsarchive/chart/12.pdf> accessed 20 June 2014.

¹⁹⁴ UN *Media Brief* at http://www.un.org/waterforlifedecade/pdf/human_right_to_water_and_sanitation_media_brief.pdf accessed 12 July 2014.

¹⁹⁵ Factsheet 35 10.

¹⁹⁶ Para 6 General Comment 15.

¹⁹⁷ Para 12(c) (ii) General Comment 15.

¹⁹⁸ Factsheet 35 10.

¹⁹⁹ UN *Media Brief* 6 at http://www.un.org/waterforlifedecade/pdf/human_right_to_water_and_sanitation_media_brief.pdf accessed 12 July 2014.

²⁰⁰ Factsheet 35 10-12; Agenda 21 also states that safe drinking water should be charged appropriately.

²⁰¹ Para 2 General Comment 15; Art 28 CRPD.

²⁰² UN *Media Brief* at http://www.un.org/waterforlifedecade/pdf/human_right_to_water_and_sanitation_media_brief.pdf accessed 12 July 2014.

2.5.3.2.2 *Obligations of states parties*

The ICESCR sets out the obligations of states to the realisation of socio-economic rights.²⁰³ State parties to the covenant are expected to take steps individually and through international assistance and co-operation, to the maximum of its available resources.²⁰⁴ General Comment 3 explains further, the provision of Article 2 of the ICESCR.²⁰⁵ The obligations described in Article 2 of the ICESCR have been referred to as ‘Obligation of Conduct’ and ‘Obligation of Result’ by General Comment 3.²⁰⁶ General Comment 3 gives details to the obligations of state parties under Article 2 of the ICESCR.²⁰⁷ General Comment 15 also highlights the obligations of states (on access to water), which are general obligations, specific legal obligations, international obligations, and core obligations.²⁰⁸

Although the ICESCR provides for a progressive realisation, and understands that there may be constraints, it also imposes various obligations, which are of immediate effect.²⁰⁹ Such obligations include the right be exercised without discrimination, and involve deliberate, concrete steps targeted towards a full realisation of the right to water.²¹⁰ General Comment 15 further states that states parties have a continuing duty to move expeditiously and effectively towards a practical and feasible realisation of access to water.²¹¹ Retrogression is not acceptable, however, and where such happens, the state party must prove that there was a careful consideration of all alternatives, and that the consideration are justified by reference to the totality of the rights contained in the covenant, with regards the full use of the state party’s maximum available resource.²¹² General Comment 15 also identifies the types of obligations required by state parties. These obligations are:

²⁰³ Art 2 ICESCR.

²⁰⁴ Art. 2 (1) ICESCR.

²⁰⁵ CESCR General Comment No 3: The Nature of States Parties’ Obligations (hereafter General Comment 3) (Adopted at the fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 contained in Document E/199/23) at <http://www.refworld.org/docid/4538838e10.html> accessed October 15 2014.

²⁰⁶ Para 1 General Comment 3.

²⁰⁷ See generally for details General Comment 3.

²⁰⁸ Para 8-13 General Comment 15.

²⁰⁹ Art 2 ICESCR.

²¹⁰ Para 17 General Comment 15.

²¹¹ Para 18 General Comment 15.

²¹² Para 19 General Comment 15; see also General Comment 3.

- i. **Obligation to respect:** States are required to refrain from interfering with the enjoyment of the right to water.²¹³
- ii. **Obligation to protect:** States parties are expected to prevent third parties from interfering in any way with the enjoyment of the right to water, and where water services are controlled by third parties, states should prevent them from compromising the characteristics of the human right to water.²¹⁴ Furthermore this obligation encourages states parties to adopt necessary and effective legislative and other measures from polluting water sources.²¹⁵
- iii. **Obligation to fulfil:** Positive measures to assist individuals to enjoy the right to water by facilitating, promoting and providing water, must be taken.²¹⁶ This obligation also includes educating people on hygienic use of water, protecting the water source, and methods of minimising wastages.²¹⁷ This obligation also expects states to adopt comprehensive, integrated strategies and programmes to ensure sufficient and safe water in the present and the future.²¹⁸ General Comment 15 also expects that states should recognise the role of international cooperation and assistance.²¹⁹

The core obligations of states parties towards the human right to water can also be found in General Comment 3.²²⁰ These core obligations are ‘of immediate effect’ and include ensuring a minimum essential amount of safe water for personal and domestic use to prevent disease; the right of access to water is ensured for the disadvantaged and marginalised groups; the provision of physically accessible water to prevent too much time spent on water acquisition;²²¹ and the adoption

²¹³ Para 20 (a) 21 & 22 General Comment 15.

²¹⁴ General Comment 23 & 24. See also 2.1.4 (i) above for the characteristics of the human right to water.

²¹⁵ Perhaps if Nigeria had effective laws in this regard, the waters of the people of Ogoniland would not have been polluted. See the *SERAC* case.

²¹⁶ Para 25 General Comment 15.

²¹⁷ Para 25 & 26 General Comment 15.

²¹⁸ Para 26-28 General Comment 15.

²¹⁹ Para 30-32 General Comment 15: Also Art 2, 11 & 23 ICESCR.

²²⁰ HRI/GEN/1/Rev.9 (Vol. I) General Comment 3 adopted in 1981. See also Human Rights Committee, General Comment 31 Nature of the General Legal Obligation on states Parties to the Covenant, (which replaced General Comment 3) U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

²²¹ This also includes that personal security is not threatened.

and implement of a national water strategy and Plan of Action addressing the whole nation.²²²

States parties to the ICESCR are expected to take measures, both individually and through international assistance and cooperation, to the maximum of its available resources, with a view to achieving progressively the full rights recognised in the ICESCR by all appropriate means, including particularly the adoption of legislative measures.²²³ In breaking this down, states are expected to take measures and maximise available resources, as well as progressively realise access to water by all means possible, as well as to take legislative measures.

2.5.3.2.3 Implementation of the human right to water

All appropriate means, especially when it comes to legislative measures, are expected to be adopted by states parties.²²⁴ The emphasis is placed on legislation, strategies, policies, indicators and benchmarks, as well as remedies and accountability.²²⁵ A national plan of action to realise the right to water has to be adopted.²²⁶ This plan of action must be based on “transparency, accountability and the independence of the judiciary”, which are elements of the principles of a human rights-based approach to water.²²⁷ Existing legislation should also be reviewed so as to ensure that these are compatible with the obligations arising from the right to water.²²⁸ People must have a right to participate, which must form an integral part of the policies or programme concerning water or water services.²²⁹

General Comment 15 comprehensively details that which a human right to water entails. These provisions have subsequently been incorporated into the United Nations General Assembly declaration on the human right to water and sanitation, in 2010. When water is considered as a human right, none of the characteristics

²²² This should also be reviewed on the basis of a participatory and transparent process so that progress can be monitored.

²²³ Art 2 (1); See also Coomans (2007) 11 *Max Planck UNYB* 360.

²²⁴ Art 2 ICESCR; Para 45 General Comment 15.

²²⁵ Para 46-59 General Comment 15.

²²⁶ Para 47 General Comment 15.

²²⁷ Para 49 General Comment 15.

²²⁸ Para 46 General Comment 15. As will be discussed in Chapter Four of this study, existing legislations on access to water does not reflect any compatibility with obligations arising from the right to water, nor do currently reviewed state laws and policies reflect this review.

²²⁹ Para 48 General Comment 15.

such as availability, affordability, the quantity or the quality of the water for domestic use may be diminished. All these are what a human right to water is about. Now to guarantee that the human right to water is fulfilled, a human rights-based approach is the only approach that can adequately encompass all the normative content of the human right to water, as detailed in General Comment 15. While the human right to water, for example, states that water for domestic use must be available, a human rights-based approach states that there should be no discrimination in the availability of access. In other words, water should be available to everyone, irrespective of class, gender, age or physical ability. Furthermore, human rights-based approach to water focuses on how the water is made available. The floodlight is thus turned on the water providers, who ought to be accountable to the water users, by showing how the water is going to be made accessible.

2.4.3.3 United Nations General Assembly Resolution - the human right to water and sanitation

The human right to water was not explicitly recognised until eight years after the Committee on Economic Social and Cultural Rights adopted General Comment 15, wherein the right to water was described in detail.²³⁰ Putting an end to the argument of water being an implicit or derivative right, the United Nations General Assembly on 28 July 2010 declared the human right to water and sanitation.²³¹ In doing so, the General Assembly recalled events that led to the recognition of the human right to water, such as the Mar del Plata Action Plan, and Agenda 21, contained in the United Nations Conferences of 1992 and 1977;²³² and the United Nations General Assembly, also considered international instruments such as Universal Declaration of 1948, the ICESCR, ICCPR, CEDAW, CRC and CRPD, and the Geneva Convention.²³³ All these consideration of the covenants and pronouncements on water via the water conferences only emphasise that water has always been a human right, in spite of its implicit nature amongst international human rights instruments.

²³⁰ See General Comment 15.

²³¹ See Resolution A/RES/64/292.

²³² See sec 2.4.2.2 above.

²³³ Resolution A/RES/64/292 1; also discussed under sec 2.4 above.

The eventual recognition of the human right to water became necessary due to the establishment of the fact that approximately 884 million were found to still lack access to safe drinking water, and that approximately 1.5 million children between the ages of one and five years die as a result of water and sanitation problems; moreover, a number of school days are lost each year due to water and sanitation related diseases.²³⁴ The human right to water, as I have argued in this chapter, is necessary for the realisation of other human rights, considering the fact that without adequate access to clean water, other human rights, such as the right to health, the right to education, and even the right to life, cannot be adequately realised.²³⁵ The human right to water was recognised as necessity for the full enjoyment of life and all human rights.²³⁶

The initial recognition of the human right to water and sanitation in 2010 has since been recognised as two distinct rights, namely the human right to water and the human right to sanitation, which although distinct, are closely linked.²³⁷ This recent recognition is deemed necessary, as the right to sanitation has the tendency of being overshadowed by the right to water, premised on the fact that while the right to water has been advocated, the right to sanitation may not necessarily fall within this scope, and this argument is based on a disparity in the number of people without access to water, and those without access to sanitation.²³⁸ In other words, the promotion of water does not automatically promote the right to sanitation. This is evident in the disparity between the statistics of access to water and access to sanitation, with approximately 884 million people not having access to water and 2.5 billion people not having access to basic sanitation.²³⁹ In other words advocating for a separation of the rights to water and sanitation would help ensure that governments pay adequate attention to sanitation.²⁴⁰ With the United Nations recognition of the human right to water, 122 countries were in support of

²³⁴ Resolution A/RES/64/292 2.

²³⁵ See this discussion in sec 2.3 above.

²³⁶ Para 1 Resolution A/RES/64/292.

²³⁷ Amnesty International *et al* at

https://www.hrw.org/sites/default/files/supporting_resources/unga70-resolution_on_wash_-_joint_ngo_statement.pdf accessed 6 June 2016.

²³⁸ Resolution A/RES/64/292 2.

²³⁹ Resolution A/RES/64/292 2.

²⁴⁰ Amnesty International *et al* at

https://www.hrw.org/sites/default/files/supporting_resources/unga70-resolution_on_wash_-_joint_ngo_statement.pdf accessed 6 June 2016.

this right, while 41 countries abstained from voting, however no country voted against the recognition of the human right to water. Bulto has argued that the abstaining states held the belief that they did not owe a legal obligation to ensure the right to water for their citizens.²⁴¹ This may be particularly true since I argue that recognising the human right to water is a first step to resolving the challenges of access to water in any nation. The human right to water has been officially recognised as a human right under the banner of international human rights, and countries that are keen to address the challenges of access to water in their respective nations are constitutionalising this right, and putting in place an institutional framework for its realisation.

2.6 THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM AND THE RECOGNITION OF THE HUMAN RIGHT TO WATER

Regional human rights systems consist of regional instruments and mechanisms through which human rights are promoted and protected.²⁴² There are five identified regional human rights systems, namely Europe, America, East, Arab and Africa.²⁴³ I analyse only the African regional human rights system, as the main jurisdictions considered in this thesis are African countries. Even though I examined Colombia and India for promising practices, I do not examine their respective regional human rights systems in depth.

The African regional human rights system is the youngest of the three developed regional systems. It was created under the African Union, and has a Commission and a Court. There are a number of African human rights systems which the Court and Commission are charged to interpret, such as the African Charter on Human and Peoples' rights (also known as the Banjul Charter),²⁴⁴ and the African Charter

²⁴¹ Bulto (2014) 28.

²⁴² United Nations Human Rights (Office of the High Commissioner for Human Rights) 'An overview of Regional Human Rights Systems' at <http://bangkok.ohchr.org/programme/regional-systems.aspx> accessed 6 October 2014.

²⁴³ European Parliament (2010) 11-12 at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410206/EXPO-DROI_ET\(2010\)410206_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410206/EXPO-DROI_ET(2010)410206_EN.pdf) 12 accessed 27 October 2014.

²⁴⁴ Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5 21 I.L.M. 58 (1982) entered into force 21 October 1986.

on the rights and Welfare of the Child,²⁴⁵ both of which I discuss here, as applicable to the right to water.

The African Charter is silent on access to potable water, which is one of the most pressing needs in Africa.²⁴⁶ Cases that are entertained at the African Courts usually concern the right to fair trial and jurisdictions of courts being ousted by military decrees.²⁴⁷ The African Charter on the Rights and Welfare of the Child, on the other hand, provides for the right of children to water.²⁴⁸ However, in the *Ogoniland* case, the court stated that there is no right in the Charter that cannot be made effective.²⁴⁹ The African Commission on human rights in the *Ogoniland* case conceptualised a fourth obligation of government, namely the obligation to promote.²⁵⁰ In the *Darfur* case, the complainants felt the right to water was being violated as a result of the poisoning of wells.²⁵¹ They requested that the Commission finds against the government a violation of the right to water under the provisions of Article 4, which states:

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

Article 16 which states:

Every individual shall have the right to enjoy the best attainable state of physical and mental health.

States parties to the present charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

And article 22 which states that:

²⁴⁵ Adopted July 1990 (entered into force 29 November 1999) OAU Doc.CAB/LEG/ 24.9/49 (1990).

²⁴⁶ Viljoen (2012) 215.

²⁴⁷ Viljoen (2012) 215-216.

²⁴⁸ Art 14 (2) (c) African Charter.

²⁴⁹ *Ogoniland* case Para 68; see also Viljoen (2012)216.

²⁵⁰ *Ogoniland* case Para 68; Viljoen (2012) 216.

²⁵¹ *Sudan's Human Rights Organisation and another v Sudan* (2009) AHRLR 153 (ACHPR 2009) 28th Activity Report) Communications 279/03, 296/05 (joined).

All peoples shall have the right to their economic social and cultural development with due regards to their freedoms and identity and in the equal enjoyment of the common heritage of mankind

States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Although the Court understood that rights are linked and interrelated and the right to water could be implied, it nonetheless chose to interpret the right to water as falling under the right to health.²⁵² Viljoen argues that the rights in the African Charter, when interpreted, can imply other rights not provided for.²⁵³ His position is that rights not explicitly guaranteed when interpreted, can invoke the invisible right.²⁵⁴ Sometimes the court rely on civil and political rights provisions to interpret social economic rights, in cases where they are not explicitly provided for.²⁵⁵ Where national courts refuse to recognise or make a ruling recognising the human right to water, the regional courts have been seen to make such pronouncements.²⁵⁶ The courts play an important role in the promotion of access to water.

The African Charter on the Rights and Welfare of the Child states that:

Every child shall have the right to enjoy the best attainable state of physical mental and spiritual health and that states parties to the charter shall pursue the full implementation of the right and take measures to ensure the provision of adequate nutrition and safe drinking water.²⁵⁷

²⁵² See Para 209 *Darfur's case*; Viljoen (2012) 216 and General Comment 14, which is an interpretation of the right to health.

²⁵³ Viljoen (2012) 217.

²⁵⁴ Viljoen (2012) 217, 327-328.

²⁵⁵ An example is in India where the Apex Court interpreted the right to water from the right to life. Also the *Gbemre* case, where the right to life and dignity was stated to include the right to clean, poison-free, pollution-free, and healthy environment. See also Viljoen (2012) 555-556.

²⁵⁶ See both *Darfur* and *Gbemre* cases.

²⁵⁷ Art 14 (1) & (2) (c).

The right to nutrition and adequate food to women recognised under the African Region²⁵⁸ specifically, states that state parties should respond appropriately, so as to provide women with access to clean drinking water.²⁵⁹

Although the African Charter of Human and People's Rights of 1981 did not explicitly provide for the right to water, this right can however be implied from the provisions of Article 16 and Article 18. The Charter provides that every individual shall have the right to enjoy the best attainable state of physical and mental health, and that state parties to the Charter shall take the necessary measures to protect the health of their people.²⁶⁰ Furthermore, Article 18 of the Banjul Charter provides for state parties to take care of the physical health of the family.²⁶¹ The Charter further provides that the states shall ensure the elimination of discrimination against women, and ensure the protection of their rights and the rights of the child, as stipulated in international declarations and conventions.²⁶² The application of this provision requires a consideration of all the international declarations or conventions, which provide for access to water at the international level.

Africa is one of the continents with the most pressing needs for access to water. Countries like Nigeria have shied away from being committed to the course of promoting and realising access to water, by not making adequate legal provisions as well as by preventing the national courts from making rulings that would suggest the actual right to access water (under the international meaning of a human right to water), yet it hosts meetings on the need to promote access to water. Regional systems like the African Courts exist to promote human rights, where state parties have failed to do so. African countries such as South Africa and Kenya have recognised access to water as a human right, and their national courts are obliged to entertain issues that arise from the violation of such rights.

²⁵⁸ Protocol to the African Charter on Human and peoples' rights on the rights of women in Africa 2000.

²⁵⁹ Art 15 Protocol to the African Charter on the Rights of Women in Africa.

²⁶⁰ This provision is quite similar to the African charter on children's rights where "access to safe drinking water was stated as one of the measures to ensuring best attainable state of physical and mental health." See Art 14 of the African Charter of a Child.

²⁶¹ Art 18 (1).

²⁶² Art 18 (3).

2.7 CONCLUSION

In this chapter, I have traced the historical development of the right to water and its gradual acceptance as a human right under international law.

In spite of the time it took for the human right to water to emerge under international human rights law, there is no gainsaying that it is a welcome development. Much as domestic water cannot be separated completely from other water uses, as they are just as important, the human right to water ought to be prioritised, as the quantity of water needed for human survival and human dignity cannot be compared to what is needed for other uses of water, such as irrigation and hydroelectricity.

The essence and uses of water cannot be overemphasised. Its uses for development and sustenance for human life are what makes it a human right. Nobody can survive without a substantial amount of water to drink, and polluted water has been known to cause diseases and both partial and permanent disabilities.

Recognising water as a human right is just one step to promoting development, sustaining life and facilitating all other human rights. Countries that experience problems with access to water and have not recognised water as a human right or made provision in their legislation or taken major steps towards a progressive realisation of access to water for domestic use, are not keen or committed to addressing the challenges people face in realising clean water for domestic use. Making water a human right is just one step towards ameliorating the challenges of all people to access water for their domestic use. A second step towards realising access to domestic water is the approach adopted, which may either be a social, an economic or a human rights-based approach. In this thesis, I propose a human rights-based approach to water. This is critically examined in Chapter Three of this thesis.

Furthermore, recognising the human right to water does not necessarily guarantee access to water. For a human right to water to positively address issues of access to water, there are five major principles that are important, namely: participation, accountability, non-discrimination, empowerment, and legal

redress. These principles are referred to as the PANEL principles.²⁶³ The PANEL principles support and sustain the creation of international human rights, and this study emphasises their indispensability to addressing human rights concerns such as the human right to water. Recognition of the human right to water and an application of a human rights-based approach to water also need to be followed up with other activities, such as monitoring violations of the right to water, and implementing enforcement mechanisms (which I argue are components of a human rights-based-approach to water) are necessary.

It ought to be noted that there cannot be a talk on a human rights-based approach to water without first recognising water as a human right. This is because a human rights-based approach sets out in details how the human right to water is to be realised. As such, there are many mentions of the human right to water throughout this thesis. While the human right to water constitutes the substance of the need for access to domestic water, with its concern for the quality, quantity, accessibility and affordability of water for domestic use, a human rights-based approach constitutes the means of ensuring domestic water of good quality, sufficient quantity, accessibility and affordability for everyone, especially the vulnerable in the society. The human right to water and a human rights-based approach to water can thus be seen to work hand-in-hand.

²⁶³ Chapter Three of this thesis focuses on these principles.

CHAPTER THREE

A CONCEPTUAL FRAMEWORK FOR A HUMAN RIGHTS-BASED APPROACH TO WATER

3.1 INTRODUCTION

In this chapter I begin by identifying six approaches to access to water: a commodity approach; a community approach; a social approach; a public approach; and a legislative approach. I contend that each of these identified approaches to water has a link to the sixth approach, namely a human rights-based approach to water. As a matter of fact, all these other five approaches are contained in a human rights-based approach to water. As such, this chapter is focused on a human rights-based approach that is, how it evolved, what it entails, and why it is a preferred approach in realising access to domestic water.

The United Nations, through its agents, the World Health Organisation and the United Nations Children's Fund, have defined access to (safe drinking) water as referring to the distance, the available quantity, and the quality of water available for a person's domestic use.¹ According to their definition, the distance to the water should be less than one kilometre; the quantity available to each person each day should be at least twenty litres, and the source of water should either be a household connection, public standpipe, rainwater or a protected source.² This definition obviously takes into consideration the requirements attached to a human right to water (such as the quantity, quality and the physical accessibility to water), as defined by General Comment 15.³ I have argued that when water is considered to be a human right, this is guaranteed by a human rights-based approach. However, when water is not considered as a human right, there are various other approaches that may be adopted to realise access to water. These are discussed in this chapter.

¹ WHO (2006) at http://www.who.int/water_sanitation_health/mdg1/en/ accessed 6 February 2015.

² WHO (2006) at http://www.who.int/water_sanitation_health/mdg1/en/ accessed 6 February 2015.

³ See Chapter two of this thesis; See also Para 2 General Comment 15.

I have noted that access to water and the right to water is discussed through the lens of a human rights-based approach to development.⁴ This, I contend, is not completely misplaced, as there is a relationship between human rights generally and development.⁵ Development has been described as a right which is associated with economic empowerment and human well-being.⁶ Without access to clean water for survival and good health, a discussion on human wellbeing cannot go forward. The right to development encompasses all human rights, including the human right to water.⁷ There can be no proper development without access to water, because water cuts across all areas of development, such as health and education.⁸ Human rights-based approaches are, as such, usually analysed or discussed in the context of development.⁹ The realisation of access to water is intrinsic to development. And the human rights-based approach to development creates an enabling framework for the realisation of the human right to water and other socio-economic rights.¹⁰ The human rights-based approach to development creates the framework and approaches according to which human rights may be realised. In particular, it embodies the PANEL principles.¹¹ This being the case, I examine here the origin of the human rights-based approach to development and the characteristics of a human rights-based approach to development, and argue that human rights-based approaches can be applied to any developmental concerns, especially socio-economic rights concerns such as water, education and health.¹² To this effect, I conceptualise a human rights-based approach to water, and analyse the PANEL principles, as these may be useful in the realisation of access to water.

⁴ Filmer-Wilson (2005) 23 *Netherlands Quarterly of Human Rights* 213.

⁵ Uvin (2004) 122; Uvin (2007) 17 *Development in Practice* 597-606 Cornwall & Nyamu-Musembi (2004) 25 *Third World Quarterly* 1415; Filmer-Wilson (2005) 23 *Netherlands Quarterly of Human Rights* 213; Olowu (2009).

⁶ Olowu (2004) 5 *San Diego International Law Journal* 184-185.

⁷ United Nations (Office of the High Commissioner, Human Rights) at http://www.un.org/en/events/righttodevelopment/pdf/rtd_at_a_glance.pdf accessed 6 June 2016.

⁸ Art 8 United Nations Declaration on the Right to Development A/Res/41/128 at <http://www.un.org/documents/ga/res/41/a41r128.htm> accessed 6 June 2016. (Hereafter Declaration on the Right to Development).

⁹ Winkler (2014) 213.

¹⁰ Art 8 Declaration on the Right to Development.

¹¹ Declaration on the Right to Development.

¹² Art 8 (1) Declaration on the Right to Development.

I note there to be quite a number of terms adopted by various writers or researchers such as a ‘rights-based approach’, ‘human rights approach’ and ‘human rights framework’, where the similarity in characteristics of these terms are derived from human rights standards. I therefore argue, to avoid a confusing use of terms (particularly because researchers have used these terms interchangeably), that they may all be included under the umbrella of a human rights-based approach. Justification for this view is provided.

I introduce another approach, which I termed the ‘legislative approach’ to water. I distinguish between a human rights-based approach to water, and a legislative approach to water. When it comes to a legislative approach to water, I cite the examples of Nigeria, Canada and France. A legislative approach, I argue, has been applied differently in Nigeria, on the one hand, and Canada and France on the other.

In this chapter, I analyse the various approaches to water and distinguish between these approaches and a human rights-based approach to water. I identify the terms ‘rights-based approach’, ‘human rights-based approach’, and ‘human rights framework’, which are used by various authors and have been suggested to carry different meanings. In my understanding of these terms, I submit for a shared fundamental meaning between them. I discuss these terms as adopted by other authors, and outline reasons for my submission. From my understanding of a human rights-based approach (to development), I identify the principles of a human rights-based approach to water. These principles, I submit, are what link a human rights-based approach to water with good water governance. However, I distinguish between water governance and a human rights-based approach to water.

Since the PANEL are the core principles of a human rights-based approach, I analyse the function of each of these principles in realising access to water. I examine the scope, implementation and monitoring mechanisms of a human rights-based approach to water. In doing so, I also identify jurisdictions and court cases that have expanded on the features of a human rights-based approach to water.

I thereafter examine the challenges of a human rights-based approach to water. In conclusion I contend that a human rights-based approach to water is a viable approach, which may be applied in virtually every nation as a means to a sustainable access to water for domestic use, where I argue the benefits of a human rights-based approach to water to be greater than the challenges it poses.

3.2 APPROACHES TO ACCESS TO WATER

As stated earlier, there are various approaches to access to water as identified by researchers.¹³ These approaches allow water users to access water for domestic use. An approach to access to water refers to the method an individual employs to acquire water of good quality for his or her domestic use. In this section, I identify and discuss five basic approaches to access to water as mentioned, namely the commodity, social, community, legislative and public approaches. I briefly discuss these approaches to show how they realise access to water, how these approaches relate to a human rights-based approach to water, and why a human rights-based approach to water is preferable in the realisation of access to water.

3.2.1 COMMODITY APPROACH

The commodity approach to water is also regarded as the economic approach.¹⁴ This type of approach supports the pricing of water, water privatisation and the private ownership of water resources.¹⁵ Conceivably, this type of approach has been encouraged by the World Bank and the International Monetary Fund.¹⁶ While it may be presumed that the human right to water is a conception of the United Nations and human rights generally are ‘free’, the human right to water is not free. The definition of the human right to water states that water for domestic use should be affordable.¹⁷ The Dublin Principles of 1992 also proclaimed water to be an economic good, when it stated in principle four, that “water has an economic value in all its competing uses and should be recognised as an economic good”.¹⁸

¹³ Langford (2005) 21 *Water Resources Development* 274-275; Miranda *et al* (2011) 4 *Literature Review* 9-12.

¹⁴ Langford (2005) 21 *Water Resources Development* 274.

¹⁵ Langford (2005) 21 *Water Resources Development* 274.

¹⁶ Langford (2005) 21 *Water Resources Development* 274.

¹⁷ Para 2 General Comment 15.

¹⁸ Principle 4 Dublin Statement; Solanes (1999) Global Water Partnership Technical Advisory Committee (TAC) No 3 TAC Background Papers 9.

Water in various parts of the world is considered chiefly as an economic good.¹⁹ Adopted in France, for example, is the “water has to pay for water” approach, which means that water is priced and the cost of providing for such water must be recovered.²⁰ This type of approach may not be favourable to the vulnerable in the society, especially the poor, as the number of people living in extreme poverty is high, especially in Africa.²¹ Furthermore, privatising water has led to conflicts and protests.²² As such, treating water purely as an economic good would only lead to crises, especially when the cost is heavy on communities.²³ Adopting a commodity approach to water does some good too, where it reduces wastage.²⁴ However, if the only good the commodity approach does is to reduce water wastage, then an alternative to that would be water education, sensitising people on the need to conserve water. The commodity approach may not be disputed in areas where the affluent live, as long as it guarantees their constant access to water supply. However, this approach should not be the only approach to be considered in any given nation, since there are always vulnerable persons in every society. The World Bank has identified over two billion people to be poor, who may not be able to afford their basic needs.²⁵ A majority of these persons are found in Africa, and applying a commodity approach in its entirety would not guarantee access to water for all.

¹⁹ Rogers *et al* (2002) 4 *Water Policy* 1.

²⁰ Smets (2007) at http://www.ielrc.org/activities/workshop_0704/content/d0723.pdf accessed 10 October 2015.

²¹ Africa Pulse (2013) 7 at

http://www.worldbank.org/content/dam/Worldbank/document/Africa/Report/Africas-Pulse-brochure_Vol7.pdf accessed 8 October 2016.

²² Shultz (2003) XXXVI *Privatization in the Americas* 34-47 at

<http://www2.fiu.edu/~hudsonv/Shultz.pdf> accessed 12 October 2015.

²³ An example is the Cochabamba water war in Bolivia. See Shultz (2003) 34-47 at

<http://www2.fiu.edu/~hudsonv/Shultz.pdf> accessed 12 October 2015.

²⁴ The legal department of the Ogun State Water Corporation, at a discussion session on the human rights-based approach to water in Nigeria, stated that since pre-paid meters were installed, in some areas of Ogun State, water wastage was reduced. I was informed that water companies used treated water for backwashing which constituted a waste (this information was gathered during my academic visit to Nigeria in August 2015).

²⁵ UNDP (2014) at

<http://www.undp.org/content/undp/en/home/presscenter/pressreleases/2014/07/24/2-2-billion-people-are-poor-or-near-poor-warns-2014-human-development-report-on-vulnerability-and-resilience.html> accessed 15 October 2015.

3.2.2 SOCIAL APPROACH

This approach does not necessarily mean that water should be free; rather it mandates that the government should make it affordable by subsidy or by transferring costs to those that can pay.²⁶ This approach is the opposite of the commodity/economic approach, and it is found to be consistent with the public and community approach, where the emphasis is on human dignity, and the fact that access to water for a basic need is a non-negotiable priority.²⁷

3.2.3 COMMUNITY APPROACH

A community approach to access to water involves community participation in solving water-related problems.²⁸ This type of approach would involve decentralisation, such that people at the community level can be responsible for access to water in their communities. Part of the problems of access to water at the community level is based on the lack of awareness of the community of water users to management and maintenance.²⁹ A community approach exists where informal providers (such as philanthropists, non-governmental organisations, or local communities) provide the water via wells or water trucks.³⁰ The emphasis of this approach is on the role of the community in providing and maintaining their own water.³¹ The community approach also promotes participation of the people and encourages an inexpensive system of water provision. The community approach brings water to the local communities and the indigenous peoples. This approach places an emphasis on the roles of communities and local government in water supply.

3.2.4 PUBLIC APPROACH

A public approach is an approach in which the government, through its water board, or state owned companies, provide water services to the people.³² In contrast to a commodity approach, a public approach argues that water should be firmly under the control of government, and that the public should participate in

²⁶ Kok in De Feyter & Isa (eds) (2005) 286; Miranda *et al* (2011) 4 *Literature Review* 11.

²⁷ Langford (2005) 21 *Water Resources Development* 275.

²⁸ Langford (2005) 21 *Water Resources Development* 275.

²⁹ Khurana & Sen (2011) at <http://www.wateraid.org/~media/Publications/drinking-water-quality-rural-india.pdf> accessed 10 October 2015.

³⁰ Miranda *et al* (2011) 4 *Literature Review* 7.

³¹ Langford (2005) 21 *Water Resources Development* 275.

³² Miranda *et al* (2011) 4 *Literature Review* 7.

making decisions over price of water.³³ In other words, the water resources are vested in the government and held in trust for the people, where the people however have a say in the decision over cost, since they are the direct beneficiaries of the water. The public approach is also evident in Nigeria, where the various 36 states have their respective state water corporations. These water corporations are expected to provide water services to the people via reticulations to their homes or to communities through the local government.³⁴ The problem with this approach is that, where houses are not reticulated, providing water to people in their homes is automatically rendered impossible. In Nigeria, for example, access to water from the government is limited to homes that are reticulated. Homes that are not reticulated find other means of realising their access to water for domestic use. As such, this approach does not take into consideration all people, as it is limited to those who already had access through government pipes. Newly developed areas, for example, would have to source for their water individually, until they became reticulated by the government; and until this happens, access to water is limited.

In contrast to the commodity approach, the public approach places water under the control of government.³⁵ This approach aims to place all water resources under government ownership, while privatisation of water resources does not occur at all.³⁶

However, the public approach to water has recorded a wide failure in many jurisdictions all over the world, as governments of developing countries in particular, have found it difficult to maintain the public water sector successfully.³⁷ This has led to privatisation of the water sector, which has been re-packaged under various names such as “Public Private Partnership”, “Private Sector Participation”, “Water Operator Partnerships” and “Integrated Water Resources Management.”³⁸ According to Chong *et al*, water privatisation began in the late 1980s in the UK, and this began the spread of various privatisation

³³ Langford (2005) 21 *Water Resources Development* 274-275

³⁴ Discussions with senior water officials at the Kwara State Water Corporation.

³⁵ Mirinda *et al* (2011) 4 *Literature Review* 7.

³⁶ Langford (2005) 21 *Water Resources Development* 275.

³⁷ Ameyaw & Chan (2013) 11 *Journal of Facilities Management* 153; Olowu (2008) 4 *TD: The Journal for Transdisciplinary Research in Southern Africa* 59-93.

³⁸ Olowu (2008) 4 *TD: The Journal for Transdisciplinary Research in Southern Africa* 64.

initiatives in the public water sector around the world.³⁹ The Public Private Partnership approach to water (as I would like to term it in this thesis) involves the transfer of part or all the assets and operations of the public water system to private investors to maintain public water operations.⁴⁰ This type of approach is usually found where the government has failed to provide the much-needed water to the people, as or where the government does not want to spend money in this area of water sector, as found.⁴¹

3.2.5 LEGISLATIVE APPROACH

By the legislative approach to water, I refer to the adequate or inadequate laws that identify the various uses of water, in this case domestic water. The legislative approach sets out the national standard for the quality, quantity and tariffs on water for domestic use, provides for a regulatory framework, and states the steps an individual may follow to ensure his or her right to water is not violated. A legislative approach to domestic water would, therefore, refer to the legal framework set out towards the realisation of potable water in any nation. This approach to water may turn out to be a commodity approach, a human rights-based approach, or neither of these approaches, that is:⁴² a commodity approach, where the water laws of a country endorses that water consumed must be paid for; a human rights-based approach, which takes into consideration the poor in the society that cannot afford to pay; and neither of these approaches, where the law makes inadequate provision that neither favours a commodity approach nor a human rights-based approach.

In France, the legislative approach adopted can be stated to be adequate on a large scale. This is because this approach ensures access to water for about 99 percent of French people.⁴³ The legislative approach adopted in France encourages a commodity approach, and is also referred to as ‘water pays for water’.⁴⁴ And, although this was the case, the legislative approach adequately covered issues of

³⁹ Chong *et al* (2006) 29 *Review of Industrial Organisation* 149-169.

⁴⁰ Kok in De Feyter & Isa (2005) 264.

⁴¹ Hall *et al* (2005) 15 *Development in Practice* 286.

⁴² See Sec 3.2.6 of this chapter for this argument.

⁴³ Smets (2007) 4 at http://www.ielrc.org/activities/workshop_0704/content/d0723.pdf accessed 10 October 2015.

⁴⁴ Smets (2007) 4 at http://www.ielrc.org/activities/workshop_0704/content/d0723.pdf accessed 10 October 2015.

access to water in France. France has, however, incorporated a human right to water since the United Nations General Assembly's recognition of the human right to water.⁴⁵ The legislative/economic approach to water in France was replaced by a human rights-based approach by virtue of the 2006 French Water law.⁴⁶

In Malaysia, Daud notes that a legislative approach that was adopted to water quality management showed remarkable success.⁴⁷ Under this approach in Malaysia, laws are used as a form of management response to environmental problems.⁴⁸ Edwards also analysed the various water pollution Acts under the federal and state laws in the US, and how these laws addressed the issues of water pollution by making adequate provisions and filling up gaps which may be created by law or non performance by the identified water officers.⁴⁹ Apart from polluted water, causing ill health, it also decreases access to sufficient water for domestic use. Where a legislative approach is adopted to tackle pollution and address water quality, such an approach promotes a human right to water as well as increases access to water. When a comprehensive legislative approach to water is adopted, it enhances access to water in terms of the WHO and UNICEF.⁵⁰ When a water law makes provisions for access to water, this *should ordinarily* include the organisational structure of the various water uses, so as to ensure access to domestic water and the institutional framework set out to apply the law from the source to the users. A legislative approach that makes provision for domestic water supply - but does not set out a framework or identify the persons, organisations or institutions that are responsible for domestic water supply - is inadequate. The approach identified in Nigeria is an inadequate legislative approach, which is adopted at the federal level. The inadequate legislative approach to water in Nigeria as seen in the Water Resources Act (a federal law), does not ensure domestic water and makes no provision for it. The Water Resources Act is heavily

⁴⁵ At the sixty-fourth United Nations General Assembly meeting, France was amongst the 122 nations that voted in favour of the human right to water. See UN Resolution on the human right to water and sanitation available at <http://www.un.org/press/en/2010/ga10967.doc.htm> accessed 24 June 2014.

⁴⁶ Smets (2007) 4 at http://www.ielrc.org/activities/workshop_0704/content/d0723.pdf accessed 10 October 2015.

⁴⁷ Daud (2009) at <http://www.wepa-db.net/pdf/0810forum/paper34.pdf> accessed 13 March 2015.

⁴⁸ Daud (2009) (p. 1).

⁴⁹ Edwards (1968) *Natural Resources Lawyer* 58-69.

⁵⁰ WHO (2006) at http://www.who.int/water_sanitation_health/mdg1/en/ accessed 6 February 2015.

skewed towards water for agriculture and irrigation purposes. I argue that the Nigerian government (both at federal and state level) has adopted an inadequate legislative approach to issues surrounding domestic water supply, which does not address or ensure access to water for domestic use. Such an approach to access to water is neither a commodity approach nor a social approach.

Canada⁵¹ and Malaysia⁵² are examples of countries that have also adopted legislative approaches to water and have recorded successes.⁵³

Based on the Nigerian example, I argue that a legislative approach to water does not necessarily guarantee access to water. I also contend that when the right to water is not framed in human rights language, it cannot be referred to as a human right to water. Using the French example, I describe the transition from a legislative approach to water to a human rights-based approach to water. In contrast to a legislative approach, and other approaches analysed, I identify a human rights-based approach to water in South Africa. I maintain that a human rights-based approach, like other identified approaches, (such as commodity approach and community approach) incorporates a legislative approach. In other words, it is possible to have a legislative approach, which does not incorporate human rights language, and has a ‘perfect’⁵⁴ working water system; however it is not possible to have a human rights-based approach without a legislative framework. This is because one of the core principles of a human rights-based

⁵¹ When the United Nations General Assembly adopted the human right to water via resolution A/64/L.63/REV.1 Canada was recorded as one of the countries that refrained from voting. <http://www.un.org/press/en/2010/ga10967.doc.htm> accessed 24 June 2014. Also, Murthy notes that Canada was amongst those countries that opposed recognising a human right to water, and suggests that one of the reasons for this to be the effect it would have on privatisation, which plays a positive role in access to water. Murthy (2013) 31 *Berkeley Journal of International Law* 90.

⁵² Daud (2009) (internet page 1-9) at <http://www.wepa-db.net/pdf/0810forum/paper34.pdf> accessed 13 March 2015.

⁵³ In Nigeria, on the other hand, I reiterate that the adopted legislative approach has not dealt with the issues of pollution, as the provisions of the Water Resources Act does not even deal adequately with the issues surrounding pollution. I identify here the provisions of Section 18 of the Nigerian Water Resources Act, which stipulates a mere two thousand naira for failure to comply with the provisions of the Act, such as the provision of Section 5, which empowers the Minister of Water Resources to make provision for the prevention of pollution. Identified offences such as water diversion as provided for in Sec 9 of the Act, are also punishable by paying a fine of 2000 naira, which on conversion, is about a 100 South African rands. See sec 18 of the Nigerian Water Resources Act. The provision of such an amount is, to an extent, ridiculous, as the harm caused by virtue of the diversion may not even be commensurate with the damage it might have rendered.

⁵⁴ ‘Perfectly’ in this sense that it is measured by the higher percentage of persons with access to water in a country, and not by the absence of challenges in accessing water.

approach, viz. accountability, establishes the need for enforcement mechanisms.⁵⁵ In distinguishing a human rights-based approach to water from a legislative approach, I have argued that one of the guiding principles of a human rights-based approach, viz. legal redress, allows an individual or groups of persons who have had their rights violated to approach the court. Where an existing water law encourages a commodity approach, the human right to water becomes non-existent. Having a comprehensive water law, particularly one that protects the human right to water as described by General Comment 15, promotes access to water.

Although the five approaches are different, they are brought together by a human rights-based approach. This analysis is presented in the next section.

3.3 RELATIONSHIP OF IDENTIFIED APPROACHES WITH A HUMAN RIGHTS-BASED APPROACH

In this section I analyse the unified nature of the five approaches to access to water above, when taking a human rights-based approach. I contend that rather than adopt any of the identified approaches to realising access to water, which may indeed be extreme or unfavourable to water users, a human rights-based approach ought to be adopted, since it takes into consideration all these other approaches.

A commodity approach to water is based on water supply in exchange for a price. For example, the commodity approach entails that when water is delivered to the consumer, a tariff has to be paid for this service. A human rights-based approach to water, which ensures that the characteristics of the human right to water are observed, suggests that the water supplied to the water users must be affordable. Where a commodity approach to water is adopted, the utmost benefit of the water user is not necessarily taken into account, but rather, concern centres on the water provider, who sees water as an economic good, and is therefore focused on the profits to be realised from the supply of water. Thus, when all a water provider determines to do is provide the water for profit, and where the consumer needs the water for domestic use and for survival, the element of affordability

⁵⁵ Uvin (2004) 131.

enshrined in the human right to water is threatened. While a human rights-based approach to water does not rule out the fact that water has a cost, it takes into consideration the vulnerable that may not be able to afford the cost of this water. To this end, a human rights-based approach incorporates the commodity approach, but cushions its effect on the vulnerable, by emphasising that the characteristics of the human right to water are met.⁵⁶ This kind of approach has its own advantages and disadvantages. Its advantage lies in profit making for water marketers, or water providers, and this can be at a disadvantage to the poor in society, who either have to pay for this water or find an alternative source when their water mains are disconnected. Another advantage is when people pay so much for a product such as water, it is less likely to be wasted. The benefit of this approach is that a constant water supply may be guaranteed. However, this type of approach eventually affects the poor, who may not be able to afford the exorbitant prices that may be attached to water. The link of this approach to a human rights-based approach is the term ‘affordable’, adopted in the definition of a human right to water by the Committee on Economic Social and Cultural Rights.⁵⁷ This term suggests that a form of cost is attached to the human right to water. However what is affordable to the rich may not be affordable to the poor.

Under the community approach to water, where the water users are directly involved in water supply, this involvement emphasises the principle of participation to be found in a human rights-based approach to water. Sometimes, access to water under this type of approach is free, especially when philanthropists make this water available to people via wells and boreholes. The significance of this type of approach with a human rights-based approach is the involvement of the poor people in realising access to water for their domestic use. A human rights-based approach sometimes encourages free access to water of a basic quantity to people that cannot pay for the water, for example, the approach found in South Africa, which established a free basic water policy where a basic minimum of 25 litres is ensured for water users.

⁵⁶ The characteristics of the human right to water are availability, affordability, quality and quantity, which were discussed in Chapter Two of this study.

⁵⁷ Para 2 General Comment 15.

While the social approach to water has been described to emphasise human dignity and prioritises water for basic need as non-negotiable, this approach, according to Langford, has been framed in human rights terms.⁵⁸ Even though water is considered to be both a social and economic good, the economic good is usually more pronounced than the social good.⁵⁹ Thus, while considering water as an economic good (commodity) places emphasis on the pricing of water, considering water as a social good focuses on how more people might realise access to water. This is especially the case for the vulnerable, where the human right to water does not require that water should be free, but rather, that the problem of affordability is passed to the government, requiring it to establish policies that would guarantee access to water via subsidies,⁶⁰ or to transfer costs to those that can pay for it, so that more people may realise access to water.⁶¹ This is the fundamental concern of a human right to water, in which access to water is considered for everyone. The characteristics of a social approach to water are the emphasis it lays on access to water for everyone, and water for human dignity, which forms part of the characteristics of a human right to water. This characteristic also falls under the principle of non-discrimination, places emphasis on access to water for the vulnerable.⁶² In fact, the social approach is what replaces a human rights approach,⁶³ which I also argue in this study to be a human rights-based approach.⁶⁴

The public approach, as for the social approach, emphasises the role of government in making access to water realisable, since the government is the custodian of water held in trust for the public. As such, the government is expected to make this access realisable for the people. The relationship of this approach with a human rights-based approach is that water supply for domestic use is the obligation of the government. A human rights-based approach to water emphasises the principles of accountability, in which water providers are accountable to the people in water supply and maintenance of quality; and the

⁵⁸ Langford (2005) 21 *Water Resources Development* 275.

⁵⁹ See generally Rogers *et al* TAC Background Papers No 2; see also Agenda 21 and the Dublin Principles, where water was considered as an economic good.

⁶⁰ Mirinda *et al* (2011) 4 *Literature Review* 10.

⁶¹ Kok in De Feyter & Isa (eds) (2005) 286; Mirinda *et al* (2011) 4 *Literature Review* 11.

⁶² Mirinda *et al* (2011) 4 *Literature Review* 10.

⁶³ Mirinda *et al* (2011) 4 *Literature Review* 10; Langford (2005) 21 *Water Resources Development* 275.

⁶⁴ See Sec 3.3 of this chapter.

principle of empowerment in which government creates an enabling environment for the realisation of access to water. This is usually backed up by legislation.

The legislative approach refers to the legal provisions protecting the approach to water adopted in a country. This approach can either be commodity based or human rights-based. Where the legislative approach is commodity based, the cost of water is not only emphasised; it is also backed by law. This type of approach to water was popular in both Canada and France. The legislative approach can also be neither commodity based nor human rights-based when it is neither. There is an inadequate provision of law in this regard, especially at the national or federal level of government. The legislative approach may also be encompassing of all these approaches. Where it is all-encompassing, it is more likely to be a human rights-based approach, anchored on legislation. This provision of law regarding access to water, as earlier stated, may be adequate or inadequate. An adequate provision of legislation for domestic water supply may either be a commodity approach, where the law supports the full recovery of costs for domestic water supply, or a human rights-based approach, where the normative content of the human right to water is ensured. While the former favours a disconnection of water supply for non-payment, the latter does not. The legislative approach, anchored by human rights, is the principle of legal redress, where there is a law backing up access to water.

As shown, all these approaches play a part in a human rights-based approach to water. As such, I argue that it is better to consider a human rights-based approach to realising access to water, since it does not ‘harm’ anyone. Rather, it protects the interest of both the vulnerable poor and the rich in the society. It places the government in a position not to have to offer access to water as charity, but rather a right to which every human being may lay claim.

3.4 A HUMAN RIGHTS-BASED APPROACH TO WATER

In this section, I discuss the evolution of a human rights-based approach to development, so as to provide background of the evolution of the human rights-based approach. Secondly, I address the issue of terminologies such as a ‘human rights approach’, a ‘human rights-based approach’ and a ‘rights-based approach’.

Thirdly, I discuss the principles of a human rights-based approach to water, and give examples of jurisdictions that have adopted this approach, and I analyse legal cases that best depict the principles of a human rights-based approach to water. Distinguishing this approach from water governance, I examine the scope, implementations and monitoring mechanisms of a human rights-based approach to water.

3.4.1 EVOLUTION OF A HUMAN RIGHTS-BASED APPROACH (TO DEVELOPMENT)

Discussions on ‘human rights-based approaches’ seem impossible without including development. Researchers have frequently mentioned ‘development’ when examining ‘human rights-based approaches,’⁶⁵ where Sano can be seen to have described the merging of human rights and development, which occurred in the 1990s.⁶⁶ He noted that despite the fact that the discipline of development was not based on rights, development existed within the framework of human rights.⁶⁷ The relationships between ‘human rights-based approach’ and ‘development’ have meanwhile been highlighted by various academics and researchers.⁶⁸ Notable amongst them is the summation of Uvin, who argues that although development and rights are not the same, both can be understood as inseparable aspects of the same process.⁶⁹ He explains that human rights and development are “conceptually and operationally inseparable parts of the same process of social change”.⁷⁰ Olowu also notes the link between human rights and human development, where he states that human rights are “veritable vehicles for human development.”⁷¹ Because a rights-based approach encompasses civil, political, economic, social and cultural rights, this approach is argued to work in line with international development targets, such as poverty alleviation and human rights development.⁷²

⁶⁵ Uvin (2007) 17 *Development in Practice* 597-606; Cornwall & Nyamu-Musembi (2004) 25 *Third World Quarterly* 1415-1437; Filmer-Wilson (2005) 23 *Netherland Quarterly of Human Rights* 213; Olowu (2009).

⁶⁶ See Sano (2000) 22 *Human Rights Quarterly* 734-752.

⁶⁷ Sano (2000) 22 *Human Rights Quarterly* 734.

⁶⁸ Uvin (2007) 17 *Development in Practice* 597-606; Cornwall & Nyamu-Musembi (2004) 25 *Third World Quarterly* 1415-1437.

⁶⁹ Uvin (2004) 122.

⁷⁰ Uvin (2004) 122.

⁷¹ Olowu (2009) 5.

⁷² Olowu (2009) 7.

Human rights are, as such, components of human development, and also serve as a platform for achieving it.⁷³

According to Nyamu-Musembi and Cornwall, the consistent talk of a “rights-based approach” to development remains unclear.⁷⁴ They identified two schools of thoughts in this regard. The school of thought that believes that “rights-based approaches” come with a promise of re-politicising areas of development,⁷⁵ and that it is a “new fashion” used to “dress up the same old development”, “repackaging of old wine in new bottles”.⁷⁶ They argued, however, that in whatever form, a “rights-based approach” is applied, it would make no sense if it does not bring about a positive transformation among development actors.⁷⁷

There is no one clear definition of a human rights-based approach, especially when it is applied to different disciplines, or used by different organisations. Amongst organisations and researchers it is however agreed that a human rights-based approach is concerned with ensuring that the vulnerable in the society are provided with the basic services needed.⁷⁸ Aware of the inconsistency in the understanding and application of the human rights-based approach to development; the United Nations Development Group⁷⁹ adopted a “common understanding”, to ensure consistency in the application of a human rights-based approach by the various United Nations agencies.⁸⁰

⁷³ Olowu (2009) 7.

⁷⁴ Nyamu-Musembi & Cornwall (2004) IDS Working paper 234 1-53 at <http://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/4073/Wp234.pdf?sequence=1> accessed 15 July 2015; Gruskin *et al* stated that they had no one definition of what a ‘rights-based’ entails see Gruskin *et al* (2007) 370 *The Lancet* 452.

⁷⁵ Ferguson (1999) *Social Development Department, Department for International Development* at https://www.google.co.za/url?sa=t&rcct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBsQFjAAahUKEwjzskPu-XIAhWGvhQKHa2WDs8&url=http%3A%2F%2Fwww.eldis.org%2Fvfile%2Fupload%2F1%2Fdocument%2F0708%2FD0C7518.pdf&usq=AFQjCNGxVSzXYQtqW86LaUGlDslhrUy_Q&sig2=HGfgeNjMZrgl_WcYvXvz7Q&bvm=bv.106130839,d.d24 accessed 28 October 2015.

⁷⁶ Uvin (2002) 17 *Praxis: The Fletcher Journal of Development Studies* 2.

⁷⁷ Nyamu-Musembi & Cornwall (2004) IDS working paper iii.

⁷⁸ Gruskin *et al* (2007) 452.

⁷⁹ The United Nations Development Group (UNDG) was created by the Secretary General of the United Nations in 1997 to develop policies and procedures which allow member agencies work together, analyse country issues, and advocate for change, which increase the United Nations impact in helping countries achieve the Millennium Development Goals (MDGs) and poverty reduction.

⁸⁰ “The human rights-based approach to development cooperation: towards a common understanding among UN agencies” HRBA portal at <http://hrbaportal.org/the-human-rights-based->

The Statement of Common Understanding refers to the human rights-based approach to the development cooperation and programming by United Nations agencies. This sets out that:

1. All programmes of development (cooperation, policies and technical assistance) as laid down by the Universal Declaration of Human and People's Rights and other human rights instruments should further the realisation of human rights;
2. Human rights standards and principles as derived from international human rights instruments should serve as a guide to development in all sectors and in all phases; and
3. The programmes of development should contribute to the development of the capacities of the duty bearers to meet their obligations and the rights-holders to claim their rights.⁸¹

The implication of this 'Common Understanding' is that a human rights-based approach requires four necessary and specific elements: (i) an identification of the human rights claims and the duty bearers obligations which should be analysed; (ii) the capacity of the right holders to claim and the duty bearers to fulfil their obligations; (iii) an evaluation of the outcome and process which is to be guided by human rights standards and principles; and (iv) that an application of the recommendations of international human rights bodies and mechanisms.⁸²

The human rights-based approach is a contemporary framework of the United Nations. This approach was formulated to be applied for the purpose of development of human rights issues, such as health, development, education,

approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies accessed 11 February 2015.

⁸¹ United Nations Environment Programme (UNEP) at <http://www.unep.org/documents.multilingual/default.asp?DocumentID=43&ArticleID=4532&l=en> accessed 12 April 2015.

⁸² UNEP at <http://www.unep.org/documents.multilingual/default.asp?DocumentID=43&ArticleID=4532&l=en> accessed 12 April 2015.

sanitation and water.⁸³ In other words, a human rights-based approach sets out a uniform standard to be followed for the promotion and protection of all human rights. These standards are expected to boost development; eradicate inequalities; address discrimination, and empower the vulnerable.⁸⁴

Even though human rights and development seemed to have related objectives, the relationship between the two was not recognised until the late 1980s.⁸⁵ Development and human rights were separate and had different strategies and objectives. Uvin has posited that the evolution of a human rights-based approach is as a result of the failure of structural adjustment programmes, which resulted from the non-accountability of governments where civil society pressed for good governance and democracy.⁸⁶ Laban argued that the failure of water management was due to the fact that an enabling environment between dutybearers and right holders was not created; thus there was no responsibility for water use, or its management.⁸⁷ Olowu argues that there is a primary responsibility for both the duty bearers and the rights holders, which a human rights-based approach would address by emphasising the accountability and responsibilities of government or the providers and the consumers.⁸⁸ Human rights and human development were separate, though both concerns formed part of the four cornerstones of the United Nations Charter. These four elements (human rights, peace, development and international law), were, however, found to be linked.⁸⁹ Dias and Leckie engage the connection between these four cornerstone objectives by explaining what each means:

- i. Lasting peace must be built upon respect for the human rights of all people.
- ii. Development is the key to the progressive realization [sic] of human rights.

⁸³ See Nyamu-Musembi & Cornwall (2004) *IDS working paper* 234.

⁸⁴ See Nyamu-Musembi & Cornwall (2004) *IDS working paper* 234.

⁸⁵ Filmer-Wilson (2005) 23 *Netherlands Quarterly of Human Rights* 214.

⁸⁶ Uvin (2007) 17 *Development in Practice* 597.

⁸⁷ Laban (2007) 23 *International Journal of Water Resources Development* 356.

⁸⁸ Olowu (2014) 35 *Obiter* 219.

⁸⁹ Dias & Leckie (2002) UNDP *Occasional Paper 21* at <http://core.ac.uk/download/pdf/6248903.pdf> accessed 20 October 2015.

- iii. Human Rights provide the value framework and the criteria for accountability for all UN activities with respect to peace and development alike.
- iv. International law is the vehicle to achieve these purposes.⁹⁰

Apparently development cannot be separated from human rights. In other words, when human rights are merged with development, what evolves (human rights-based approach to development), is a situation where human rights become the standards for human development. The human rights-based approach “presents a framework for the pursuit of human development with human rights standards and principles guiding that process and international human rights obligations providing the objectives of development.”⁹¹

Academic writers in various disciplines such as health,⁹² education,⁹³ and journalism⁹⁴ have applied (in theory) a human rights-based approach to their disciplines.⁹⁵ London, who wrote on a human rights-based approach to health, has described this approach as holding states and other ‘moral duty bearers’⁹⁶ accountable; developing policies and programmes that are consistent with human rights, and facilitating legal redress in cases of violation to health.⁹⁷ Filmer-Wilson’s approach to access to water was through the lens of human rights-based approach to development.⁹⁸ She notes the essential nature of water to human life, economic development and environment integrity,⁹⁹ and observes, as argued by Olowu, a non-improvement in global access to water to inhibit progress in human development.¹⁰⁰

⁹⁰ Dias & Leckie (2002) (internet page 3).

⁹¹ Filmer-Wilson (2005) 23 *Netherlands Quarterly Human Rights* 213.

⁹² London (2008) 10 *health and human rights* 65.

⁹³ Dina *et al* (2007).

⁹⁴ Rose (2012) 19 *The Journal of International Communication* 85.

⁹⁵ ‘In theory’ refers to the academic research and writing, wherein the human rights-based approach is conceptualised and applied to various disciplines, and argued as a better approach towards enhancing the betterment of such disciplines. It is worth keeping in mind that a human rights-based approach is both theoretical and practical.

⁹⁶ Any state, institution, organisation or leader saddled with the responsibility of ensuring that rights of the people are met have a moral obligation to such people and are therefore ‘moral duty bearers’.

⁹⁷ London (2008) 10 *Health and Human Rights* 65.

⁹⁸ Filmer-Wilson (2005) 23 *Netherlands Quarterly Human Rights* 213-241.

⁹⁹ Filmer-Wilson (2005) 23 *Netherlands Quarterly Human Rights* 227.

¹⁰⁰ Olowu (2014) 35 *Obiter* 205.

The main focus of ‘rights-based approaches’ is the integration of the laws and policies with human rights principles.¹⁰¹ In other words, the principles of human rights are mainstreamed into laws and policies aimed at creating an enabling environment for development achievement.

Human rights-based approaches consider the steps or range of systems necessary, both at the national and international level, to promote, protect, respect and fulfil the human rights by all people as a basis for human development.¹⁰² This approach incorporates human rights standards into national law and integrates human rights principles into public administration and education in human rights and responsibilities.¹⁰³ In other words, a human rights-based approach focuses on social structure, the rule of law, empowerment, and structural change, in favour of the vulnerable and the most deprived.¹⁰⁴

3.4.2 ‘HUMAN RIGHTS-BASED’; ‘RIGHTS-BASED’; AND ‘HUMAN RIGHTS APPROACH’

The use of the terms ‘human rights-based approach’; ‘rights-based’; and ‘human rights approach’ varies as much as the authors that engage in its discourse. Some authors discuss a human rights-based approach through the lens of the right to development. According to Nyamu-Musembi and Cornwall, the human rights-based approach to development varies in definition and is inconsistent in use from one agency to another.¹⁰⁵ These authors analysed the definition as stated by various agencies,¹⁰⁶ and highlighted the definition of the United Nations Office of the High Commissioner for Human Rights (OHCHR), which has the underlying principles of empowerment, participation, equality, equity and non-discrimination.¹⁰⁷ Nyamu-Musembi and Cornwall consider various definitions of a human rights-based approach.¹⁰⁸ Amongst these definitions, there were variations in the use of terms

¹⁰¹ Gruskin *et al* 370 *The Lancet* 492.

¹⁰² Hausermann (2003) 10 *Water Nepal* 131.

¹⁰³ Hausermann (2003) 10 *Water Nepal* 131.

¹⁰⁴ Uvin (2004) 131.

¹⁰⁵ Nyamu-Musembi & Cornwall (2004) *IDS working paper* 234 12.

¹⁰⁶ Nyamu-Musembi & Cornwall (2004) *IDS working paper* 234 12.

¹⁰⁷ Nyamu-Musembi & Cornwall (2004) *IDS working paper* 234 12.

¹⁰⁸ Nyamu-Musembi & Cornwall (2004) *IDS working paper* 234 13.

such as ‘human rights approach’ and ‘rights-based approach’.¹⁰⁹ Nyamu-Musembi and Cornwall also note these terms to be common.¹¹⁰

To avoid inconsistency in the use of terms in this regard, I identify and define the terms adopted by various researchers whose works have been analysed in the current study. For this reason, I forward the question as to whether there is a distinction between a human rights based approach, a rights-based approach and a human rights framework. I also examine the use of these terms by various scholars.

The terms ‘human rights-based’, ‘rights-based’ and ‘human rights’ approach have been used by researchers mostly without recourse to a specific definition. As submitted by Filmer-Wilson, there is no fixed definition of the human rights-based approach,¹¹¹ while Nyamu-Musembi and Cornwall submit that “definitional differences” exist and “distinctions remain fuzzy.”¹¹² This being the case, what can we call a human rights-based approach? What is a rights-based approach? Are there differences between the two concepts, and, where does human rights framework fit in?

According to UNDP, a human rights-based approach is concerned with both development outcomes and the process by which rights are realised.¹¹³ It focuses on the relationships of obligations and rights, and on improving the capacity of the duty bearers who have the responsibility of respecting, protecting and fulfilling these rights to meet their obligations, and on improving the capacity of the rights holders to claim them.¹¹⁴ The focus of a human rights-based approach is on process, which refers to the way and manner a right is realised, basing its foundation on the principles of equality and non-discrimination, participation, and accountability.¹¹⁵ In other words, a human rights-based approach can be described

¹⁰⁹ Nyamu-Musembi & Cornwall (2004) *IDS working paper 234* 13.

¹¹⁰ Nyamu-Musembi & Cornwall (2004) *IDS working paper 234* 12.

¹¹¹ Filmer-Wilson (2005) 216.

¹¹² Nyamu-Musembi & Cornwall (2004) *IDS working paper 234* 12.

¹¹³ UNDP Mainstreaming Human Rights at

http://www.undp.org/content/undp/en/home/ourwork/environmentandenergy/focus_areas/water_and_ocean_governance/human-rights-based-approaches.html accessed 2 May 2015.

¹¹⁴ UNDP Mainstreaming Human Rights at

http://www.undp.org/content/undp/en/home/ourwork/environmentandenergy/focus_areas/water_and_ocean_governance/human-rights-based-approaches.html accessed 2 May 2015.

¹¹⁵ UNDP Mainstreaming Human Rights at

http://www.undp.org/content/undp/en/home/ourwork/environmentandenergy/focus_areas/water_and_ocean_governance/human-rights-based-approaches.html accessed 2 May 2015.

as a framework that sets out the guidelines to be used and applied towards ensuring the realisation of human rights. It is also safe to say that a human rights-based approach aims at strengthening the ability of the ‘moral duty bearers’ to fulfil their obligations to the people.¹¹⁶

A human rights-based approach takes into account the principles of human rights, such as participation, non-discrimination and transparency. While I argue that it may be possible to recognise a right to water without following a human rights-based approach to water, it is however impossible to adopt a human rights-based approach to water without first recognising water as a human right. This is because there is a thin line between a human right to water and the right to water. Where a human rights-based approach to water is adopted, human rights standards such as participation, empowerment and non-discrimination, are applicable. On the other hand, where a right to water is adopted without a human rights framework, the approach adopted might as well be an economic approach. In such a scenario, a person has a right to water, provided he or she pays for that water, viz. ‘water pays for water’. What distinguishes a human rights-based approach to water from other approaches to water is the human rights standard. Human rights standards are contained in the Universal Declaration of Human Rights, and the international human rights instruments.¹¹⁷ The human rights standard gives rise to the PANEL principles.¹¹⁸

While it is argued that a human rights-based approach is based on international human rights standard,¹¹⁹ a rights-based approach, on the other hand, is argued to be an approach based on the justiciable rights or entitlements that are already obtainable within a country.¹²⁰ A human rights-based approach is explained to

¹¹⁶ Any state, institution, organisation or leader saddled with the responsibility of ensuring that rights of the people are met have a moral obligation to such people and are therefore ‘moral duty bearers’.

¹¹⁷ UNICEF (2004) at <http://www.unicef.org/sowc04/files/AnnexB.pdf> 91 accessed 27 October 2014.

¹¹⁸ Frankovits (2006) 54.

¹¹⁹ WaterAid (2011) *WaterAid Discussion Paper* 17 at

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB4QFjAAahUKEwis00j32O7GAhXoF9sKHwQ6A_M&url=http%3A%2F%2Fwww.wateraid.org%2Fjp%2F-%2Fmedia%2Fpublications%2FRights-based-approaches-to-increasing-access-to-water-and-sanitation.pdf&ei=j4avVezMGUiv7Abk9IyYDw&usg=AFQjCNF2zY2b8ucz8vNPrpBGsJLU0BlM9g&bvm=bv.98197061,d.ZGU accessed 22 July 2015.

¹²⁰ WaterAid (2011) *WaterAid Discussion Paper* 17.

include a moral dimension by including international human rights law into policies and debates within a country, even if such a right has not been included in the country's legislation. In other words, a rights-based approach is seen as a subset of a human rights-based approach.¹²¹ Boesen and Martin also defined the 'rights-based' approach (to development) as "a framework that integrates the norms, principles, standards and goals of international human rights system into the plans and processes of development."¹²² Boesen and Martin's definition of a 'rights-based' approach is very much like the definition of a 'human rights-based' approach as defined by WaterAid.¹²³ The UNDP conceptualises the rights-based approach (to development) as providing both the conceptual and practical framework for the realisation of human rights through development process.¹²⁴

Winkler notes that discussions on human rights-based approaches exist in the context of development cooperation.¹²⁵ Her analysis here is that when water is discussed in this context, three actors are involved: the individual, the state and the development agency/organisation as a facilitator. On the other hand, she argues that the involvement of two actors is evident in the human rights framework.¹²⁶ Winkler's exposition does not mention human rights-based approach; rather, she terms her approach as the human rights framework, and an approach based thereon.¹²⁷ She argues that the human rights framework mean that human rights standards are the set objectives of water management and that the measures to reach these objectives are at the discretion of governments.¹²⁸

A rights-based approach finds its substance in promoting human dignity through the development of claims that seek to empower excluded groups and that seek to create socially guaranteed improvements in policy (including but not limited to legal frameworks).¹²⁹ It brings about a relationship between political and social

¹²¹ WaterAid (2011) *WaterAid Discussion Paper* 17-18.

¹²² Boesen & Martin (2007) *Danish Institute for Human Rights Denmark* 6.

¹²³ WaterAid (2011) *WaterAid Discussion Paper* 17.

¹²⁴ Nyamu-Musembi & Cornwall (2004) *IDS Working Paper* 234 17.

¹²⁵ Winkler (2014) 212; See also Frankovits (2002) *17 Praxis - The Fletcher Journal of Development Studies* 9.

¹²⁶ Winkler (2014) 213.

¹²⁷ Winkler (2014) 213

¹²⁸ Winkler (2014) 214.

¹²⁹ Uvin (2004) 163.

processes, by giving life to the law.¹³⁰ Rights-based approaches suggest a deeper approach, of changing law into principles, making rights more operational than merely declaratory.¹³¹

Eyben has also examined the distinction between the terms ‘human rights-based approach’ and ‘rights-based approach’.¹³² She argues that the human rights-based approach emphasises legal codification and universality of rights, while the term ‘rights based-approach’ emphasises equity, justice and entitlement.¹³³ If the distinction Eyben makes is to be considered, then the terms ‘human rights approach’ and ‘rights-based approach’ should be unified as ‘human rights-based approach’. This is because a legal codification of rights cannot in itself guarantee human rights; nor can there be an emphasis on equity, justice and entitlement without a framework.

Olowu, in his book, tries to clarify the use of the terms ‘rights-based approach’ and ‘integrative-rights based approach’.¹³⁴ He notes that since the 1990s, groups such as development theorists, policy experts and human rights advocates have addressed development in the language of rights. The commitment of international non-governmental organisations in including human rights into their work on development is what has brought about the rights-based approach.¹³⁵

The use of either of these terms would be insufficient to address the present discourse on the human rights-based approach to water; hence the need to conceptualise a human rights-based approach to water.

Against the backdrop that a rights-based approach is applied at the national level and a human rights approach is applied at an international level, I suggest a fusion of these terms as a human rights-based approach. Applying a human rights-based approach to the right to water would thus mean involving an international standard or human rights principles at the national level. A human rights-based

¹³⁰ Gready (2008) *18 Development in Practice* 736.

¹³¹ Gready (2008) *18 Development in Practice* 736.

¹³² Nyamu-Musembi & Cornwall 14.

¹³³ See Eyben’s position as analysed in Nyamu-Musembi & Cornwall (2004) *IDS working paper* 234 14.

¹³⁴ See generally Olowu (2009).

¹³⁵ Olowu (2009) 15.

approach to water being applied to the right to water is preferable (to a rights-based approach) for two reasons:

- i. Terms such as ‘human rights framework’ and ‘rights-based approach’ are derived from the human rights-based approach and irrespective of what terms is adopted by a given researcher, he or she would still be talking about the same principles derived from human rights. In other words, the human rights-based approach as well as these other terms share the same base of principles with human rights.¹³⁶
- ii. The human rights-based approach, which Eyben¹³⁷ and Winkler¹³⁸ have argued is considered at international level, is in line with the provisions of Article 2 of the ICESCR, which states that state parties will take steps “individually and through international assistance.” Adopting a human rights-based approach to development through the lens of the right to water only buttress the need to “take all appropriate measures”, and includes a desire to incorporate “international assistance”.¹³⁹

3.4.3 HUMAN RIGHTS-BASED APPROACH TO WATER

A human right to water and a human rights-based approach to water should not be taken to mean the same thing, and these terms should not be used interchangeably. A human right to water is ‘the what’, and a human rights-based approach is ‘the how’, where a human right to water describes what *type* of water is in question, what *quality* of water is expected, and what *category of people* is affected. A human right to water implies that the state must set a priority for the fulfilment of access to water as a basic need.¹⁴⁰ A human rights-based approach to water, on the other hand, concerns *the means by which* this water of good quality and sufficient quantity is made accessible to everyone, especially persons who are most vulnerable.

¹³⁶ WaterAid (2011) *WaterAid Discussion Paper*.

¹³⁷ Nyamu-Musembi & Cornwall (2004) 13-14.

¹³⁸ Winkler (2014) 212-213.

¹³⁹ See art 2 ICESCR.

¹⁴⁰ Winkler (2014) 214.

While the normative content of the human right to water refers to the quantity and quality of water available and accessible for domestic use,¹⁴¹ a human rights-based approach to water is described on two levels, that is, at a theoretical level and a practical level, respectively.¹⁴² At a theoretical level it constitutes a conceptual framework for human development, aimed at promoting and protecting human rights and at a practical level, it encompasses a vast range of interpretations, methodologies and practices amongst the United Nations agencies, which can be applied domestically or regionally.¹⁴³

The relationship between a human right to water and a human rights-based approach to water takes form using the application and monitoring schemes set out to achieve the right to water. The link between the human right to water and a human rights-based approach to water is found in the explanation of the UN Common Understanding, under which United Nations agencies could ensure consistency on the application of a common programming at a global, regional and national level in human rights concerns.¹⁴⁴ In a human rights-based approach, that which determines the relationship between individuals and states is human rights.¹⁴⁵ What then does a human rights-based approach to water entail?

A human rights-based approach to water refers to the realisation of the human right to water using the international human rights framework as the standard.¹⁴⁶ A human right to water and human rights-based approach to water go beyond a minimum target such as that set by the Millennium Development Goal (MDG).¹⁴⁷ A human rights-based approach to water requires a progressive realisation, and has

¹⁴¹ General Comment 15 4-7.

¹⁴² Tremblay (2011) 51 *Natural Resources Journal* 316-317.

¹⁴³ Nyamu-Musembi & Cornwall (2004) 12-13. These authors have identified some of the definitions of the human rights-based approach as interpreted by various agencies in the interpretations of these agencies.

¹⁴⁴ The Human Rights Based Approach To Development Cooperation: Towards A Common Understanding among UN agencies at <http://hrbportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies> accessed 12 April 2015.

¹⁴⁵ UNDP (2006) at http://waterwiki.net/images/e/ee/Applying_HRBA_To_Development_Programming.pdf accessed 3 May 2015.

¹⁴⁶ Winkler (2014) 214.

¹⁴⁷ Millennium Development Goals and Beyond 2015 at <http://www.un.org/millenniumgoals/enviro.html> accessed 30 October 2015; see Generally Winkler (2014) 215-217 for the distinction between the MDG and the human rights-based approach.

its emphasis on targeting the most vulnerable in a society.¹⁴⁸ Countries that are signatories to any of the human rights instruments have a legal and moral obligation to ensure the realisation of such rights for their citizens. The human right to water had its roots in various international human rights instruments, such as the ICESCR,¹⁴⁹ CEDAW,¹⁵⁰ CRC¹⁵¹ and CRPD,¹⁵² before its affirmation by the United Nations General Assembly.¹⁵³ CEDAW, CRC and CRPD are specific human rights instruments relating to the most vulnerable in the society, viz. women, children and persons with disabilities.

Although the human right to water has been recognised under international human rights law, and countries are bound to ensure access to water for their citizens, international human rights do not specify a method of application towards ensuring the right to water in any country. In other words, a country may decide to begin the process of realising access to water through carrying out repairs of old pipes to prevent waste and pollution, while another country may decide to start its process of ensuring access to water by laying pipes in rural communities. Countries could do this with or without having recognised a human right to water. This approach to ensuring access to water may either be the economic approach, which does not usually benefit the poor, or the legislative approach, which may include ‘directive principles’ instead of a justiciable right. In fact, having a good water system refers to water governance per se, where the relationship between a human rights-based approach to water and water governance is closely knitted. I will draw the distinction shortly.

Specific procedures on how a country ensures access to water are not established by international human rights. However, at an international level, there are human rights monitoring mechanisms such as the Special Rapporteurs, established to help promote and ensure specific human rights issues.¹⁵⁴

¹⁴⁸ Winkler (2014) 216.

¹⁴⁹ Art 11 & 12 ICESCR was interpreted to include the right to water. See also General Comment 15.

¹⁵⁰ Art 14 (2) (h) (CEDAW).

¹⁵¹ Art 24 (1) (c) CRC.

¹⁵² Art 28 CRPD.

¹⁵³ United Nations General Assembly Resolution A/64/L.63/REV.1.

¹⁵⁴ A special rapporteur is an independent expert appointed by the Human Rights Council to examine and report back on a country situation or specific human rights theme. The Special Rapporteur on human right to water examines crucial issues on water and provides

Simply put, a human rights-based approach to water is a theoretical and conceptual framework, based on human rights standards, and under which the human right to water can be analysed, and progressive realisation monitored. Furthermore, a human rights-based approach to water establishes the claims and the obligations to ‘respect, protect and fulfil’, and commits all water management systems to the guarantee of the basic human need for water, providing the individual water user with the instrument/s to enforce this interest.

3.4.4 PRINCIPLES OF A HUMAN RIGHTS-BASED APPROACH TO WATER

The principles of a human rights-based approach are derived from the Universal Declaration of Human Rights of 1948.¹⁵⁵ The human rights principles of universality and inalienability, indivisibility, interdependence and inter-relatedness, non-discrimination and equality, participation and inclusion, accountability and the rule of law form the basis for a human rights-based approach.¹⁵⁶ These principles have been given the acronym PANEL, which stands for participation, accountability, non-discrimination, empowerment, and legal redress.¹⁵⁷ These PANEL principles provide a framework under which the application of the human rights to water may be monitored and realised. These principles are discussed as they relate to access to water as follows.

3.4.4.1 Participation

One of the characteristics of a human rights-based approach to water is that it invites the active participation of everyone in an issue that concerns their lives.

recommendations to governments, the United Nations and other stakeholders. See United Nations Human Rights (Office of the High Commissioner for Human Rights) ‘Special Rapporteur on the human right to safe drinking water and sanitation’ at <http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/SRWaterIndex.aspx> accessed 18 April 2015. Catarina de Albuquerque was the first appointed special rapporteur on the human right to safe drinking water and sanitation.

¹⁵⁵ United Nations Environment Programme (UNEP) at <http://www.unep.org/documents.multilingual/default.asp?DocumentID=43&ArticleID=4532&l=en> accessed 12 April 2015; Frankovits (2002) 17 *Praxis* 3.

¹⁵⁶ Carpenter (2012) 34 *Human Rights Quarterly* 480.

¹⁵⁷ Frankovits (2006) 54. The last principle ‘Legal redress’ is termed differently for example Frankovits notes the L as ‘Linkage to other human rights’ See Frankovits (2006) United Nations Educational, Scientific and Cultural Organization (UNESCO) at <http://unesdoc.unesco.org/images/0014/001469/146999e.pdf> accessed 14 July 2015 54; Donald refers to it as ‘Legality’ See Donald (2012) (p. 13) at <http://www.humanrightsinhealthcare.nhs.uk/Library/a-z/HUMAN%20RIGHTS%20IN%20HEALTHCARE%20EVALUATION%20GUIDE%20ALICE%20DONALD%20NOVEMBER%20EVENT.pdf> accessed 29 October 2015.

Many conventions or United Nations instruments,¹⁵⁸ even the ICCPR, guarantees the right to take part in the conduct of public affairs and to have access to public services.¹⁵⁹ The CEDAW,¹⁶⁰ the CRPD,¹⁶¹ and the CRC¹⁶² all provide for the rights of women, persons with disabilities and children (respectively) to participate and express their views.¹⁶³ The principle of participation, which may be direct or indirect, is expected to be free and meaningful.¹⁶⁴ Direct participation will mean involvement in decision-making of all people concerned, including women, children, persons with disabilities,¹⁶⁵ to give their opinions, suggestions or express their concerns such that it influences decision making.¹⁶⁶ Indirect participation will include access to information on all water issues, with an avenue to complain if and when necessary. Participation is expected to be inclusive, such that people can express their concern, or demands, which can also influence decision-making. Participation is broad-based, and incorporates every human being, irrespective of status, sex, age or religion, to participate as right-holders and not as mere recipients.¹⁶⁷

Winkler, in addressing the principle of participation as a requirement of a human rights framework, states that participation of all stakeholders, including marginalised persons discriminated against in decisions regarding water allocation, must be enabled.¹⁶⁸

¹⁵⁸ Darrow & Tomas (2005) 27 *Human Rights Quarterly* 471 & 475.

¹⁵⁹ Art 25 ICCPR; CCPR General Comment No. 25: Art 25 (Participation in Public Affairs and the Right to Vote). The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service Adopted at the Fifty-seventh Session of the Human Rights Committee, on 12 July 1996, 2 CCPR/C/21/Rev.1/Add.7, General Comment No. 25 at <http://www.refworld.org/docid/453883fc22.html> accessed 28 October 2015; see also Winkler (2014) 219.

¹⁶⁰ See arts 7 13& 14(2) of CEDAW views, the right to express those views in all matters concerning such a child must be given full weight see art 12 (1). Furthermore art 23 (1) of the CRC also recognises the need of a child with disabilities CEDAW which recognises the right of women to participate.

¹⁶¹ Art 29 of CRPD also states equal participation of persons with disabilities.

¹⁶² Art 12 of the CRC does not expressly state 'participation', but it explains that where a child is capable of forming his or her own views such a child's active participation in the community should be facilitated.

¹⁶³ Winkler (2012) 219.

¹⁶⁴ Art 2 (3) Declaration on the right to development.

¹⁶⁵ Winkler (2014) 220.

¹⁶⁶ Gready & Ensor (2005) in Gready & Ensor (eds) 25.

¹⁶⁷ Winkler (2014) 220.

¹⁶⁸ Winkler (2014) 220; Filmer-Wilson (2005) 221 233-234.

The principle of participation encourages public participation in formulating and implementing water strategies and plans of action.¹⁶⁹ This principle is based on two criteria: participation in decision-making processes, and access to relevant information.¹⁷⁰ In allowing people to participate adequately, information has to be conveyed in a language (including sign language, where appropriate) that they understand. Participation refers to the involvement of all stakeholders in the decision-making, to express their demands, views and concerns on access to water.¹⁷¹ The stakeholders at each level of decision-making are expected to have all the information needed to enable them to take part and contribute positively to the outcome of access to water.¹⁷² Participation must extend to all aspects of community life, including the definition and formulation of development policies and programmes, as well as their implementation, monitoring and supervision.¹⁷³ Frankovits argues that for development agencies fostering democracy and human rights, participation is a prerequisite to ensure stability.¹⁷⁴ General Comment 15 states that even where water services are controlled by third parties, states parties must encourage the participation of the public to prevent an abuse or compromise of the human right to water.¹⁷⁵ On the issue of relevant information, General Comment 15 states that individuals and groups ought to be given “full and equal access to information concerning water, water services and the environment by whichever authority holding the information such as public authorities or third parties.”¹⁷⁶

There are several court cases on the principle of participation at the national level in Africa, America and Europe, as well as at the regional level.¹⁷⁷ I give two examples here in Africa. In the case of *Federation for sustainable environment and others v Minister of water affairs and others*,¹⁷⁸ water supply was contaminated by

¹⁶⁹ Par 24 & 48 General Comment 15.

¹⁷⁰ WaterAid (2011) *WaterAid Discussion Paper* 44.

¹⁷¹ Winkler (2014) 221; Filmer-Wilson (2005) 23 *Netherlands Quarterly of Human Rights* 217.

¹⁷² Frankovits (2002) XVII PRAXIS *The Fletcher Journal of Development Studies*.

¹⁷³ The Limburg Principles on the implementation of the International Covenant on Economic Social and Cultural Rights UN Doc E/CN/.4/1987/17; see also Frankovits (2002) 221.

¹⁷⁴ Frankovits (2002).

¹⁷⁵ Para 24 General Comment 15.

¹⁷⁶ Para 48 General Comment 15.

¹⁷⁷ See WaterLex & WASH United (2014) 14.

¹⁷⁸ (2012) High Court (North Gauteng, Pretoria) 3567/12 ZAGPPHC 128 (hereafter *Federation for Sustainable Environment case*) available at <http://www.saflii.org/za/cases/ZAGPPHC/2012/128.html> accessed 29 October 2014.

‘acid mine water’ in Silobela and Carolina. Twenty tanks were brought in from neighbouring towns so as to provide water to these localities.¹⁷⁹ Seven of these tanks were set up in Silobela, which proved inadequate to supply drinking water, and several tanks were not refilled. The distance to access water from these tanks was also in question.¹⁸⁰ The applicants, in this case, applied to the court for mandamus relief, alleging that the lack of access to a sufficient and reliable supply of potable water constituted a breach of their right to water.¹⁸¹ They also petitioned the court to order the respondents in this case “to engage actively and meaningfully”¹⁸² with them on steps taken to ensure their access to drinking water and information on the volume and regularity of the water supply. Noting that Silobela still bore the brunt of the apartheid legacy, and was under-developed and under-resourced, the court ruled that “the State is enjoined to take measures that are progressively geared towards eradicating the incongruity in living areas of communities, structured on racial divide by the hitherto apartheid regime.”¹⁸³ The court considered Section 152 of the 1996 Constitution and the objective to provide sustainable services to communities and stated that “the municipality must strive to resolve as speedily as possible the water problem in Silobela and Carolina” and must devise a progressive plan as to how this is to be done, with the full engagement of the community and access to information, since the respondents are responsible to the community.¹⁸⁴ The court, in granting the claims of the applicants, ordered that the respondents must engage actively with the applicants by also letting them know the place, time and quantity of water that would be made available to them, as well as how regular this would be. The measures adopted were to be reported to the court within a month of the order of the court.¹⁸⁵

¹⁷⁹ Para 4 *Federation for sustainable environment case*.

¹⁸⁰ Para 5 *Federation for sustainable environment case*.

¹⁸¹ Para 5 & 6 *Federation for sustainable environment case*.

¹⁸² Yacoob J in the case of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and others* 2008 (3) SA 208 (CC), states that “meaningful engagement” is a two-way process, in which involved parties talk to each other meaningfully to achieve certain objectives, where such engagement has the potential to contribute towards a resolution of disputes. See Para 14 & 15.

¹⁸³ Para 17 *Federation for sustainable environment case*.

¹⁸⁴ Para 24 *Federation for sustainable environment case*.

¹⁸⁵ Para 26 *Federation for sustainable environment case*.

In this case, the principle of participation was anchored on access to sufficient information regarding issues that concerned the community and the opportunity to make their contribution. Also, in the case of *Beja and others*,¹⁸⁶ the court notes that effective interactive participation is a requirement under the National Housing Code and the Upgrading of Informal Settlement Programme (UISP).¹⁸⁷ The court also notes that section 2(1) of the Housing Act sets out general principles based on the three spheres of government, prioritising the needs of the poor and ensuring that “meaningful engagement” is engaged with the affected communities.¹⁸⁸

3.4.4.2 Accountability

The principle of accountability under a human rights-based approach is grounded in the identification of duty bearers and rights holders.¹⁸⁹ The duty bearers in this instance are persons saddled with the responsibility of providing the water (usually the state). For the promotion and protection of human rights, accountability cannot be neglected. This principle of human rights focuses on the relationship between the duty bearers and the right-holders and emphasises that the provision of water is not a charitable act.¹⁹⁰ Accountability has two core aspects: answerability - the right to make claims and demand a response; and enforceability - the mechanisms for delivering and for sanctioning non-responsiveness.¹⁹¹ Winkler refers to these two aspects as the relationship between the right holders (the people or water users) and the duty bearers (the government or the water providers).¹⁹² The principle of accountability under a human rights-based approach to water allows the right-holders to hold government accountable.¹⁹³

¹⁸⁶ *Beja and others v Premier of the Western Cape and others* (2011) High Court (Western Cape) 21332/10 ZAWCHC 97 at <http://www.saflii.org/za/cases/ZAWCHC/2011/97.html> accessed 22 October 2014.

¹⁸⁷ Para 86 *Beja and others*.

¹⁸⁸ Para 53 *Beja and others*. See also sec 2 (1) (l) Housing Act No 107 of 1997, which provides for the active participation of all relevant stakeholders in housing development.

¹⁸⁹ Darrow & Tomas (2005) 27 *Human Rights Quarterly* 518; Winkler (2014) 224.

¹⁹⁰ Winkler (2012) 224.

¹⁹¹ Newell in Newell & Wheeler (Eds) (2006) 39; See also Smith (2007) 21-36, in which he discusses the two aspects of accountability, viz. enforcement and answerability, in the context of politics and election.

¹⁹² Winkler (2014) 224.

¹⁹³ Winkler (2014) 224.

According to Uvin, accountability is what distinguishes charity from claims.¹⁹⁴ Uvin argues that the distinction between claims and charity (also otherwise known as the rights approach and the needs approach respectively), is with a focus on mechanisms of accountability.¹⁹⁵ This is because, if there are claims, then methods for holding violators must also exist.¹⁹⁶ If a method is absent, the claims lose meaning.¹⁹⁷ In other words, there must be a law or a policy that recognises the right, and there must be an institution that can interpret and enforce such rights.

Accountability as a principle of a human rights-based approach to water identifies the relationship between the people who are the rights holders, and the government who holds water in public trust and are referred to as duty bearers. The government usually treats basic needs (such as water and education) of the people as a charitable act.¹⁹⁸ The principle of accountability under a human rights-based approach guards against this as it provides the people with an instrument to enforce their right.

The principle of accountability also touches on a non-violation of the right to water and a 'progressive realisation' of this right. In the case of *Bushula v Ukhahlamba*,¹⁹⁹ the court notes that WSA was enacted to protect the constitutional right to water.²⁰⁰ The respondents in this case, installed water pipes in 2001, supplied potable water from communal taps in 2004 and 2008, water supply service stopped without notice to the community.²⁰¹ In February 2009, the respondent supplied water by truck cartage, which was insufficient and irregular, and also came to a stop in June 2009.²⁰² The respondents claimed that pipelines installed in the area were undertaken under the drought relief fund and that the quality of water forced production than the capacity for which it was designed, as a result of unauthorised connections by the communities. This affected the

¹⁹⁴ Uvin (2004) 131; Frankovits & Earle (2000) 7.

¹⁹⁵ Uvin (2004) 131.

¹⁹⁶ Uvin (2004) 131.

¹⁹⁷ Uvin (2004) 131.

¹⁹⁸ Hansen & Sano (2006) in Andreassen & Marks (eds) 36; Uvin (2004) 129; Olowu (2008) 4 *TD: The Journal for Transdisciplinary Research in Southern Africa* 81.

¹⁹⁹ *Mandla Bushula v Ukhahlamba District Municipality* (2012) High Court (Eastern Cape Division) 2200/09 ZAECGHC 1 at <http://www.saflii.org/za/cases/ZAECGHC/2012/1.html> accessed 2 November 2015.

²⁰⁰ Para 4 *Bushula v Ukhahlamba*.

²⁰¹ Para 9 *Bushula v Ukhahlamba*.

²⁰² Para 10 & 11 *Bushula v Ukhahlamba*.

quantity of water produced by the plant, which was now also of a low grade, and unhygienic. The respondents decreased the quantity of water produced to increase quality, on advice by scientific analysis.²⁰³ The court held in this case that the respondents took reasonable measures for the progressive realisation of access to water and that the problems that existed were caused by the community, by diverting water into their household, without the consent of the Municipality.²⁰⁴ Respondents, in this case, took adequate measures to ensure that the people of the community were not left without the supply of water.

3.4.4.3 Non-discrimination

The principle of non-discrimination is another fundamental principle of international human rights law.²⁰⁵ The ICESCR provides that the rights contained therein are exercised without discrimination.²⁰⁶ International human rights instruments, amongst some other international human rights instruments, aim to eliminate ‘discrimination’ against women,²⁰⁷ and persons with disabilities.²⁰⁸

The principle of non-discrimination is an important part of international human rights law.²⁰⁹ The ICESCR guarantees the exercise of human rights without discrimination.²¹⁰ Under a human rights-based approach, non-discrimination requires an analysis of the underlying challenges, which includes addressing the political and power relationships as well as examining how laws, policies and institutions affect access to water.²¹¹ The principle of non-discrimination under a human rights-based approach to water addresses, in particular, the marginalised and disadvantaged.²¹² There is no doubt that water is unequally distributed across the surface of the earth. People living in water rich areas should not be the only

²⁰³ Para 13 *Bushula v Ukhahlamba*.

²⁰⁴ Para 18 *Bushula v Ukhahlamba*.

²⁰⁵ Art 2 (2) ICESCR & Winkler (2012) 221.

²⁰⁶ Art 2 (2) ICESCR; see also Bourquain (2008) 102.

²⁰⁷ CEDAW generally, and in particular Art 14 (2) (1), which provides a list of areas in which women should not be discriminated against, in particular water.

²⁰⁸ Art 3 (b) of the CRPD mentions ‘non-discrimination’ as one of its principles. See generally the CRPD and in particular Art 5, which deals with equality and non-discrimination, and Art 28 (2)(a), which provides that state parties ensure equal access to clean water services, which should be affordable and appropriate devices, and that other assistance for disability-related needs ought to be ensured.

²⁰⁹ Winkler (2012) 221.

²¹⁰ Art 2 (2) ICESCR.

²¹¹ Filmer-Wilson (2005).

²¹² Winkler (2012) 223.

persons to enjoy potable water, as everyone needs same amount of water for their survival and good health. Based on this principle, a human rights-based approach to water seeks to prohibit discrimination, and it requires that all people be given sufficient water for their needs.²¹³

The well-known case of *Mazibuko*²¹⁴ is discussed here, as it pertains to the principle of non-discrimination. The applicants argued that the introduction of pre-paid meters in Soweto, but not into white suburbs elsewhere, discriminates between “poor black South Africans and wealthy white South Africans”, violating the prohibition of unfair discrimination in Section 9(3) of the 1996 Constitution.²¹⁵ To determine whether or not the discrimination was unfair, the court considered the people targeted the purpose for which the prepaid meter policy was introduced and the extent to which the policy was harmful.²¹⁶ Although on the grounds of the existence of deep inequality in South Africa, the respondents conceded that a differential treatment of townships might have an adverse impact on the grounds of race, and as such, constitutes indirect discrimination, which they also argued may be sometimes necessary.²¹⁷ The court, however, held while considering the three purposes of who it affects, the purpose of the policy and the extent of harm, that the people affected “have been the target of severe unfair discrimination in the past.”²¹⁸ However, the purpose for which it was introduced was to eradicate severe water losses, which constitute a legitimate purpose.²¹⁹ On the extent of harm, the court stated that “it is not clear at all that a pre-paid meter system was harmful.”²²⁰ Although I analyse this case in Chapter Five of this study in further detail, I will here express agreement with the court that a prepaid meter may not be unlawful if the aim is to prevent waste and curtail the amount of water unaccounted for. The argument of the applicants on the unlawfulness of the installation of prepaid meters were that they are not authorised by law; they resulted in unauthorised water cut-offs; and that the manner in which they were

²¹³ De Albuquerque (2012) 12.

²¹⁴ *Mazibuko and others v city of Johannesburg and others* CCT 39/09 (2009) ZACC 28.

²¹⁵ Para 106 & para 148 *Mazibuko case* (CC).

²¹⁶ Para 150 *Mazibuko case* (CC).

²¹⁷ Para 151 *Mazibuko case*(CC).

²¹⁸ Para 150 *Mazibuko case* (CC).

²¹⁹ Para 150 *Mazibuko case*(CC).

²²⁰ Para 150-154 *Mazibuko case* (CC).

introduced was also unlawful.²²¹ Although the WSA did not in particular mention prepaid meters, it did allow water providers to discontinue water services once they may have provided for the circumstances under which water may be limited or discontinued, and stipulated procedures for limiting or discontinuing water services,²²² and these activities of the water providers must be provided in terms of conditions which must be accessible to the public.²²³ In this case, the respondents provided for the conditions of water services and the installation of prepaid meters.²²⁴ Although the applicants argued that a prepaid meter is unlawful, as it halts water supply, the provision of the national and municipal law, however, makes it lawful for water supply to be discontinued if adequate measures were taken.²²⁵ Regarding the manner in which prepaid meters were installed, the Constitutional Court showed that the evidence presented by the respondents detailing the process in which the implementation was carried out was “thorough and comprehensive.”²²⁶ The court at this point agreed that there was, in fact, a possibility that Mrs. Mazibuko²²⁷ was not “fully or properly informed”²²⁸ on the choices she had made on prepaid meters and a standpipe, still the implementation of the project which brought about the installation of prepaid meters cannot be said to be unfair.²²⁹ However, if the manner in which it was introduced was unfair, then such an installation can be said to be discriminatory, especially if it is shown that a discrimination between “poor, black South Africans and wealthy, white South Africans”.²³⁰ Arguably, the ruling of the Constitutional Court that there was no discrimination should stand, as Soweto was only one out of the four “deemed consumption areas with poor black residents”,²³¹ whereas long as these other three deemed consumption areas with poor black residents were not discriminated

²²¹ *Mazibuko* (CC) para 105.

²²² Sec 4 WSA particularly (2) (c) (iv) & (v).

²²³ Sec 4 WSA (1) & (2) (b).

²²⁴ See Sec 3 Water Services By-laws 2003 as set out in Para 78 *Mazibuko* (CC).

²²⁵ Sec 4 WSA; sec 21 (1) (f) WSA; Sec 11 City Water Services By-laws as set out in Para 116 footnote 72 *Mazibuko* (CC).

²²⁶ *Mazibuko* (CC) 132 133 & 134.

²²⁷ The main applicant in this case, who passed away sometime after the ruling at the High Court; see also Para 134 *Mazibuko* (CC).

²²⁸ Para 134 *Mazibuko* (CC).

²²⁹ Para 134 *Mazibuko* (CC).

²³⁰ *Mazibuko*(CC) Para 148.

²³¹ Deemed consumption areas refer to townships established by the former apartheid government for black residents. The four deemed consumption areas are Soweto, Alexandra, Ivory Park and Orange Farm. See *Mazibuko* (CC) Para 145; *Mazibuko* (CC) Para 149.

against, it would be difficult for Soweto to claim discrimination on this basis, particularly as it has been established that the problem of unaccounted for water was most acute in Soweto.²³²

3.4.4.4 Empowerment

The empowerment principle is based on the process where the disadvantaged in society can exercise their rights and are afforded access to resources.²³³ According to Winkler, empowerment expands people's capabilities and freedoms to participate in, negotiate with and hold accountable institutions concerned with water, which affects their lives.²³⁴ In other words, for people to be empowered there must be laws setting out their rights; there must also be laws identifying the duty bearers that apportion and state their functions; and there must also be access to information such that the people are made aware of those issues that concern them.²³⁵

In regards to this principle of the rights-based approach to water, I argue that the existence of concrete laws and the participation of the people and the opportunity to seek redress in court all form part of the principle of empowerment.

3.4.4.5 Legal redress

This principle of the human rights approach allows the judicial enforcement of the right to water. This principle allows the duty bearers to be accountable when a right to water has been violated. Although it is argued that legal enforcement should be a last resort,²³⁶ this feature of a human rights-based approach places emphasis on the legal recognition of the human right to water. Although water is recognised as a right under international human rights law, it is not a human right under certain national legislation.²³⁷ Water has been recognised expressly under a few laws and it has been recognised implicitly under some more. Some other provisions of international law have been interpreted to include a right to water.²³⁸

²³² *Mazibuko* (CC) Para 146.

²³³ Luttrell *et al* (2009) 2 at <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/5500.pdf> accessed 7 July 2015.

²³⁴ Winkler (2012) 228-229.

²³⁵ WaterAid (2011) *WaterAid Discussion Paper* 44.

²³⁶ Winkler (2012) 229.

²³⁷ Nigeria does not recognise water as a human right under the national laws.

²³⁸ In *SERAC's* case, water has been interpreted to be included under the right to environment.

This principle ensures that the functions and duties of duty bearers and the water providers are codified and that an institutional and legal framework exists. It recognises the existence of the right to water as a legal right and gives people the opportunity to seek legal remedies when they are denied their rights. Courts serve as an avenue where such issues can be corrected. Legal redress is a critical principle of a human rights-based approach, where, in such case, those other principles of a human rights-based approach are denied, then recourse can be made in court to correct this.

The principles of a human rights-based approach to water are each dependent of the other and are related. Legal redress, for example, suggests that there should be laws and policies or a legal framework according to which people can enforce their interest against the state, enforcing an interest against the state will mean that a state is accountable to the people.²³⁹ Accountability in turn involves a participatory relationship between both duty bearers and right holders, as the people also take part in decision-making.²⁴⁰ This participation involves everyone - the women, children and persons with disabilities. The involvement of everyone, especially the vulnerable, enhances the principle of non-discrimination. Finally when there is a legal and institutional framework which involves the participation of everyone, then the people can be said to have been empowered since they are aware of their rights and have been armed with the necessary mechanisms to ensure redress should there be a violation.

3.3.5 HUMAN RIGHTS-BASED APPROACH TO WATER AS A CONTEMPORARY REFLECTION OF GOOD WATER GOVERNANCE

A human rights-based approach is a contemporary reflection of water governance. Water governance has received definition by various authors. The most accepted definition is that given by Roger and Hall, where they described water governance as

The range of political social and economic and administrative systems that are in place to develop and manage water

²³⁹ Bourquain (2008) 65.

²⁴⁰ WaterAid (2011) *WaterAid Discussion Paper* 44-45.

resources and the delivery of water services, at different level of society.²⁴¹

There is much similarity between a human rights-based approach to water and good water governance. This is reflective in the key concepts of the water governance framework as analysed by Frank and Cleaver.²⁴²

While some of the principles of a human rights-based approach to water, viz. accountability and participation, form part of the principles of water governance, there exists one major difference. While a human rights-based approach to water prioritises water for domestic use, as well as water needed for the realisation of other human rights, such as the right to health, a basic minimum set aside for the use of the poor and vulnerable²⁴³ thus making the obligation of states to provide to be of immediate effect, Water governance, on the other hand, as deduced from the definition, is focused on all other uses of water, and especially the laws and policies set out to develop and manage water resources in general, along with delivery at different levels of society.²⁴⁴ In other words, water governance deals with the holistic use of water, while a human rights-based approach to water deals with water for domestic use, which constitutes one of the other uses of water. Although the human right to water has also been considered from an extraterritorial perspective where the question of violation of the right to water in one state is caused by a co-riparian state,²⁴⁵ this thesis, however, remains faithful to the international discourse of the meaning of the human right to water, which does not consider extraterritorial violation of the right to water.²⁴⁶ The right to water within states does not necessarily prioritise domestic water supply and while the human rights-based approach to water prioritises domestic water, water governance does not prioritise the use of water. It uses the political, social, economic, and administrative systems available to develop and manage water resources. While General Comment 15 stresses that water is needed for other uses, it reiterates that priority in allocation ought to be given to the right to water for

²⁴¹ Rogers & Hall (2003) Global Water Partnership 16.

²⁴² Franks & Cleaver (2007) 293.

²⁴³ Para 37 General Comment 15.

²⁴⁴ Rogers & Hall (2003) Global Water Partnership 16.

²⁴⁵ Bulto (2013) 12.

²⁴⁶ See Generally General Comment 15.

personal and domestic use, and to water resources required to prevent starvation and disease.²⁴⁷ The priority given to water for domestic use, in other words, is central to life.²⁴⁸

Current water crises all over the world have been attributed to a failure in water governance, rather than to a lack of access to water per se.²⁴⁹ In other words, because of the failure of effective water governance in a majority of current states, all other uses of water are bound to be affected, in particular, domestic water supply. When there is no proper management of other water uses or water resources in general, then the ability for a basic minimal usage of water (viz. water for domestic use) is likely to suffer the most.

As stated by Miranda *et al.*, water governance involves the interaction between governments, international agencies, Non-Governmental Organisations and other relevant power holders, who are involved in debates and social and political confrontations around water services with respect to how these should be governed, and by whom.²⁵⁰

As noted, in governance generally, and in water governance in particular, approaches have shifted from state provision to private provision.²⁵¹ But, where a human rights-based approach is concerned, water cannot be examined only from an economic perspective.²⁵²

Olowu draws a connection between a rights-based approach and water governance, posing the question “where lies the linkage between water governance and the language of human rights?”²⁵³ He attempts an answer to this question by defining both terms and then giving reasons why rights-based approaches need to be incorporated in water governance issues.²⁵⁴ He showed that both methods are closely intertwined with the human rights-based approach, being

²⁴⁷ Par 6 General 15.

²⁴⁸ Para 7 8 & footnote 8 General Comment 15.

²⁴⁹ Miranda *et al* (2011) 4 *Literature Review* 3.

²⁵⁰ Miranda *et al* (2011) 4 *Literature Review* 4.

²⁵¹ Miranda *et al* (2011) 4 *Literature Review* 4.

²⁵² Baillat & Schmitz (2013) at <http://www.waterlex.org/new/wp-content/uploads/2013/08/WaterLex-HRC-side-event-paper.pdf> accessed 21 October 2015.

²⁵³ Olowu (2008) 4 *TD: The Journal for Transdisciplinary Research in Southern Africa* 62.

²⁵⁴ See generally Olowu (2008) 4 *TD: The Journal for Transdisciplinary Research in Southern Africa* particularly 76-78.

more human-centred, and drawing on the principles of participation and accountability.²⁵⁵ The principle of non-discrimination and prioritising the need of the vulnerable and marginalised are foremost in a human rights-based approach.²⁵⁶ At this point, Baillat and Schmitz conceptualise a human rights-based approach to water governance to include access to water for other uses, which promote core human rights, such as the right to food.²⁵⁷ While the human rights-based approach to water centres on prioritising water for domestic use, and other human rights needs for survival and living a life of human dignity, water governance does not specifically attach to a human rights framework, and it does not prioritise water for any usage.²⁵⁸

3.3.6 IMPLEMENTATION AND MONITORING A HUMAN RIGHTS-BASED APPROACH TO WATER

What makes a human rights-based approach to water a unique approach is the practical aspect thereof, which involves implementation and monitoring. A human rights-based approach to water is not only about the legislative framework in which the laws that provide for and protect the human right to water are highlighted. The practical aspect of the human rights-based approach to water examines the manner according to which the human right to water is realised through a human rights-based approach. This practical aspect involves the implementation and the monitoring of the human rights-based approach to water.

3.3.6.1 Implementation

Implementing a human rights-based approach to water is mainly dependent on the legal framework put in place to ensure it.²⁵⁹ The Constitution is the strongest of the legal frameworks because it establishes a national commitment.²⁶⁰ A constitutional recognition, coupled with a statutory framework, which recognises “practical and tangible significance” is the first step toward implementation.²⁶¹ South Africa is a good example of a country with a legal framework, having

²⁵⁵ Olowu (2008) 4 *TD: The Journal for Transdisciplinary Research in Southern Africa* 76-82.

²⁵⁶ WaterAid (2011) WaterAid Discussion Paper 20.

²⁵⁷ Baillat & Schmitz (2013) 12 at <http://www.waterlex.org/new/wp-content/uploads/2013/08/WaterLex-HRC-side-event-paper.pdf> accessed 21 October 2015.

²⁵⁸ For a general discourse on priorities in water allocation see Winkler (2014) 207-211.

²⁵⁹ Albuquerque & Roaf (2012) 51.

²⁶⁰ Albuquerque & Roaf (2012) 51.

²⁶¹ Albuquerque & Roaf (2012) 52.

recognised the human right to water constitutionally and adopting the WSA, which sets out policy initiatives towards the realisation of the right to water, for example, the 2002 Free Basic Water provision, which ensures a supply of 6,000 litres of free basic water per household per month.

It is one thing to have a legislative framework, and another to set out a budget for this implementation.²⁶² Implementation would require finances for construction, operation and maintenance. It would also require funding for developing the policies, participatory processes and information dissemination.²⁶³ All these requirements for implementation may be realised progressively before full implementation.²⁶⁴ I argue that the Implementation of a human rights-based approach to water commences at the codification of the human right to water, after which it involves public participation and sufficient public access to information. Accountability implementation also includes an identification of water providers and the way in which their functions will be carried out. Once there are plans in place in this regard, implementation of these plans is necessary to ensure the realisation of access to domestic water supply.

3.3.6.2 Monitoring

It is however not enough to have plans and to implement these plans. It is also important to monitor the implementation, by having set goals and monitoring each level or stage of the plans as they are implemented. Monitoring and evaluation are essential, to be able to ascertain whether the plans are followed, as well as to record improvements. In other words, monitoring should be regular, and should also include feedback from the water users to the water providers.²⁶⁵ This can be done through intermediaries, who are appointed for this purpose, or even directly through the organisation of workshops and seminars.

Monitoring a human rights-based approach to water is important so as to ensure that no harm is recorded on another human right. For example, spraying chemicals on crops to enhance food production must not pollute water or have an adverse

²⁶² Albuquerque, in her statement to the human rights Council at their 18th session, cited in Albuquerque & Roaf (2012) 74.

²⁶³ Albuquerque & Roaf (2012) 76.

²⁶⁴ Albuquerque & Roaf (2012) 74.

²⁶⁵ Boesen & Martin (2007) Danish Institute for Human Rights 31.

effect on health.²⁶⁶ Monitoring also ensures that human rights principles are central to the realisation of the right to water. An example is to ensure that while recording a general progressive realisation of the right to water, it is important that there is no discrimination, and that the most vulnerable are not excluded. In other words, a complaint mechanism needs to be included. Where such a mechanism is included, it informs the duty bearers that right holders are aware of their right, the implementation standard, and the outcomes.²⁶⁷ The implementation of a rights-based approach is based on the relationship between rightholders and duty bearers.²⁶⁸ The principles of participation, non-discrimination and accountability are more directly relevant to the implementation of a human right to water.²⁶⁹

3.5 VIABILITY OF A HUMAN RIGHTS-BASED APPROACH TO WATER

To analyse the viability of a human rights-based approach to water, I pose two questions here, the first under this section and the second in a subsequent chapter. The first asks what the benefit of a human rights-based approach to water might be. The second asks, are there any recorded successes, which may prompt the belief that a human rights-based approach to water is viable? The second question will be addressed in a subsequent chapter, where I consider various jurisdictions in Africa and outside Africa that have adopted a human rights-based approach to water.

A human rights-based approach is not particularly new. This approach has been referred to as “repackaging of old wine in new bottle”²⁷⁰ especially as water governance has some likeness to a human rights-based approach. However, what a human rights-based approach to water is, is different from water governance is the way it is implemented and the scope covered by it. What do I mean by this? First, water governance incorporates the principles of accountability and participation, which a human rights-based approach takes further, by requiring that the application of these principles be measured through the outcomes. Second, a

²⁶⁶ Boesen & Martin (2007) 31.

²⁶⁷ Boesen & Martin (2007) 31.

²⁶⁸ Winkler (2014) 217; Filmer-Wilson (2005) 223.

²⁶⁹ Winkler (2012) 219.

²⁷⁰ Uvin (2002) 17 *Praxis: The Fletcher Journal of Development Studies* 2.

human rights-based approach promotes a pro-poor orientation, which water governance does not do. A human rights-based approach to water is anchored in the existence and legality of a human right to water. A law recognising the human right to water empowers the poor or vulnerable with a law that protects their right to access water. The legal framework of the human right to water establishes legal claims, to which the right to water may be ensured, and should there be a violation of this right, a court action may be explored. A demand for the fulfilment of a human right to water in court brings to fore the principle of accountability, where the function of the duty bearer (water provider) is examined to find out the roles played to ensure the realisation of access to water.

A human rights-based approach to water provides a comprehensive set of minimum standard for all actors, guides sector reforms, and establishes a monitoring and accountability and transparency mechanisms. It ensures a voice for the disadvantaged.

3.6 CONCLUSION

This chapter began by identifying the various approaches to access to water. Of all the approaches identified, I dwelt most on a human rights-based approach, which I argue encompasses all the characteristics of the other approaches to access water. I also conceptualised a human rights-based approach to water and identified the principles associated with this approach, and analysed court cases which depict the principles of a human rights-based approach to water. I note that there are various terms related to a human rights-based approach, and in spite of the jurisdiction difference identified by Eyben, I have come to the conclusion that a human rights-based approach, a rights-based approach, and a human rights framework identified in this regard, are the same, as the same principles of international human rights apply. Furthermore, I agree with Olowu, Nyamu-Musembi and Uvin, that these terms have been quite confusing, and in fact, are used interchangeably. I note the argument of Eyben and Tremblay, who have argued the ‘rights-based approach’ to be a domestic approach, while a ‘human rights-based approach’ is an international approach. I fail to see the difference in this regard since human rights formulated at the international level are

encouraged to be adopted at national level. A distinction of this sort would only complicate the already complicated rights discourse.

Furthermore, I have included the term adopted by Winkler, ‘human rights framework’, in the discourse on ‘rights-based approaches’. This is because it shares the same principles of a human rights-based approach. All these terms are the same as they have one goal, namely the realisation of a human right to water in a transparent manner, with the recognition and consideration of the most vulnerable in the society. In this chapter, I examined the thin line between the human rights-based approach to water and water governance. I discussed further the implementation and monitoring mechanisms which are part of the practical aspects of a human rights-based approach. I conclude this chapter by identifying the values of a human rights-based approach to water, which I draw from its principles. On whether a human rights-based approach to water is viable, I move the discussion to a subsequent chapter of this study, where I will examine African and non-African jurisdictions that have adopted a human rights-based approach to water. It is also in this subsequent chapter that I highlight the successes and challenges of a human rights-based approach to water.

Access to water should not be a charitable offer, but a legal entitlement, which leads to claims.²⁷¹ As such, access to water should not be left to the discretion of the government to distribute as it pleases, without the input of water users themselves.²⁷² Rather, access to water must constitute a legal obligation, which puts people in a position to claim, which is stronger than if they were in a position of need, which then places them at the mercy of the government, or the water provider.²⁷³ A human rights-based approach, I have argued, is the only approach that can ensure access to water if adopted, and dutifully monitored, with room for a progressive realisation of the human right to water. I do not argue that a human rights-based approach is a perfect approach to realising access to water; rather, I argue that a human rights-based approach, with all its attendant principles, is more likely to guarantee a progressive realisation of access to water for everyone, without discrimination and attended by the demands of accountability.

²⁷¹ Uvin (2004) 129; Hamm (2001) 23 *Human Rights Quarterly* 1014.

²⁷² Darrow & Tomas (2005) 27 *Human Rights Quarterly* 485.

²⁷³ Winkler (2014) 214; Gready & Ensor (2005) in Gready & Ensor (eds) 23.



CHAPTER FOUR

THE LEGAL AND INSTITUTIONAL FRAMEWORK OF WATER GOVERNANCE IN NIGERIA: IMPLICATIONS FOR A HUMAN RIGHTS- BASED APPROACH

4.1 INTRODUCTION

In this chapter, I examine the current legal and institutional framework of water governance in Nigeria to argue for the adoption of a human rights-based approach to water in Nigeria.

The Federal Government of Nigeria began a reform of the water resources sector in 1997.¹ The European Commission agreed to fund a water supply and sanitation sector reform programme in Nigeria with the Federal Government of Nigeria. The Commission covered a substantial amount of the funds, with what was left was to be shared amongst the three tiers of government, and the beneficiary communities and UNICEF.² The aim of the reform was to improve water governance at the three levels of government.³ However, I argue that there has been an insignificant improvement (if any) in access to domestic water in Nigeria, because the laws at both federal and state levels are inadequate, and do not guarantee access to water. Although it may be argued that laws may not necessarily improve access to water, I argue that an absence of proper laws decreases access to water, and exposes the citizens to more health risks (and may compromise other human rights such as education, adequate standard of living, and even the right to life); due to the inadequate laws governing the activities of multinational companies that result in water pollution, thus reducing access to the water that communities rely on for their domestic use.⁴

¹ Ahmad *et al* (2009) 2.

² Ahmad *et al* (2009) 2.

³ Anambra State, Cross River, Osun State, Kano State, Jigawa State and Yobe State.

⁴ See the cases of SERAC, Gbemre & SERAP, in which the rivers communities had access to were polluted by multinational oil companies.

It has been noted that Nigeria has water resources in abundance.⁵ Several researchers have also analysed the available waters in Nigeria, such as rainfall⁶ and rivers⁷ and have come to the conclusion that the majority of water available in Nigeria are polluted, and not fit for human consumption.⁸ It is, however, ironic that in spite of Nigeria being categorised as a nation having water in abundance,⁹ there is a multitude of citizens of Nigeria without access to safe, clean water.¹⁰ In spite of the abundance of water in all forms, many Nigerians are exposed to polluted water and insufficient water for their domestic use.¹¹ Some have to spend a great deal of money to access clean water, while others are required to travel long distances to acquire clean water for their basic use.¹² I contend in this chapter and in the study more broadly that where water is recognised as a human right, then the quality, quantity, availability and accessibility of water becomes strong elements to be considered to realising water for domestic use. Furthermore as argued in the previous chapter, a human rights-based approach is the only approach that may be considered, when water is recognised as a human right.

I use the term ‘water resources’ in this chapter because the use of the term ‘domestic water’ under Nigerian federal laws is scant, while the term ‘water resources’ is used generally in the federal laws, and the term ‘water resources’ incorporates all water forms and uses including domestic water. I expand on the definition of water resources for this purpose, since Nigeria does not recognise the human right to water domestically. Although water resources in Nigeria are vested in the federal government,¹³ the duty of domestic water supply is placed on the various state governments.¹⁴ There are 36 states in Nigeria and a Federal Capital Territory (FCT).¹⁵ There are three tiers of government - federal, state and local -

⁵ National Water Policy 2004 3; Goldface-Irokalibe (2008) *ELRI* 4; Ajai (2012) 8 *LEAD Journal* 91-113.

⁶ Ayoade (1975) 20 *Hydrological Sciences Bulletin* 583-584; Oguntunde *et al* (2011) 411 *Journal of Hydrology* 207; Ishaku *et al* (2011) 3 *Journal of Water Resources and Protection* 598-606; Aladenola & Adeboye (2010) 24 *Water Resource Management* 2129-2137.

⁷ Goldface-Irokalibe (2008) *ELRI* 2; Longe *et al* (2010) 12 *Journal of Sustainable Development in Africa*.

⁸ Longe *et al* (2010) 12 *Journal of Sustainable Development in Africa* 35-44.

⁹ Ayoade (1975) 20 *Hydrological Sciences Bulletin* 583.

¹⁰ Ladan (2009) 490.

¹¹ Ladan (2009) 490-491.

¹² Ayoade (1975) 20 *Hydrological Sciences Bulletin* 588.

¹³ Sec 1 WRA.

¹⁴ Franks *et al* (2011) 9 *Intl J of River Basin Management* 94.

¹⁵ Sec 3 (1) (4) CFRN.

that share the responsibility for water resources management and especially domestic water supply.¹⁶ I examine the laws and the obligations under each tier of government. There are several federal laws on water resources in Nigeria; however, I refer to only the laws that mention water for domestic use.¹⁷

Under the state government, each of the 36 states and the FCT has its state water agencies, known as water corporations. There are thus 37 water corporations (or boards), in Nigeria. The various water corporations or boards have the duty of providing water for people within a given state.¹⁸ Considering the expanse of territory, and the number of people and diversity of languages these boards oversee, it would be nearly impossible to conduct an accurate examination of the challenges of access to water in each state and community in Nigeria.¹⁹ My analysis therefore is limited to available literature on potable water in the six geo-political zones, and the actual research visit I made to some of the states' water corporations in the Nigerian North-Central,²⁰ South-South²¹ and South-Western²² geo-political zones.

There are currently six geo-political zones in Nigeria, created as convenient administrative configurations during the regime of President Ibrahim Babangida, for effective allocation of resources.²³ These six geo-political zones were created based on culture, ethnicity, contiguity and common history. Using these six geopolitical zones, I conduct an analytical examination of access to domestic water supply in Nigeria. I assess the duties of the water corporations or boards to ascertain their role, and to determine whether they are sufficient in guaranteeing

¹⁶ Goldface-Irokalibe (2008) ELRI Report at http://www.forumfed.org/en/global/thematic/water_papers/Joe%20Goldface_en.pdf 2 accessed 14 June 2014 (hereafter Goldface-Irokalibe (2008) ELRI report).

¹⁷ Akpabio & Ansa (2013) 4 *Mediterranean Journal of Social Sciences* 305.

¹⁸ Goldface-Irokalibe (2008) ELRI report 4.

¹⁹ However, from discussions with various government officials at both federal and state levels, the challenges are much the same (discussions and meetings held in various parts of Nigeria between August and September 2015).

²⁰ Kwara State Water Corporation.

²¹ Edo State and Delta States Water Corporation.

²² Lagos State, Ogun State and Oyo State Water Corporations.

²³ The six geo-political zones are the North-East, the North-West, the Middle Belt (herein referred to as North-Central Zone), the South-East, the South-West, and the South-South. See Barkan *et al* at

http://info.worldbank.org/etools/docs/library/5783/State_and_Governance_Nigeria.htm accessed 18 September 2015; Ostein NRN Working Paper No. 1 at <http://www3.qeh.ox.ac.uk/pdf/nrn/WP1Ostien.pdf> accessed 18 September 2015.

access to water for their citizens. The local government has the duty of disseminating water in the rural areas within their respective states.²⁴ I examine the method of allocation and delivery so as to identify whether there is a nascent human rights-based approach to water, and how this can be developed to address the challenges of access to domestic water.

In examining access to domestic water supply under the federal and state laws, I note that there is a fragmentation of these laws. I argue that this fragmentation deepens the challenges of access to domestic water in Nigeria, and contend that government has failed to enact concrete laws (particularly at the federal level) to address these challenges. At the state level, a commodity approach is adopted. I show in this chapter that the extant of water laws in Nigeria are inadequate, and as a result of this inadequacy, Nigerians are encouraged to source their water for domestic use individually and privately. I identify institutional frameworks at both federal and state levels of government, and I conclude that there is a need to create better institutions, which incorporate a human rights-based approach framework.

In this chapter, I give an overview of public water systems in Nigeria to show how the laws governing access to water have evolved over time in the provision of domestic water for the Nigerian people. This is necessary because the Nigerian legal system is a combination of customary laws, Islamic law and received English laws.²⁵ The purpose of tracing the history of public water system here is to show how the people access water for domestic use. Customary laws in Nigeria are largely unwritten,²⁶ and water for domestic use is retrieved individually from rivers and streams.²⁷ However the unwritten customary law on access to water reflects in the WRA, which provides for the continuous use of river and stream waters for domestic use by people living in rural areas in Nigeria.²⁸ I argue here that Section 2

²⁴ Ishaku *et al* (2011) 26 *Water Resources Management* 296.

²⁵ For an overview of this, see Tobi (1996) *Sources of Nigerian Law*.

²⁶ Tobi (1996) 108.

²⁷ Nkwocha (2009) 90 *Social Indicators Research* 410.

²⁸ Sec 2 WRA.

of the WRA, although necessary,²⁹ has meant governmental neglect of the need to improve access to water sufficiently in the rural areas of Nigeria.³⁰

Despite Nigeria being a signatory to virtually all the international covenants which guarantee a human right to water,³¹ and in spite of the international and regional roles Nigeria has played in ensuring access to water within and outside of Nigeria,³² the challenges of access to water remain the same in Nigeria, with a deterioration in the percentage of people with access to potable water from 2010 to 2012.³³ I analyse the identified laws, which make specific provision for domestic water, so as to determine the process of delivery and access to water for Nigerian citizens, and whether these processes imply in anyway a human rights-based approach to water.

Given the fact that water is a human right, which the Nigerian government has a duty to provide, I identify and examine the federal and state institutions saddled with the responsibility of ensuring domestic water supply.³⁴ I argue that the Nigerian government favours water for agricultural use, and encourages, albeit unsatisfactorily, the legal protection of water from pollution.³⁵ The various uses of water must be adequately covered by the law, especially domestic water supply, which in comparison with the quantity of water needed for irrigation or agriculture

²⁹ Necessary because people cannot be completely torn from their tradition and beliefs and it is important that such beliefs be promoted, if not repugnant to natural justice, equity, and good conscience.

³⁰ My argument here is that since people living in rural areas can continue to harness the rivers and streams for their use, there is no urgent need on the part of government to increase access to sustainable, improved water sources, except where these waters are grossly polluted or there is a target such as the Millennium Development Goals. In such instances, when government installs hand-operated boreholes, there are usually no mechanisms set up for the management of the same. In other words, there is no proper planning to accommodate rural communities under a sustainable improved access to water, hence, the need to provide that they continue to use such unimproved sources for their domestic use.

³¹ Such as the ICESCR, ratified in 29 July 1993; CEDAW was ratified 23 April 1984 and CRC ratified 19 April 1991. For a list of other human rights instruments ratified by Nigeria, see http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/NG/NHRC_NGA_UPR_S4_2009anx_RatifiedHumanRightsInstruments.pdf accessed 10 November 2015.

³² Nigeria hosted the first Africa-South America Summit, which was held in Abuja. One of the consensus at the meeting was to promote the right of citizens to secure access to clean water. For a general overview see <http://asasummit.itamaraty.gov.br/asa-ingles/summit-of-south-american-africa> accessed 1 October 2014.

³³ In 2010, Hall estimated that 72% of people living in urban areas in Nigeria had access to improved water see Hall (2010) *PSIRU* 4, whereas in 2012, Ajiboye *et al* estimated that only 60% of people living in urban areas had access to water, see Ajiboye *et al* (2012) *Int. J Life ScBt & Pharm Res*.

³⁴ See General Comment 15 Para 17-29.

³⁵ See generally the WRA. Sec 18 provides a penalty fee not exceeding #2,000 (about R100) for any violations of the provisions of the Act.

is insignificant. I also argue that water for domestic use should be prioritised over other uses of water.³⁶

In this chapter, I discuss the challenges of domestic water supply in Nigeria. I note that water pollution has been a major issue in this regard and that the available laws are not sufficient to address water pollution.³⁷ I note that aside from the inadequacy of the law on water for domestic use, that water pollution is one of the major challenges of domestic water supply.³⁸ There are social and legal challenges, which hamper access to domestic water in Nigeria. Although this chapter is heavily skewed towards a legal analysis, I also identify and discuss the social challenges that impede access to water.

The challenges of access to water in Nigeria are numerous and divergent. In this divergence lies a lack of political will, a lack of knowledge on the part of the people and the absence of judicial activism; all of which when present form the backbone of a human rights-based approach. I also argue that there exists a dearth of literature in this area of law, which is a major challenge, as it leaves the people less informed, and the government unperturbed about the need to ensure access to domestic water through the enactment of laws and an institutional framework. In this chapter, I argue that there is a need for an overhaul of the Nigerian water laws for the sustainable realisation of access to water for domestic use in Nigeria. I contend that a constitutional guarantee of the human right to water and an incorporation of a human rights-based approach to water at federal and state levels of government are required.

I conclude in this chapter that the legislative approach to domestic water supply adopted in Nigeria is not sufficient to addressing the challenges of access to water in Nigeria. There is the need to understand that water is a human right, and one of the ways the legislative approach can be strengthened to address the challenges of access to water in Nigeria adequately, is through the recognition of a human right to water, as well as an adoption of the principles of a human rights-based approach as enunciated in Chapter Three of this study.

³⁶ Para 6 General Comment 15 makes it clear that water resources required to stay alive and keep healthy should be prioritised including water required to meet core human rights.

³⁷ Sec 18 WRA.

³⁸ Ishaku *et al* (2011) 26 *Water Resources Management* 297.

4.2 DEFINITION OF TERMS USED IN THIS CHAPTER

4.2.1 WATER GOVERNANCE

I have referred to water governance first in the title of this chapter, and I mention it in various parts of the work. It is necessary here to define the use of the concept of water governance in this study.

Although 'governance' is used in different contexts, it is herein clarified not to mean 'government' or 'maintenance'.³⁹ The United Nations Development Programme, for example, defines governance as:

The exercise of economic, political and administrative authority to manage a country's affairs at all levels. It comprises the mechanisms, process and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences.⁴⁰

This definition of governance encompasses a range of systems and all peoples concerned in the administration or direction of a country's affairs. Water governance, as defined by Rogers and Hall is:

[t]he range of political, social, economic and administrative systems that are in place to develop and manage water resources and the delivery of water services at different level of society.⁴¹

In other words, water governance entails the participation of everyone. It concerns the way in which legal and policy decisions are made with particular emphasis on participation, by people who will be directly affected by the outcome of such

³⁹ Franks (2006) *Paper presentation at the University of Bradford Department for international development 18 and 19 November. ESRC funded seminar on water governance - new perspectives and directions* at <http://bradscholars.brad.ac.uk:8080/bitstream/handle/10454/3189/PDF%20Tom%20Franks%20Water%20governance%20solution%20to%20all%20problems.pdf?sequence=3&isAllowed=y> accessed 23 July 2013.

⁴⁰ UNDP (1997); UNESCO (2006) 27-31at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan022332.pdf> 23 March 2015.

⁴¹ Rogers & Hall (2003) *Tec background papers no 7*; Olowu (2008) *4 TD: The Journal for Transdisciplinary Research in Southern Africa* 62; Franks (2006) *ESRC Funded Seminar on Water Governance* 4, seem to also agree with this definition as it was used and adopted in their works.

decisions.⁴² To better a country's water supply or accessibility, the government, the lawmaking bodies, university researchers, training centres, bodies or organisations representing the interest of users, as well as professionals acting in the field, must be taken into consideration.⁴³

Batchelor adopted the definition of Rogers and Hall,⁴⁴ identifying that there is a political element to water governance which makes water governance reflect political realities at international, national, provincial and local levels.⁴⁵ Franks et al. examined the concept of water governance at the basin level and adopted a working definition of water governance as

[t]he system of actors' resources mechanisms and process, which mediate society's access to water.⁴⁶

Water governance has also been described to mean

[t]he ways in which individuals and societies have assigned value to made decisions about and manage the water resources around them.⁴⁷

In agreement with all these definitions, I use water governance to mean the range of systems put in place to manage water resources, effectively bearing in mind the different uses of water, with a view to ascertaining that water for the various uses are processed and delivered at the various levels of society where they are needed. Inferring from this point, I use water governance in this chapter as

⁴² Olowu (2008) 4 *TD: The Journal for Transdisciplinary Research in Southern Africa* 62.

⁴³ Cano (1981) 51 *Journal of Hydrology* 382.

⁴⁴ See Batchelor's report contributing to the scoping exercise managed by IIED to help develop a DFID research programme on water ecosystems, and poverty reduction under climate change found at <http://pubs.iied.org/pdfs/G02523.pdf> accessed 23 March 2013 5. See also Roger & Hall (2003) Tec background papers at <http://www.gwp.org/Global/ToolBox/Publications/Background%20papers/07%20Effective%20Water%20Governance%20%282003%29%20English.pdf> 7 accessed 23 March 2015 (hereafter Batchelor IIED).

⁴⁵ See Batchelor IIED 5.

⁴⁶ Franks et al (2011) 9 *Intl J River Basin Management* 94.

⁴⁷ UNDP (2004) at

https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCEQFjAA&url=http%3A%2F%2Fwww.undp.org%2Fcontent%2Fdam%2Faplaws%2Fpublication%2Fen%2Fpublications%2Fenvironment-energy%2Fwww-ee-library%2Fwater-governance%2Fwater-governance-for-poverty-reduction%2FUNDP_Water%2520Governance%2520for%2520Poverty%2520Reduction.pdf&ei=gxkQVenBN8S17gbU7oCYDg&usq=AFQjCNH3YwbP73UA2VAScz7R6m2-G1ZRcg&bvm=bv.88528373,d.d24 accessed 22 July 2013.

encompassing all laws and the range of systems that have been established to allow for access to domestic water supply in Nigeria.

4.2.2 WATER RESOURCES

Water Partnership has defined water resource management as a

...process which promotes the coordinated development and management of water, land and related resources, in order to maximize [sic] the resultant economic and social welfare in an equitable manner without compromising the sustainability of vital ecosystems.⁴⁸

From the above definition, the term 'water resources' is all-encompassing of the various uses of water. Water resources may not be construed to mean water for domestic use; rather it would be construed to mean all uses of water, such as agricultural, irrigation, recreation, hydro-electrical, industrial and water for domestic use. This is because in most of the legislative documents in Nigeria, water for domestic use is rarely mentioned, and where it does appear, it is found under water resources in general. It would therefore be careless to assume that there is no sufficient provision for domestic water, based on the fact that it is not specifically mentioned.

I use the term 'water resources' often in this chapter because the term is what is commonly used in the Nigerian legislative documents. This is to show that there is a holistic consideration of all forms of water, and their various uses in Nigeria. However, as will be argued in this chapter, water for agricultural purposes is more pronounced under Nigerian legislative documents, while domestic water is either relegated completely, or rarely mentioned, and not entirely guaranteed under the federal laws. The implication of this is that domestic water is not a priority of the federal government.

⁴⁸ Global Water Partnerships (2000) 22 No 4 TAC Series at http://www.gwp.org/Global/GWP-CACENA_Files/en/pdf/tec04.pdf accessed 18 June 2014.

4.3 BRIEF HISTORICAL OVERVIEW OF ACCESS TO DOMESTIC WATER SUPPLY AND PUBLIC WATER SYSTEM IN NIGERIA

Before the colonial period and the present day in Nigeria, what existed was a group of different people who were bound by their culture, language and place.⁴⁹ As such, water resources were based on customary law.⁵⁰ Although customary laws in Nigeria are unwritten, people understood these laws and knew where to fetch water and when. People had access to the rivers and streams and fetched water from those sources for their domestic use.⁵¹ While some water was kept strictly for cooking and drinking purposes, other sources of water were used for grazing cattle, washing and sanitation purposes.⁵²

Since the advent of Nigeria as a nation, there has been a written law, which has governed the management of all water resources.⁵³ This, however, did not negatively affect the access of rural people to their water, as the law stated that everyone has the right to take water from any stream or river for their domestic use, which was what the people were already accustomed to.⁵⁴

Public water supply started in Nigeria in the 19th century,⁵⁵ when Lagos, Calabar, Abeokuta, Ijebu-Ode and Kano were the first beneficiaries.⁵⁶ The public water system was maintained with revenue made from the water rates, with no financial support from the government.⁵⁷ In the 1950s, the regional government emerged, and took over the financial and technical responsibilities for developing new water systems,⁵⁸ assigning water engineers and officers to the water supply activities.⁵⁹

⁴⁹ Kuruk (2004) 2 at http://www.fao.org/fileadmin/templates/legal/doc/Casestudy_Nigeria.pdf accessed 26 February 2015.

⁵⁰ Ladan (2013) Ladan's Law and Policy Review Papers 11.

⁵¹ Ajiboye *et al* (2012) 1 *Int J Life ScBt & Pharm Res* 2.

⁵² Sanitation purpose in this regard refer to the disposal of human waste. As it was believed that the rivers washed them far away.

⁵³ See generally WRA.

⁵⁴ Sec 2 WRA. Customary law and statutory water rights coexist in Nigeria. Burchi (2005) 45 FAO *Legal papers online (internet page 6)* at http://www.fao.org/fileadmin/user_upload/legal/docs/lpo45.pdf accessed 1 July 2015.

⁵⁵ Water Supply and Sanitation Policy 2000.

⁵⁶ Ishaku *et al* (2011) 26 *Water Resources Management* 296.

⁵⁷ This operated like the 'water pays for water' system adopted in France, where water consumers through their water bills bear the majority of the cost of accessing their water.

⁵⁸ Federal Republic of Nigeria (2000) 1 (internet page 4) at http://siteresources.worldbank.org/NIGERIAEXTN/Resources/wss_1100.pdf accessed 11 October 2015.

⁵⁹ Water Supply and Sanitation Policy 2000 1.

These officers retained positions at the regional service, and they were also paid from the water rate,⁶⁰ being paid twice by the same regional government.⁶¹ There was an increase in demand and cost, and the regional government had to secure loans.⁶² They also set up independent Water Corporations, which were saddled with the duty of developing, operating and managing the water supply activities.⁶³ Although there was one independent Water Corporation formed in 1966 in the western region, by the 1970s, more water corporations were formed, and today, each of the 36 states has a water corporation, and the FCT has a separate water board.⁶⁴

The Federal Government of Nigeria became involved in the management of water resources in 1976, by creating the Federal Ministry of Water Resources and the River Basins Development Authorities.⁶⁵ The purpose of the River Basins Development Authority was to provide bulk water for irrigation.⁶⁶ The provision of the River Basins Development Act has not changed, as the provisions of the River Basins Development Act are still solely irrigation and agriculture, where there has not been an expansion or development of focus on domestic water supply.

In 1981, the National Committee of water resources and boards was formed.⁶⁷ Presently in Nigeria, the water supply policy operators are found in four authorities:

- i. The Federal Ministry of Water Resources: charged with the responsibility of policy advice and formulation, data collection, monitoring and coordination of water resources, inclusive of water supply.⁶⁸
- ii. The River Basins Development Authority: charged with the development, operation and management of reservoirs for the supply of bulk water supply amongst other uses in their jurisdiction.⁶⁹

⁶⁰ Water Supply and Sanitation Policy 2000 1.

⁶¹ Water Supply and Sanitation Policy 2000 1.

⁶² Water Supply and Sanitation Policy 2000 1.

⁶³ The first Water Corporation was formed in 1966 by the then Western Region.

⁶⁴ Water Supply and Sanitation Policy 2000 1.

⁶⁵ Federal Ministry of Water Resources at <http://waterresources.gov.ng/about/history-of-the-ministry> accessed 11 August 2015.

⁶⁶ Water Supply and Sanitation Policy 2000 1.

⁶⁷ Gbadegesin & Olorunfemi (2007) *ATPS Working Paper Series* no 4920.

⁶⁸ USAID (2010) 2.

⁶⁹ USAID (2010) 2.

- iii. State Water Agencies: responsible for urban, semi-urban and rural water supplies.⁷⁰
- iv. The Local Government Authorities: responsible for the provision of potable water to rural communities in their areas of jurisdiction.⁷¹

Nigeria is a signatory to the United Nations International Drinking Water Supply and Sanitation Decade, which has, as its main objective, the supply of water to all citizens of the country between 1981 and 1990.⁷² The United Nations International Children Emergency Fund (UNICEF) and United Nations Development Programme (UNDP) were also involved in public water supply in Nigeria.⁷³ These two United Nations agencies, however, did not succeed in their objective. In spite of the efforts of the Nigerian government at all levels, the water supply coverage in the country appears to be decreasing and deteriorating.⁷⁴

4.4 AN EXAMINATION OF THE LEGAL AND POLICY FRAMEWORK OF CURRENT WATER GOVERNANCE IN NIGERIA

The legal and policy framework of water governance is examined in three sections. In the first section, I identify and examine extant federal laws that provide for water resources. In the second section, I analyse policies that sought to improve access to potable water, and in addition to this, I examine the Water Bill, which is expected to replace the WRA. The aim of this analysis is to determine whether a human rights-based approach or elements of a human right to water, forms part of the Water Bill. Furthermore, an analysis of the Water Bill will determine whether the omissions of the WRA, such as an adequate provision for domestic water, is a priority of the federal government, if and when it eventually passed, and how the challenges of access to water would be addressed at the federal level. In the third section, I examine water laws and policies at the state level. I focus in particular on the water laws of the Nigerian states I visited. Discussions with water officials in Nigeria showed that water is not a human right, and a human rights-based

⁷⁰ USAID (2010) 2.

⁷¹ USAID (2010) 2.

⁷² National Water Supply Policy 2000.

⁷³ National Water Supply Policy 2000.

⁷⁴ Para 9 National Water Supply Policy 2000; Onyenechere & Osuji (2012) 4 *Journal of Water Resource and Protection* 498.

approach to water has not been considered in addressing the challenges of access to water.

4.4.1 EXTANT LAWS ON DOMESTIC WATER SUPPLY AT THE FEDERAL LEVEL

For a natural resource such as water, on which the very existence of life is contingent, the provisions of the water law at federal level are inadequate to guarantee clean water for domestic use and a life worthy of human dignity.⁷⁵ In this section of the chapter, I identify and analyse the federal laws, which provide for domestic water supply, such as the CFRN and WRA. I analyse these laws with regard to domestic water supply. This is done in order to establish the need for sustainable reform, which would incorporate the principles of a human rights-based approach. I argue here that the current water situation in Nigeria, amongst other utility services, cannot provide the infrastructure required for social and political development.⁷⁶ This is because water supply systems are unreliable and underdeveloped.⁷⁷ I emphasise that in spite of the efforts of the federal government on water reforms in Nigeria, domestic water is still not prioritised, as against agricultural or irrigational uses. I argue that the inadequate provision and non-prioritisation of domestic water at the federal level has contributed to an inadequate, commodity-focused approach to domestic water at the state level.

4.4.1.1 Constitution of the Federal Republic of Nigeria (CFRN)

The 1999 CFRN, like many other states' constitutions, is supreme, with its provisions having binding force on all authorities and persons throughout the Federal Republic of Nigeria.⁷⁸ The CFRN was described in the case of *Kalu v Odili* as

[a]n instrument of government under which laws are made and are not mere Acts or law and the construction which the court will give to a constitutional provision must be such that will serve the interest of the Constitution and best carry out the subject and purpose and give effect to the intention of the framers.⁷⁹

⁷⁵ See generally National Water Policy 2004.

⁷⁶ Hall (2006) *PSIRU Reports* 3.

⁷⁷ Hall (2006) *PSIRU Reports* 3.

⁷⁸ Sec 1 (1) CFRN.

⁷⁹ See (1992) 5 NWLR (Pt.240) 130 at 156.

The CFRN contains a bill of rights⁸⁰ with the provisions of water (as an environmental objective) under “fundamental objectives and directive principles of state policy.”⁸¹ The occupation of the provision on water in this part of the CFRN makes it non-justiciable, which whittles down the constitutional guarantee of the right to water.⁸² Socio-economic rights are not justiciable in Nigeria. The debate on socio-economic rights and their non-justiciability is centred on the competency and/or unwillingness of the adjudicating body to entertain cases of violations of the human right to water.⁸³ However, in determining the extent of the application of fundamental objectives and directive principles of state policy on political objectives,⁸⁴ the presiding Judge in the case of *Attorney General of Ondo State v Attorney General of Federation*⁸⁵ stated that

[i]t has been argued that the fundamental objectives and the directive principles of state policy are meant for authorities that exercise legislative, executive and judicial powers only and therefore any enactment to enforce their observance can apply only to such person in authority and should not be extended to private persons, companies or private organisations. This may well be so, if narrow interpretation is to be given to the provisions, but it must be remembered that we are here concerned not with the interpretation of a statute but the Constitution which is our organic law or grundnorm. Any narrow interpretation of its provisions will do violence to it and will fail to achieve the goal set by the constitution.⁸⁶

On the issue of water, the CFRN provides that “the state shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of

⁸⁰ Chap 4 CFRN.

⁸¹ See Chap 2 CFRN.

⁸² Olowu (2006) 69 *Saskatchewan Law Review* 41.

⁸³ For an overview of this debate see Ibe (2007) 7 *African Human rights Law Journal* 225-248; Liebenberg in Eide *et al* (eds) *Economic, Social and Cultural Rights* (2001) 55, 60.

⁸⁴ See Sec 15 of the CFRN, and in particular, (5), which states that “the State shall abolish all corrupt practices and abuse of power”. The applicants argument was that the legislature cannot make laws in this regard as the provision was found under Chapter II of the CFRN - directive principles of public policy which are not justiciable

⁸⁵ (2002) 9 NWLR (pt. 772) 222 (hereafter *AG Ondo v AG Fed*).

⁸⁶ See also *Nafiu Rabiu v Kano State* (1980) 8-11 AC 130.

Nigeria.”⁸⁷ The CFRN does not specify what water it shall “safeguard”, and as such, it is difficult to imply a human right to water. This provision would have seen the beginning of the human right to water in Nigeria, as protecting water from pollution is an essential criterion of the human right to water. However, Section 20 of the CFRN is curtailed by Section 6 of the CFRN, which sets out the powers of the judiciary. Section 6 lists the judicial powers and sets limits on the powers of the judiciary in adjudicating upon issues or questions related to the fundamental objectives and directive principles of state policy, which is found in Chapter II of the CFRN. It provides that the powers vested in the judiciary

shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the fundamental objectives and Directive principles of state policy set out in Chapter II of this Constitution.⁸⁸

A provision for the protection of the environment shows that the state has positive objectives towards ensuring an improvement of the environment in general but places a caveat in the form of Section 6(6)(c). Olowu describes this as a marginalisation of human rights.⁸⁹ Placing such an important provision under Chapter II of the CFRN nullifies the intention of the government in this regard, particularly when it specifies that the judiciary cannot adjudicate on such matters.

Furthermore, Chapter 4 of the CFRN houses the Bill of Rights but does not make any provision for the right to water. In other words, water, as used in the CFRN, may or may not refer to potable water. I argue that if Section 20 of the CFRN refers to water resources generally (and as such inclusive of potable water), such provision does not adequately address the issue of access to potable water. Section 16 seems to address the issue of food, albeit inadequately when it states that “the state shall direct its policy towards ensuring suitable and adequate food for all citizens”.⁹⁰ It, however, cannot be enforced, as it also falls under Chapter II of the

⁸⁷ Sec 20 CFRN.

⁸⁸ See (6) (c) CFRN.

⁸⁹ Olowu (2006) 69 *Saskatchewan Law Review* 60-61.

⁹⁰ Sec 16 (2) (d) CFRN.

CFRN, which is not justiciable. The Supreme Court (which is the apex court in Nigeria), in the case of *Attorney General of Ondo v Attorney General of the Federation*, held that “directive principles can be made justiciable by legislation”.⁹¹ In other words, if there are no federal laws guaranteeing the provisions of “directive principles” under the CFRN, then those laws, including the right to water, cannot be justiciable. Water as a socio-economic right or as a human right is not extant in Nigeria, and access to water as a human right has never been adjudicated upon by any court of law in Nigeria, except in cases where water in the form of rivers or wells are being polluted, wherein such matters, clean water is mentioned as a requirement of a healthy environment.⁹²

In the case of *Gbemre v SPDC*, the applicants applied for the enforcement of their fundamental right to life and dignity of the human person as guaranteed in Section 33 and 34 of the CFRN as well as Articles 4 (right to life and human dignity), 16 (right to physical and mental health) and 24 (right to environment) of the African Charter.⁹³ The Federal High Court explained that the burning of gas by flaring contributes adversely to the environment, by emitting carbon dioxide and methane, which causes warming of the environment, and which pollutes the people’s food and water.⁹⁴ The court further ruled that gas flaring causes acid rain, and that this rain acidifies the lakes and streams and damages vegetation.⁹⁵ Although the court did not in particular mention the right to water, perhaps because the right to water had not been recognised then, it however understood the importance of water to life and health when it mentioned that the pollution of water was a violation of the human right to the environment.⁹⁶ The Federal High Court in this case found for the applicants a violation of their constitutional right to life and human dignity, which includes a clean, poison-free, pollution-free healthy environment.⁹⁷ There was no mention of the right to water. In the ruling of the case, the Court referred to the right to life and the right to dignity guaranteed

⁹¹ (2002) 9 NWLR (pt. 772) 222.

⁹² *Gbemre v Shell Petroleum Development Company Nigeria Limited* (2005) Suit FHC/B/CS/53/05, 14 November 2005; (2005) AHRLR 151 (NgHC 2005) (hereafter *Gbemre v SPDC*).

⁹³ African Charter on Human and People’s Rights (Ratification and Enforcement) Act Cap A9 Vol 1 Laws of the Federation of Nigeria 2004.

⁹⁴ *Gbemre v SPDC* Para [4] 7 (c).

⁹⁵ *Gbemre v SPDC* Para [4] 7 (f).

⁹⁶ *Gbemre v SPDC* Para [4] 7 (c) Par 9 & 14.

⁹⁷ *Gbemre v SPDC* Para [5] 2 & 3.

by the CFRN,⁹⁸ as well as the African Charter on Human and Peoples Rights (Ratification and Enforcement), which reinforces these rights.⁹⁹ The African Charter was incorporated into the Nigerian domestic law in 1983 through the African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act.¹⁰⁰ As such, the provisions in the African Charter formed part of the Nigerian laws. There was no mention of section 20 of the CFRN, which provides for the environmental objective of the state. This perhaps may be as a result of the provision of section 6(6)(c), which precludes the judiciary from making any decision arising from the fundamental objective in Chapter Two of the CFRN. Stemming from the facts of *Gbemre v SDPC* on environmental pollution, was the regional case of *SERAP v Nigeria* at the ECOWAS Court.¹⁰¹ The plaintiff in this case sought an order of court declaring that everyone in Niger Delta has the right to an adequate standard of living, including adequate access to food, healthcare, clean water, clean and healthy environment; to social and economic development; and the right to life and human security and dignity.¹⁰² The defendant argued in this case that only Nigerian domestic courts have the jurisdiction to entertain rights contained in the ICCPR and ICESCR, and as far as the CFRN is concerned, the issue before the ECOWAS Court was not justiciable.¹⁰³ The court ruled in response to this that invoking lack of justiciability to justify non-accountability was baseless,¹⁰⁴ and that Nigeria has a responsibility to protect its citizens within the framework of the African Charter, and that it has jurisdictions to examine matters in which the applicants invoke ICCPR and ICESCR.¹⁰⁵ The African Charter does not recognise the human right to water; however it recognises the right to life and human dignity,¹⁰⁶ the right to environment,¹⁰⁷ and the right to health,¹⁰⁸ which, it has been argued in

⁹⁸ Sec 33(1) & Sec 34(1) CFRN.

⁹⁹ Art 4, 16 & 4; see also Para [2] 1 *Gbemre v SPDC*.

¹⁰⁰ See *Oba* (2004) 4 AHRLJ 277 & 280.

¹⁰¹ *The Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v President of the Federal Republic of Nigeria & Ors (hereafter SERAP v Nigeria)* Suit No ECW/CCJ/APP/08/09; Rul No; ECW/CCJ/APP/07/10 Judgment No ECW/CCJ/JUD/18/12 Para 3 (hereafter *SERAP v Nigeria*).

¹⁰² *SERAP v Nigeria* Para 19 (a).

¹⁰³ *SERAP v Nigeria* Para 24.

¹⁰⁴ *SERAP v Nigeria* Para 38.

¹⁰⁵ *SPDC v Nigeria* Para 39 & 40.

¹⁰⁶ Art 4 & 5 African Charter.

¹⁰⁷ Art 24 African Charter.

¹⁰⁸ Art 16 African Charter.

this study, are not achievable without a considerable amount of clean water.¹⁰⁹ The right to water was realised as a derivative of the right to “a general satisfactory environment favourable to their development,” as guaranteed under the African Charter,¹¹⁰ and provided for (as a directive principle) under the Nigerian CFRN. However, the court only ruled on this right because water was polluted, which meant the right to water was indirectly and partially realised through an environmental perspective. However, as argued in this study, access to water should be considered from a human rights perspective, which means much more than examining or realising only one characteristic (quality) of the human right to water. Furthermore, the non-justiciability of socio-economic rights in the CFRN, and in particular, the right to water, provides an escape route from the principle of accountability.¹¹¹

4.4.1.2 Water Resources Act (WRA)

The WRA is a federal law, and should ordinarily contain general provisions on water resources, and all the uses of water. This Act was originally a decree of the military government but is now deemed to be an Act by the CFRN. By virtue of section 315 of the CFRN, all existing decrees are deemed to be an Act of the National Assembly.¹¹² The present 1993 WRA falls under this category of laws, which was formerly a military decree. The importance of this is that the Water Resources Decree, which had insufficient provisions for domestic water supply without modification, alteration or total repeal, was upgraded as the current WRA of 1993. The Act thus brought forward all the provisions of the Decree without amendments to sections of the Act recognising water as a human right. This of course contributed to the problems of access to domestic water, carrying forward the legal problems of omission of an adequate supply of water for domestic use.

Although the CFRN does not mention water resources, it does, however, make it clear that the water sources that affect more than one state is a legislative of the federal government,¹¹³ and any matter on which the National Assembly has the

¹⁰⁹ See Sec 2.3 herein.

¹¹⁰ Art 24 African Charter.

¹¹¹ Olowu (2006) 69 *Saskatchewan Law Review* 57.

¹¹² Sec 315 (1) (a) & (b) CFRN.

¹¹³ Nos 64 Second schedule CFRN.

power to make law.¹¹⁴ The WRA is an enactment of the National Assembly, and as such, all water rights and control are vested in the Federal Government.¹¹⁵ This means that the Federal Government is responsible for all water resources, including, indirectly, domestic water supply. Although not expressly mentioned, the responsibility of domestic water also falls under the concurrent legislative list, wherein the House of Assembly of a state is saddled with making laws on any matter not included under the exclusive legislative list, or any matter included in the concurrent list.¹¹⁶ Domestic water is neither included in the legislative list, nor the concurrent list, and because it is not included in the exclusive list, matters concerning it, such as sourcing, supply and distribution, are the duty of the various states. Although the CFRN makes it clear that any state law that is inconsistent with the law made by the National Assembly is void, neither of the water laws made by the various Nigerian states is found to be void, as the National law has not arrived at adequate law in this regard, thus, there is a dominance of a commodity approach to water by the states. Where citizens do not have access to water from the states, the provision of the WRA, which vests all water in the Federal Government, allows anyone to take water from the rivers and streams, without charge for his or her domestic use.¹¹⁷ It also recognises the customary usage of water and states that anyone with customary right of occupancy or a statutory right of occupancy may take water from underground, without charge.¹¹⁸ This has further encouraged landowners to source for their water without waiting for public water supply, as the provisions only buttress the government's lack of eagerness to lay new pipes for water supply or "progressively realise" access to potable water. Regarding Section 4, the groundwater use is expected to be monitored by the Minister.¹¹⁹ The WRA does not, however, provide an indication for how it sets out to monitor underground water usage. As such, the provision of Section 4 of the WRA seems irrelevant, since a majority of Nigerians depend on groundwater, and considering the inadequate law in this regard, and the increased population, it is near impossible to monitor underground water use, particularly at the federal

¹¹⁴ Nos 67 Second Schedule CFRN.

¹¹⁵ Sec 1 (1) WRA.

¹¹⁶ Sec 4 (7) CFRN.

¹¹⁷ Sec 2 (1) WRA.

¹¹⁸ Sec 2 (3) WRA.

¹¹⁹ Sec 4 WRA.

level. The fact that Section 2 allows a landowner to source water within his compound without charge contributes to the impossibility of monitoring ground water usage. In essence, not many of the water acquisition through wells and boreholes are recorded, or known to the Minister. It is only probably assumed that since many Nigerians do not have access to public water supply, which is not provided for by the Federal government and scarcely provided for by the various state governments, Nigerian citizens are bound to find an alternative means of realising access to water for domestic use.

I note that the powers of the Minister, as laid out in the WRA, are all-encompassing, too broadly described, and overlapping with the duties of the Minister for Agriculture. For example, the Minister is in charge of water for animals, irrigation and agricultural purposes, as well as domestic and non-domestic purposes.¹²⁰ The Minister also has the duty to make provision for adequate water for a hydro-electric generation, fisheries and recreation.¹²¹ The duties of the Minister, as spelt out in the WRA, are too various, and as mentioned, some are found to overlap with the duties of other Ministers in other agencies, such as the Minister for Agriculture, or the Minister for Environment. Therefore, it can be observed that guaranteeing access to water is not a specific priority of the Federal government. The functions of the Minister of Water Resources need to be properly detailed and reduced, for the effective monitoring of all water contingencies. As the WRA currently stands, the powers of the Minister are too many, and not adequately detailed.¹²²

4.4.1.3 Federal Environmental Protection Agency Act

The Federal Environmental Protection Agency Act¹²³ is not a Water Act per se, however the term 'environment' has been interpreted to include water, air, land, flora and fauna (inclusive of humans) living in the environment and their inter-relationship.¹²⁴ This Act, however, addresses the quality of the water in use in

¹²⁰ Sec 5 (a) (i) WRA.

¹²¹ Sec 5 (a) (ii) WRA.

¹²² Sec 5 6 8 11-17 WRA. Virtually every section of the WRA is riddled with the powers and functions of the Minister.

¹²³ Vol VII Chap 131 Laws of Federation of Nigeria (LFN) hereafter FEPA Act.

¹²⁴ Sec 41 of FEPA Act.

Nigeria.¹²⁵ It has been established that a majority of the Nigerian rivers and streams forming the main source of domestic water supply for poor rural people, are not fit for human consumption.¹²⁶ One of the functions of the Federal Environmental Protection Agency is to establish the quality standard of water in use, so as to protect the health of the public and enhance the quality of the water.¹²⁷ Another of its duties is to establish the quality standard for the various uses of water. In other words, the quality of the water for drinking or domestic use should ordinarily vary from the quality of water for agriculture, and this should be the duty of the agency to address.¹²⁸

4.4.1.4 Rivers Basins Development Authorities Act

The River Basins Development Authorities Act was established after the promulgation of Decree 25 of 1979.¹²⁹ This 1979 Act was repealed by a 1987 Act and established eleven authorities listed in the first schedule of the Act.¹³⁰ By a proposed amendment in 2008, the River Basins Development Authorities Act increases the number of river basins authorities to thirteen.¹³¹ However, there are currently eleven river basins by virtue of the extant River Basins Development Act, and twelve currently functioning river basins, with the twelfth and thirteenth not covered by law.¹³² The functions of these authorities were to develop both surface and underground water resources, for multipurpose use with particular emphasis on irrigation, flood control and watershed management.¹³³ These authorities also have the duty of supplying water from the authority's completed storage schemes, to all users, for a fee which is usually determined by the authority, but with the approval of the Minister for Water Resources.¹³⁴ Although the functions of the authorities include water resources, which infer all water uses, it does not make

¹²⁵ Sec 16 FEPA Act.

¹²⁶ Mombeshora *et al* (1981) 5 *Environment International* 53; Jaji *et al* (2007) 133 *EMA* 473-482.

¹²⁷ Sec 16 (1) FEPA Act.

¹²⁸ Sec 16 (3) FEPA Act.

¹²⁹ Hereafter RBDA Act.

¹³⁰ See sec 1 RBDA Act No 35 of 1987.

¹³¹ See Par 4 of the Bill to amend the provisions of RBDA Act Cap R9 no C 4073 of 2008.

¹³² Imo River Basin development authority and Lower Niger River Basin Development authority are not covered by the extant RBDA. See First Schedule of RBDA Act 1987.

¹³³ Sec 4 (1) (a) RBDA Act.

¹³⁴ Sec 4 (1) (c) RBDA Act.

mention of domestic water supply, and does not lay an emphasis on it, as it has stipulated for water for irrigation purposes.¹³⁵

In the course of this research, I paid an academic visit to the Lower Niger River Basin Authority based in Ilorin, Kwara State.¹³⁶ Contrary to the belief that the Federal Government has made no concrete contribution to the realisation of access to domestic water, I gathered that, although the duty of domestic water supply is the sole function of the various state governments, the Federal government plays an ‘interventionist role’ in rural communities, through the various River Basins in the country.¹³⁷ These interventionist roles are channelled towards ameliorating the pains that inadequate access to water may have caused or the access to and use of polluted waters by such communities that may have resulted in cholera and diarrhoea. The interventionist roles include the provision of small dams, the drilling of boreholes, or the provision of funds to the state government to address these problems. Usually, such interventions do not arise, except where there is a community outbreak of cholera, or waterborne diseases, which reaches the media.

4.4.2 POLICIES ON DOMESTIC WATER SUPPLY IN NIGERIA AND THE PROPOSED WATER BILL

There are national water policies, which identified the defects of the water law and sought to address domestic water issues.¹³⁸ These policies - the National Water Policy, National Policy on the Environment and the Water Bill - are examined here so as to establish how much reform is considered with regards to domestic water. I also examine the Water Bill, as the most recent review on water reform, which was drafted to adequately address the inadequate provisions of the WRA, and to make better provision for water resources generally. I argue that this Water Bill still does not adequately consider water for domestic use.¹³⁹ I provide an overview of the identified policies, and how they would have or not have positive influences on domestic water supply if they became law.

¹³⁵ See Sec 4 RBDA Act.

¹³⁶ The purpose of this visit was to inquire into the functions of the Federal government on access to domestic water in Nigeria, as well as to retrieve documents that may be helpful in the writing of this thesis. The research visit was conducted from 3 August 2015 - 4 September 2015.

¹³⁷ Academic research visit to Lower Niger River Basin, Kwara State.

¹³⁸ Proposed Water Bill 2008 3.

¹³⁹ Para 2.2.6 National Water Policy 2004.

4.4.2.1 National Policy on the Environment 2004

The National Policy on the Environment of 2004 addresses specific aspects of water management, including the institutional frameworks necessary to implement the policy.¹⁴⁰ The aim of this policy is to achieve sustainable development in Nigeria, with specific regard to improving the environment for human well-being, conserving natural resources, maintaining a balance of the ecosystem, creating public awareness of the link between the environment, natural resources and development, and preventing trans-boundary environmental degradation.¹⁴¹ The policy identifies environmental problems, the effects and how it can be addressed.¹⁴² On strategies for implementation, the policy notes that there is the need to develop environmental friendly settlement structures under the national housing policy to ensure Nigerians have access or own decent accommodation.¹⁴³ To this end housing mechanisms are expected to be put in place to "reduce urban pollution resulting from inadequate water supply."¹⁴⁴ The policy on water resources management notes that water is vital in providing the basis for socio-economic development.¹⁴⁵ As noted in Chapter Two of this thesis, water is related to all the socio-economic rights. The policy states that to ensure a sustainable water resource management, there is the need to provide water in adequate quantity and quality to meet domestic, industrial and other water needs.¹⁴⁶

On issues of water resources, the policy addresses water pollution.¹⁴⁷ Pollution is known to reduce access to clean water, as it touches on the quality of water and the quantity of water available for domestic use. This also directly affects other features of the human right to water, such as affordability and accessibility. This policy addresses a nascent human rights-based approach, where it states that the goal of the policy is to create 'public awareness' and encourage individual and community participation in environmental development,¹⁴⁸ active participation of

¹⁴⁰ National Water Policy 6.

¹⁴¹ (Para 2) National Policy on the Environment.

¹⁴² Para 3 National Policy on the Environment.

¹⁴³ Para 4.3 National Policy on the Environment.

¹⁴⁴ Para 4.3 (L) National Policy on the Environment.

¹⁴⁵ Para 4.8 National Policy on the Environment.

¹⁴⁶ Para 4.8 (A) National Policy on the Environment.

¹⁴⁷ Para 4.8 National Policy on the Environment.

¹⁴⁸ Para 2 (d) National Policy on the Environment.

the three tiers of government,¹⁴⁹ and participation in decision making, which would include both formal education and non-formal education.¹⁵⁰ The policy recognises that public participation is vital to ensuring commitment, and to enlighten every stakeholder.¹⁵¹ On the principle of accountability, the policy provides that monitoring mechanisms would be created to enhance accountability when there are disasters arising from environmental issues (natural or man-made), such as hazardous waste dumping, and 'water accidents', amongst other disasters.¹⁵² In other words, the principle of accountability is only addressed where there are disasters. The policy also identifies the need to enact legal instruments, and an institutional framework, which can help in achieving the objectives of the policy.¹⁵³

4.4.2.2 National Water Policy 2004

The National Water Policy considered a series of international events, such as the world conference on water and the environment (1992), and the UN conference on the environment and development (Earth Summit),¹⁵⁴ national documents, laws and programmes such as the provisions of the Water Act of 1993, the National Water Resources Plan of 1995 and the Water Resources Management Reform Programme, which commenced in 1997 to review water resources matters. These resulted in the current 2004 National Water Policy, where Policy provisions incorporate some of the current discourse on access to water and exhibit a nascent human rights-based approach to water. On the whole, however, the water policy examines water resources management from an environmental perspective. To a large extent, this is beneficial, as it considers international instruments and developments, such as the conferences on environment and water.¹⁵⁵ The challenge, however, with looking at access to domestic water from an environmental perspective, is that protection of water from pollution, and the provision of stringent punishments for pollutants, would be the focus of domestic water access. Addressing access to water in this policy from a rights-based

¹⁴⁹ Para 4.3 National Policy on the Environment.

¹⁵⁰ Para 4.17 National Policy on the Environment.

¹⁵¹ Para 6.6 National Policy on the Environment.

¹⁵² Para 5.1 National Policy on the Environment.

¹⁵³ Para 3.0 & 8.0 National Policy on the Environment.

¹⁵⁴ Para 2.1.1. National Water Policy.

¹⁵⁵ Para 2.1.1 National Water Policy.

approach, on the other hand would not particularly focus on the economic aspect of water, as this water policy proposes.¹⁵⁶ Although the policy understands that there is the need to strike a balance between the social and economic development of the water sector,¹⁵⁷ where the fear in not recognising water first as a basic human right is that it may rob citizens of the affordability of water, which is key in accessing clean water, especially as it has been agreed that water is also a source of economic good.¹⁵⁸

The policy mentions participation among all water users and stakeholders in the planning and management of Nigeria's water resources. This is a key principle of a human rights-based approach to water. Private sector participation is also encouraged in this policy. It is, however, imperative that monitoring mechanisms be put in place so as to avoid arbitrary increments in water tariffs. In this respect, the policy provides that one of its objectives is to improve transparency and accountability in the water sector, by providing a framework by means of which to address the challenges of “financial discipline and accountability for performance”.¹⁵⁹

On the principle of legality, the policy mentions the need to review the current water laws, as it notes specifically that the WRA of 1993 does not address current water resource issues, and that as such, there is a need for it to be reviewed. The policy sets out visions addressing specific water uses and outlines the institutional frameworks necessary to implement the policy.¹⁶⁰ It also defines the plan for developing new legislation.¹⁶¹ Overall, there is no specific consideration of other principles of the human rights-based approach, such as non-discrimination, wherein access to water is expected to address - specifically and quite importantly - water supply for vulnerable persons in society such as women, children, persons with disabilities, and the poor.

¹⁵⁶ Para 2.1.2 National Water Policy.

¹⁵⁷ Para 2.1.3 National Water Policy.

¹⁵⁸ Para 2.2.6 National Water Policy.

¹⁵⁹ Paras.1.2, 2.3.3 National Water Policy.

¹⁶⁰ Para 1.4 National Water Policy.

¹⁶¹ Para 1.4 National Water Policy.

4.4.2.3 Water Bill of 2008

The current Water Bill awaiting passage into law addresses the issue of access to potable water.¹⁶² If this bill is passed into law, it would address some of the current challenges of access to water, and it would include some of the principles of a human rights-based approach to water, such as participation¹⁶³ and accountability,¹⁶⁴ although from an environmental perspective.¹⁶⁵

The provision of Section 2 of the WRA of 1993, which states that water for domestic use can be abstracted from rivers or any water source available to the public, is retained in the proposed Water Bill. It also states that where there is a statutory or customary right of occupancy, water can be taken without charge from the underground water source. What the provisions of the WRA and the proposed Water Bill have promoted, is the on-going individual and privately sourced water for domestic use. Government does not commit itself to making provisions in this regard or to creating an enabling environment under which people might be able to access clean water for domestic use. In this regard, government's genuine commitment to access to water for domestic use is absent.

The review of the Nigerian water laws currently found in the Water Bill commenced in 2006. It is stated that once this Water Bill had been enacted, it would replace the current WRA of 1993.¹⁶⁶ In view of this development, I analyse the provisions of this bill so as to deduce whether and how its proposed enactment may address the issues of domestic water supply and access to water. I do this by examining applicable provisions *vis-à-vis* the principles of a human rights-based approach to water.

The purpose of the Bill stated in Section 1 to a large extent covers the purpose of recognising water as a human right and also adopting a human rights-based approach to water as the Bill provides:

¹⁶² Sec 1 Water Bill.

¹⁶³ Sec 2(a) Water Bill 9.

¹⁶⁴ Sec 2 (e) Water Bill 5.

¹⁶⁵ Several provisions in the Water Bill refer to environmental protection of water resources generally, as well as pollution prevention. See Sec 1 (d), 2(f); Sec 3 pollution of the proposed Water Bill.

¹⁶⁶ Water Bill 3.

1. The purpose of this Act is to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways that take into account, amongst other factors:

- a. citizens right of access to clean water and sanitation;
- b. meeting the basic human needs of present and future generations;
- c. promoting equitable and affordable access to water and reducing poverty;
- l. encouraging comprehensive and equitable coverage of water supply and Sanitation and promoting public-private sector partnership in delivery of water services;
- n. meeting international obligations;
- o. Recognizing [sic] and implementing the principle of water as an economic good and social good, taking into consideration the socio-economic status of the users, particularly affordability.¹⁶⁷

On the principle of participation, the Water Bill provides in Section 2 that institutions would be established to achieve the purpose set out in subsection one of the bill, by considering the participation and consultation of all stakeholders particularly, the states (as the various states are responsible for domestic water supply), and women. Institutions to be established are also expected to be guided by the principle of transparency and accountability.¹⁶⁸

This shows that water is considered by means of an economic approach, rather than a social approach or a rights-based approach. The federal policies also show that extant laws do not address current issues raised at international level, nor do they meet the challenges of water supply and protection in Nigeria, necessitating the proposal for a review of the extant laws. Although these policies cover, to a large extent, the current discourse and challenges of access to potable water, these policies are not law and are not enforceable. Furthermore, the provisions of the policies address a nascent human rights-based approach; however, it bears the

¹⁶⁷ Sec 1 (a-c) (l) (n-o) Water Bill

¹⁶⁸ Sec 2 (d) & (e) Water Bill.

shadow of an economic approach, and leans towards an environmental perspective, rather than a rights perspective.

4.4.3 ANALYSIS OF STATE LAWS ON DOMESTIC WATER SUPPLY IN NIGERIA

Although water resources have been noted to be a federal government concern in Nigeria, I have also explained that the different state governments have the duty to provide domestic water supply within their respective states. In view of this, I visited a few states in Nigeria to gather information on access to water.¹⁶⁹ The visit to these states showed that the laws of a majority of them were still behind with regards to a human right to water; human rights-based approach to water, and even merely adequate access to water. A few states in South-western Nigeria, like Ogun and Ekiti States, are currently working on improving access to water for domestic use within their respective states.¹⁷⁰ These states have repealed their water laws and contents of these laws would be discussed under the various states and geopolitical zones in this section. I analyse policy frameworks in this section because, as required by the state government to make domestic water supply to her citizens within the state, the state governments do not rely solely on federal laws to provide a framework for access to water within their respective states.

While activities towards improving domestic water supply in various states across Nigeria are on-going, I argue that some of these states have failed to consider a human rights-based approach to aid an enhancement in their activities of improving and delivering domestic water supply, due to the inadequate provisions of the policy that guides their activities.

As stated earlier, Nigeria is a large nation, having 36 states, and a Federal Capital Territory, where each state has a water corporation and a policy framework guiding the provision of access to water for the inhabitants of that state. To examine all 36 policies would not be feasible, as some of these policies have similar provisions to those of other states, and a review of such policies would only be a repetition. I undertake below a geopolitical zone analysis of state water laws, so as to establish that the challenges of access to potable water in Nigeria are similar to a large extent. This is based on the similarity and uniformity of

¹⁶⁹ These states are Kwara, Oyo, Ogun, Edo, Delta and Lagos.

¹⁷⁰ Information gathered on research in Nigeria.

challenges and it is important that these issues be tackled as well at the federal level.

4.4.3.1 State Water Laws in the North-Central Geopolitical Zone

There are six states within the North-Central zone in Nigeria.¹⁷¹ I made a research visit to Kwara State. The Kwara State Water Corporation Law¹⁷² establishes the Water Corporation in the State¹⁷³ and sets out the duties of the Corporation and general provision of water supply in Kwara State.¹⁷⁴ Kwara State Water Corporation Law does not consider water as a human right; nor does it make provisions which seek to improve or enhance potable supply. Sections of Kwara State Water Law refer to ‘cost’, ‘rates’, ‘charges’ and ‘tariffs’ emphasising water as a commodity.¹⁷⁵ The characteristics of the human right to water, as laid out in Chapter Two of this thesis, and the normative content of the human right to water, as highlighted in General Comment 15, does not reflect in the Kwara State Water Corporation Law. General Comment 15, for example, makes it clear that water for domestic use may not be discontinued.¹⁷⁶ Kwara State Water Corporation Law makes it clear that water would be discontinued when payments or dues are in arrears,¹⁷⁷ and such a water user may be called to court for non-payment.¹⁷⁸ Kwara State Water Corporation bears no responsibility or obligation towards a water user when water is discontinued, partially interrupted or suspended.¹⁷⁹ A human right to water and a human rights-based approach recognises that there is a relationship between a duty bearer and a right holder.¹⁸⁰ In fact, non-payment of water rates or charges is treated as a criminal offence, which is punishable by either imprisonment or the payment of a fine.¹⁸¹ The law does not consider a poor person not being able to pay for water, and exclusion of water rates are considered only by the governor or the corporation. The only known free water

¹⁷¹ Benue, Kogi, Kwara, Nasarawa, Niger and Plateau are the states that make up the North Central Geo-Political zone.

¹⁷² Cap K57 of 1992 (Hereafter KSWCL).

¹⁷³ Sec 3 KSWCL.

¹⁷⁴ Sec 21-31 KSWCL.

¹⁷⁵ See sec 21-28, 38 & 39 KSWCL.

¹⁷⁶ General Comment 15 Para 10.

¹⁷⁷ Sec 26 (b) KSWCL.

¹⁷⁸ Sec 25 & 38 KSWCL (This section further imposes a penalty on a water user for non-payment).

¹⁷⁹ Sec 26 KSWCL.

¹⁸⁰ Winkler (2014).

¹⁸¹ Sec 39 KSWCL.

supply in Kwara State is that delivered by water corporation water tankers to all the mosques in the Kwara State capital on Fridays for the *Jumaat* prayers.¹⁸²

4.4.3.2 State Water Laws in the South-Western Geopolitical Zone

There are also six states in the South Western geo-political zone.¹⁸³ I visited three of these states - Oyo, Ogun and Lagos -where there are on-going law reforms in Oyo and Ogun States. I discuss the content of these laws with the water officials in relation to a human right to water and a human rights-based approach to water hereunder.

4.4.3.2.1 Oyo State

The water law currently governing domestic water supply in Oyo State is the Water Corporation of Oyo State (Amendment) Law 2006. This law replaced the 1976 Water Corporation Law, which was revised in 2000. The only amendments made are the title, which confirms it should no longer be referred to as an edict, and Section 17, which extends the position of chief executive officer of the Corporation to other water officers on the directorate cadre, other than a “qualified engineer with sound experience.” Aside from these amendments, the provisions of the Oyo State water Law is still the same as the Water Corporation Oyo State Edict No 24 of 1977.

There is much similarity between the Oyo State Water Corporation law and the Kwara State Water Corporation Law. There is a general water rate, levied on all water users, depending on the tenement area, and on whether a tenement is supplied by an internal pipe, to which the water rate is increased.¹⁸⁴

The non-payment of water rate is treated as a criminal offence, for which the water user is required to pay a fine or be imprisoned for a year.¹⁸⁵ There is, however, no known case of persons imprisoned for non-payment of water rate. The Water Corporation of Oyo State Law further provides that water users, who default in the payment of their water rate after fourteen days of notice, would be disconnected and charged to a court of competent jurisdiction for recovery, and

¹⁸² Discussions with a senior Water Corporation officer during a research visit in 2015.

¹⁸³ Ekiti, Lagos, Ogun, Ondo, Osun and Oyo.

¹⁸⁴ Sec 22 Water Corporation of Oyo State (amendment) Law, 2006 (hereafter WCOSL).

¹⁸⁵ Sec 24 WCOSL 2006.

with costs as well as the expense of disconnecting the service to such tenement.¹⁸⁶ The provision of this law is harsh, because water is needed to sustain life, and not many people can afford to pay for the water used. The South African WSA provides that, where a water user shows he or she is too poor to pay for water for domestic use, the water provider must not disconnect his or her access to water.¹⁸⁷ There is no provision in the Oyo State Water Corporation Law that exonerates a water user from payment or even a discount to vulnerable persons. Although a human right to water does not exempt people from paying for water used, it details that such water should be affordable, and where a person cannot afford to pay, such water supply must not be disconnected.¹⁸⁸ The Oyo State Water Corporation Law still reflects the provisions of the 1977 Edict. Although there is a Water Bill currently under consideration by Oyo State lawmakers, it is not certain that these issues would be concretely addressed.¹⁸⁹

4.4.3.2.2 Lagos State

The Lagos State Water Corporation Law¹⁹⁰ was repealed, and replaced by the Lagos State Water Sector Law.¹⁹¹ The Lagos State Water Sector Law establishes the Lagos Water Corporation¹⁹² and states the functions of the corporation.¹⁹³ One of the functions of the Corporation is to ensure the supply of potable water to everyone within the state at “reasonable charges.”¹⁹⁴ The Water Sector Law, however, does not state or interpret what “reasonable charges” mean, specifically, where it ought to be considered that reasonable charges in this regard may not be affordable or ‘reasonable’ regarding cost to the poor.

The Lagos Water Sector Law provides that where an application is made for water connection for private purposes, it would be granted on the condition that it does

¹⁸⁶ Sec 26 WCOSL 2006.

¹⁸⁷ Sec 4 (3) (c) WSA.

¹⁸⁸ Para 10 General Comment 15.

¹⁸⁹ Discussions with Oyo State Water Corporation officers hinted that a major review of the law is that senior officers other than a qualified engineer may now head the water corporation board. Formerly only qualified engineers could head the water corporation however the new law allows other senior officers with different qualifications to also aspire to head the corporation. It however remains unclear how this change would increase access to potable water supply.

¹⁹⁰ Cap L55 of 2003.

¹⁹¹ No 14 of 2004.

¹⁹² Sec 1(1) Lagos State Water Sector Law.

¹⁹³ See Sec 6 Lagos State Water Sector Law.

¹⁹⁴ Sec 6 (h) Lagos State Water Sector Law.

not cause a detriment to existing supplies or people living in the area.¹⁹⁵ The provision of the Water Sector Law limits access to public water supply.¹⁹⁶ A human right to water recognises the right of everyone to water. However, the provision of section 40 limits that right. Section 42 of the Lagos State Water Sector Law also allows for the disconnection or suspension of domestic water for lack of payment. This provision also rejects any form of obligation on the part of the government for discontinuance or suspension of domestic water supply, and it does make an alternative to supplying when water is discontinued totally or partially, for whatever reason.¹⁹⁷ The provision of section 42 of the Lagos Water Sector Law obviously is not in tandem with the principle of accountability, and the international human right interpretation of state obligation. The Water Sector Law also follows the provision of Section 2 of the Federal WRA, where it states that any person may construct a well or borehole without permission or without obtaining a licence for the purpose of abstracting water from their premises for domestic use.¹⁹⁸ However, on the principle of accountability, the Water Sector Law establishes a complaint centre, which receives and pursues consumer complaints concerning the quality of water, water wastage, and standard of services.¹⁹⁹ It is, however, unclear how the centre treats the complaints of customers.

The provisions of the Lagos Water Sector Law guarantee domestic water to the extent that it does not convey any obligation on the state, and to the extent that it is convenient for the water corporation to provide. The quantity and the cost of domestic water supply are determined by the water corporation. Water supply, according to the Lagos Water Law, follows an environmental approach, as it is more concerned with the quality of water supply. The Lagos State Drug Quality Assurance laboratory is mandated to monitor the quality of drinking water.²⁰⁰ The quality of water supply must conform to the standards for potable water as set by WHO.²⁰¹

¹⁹⁵ Sec 40 Lagos State Water Sector Law.

¹⁹⁶ Sec 40 Lagos State Water Sector Law.

¹⁹⁷ Sec 42 (2) Lagos State Water Sector Law.

¹⁹⁸ Sec 43 Lagos State Water Sector Law.

¹⁹⁹ Sec 46 & Sec 47 Lagos State Water Sector Law.

²⁰⁰ Sec 112 Lagos State Water Sector Law.

²⁰¹ Sec 114 Lagos State Water Sector Law.

4.4.3.2.3 *Ogun State*

Although Ogun State, like Kwara State and Oyo State, still operates according to the “old water law”²⁰² where there exists a current Water Bill, which is expected to be signed by the governor after been passed by the State Executive Council.²⁰³ Following the crisis of domestic water supply in Ogun State, there was a need for policy and strategy change. This brought about reform in the Water Corporation. This reform established the legal department of the Water Corporation, which had to review the old water law and policy. The Ogun State Water Supply and Sanitation Policy of 2013 was thereafter passed, but the implementation is a challenge, as there is still the need to set up agencies for such a purpose.²⁰⁴

The current Water Policy of 2013 considers water as a social good, an economic good and environmental good, which every resident of Ogun State has a right to access.²⁰⁵ The Water and Sanitation Policy of Ogun State also considers 30 litres of water every day within a distance of 250 metres from households.²⁰⁶ The principles of a human rights-based approach to water are also considered in the Ogun State Water Policy of 2013. For example, on the principle of participation, the policy provides that subsidies are to be designed with the active participation of the intended beneficiaries,²⁰⁷ and citizens’ participation in sectoral programmes, particularly participation in the water supply regulatory body.²⁰⁸

Although states in Nigeria are reviewing the water laws governing their various states concretely (like Ogun State and Lagos State), or superficially (like Oyo state and Kwara State), the economic aspect of water, and the environmental perspective on water, is more significant in the Nigerian Laws than the rights perspective, which I argue for in this study. Promoting an economic approach to water over a rights approach deprives the poor from accessing sustainable, clean water for their use. The environmental perspective dwells more on the quality of water, which is just one aspect of a human rights-based approach to water. A

²⁰² ‘Old water law’ refers to the laws of the military regime. These laws have remained static and are the current laws in the democratic regime. Nigeria achieved a stable democracy in 1999.

²⁰³ Discussions with the legal department of the Ogun state Water Corporation during my academic visit in August 2015.

²⁰⁴ Information gathered from legal officers at the State Water Corporation in Ogun State.

²⁰⁵ Ogun State Water Policy 2013 8.

²⁰⁶ Ogun State Water Policy 2013 8.

²⁰⁷ Ogun State Water Policy 2013 9.

²⁰⁸ Para 4.12 Ogun State Water Policy 2013 38.

human rights-based approach considers the quality of water, the quantity of water, the distance of the water, water delivery, and the rights of the poor and the vulnerable to a basic minimum for survival and a life of human dignity. The environmental perspective and the economic approach addresses only one major aspect each, namely pollution and cost, respectively.

Addressing water from a human rights-based approach does not deny that water has an economic value, nor does it neglect the quality of water. What a human rights-based approach does is to prioritise the access of a basic minimum of potable water for everyone, including those who cannot afford to pay for it. It focuses on law, implementation and monitoring of the right to water.

4.5 INSTITUTIONAL FRAMEWORK OF DOMESTIC WATER SUPPLY IN NIGERIA

As stated earlier, all water resources are vested in the Federal Government. However the three tiers of government - federal, state and local governments - are empowered to develop and harness water resources.²⁰⁹ The institutional framework of domestic access to water is discussed under three headings: the federal level, at which all water resources are vested in the federal government; the state level, at which domestic water supply becomes the duty of the state government; and the local government level, at which domestic water supply is the duty of the local government. In this section, I examine the water institutions and water providers, and their duties in water supply. These institutions are examined under the three levels of government, accordingly.

4.5.1 FEDERAL LEVEL

At the federal level, I chiefly identify the Ministry of Water Resources, which is an agency of the Federal Government, given the responsibility of applying the WRA. I also identify the River Basins Development Authority, which is also a branch of the Ministry of Water Resources. There are thirteen River Basins Development Authorities in Nigeria. These development authorities are a body corporate, which can both sue and be sued.²¹⁰ It is responsible for water resources generally in Nigeria, and especially water for agriculture and irrigation.

²⁰⁹ See Mjokanma (2004) in Niasse *et al* (Eds) 145.

²¹⁰ Sec 1 (3) River Basin Development Authority Act.

4.5.1.1 Federal Ministry of Water Resources

In Nigeria, the Federal Ministry of Water Resources (FMWR) is responsible for their management and control.²¹¹ The Federal Ministry of Water Resources was created in 1976 to formulate national water resource policies.²¹² The following year, 1977, it was merged with the Federal Ministry of Agriculture. Two years after this, it was recreated and had only the department of water resources as the operational department. It was again merged with the ministry of agriculture in 1984. This on and off merger continued two more times, before it obtained its current status in 2010, as the Federal Ministry of Water Resources.²¹³ The reason for this ‘on and off’ merger may seem unclear. However, it appears to be due to a lack of proper analysis and definition of the functions of the respective ministries.

The Federal Ministry of Water Resources has 11 departments to handle different aspects of water use. The Department of Water Supply is one of these. The function of this department is to create water supply policies and formulate guidelines and implementation strategies.²¹⁴ It also implements the intervention of water supply at the state level under three segments: urban water supply, small town water supply, and rural water supply. Under the rural water supply segment, the department of water supply under the Federal Ministry of Water Resources addresses the challenges of accelerating access to safe drinking water to rural communities and a small population in Nigeria. The programmes to improve access to domestic water are done with international agencies and development partners, such as the African Development Bank, and the Japan International Cooperation Agency (JICA).²¹⁵

²¹¹ Akpabio & Ansa (2013) 4 MJSS 306.

²¹² FMWR (2015) at <http://www.waterresources.gov.ng/about/history-of-the-ministry> accessed 19 November 2015.

²¹³ FMWR (2015) at <http://www.waterresources.gov.ng/about/history-of-the-ministry> accessed 19 November 2015.

²¹⁴ FMWR (2015) 'core functions' at <http://www.waterresources.gov.ng/about/core-functions> accessed 19 November 2015.

²¹⁵ Ahmad *et al* (2009) Proceedings of the 34th WEDC International Conference, United Nations Conference Centre, Addis Ababa, Ethiopia, 18-22 May 2009 (32-39).

Water Engineering and Development Centre (WEDC) Loughborough University of Technology (internet page 1) also at

http://www.sswm.info/sites/default/files/reference_attachments/AHMAD%20et%20al%202009%20Water%20and%20Sanitation%20Sector%20Reform%20in%20Nigeria.pdf accessed 12 October 2015.

4.5.1.2 River Basin Development Authorities

Considering the fact that the river basin is the “most appropriate geographical unit for planning and management of water resources,”²¹⁶ Nigerian river basins do not have any involvement in drinking water provisions.²¹⁷ There are 13 river basin development authorities in Nigeria. The functions of these basin authorities are the same. I examine in particular the institutional framework of the Lower Niger Basin Development because I had the opportunity to visit and to inquire about their duty in domestic water supply to Nigerians. This visit was also to find out whether there is a nascent human rights-based approach to potable water, and how this approach may help to improve access to water in Nigeria.

The mission statement of the Lower Niger River Basin Authority in Ilorin is

To optimally develop and harness, conserve and organize [sic] efficient utilization [sic] of available surface and underground water resources potentials within the Lower Catchment Basins of the River Niger with a view to improving the socio-economic standard of living of Nigerians particularly those in the rural areas through irrigation agronomy and water supply for multi-purpose uses.²¹⁸

The recorded activities of the river basins are mainly agriculture and irrigation.²¹⁹ The lower Niger River Basin contracts the digging of wells in rural communities (in Kogi and Kwara States) for both agricultural and domestic use.²²⁰ This is how Federal government becomes involved in rural water supply through the basins.

4.5.1.3 National Waters Resources Institute

The functions of this Institute are to advise the federal and state government on all aspects of hydrology.²²¹ This would include all water sources, uses, data collation and challenges.²²² The Act states that the institute has the duty of

²¹⁶ Dublin Statement at <http://www.wmo.int/pages/prog/hwrp/documents/english/icwedece.html> accessed 16 July 2015.

²¹⁷ Adeoti (2010) 1 *Research Journal of Soil and Water Management* 91.

²¹⁸ LNRBDA (2005) Brief on the activities of the Lower Niger River Basin Development Authority.

²¹⁹ LNRBDA (2005) 6-13.

²²⁰ LNRBDA (2005) 13.

²²¹ Sec 7 (1) National Water Resources Institute (hereafter NWRI).

²²² See Sec 7NWRI Act.

enforcing compliance with policies and guidelines on water quality including pollution abatement.²²³ The hydrological services of NWRI include giving information on river and stream flow, groundwater fluctuation surface, and groundwater level and quality.²²⁴ The services of NWRI in this regard can go a long way in addressing some of the challenges of water resources in Nigeria and especially domestic water. In order to improve general knowledge of water issues beyond Nigeria having water in abundance, or the rainfall pattern in the Northern and Southern parts of Nigeria, a regular publication of hydrological ‘issues’ and services ought constantly to be made public. The only periods of such publication or notices are when there is a disaster, such as water flooding.

Furthermore, the general recourse to groundwater extraction by Nigerians in the form of wells and boreholes is certainly not a threat to the nation, for if it were, there would be a legal and institutional framework to monitor the arbitral and constant drilling of the ground for water for domestic use.

4.5.1.4 National Environmental Standards and Regulations Enforcement Agency

The National Environmental Standards and Regulations Enforcement Agency (NESREA) is responsible for the protection and development of the environment and in retrospect water,²²⁵ with liaison with relevant agencies, such as the Federal Ministry of Water Resources.²²⁶ It is this agency that enforces environmental standards, regulations, rules, laws, policies and guidelines.²²⁷ To protect public health, the agency is expected to liaise with other relevant agencies in order to enhance water quality.²²⁸ The function of NESREA overlaps with that of the Ministry of water resources when it provides that it should draw a proposal for the value of water supply, recreation, agriculture industrial and other legitimate use of water.²²⁹

²²³ Sec 7 NWRI Act.

²²⁴ Sec 25 (1) NWRI Act.

²²⁵ Sec 37 NESREA Act explains that water is inclusive of the term environment.

²²⁶ Sec 2 & 3 NESREA Act.

²²⁷ Sec 7 (d), Sec 8 (k) (vi) NESREA Act.

²²⁸ Sec 23 (1) NESREA Act.

²²⁹ Sec 23 (2) NESREA Act.

4.5.1.5 Nigeria Hydrological Services Agency

The Nigeria Hydrological Services Agency (Establishment) Act establishes an agency which would be responsible for hydrological services in Nigeria. Hydrological services have been interpreted to mean information on river or stream flow, groundwater fluctuation, surface and groundwater (level and quality), aquifer study and investigation, salinity studies and management, flood forecasting, and other facilities furnished, issued or provided in connection with hydrological activities.²³⁰ Although the exact duties of the agency are not specified, and there is no mention of domestic or potable water, the services of the agency cannot be argued to not include domestic water issues. This is because the rivers and streams form part of the water available for domestic use in Nigeria, and as such, any information regarding such sources would directly affect water for domestic use. The duties of this agency include advising both the federal and state governments on all aspects of hydrology.²³¹ This act or duty of the agents does not make reference to domestic water, nor does it specify which uses of water.

At the federal level, there are various institutes and agencies saddled with overlapping duties to address the challenges of water resources in Nigeria. Many of the duties of these institutes or agencies are tilted towards environmental issues. Although water is part of the environment, access to water would only be addressed with regards to pollution or the quality of water available.²³² A human rights-based approach to water does not only examine the quality of the water, it also considers the quantity available and the cost of this water. Where a human rights-based approach to water is adopted, the principle of accountability ensures that the duties of water officials are well spelt out, so as to avoid overlapping duties. Overlapping duties sometimes lead to non-performance or a conflict in performance.

4.5.2 STATE LEVEL

Each of the 36 states in Nigeria has a Water Board or Water Corporation (or a state water company as found in Akwa Ibom State),²³³ which is a state government parastatal, established to supply water for domestic use within their respective

²³⁰ Sec 25 (1) NESREA Act.

²³¹ Sec 7a - p NESREA Act.

²³² Sec 37 NESREA Act.

²³³ Aster & Udoh (2015) 9 *African Journal of Environmental Science and Technology* 31.

states. Usually, in each state, there are three government agencies or parastatals responsible for domestic water supply, namely federal, state and local government. At the urban level and peri-urban level, the state water corporation/board is responsible for domestic water supply, where the local government supply water to the rural areas and small villages within each state.²³⁴ The State, through the Water Corporations, procures bulk raw water from the River Basins Authorities (a federal authority), which is processed and made available to users as potable water.²³⁵ When the state water corporations fail to deliver water supply, people abstract ground water. This abstraction, which is usually not monitored, endangers groundwater sustainability.²³⁶

4.5.3 DOMESTIC WATER SUPPLY AT LOCAL GOVERNMENT LEVEL

There are 774 local government authorities in Nigeria administered by the local councils.²³⁷ The local government agencies are responsible for rural water and sanitation supply in their various jurisdictions.²³⁸ However, most of these local governments lack the funds and skills to address the challenges of sustainable water and sanitation.²³⁹

Decentralisation laws in the water resources sector explicitly gave the establishment, operation and maintenance of local water scheme to Local Government Areas in conjunction with those communities that benefit.²⁴⁰ However, at the local government level, there is no regulatory framework, and this has led to no quality assurance and no implementation of water provision.²⁴¹ Usually, groundwater abstraction is preferred by the local government, so as to surface water abstraction, as this enables free access to water. However, in such case, as pumps break down due to wear or lack of maintenance, access to water is

²³⁴ Para 4 National Water Supply and Sanitation Policy 2000.

²³⁵ Adeoti (2010) 1 *Res J Soil and Water Mngt* 93.

²³⁶ Onyenechere & Osuji (2012) 4 *Journal of Water Resource and Protection* 504.

²³⁷ Adeyemi (2013) 15 *Journal of Sustainable Development in Africa* 88; see also Ahmad *et al* (2009) 1.

²³⁸ Para 14 National Water and Sanitation Policy 2000.

²³⁹ Para 30 National Water and Sanitation Policy 2000.

²⁴⁰ Onyenechere & Osuji (2012) 4 *Journal of Water Resource and Protection* 501.

²⁴¹ Onyenechere & Osuji (2012) 4 *Journal of Water Resource and Protection* 501.

discontinued until the pumps are fixed, which is usually undertaken by the community.²⁴²

With regards to water laws at local government level, there is customary law in place.²⁴³ Although all native communities in Nigeria have their customary law relating to water resources and water rights,²⁴⁴ studies have shown that customary laws on water resources are uniform.²⁴⁵ Water bodies in communities belonged to everyone, and private ownership was not recognised.²⁴⁶ In some communities, the various uses of water are identified. An example is found in River states, where the Bolo community of the Okrika local government area identified different streams for different uses,²⁴⁷ where the use of rivers or streams for purposes other than that which the community recognises results in social stigma, rather than a fine or punishment of any other kind.²⁴⁸ Similarly, in Ekiti State, the people of Ogotun Ekiti in the Ekiti South West local government use the Owena stream for spiritual purposes, and it is believed that any other (inappropriate use) of the water attracts a curse from the river goddess, or results in the mysterious death of such an individual. The responsibility of domestic water use in communities is that of the women. They are experts in knowing where to fetch water of good quality for cooking or drinking, which is usually of a better quality than that used for bathing and growing crops.²⁴⁹ The WRA incorporates the customary laws of water for domestic use by providing that water be abstracted from any river or streams without permission.

Currently, there exists a rural water supply and sanitation agency in every state in Nigeria. However, potable water supply in rural areas in Nigeria is estimated to be 39 percent.²⁵⁰ A designed framework does not exist at this level of government to transfer water operation or maintenance to the rural dwellers.²⁵¹ What local government does do is to dig wells for communities as their source of drinking

²⁴² Onyenechere & Osuji (2012) 4 *Journal of Water Resource and Protection* 501.

²⁴³ Goldface-Irokalibe (2008) *ELRI* 15.

²⁴⁴ Goldface-Irokalibe (2008) *ELRI* 9.

²⁴⁵ Ladan (2013) 12.

²⁴⁶ Ladan (2013) 12; Goldface-Irokalibe (2008) *ELRI* 9.

²⁴⁷ Goldface-Irokalibe (2008) *ELRI* 9.

²⁴⁸ Ladan (2013) 12.

²⁴⁹ Ladan (2013) 15.

²⁵⁰ Para 1 National Water Supply and Sanitation Policy 2000.

²⁵¹ Adeoti (2010) 1 *Res. J Soil and Water Mngt* 93.

water, usually unaccompanied by an assessment of the quality of the water.²⁵² This is not sustainable, as some wells dry up, while the people resort to other sources for their water.

Positive efforts to realise domestic water in Nigeria, after the failure of the public sector to deliver, is set around the PPP. In the year 2000, the National Water Supply and Sanitation Policy was launched by the Federal Ministry of Water Resources. This policy encouraged private-sector participation and the expansion of rural water supply systems. However, perhaps due to the wide failures of the PPP in the water sector in African countries,²⁵³ not many states in Nigeria have incorporated this system in their water sector, except for states like Lagos State that has incorporated the PPP into its water law.²⁵⁴

In spite of the recorded failures of the PPP, there exists effective application of the concept in the infrastructural provision and maintenance of roads, bridges, and health sector.²⁵⁵ Perhaps a positive realisation in Lagos State may encourage other states also to adopt the PPP in their water sector. However, I argue that PPP may still be the only plausible way of improving water infrastructure and water supply, especially where properly articulated. I contend that adopting PPP in the water sector, particularly in the supply of domestic water, would function effectively, where the same is anchored on a human rights-based approach, viz. incorporating the PANEL principles in the application of PPP.

4.6 CHALLENGES OF ACCESS TO WATER IN NIGERIA

The challenges of access to water in Nigeria are numerous and divergent. Many of these challenges are identified by the Nigerian National Water Policy.²⁵⁶ Identifying a problem is a major step towards resolving such problems. However, with the identification of some of the challenges of access to water in Nigeria, there are inconclusive solutions and plans to address these challenges. In spite of government's efforts in addressing the situation, the problems of access to water

²⁵² Adeoti (2010) 1 *Res. J Soil and Water Mngt.* 93.

²⁵³ Olowu (2008) 4 *TD: The Journal for Transdisciplinary Research in Southern Africa* 68-69.

²⁵⁴ Lagos State Water Laws (2004).

²⁵⁵ Soyaju (2013) 46 *De Jure* 831.

²⁵⁶ Nigeria National Water Policy 5.

still exist in Nigeria, as if they were there to stay. The average Nigerian now has an attitude of solving his water problems by making adequate provision for his family, especially as regards their basic needs for house sanitation, cooking and drinking.²⁵⁷

In this part, I note that the challenges of access to water in Nigeria are numerous and that it results in both legal and social problems. By legal problems, I refer to the absence of legal provisions and inadequate laws at both federal and state law levels that might adequately cover current issues of access to domestic water, such as considering water as a human right and implementing concrete laws and an institutional framework that can be monitored by law. I discuss the problems of access to water in Nigeria under two headings in this section, namely, the legal challenges and the social challenges. For example, one of the problems of access to water in Nigeria is the quality of the accessible water, which is usually polluted. The streams and the rivers are the major sources of domestic water supply for people living in rural areas and development activities from industries, who have been known to contribute to the challenges not adequately protected against or prevented by law. Virtually all the rivers and streams in Nigeria have been identified as “unfit for drinking,” yet the law provides that such water can be abstracted for domestic use.²⁵⁸

4.6.1 LEGAL CHALLENGES

The challenges of domestic water supply and indeed access to water stem from the law-making process and the provisions of the law through to the attitude of the court in providing a deeper interpretation of the laws.

There exist inadequate normative frameworks on domestic water supply in Nigeria. The provisions of the federal laws, such as the River Basins Development Act, and the WRA, have not made any meaningful provision on domestic water supply.

At federal level, domestic water supply is not recognised as a federal concern, nor is there a provision of law prioritising domestic water supply. Federal laws of

²⁵⁷ On the issue of electricity, it is a known fact that Nigerians acquire generators to power electricity in their homes; landowners dig wells or boreholes to provide for their water use; and groups of families living together in communities contribute money to fill potholes and create drainages to ease road access to their homes. No one can afford to wait for government.

²⁵⁸ Sec 2 WRA.

water resources, such as the River Basin Development Authority, prioritise water for irrigation and agriculture,²⁵⁹ while domestic water is left at the mercy of the various state governments.²⁶⁰ Unlike the 1996 South African Constitution, and the 2010 Kenya Constitution, which guarantees the right to water, the 1999 CFRN does not guarantee any right of this sort. In Nigeria, domestic water supply follows an economic approach, where a default in payment at the state level is treated as a criminal offence, which may attract imprisonment for a year or the payment of fine. There is heavy and uncontrolled groundwater exploitation in Nigeria. The groundwater is a source of water for most Nigerians. As a result of the inadequate provision of domestic water by the government, Nigerians have resorted to sourcing for water privately. This is done through digging private wells and boreholes, especially in urban areas of the country.

The Nigerian water laws at both federal and state level do not provide adequately for domestic water supply. None of these laws concretely endorses a human rights framework to potable water supply in Nigeria. At the federal level, the duty of government, through its various parastatals, such as the River Basins and the Ministry, is to formulate concrete laws and policies that would protect Nigerian waters, as well as address current discourses on water. The extant laws are still military laws, both at state and federal level, which do not cover issues of domestic water. Approaches to water governance in Nigeria remain fragmented and uncoordinated.

Another challenge is the approach to international treaties. Nigeria operates according to a dualist approach, where, if an international treaty is not incorporated in the national legislation; such a treaty cannot be directly applicable by the Nigerian courts.²⁶¹ Nigeria is a signatory to some of the international

²⁵⁹ Sec 4 (1) (a) River Basin Development Authority Act.

²⁶⁰ Although the CFRN does not explicitly state that water services is the duty of the State Government, it mentions, however, that the State Government is responsible for the provision of adequate facilities for goods and services to the people. Sec 15 (3) CFRN 1999.

²⁶¹ Sec 12 (1) CFRN; (2000) 77 LRCN 1255. In this case, the court cited with approval the case of *Higgs & Anor v Minister of National Security & Ors*, the Times of December 23, 1999; where the Privy Council opined that Treaties formed no part of the domestic law unless enacted by the legislature. See also Duru 20-21 at http://www.academia.edu/5185447/INTERNATIONAL_LAW_VERSUS_MUNICIPAL_LAW_A_CASE_STUDY_OF_SIX_AFRICAN_COUNTRIES_THREE_OF_WHICH_ARE_MONIST_AND_THREE_OF_WHICH_ARE_DUALIST accessed 18 September 2015.

treaties that have recognised a human right to water.²⁶² These international instruments have been signed and ratified by the Nigerian government, but have not been domesticated. International laws have been known to influence national laws directly, or indirectly.²⁶³ Nigeria has, however, incorporated the African Charter on Human and People's Rights.²⁶⁴ The ECOWAS court interpreted the right to life and human dignity as including the right to a clean, poison free, pollution free environment, noting that the Constitutional 'directive principle' provision of the right to environment has been made active by the domestication of the African Charter.²⁶⁵ Aside from this, there is no judicial activism on the parts of the judges to give in-depth meaning or life to issues that can be related to socio-economic rights found under Chapter Two of the CFRN.

As previously introduced, there is a dearth of academic writing and research on water law in Nigeria and especially domestic water. Scholarship on domestic water supply in Nigeria usually emanates from environmentalist, engineers and geographers, where there is a need for legal writings on access to water and an analysis of laws and policies in this field. Such scholarship would inform law and policy makers on the areas that need to be focused on in water resources.

4.6.2 SOCIO-LEGAL CHALLENGES

Inadequate national planning and demographic challenges are one of the issues facing domestic water supply in Nigeria. In the North-Eastern part of Nigeria, about 80 percent of households do not have access to improved water supply.²⁶⁶ It is difficult to ascertain the percentage of people without access to potable water in Nigeria as a whole.²⁶⁷ As Biswas would put it "it is not uncommon for countries to provide biased information. Some tend to provide overoptimistic assessments, to indicate to the outside world that they are more 'developed' than they are and in contrast, others may present pessimistic data, hoping this will increase the flow of external aid."²⁶⁸ The Nigerian government, however, estimates that by 2015,

²⁶² Such as ICESCR and CEDAW.

²⁶³ Killander (2013) 17 *Law Democracy and Development* 386.

²⁶⁴ Oba (2004) 4 *AHRLJ* 277.

²⁶⁵ *AHRLR* (2005) 151 5 (2) & (3).

²⁶⁶ Ishaku *et al* (2012) 26 *Water Resource Management* 298.

²⁶⁷ See Biswas (1981) 60 *Fall Council on Foreign Relations* 152.

²⁶⁸ Biswas (1981) 60 *Fall Council on Foreign Relations* 152.

75% of Nigerians would have access to water.²⁶⁹ The United Nations, on the other hand, as represented by their agencies,²⁷⁰ reported in 2010 that Nigeria (amongst ten other countries) has the largest population of people without access to an improved drinking water source.²⁷¹ According to their 2012 update on the progress on drinking water and sanitation by UNICEF and the World Health Organisation, Nigerians without access to potable water number approximately 66 million.²⁷² The proportion of people with improved sanitation in Nigeria was projected to be less than 50%, where the report showed that 109 million people in Nigeria do not have access to improved sanitation.²⁷³

Climate change and global warming should, I argue, be taken into consideration by those drafting the water laws. The rainy season period in Nigeria extends for more months than the dry period. The Northern part of Nigeria is more drought-prone than any other area in Nigeria. Nigeria is currently undergoing a change in rain pattern, as 2015 recorded more rain in the Northern part of the country.

There is also the need for credible records and statistics of the people with access to public water, and people without access at all. This is an issue this research has mentioned in a previous chapter. There is also the issue of different water laws not synchronising or complementing each other in the same way that, for example, South African water laws can be seen to do. Nigeria, unlike South Africa, does not have a developed system of data collection or statistics. The Nigerian legal system makes heavy use of estimates, where there are bureaus responsible for the data collation both under census and other areas, however, either as a result of manpower, financial constraint or corruption, this area is not addressed. Other social challenges that can be addressed by law include water education, where water users in rural, peri-urban and urban areas are educated on water quality, cost and wastages. Arguably, people refuse to pay water tariffs, due to their

²⁶⁹ Akpe at <http://www.businessdayonline.com/NG/index.php/analysis/features/35265-president-promises-water-slashes-budget> also at <http://pulitzercenter.org/reporting/nigeria-water-sanitation-millennium-development-goals-budget-cuts-president-goodluck-jonathan> accessed 9 October 2013.

²⁷⁰ UNICEF and the World Health Organisation are some of the Agencies of the United Nations.

²⁷¹ UNICEF and WHO (2012) at www.unicef.org/media/files/JMPReport2012.pdf accessed 21 May 2013.

²⁷² UNICEF and WHO 2012 Report 9 Fig 8.

²⁷³ UNICEF and WHO 2012 Report 19 Fig 20.

perception that water should be free.²⁷⁴ There is also the issue of corruption and poor infrastructure, and insufficient budgetary allocation, an example of which can be found in the case where the government of President Jonathan slashed the water budget.²⁷⁵

4.7 AN ARGUMENT FOR THE RECOGNITION OF THE HUMAN RIGHT TO WATER AND AN APPLICATION OF THE HUMAN RIGHTS-BASED APPROACH TO WATER IN NIGERIA

Based on the challenges of access to water in Nigeria, and based on the analysis of the legal and policy framework of the country's access to water, I motivate here for both the recognition of the human right to water in Nigeria, and a concomitant application of a human rights-based approach, towards ensuring a sustainable access to water in Nigeria.

The conceptualisation of the human right to water as detailed in Chapter Two of the current study identifies the characteristics of what the human right to water entails. This sets a standard for domestic water. When a human right to water is identified in Nigeria, it raises the base standard of the quality of water supply in Nigeria. This is because, as mentioned previously, Nigerian waters have been shown to be polluted, where even the sachet waters,²⁷⁶ referred to as 'pure water', and are not usually prepared under hygienic conditions. Since the law is *laissez-faire* in this regard, many more unrecognised producers of 'pure water' emerge, and the people who are in search for better water buy this so-called pure water, usually for drinking. Recognising water as a human right, addresses the issue of the quality of water for consumption.

Recognising water as a human right prioritises domestic water supply against other uses of water, such as agriculture. According to General Comment 15, water for domestic use should be separated from other uses before other uses of water are considered. This is because, compared to water for industrial use or agricultural use, the quantity of water needed for domestic use is insignificant in quantity.

²⁷⁴ Information gathered from discussions had with water officials in Oyo State and Kwara State during a research visit.

²⁷⁵ Akpe (2012) found at <http://pulitzercenter.org/reporting/nigeria-water-sanitation-millennium-development-goals-budget-cuts-president-goodluck-jonathan> accessed 12 March 2013.

²⁷⁶ Sachet water refers to drinking water sealed in small polythene bags.

Furthermore, water of highest quality is to be used for domestic use, as against other uses of water in Nigeria. The original meaning of the human right to water was ascribed to water for domestic use.

To recognise water as a human right would be equivalent to protecting other human rights, such as the right to education, and protecting the rights of women and children. It has been established that water is important to the continuing existence of other human rights. Children in Nigeria are made to support their mothers, who have the responsibility of providing water for domestic use for the family. When there is no water to take a bath, or for consumption and the preparation of meals in the home, the mother usually stays at home to find a solution to retrieving water for the home use, and if the children are old enough to assist, they do not go to school. Rather, they join their mother in search of good water quality for domestic use in the household.

The characteristics of the human right to water include availability, accessibility, affordability, quality and quantity. All these characteristics touch on the present water status in Nigeria. Nigerian waters available for domestic use have been known to be of questionable quality, inaccessible, and where available, expensive and insufficient. Recognising water as a human right means that these characteristics of water for domestic use have to be legally addressed.

I argue that, even though a constitutional recognition of a human right to water may not necessarily supply the water, its constitutional recognition would most certainly influence in “building, institutionalising and sustaining the process that would ensure” the realisation of water for domestic use,²⁷⁷ particularly when a roadmap is created for the realisation of access to water.

Adopting a human rights-based approach to water, I argue, does not necessarily need to dismiss the legislative approach to water, which the Nigerian Government have endorsed. This is because a human rights-based approach would only exist to strengthen the legislative approach, ensuring that Nigerians participate in decision-making, reviews, and the maintenance of mechanisms put in place to ensure access to water.

²⁷⁷ Olowu (2006) 69 *Saskatchewan Law Review* 45-46 & 49.

Presently in Nigeria, access to domestic water is not sufficiently addressed, and the people have to seek their water. Adopting a human rights-based approach to water would ensure that those that cannot source their water as a result of poverty would be included and considered in the water scheme. This will assist in reducing the risks women face when they go in search of water, the spread of diseases, and the death of children between the ages of one and five. A human rights-based approach would unveil those in charge of water delivery and quality, and allow the people seek legal redress when there is a violation of their right to access clean water for domestic use.

4.8 CONCLUSION

Nigeria does not recognise water as a human right, despite supporting and promoting a human right to water in the international arena. The Federal Government considers water from an environmental perspective, wherein the quality of water is the focus. However availability, sufficiency and affordability are also important aspects necessary to guarantee water for domestic use. The current focus of the Nigerian laws at the federal level does not adequately make provision for domestic water supply. The various states focusing on domestic water supply are skewed towards a commodity approach. This approach does not guarantee consistency in supply, or availability, as water is still rationed. Access to water under this approach in Nigeria is limited to homes that are reticulated.²⁷⁸ Some of the challenges range from inadequate supply of machinery put in place, as well as electricity, which makes water pumping difficult or impossible. Although domestic water supply by the state government may be affordable to people living in certain urban areas, and the quality is also guaranteed, these two elements are not sufficient to address the challenges of access to water in Nigeria. What dominates Nigerian access to domestic water is an economic approach wherein people purchase water privately for their domestic use at various prices as domestic water from the government is neither guaranteed not readily available.

²⁷⁸ Information gathered during research visit to Nigeria.

Amnesty International classes Nigeria as one of the countries that have recognised water as a human right, and are also in full support of this right.²⁷⁹ The argument in support of water as a human right is based on the fact that Nigeria voted in favour of General Assembly resolution 64/292 of July 2010, co-sponsored several resolutions on the human right to water,²⁸⁰ and hosted the First African South-American Summit in Abuja on promoting the rights of citizens to access clean water.²⁸¹ It ought to be considered, however, that there is much more to recognising a human right to water than the support given to it in the international arena. While Amnesty International considers Nigeria as having recognised the human right to water, the laws in Nigeria, in fact, fails to identify water as a human right.

‘International signatures’ and summits do not mean that the human right to water in Nigeria is entrenched. This is especially the case when ‘performance’ at international level does not reflect in Nigeria via domestication of water at national and state levels of government, and more particularly when there is no institutional framework or implementation mechanisms put in place for the actual realisation of the right to water. The MDG on water was in fact simply a competition with other global communities to halve the population of persons without access to water. Not that anything has changed significantly in Nigeria. The laws are the same, the population has increased, water is still polluted, and there are no cases in Nigerian court emanating from a violation of the human right to water.

A mere recognition of water as a human right does not address the challenges of access to water automatically. Rather, it suggests a genuine interest on the part of the government to address domestic water supply and be ready to be bound by it. On the part of the Nigerian government, there is no genuine interest even to be bound by pronouncements on the human right to water at international level, as

²⁷⁹ Amnesty International & WASH United (2015) at <http://www.righttowater.info/wp-content/uploads/AI-and-WASH-United-States-Recognition-of-HRWS-2015.pdf> accessed 22 April 2016. (Hereafter Amnesty International and WASH United (2015))

²⁸⁰ Human rights Council Resolution 24/18 of September 2013 and Resolution 27/7 of September 2014 (both resolutions contain the full definition of the human right to safe drinking water and sanitation), Resolution 15/9 of September 2010 and Resolution 18/1 of September 2011, as well as Resolution 21/2 of September 2012 and the General Assembly resolution 68/157 of December 2013.

²⁸¹ Amnesty International and WASH United (2015).

such the laws have remained the same, where the WRA guarantees no access to water, and the various states laws are based solely on a commodity approach. The recognition of water as a right in a federal law not only creates widespread awareness of water as a human right but empowers people to lay claims and demand a fulfilment of their rights where there is a concrete law protecting such. A federal legislation recognising the human right to water places a huge responsibility on government and demands commitment on the part of government towards ensuring access to water for every citizen. Supporting institutional frameworks anchored on the PANEL principles of a human rights-based approach, I contend, will promote access to water. This is because under this approach, everyone is guaranteed a basic minimum, and where access to water is violated, the people are empowered by the legislative measures put in place to demand a fulfilment of their right to access water. Furthermore, under a human rights-based approach to water, the principle of non-discrimination emphasises that a basic minimum of clean water must be made available to the poor and vulnerable in the society. The implementation, evaluation and monitoring mechanisms help examine the challenges that may arise from applying a human rights-based approach to water, and how such challenges may be addressed.

To sufficiently address the challenges of access to water in Nigeria in earnest, the federal recognition of water as a human right and an institutional framework is important, built on a human rights-based approach with structures for evaluation and monitoring of the application to fulfilling the human right to water.

The solution of access to water in Nigeria does not end in its transformation into positive law through its recognition in the Constitution or federal law of the country. Rather, a practical, social policy and administrative action are necessary.²⁸² All the approaches described in Chapter Three of the thesis have been applied in Nigeria, except the human rights-based approach, which requires an adequate legislative and institutional framework to be put in place for the realisation of domestic water. The favourable aspect of a human rights-based approach is that it does not require that domestic water is met immediately, but

²⁸² Eide *et al* (Eds) (1995) 21; Beredugo (2014) 2 PhD thesis University of Pretoria.

rather, that adequate legislative and other measures be set in motion for the realisation of this right.²⁸³

With a human rights-based approach to water, the dominant commodity approach in states would be reduced, if not phased out. This would enable that people are not deprived of access to water because they cannot afford it. Furthermore, it has been recorded that many children die yearly as a result of water-related diseases, such as cholera and diarrhoea, which are preventable if children had access to sufficient clean water for drinking and sanitation purposes.²⁸⁴

To begin to impact the current deleterious state of access to water in Nigeria, wherein a majority of Nigerians source for their water both individually and privately, through the digging of wells (which are often shallow and do not yield sufficient water) and boreholes, which usually are not monitored; and the use of surface waters by people living in communities where there are rivers and streams (widely known to be mostly polluted), there is the need for a legislative and institutional framework which incorporates the desire to promote access to water for all Nigerians. To do this, it is important that access to clean water is prioritised, by recognising same as a human right in Nigeria. As explicated herein, Nigeria has already agreed to the existent of the right at the international arena, however, the unmonitored increase in sale and purchase of ‘pure water’ for drinking purposes clearly shows that there is insufficient access to water from its government pipes.

A human rights-based approach is a complex approach to adopt in any jurisdiction, because it takes into consideration a broad array of factors, such as the people, the implementation, and monitoring and evaluation mechanism. However, beyond the accompanying challenges of this, are the expansive benefits which, when applied, can transform communities for the better through their involvement. A human rights-based approach, argued for as a significantly better approach to devising legal instruments to ensuring access to domestic water in Nigeria is not without its complications or challenges. Based on this summation, in the next

²⁸³ See Art 2 ICESR.

²⁸⁴ Ucha (2010) 1 *Global Majority E-Journal* 55 at http://www.american.edu/cas/economics/ejournal/upload/Global_Majority_e_Journal_1-1_Ucha.pdf accessed 12 July 2016.

chapter, I move on to identify jurisdictions that have adopted a human right-based approach to water, and the challenges of this approach to water in these contexts, using a comparative analysis of human rights-based approaches to water. I consider the promising practices and the challenges of this approach in both South Africa and Kenya, so as to identify promising practices from which Nigeria may learn.

CHAPTER FIVE

COMPARATIVE HUMAN RIGHTS-BASED APPROACHES TO WATER FROM SELECTED JURISDICTIONS

5.1 INTRODUCTION

Following up on my argument in the previous chapter on the recognition of a human right to water, and an adoption of a human rights-based approach to realising access to water in Nigeria, in this chapter I identify and examine promising practices on a human rights-based approach to water from selected jurisdictions. Although my main focus in this chapter is South Africa and Kenya, I also consider promising practices in Colombia and India, and I justify my reasons for this consideration in the appropriate section in this chapter.

In an analysis of South Africa, I examine the legal and institutional frameworks of the human right to water firstly. I then analyse case law and judicial interpretations of the human right to water and how a human rights-based approach to water has been adopted. I examine the challenges of a human rights-based approach to water and the implementation and monitoring mechanisms put in place to ensure access to water in South Africa. I investigate how this approach may have improved access to water, and I identify the promising practices of a rights-based approach to water in South Africa and draw conclusions.

In my examination of Kenya, I focus on the current water reforms that emulate a human rights-based approach to water. Considering the recent recognition of the human right to water in the Constitution of Kenya, I investigate how this recent recognition and current water reforms follow a human rights-based approach. I examine the institutional framework and the implementation and monitoring mechanism put in place to ensure access to water in Kenya. I identify promising practices and draw conclusions.

I however do not limit my examination and analysis of promising practices of a human rights-based approach to water to South Africa and Kenya; rather, I identify promising practices in India and Colombia, which are arguably two jurisdictions

that have made a remarkable impact on realising an improved access to water without even explicitly recognising water as a human right. These two jurisdictions ride on the back of civil society mobilisation, as well as judicial activism, in realising the right to water, traits which are also found in South Africa.

Although I argue that the adoption of a human rights-based approach has contributed immensely to the progressive realisation of the right to water in South Africa,¹ the mobilisation of civil society can be seen to have contributed no less to both the realisation of the right to water (and an implementation of one or more of the PANEL principles) in South Africa² and Colombia,³ and judicial activism to the right to water in India.⁴

In this chapter, I, therefore, examine the legal application, challenges and benefits of incorporating a human rights-based approach to water in selected jurisdictions. The manner in which Colombia and India have addressed the challenges of access to water cannot be compared to either that of Kenya or South Africa. India, like Nigeria, does not explicitly recognise the human right to water. The reason for considering India and Colombia is to ascertain the type of approach adopted, to ensure a progressive realisation of access to water, and whether this approach may be likened to incorporating parts of a human rights-based approach, and to determine implications for Nigeria.

5.2 A HUMAN RIGHTS-BASED APPROACH TO ACCESS WATER IN SOUTH AFRICA

In this section, I analyse a human rights-based approach to access water in South Africa under three subsections. In the first subsection, I examine the legal framework of the human right to water. In the second subsection, I examine case law and the interpretation of various South African courts on the human right to water and a human rights-based approach to water, with particular reference to

¹ Niyi-Gafar (2015) 3 *African Nazarene University Law Journal* 72-89.

² Dugard (2010) *Mobilising social justice in South Africa Perspectives from researchers and practitioners* 71-99 at http://www.pulp.up.ac.za/pdf/2010_10/2010_10_j_chapter4.pdf accessed 16 February 2014.

³ Food & Water Watch (2009) June briefing paper at <http://www.municipalservicesproject.org/sites/default/files/Colombias-Constitutional-Reform.pdf> accessed 12 February 2016.

⁴ Mishra (2015) 2 *International Journal of Research in Humanities and Social Studies* 1.

the PANEL principles. In the third subsection, I analyse the implementation and monitoring mechanisms put in place to ensure access to water in South Africa. I identify the promising practices of a human rights-based approach to water in South Africa from which Nigeria may learn lessons. I end my argument in this section with an analysis of the benefits of a human rights-based approach to water in South Africa, which I enumerate alongside the challenges of incorporating a rights-based approach to water.

5.2.1 LEGAL FRAMEWORK OF A HUMAN RIGHTS-BASED APPROACH TO WATER IN SOUTH AFRICA

By legal framework, I refer to the water laws by which a human rights-based approach to water is anchored. Arguably, South Africa is a pioneer country in the constitutional recognition of the human right to water, and with an immediate follow up in two national water laws, the WSA,⁵ and the NWA.⁶ This being the case, I examine and analyse the provisions of three national laws that ushered in a human rights-based approach to water in South Africa: the 1996 Constitution, the 1997 WSA and the 1998 NWA. I limit myself to only these national laws, as these laws set the foundation of a human rights-based approach to water in South Africa.⁷ Aside from the NWA and the WSA, the Constitution is the supreme law, and any other provision of law which conflicts with it is null and void and of no legal effect.⁸ In other words, considering chiefly any other national water law, which also works in tandem with the Constitution, would create unnecessary repetition, also because these are the only national laws dealing with access to water in South Africa. Furthermore the Constitution is the supreme law to which all other laws must conform.⁹ The reason for this is to show that a human rights-based approach to water begins from the recognition of water as a right, to which every individual can lay claims.

Apart from the 1996 Constitution and the statutes, NWA and WSA policy documents have also become veritable tools for implementing economic social and cultural rights, including the right to water. To this end, I discuss the Free Basic Water

⁵ No 108 of 1997.

⁶ No 36 of 1998.

⁷ I do not examine municipal water services by-laws, except where provisions in such may have been considered by a court in its ruling on the right to water in South Africa.

⁸ See Bilchitz in Woolman & Bilchitz (Eds) (2012) 269.

⁹ See Bilchitz in Woolman & Bilchitz (Eds) (2012) 269.

policy in South Africa.¹⁰ In this section of the chapter, I examine the national laws, which pave the way for the realisation of a human rights-based approach to water. I examine the provision of the 1996 Constitution, the WSA, the NWA and the FBW policy.

5.2.1.1 1996 South African Constitution

Arguably, a human rights-based approach to water in South Africa was only adopted when the 1996 Constitution emerged. This new Constitution sought to “recognise the injustices of the past,” “heal the divisions of the past, establish a society based on democratic values, social justice and fundamental human rights,” and “improve the quality of life of all citizens.”¹¹ These objectives of the 1996 Constitution cannot be realised without access to water for everyone, and an opportunity to demand a fulfilment of the right to water.

The 1996 Constitution provides that everyone has the right to access sufficient water and that the state must take reasonable legislative steps and other measures within its available resources to achieve the progressive realisation of this right.¹² This provision of the 1996 Constitution aligns with international law’s call on nations to recognise the right to water and progressively realise this right.¹³ The 1996 Constitution has embedded in it a human right to access to water following the words to “respect, protect and fulfil.”¹⁴ The provision of the right to access to water has provided an avenue for South Africans to demand a fulfilment of this right.¹⁵ The constitutional recognition of the right to access to water is further made active by the WSA and the NWA, which are discussed below.

An inclusion of socio-economic rights in the 1996 Constitution, and especially the right to access water, elucidates arguments on resources constraint and the justiciability of socio-economic rights, and in this case, the argument for the right to access to water.¹⁶ According to Olowu, there is no plausible justification for not

¹⁰ 2000 (hereafter FBW policy); See DWARF (2002) 3 at <https://www.dwaf.gov.za/Documents/FBW/FBWImplementStrategyAug2002.pdf> accessed 14 July 2016.

¹¹ Preamble 1996 Constitution.

¹² Sec 27 (1) (c) (2).

¹³ United Nations General Assembly (2016) Para 5.

¹⁴ Sec 7 (2) 1996 Constitution; Winkler (2007) *IELRC* 1 5.

¹⁵ *Mazibuko* (CC) CCT 39/09 (2009) ZACC 28 Para 1.

¹⁶ Olowu (2006) 69 *Saskatchewan Law Review* 64-65.

guaranteeing socio-economic rights in the midst of the deprivation of basic needs in the society.¹⁷ With the constitutional guarantee of the human right to access to water in South Africa, the Constitutional Court has decided that government is required to take reasonable measures to realise water access progressively; however, the court did not create a directly enforceable right to immediate delivery of water.¹⁸

I argue that South Africa took up a human rights-based approach when it sought to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”;¹⁹ hence, the entrenchment of socio-economic rights in the 1996 Constitution, including the right to access to water.²⁰ The 1996 Constitution is thus described as transformative.²¹ I contend that what is more transformative is guaranteeing the rights that secure the equal and non-discriminatory access to basic needs by means of which to enhance human dignity, which, of course, the 1996 Constitution has done.

5.2.1.2 The Water Services Act (WSA)

The purpose of the WSA is to provide for the rights of access to basic water supply and set out standards and a regulatory framework under which the right to water is to be provided.²² As such, the WSA is focused on potable water and sanitation services.²³

The WSA was enacted to protect the constitutional right to water.²⁴ Echoing section 27 of the 1996 Constitution, the WSA provides that everyone has a right of access to basic water supply, which every water service institution must take reasonable measures to realise, through provisions in their water services development plan, showing measures to realise the right.²⁵

¹⁷ Olowu (2006) 69 *Saskatchewan Law Review* 65.

¹⁸ Wekesa (2013) 14 *ESR Review*.

¹⁹ Preamble 1996 Constitution.

²⁰ Sec 27 1996 Constitution.

²¹ Klare (1998) 14 *South African Journal on Human Rights* 146-188.

²² Preamble WSA; Sec 2 WSA a-j.

²³ Para before the Preamble found in the WSA.

²⁴ *Mandla Bushula v Ukhahlamba District Municipality* (2012) High Court (Eastern Cape Division) 2200/09 ZAECGHC 1 at <http://www.saflj.org/za/cases/ZAECGHC/2012/1.html> accessed 2 November 2015 (hereafter *Bushula's case*) Para 4.

²⁵ Sec 3 (1) - (3) WSA.

I analyse the provisions of this WSA in synchrony with the human rights-based approach principles of participation, accountability, non-discrimination, empowerment and legal redress. This is to show how South Africa theoretically follows a human rights-based approach to water.

On the principle of participation, as explained in Chapter Three, everyone should be involved directly or indirectly in partaking in the issue of access to water which concerns them as human beings.²⁶ Although the WSA does not directly use the word participation, it does, however, use the term “information.”²⁷ As contended in Chapter Three, participation can either be direct, or indirect. Indirect participation involves access to information.²⁸ The WSA has repeatedly emphasised this aspect of participation, which takes transparency as a compulsory ingredient of human rights that affords the principle of accountability. As such, information with regards water (supply, delivery and tariff) is covered by the WSA. The WSA provides that water services providers should supply information concerning the provision of water services to “a consumer or potential consumer.”²⁹ Furthermore, a policy statement must be prepared and adopted by a water board, and such policy statement must contain information concerning the water boards, showing the nature and extent of the activities to be undertaken³⁰ and the measures to reduce water wastage to an acceptable level.³¹ This particular provision on wastage is important for public knowledge, because in Nigeria for example, drastic measures are taken to reduce water wastage, such as the permanent sealing of a pipe, which discontinues water supply to the water users, and constitutes a violation of the human right to water. To know how water wastage is going to be addressed by the water providers is an important criterion in the human right to water, as it prepares the water users for what to expect when water is found to be wasted. Also, the policy statement contains the nature and extent of ensuring access to water, and how this access would be improved.³² This policy statement,

²⁶ Sec 3.3.4.1 Chapter Three of this thesis.

²⁷ See arts 23 39 40 45 59 67-70 WSA.

²⁸ Sec 3.3.4.1 Chapter Three of this thesis.

²⁹ Sec 23 (d) WSA.

³⁰ Sec 39 (1) (3) (a) WSA.

³¹ Sec 39 (3) (h) WSA.

³² Sec 39 (3) WSA.

the WSA provides, must be accessible to the public.³³ Water boards are also expected to issue a report (which is accessible to the public)³⁴ of their activities at the end of the year, which must contain sufficient information to allow relevant bodies, including the public, to assess their performance.³⁵ The WSA provides for the establishment of a national information system, which must be in an accessible format.³⁶ This national information system is established to record and provide data for the development, implementation and monitoring of national policy on water services and to provide information to consumers and the public.³⁷ Having access to information about water services generally and giving the public an opportunity to assess the functions of their water providers, establishes not just transparency, but also enhances the principle of participation under a human rights-based approach to water.

On the principle of accountability, the WSA acknowledges that all the spheres of government have a duty to ensure that water supply services are provided in an efficient, equitable and sustainable manner.³⁸ It highlights the connection between the right of the people to access water and the duty of government to supply and manage the water sustainably.³⁹ All these provisions, such as the duty of government and the powers of the Water Board, form the institutional framework of a human rights-based approach to water, and in particular, it is associated with the principle of accountability. The WSA establishes accountability of water service providers as one of the objectives of the Act.⁴⁰ A water services provider has been described as “any person who provides water services to consumers or to another water services institution.”⁴¹ There are four identified water services institutions who are responsible for water services under the WSA: the water services authorities which are the municipalities; the water services providers who operate as water services providers, with the approval of the water authorities and who are responsible for providing water services to consumers; the water services

³³ Sec 39 (4) WSA.

³⁴ Sec 44 (C) WSA.

³⁵ Sec 44 (3) (d) WSA.

³⁶ Sec 67 WSA.

³⁷ Sec 69 WSA.

³⁸ Preamble WSA.

³⁹ *Mazibuko CC* Para 3.

⁴⁰ Sec 2 (i) WSA.

⁴¹ Sec 1 WSA.

intermediaries, who are not considered water providers, but are obliged to provide water services to another by a contract;⁴² and the water services committee, established by the Minister, to provide for water services in areas where the water authorities have not provided water services.⁴³ The functions of these identified categories of persons, as it relates to water services provision, are discussed as follows.

According to the WSA, it is the duty of the water services authorities to provide access to water services within its area of jurisdiction.⁴⁴ The water services authorities have been defined as the municipality responsible for ensuring access to water services.⁴⁵ The water services authority is not the water provider per se; however, it may perform the functions of a water services provider by entering into a written contract with a water services provider or form a joint venture with a water services institution to provide water services.⁴⁶ It has the duty of ensuring efficient and affordable, economical and sustainable access to water services.⁴⁷ These authorities have the duty of preparing the draft water services development plan for the following five years,⁴⁸ which must contain details of the area to which it applies, the size and distribution of the population within the area, existing water services, the number and location of people who are not being provided with a basic water supply, amongst other things.⁴⁹ This draft water services development plan must be brought to the notice of the consumers within its area of jurisdiction, who are also invited to comment on the draft within a reasonable amount of time before the copies of the plan are sent to the Minister.⁵⁰ These water authorities have bylaws,⁵¹ which set out the standard of the services, the

⁴² Sec 1 WSA.

⁴³ Sec 50 WSA.

⁴⁴ Sec 11 WSA.

⁴⁵ Sec 1 WSA.

⁴⁶ Sec 19 WSA.

⁴⁷ Sec 11 WSA.

⁴⁸ Sec 12 WSA.

⁴⁹ Sec 13 WSA.

⁵⁰ Sec 14 & 15 WSA.

⁵¹ Examples are the Province of Western Cape: Provincial Gazette 6378 city of Cape Town water law 1 September 2006 & City of Johannesburg Metropolitan Municipality Water Services By-laws *Provincial Extraordinary Gazette* (Gauteng), Gazette No 179, Notice 835 of 2004 (21 May 2004).

structure of tariffs, and the circumstances under which water services may be limited or discontinued.⁵²

The WSA provides for water services providers who operate only with the approval of the water services authorities, having jurisdiction in the area of provision.⁵³ They have the duty of providing water services to consumers or water institutions,⁵⁴ and are obliged to give information with regard to water services, as may be required by the authority with jurisdiction, the minister, or a consumer or potential consumer.⁵⁵

Although the WSA does not consider the water services intermediary to be a water provider, it performs the functions of a water provider, as it provides water services to “another in terms of a contract.”⁵⁶ And although the Act does not state that the intermediaries are private water services providers, it, however, provides that the duties of the water services intermediaries must meet any minimum standard prescribed by the Minister, and mentions, in particular, the quality, quantity and quality of water services the intermediary provides.⁵⁷ The duty of both the water services providers and intermediaries are monitored by the water authority.⁵⁸

The WSA also provides for the establishment of a water board by the minister, with the primary duty of providing water services to water services institution within its service area.⁵⁹ Although the WSA states that the water board may act as a water service provider with the approval of the water authority, this is under the condition that it does not affect its primary duty of providing water services to institutions within its area.⁶⁰ The Act allows the Minister to establish a water service committee to provide water services in any area where the Minister feels it is required, however, upon satisfaction that such water authorities can effectively

⁵² Sec 21 WSA.

⁵³ Sec 22 WSA.

⁵⁴ Sec 1 WSA.

⁵⁵ Sec 23 WSA.

⁵⁶ Sec 1 WSA.

⁵⁷ Sec 25 WSA.

⁵⁸ Sec 27 WSA.

⁵⁹ Sec 28-30 WSA.

⁶⁰ Sec 30 WSA.

provide water services, where the Minister can at their discretion disestablish such water services committee.⁶¹

The principle of accountability, as discussed in previous chapters, focuses on the water services providers making water accessible to the consumers using the provisions of the WSA as a guideline. As such, these water services providers act on transparency, by making their policy available to consumers, showing how water is to be made accessible to them. Every person in South Africa has a right to access to basic water supply, and every water services institution must take reasonable measures to realise this right.⁶² The WSA also provides that all water services authorities must set out the development plan and measures to realise the right to water.⁶³ Setting out a plan of action does not only give a participatory effect (access to information) to realising access to water, but it also allows transparency on the part of the water providers, in the performance of their duty. The water services institution is expected to take reasonable measures to realise the right of access to water, and every water services authority - such as the municipality, district or rural council - must set out the terms for provisions, to be accessible to the public.⁶⁴

In line with the provisions of the 1996 Constitution that everyone has the right to access to water, the WSA states that everyone has the right of access to basic water services, in the realisation of which, water services institutions must take reasonable measures.⁶⁵ Section 3 also makes it important for water services authority to have a development plan in which the measures for realising the rights to water are set out.⁶⁶ The WSA describes basic water supply as the prescribed minimum standard of water supply services necessary for the reliable supply of sufficient quantity and quality of water to households, including informal households, to support life and hygiene.⁶⁷

⁶¹ Sec 51 WSA.

⁶² Sec 3 WSA.

⁶³ Sec 3 (3) WSA.

⁶⁴ Sec 4 WSA.

⁶⁵ Sec 3 (1) (2) WSA.

⁶⁶ Sec 3 (3) WSA.

⁶⁷ Sec 1 (iii) WSA.

The desire to realise access to water is no doubt adequately covered by the WSA as it identifies what institution is in charge, what quantity of water is to be delivered by which water services provider, how regularly it should be supplied, the tariff to be paid for water supplied or consumed.⁶⁸ The WSA provides comprehensively for the realisation of the right to water. The objectives of the WSA range from providing the right of access to basic water supply to setting out a national standard for tariffs in respect of the water services, the preparation and adoption of water services institutions, a regulatory framework for water services institutions, the establishment of water boards, the monitoring of water services, the gathering and dissemination of information on water, the accountability of water services providers and the promotion of effective water management and conservation.⁶⁹ All these objectives set out by the WSA are important parts of the principles of a human rights-based approach to water.

On the principle of non-discrimination, the WSA recognises the constitutional provision of access to water for everyone.⁷⁰ Although the WSA does not mention categories of persons such as women, children, the poor, or persons with disabilities who are usually the vulnerable in the society, the WSA states that water services may be discontinued or limited⁷¹ only when it sets out the conditions for such limitation or discontinuation that is accessible to the public.⁷² Arguably, this provision falls short of the international human rights definition and meaning of the human right to water, which states that access to water, should be continuous, and that disconnection constitutes a violation of the human right to water.⁷³ However, on closer examination, I argue that reasonably speaking, and in support of the principle of ‘progressive realisation’, a discontinuation of access to water may be necessary, as long as there is ‘transparency’ (which forms part of the principle of accountability), for which the WSA has provided in Section 4, where it states that conditions for discontinuation must be set out and must be accessible to the public.⁷⁴ Even though access to water under international human

⁶⁸ See generally WSA.

⁶⁹ Sec 2 (a) - (j) WSA.

⁷⁰ Sec 3 WSA.

⁷¹ Sec 4 (2) (c) (iv) WSA.

⁷² Sec 4 (2) (a) WSA.

⁷³ General Comment 15.

⁷⁴ See Sec 4 WSA.

rights must be continuous,⁷⁵ the WSA provision on discontinuation of water services cannot be said to be incompatible with the international human rights law's definition of the human right to water, especially if a discontinuation will enhance a human right to water.⁷⁶ Although an examination of this provision of the WSA would seem like it is not in keeping with a human right to water, the WSA has made it clear that when a water user proves to the satisfaction of the water services authority that he or she is unable to pay for basic services, then such water services should not be discontinued.⁷⁷ This provision is in line with the international human rights provision that no one should be denied access to water because he or she cannot afford to pay.⁷⁸ Paying for water consumed should not be a basis for questioning the purpose of water as a human right, as international human rights resolution of water as a human right was not implied to be free, and the definition of the right to water should not be so construed as the human right to water has been described to be "affordable."⁷⁹ Affordable does not in any way mean free; rather it means that water users have the financial means to acquire water for their use. This would, as such, imply that differentiated charges may apply, as it stands to reason that what the rich may consider affordable may not be affordable to the poor.⁸⁰ The WSA has thus accommodated the provisions of the human right to water as set out by the Committee on Economic Social and Cultural Right via General Comment 15.

Although the WSA does not specifically mention the principles of empowerment and legal redress, these principles are, however, covered by the general provisions of the Act, where policies and plans of the water providers are stated to be accessible to the public.⁸¹ The people are empowered by the existence of the law and its provisions, which guarantee their right to water. Where the provisions of the law ensuring their right are violated, water consumers can seek legal redress in

⁷⁵ See definition of the human right to water in Para 2 General Comment 15; Para 5 Resolution 70/169.

⁷⁶ For example, discontinuing water to clean the pipes, so as to improve the quality of water supplied; or discontinuing water supply to prevent wastage, which in itself, reduces access to water.

⁷⁷ Sec 4 (3) (c) WSA.

⁷⁸ Para 5 Resolution 70/169.

⁷⁹ Para 2 General Comment 15.

⁸⁰ Kok in De Feyter & Isa (Eds) (2005) 274 -275 & 286.

⁸¹ Sec 12 & 13 WSA.

a court, as done in the *Mazibuko case*.⁸² Informing water users of vital information with regards to access to water forms part of the principle of participation and empowerment under a human rights-based approach to water. Furthermore, seeking legal redress in the court called for a “proper interpretation” of the WSA.⁸³

5.2.1.3 National Water Act (NWA)

The NWA was enacted in 1998 to ensure the protection, use, development, conservation and management of the country’s national water resources.⁸⁴ Even though the NWA focuses on water resources in general, it prioritises access to domestic water for all South Africans.⁸⁵ This Act allows the continuous use of water resources for domestic use.⁸⁶ I give a summary of what the NWA entails in relation to domestic water supply.

The NWA does not directly provide for domestic water supply or use; rather, it deals with water resources generally, which refers to ‘watercourse’ such as rivers, dams and groundwater.⁸⁷ It contains rules about how these waters are protected, used and controlled in an integrated manner.⁸⁸ As it relates to the human right to drinking water, the NWA recognises two types of reserves, namely water for basic human needs, and water for ecological reserve.⁸⁹ “Reserve,” according to the Act, refers to the quantity and quality of water required to satisfy basic human needs, as prescribed under the WSA.⁹⁰ The NWA thus ensures that water for basic human needs, such as drinking, food preparation and personal hygiene, are reserved before water is allocated for other uses.⁹¹ The significance of this is the importance of water for basic human needs, and the priority given to it.⁹² Furthermore, the quantity of water needed for domestic use is quite insignificant,

⁸² See Paras 6 20 & 22 WSA.

⁸³ Para 37 WSA.

⁸⁴ Sec 2 NWA.

⁸⁵ Sec 2 (a) - (f) NWA.

⁸⁶ Sec 4 22 & Schedule 1 NWA.

⁸⁷ See preamble & sec 1 (xxiv) (xxvii) NWA.

⁸⁸ Sec 6 (1) (l) NWA.

⁸⁹ Part 3 NWA.

⁹⁰ Sec 1 (xviii) NWA.

⁹¹ See generally the Guide to the National Water Act published by the Department of Water Affairs and Forestry (DWARF). See also WaterAid *et al* at <http://www.righttowater.info/progress-so-far/national-legislation-on-the-right-to-water/> accessed 15 June 2013.

⁹² Sec 2 (a) NWA.

compared to what is needed for other water uses, such as industrial and agricultural.⁹³ Principles of a human rights-based approach have also been established in the provisions of the NWA, particularly in Chapter Two of the Act, where there is a specific focus on non-discrimination.⁹⁴

The NWA is thus consistent with the provisions of the 1996 Constitution and the WSA, by ensuring that water for basic human needs is reserved before water is allocated for other uses.⁹⁵ The three national water laws are in harmony in relation to the realisation of access to water in South Africa. The provisions and synchrony of these laws arguably form part of the reason South Africa has been described to have a “commendable legal framework.”⁹⁶

And, as if these laws were not sufficient enough, the South African government went ahead to promulgate the FBW policy, so as to further reach and improve access to clean water for the poor in the society. I briefly discuss this policy as it depicts and supports a human rights-based approach to water.

5.2.1.4 FREE BASIC WATER POLICY

South Africa’s FBW policy of 2000 was the decision of the government to further alleviate the challenges of access to potable water to the poor in the society.⁹⁷ The Department of Water Affairs and Forestry commenced the implementation of this policy in 2001.⁹⁸ In this section, I discuss the emergence, quantity and implementation of the FBW Policy, and analyse how it aims to fulfil the principle of non-discrimination and the human right to water.

Noting that a significant number of South Africans lacked access to adequate water supply, the FBW Policy of 2000 aimed at ensuring poor households have a basic supply of water free of charge; as such, 6000 litres of clean water was approved

⁹³ World Water Vision at <http://www.worldwatercouncil.org/fileadmin/wwc/Library/WWVision/Chapter2.pdf> accessed 25 April 2016.

⁹⁴ See sec 2 (b) (c) National Water Act.

⁹⁵ See sec 9 (a) NWA.

⁹⁶ Dugard in Langford *et al* (Eds) (2014)275.

⁹⁷ DWARF (2002) 3 at

<https://www.dwaf.gov.za/Documents/FBW/FBWImplementStrategyAug2002.pdf> accessed 14 July 2016; Muller (2008) 20 *Environment & Urbanisation* 67.

⁹⁸ DWARF (2002) 3.

for households monthly.⁹⁹ The basic quantity of water supply is 25 litres per person per day, or 6000 litres for a household of eight people.¹⁰⁰ Although the primary aim of the policy is for poor households, the national policy does not define ‘poor’. The local government has the role of defining and identifying those households that fall under this category.¹⁰¹ Although this may seem an unusual task, it is, rather, a preferable one, since poverty indicators vary from place to place.

The FBW intends to serve the purposes of drinking and cooking primarily; however, water may also be used domestically for gardening, or for food consumption, and this is clearly not covered by the FBW Policy.¹⁰² The aim of the FBW policy is to ensure a basic supply to the poor in the society. Although this aim is praised for its consideration, incorporating and ensuring a basic amount to the poor,¹⁰³ this basic supply is meted out to every household in South Africa, regardless of their household budget.¹⁰⁴ At this point, it is difficult to conclude whether the FBW policy has been successful or not because there were so many issues that arose with regards the implementation of the FBW policy. First, water for sanitation services was not dealt with adequately; secondly, even the ‘non-poor’ were beneficiaries of this FBW, which, as analysed by Mehta, meant that not all the poor were beneficiaries under the policy.¹⁰⁵ Since the FBW was universal, more of the non-poor were served than were the poor citizens, as the policy relied on municipalities, the poorer and weaker municipalities were less able to administratively and financially implement the policy as effectively as were wealthier, better-resourced municipalities.¹⁰⁶

Operationalising the FBW policy has been difficult, as there was no proper planning or details as to how it would play out before it was announced.¹⁰⁷ With the

⁹⁹ DWARF (2002) 7.

¹⁰⁰ DWARF (2002) 8.

¹⁰¹ DWARF (2002) 8 .

¹⁰² Mehta in Kabeer (Ed)(2005) 239.

¹⁰³ DWARF (2002) 7.

¹⁰⁴ Farrar & Rivett at

<http://www.ewisa.co.za/literature/files/ID252%20Paper315%20Farrar%20L.pdf> accessed 14 July 2016.

¹⁰⁵ Muller (2008) 20 *Environment & Urbanization* 79-80.

¹⁰⁶ Hall *et al* (2006) South African Child Gauge 62 at

http://ci.org.za/depts/ci/pubs/pdf/general/gauge2006/gauge2006_accom.pdf accessed 1 September 2016.

¹⁰⁷ Mehta in Kabeer (Ed) (2005) 241.

constitutional and institutional endorsement of the human right to water, South Africa has also adopted a cost recovery approach, which has made the policy difficult to realise.¹⁰⁸ Furthermore, devolving the implementation of the FBW policy from the national government to local government has meant that poorer municipalities that have inadequate financial resources to implement it¹⁰⁹ would not be able to realise a sustainable basic minimum. Nonetheless, there is value in constitutionalising and institutionalising the human right to access water, as the human right to water does not only allow the right to justiciable claims for the poor in their water struggles, it also creates an avenue for mitigating the force of the economic approach to water.¹¹⁰

Considering the basis for which the policy was formulated, and the implications for the poor, the FBW policy, I argue, is a positive tool for the realisation of access to water for the poor, as the implementation of the FBW policy addresses the principle of non-discrimination wherein the vulnerable in the society can benefit in the realisation of the basic water supply. If the objective of the FBW had been strictly adhered to, and only the poor were recipients of the FBW supply, then perhaps all the poor in South Africa would have been served under this policy, with the aim of progressively realising for everyone. However, as the policy currently stands, even the non-poor are beneficiaries, and this limits the access of water to all the poor.

5.2.2 CASE LAW AND JUDICIAL INTERPRETATION OF THE RIGHT TO WATER SHOWCASING A HUMAN RIGHTS-BASED APPROACH TO WATER IN SOUTH AFRICA

Since the constitutional recognition of the right to water in the 1996 Constitution and the supporting water Acts, especially the WSA, there have been a series of cases on the human right to water supported by the 1996 Constitution.¹¹¹ In this section, I identify some of these cases to show how the human right to access to water is being implemented by the courts in South Africa.

¹⁰⁸ Mehta in Kabeer (Ed) (2005) 237.

¹⁰⁹ Mehta in Kabeer (Ed) (2005) 242.

¹¹⁰ Mehta in Kabeer (Ed) (2005) 238.

¹¹¹ *Federation for Sustainable Environment and Others v Minister of Water Affairs and Others* [2012] High Court (North Gauteng, Pretoria) 35672/12, [2012] ZAGPPHC 128 <http://www.saflii.org/za/cases/ZAGPPHC/2012/128.html>; *City of Cape Town v Strumpher* [2012] Supreme Court of Appeal 104/2011, [2012] ZASCA 54 <http://www.saflii.org/za/cases/ZASCA/2012/54.html>; *Mazibuko*(CC).

Arguably, the *Mazibuko* case is the most important case in the history of South Africa's interpretation of the human right to water, its violation, implementation and enforcement.¹¹² The reason for this is that the *Mazibuko* case, which began in the High Court, proceeded to the Supreme Court of Appeal, and then the Constitutional Court, and has since been the only water case to reach the apex court. Although there are several other cases emanating from the constitutional provision of the human right to access to water, the *Mazibuko* case is of particular interest, because it touches on virtually all the principles of a human rights-based approach to water, namely participation, accountability, non-discrimination, empowerment and legal redress. I analyse this case and how the principles of a human rights based approach to water played out. First, I present an overview of the *Mazibuko* case, then, I analyse the issue for determination before the court, as well as the ruling of the court in the case, in line with the PANEL principles.

The case commenced at the High Court with two issues for determination: whether the city's policy to supply six kilolitres of water to every account holder was in line with Section 3 of the WSA and the right to sufficient water in Section 27 of the 1996 Constitution; and secondly, whether prepaid meters which charged for water consumed, in excess of the free basic water supply, was lawful.¹¹³ The High Court held that prepaid meters were unlawful and discriminatory, since the people of *Phiri* were not given the same option as residences inhabited by whites,¹¹⁴ that the free basic supply was unreasonable, and that the city should provide 50 litres of free basic water daily to the people of *Phiri*.¹¹⁵ Dissatisfied with this ruling, the City of Johannesburg appealed to the Supreme Court of Appeal.¹¹⁶ The Supreme Court of Appeal altered the decision of the lower court and ordered that 42 litres of water would constitute "sufficient" in terms of the provision of Section 27 of the 1996 Constitution.¹¹⁷ Dissatisfied, the applicants and respondents sought leave

¹¹² *Mazibuko*(CC).

¹¹³ *Mazibuko and others v City of Johannesburg and others* (06/13865) [2008] ZAGPHC 491; [2008] 4 All SA 471 (W) (30 April 2008) (hereafter *Mazibuko* (HC)).

¹¹⁴ *Mazibuko* (HC) Para 94.

¹¹⁵ *Mazibuko*(HC) Para 183.5.1.

¹¹⁶ *City of Johannesburg and Others v Mazibuko and Others* (489/08) [2009] ZASCA 20; 2009 (3) SA 592 (SCA); 2009 (8) BCLR 791 (SCA); [2009] 3 All SA 202 (SCA) (25 March 2009) (hereafter *Mazibuko* (SCA)).

¹¹⁷ *Mazibuko* (SCA) Para 2 & 43.

to appeal and cross-appeal the decision of the Supreme Court of Appeal.¹¹⁸ At the Constitutional Court, the applicants sought a reinstatement of the High Court order on the allocation of 50 litres of water daily.¹¹⁹ The respondents, on the other hand, appealed against the order of the Supreme Court of Appeal, which held that the free basic water policy was unlawful, and declared 42 litres as constituting ‘sufficient’ water in terms of the provisions of Section 27 of the Constitution.¹²⁰

There were two major issues for determination before the Constitutional Court, namely whether the free basic water policy to supply six kilolitres of free water monthly to accountholders in the city was in conflict with the provision of section 27 of the 1996 Constitution and Section 11 of the WSA; and, whether the installation of pre-paid meters was lawful.¹²¹ These issues addressed by the court, I analyse alongside the principles of a human rights-based approach to water.

On the principle of accountability, there are two requirements, namely: the “right to a remedy” and “oversight responsibilities.”¹²² These two requirements have also been referred to as “answerability”, which is the right to claim and demand a response and “enforceability”, which is the mechanism for delivering and for sanctioning non-responsiveness.¹²³ Winkler also approaches accountability from two sides: the capacity of duty-bearers being accountable to the right-holders, and the capacity of the right-holders to hold government accountable.¹²⁴ On the right to remedy, water users that claim their rights to water have been violated must have access to courts to have their claims heard, and there should be remedies when the court finds that there is a violation of this right.¹²⁵ On the aspect of “oversight responsibilities,” there must be laws that clearly define the duties of

¹¹⁸ *Mazibuko (CC)* See Para 30-32.

¹¹⁹ *Mazibuko (CC)* Para 30.

¹²⁰ *Mazibuko (CC)* Para 32.

¹²¹ *Mazibuko (CC)* Para 6.

¹²² Waterlex & WASH United (2014)15-16.

¹²³ Newell in Newell & Wheeler (Eds) (2006) 39; Smith (2007) 21-36, in which Smith discusses the two aspects of accountability, enforcement and answerability, in the context of politics and election; Sec 3.3.4.2 of this study.

¹²⁴ Winkler (2014) 224.

¹²⁵ De Albuquerque & Roaf (2012) 177 at www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/SRWaterIndex.aspx accessed 26 April 2014.

the water providers, so that actions taken under those provisions may be accounted for.¹²⁶

Now on the human rights-based approach principle of “accountability” the court in the *Mazibuko* case determined the “extent of the state’s positive obligation under Section 27(1) (b) and Section 27(2).”¹²⁷ It adopted the approach used in the *TAC* case¹²⁸ and *Grootboom*,¹²⁹ and concluded that the provisions of Section 27(1)(b) and section 27(2) “does not require the state to provide everyone with sufficient water without more but rather to progressively realise the achievement of the right of access within available sources.”¹³⁰ The principle of accountability holds that the state has obligations to provide. The Constitutional Court, in this case, held that the obligation of state is to take reasonable legislative and other measures progressively, so as to achieve the right of access to sufficient water within the scope of available sources, and as such, the right to water in the 1996 Constitution does not mean a right to claim sufficient water with immediacy.¹³¹

On the principle of non-discrimination, the *Mazibuko* case is instructive particularly in the High Court, where the court held that prepaid meters were unlawful, as they halt the supply of water once the free basic supply had been exhausted, and as such, creates an unreasonable discontinuation of water supply.¹³² The actions of the respondents to install prepaid meters in black suburbs were said to be discriminatory, because residents of Soweto were not given an option of credit meters that were provided to other residents inhabited by the whites.¹³³ In addressing the issue of discrimination, the Constitutional Court noted that a prepaid system was introduced initially only to Soweto.¹³⁴ The Court justified this by stating it was not particularly clear that the act of the respondents was discriminatory, because other areas where poor black South Africans lived, such as Alexandra Orange Farm, or Ivory Park, did not have the prepaid system

¹²⁶ Waterlex & WASH United (2014)16.

¹²⁷ *Mazibuko* (CC) Para 48.

¹²⁸ *Minister of Health and Others v Treatment Action Campaign and Others* [2002] ZACC 15.

¹²⁹ *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19.

¹³⁰ *Mazibuko* (CC) Para 50.

¹³¹ *Mazibuko* (CC) Para 58.

¹³² *Mazibuko* (HC) Para 92-93.

¹³³ *Mazibuko* (HC) Para 94 & 155.

¹³⁴ *Mazibuko* (CC) Para 149.

introduced to them as well.¹³⁵ The Constitutional Court considered the Promotion of Equality and Prevention of Unfair Discrimination Act¹³⁶ to determine whether the acts of the respondents in installing prepaid meters were discriminatory.¹³⁷ To properly analyse this, the court adopted the *Harksen tests* of unfair discrimination.¹³⁸ The court examined three things: the group affected; the purpose of the law; and the interests affected.¹³⁹ The court first considered why prepaid meters were installed in Soweto, and noted an enormous quantity of water being distributed there, but that costs were somehow not being recovered.¹⁴⁰ The court stated that it was not clear that “the policy impacted more adversely on black poor customers” as same prepaid meters was not installed in white suburbs and even black suburbs such as Alexandra or Orange Farm Incomplete.¹⁴¹ Secondly, the court considered the reason for which the prepaid meters were installed in Soweto, to determine whether this was inconsistent with the 1996 Constitution, which provides that the state must not unfairly discriminate against anyone.¹⁴² The court notes that the people affected were poor people, who were “target of severe discrimination in the past”¹⁴³ and that the purpose of the law was to eradicate severe water losses, which the court notes are a “legitimate government purpose.”¹⁴⁴

Thirdly, in considering the extent to which the policy was harmful,¹⁴⁵ in the court’s analysis of unfair discrimination,¹⁴⁶ the court held that government had the authority to determine how to provide essential services, provided the mechanism used is lawful and reasonable,¹⁴⁷ and to this end, concluded that the acts of government were not discriminatory.¹⁴⁸ In other words, for an action of government to be discriminatory, the applicants must show that they are

¹³⁵ *Mazibuko* (CC) Para 149.

¹³⁶ No. 4 of 2000.

¹³⁷ *Mazibuko* (CC) Para 148.

¹³⁸ *Harksen v Lane NO and Others* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) Para 51; *Mazibuko* (CC) Para 152.

¹³⁹ *Mazibuko* (CC) Para 150.

¹⁴⁰ *Mazibuko* (CC) Para 149.

¹⁴¹ *Mazibuko* (CC) Para 149.

¹⁴² Sec 9 (3) 1996 Constitution.

¹⁴³ *Mazibuko* (CC) 150.

¹⁴⁴ *Mazibuko* (CC) Para 150.

¹⁴⁵ *Mazibuko* (CC) Para 150.

¹⁴⁶ *Mazibuko* (CC) Para 154.

¹⁴⁷ *Mazibuko* (CC) Para 156.

¹⁴⁸ *Mazibuko* (CC) Para 149-157.

prejudiced in one way or another, based on their vulnerable status. An example is found in the *Grootboom case*, where the court stated that where programmes or measures put in place do not respond to the needs of the most vulnerable, such a measure cannot be said to be reasonable.¹⁴⁹

As seen in this case, the principle of participation is not just about water users participating in decision making, but also about having access to information and transparency on the part of water providers. With regards to this principle, I also refer to the *Mazibuko case*, wherein the applicants argued that a denial of their application would make litigation in respect of socio-economic rights futile.¹⁵⁰ The Constitutional Court, however, responded that community participation is a positive way to view the *Mazibuko case*.¹⁵¹ The fact that the people of *Phiri* could take their grievances and reservations about the right to water, and claim that prepaid meters constituted a violation of this right, should not be strictly viewed as a defeat, simply because they lost the case. On a positive note, they could make a claim emanating from a constitutional provision of the right to water.¹⁵² Secondly, the scope of the human right to water, as entrenched in the Constitution, was determined.¹⁵³ Thirdly, the supply of water was not discontinued, but rather, it was suspended, because the basic minimum of 6,000 litres per household was supplied.¹⁵⁴ Furthermore, duty-bearers could be identified and held accountable to their duties of providing water for the people.

While Dugard argues that the Constitutional Court has failed to “advance transformative socio-economic adjudication.”¹⁵⁵ and also joins Wilson¹⁵⁶ and Madlingozi in the criticisms and failures of rights generally,¹⁵⁷ it should be noted that rights-based approaches do not constitute a ‘magic wand’ that might correct all the anomalies in a society at once, but rather, that human rights-based

¹⁴⁹ *Grootboom case (CC)* Para 43 & 44.

¹⁵⁰ *Mazibuko (CC)* Para 160; see also Clark (2010) 19 Human Rights Defender 13.

¹⁵¹ Clark (2010) 19 *Human Rights Defender* 13.

¹⁵² Sec 27 1996 Constitution.

¹⁵³ *Mazibuko (CC)* Para 49 & 57.

¹⁵⁴ *Mazibuko (CC)* Para 120.

¹⁵⁵ Dugard (2009) 24 *SAJHR* 214-238.

¹⁵⁶ Wilson’s position is that rights can be manipulated to legitimise policies and practices that preserve existing powers that continue to justify inequality. Wilson (2004) 20 *SAJHR* 419.

¹⁵⁷ See Dugard (2007) *RIPOCA research notes* 15 -17 at

<http://www.jus.uio.no/smr/english/research/projects/ripoca/rn/9-2011.pdf> accessed 13 November 2014.

approaches should be adopted as a tool for progressive change, which would, of course, stir up resistance (on the part of government and water providers). A human rights-based approach creates an avenue for continual dialogue between the consumers and the providers, which would, in turn, create an avenue for a change in policy and application. The WSA creates a five-year development plan for the application of a human rights-based approach to water.¹⁵⁸ This development plan contains details of the water services, and must be made available to the water consumers, and invite public comments on the plan, which must also be considered before it is adopted.¹⁵⁹

Of course, there are arguments that show that civil society organisations and campaign groups have contributed to the realisation of the right to water.¹⁶⁰ No doubt, however, that there is no displacing the contributions of a human rights-based approach, particularly when campaigns of civil society mobilisation are clearly centred on the realisation of their rights via an unadulterated enforcement of a human rights-based approach.¹⁶¹ Be that as it may, the place of rights in the advancement and realisation of basic needs in South Africa cannot be denied. It perhaps may be fair to add that civil society organisations and mobilisations have contributed immensely to the realisation of rights in South Africa.¹⁶² It cannot be denied that there are positive values contained within a human rights-based approach to access to water in South Africa, such as community participation, as was displayed in the *Phiri case*. On this note, Clark agrees with the statement of

¹⁵⁸ Sec 12-15 WSA.

¹⁵⁹ Sec 14 & 15 WSA.

¹⁶⁰ See generally Langford *et al* (Eds) (2014) see particularly 431.

¹⁶¹ Campaign groups raise their voices and placards when their rights are violated. Usually the effect of this is that governments are uncomfortable, and such campaigns are addressed 'technically', either by a promise to do something in response to demands, or by actually addressing the root cause of these campaigns to further prevent an uproar. The violation of these rights usually arises from a non-recognition of a right, an unfulfilled right, an unenforced or a non-adoption of the human rights-based approach. For example, if the law says everyone should have water, it is the right of the people to submit complaint if they do not have the access to water. If they feel the provisions of the law are unfair, human rights approaches creates a legal avenue for ruminating over this via participation or seeking a legal redress in court. Mobilisation and peaceful campaigns do have an effect on realising rights (such as the right to water, and, especially as seen in India and Colombia, however the effects of recognising the human right to water and adopting a human rights-based approach, coupled with the mobilisation of civil society in South Africa, cannot be compared to judicial activism and civil society movements, which are what exists in India and Colombia.

¹⁶² Langford *et al* (2014) in Langford *et al* (Eds) 454-455.

O'Regan, that the *Phiri* case should be seen as a victory for community participation in the dialogue over social rights in South Africa.¹⁶³

Another key principle of a human rights-based approach is the platform of legal redress that it affords victims of violations, to seek justice in court. When it comes to this principle, I argue that there were extant water laws sufficient to address a progressive realisation of the right to water in South Africa. The various levels of the court from the High Court to the Constitutional Court are available to entertain issues of violation of the human right to water. As a result of the recognition of the human right to water, citizens have had the opportunity to claim a violation of their right to water, and in some cases, where the issue before the court is not on the right to water, the court has made reference to access to “a regular supply of water” as constituting a minimum to the right to housing.¹⁶⁴

Although it is asserted that the judiciary is untransformed and insensitive to the plight of the poor, following the *Mazibuko* ruling (that the use of prepaid meters did not constitute a breach of section 27 of the 1996 Constitution and the reduction of free basic water supply to 25 litres from the 42 litres initially ordered by the Supreme Court of Appeal),¹⁶⁵ I argue that this is not enough grounds to conclude that a human rights-based approach has failed. Nigeria recognises the human right to water at an international ‘discussion’ level, where nothing of nature exists in Nigeria’s legal framework, judicial interpretation or civil society mobilisation (challenges of which reduces continuously the human right to water). The reduction of access to water to the free basic minimum (with room for progressive realisation) and the installation of prepaid meters (to curb wastage and account for water loss) do not sound to me like a failure of a human rights-based approach to water. Even though the decision of the Constitutional Court went against the *Phiri* people, the Constitutional Court made it clear that there was no disconnection by the operation of the meters, but rather, a suspension of the free basic water, which was still going to be available the following month.¹⁶⁶

¹⁶³ Clark (2010) 19 *Human Rights Defender* 13.

¹⁶⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) see Para 4 (CC).

¹⁶⁵ See Para 169 *Mazibuko* (CC); See Dugard (2008) 24 SAJHR 215-217.

¹⁶⁶ See Clark (2010) 19 *HRD* 13.

There are several other cases involving the human right to water in South Africa that have touched on one or more of the principles of a human rights-based approach to water, and which have contributed to the progressive realisation of access to water in South Africa through the adoption of a human rights-based approach.¹⁶⁷ I discuss some of these cases and the principles of a human rights-based approach that cut across them.

The principle of accountability requires that water providers know their functions of providing water to the users and that these services are monitored.¹⁶⁸ The principle of accountability also demands transparency on the part of the government (who are usually the duty-bearers or the water providers). So, for the human right to water to be realised, water providers must be accountable to users.¹⁶⁹ This principle of accountability was depicted in South Africa's High Court case of *Mandla Bushula v Ukhahlamba District Municipality*.¹⁷⁰

In this case, the court considered Section 27 of the 1996 Constitution and relevant excerpts from the preamble and sections of the WSA, in light of the disconnection of installed pipelines by the district municipality.¹⁷¹ The court, in considering the obligation of the state to respect, protect, promote and fulfil the right to water, considered also the decision of the Constitutional Court in the case of *Minister of Health and others v Treatment Action Campaign and others*,¹⁷² and held in *Bushula case* that the municipality took reasonable measures in line with the provision of the Constitution and the law, to ensure that the community was not left without water, by introducing water cartage trucks after the pipes were disconnected.¹⁷³ The municipality, upon disconnecting the pipes due to illegal connections, created alternative water supply measures for the community, until the issue was to be rectified. This situation depicts the accountability principle on the part of the

¹⁶⁷ *Federation for Sustainable Environment and Others v Minister of Water Affairs and Others* [2012] High Court (North Gauteng, Pretoria) 35672/12, [2012] ZAGPPHC 128; *City of Cape Town v Strumpher* [2012] Supreme Court of Appeal 104/2011, [2012] ZASCA 54.

¹⁶⁸ De Albuquerque (2012) 177 at

www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/SRWaterIndex.aspx accessed 20 April 2014.

¹⁶⁹ Waterlex & WASH United (2014) 15.

¹⁷⁰ (Hereafter *Bushula case*); [2012] High Court (Eastern Cape Division) 2200/09, [2012] ZAECGHC 1 at <http://www.saflii.org/za/cases/ZAECGHC/2012/1.html> accessed 22 May 2015.

¹⁷¹ See Para 1-6 *Bushula case*.

¹⁷² 2000 (5) SA 721 (CC) also at Para 16 *Bushula case*.

¹⁷³ See Para 18 *Bushula case*.

water providers, who understood that they had to take reasonable measures to continue to provide access to water. The test of the principle of accountability is to find out the obligations of water providers, and to ascertain whether reasonable measure for the progressive realisation of access to water is being ensured. The court in this case also held that the state took reasonable measures to progressively realise access to water even though in this case, the state decreased the quantity of water to improve the quality of water.¹⁷⁴ Even though quantity and quality of water are two essential aspects of the human right to water, I contend that the quality of water is more relevant to the human right to water than the quantity of water. This is because for the quantity of water, there is a minimum supply (25 litres as prescribed by South Africa and 20 litres as prescribed under international human rights law), which is expected to be the least minimum a state can supply with a progressive realisation of more, as time progresses. A 50-litre supply of unclean water (which is more in quantity) automatically vitiates the human right to water, which should be clean and fit for human consumption.

The court, in the case of *Federation for Sustainable Environment and Others v Minister of Water Affairs and Others*,¹⁷⁵ stated that engaging “actively and meaningfully” with water users on “where, when, what quantity and how regularly water” will be made available to the water users was important to realising the constitutional right to water.¹⁷⁶ This case engages the principle of participation, which emphasises that water users must have access to information and the principle of accountability, emphasising that water providers must carry the water users along on how access to water would be realised.

The principles of empowerment and legal redress is also to be found in the case of *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*,¹⁷⁷ where the court stated that the disconnection of water violated the right to water.¹⁷⁸ If the right to water were not entrenched in the 1996 Constitution, the applicants would not have been able to go to court to seek legal redress for the enforcement of their constitutional right to water. The recognition of the right to water

¹⁷⁴ *Bushula* case Para13.

¹⁷⁵ (35672/12) [2012] ZAGPPHC 128 (10 July 2012).

¹⁷⁶ See Para 26.

¹⁷⁷ (2002) (6) BCLR 625 (w).

¹⁷⁸ See *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* Para 20.

diminishes a sense of water inequality and formalises the commitment to end all forms of inequality¹⁷⁹ still extant in South Africa.¹⁸⁰

It is not just the recognition of the right to water that contributes to the realisation of the right, but a continued effort to operationalise the right.¹⁸¹ Such efforts are found in the implementation and the monitoring mechanisms put in place to progressively realise the right to water. I now turn to a discussion of these monitoring mechanisms.

5.2.3 IMPLEMENTATION AND MONITORING MECHANISMS FOR A HUMAN RIGHT TO WATER IN SOUTH AFRICA

Implementation and monitoring mechanisms are crucial to achieving a human right to water. South African national laws recognised a human right to water, established an institutional framework which would ensure the implementation of the right to water, and empowered the South African Human Rights Commission to monitor and assess the observance of human rights concerning water amongst other rights.¹⁸² In this section, I focus on the activities of the South African Human Rights Commission in monitoring access to water in South Africa. I draw largely from the commission's 2014 report on the progress of access to water in South Africa.

The South African Human Rights Commission is an independent institution established to strengthen constitutional democracy in South Africa.¹⁸³ It is independent, and subject only to the Constitution and the law,¹⁸⁴ and is only accountable to the National Assembly, to which it reports its activities once a year.¹⁸⁵ The functions of the South African Human Rights Commission range from promoting respect for human rights to educating the public, carrying out research, and taking steps to secure appropriate redress where human rights have been violated.¹⁸⁶ One of the powers of the South African Human Rights Commission is to compel the relevant organs of the state to provide the Commission with

¹⁷⁹ Anand (2007) 19 *Journal of International Development* 518.

¹⁸⁰ *Mazibuko* (CC) Para 2.

¹⁸¹ Anand (2007) 19 *Journal of International Development* 520.

¹⁸² Sec 184 1996 Constitution.

¹⁸³ Sec 181 (1) (b) 1996 Constitution.

¹⁸⁴ Sec 181 (2).

¹⁸⁵ Sec 181 (5).

¹⁸⁶ Sec 184.

information on the measures they have taken towards the realisation of the human right in question, which includes the right to water.¹⁸⁷

Based on the function of the South African Human Rights Commission, water and sanitation received focus between 2012 and 2013.¹⁸⁸ The aim of this was to highlight the challenges faced by communities and to increase state accountability on the right to water and sanitation.¹⁸⁹ The South African Human Rights Commission commissioned the Department of Performance, Monitoring and Evaluation to conduct a study on access to water and sanitation in South Africa. The report of the study, which included complaints received by the Commission from communities in the Western Cape and Free State regions,¹⁹⁰ indicated that although there has been progress on sanitation and access to water, service delivery remains a challenge at the municipal level, and in the poorest areas.¹⁹¹

The report of the South African Human Rights Commission on water and sanitation was structured into four sections. The first section discusses the Commission's mandate and the monitoring methods applied,¹⁹² while the second part gave an overview of the applicable international and national laws on the right to water and sanitation.¹⁹³ It highlights the responsibilities of the different spheres of government, with a special focus on local government, which is responsible for service delivery at the local level.¹⁹⁴ The third section of the report provides an overview of the state of access to water in South Africa¹⁹⁵ and presented an analysis of the state of access to water and sanitation in South Africa at the national and provincial levels.¹⁹⁶ In the fourth section of the report, the work of the Commission in monitoring and investigating the right to water was analysed.¹⁹⁷ In this section of the report, the investigation and hearing of two complaints in the

¹⁸⁷ Sec 184 (3) 1996 Constitution.

¹⁸⁸ South African Human Rights Commission, 'Annual Report 2014' 18 <http://www.sahrc.org.za/home/21/files/2013_14%20SAHRC%20ANNUAL%20REPORT%20AS%20AT%2031%20MARCH%202014.pdf> accessed on 20 September 2015 (hereafter SAHRC Annual Report 2014).

¹⁸⁹ SAHRC Annual Report 2014 19.

¹⁹⁰ SAHRC Annual Report 2014.

¹⁹¹ Mirugi-Mukundi (2014) 15 *ESR Review* 12.

¹⁹² SAHRC Annual Report 2014 12.

¹⁹³ SAHRC Annual Report 2014 24-27.

¹⁹⁴ SAHRC Annual Report 2014 11.

¹⁹⁵ SAHRC Annual Report 2014 11.

¹⁹⁶ SAHRC Annual Report 2014 11.

¹⁹⁷ SAHRC Annual Report 2014 12 42-44.

Western Cape and Free State regions, as well as the findings and recommendations of the Department of Performance, Monitoring and Evaluation, were analysed.¹⁹⁸ In its report, the South African Human Rights Commission noted that there is a lack of a human rights-based approach to the delivery of water and sanitation services.¹⁹⁹ The principles affected by this omission include the concepts of transparency, participation and access to information.²⁰⁰ The absence of these key principles of a human rights-based approach does not necessarily vitiate the existence of this approach to water, as the enabling laws and the monitoring mechanisms are still in place to ensure that the human right to water is realised via a human rights-based approach.

Although the Commission noted that water was largely treated as an ‘economic good’ by government departments and the private sector, which is evidenced by the fact that most of South Africa’s water is utilised by agribusinesses and mining industries at a relatively lower cost per kilolitre than by poor households,²⁰¹ and although considering water purely as an economic good alters a human rights-based approach, the existence of an active monitoring mechanism, such as the South African Human Rights Commission, is necessary to ensure a realisation of access to water for the poor. The South African Human Rights Commission emphasised that private companies should understand that water is required to be provided to those in need, even if they lack the financial means to pay for the services.²⁰² The poorest communities need to be targeted as a starting point in the enforcement and realisation of the right to water. The findings of the Department of Performance, Monitoring and Evaluation, which, as pointed out, were included in the Commission’s report, stated that there was inefficiency in the water sector due to inadequate funds, poor revenue collection, political interference, and corruption.²⁰³ The problems of access to water in South Africa can also be attributed to a lack of political will.²⁰⁴ In particular, Bond has argued that rural communities receive inadequate water services, and that most of those receiving

¹⁹⁸ SAHRC Annual Report 2014 12 13 & 30.

¹⁹⁹ SAHRC Annual Report 102.

²⁰⁰ SAHRC Annual Report 2014 60.

²⁰¹ SAHRC Annual Report 2014 15.

²⁰² SAHRC Annual Report 8.

²⁰³ SAHRC Annual Report 8.

²⁰⁴ Hall *et al* (2014) 20 *Sci Eng Ethics* 852.

these services often face mass disconnections for non-payment, an issue that the government has acknowledged.²⁰⁵

5.2.4 CONCLUSION

South Africa is an important jurisdiction to consider when discussing a human rights-based approach to water. Apart from the immense scholarship South Africa has to contribute to this present discourse, South Africa has a laudable legal and regulatory framework on the realisation of access to water.²⁰⁶ The 1996 Constitution is anchored on human rights and guarantees the right of everyone to have access to water.²⁰⁷ Subsequently, the NWA and the WSA were adopted by the South African parliament. These laws spell out in clear terms the expectations of duty bearers and right holders. The provisions of South African water law are anchored on a human rights-based approach to water.

Three basic elements characterise an adoption of a human rights-based approach: a national recognition of water as a human right, an application of the PANEL principles and an implementation and monitoring mechanism put in place to ensure access to water. The South African 1996 Constitution recognises the right to water for everyone, amongst other socio-economic rights.²⁰⁸ The right to water in the 1996 Constitution is also supported by the WSA and the NWA, both of which contribute to the three basic elements, which characterise a human rights-based approach to water in South Africa.

Although a human rights-based approach in South Africa has been adopted in the country for over twenty years, it has not completely solved the challenges of access to water in the country, as many South Africans still do not have access to potable water.²⁰⁹ This, however, does not mean the human rights-based approach to water has wholly failed. The failure of a human rights-based approach to water is in the failure to incorporate this approach at the delivery level. The South African Human Rights Commission notes that this approach was not applied at this

²⁰⁵ Bond (2007) at <<http://www2.ohchr.org/english/issues/water/contributions/universities/UniversityofKwaZulu-Natal.pdf>> accessed on 20 September 2015.

²⁰⁶ Dugard in Langford *et al* (Eds)(2014) 275.

²⁰⁷ Sec 7 1996 Constitution.

²⁰⁸ See Sec 27 1996 Constitution.

²⁰⁹ See generally the report of the South African Human Rights Commission 2014.

level.²¹⁰ The rule applicable to the rights-based approach and socio-economic rights in general is that the realisation of socio-economic rights, in this case, water, should be progressive.²¹¹ Even though access to water in South Africa still has its major challenges, to a large extent, access to water can still be argued to be in the process of being progressively realised in South Africa, via the adoption of a human rights-based approach.

5.3 KENYA WATER REFORMS: A HUMAN RIGHTS-BASED APPROACH

From the 1980s and 1990s, the challenges of basic water and sanitation services increased in Kenya.²¹² These challenges, such as an increase in pollution and a decrease in water access to the poor and increasing pressure from the public for a lasting solution to water access, brought about the beginning of water reforms.²¹³ International conventions, to which Kenya is a signatory, formed the basis of water reforms in Kenya. There are three major concerns of the water sector reform, which are: urban and rural water supply, sanitation, and water resource management.²¹⁴ I restrict my examination to the urban and rural water supply, which forms the basis of this thesis.

My examination of a human rights-based approach to water in Kenya is founded on the recent constitutional recognition of access to water as a right.²¹⁵ In view of the constitutional recognition of the right to access to water, water reforms again commenced in the water sector to align with the provision of the 2010 Constitution.²¹⁶

There is a dearth of literature available on the current water reforms in Kenya, which showcase a human rights-based approach to water. In view of this and the not-so-readily available water policies on the internet to conduct a desktop

²¹⁰ SAHRC (2014) at <http://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20%282%29.pdf> accessed on 20 September 2015.

²¹¹ Art 2 (1) ICESCR.

²¹² Ministry of Water and Irrigation Kenya (2007) 6 at <https://www.giz.de/expertise/downloads/Fachexpertise/2007-en-water-sector-reform-kenya.pdf> accessed 22 September 2015.

²¹³ Ministry of Water and Irrigation Kenya (2007) 7.

²¹⁴ Ministry of Water and Irrigation Kenya (2007) 8.

²¹⁵ Art 43 (d) Kenya's Constitution of 2010 (hereafter 2010 Constitution).

²¹⁶ The Water Act of 2002, which was in operation had to be reviewed to align with the 2010 Constitution. This is further discussed in Section 5.4.1.2 of this chapter.

examination of a human rights-based approach to water in Kenya, I embarked on a research trip to Kenya to retrieve documents and discuss with water officials there, to ascertain to what extent a human rights-based approach to water in Kenya may be found.²¹⁷ I conducted critical discussions with national water officials and analysed the current drinking water reforms in Kenya, so as to identify the ways in which Kenya has followed a human rights-based approach, which is presented below.

To analyse Kenyan water reforms and how these reforms have followed a human rights-based approach, I divide this part into three sections. In the first section, I discuss the legal framework of the right to water in Kenya. To do this, I identify and analyse national water laws that gave rise to the human right to water, and a human rights-based approach to water. I discuss how these laws may influence access to water in Kenya, incorporating discussions with water officials there. In the second section, I identify and examine court decisions on the human right to water, so as to determine its alignment with a human rights-based approach, and to assess how this may have strengthened the recognition of the right to water, recognised by the Constitution. Under this section, I note that there is no direct case on the human right to water; however, it was found that a case before a Kenya High Court on the right to housing touched on the constitutional provision of access to water. This underscores the right to water as essential in the realisation of other human rights, such as the right to housing as concerned in this case. In the third section, I investigate the implementation and monitoring mechanism put in place to ensure access to water in Kenya, thereafter concluding the discussion of Kenya Water reforms.

5.3.1 LEGAL FRAMEWORK OF THE RIGHT TO WATER IN KENYA

Under this subsection, I again restrict my examination to national laws, namely the 2010 Constitution, the Water Act of 2002, and the Water Bill of 2014. I analyse these laws in light of the recent reforms in the water sector, so as to determine the extent of its consistency with a human rights-based approach.

²¹⁷ Two-week research visit to Kenya in September 2015.

5.3.1.1 Constitution of Kenya

The 2010 Constitution of Kenya replaced the 1964 Constitution.²¹⁸ The review of the 2010 Constitution saw remarkable changes in the provisions of the Constitution. The changes include socio-economic rights (which explicitly recognised the right to water),²¹⁹ and the devolution of 47 county governments.²²⁰ The inclusion of socio-economic rights in Kenya's Constitution saw an immediate comparison with the 1996 South African Constitution, which also guaranteed socio-economic rights such as the right to water.²²¹ The 2010 Constitution has been dubbed to be a transformative Constitution, since it aims at redistributing power and resources, by means of which to eradicate inequality and promote social welfare.²²²

The 2010 Constitution, amongst other socio-economic rights, provides that every person has the right to clean water in adequate quantities.²²³ Basic water service is expected to be provided by the national government by use of the equalisation fund.²²⁴ The 2010 Constitution creates 47 county governments.²²⁵ These county governments are saddled with the responsibility of providing water and sanitation services, amongst other functions specified in the 2010 Constitution.²²⁶

An important provision of the 2010 Constitution of Kenya, which supports a human rights-based approach, is the provision for minorities and marginalised groups.²²⁷ The Constitution provides that:

²¹⁸ 'A short history of the 2010 Kenya Constitution' at <http://www.kenyaconstitution.org/> accessed 2 May 2016.

²¹⁹ Art 43 2010 Constitution.

²²⁰ Art 6 2010 Constitution.

²²¹ Sec 27 1996 Constitution.

²²² Orago (2013) 16 *PER/ PEJ* 170-171.

²²³ Art 43 (1) (d) 2010 Constitution.

²²⁴ Art 204 (2) 2010 Constitution. One half of a percent of all national government revenue is paid into an equalisation fund, established by the 2010 Constitution. See Art 204 (1).

²²⁵ Art 6 (1) see also First Schedule 2010 Constitution for the list of the 47 County governments.

²²⁶ See Part 2, Para 11 (b) 2010 Constitution. See generally Fourth Schedule of the 2010 Constitution, which highlights the distribution of functions between the national government and the county government.

²²⁷ Art 56 2010 Constitution. The 2010 Constitution describes a 'marginalised group' as a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination. See Art 260.

The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups

- a. participate and are represented in governance and other spheres of life;
- b. are provided special opportunities in educational and economic fields;
- c. are provided special opportunities for access to employment
- d. develop their cultural values, languages and practices; and
- e. have reasonable access to water, health services and infrastructure.²²⁸

Article 56 of the 2010 Constitution adopts a human rights-based approach to water; especially the principles of non-discrimination, participation²²⁹ and empowerment.²³⁰ A human rights-based approach in the 2010 Constitution creates an environment of equal access to water, without discrimination based on gender and disability.²³¹ Article 56 of the 2010 Constitution follows the international human rights framework, of not just recognising water as a human right, but also making adequate provisions for the execution and realisation of this right, by stating that action programmes designed to carry along, in particular, the minorities and marginalised groups, must be developed.²³² The resolve to recognise water as a human right and adopt a human rights-based approach is based on the “aspirations of Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law”.²³³

²²⁸ Art 56 2010 Constitution.

²²⁹ Art 56 (a) 2010 Constitution.

²³⁰ Art 56 (c) 2010 Constitution.

²³¹ United Nations Office of the United Nations High Commissioner for Human rights (2006) 15 at <http://www.ohchr.org/Documents/Publications/FAQen.pdf> accessed 2 May 2015.

²³² Biswas (1981) *Foreign Affairs* 154.

²³³ Preamble 2010 Constitution.

5.3.1.2 Water Act 2002 and a Limited Human Rights-Based Institutional Framework

The 2002 Water Act²³⁴ was repealed by the Water Act (Cap 372) of 1972.²³⁵ The new Water Act of 2002 is aimed at the management, conservation, use and control of water resources, and serves to provide for the regulation and management of water supply and sewerage services.²³⁶ The 2002 Water Act also repealed some of the provisions of the Local Government Act²³⁷ and introduced changes to the legal framework for water management in the water sector, such as separating the management of water resources from the provision of water services.²³⁸ This is similar to the position in South Africa, where the WSA regulates water services, and the NWA regulates water resources. This I contend is necessary to help prioritise domestic water, and ensure its access to everyone, especially the poor.

Before the Water Act of 2002, there was the Sessional Paper of 1999.²³⁹ This paper contained the amendments the provisions for the revision of Water Act Cap 372, which became the Water Act of 2002.²⁴⁰ Participation and accountability are two major principles of a human rights-based approach to water, considered during the commencement of water reforms in 1999. The reason for this consideration was to ensure sustainable water schemes, by creating an alternative to water management.²⁴¹ The Sessional Paper that preceded the 2002 Water Act states;

In order to ensure sustainable water schemes therefore there is need to apply alternative management options and technologies that are participatory rather than wholly recipient in nature. This will require that there exist an

²³⁴ Act no. 8 of 2002 (Hereafter Water Act of 2002).

²³⁵ JICA Nippon Koei Co ltd (2013) L5 (pdf page 11). The Development of the National Water Master Plan 2030 Final Report. (Hereafter National Water Master Plan 2030 Final Report).

²³⁶ Preamble Water Act of 2002.

²³⁷ Section 111 of the Water Act of 2002 repealed sections 168-176 of the Local Government Act.

²³⁸ Mumma (2005) *Workshop on African Waters Law: Plural Legislative Frameworks for rural water management in Africa* 160. Also at

[https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjgrKH9-](https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjgrKH9-8LMAhUJCcAKHTCND80QFggaMAA&url=http%3A%2F%2Fprojects.nri.org%2Fwaterlaw%2FAWLworkshop%2FMUMMA-A.pdf&usq=AFQjCNEPUxbuulpvzMWpJY0oAhsB2_5O1g&bvm=bv.121099550,bs.1,d.d2s)

[8LMAhUJCcAKHTCND80QFggaMAA&url=http%3A%2F%2Fprojects.nri.org%2Fwaterlaw%2FAWLworkshop%2FMUMMA-A.pdf&usq=AFQjCNEPUxbuulpvzMWpJY0oAhsB2_5O1g&bvm=bv.121099550,bs.1,d.d2s](http://www.projects.nri.org/waterlaw/FAWLworkshop%2FMUMMA-A.pdf)

²³⁹ Ministry of water resources 'Sessional Paper No. 1 of 1999 on National Policy on Water Resources Management and Development' vi, 46 at <http://www.ircwash.org/sites/default/files/824-KE99-18207-1.pdf> accessed 9 May 2015. (Hereafter Sessional Paper No. 1 of 1999).

²⁴⁰ Sessional Paper No. 1 of 1999 vii.

²⁴¹ Sessional Paper No. 1 of 1999 vi; 46.

enhanced participation in the programmes by various water users. The government on the other hand ensures an enabling environment through appropriate policies and regulations. To achieve this, the ownership and management systems of the already existing water supply scheme and water projects must be clearly defined to conform with the new policy change which encourages more active involvement of the private sector in the development and management of the water resources. This is consistent with international resolutions including those of Mar del Plata conference of 1977 and 1992 Rio de Janeiro Earth Summit, which provided for the Agenda 21.²⁴²

The above paragraph found in the sessional paper appears to lean towards a human rights-based approach, with mention of the principles of participation, which is indispensable to the success of realising access to water, and the principle of accountability, which emphasises that an enabling environment ought to be created through legislation and policies as a requirement of the international human right to water.²⁴³ However, the inclusion of ‘private sector’ may negate this thought, especially when not properly expanded, and more particularly, because of the consideration of the 1992 Rio de Janeiro Earth Summit, which emphasises water as an economic good.²⁴⁴ According to the sessional paper, institutional weakness limits access to water,²⁴⁵ and the challenges of the previous Water Act²⁴⁶ was the absence of resources to monitor the operations of water users, as well as the inadequacy of the provisions of the Water Act (Cap 372).²⁴⁷ To address the challenges of access to water does not only require good laws, and a legal framework; monitoring mechanisms are also necessary so that challenges are

²⁴² Sessional paper No. 1 of 1999.

²⁴³ Resolution 69/121, 1977 Mar del Plata Conference, 1992 Rio de Janeiro Earth Summit; Chapter Two, wherein the requirements of international law on the human right to water were discussed.

²⁴⁴ Solanes (1999) Global Water Partnership Technical Advisory Committee (TAC) No 3 TAC Background Papers 9.

²⁴⁵ Sessional Paper No. 1 of 1999 Para 2.1.2 12.

²⁴⁶ Cap 372.

²⁴⁷ Para 2.4.2, 2.4.3 & 17 of the 1999 Sessional Paper.

immediately identified and tackled before further challenges arise.²⁴⁸ Furthermore, an economic (commodity) approach to water is dissimilar to a human rights-based approach, because it is profit driven, depriving those who cannot afford to pay for water access to water services. Although like a human rights-based approach, privatising the water services aims at improved services in water delivery to everyone, however, this is usually inhibited by poor people's inability to pay for these services, which in turn reduces or halts access to domestic water. A human rights-based approach aims at water delivery for all, especially the poor, with no deprivation of such services to the poor recipients when they can prove that they cannot afford to pay for such services.²⁴⁹ Although policy principles relating to urban and rural domestic water supply such as water being a public good and a basic minimum supply regardless of ethnicity or gender formed part of what culminated in the Water Act of 2002,²⁵⁰ the Water Act of 2002 is not without its challenges, which have made it a subject of criticism.²⁵¹ The institutional framework for water governance in the Water Act of 2002 has been criticised for having "undue fragmentation of institutional responsibilities", which may lead to "lack of accountability" and eventual "inefficiency".²⁵² Although the 2002 Water Act gives a clear recognition and apportionment of roles and responsibilities of institutions in the water sector, which is necessary under a human rights-based approach to water (principle of accountability), K'Akumu²⁵³ and Mumma²⁵⁴ have argued that the needs of the poor are ignored by the Water Act of 2002.

According to K'Akumu, who argued that the much-needed water reform follows an economic approach, the local authorities who are in charge of water supply in the

²⁴⁸ Chapter 3.

²⁴⁹ An example is found in the provision of Sec 4 (3) (c) WSA, where the law states that when a water user proves to the satisfaction of the water services authority that he or she is unable to pay for basic services, then such water services should not be discontinued.

²⁵⁰ Ministry of Water and Irrigation, Kenya (2007) 13.

²⁵¹ K'Akumu (2004) 16 *Environment and Urbanization* 213 -222; Akech Paper prepared for the workshop entitled '*Legal Aspects of Water Sector Reforms*' organised in Geneva from 20 to 21 April 2007 by the International Environmental Law Research Centre (IELRC) in the context of the Research partnership 2006-2009 on water law sponsored by the Swiss National Science Foundation (SNF) at http://www.ielrc.org/fr/activites/atelier_0704/content/d0702.pdf accessed 3 May 2016; Mumma Workshop on African waters Law: Plural Legislative Frameworks for rural water management in Africa 158-172.

²⁵² Akech (2007) 4.

²⁵³ K'Akumu (2004) 16 *Environment and Urbanization* 213 -222.

²⁵⁴ Mumma (2005) *Workshop on African Waters Law: Plural Legislative Frameworks for rural Water Management in Africa* 160.

urban areas resisted the implementation of the Water Act of 2002 as it removes a substantial portion of their revenue and their function as local service providers.²⁵⁵ Although K'Akumu did not outright dismiss or argue against the Water Act of 2002 privatising water services, he analyses how the needs of the vulnerable may be served under privatisation. The Water Act of 2002 emphasises that water services will be on a commercial bases and in accordance with 'sound business principles.'²⁵⁶ However, the Act does not define what 'commercial basis' means.²⁵⁷ This does not depict a human rights-based approach to water; rather it considers largely the economic approach to realising access to water, which would not be beneficial to the poor, who would have to pay to enjoy water services, and may be deprived of same where they cannot afford to pay.²⁵⁸ K'Akumu also argues that the Water Act 2002 does not recognise small-scale providers, who are more beneficial to the poor and rural communities, and who are not likely to benefit from infrastructures for a long time,²⁵⁹ as the Water Act of 2002 makes strict rules that the operation of small scaled water providers should not exceed services to more than 20 households, and not more than 25000 litres of water a day may be supplied for domestic purposes. These limits access to water to the poor, and as such, cannot be stated to reflect a human rights-based approach.

Also, the institutions identified by the Water Act of 2002 and their responsibilities include: the Ministry of Water and Irrigation, which has the responsibility of developing legislations, policy and strategy formulation, as well as monitoring and evaluation in the water sector; and the Water Services Trust Fund, which was put in charge of financing provision of water and sanitation to disadvantaged people in both the rural and urban areas in Kenya. The Water Services Regulatory Board is in charge of regulating and the monitoring of service provision, setting standards and developing guidelines for the provision of water services. The Water Services Boards are the contracting water providers, and they apply regulations on water services and tariffs, while the water service providers provide the water and sanitation services work towards attaining or make efforts to reach the

²⁵⁵ K'Akumu (2004) 16 *Environment & Urbanization* 213.

²⁵⁶ Art 57 Water Act 2002.

²⁵⁷ K'Akumu (2004) 16 *Environment & Urbanization* 217.

²⁵⁸ K'Akumu (2004) 16 *Environment & Urbanization* 217.

²⁵⁹ K'Akumu (2004) 16 *Environment & Urbanization* 221; Carpenter (2003) *Twelfth Stockholm water symposium August 12-15 IWA*.

performance level set by regulation.²⁶⁰ Some of these functions, however, are found to be unclear, and overlapping with other institutional functions.²⁶¹

It has been argued that conflicts in carrying out their functions due to overlapping responsibilities may ensue.²⁶² In fact, for proper accountability in the water sector, the responsibilities of the water departments must be well defined. The Ministry of Water and Irrigation is responsible for monitoring and evaluation; as is the Water Services Regulatory Board, saddled with the same duty.

Before the reforms, which brought about the enactment of the 2002 Water Act, the local authorities and the National Water Conservation and Pipeline Corporation had the duty of water and sanitation services.²⁶³ Currently, the water sector reform in Kenya is channelled along international human rights standards of participation and non-discrimination. One of the responsibilities of the Water Services Trust Fund has been expanded into urban slums, and pro-poor regulation is part of the steps set out to realise access to water in Kenya.²⁶⁴ The crux of the current reform in the water sector is to separate water resources management and development from water services delivery.²⁶⁵ The function of the Ministry of Water and Irrigation would, therefore, be limited to formulating policy, implementation, and monitoring water resources.²⁶⁶ This will exclude the Ministry from other functions such as detailed regulation.²⁶⁷ The shift in function and duty of water supply services began in 2011, with the devolution of county government as provided for by the Constitution.²⁶⁸ On account of the enactment of the 2010 Constitution recognising the human right to water and the devolution of county governments, as well as the already overlapping functions of water institutes, a review of the 2002 Water Act became necessary. This led to the 2014 Water Bill.

²⁶⁰ Art 46 & 47 Water Act 2002.

²⁶¹ National Water Master Plan 2030 Final Report L 12 (pdf 18).

²⁶² Akech (2007) 4.

²⁶³ Akech (2007) 13.

²⁶⁴ Ministry of Water and Irrigation (2007) 28.

²⁶⁵ National Water Master Plan 2030 L9 (pdf 15).

²⁶⁶ Information retrieved from discussions with Nairobi Water Officials.

²⁶⁷ Water Resources Management Authority (2012) Sec 2.2.

²⁶⁸ Sec 6 2010 Constitution.

5.3.1.3 The Water Bill of 2014 and an Incorporation of a Human Rights-Based Approach to Water

Since the coming into effect of the 2010 Constitution, which formally recognised the human right to water, the 2002 Water Act necessarily had to be reviewed. The 2002 Water Act followed the economic approach, where it made room for private partnership to help make water more readily available to the public.²⁶⁹ Although this may seem to be an improvement in the water sector, the effect of a dominant economic approach to water is not usually favourable to the poor. Considering water via an economic approach would certainly vitiate the human right to water, especially when the most vulnerable in the society like the poor cannot afford to pay for the water they need for domestic use.

The Water Bill of 2014²⁷⁰ seeks to replace the 2002 Water Act and would be referred to as the 2014 Water Act.²⁷¹ The purpose of the 2014 Water Act, like the 2002 Water Act, is “to provide for the regulation, management and development of water resources and water and sewerage services in line with the Constitution.”²⁷² The 2010 Constitution has set out the principles and values according to which access to water may be realised, which has also been considered and provided for in the 2014 Water Bill.²⁷³ The major reason for the institution of the 2014 Water Bill is to address the issues of accountability and to draw together the people development by the provision of the devolution of county governments, which are responsible for water delivery within their counties, instead of all control being held at national level. This in effect allows more people to participate in the issues of access to water.

The Water Bill of 2014 has, however, not been passed, leaving the Water Act of 2002 in effect, and as explained above, the 2002 Act does not completely support a human rights-based approach to water.

²⁶⁹ Owuor & Foeken (2009) ASC Working Paper 83 18.

²⁷⁰ Kenya Gazette Supplement No. 27 (National Assembly Bills No. 7, 2014) at https://www.google.co.za/url?sa=t&rc=tj&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKewiMzoyziM_MAhWSCD4KHVW7Db4QFgggMAE&url=http%3A%2F%2Fwww.cickenya.org%2Findex.php%2Flegislation%2Fitem%2F341-the-water-bill-2014&usg=AFQjCNEVxxw0Sre0U1xQFOim85omVQHrlw&bvm=bv.121421273,d.d24 (hereafter 2014 Water Bill)

²⁷¹ Art 1 2014 Water Bill (However it is referred to in this thesis as Water Bill 2014).

²⁷² Art 3 2014 Water Bill.

²⁷³ Art 5 2014 Water Bill.

5.3.2 CASE LAW AND JUDICIAL INTERPRETATION OF A RIGHTS-BASED APPROACH TO WATER IN KENYA

The Kenyan experience of a human rights-based approach to water cannot be compared to that of South Africa. This is due to its recent constitutional recognition of water as a human right, the yet to be passed 2014 Water Bill, and the absence of case law testing the impact of a human right to water. Apart from the availability of literature and the years of adopting a human rights-based approach to water in South Africa, South Africa also has a wealth of judicial cases and interpretation on the right to water and socio-economic rights in general. Kenya, on the other hand, recorded its first case in 2011, with *Ibrahim Sangor Osman v Minister of State for Provincial Administration and Internal Security*.²⁷⁴ This case is not directly related to the human right to water. There is also no other known case, at this time, emanating from the constitutional recognition or violation of the human right to water. However, this case raised the constitutional recognition of the human right to water.

In this case, the government began the demolition of houses at ‘Medina Location’ in Garissa without notice, consultation or a provision of alternate housing to the inhabitants (petitioners). The petitioners have been in occupation of Medina Location since the 1940s. As a result of this demolition, access to basic resources was cut off. Attempts to discuss with the government of Kenya were not successful, and this left the petitioners homeless and exposed to all manner of risk.²⁷⁵ The demolitions began in December 2010, with 149 houses and structures demolished. The petitioners filed for an interim order in February 2011, to stop the respondents from evicting them without a court order, and without an alternative provision for housing. The petitioners claimed a violation of their fundamental right to life, protection of property, and clean and safe water, amongst other basic services.²⁷⁶ The court found applicable the Constitution of Kenya, the International Covenant on Economic Social and Cultural Rights and the International Covenant on Civil and Political Rights. The Court held that Article 43

²⁷⁴ High Court (Embu) Constitutional Petition No. 2 of 2011 at http://www.escri-net.org/usr_doc/Decision_Garissa.pdf accessed 2 May 2016 (hereafter *Medina Location case*).

²⁷⁵ *Medina Location Case* Para 4.

²⁷⁶ *Medina Location Case* Para 3-6.

of the Constitution guarantees the fundamental rights of the petitioners.²⁷⁷ The Court also cited Article 21(3) of the 2010 Constitution that held that “the State and every state organ has a duty to observe fulfil respect protect promote and fulfil the rights and fundamental freedoms in the bill of rights.”²⁷⁸ The Court ordered that the respondents reconstruct reasonable residences or alternative housing, with all amenities that were on the land prior to the demolition, and that each petitioner is paid 200,000 Kenyan Shillings.²⁷⁹ The court emphasised that the state owes a duty to protect and fulfil human rights, in other words, the state was accountable to the people. This principle relates to the human rights-based principle of participation, where it was obvious that the petitioners had no prior information of the eviction or demolition before it began. One of the attributes of the principle of participation is access to information, which the petitioners, in this case, had no access to. Another principle of a human rights-based approach to water is the principle of legal redress. When attempts to receive audience from the government failed, the petitioners sought legal redress in the court. This was also largely possible because there are both national laws and International law recognised by Kenya that protects the human rights of its people. The petitioners could seek a redress because they had the backing of this law.

There is room to argue that the events of this case show a human rights-based approach is observed in Kenya and was followed by the court. The practical aspect of a human rights-based approach to water is yet to play out since the 2014 Water Bill is yet to be passed. What addresses the practical aspect of what of a human rights-based approach to water is the aftermath of the decision in this case. That is, how water officials help the petitioners to realise their access to water such as involving them in the participation and not discriminating against them. It is to this effect that I examine the implementation and monitoring mechanism set up in Kenya to ensure a realisation of the human right to water.

5.3.3 IMPLEMENTATION AND MONITORING MECHANISM

In adopting a human rights-based approach, three things are important. The first is the recognition of a human right to water, the second is the enactment of an

²⁷⁷ *Medina Location Case* Para 12.

²⁷⁸ *Medina Location Case* Para 10.

²⁷⁹ *Medina Location Case* Para 11 & 12.

institutional framework which establishes the duties of water providers, and the third is the existence of a monitoring mechanism by means of which to keep tabs on how the human right to water is being implemented, and by means of which to ascertain whether there is a progressive realisation of the right to water.

The Constitution has made it clear that it is the fundamental duty of the state and every state organ to observe, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights, including the right to water.²⁸⁰ The 2010 Constitution empowers the Kenya National Human Rights and Equality Commission²⁸¹ to promote, monitor, investigate, receive and investigate complaints about alleged human rights abuses, and to take steps to redress human rights violations.²⁸²

The 2010 Constitution empowers the courts to implement and apply the rights contained in Article 43 of the Kenyan Constitution, including the right to water.²⁸³ The high court in this case has the power to hear and rule over fundamental human rights and must be guided by certain principles as enumerated in the Constitution.²⁸⁴ An analysis of these principles reflects a human rights-based approach to water, particularly the principles of accountability, wherein the constitution emphasises that the state must implement a right and that where the state hides behind a lack of availability of resources, the state must show that the resources are not available;²⁸⁵ and the principle of non-discrimination, wherein the state is expected to give priority to the vulnerable.²⁸⁶

5.3.4 CONCLUSION

Kenya has been classified as a water scarce nation.²⁸⁷ In spite of this classification, Kenya has made more efforts in the last two decades to address the issues of access to water. These efforts have, in the water, sector culminated in recognition

²⁸⁰ Art 21 2010 Constitution.

²⁸¹ Hereafter KNHREC.

²⁸² Art 59 2010 Constitution.

²⁸³ Art 21 2010 Constitution.

²⁸⁴ Art 20 2010 Constitution.

²⁸⁵ Art 20(5) (a) 2010 Constitution.

²⁸⁶ Art 20 (5) (b) 2010 Constitution.

²⁸⁷ World Bank (2004) at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2004/04/23/000090341_20040423105557/Rendered/PDF/283980KE.pdf accessed 09 May 2016; Ogendi & Ong'oa (2009) 7 *Santa Clara Journal of International Law* 177-196.

of the right to water in the 2010 Constitution. The 2002 Water Act, which was initially enacted to address the challenges of the domestic supply by establishing the principles of a human rights-based approach, especially the principle of accountability, was found to demonstrate overlapping duties of the various water institutes responsible for water delivery. This can vitiate the principle of accountability and render ineffective the human right to water, now recognised in the 2010 Constitution. As a result of this, and to align with the 2010 Constitution, further reforms are on-going in the water sector, particularly legal reforms. The 2014 Water Bill addresses the issues of overlapping functions raised in the 2002 Water Act. The principle of accountability, if properly addressed and harnessed, will contribute immensely to the progressive realisation of access to water in Kenya. The 2014 Water Bill also considers the principle of non-discrimination, as the Bill emphasises that a basic minimum of water should be given to the vulnerable, whether or not they have paid for water already supplied.²⁸⁸

Like South Africa, Kenya has adopted a rights-based approach to water following the recognition of the right to water in their 2010 Constitution and the review of the 2002 Water Act.²⁸⁹ Arguably, Kenya is determined to address the challenges of access to water via a human rights-based approach, as the 2010 Constitution has intimated that the general rules of international law shall form part of the laws of Kenya.²⁹⁰ In other words, all the international rules that govern access to water, which are found in the principles of a human rights-based approach to water and the interpretation of the human right to water by General Comment 15, will be applicable in Kenya.

5.4 AN ANALYSIS OF COMPARATIVE HUMAN RIGHTS-BASED APPROACHES TO WATER FROM SELECTED JURISDICTIONS

Although the focus of this study is on Nigeria, South Africa and Kenya, I borrow promising practices of a human rights-based approach to water from India and Colombia as well. I consider India, because, like Nigeria, in India, socio-economic

²⁸⁸ Highlight of the Water Bill 2014 and Implications to the water service providers and the water sector Para 2 (Document retrieved from the Nairobi water and Sewerage Company on a 2015 research visit).

²⁸⁹ See Art 43 (1) (d) 2010 Constitution.

²⁹⁰ Art 2 (5) 2010 Constitution.

rights are found under the Fundamental Objectives and Directive Principles of State Policy, and yet the country has made efforts to recognise the human right to water via judicial activism.²⁹¹ I consider Colombia because like South Africa and Kenya, it has recognised access to water as a human right, where judicial activism and civil organisation groups have contributed to the recognition of water as a human right and in a way, helped to promote access to water.

In this section, I give a brief overview of how access to water is being promoted, first in Colombia, and secondly in India. I then juxtapose the recognisable PANEL principles in Colombia and India with Kenya and South Africa and analyse how these principles may have helped with the promotion of access to water in these countries.

5.4.1 AN OVERVIEW OF THE LEGAL FRAMEWORKS OF ACCESS TO WATER IN COLOMBIA

Following the success of water activism in Uruguay in 2004, Ecuador in 2008 and Bolivia in 2009, on the explicit recognition of the human right to water in their national legislation, Colombia sought to promote the human right to water by seeking an explicit recognition in their Constitution.²⁹² Water reforms commenced in Colombia in the 1990s, following the reform of the 1991 Constitution, which limited state regulation on the provision of public services. Thus, Colombia moved from a state monopoly over water supply systems to a competitive market for water supply, as such, allowing private companies to participate in water provision, and leaving the state with the function of monitoring and regulation.²⁹³ The challenges of access to water in Colombia took a positive turn with the recognition of water as a necessity for the general well-being and improvement of the quality of life.²⁹⁴ Although the 1991 Constitution of Colombia does not explicitly recognise water as a human right, Chavarro argues that it considers a

²⁹¹ Akintayo (2014) *ESR Review* 5-9 at 6.

²⁹² Food & Water Watch *Briefing paper June 2009* at <http://www.municipalservicesproject.org/sites/default/files/Colombias-Constitutional-Reform.pdf> accessed 20 April 2016; Dugard & Drage (2012) *Occasional paper No. 17* June 2012 at http://www.right2water.eu/sites/water/files/u/u4/OccasionalPaper17_Dugard-Drage_Shields_and_Swords_Legal_Tools_Public_Water_June2012.pdf accessed 21 April 2016.

²⁹³ Chevarro (2015) 219.

²⁹⁴ Art 366 Colombia's Constitution of 1991 with amendments through 2005 (hereafter 1991 Colombian Constitution) at https://www.constituteproject.org/constitution/Colombia_2005.pdf accessed 14 April 2015.

group of human rights under one title.²⁹⁵ The Constitution of Colombia provides that:

The general well-being and improvement of the population's quality of life are social purposes of the State. A basic objective of [the State's] activity will be to address the unfulfilled public health, educational, environmental, and drinking water needs of those affected. For such an outcome, in the plans and budgets of the nation and of the territorial entities, public social expenditures will have priority over any other allocation.²⁹⁶

The 1991 Constitution of Colombia further stipulates that the general management of the economy is the responsibility of the state, thus placing a defined responsibility of exploiting natural resources, production, use and consumption of goods in public and private services in order to streamline the economy, so as to improve the quality of life for the inhabitants through equitable distribution of opportunities and the benefits of development and conservation of a healthy environment.²⁹⁷

There is no way the quality of life of the inhabitants of Colombia can be improved without access to water, and where access to water is solely placed in the purview of private sectors, without management and monitoring mechanisms in place, water would be solely handled as an economic good, which I have argued has the tendency of depriving the poor from enjoying water as a human right.²⁹⁸ To address this, the Constitution further provides that the state will make special efforts to ensure that those with low income will have access to basic services.²⁹⁹ Although it not particularly clear what 'special efforts' the Constitution refers to, it can, however, be argued that this phrase leaves room for a possible consideration of a free basic minimum supply of domestic water, as considered in South Africa. The provision of Article 334 of the 1991 Colombian Constitution

²⁹⁵ Chavarro (2015) 262.

²⁹⁶ Art 366 1991 Colombian Constitution.

²⁹⁷ Art 334 1991 Colombian Constitution.

²⁹⁸ See Chapter Three of the current study.

²⁹⁹ Art 334 1991 Colombian Constitution.

incorporates the principle of non-discrimination under a human rights-based approach to water, especially as the principle of non-discrimination emphasises that the poor should enjoy basic access to water.

Since Latin American countries are known to present interesting events in regards to the evolution of the human right to water and how access to water is being realised according to it,³⁰⁰ it is no surprise that the human right to water in Colombia has thrived on the interpretation of Colombia courts, more so because the Colombian Constitution empowers the courts to hear matters which concern the violation or possible violation of fundamental rights.³⁰¹ The *tutela* action is known as the most effective way of promoting a human right to water in Colombia.³⁰² A *tutela* action refers to an injunction or a complaint, brought by a citizen before any judge, to seek an immediate judicial injunction against actions or omissions of any public authority that violates their constitutional fundamental rights.³⁰³

In 2009, a survey conducted by the *Defensoria del Pueblo*, showed that nine million Colombians did not have a reliable access to drinking water, and that 20 million were at a high risk of going without access to it, due to its scarcity.³⁰⁴ The solution to this was “democratic reform, citizen participation and increased public investment” in the water sector.³⁰⁵ These required solutions can be likened to elements of a human rights-based approach, where it was not just recognition of the right to water that would address the challenges or make access to water realisable, but the implementation of such, which was anchored by democratic reform, including the participation of the people. A *tutela* action was the most effective mechanism for protecting the human right to water in Colombia.³⁰⁶ The process of realising the human right to water and adopting a human rights-based

³⁰⁰ Belen *et al* (2015) 15 *Anuario Mexicano de Derecho Internacional* 326.

³⁰¹ Art 86 1991 Colombian Constitution.

³⁰² Chavarro (2015) 262.

³⁰³ Cepeda-Espinosa 22 at

<http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/BrookingsSpecial/13.pdf>
accessed 21 April 2016.

³⁰⁴ Food and Water Watch, (2009) ‘Colombia’s Movement for Water Democracy and Constitutional reform’ June *Briefing Paper* at

<http://www.municipalservicesproject.org/sites/default/files/Colombias-Constitutional-Reform.pdf>
accessed 20 April 2016.

³⁰⁵ Food & Water Watch (2009).

³⁰⁶ Chavarro (2015) 262.

approach to water in Colombia commenced from judicial activism and civil society mobilisation.³⁰⁷

As far as the PANEL principles go in Colombia, the Constitution states that the objective of the state is to guarantee the rights and duties stipulated in the Constitution, and to facilitate the participation of all in the decisions that affect them.³⁰⁸ On the principle of accountability, the Constitution makes it clear that the state is responsible for improving the quality of life of its citizens, with special measures to ensure that the poor have effective access to basic goods;³⁰⁹ that efficient provision of public services is made available to all inhabitants;³¹⁰ and that the general welfare and the provision of potable water according to need are the basic objective of the state.³¹¹ With regards to non-discrimination, the Constitution recognises the primacy of inalienable rights and states that there should be no discrimination whatsoever.³¹² To buttress this principle, the Constitution stipulates that measures in favour of groups discriminated against (such as children women, persons with disabilities, the poor and prisoners) would be adopted, emphasising that a basic minimum must not be refused to prisoners, or that water piping installation must not be denied people.³¹³ As stated earlier on the principle of legal redress, the courts are available for immediate redress of human rights violations through the *tutela* actions. The principle of legal redress here stems from the Constitutional provision of Article 366, which states that the basic objective of the state's activity will be to address unsatisfied potable water needs, and Article 86, which allows any individual to file a writ of protection when a violation by action or omission is committed against an individual's fundamental human rights. The Constitution demands immediate compliance with the order of

³⁰⁷ Zambrano & Isa Norwegian Peace Building Resource Centre July 2013 Report at http://www.peacebuilding.no/var/ezflow_site/storage/original/application/ab5b7f705279f72c3de76a00eafdf6a.pdf accessed 21 April 2016.

³⁰⁸ Art 2 1991 Colombian Constitution.

³⁰⁹ Art 334 1991 Colombian Constitution

³¹⁰ Art 365 1991 Colombian Constitution.

³¹¹ Art 366 1991 Colombian Constitution.

³¹² Art 5 1991 Colombian Constitution.

³¹³ *Hernán Galeano Díaz c/ Empresas Públicas de Medellín ESP, y Marco Gómez Otero y Otros c/ Hidropacífico SA ESP y Otros* (2010) at <http://www.waterlex.org/waterlex-legal-database/index.php?r=legalDocument/customView&id=343> accessed 20 April 2016.

court, which restrains a perpetrator of the violation of a human right to act or refrain from acting in such violations.³¹⁴

In the quest for promising practices, Colombia cannot be exempted. This is because, in spite of it not expressly recognising water as a human right to water, there are provisions of the Constitution that can make this right active, as well as pursuing activities geared towards the recognition of a human right to water, and in addition to this, judicial pronouncements ruling on the right to access water.

5.4.2 AN OVERVIEW OF THE LEGAL FRAMEWORK OF ACCESS TO WATER IN INDIA

India has four percent of the world's water resources,³¹⁵ is ranked ninth globally in terms of renewable water resources, and as such is considered a water-rich country.³¹⁶ However, access to water for domestic use in India is poor.³¹⁷ There are two major reasons contributing to the challenges of access to water in India, namely population, and ground water pollution.³¹⁸ In addition to this, the Indian Constitution has made it difficult to adjudicate directly on the right to water. Like Nigeria, India does not explicitly recognise water as a human right, and has placed the possibility of an implicit recognition of this right under the Fundamental Objectives and Directive Principles of state policy.³¹⁹ For example, Article 47 of the India Constitution states that the standard of living of the people and public health shall be the primary duty of the state, yet it does not recognise access water as a necessity for the realisation of this right, and furthermore, it places this right to standard living and health under 'directive principles of state policy' wherein provisions contained in this part of the Constitution are not enforceable by any court.³²⁰

³¹⁴ See Art 86 1991 Colombian Constitution.

³¹⁵ KPMG (2010) 1 at water_sector_in_india_pdf accessed 16 July 2016.

³¹⁶ FAO (2003) 22 & 63 at wr23e.pdf accessed 16 July 2016; Kumar *et al* (2005) 89 *Current Science* 794-795.

³¹⁷ Government of India Ministry of Water Resources National Water Policy (2012) Para 1.1 at <http://wrmin.nic.in/writereaddata/NationalWaterPolicy/NWP2012Eng6495132651.pdf> accessed 2 March 2016; Thielborger (2015) 50.

³¹⁸ Currently, the population of India is over a billion, which form about fifteen percent of the world population.

³¹⁹ See Art 36-48 Constitution of India.

³²⁰ See Art 37 Constitution of India.

In spite of this provision that may contribute to the realisation of access to water and the caveat in Article 37 which prevents the enforcement of a possible realisation of access to water Indian courts have interpreted the right to water via the constitutional provision of the right to life.³²¹

A human right to water in India arose via public interest litigation.³²² In the case of *Subhash Kumar v State of Bihar*,³²³ the petitioner, by way of public interest litigation allowed by the Constitution of India,³²⁴ petitioned the court for an order preventing the respondents from polluting the Bokaro River. Although this case was dismissed because the petitioner was found to have personal interest, which conflicted with public litigation, the court held that the right to life is a fundamental right, which includes the right of enjoyment of pollution free water.³²⁵ A court has held that the right to life guaranteed in any country implies the right to water.³²⁶ As such, the right to water has been determined in many Indian cases from a deduction of the constitutional right to life, enshrined in Article 21 of the Indian Constitution.³²⁷

5.5 COMPARATIVE HUMAN RIGHTS-BASED APPROACHES TO WATER IN SOUTH AFRICA, KENYA, COLOMBIA AND INDIA

To improve access to water, countries herein analysed have embarked on various approaches. Only South Africa and Kenya have embarked on adopting a full human rights-based approach to water, having recognised the right to water and put in place legal, monitoring and evaluation mechanisms for the full realisation of this right. Other countries such as India and Colombia have sought other means of realising the right to water, which range from judicial activism to civil society mobilisation.

³²¹ Narain (2009) 34 *Vermont Law Review* 917.

³²² Murthy (2013) 31 *Berkley Journal of International Law* 98; Ghoshray 19 *Geo. Int'l Env'tl. L. Rev.* 643 (2007).

³²³ (1991) SCR (1) 5.

³²⁴ See Art 32 Indian Constitution.

³²⁵ *Subhash Kumar v. State of Bihar* 1 at <https://indiankanoon.org/doc/1646284/> accessed 12 July 2016.

³²⁶ *Chameli Singh & Ors v State of U.P. & Anor* (1996) 2 SCC 549; see also Jani *et al* (2013) 2 *Voice of Research* 65.

³²⁷ *MC Mehta v Union of India*, AIR 1998 SC 1037 (India 1998); Bluemel (2004) 31 *Ecology Law Quarterly* 980.

As stated in Chapter Four of the thesis, Nigeria lacks both in a legal and institutional framework, which are the crux of the human rights-based approach to water. In South Africa, which is more advanced in experience and jurisprudence, the promising practices lie in what should still be done if a progressive realisation to access to water is going to be fully realised. This is to say that, with all the legal and institutional framework of the human right to water to be found in South Africa, the application of a human right to water was fully realised at the very level where it was needed the most, that is, on behalf of the poor and vulnerable.

However, promising practices of a human rights-based approach to water found in South Africa range from first recognising water as a human right, and enacting national laws to ballast the Constitutional provision. Secondly, judicial interpretation of the human right to water is necessary. Thirdly, monitoring mechanisms such as the South African Human Rights Commission are also necessary, which can quickly investigate and address the failures of human rights based approach to water before they are allowed to exacerbate. Civil society mobilisation in South Africa has also contributed to addressing the challenges of access to water as it exposes the areas that have been neglected and calls for a fulfilment of the human right to water.

5.6 CHALLENGES OF INCORPORATING A HUMAN RIGHTS-BASED APPROACH TO WATER

Recognising water as a human right and adopting a human rights-based approach does not automatically solve all the challenges associated with access to water. It, however, ensures a progressive realisation of access to water. This is because, firstly, there are requirements of the human right to water, such as a minimum quantity, a prescribed quality (by WHO), accessibility in the distance, and affordability of the water. As stated in Chapter Two, the human right to water sets the minimum standard of the human right to water. Secondly, a human rights-based approach to water, as stated in Chapter Three, sets out the guiding principles that should be considered while trying to realise access to water progressively. Just as other approaches to water present challenges to access to water, a human rights-based approach likewise presents its challenges. An economic approach to water, for example, may not be considered a better

approach to access to water, as it may not put into consideration the poor in the society. I have argued in Chapter Three of this thesis that a human rights-based approach to water is a fusion of all the other approaches, namely the economic, social and community approaches.³²⁸ The economic approach, which was solely considered in France, for example, ensured that “water paid for water.” Of course, this approach would come to have an adverse effect on the poor, who would source for alternate access to water when they could not afford the clean water from the government or private companies. And although France is one of the countries with broad access to water using this approach, a human rights-based approach to water remains that approach that ensures help for the poor in the society to also benefit from this access, despite their poverty. In line with this, France has also recognised the human right to water.³²⁹ However, it lies outside the scope of the current focus on Africa.

The focus of this study is, rather, Nigeria, South Africa and Kenya. As such, I consider the challenges South Africa and Kenya have faced having adopted a human rights-based approach to water to expose the areas Nigeria may need to be aware of should a human rights-based approach be adopted. I focus primarily on South Africa in this section, because South Africa has more experience in adopting a human rights-based approach than does Kenya, which has yet to pass the Water Act of 2014, which is expected to replace the current Water Act of 2002.

With the recognition of the human right to water in South Africa and the adoption of a human rights-based approach to water, the challenges of access to water are not over. With the recognition of water as a human right, it might be expected that water would be more accessible to everyone. However, a recognition of the human right to water is just a step, which perhaps shows government’s commitment to ensuring access to water.³³⁰ Constitutional recognition, however, does not ensure everyone has access to water. As shown in South Africa for example, with the constitutional recognition of the human right to water, and the adoption of a human rights-based approach to water, there are still many people without access to water. In other words, in spite of the recognition of the human

³²⁸ Chapter Three of the current study.

³²⁹ Thielborger (2014) 25.

³³⁰ Anand (2007) 19 *Journal of International Development* 511-526.

right to water, there still exist discrepancies in actual access to water. Does this mean a human rights-based approach to water has failed, or perhaps that there is a better approach to ensure access to water to everyone? I think not. Below I examine the challenges of a human rights-based approach to water with particular reference to South Africa to determine why there still exist a significant number of people who are without access or inadequate access to water.

Dugard affirms that even though there is a commendable legal and policy framework from a human rights perspective in the country, there are widespread failures at the local level with regards delivery of water to the poor.³³¹ She notes some of the reasons for these failures, which receive analysis hereunder.

The local government is the sphere of government responsible for basic service supply in South Africa.³³² Housing services such as water and sanitation are counted as basic services.³³³ First, Dugard argues that the difference between framework and practice exists due to the failure of advancing inclusive economic and human development.³³⁴ Pillay argues that even though the African National Congress (ANC) recognised the role of the local government in delivery of basic services, and created a tax base and cross-subsidisation of municipal expenditure, the ANC faced fundamental challenges, where for example, the number of households along with household income of households that suffered services delivery to have been unknown.³³⁵ Furthermore, the capacity of the local government to deliver services was also unknown, and as such, the Municipal Infrastructure Investment Framework was prepared based on ‘guesstimates’ alone.³³⁶ Dugard notes that, since the democratic transition, a cost-driven approach towards basic service has been emphasised.³³⁷ Under the cost-driven approach, municipalities are under financial pressure to limit services to households that cannot pay.³³⁸ She argued

³³¹ Dugard in Langford *et al* (Eds) (2014) 275.

³³² Sec 152 1996 Constitution; See also Dugard in Langford *et al* (Eds) (2014) 276.

³³³ Pillay (2008) 19 *Urban Forum* 115.

³³⁴ Dugard in Langford *et al* (Eds) (2014) 276.

³³⁵ Pillay (2008) 19 *Urban Forum* 115.

³³⁶ Pillay (2008) 19 *Urban Forum* 115.

³³⁷ Dugard in Langford *et al* (2014) 276.

³³⁸ Dugard in Langford *et al* (Eds) (2014) 276.

that, since profit maximisation became the order of the day, services were limited, and disconnected in poor households.³³⁹

Secondly, Dugard raises the issue of corruption and incompetence of the municipal governance.³⁴⁰ She argues that, in spite of the rights-based framework, millions of South Africans do not have access to basic services.³⁴¹

Mehta examines why poor people still lack access to water, with particular reference to South Africa and India.³⁴² Mehta argued that the Free Basic Water (FBW) Policy adopted in South Africa stresses cost recovery mechanism, and shies away from endorsing the human right to water.³⁴³ Mehta however notes that the FBW has made a significant difference in the lives of people, especially women, whose time on water collection has reduced.³⁴⁴ It was, however, contended that some South Africans do not enjoy FBW, and some are not even aware of their constitutional right to water, which contributes towards access to water in South Africa remaining uneven.³⁴⁵

Since the devolution of water services delivery to local government, the national government has decreased financial support and technical support to the local government.³⁴⁶ This puts municipalities under pressure to be financially self-sufficient and recover service costs from all areas including poor communities.³⁴⁷ This means that at the municipal level, it is cost-recovery, rather than social or developmental benefit, that largely determines water services delivery.³⁴⁸ As a consequence of this decentralised and largely unregulated model, water services delivery is very uneven.³⁴⁹

³³⁹ Dugard in Langford *et al* (Eds) (2014) 276.

³⁴⁰ Dugard in Langford *et al* (Eds) (2014) 276-277.

³⁴¹ Dugard in Langford *et al* (Eds) (2014) 282-285.

³⁴² Mehta (2005) *IDS Working Paper* 260.

³⁴³ Mehta (2005) *IDS Working Paper* 260 3.

³⁴⁴ Mehta (2005) *IDS Working Paper* 260 8.

³⁴⁵ Mehta (2005) *IDS Working Paper* 260 9.

³⁴⁶ Black Sash: You and Your Rights (2015) at <http://www.blacksash.org.za/index.php/your-rights/local-government/item/you-and-your-rights-water> accessed 3 May 2015 (Hereafter Black Sash: You and Your rights).

³⁴⁷ Black Sash: You and Your Rights.

³⁴⁸ Black Sash: You and Your Rights.

³⁴⁹ Black Sash: You and Your Rights.

The South African Human Rights Commission's report also showed many poor communities lack access to water, where women and children and persons with disabilities were the most affected.³⁵⁰ There is obviously a disparity between access to water in theory and practice.³⁵¹ While the theoretical aspect is an amalgam of the legal and institutional framework, the practical aspect involves the application which sees to the actual delivery. It has been argued that rural communities receive inadequate water services, and most of those receiving services often face mass disconnections for non-payment, an issue that the government has acknowledged.³⁵² One of the ways to improve access to water is by governance from a human rights-based approach. Good governance has been equated with a human rights based approach, considering the focus of its emphasis which is participation, accountability and transparency.³⁵³ The South African Human Rights Commission's report found that a human rights-based approach to water did not exist at the delivery level. In other words, the issue of concern is not the failure of a human rights-based approach to water to address the challenges of access to water, but rather the non-application of a human rights-based approach to water at the level in which it is needed the most. Although it may seem difficult to comprehend how South Africa can be argued to have adopted a human rights-based approach, when clearly this approach is not evidenced in delivery and to the most vulnerable who are the major beneficiaries of a human rights-based approach, however, it should be noted that the recognition of the human right to water, the principle of accountability and legal redress, coupled with an active monitoring mechanism, are also important requirements of a human rights-based approach. And it is the report of the monitoring mechanisms that has exposed the absence of a human right-based approach at the delivery level.

³⁵⁰ Black Sash: You and Your Rights.

³⁵¹ Mirugi-Mukundi (2014) *ESR Review: Economic and Social Rights in South Africa*, 15(1) 12.

³⁵² Bond (2007) at

<http://www2.ohchr.org/english/issues/water/contributions/universities/UniversityofKwaZulu-Natal.pdf> accessed 20 September 2015.

³⁵³ Nyamu-Musembi & Cornwall *IDS Working Paper 234* 19.

5.7 CONCLUSION

Activities surrounding access to water in South Africa, such as the publication of a general household statistics survey,³⁵⁴ review of water policies,³⁵⁵ and litigation,³⁵⁶ show that South Africa has followed a human right-based approach, and also that South Africa is working towards ensuring access to water for all its citizens, arguably, in line with the concept of universality of rights. In spite of these activities, poor South Africans living in its rural areas do not have access to adequate potable water. One of the aims of a human right-based approach to water is to extend water to those who do not have the means to access adequate clean water for their needs.³⁵⁷

The provision in the Constitution of Kenya is reflective of the South African Constitution of 1996. I examined the application of a human rights-based approach to water in Kenya in the light of the partial failure of the rights-based approach to water in South Africa. The reason for this examination is to unveil what Kenya has done (or is doing) differently from South Africa, which may ensure it does not experience the same setbacks currently experienced in South Africa. This approach would further help to determine lessons for Nigeria, where I further provide certain suggestions for South Africa in the concluding chapter of the current study. Since the recognition of water as a human right under international human rights law, not less than 15 African countries have incorporated water as a right into their national laws,³⁵⁸ although not all these countries have seen an improvement

³⁵⁴ The 2010 South African statistical release P0318 general household survey showed there was a remarkable increase of people with access to water in 2010. While in 2002 only 56% of South Africans had access to drinking water, in 2010 the percentage of people with access had risen to 89.3%. See South African Statistical Release P0318 General household survey (2010) at www.statsa.gov.za/publications/P0318/p0318june2010pdf accessed 12 February 2014.

³⁵⁵ The National Water Policy review of 2013 No. 36798 is the most recent. The general notice (Notice 888 of 2013) issued by the Department of Water Affairs, was to call for comments from the general public on the updated policy set out to overcome water challenges, and also to improve access to water.

³⁵⁶ *Mazibuko and others v City of Johannesburg and others* (CCT 39/09) (2009) ZACC 28; 2010 (3). BCLR 239 (CC); 2010 (4) SA 1 (CC) (8 October 2009); *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W).

³⁵⁷ Calaguas (1999) WaterAid briefing paper 6 at <http://www.righttowater.info/wp-content/uploads/humanrights.pdf> accessed 20 September 2015.

³⁵⁸ Algeria, Morocco, Eritrea, Ethiopia, Kenya, Tanzania, Uganda, Mozambique, South Africa, Zambia, Angola, Madagascar, Democratic Republic of Congo, Gambia and Mauritania. See WaterAid (2003) 'The right to water and sanitation under national laws' available at <http://www.righttowater.info/progress-so-far/national-legislation-on-the-right-to-water/#AL> accessed 19 October 2015; see also UN (2010) The right to water Fact Sheet 35 7.

in access to water. Recognising water as a human right and adopting a human rights-based approach to water are distinct from one another.³⁵⁹ A human right to water does not provide the actual water for domestic use. Adopting and applying human rights principles and a human rights-based approach is what helps access to the actual water. This is because a human rights-based approach requires an institutional framework as well as implementation and monitoring mechanisms to aid the actual access to water.³⁶⁰ This human rights-based approach, phrased as human rights perspective by Khoo, constitutes the obligation to act, where nations are obliged to take steps to realise the right progressively.³⁶¹

In Anand's assessment of the right to water in South Africa, he argued that the recognition of the right to water in South Africa has not contributed significantly to access to water in a practical sense.³⁶² This is not to say that recognising a human right to water makes no contribution to access to water, as he asserts that the recognition of the human right to water in South Africa helps to diminish water insecurity and also formalise a "commitment by the state to avoid inequality."³⁶³ The right to water in the 1996 South African Constitution is not just there as an appeal to what is either good or desirable, but as a justifiable claim and commitment on the part of the South African government.

A human rights-based approach, in spite of all the criticisms, challenges and complexities it might initiate, remains the more robust avenue for realising access to drinking water than the environmental or economic approach to water. South Africa amongst other African countries (that have recognised the human rights to water and have applied a human rights-based approach) exist as a model for promising practice for Nigeria, which has neither recognised a human right to water nor adopted a human rights-based approach to water.

³⁵⁹ See Chapter Two and Chapter Three of the current study for an overview.

³⁶⁰ Niyi-Gafar (2015) 3 *ANULJ*.

³⁶¹ Khoo (2005) *Trocaire Development Review Dublin* 54.

³⁶² Anand (2007) 19 *Journal of International Development* 511.

³⁶³ Anand (2007) 19 *Journal of International Development* 518.

CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS

6.1 INTRODUCTION

As emphasised in various parts of this thesis, access to sufficient water for domestic use is a necessity for human survival. Recognising water as a human right is important so as to realise actual access to clean water for domestic use. Even though the United Nations General Assembly has agreed that water is a human right,¹ this resolution of the General Assembly is not necessarily binding on state parties.² In spite of the fact that no country voted against the human right to water, not all countries have recognised water as a human right in their national Constitutions or national legislation.

Nigeria has not recognised in her national legislation a human right to water, despite having signed and ratified the international instruments that influenced the recognition of water as a human right.³ Furthermore, the Nigerian laws (at both Federal and State levels) do not encourage a human right to water; neither do any of the approaches to access to water in Nigeria reflect a human rights framework. As illustrated in Chapter Four of this thesis, access to water remains an economic issue and the legislative approach adopted has in turn given rise to an ‘individual-based approach’ to water in Nigeria.⁴ This position I argued has not enhanced access to water, particularly where the vulnerable persons, such as children and poor people, are concerned.

In this thesis, I have inquired into the possibility of adopting a human rights-based approach to water in Nigeria, to determine whether it would be a useful approach in resolving the problems of access to water in Nigeria. To adequately address this, I identified the following research questions:

¹ UNGA resolution A/64/L.63/REV.1

² Öberg (2005) 16 *European Journal of International Law* 879-906.

³ See Chapter two for these instruments.

⁴ Niyi-Gafar (2016) *Unpublished. Individual-based approach to water was described to mean the method in which an individual realises water for domestic use. This type of approach does not involve the government rather individuals realise water through personal boreholes wells or purchasing from water tankers.*

1. What is a human right to water and how does this right relate to a human rights-based approach to water?
2. What does a human rights-based approach to water entail, and in what ways is it a useful approach in facilitating access to water?
3. What are the challenges of access to domestic water in Nigeria?
4. Which laws, policies and civil society mobilisation exist in other jurisdictions that offer guidance to Nigeria to realise universal access to water?
5. What promising foreign practices relating to a human rights-based approach to water exist from which Nigeria may learn?

These research questions have been respectively addressed across the various chapters of this study.

To conclusively answer the main question posed in this thesis, viz. whether a recognition of the human right to water and an adoption of a human rights-based approach to water would be useful in addressing the challenges of access to water in Nigeria, this chapter provides an overview of the arguments forwarded in this study, as well as findings from each respective chapter, highlighting how the assumption and questions of the study were addressed.

Following the discussions on the human right to water in Chapter Two; the conceptualisation of a human rights-based approach to water in Chapter Three; the analytical examination of the current status of domestic water supply in Nigeria in Chapter Four; and the comparative analysis in Chapter Five of promising practices of a human rights-based approach to water in selected countries, showing how the PANEL principles of a human rights-based approach to water was applied to improve access to water in these selected countries; I conclude here with recommendations for Nigeria on the steps to be taken to realise access to water.

6.2 SUMMARY OF ARGUMENTS AND FINDINGS

The aim of this section is to reiterate the key arguments of the study as these follow from the research questions, and to summarise the study's findings.

In Chapter One which introduced the thesis, I began by setting out on the assumption that water is a human right and that a human rights-based approach

provides a viable legal and policy prospect for addressing the challenges of inadequate access to water in Nigeria. Based on this assumption, the overarching question of this study asks whether an adoption of a human rights-based approach to water would be useful in resolving the challenges of access to water in Nigeria. Since I argued that the challenges of access to water for domestic use in Nigeria are premised on the disinterest of government to ensure an operative human right to water in spite of lending support to its recognition at the international level, the aim of the study has been to consider whether the recognition of water as a human right and the adoption of a human rights-based approach would guarantee the progressive realisation of access to water for Nigerians.

Bearing in mind that part of the thesis would refer to a human right to water or water as a human right, and considering the fact that this thesis commenced based on the assumption that water is a human right, I examined the development and meaning of a human right to water under international human rights law in chapter two of the study. I discussed the emergence of the human right to water under international law, where I argued that in view of the fact that life cannot exist without adequate clean water for basic domestic use, and the right to life is a human right, concluding that water must certainly be a human right. More so, no known scholar or critic has denied that water constitutes life. I considered conferences, international human rights instruments and documents that recognised the importance of access to domestic water and gave meaning to the human right to water. I also built on the arguments of researchers that emphasised water as a human right, and I argued that recognising water as a human right shows in part the commitment of national governments towards addressing the challenges of access to water meaningfully.⁵

I posited that the human right to water confers enforceable obligations on national governments, and I argued that the essence of water to the existence of human beings is such that should be given priority by the government of every nation and as such, should be made a right in the Constitution, as done in South Africa and Kenya. I also argued that making it a right without an adequate legal and institutional framework would weaken such a provision in the Constitution. This

⁵ See Sec 2.9 of Chapter Two.

may also result in a proliferation of court cases where people demand from the government a fulfilment of their constitutional right to water. I argued that the recognition of water as a human right, the existence of an adequate legal and institutional framework, and the establishment of implementation and monitoring mechanisms are part of what forms a human rights-based approach to water, which contributes to a progressive realisation of access to water. I also contended that there cannot be the talk of a human rights-based approach to water without the recognition of the human right to water. This argument led in Chapter Three to answering two of the research questions, namely: “what does a human rights-based approach to water entail?” and “in what ways is a human rights-based approach to facilitate access to water a useful approach?”

I began this chapter by identifying five approaches I contend to be contained in the sixth approach, viz. a human rights-based approach. To this end, I focused on what a human rights-based approach entails and what distinguishes it as a preferred approach to the other five approaches identified. These five approaches, commodity, community, social, public and legislative approach, I argued, all form part of a human rights-based approach. I then introduced a fifth approach, which I termed as a legislative approach to water (this I argued currently operates in Nigeria). I distinguish between a human rights-based approach to water and a legislative approach to water.⁶ I also showed the relationship between the identified approaches and a human rights-based approach.⁷

I noted that human rights concerns such as the right to education, the right to water, and the right to health, have been addressed through the lens of a “human rights-based approach to development.”⁸ I conceptualised a human rights-based approach to water by analysing the arguments of researchers in this discourse and adopting the principles of a human rights-based approach to development, which is derived from human rights standards.⁹ I observed that there are various terms such as ‘rights-based approach’, ‘human rights-based approach’ and ‘human rights

⁶ See Chapter Three, Sec 3.1; 3.2.4.

⁷ See Chapter Three Sec 3.2.6.

⁸ Uvin (2004) 122; Uvin (2007) 17 *Development in Practice* 597-606; Cornwall & Nyamu-Musembi (2004) 25 *Third World Quarterly* 1415-1437; Filmer-Wilson (2005) 23 *Netherland Quarterly of Human Rights* 213; Olowu (2009).

⁹ Hausermann (2003) 10 *Water Nepal* 131.

framework’, which when analysed, all refer to a minimum requirement derived from human rights standards. Although Eyben attempted a distinction between a rights-based approach and a human rights-based approach, I failed to see the difference between these two terms and other terms used in this discourse. For ease of reference, I adopted the term ‘human rights-based approach’, which I conceptualised as following a human rights minimum standard.¹⁰

I showed the relationship between the human right to water and a human rights-based approach to water, and I argued that a human rights-based approach to water is what helps ensure that individuals enjoy not just access to water, but a human right to water (which includes sufficient water, with good quality, accessibility and affordability), terming the human right to water as the ‘what’ and the human rights-based approach as the ‘how’. I identified and discussed the principles of a human rights-based approach to water.¹¹ These principles, I contended, are what link a human rights-based approach to water with good water governance. I, however, distinguished between good water governance and a human rights-based approach to water.¹² I argued that the method of successfully incorporating a human rights-based approach to water is part of what may be referred to as good water governance.

In answering the research question “in what ways a human rights-based approach to water may be used to facilitate access to water,” I analysed the principles of a human rights-based approach to water, in line with court decisions.¹³ I also discussed the practical aspects of a human rights-based approach to water as it relates to implementation and monitoring.¹⁴

Having analysed the context for the proposed adoption of a human rights-based approach to water, Chapter Four follows an expository, argumentative and critical approach to the challenges of access to water in Nigeria. This chapter dwelt on both the federal and state laws which make provision for access to water in Nigeria. In this chapter I argued that in spite of Nigeria being a signatory to and

¹⁰ Hausermann (2003) 10 *Water Nepal* 131.

¹¹ See Chapter Three, Sec 3.3.4.

¹² See Chapter Three, Sec 3.3.5.

¹³ See Chapter Three Sec 3.3.4.

¹⁴ See Chapter Three Sec 3.3.6.

having ratified international documents which recognise the human right to water¹⁵ and considering the role of the Nigerian government in campaigning for the promotion of the right to water in different nations, an operative human right to water does not exist in Nigeria.¹⁶ As explained in Chapter Three, I asserted that in Nigeria there exists a fusion of an economic approach and a weak legislative approach.¹⁷ This approach is what has brought about the individual-based approach to water in Nigeria, wherein individuals seek their water privately, and usually without the support of the government. I opined that the Nigerian water laws have contributed to the enhancement of the individual-based approach to water, which negates in most cases access to clean and sufficient water, and affects mostly the vulnerable in the society.

I conducted an analytical examination of access to water supply in Nigeria under six geo-political zones, by assessing the duties of the state's water corporations/boards to find out the roles of these corporations and whether they are sufficient in guaranteeing access to water. One thing these states have in common is the absence of adequate laws guaranteeing access to water for citizens. Furthermore, access to water is based on an existing reticulation, without which citizens are usually left without a domestic water supply. This problem is further exacerbated by the absence of federal laws making adequate provision or to guarantee domestic water supply at the national level. I examined the federal laws that ought to address this contingency, such as the CFRN and the WRA. I noted that while the CFRN makes it difficult to take matters of domestic water access to court by section 6(6)(c), the WRA also neglects this need especially with its Section 2 provision which encourages the abstraction of water directly from river sources for domestic water use. This provision negates the international law definition of the human right to water which emphasises that domestic water

¹⁵ The ICESCR was ratified in 29 July 1993; CEDAW was ratified 23 April 1984 and CRC ratified 19 April 1991. For a list of other human rights instrument ratified by Nigeria see http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/NG/NHRC_NGA_UPR_S4_2009anx_RatifiedHumanRightsInstruments.pdf accessed 10 November 2015.

¹⁶ Nigeria hosted the first Africa-South America Summit, which was held in Abuja. One of the consensus reached at the meeting was to promote the right of citizens to have access to clean water. For general overview see <http://asasummit.itamaraty.gov.br/asa-ingles/summit-of-south-american-africa> accessed 1 October 2014.

¹⁷ See Chapter Three Sec 3.2.4.

supply must be from an improved source.¹⁸ Rivers and streams in Nigeria are mostly polluted.¹⁹ Moreover, these sources of water supply endorsed by the federal government through the WRA limits access to water for people without a river or stream close to their homes.

I argued that the challenges of access to water in Nigeria are both legal and social in nature.²⁰ The legal challenges of access to water in Nigeria range from inadequate legal provisions ensuring or promoting a human right to water, the absence of domestic water law at the federal level, to the economic provisions at the state level, which criminalises non-payment for domestic water use.²¹ Under social challenges, I considered demographic challenges, lack of water education, inadequate statistics and record-keeping as contributing to the challenges of access to water. I argued for the recognition of a human right to water at the federal level and the adoption of a human rights-based approach to water as a major solution to addressing the challenges of access to water in Nigeria.

In Chapter Five, I conducted an examination of comparative human rights-based approaches to water from selected jurisdictions. Although I focused more on South Africa and Kenya as major jurisdictions in Africa from which Nigeria can adopt promising practices on a human rights-based approach to water, I also considered Colombia and India, which have also made compelling efforts to realise domestic access to water through civil society organisations and judicial activism. However, I focused more on the South African case, because it was a pioneer country to recognise a human right to water in its Constitution, and support same with an institutional framework; because of the length of experience South Africa has in the recognition and application of a human rights-based approach to water; and because the human right to water and its application has been a subject of robust judicial review.

I note that South Africa has a wealth of scholarship in this area of law and has proceeded from adopting and applying a human rights-based approach to water, to improving the application of a human rights-based approach to water through its

¹⁸ General Comment 15 Para 1.

¹⁹ Longe *et al* (2010) 12 *Journal of Sustainable Development in Africa* 35-44.

²⁰ See Chapter Four Sec 4.8.

²¹ See Chapter Four Sec 4.5.2.1; 4.5.2.2; 4.8.

monitoring mechanisms. I also argued that (even though) South Africa found driving force from the end of the apartheid era in the resolution to promote equality,²² this culminated in the WSA and the NWA; which in turn led to the people being empowered to demand a fulfilment of the right to water. This is evidenced by a series of court cases, in which people demanded their right to water, with the government in turn being held accountable to ensure a realisation of access to water. I considered the arguments of Anand and Dugard, in which they argued that the recognition of the right to water had no significant contribution to the increase of access to water in South Africa²³ and that despite the rights-based framework in South Africa, millions still exist without adequate access to water.²⁴ Although this might be true, there are many more with access, since the recognition of the human right to water and an involvement of the participation of the people with substantive laws to empower them to demand a fulfilment of this right. No doubt civil service actors played significant roles in realising access to water, such as mobilising resistance against privatisation (as seen in Bolivia)²⁵ and exerting pressure in making accountability more effective.²⁶ However, a combination of civil society activities anchored on a rights-based approach is what would boost a more progressive realisation of the human rights to water.

In the light of the on-going water reforms in Kenya, following the recent constitutionalisation of the human right to water, and the adoption of a human rights-based approach to water, it was clear that Kenya was following the South African approach.²⁷ I examined Kenya's water reforms where these might be different from those of South Africa, as pertinent to the Nigerian case. I noted that the first concrete step Kenya made in this regard was to acknowledge that water is a human right to which everyone was guaranteed access under the 2010 Kenya Constitution.²⁸ This, in turn, gave way to a legislative review of the Water Act of 2002, which originally sought to improve access to water, albeit through

²² Preamble to the 1996 Constitution.

²³ See generally Anand (2007) 19 *Journal of International Development* 511-526.

²⁴ Dugard in Langford *et al* (eds) (2014) 282.

²⁵ Chng Thesis submitted to the Department of government of the London School of Economics and Political Science for the degree of Doctor of Philosophy, London 2013 23-25. Available at theses.lse.ac.uk/810/1/Chng_Even_Flow.pdf accessed 12 February 2016.

²⁶ Nelson 81-99 at 81-83 in Pruce (ed) (2015).

²⁷ Mutunga (2015) 15 *The Transnational Human Rights Review* 64.

²⁸ Art 43 (d) 2010 Kenya Constitution.

privatisation, which Mumma²⁹ and K'Akumu³⁰ argued ignores the need of the poor.³¹ The current review of the Water Act of 2002 is expected to birth the 2014 Water Act, which is still an extant Bill (as at the time of this writing). With the recognition of the human right to water in the 2010 Constitution, which devolved 47 county governments, aimed at decentralising state functions and services,³² enhancing the participation of the people in the exercise of state powers and in making decisions affecting them.³³ With the inclusion of the human right to water and the devolution of the 47 County governments incorporated in the 2010 Constitution, it became necessary to review the Water Act of 2002, which meant that even if water was to be privatised or commercialised, as stated by Article 57 of the 2010 Constitution, there was the need to incorporate the needs of the poor, since the human right to water emphasises that everyone must have access to water without discrimination on the grounds of gender, physical disability or financial inability.³⁴ This brought about the current review of the Water Act of 2002, coupled with the fact that the provision of water services now devolved to the 47 county governments created by the 2010 Constitution. Although the Water Act of 2002 is what is currently operative in Kenya, the recognition of the right to water in the Constitution would in a way limit its applicability, and especially where the poor are deprived of access based on their status of being poor. This is because the Constitution guarantees everyone access without discrimination. The first case to mention the constitutional right to water, *Medina Location*,³⁵ was in fact not directly a case on water, but rather a case on housing. The petitioners in this case claimed a violation of their fundamental right to life, protection of property, basic services including clean and safe water.³⁶ The court granted the petition and emphasised that Article 43 of the 2010 Constitution guarantees the fundamental rights of the petitioners,³⁷ and that, as guaranteed by Article 21 (3) of

²⁹ Mumma (2005) *Workshop on African waters Law: Plural Legislative Frameworks for rural water management in Africa* 160.

³⁰ K'Akumu (2004) 16 *Environment and Urbanization* 213-222.

³¹ Art 57 Water Act 2002.

³² Art 174 (h) 2010 Kenya Constitution.

³³ Art 174 (c) 2010 Kenya Constitution.

³⁴ See generally General Comment 15.

³⁵ High Court (Embu) Constitutional Petition no 2 of 2011 at http://www.escri-net.org/usr_doc/Decision_Garissa.pdf accessed 2 May 2016 (hereafter *Medina Location*).

³⁶ *Medina Location* Para 3-5.

³⁷ *Medina Location* Para 12.

the 2010 Constitution, the state and every organ of state had a duty to observe, fulfil, respect, protect and promote these fundamental rights.³⁸

I argued that while Colombia had recognised an implicit human right to water (as argued by Chavarro)³⁹ and India had not, both jurisdictions had made remarkable efforts to realise access to water for their citizenry. While Colombia recognises water as a human right under a group of other rights,⁴⁰ judicial activism through ‘*tutela actions*’ (which is an injunction or a complaint brought by a citizen before any judge to seek an immediate injunction against actions or omissions of any public authority violating their constitutional fundamental rights of which water is inclusive), has been found to be the most effective way of promoting a human right to water. India, on the other hand, like Nigeria, does not recognise a human right to water, despite being a water-rich country.⁴¹ However, public interest litigation and judicial activism on the part of the courts are the two activities that have contributed to the realisation of access to water in India.⁴²

6.3 COMPARATIVE LESSONS OF HUMAN RIGHTS-BASED APPROACHES TO WATER AND RECOMMENDATIONS FOR NIGERIA

In my comparative analysis of human right-based approaches to water in the selected jurisdictions examined in this thesis (South Africa, Kenya, Colombia and India), I identify three major lessons from these selected jurisdictions, which may be beneficial to Nigeria. These identified lessons are discussed under the themes: legal and policy framework, judicial activism, and civil society organisations, respectively. Flowing from these identified lessons, I draw recommendations for Nigeria.

6.3.1 LESSONS FROM LEGAL AND POLICY FRAMEWORK

Of the selected jurisdictions examined, South Africa offers a more comprehensive legal and policy framework for a human rights-based approach to water. The Constitutional recognition of water as a human right and the twin water laws, the

³⁸ *Medina Location* Para 10.

³⁹ Chavarro (2015) 262.

⁴⁰ Art 366 1991 Colombian Constitution.

⁴¹ KPMG (2010) 1 at *water_sector_in_india_pdf* accessed 16 July 2016.

⁴² Murthy (2013) 31 *Berkley Journal of International Law* 98; Ghoshray 19 *Geo. Int'l Envtl.L.Rev.* 643 (2007); MC Mehta v Union of India, AIR 1998 SC 1037 (India 1998); Bluemel (2004) 31 *Ecology Law Quarterly* 980.

WSA and NWA, provide the background against which access to water may be promoted and progressively realised. The FBW policy tries to cap it all by ensuring that a minimum basic quantity is available to the poor on a daily basis, even though this basic minimum is currently being applied to all and not merely to the poor. Although Kenya may also offer a progressive realisation of a human rights-based approach, the Water Bill of 2014 is yet to be passed, and the Water Act of 2002, which leans towards a commodity approach to water, is still applicable in Kenya. In Colombia and India, on the other hand, constitutional indirect or implicit provisions are what give the human right to water recognition. In Colombia for example, the human right to water is recognised not as a direct, singular human right but rather as a part of a group of other rights.⁴³ This recognition under a group of other human rights is better than no recognition of the human right to water, as found in the CFRN. A part of the Constitution from which the human right to water may be operationalised has been restricted by law under the CFRN, wherein courts have been rendered powerless to adjudicate on matters arising from government objectives, one of which is to provide access to water.⁴⁴

India too has recognised the human right to water; however, it has not done so as an explicit right, but as being part of the Constitutional provision of the right to life.⁴⁵ There are other constitutional provisions, such as Article 38, which provide that the welfare of the people would be promoted, and Article 39, which stipulates that the state shall direct its policy to secure ownership and control of material resources by means of which to serve the common good of the people. However, Article 37 of the India Constitution (like Section 6 of the Nigerian Constitution) states that even though the duties of promoting the welfare of the people, minimising inequalities,⁴⁶ and providing an enabling environment for children to develop in a healthy manner⁴⁷ are fundamental in the governance of the country, such provisions cannot be enforceable by any court. The human right to water has been deduced from the constitutional provision of the human right to life, as, without water, no life can exist.

⁴³ Chavarro (2015) 262.

⁴⁴ See Sec 6 (6) (c) of the CFRN, see also Sec 4.4.1.1 in Chapter Four.

⁴⁵ Art 21 India Constitution.

⁴⁶ Art 38 (1) & (2) India Constitution.

⁴⁷ Art 39 (f) India Constitution.

For access to water to be realised, it is important that there is a constitutional recognition of this right. A federal or national provision of a right to water supersedes any other state or municipal provision against the right. There is as such the need to recognise the right to water under federal law, as that is a first step to guaranteeing water for all. When access to water is phrased in human rights terms, then a human rights framework is activated (including the PANEL principles). In other words, to guarantee a human right to water in a national law means that the national government is going to be accountable for water supply and the people will participate, and have access to information concerning their access to water. Moreover, that there would be non-discrimination in making available domestic water supply to all, irrespective of economic status, age, gender or physical ability, and that the people are empowered by the availability of these laws, which in turn makes it possible to seek legal redress in a court.

From the lesson on legal and policy framework, I recommend the following for Nigeria:

6.3.1.1 Recognise and treat water as a human right

As argued in Chapter Four, and in line with the definition of what water as a human right entails as shown in Chapter Two, water is not currently recognised domestically as a human right in Nigeria. State laws in Nigeria make it clear that water is an economic good to which people cannot lay claim without the necessary financial backing. As a result, non-payment of water consumed is a criminal offence for which an individual can be jailed.

To improve the situation of access to domestic water in Nigeria, there is the need for government at both federal and state levels to recognise water as a universal human right. The federal water laws are mostly silent on water for domestic use. The most important laws which are expected to make adequate provisions for these exigencies are the 1999 CFRN and the 1993 WRA. These federal laws have either made inadequate provisions for water and no provisions for domestic water in the case of the CFRN and the WRA and on the other hand, have made inadequate provisions where they have stated that water from rivers made be used for domestic purposes.

Furthermore, the Nigerian laws at the federal level promote an individual approach to access domestic water by its provisions in Section 4 of the WRA, where it states that individuals may drill or dig wells and boreholes for their domestic use. The challenges this places on the human right to water is the fact that it relieves the government of its responsibility or obligation to provide domestic water. This, as a result, has also increased the cost of water, as individuals with a commercial yield in private boreholes drilled, sell the water to the public without control over the cost or quality of water sold. When water is recognised as a human right and treated as such under the federal and state laws, then the quality of water and the cost of water sold would be relevant in this discourse.

Recognising water as a human right brings to the fore the need to address all the characteristics of the human right to water, which includes the quality of water, the quantity of water, and the availability and affordability of water for domestic use. I therefore recommend that Nigeria follow up on its international show of support for a human right to water, by adopting an operative human right to water, through a recognition in the Constitution, as done in South Africa and Kenya, and also reviewing national water laws, which would elaborately set out the way in which the constitutionalised right to water will be realised.

6.3.1.2 Review the federal and state laws on domestic water

A review and an immediate amendment of Nigerian water laws are important in this discourse. As established in Chapter Four of this thesis, the federal laws that address the issue of water and the state water laws are not in harmony. While the federal law is practically not concerned about domestic water and encourages the use of ‘polluted’ rivers for domestic use, the state laws lean towards an economic approach to access to water. The current water laws in Nigeria at federal and state levels cannot guarantee access to clean water for domestic use and have not incorporated an operative human right to water, which Nigeria was clearly in support of at the international level.⁴⁸ Currently, access to water is assured to only

⁴⁸See Amnesty International and WASH United, ‘Amnesty International and WASH United, ‘Recognition of the human right to water and sanitation by UN member states at the international level: An overview of resolutions and declarations that recognise the human rights to water and sanitation’ available at <http://www.righttowater.info/wp-content/uploads/AI-and-WASH-United-States-Recognition-of-HRWS-2015.pdf> accessed 22 April 2016 (hereafter Amnesty International and WASH United (2015)).

those that can pay and also to those whose homes are reticulated (albeit not regularly). In other words, as established on a research visit to the water corporations of various states in Nigeria, houses which were reticulated and still had good piping systems have access to water, although not regularly. Only Oyo, Kwara and Ogun states claimed to be making efforts to have more homes reticulated; however, all these states complained about insufficient financial support from the state government, thus limiting their functionality in making water available to those without original piping.

6.3.2 LESSONS FROM JUDICIAL ACTIVISM

Judicial activism is a doctrine that calls for an approach where a court interprets the constitutional provision to give effect to social change and is quite common in India. Unlike in South Africa and Kenya, which has constitutional provisions on the human rights to water, the fundamental right to water in India has evolved through judicial interpretation and not through legislative provision.⁴⁹ The Supreme Court in India has often stated that water is a human right, which is realised from Article 21 - the right to life.⁵⁰ The Nigerian Constitution also recognises the right to life; however, the courts have not been proactive in this stance to deduce a human right to water. Despite the absence of a constitutional recognition of the right to water in Nigeria, the courts can help make pronouncements to make the right to water active. This position is also recognised in the Kenyan Constitution, where Article 20 empowers the court to develop laws to give and “to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.”⁵¹ In spite of the restriction described in Section 6 of the CFRN, (which is similar to Article 37 of the Constitution of India), Nigerian courts, like the Indian courts in the cases above mentioned,⁵² need to be proactive in promoting the right to life by ruling on cases which centre on human development and social wellbeing. Access to water is a necessity for the realisation of human development.

⁴⁹ Narain (2009) 34 *Vermont Law Review* 920.

⁵⁰ Updhyay (2011) India Infrastructure Report 56 available at <http://www.idfc.com/pdf/report/2011/Chp-5-Water-Rights-And-The-New-Water-Laws-In-India.pdf> accessed 3 September 2016.

⁵¹ See Art 20 (3) (a) - (b) Kenyan Constitution.

⁵² See footnote 35 above.

6.3.3 LESSONS FROM CIVIL SOCIETY ORGANISATIONS

Civil society mobilisation groups have also contributed significantly to the human right to water, and a progressive realisation of access to water via a human rights-based approach, particularly in South Africa and Latin American countries.

In South Africa, and as noted by Dugard, there has been a “movement of local protest amounting to a rebellion of the poor,” as a result of undelivered services.⁵³ Friedman, on the other hand argued that protests in townships like Diepsloot are for a demand for public services, and not service delivery,⁵⁴ distinguishing between these by arguing that service delivery entails government officials deciding what the people want for them, without allowing them to make their own choices, while on the other hand, public services begins from the recognition that government’s job is not to deliver to citizens, but rather to listen to them, and to do what the majority asks, where possible, and where not possible, to work with the citizens to ensure that what is done is as close to what they want as can be.⁵⁵ Dugard, on the other hand, has maintained that while it may be necessary to view such protests through a wider lens, it cannot be denied that the protests are in part due to inadequate service delivery.⁵⁶ Dugard further argues that rights often inform other struggles, as in the tragic rights-based protest for access to water in April 2011 in Ficksburg, Free State, in which a community activist was killed. The spokesperson for the community organisation was quoted to have said: “...if our rights for a clean environment that is free of stinking sewage had been respected, we would not be here”.⁵⁷ One of the effects a mobilisation protest creates is “raised public opinion about usage, pricing and equity of water services”.⁵⁸ Furthermore, it sensitises the media about the true state of the poor in the society, and their struggle to access basic services.

In other words, protests demanding for either public service or public delivery are a call of the people demanding to participate in the decision that affects them,

⁵³ Dugard in Langford *et al* (eds) (2014) 286.

⁵⁴ Friedman (2009) available at <http://www.bdlive.co.za/articles/2009/07/29/people-are-demanding-public-service-not-service-delivery> accessed 7 September 2016.

⁵⁵ Friedman (2009) available at <http://www.bdlive.co.za/articles/2009/07/29/people-are-demanding-public-service-not-service-delivery> accessed 7 September 2016.

⁵⁶ Dugard in Langford *et al* (eds) (2014) 286-291.

⁵⁷ Dugard in Langford *et al* (eds) (2014) 291.

⁵⁸ Dugard in Langford *et al* (eds) (2014) 303.

particularly calling on the government to fulfil its roles for citizens, as delineated in the Constitution. Furthermore, civil society organisation groups exist to defend the right of the downtrodden, especially those that suffer extreme social exclusion.

In Latin American countries such as Bolivia and Colombia, the activities of civil society organisations or mobilisation groups (which consisted of farmers, students, middle-class, professional and rural and urban committees) forced the discontinuance of water privatisation, which caused water supply to be inadequate and expensive to the communities and farmers.⁵⁹ Civil society mobilisation groups as such create a public awareness as to the true nature or state of water availability, accessibility, quality or quantity.

6.3.4 OTHER RECOMMENDATIONS

6.3.4.1 Implement water education programmes

It is a known fact that water bodies in Nigeria are polluted daily by industries, multinational corporations and individuals. It is unfair that a Nigerian Federal law such as the WRA will endorse the use of such water to individuals for domestic use.⁶⁰ To this end, I suggest that water education programmes should be created to help educate citizens, particularly those living in rural areas, on the need to report water pollutants and to stop dumping wastes into rivers and streams. To ensure a successful curbing of water pollutions by individuals, alternative disposal of wastes ought to be created. Currently, in most states and townships in Nigeria, waste is dumped in bushes, rivers, construction sites, and even main roads. Only when a proper means of waste disposal is created by the government, is the disposal of waste by dumping in available rivers and streams addressed. Furthermore, the people need to be educated as to the potential havoc that may be caused by waste disposal into the rivers and streams. Some of this pollution result in greater havoc as a result of water contamination, which includes ill health (such as dysentery, cholera and diarrheal) erosion, flooding, and in some cases death.⁶¹

⁵⁹ Achtenberg (2013) at <https://nacla.org/blog/2013/6/5/water-wars-water-scarcity-bolivia%25E2%2580%2599s-cautionary-tale> accessed 1 September 2016.

⁶⁰ Sec 2 WRA.

⁶¹ Earle *et al* (2005) 20 at http://www.acwr.co.za/pdf_files/02.pdf accessed 1 September 2016.

6.3.4.2 Adopt PPP anchored on human rights-based approach principles

Apart from reviewing the state and federal laws as discussed under lessons on legal and policy framework, it is suggested in this thesis that, owing to the fact the Federal government allocation of 293 billion naira to the water crises has failed, there is the need to consider PPP to aid in the solution of the water crises in Nigeria.⁶²

No doubt PPP has failed in many African countries, as noted by Olowu.⁶³ However, there is still a chance that PPP can work if properly applied. I suggest a human rights-based approach to its application. This would mean that the PANEL principles would be appended to the application of PPP. Positive efforts to realise domestic water in Nigeria after the failure of the public sector to deliver is set around the PPP. In the year 2000, the National Water Supply and Sanitation Policy was launched by the Federal Ministry of Water Resources. This policy encouraged private-sector participation and the expansion of rural water supply systems. However, perhaps because of the wide failures of the PPP in the water sector in African countries,⁶⁴ not many states in Nigeria have incorporated this system into their water sector, except for states such as Lagos State.⁶⁵

In spite of the recorded failures of the PPP, there exists effective application of the concept in the infrastructural provision and maintenance of roads, bridges, and the health sector.⁶⁶ Perhaps a positive realisation in Lagos State may encourage other states also to adopt the PPP in their water sector. However, I argue that PPP may still be the only plausible way of improving water infrastructure and water supply, especially where properly articulated. I contend that adopting PPP in the water sector, particularly in the supply of domestic water, would function effectively, where the same is anchored on a human rights-based approach that incorporates the PANEL principles in the application of PPP.

In addition to this, with a concerted effort by the three tiers of government, Nigeria can also borrow an insight from the 2010 events in Zambia, wherein the Ministry of Health in Zambia with other aid agencies such as Tropical Disease

⁶² Business Day Newspaper 7 June 2016 vol 14 No 113 1 & 4.

⁶³ Olowu (2008) 4 *TD: The Journal for Transdisciplinary Research in Southern Africa* 68.

⁶⁴ Olowu (2008) 4 *TD: The Journal for Transdisciplinary Research in Southern Africa* 68-69.

⁶⁵ (2004) Lagos State Water Laws.

⁶⁶ Soyaju (2013) 46 *Dejure* 831.

Research Centre installed small water schemes in over 150 health care facilities.⁶⁷ These subsequently drastically reduced diarrhoea among the populace.⁶⁸ This method will perhaps also help to reduce the spread of diseases in Nigeria, particularly amongst children of less than five years, whom, records show, are worst hit, as 68000 of them die every year as a result of this disease caused by water crises.

An example of PPP anchored on a human rights-based approach to water is found in Colombia, where a 26-year contract was signed for the operation of water supply in Cartagena, between the municipality, which owned 50% of the system, and Barcelona, which owned 46% with the remaining 4% belonging to private shareholders.⁶⁹ The success linked to this mixed ownership was because Colombia developed its approach to partnering with the private sector to deliver water supply services. Rather than allow privatisation of the water sector to thrive according to the guidelines set by private investors, it is preferable that the guidelines for water supply delivery are set by the government, with the input of the people to be served, along with the private investors in question. These guidelines ought to incorporate human rights-based approach principles, such as participation, accountability and non-discrimination.

6.4 AVENUES FOR FURTHER RESEARCH

I noted in my discussion of a human rights-based approach to water that this approach is based both on practical and theoretical approaches. A practical assessment of a human rights-based approach to water, which has not been reverted to here, would prove a fruitful area of research on how a human rights-based approach to water has benefitted South Africa. This study has assessed the PANEL principles based on the provisions of the laws in selected countries analysed, where I have contended that it is important first to recognise access to water as a human right and implement laws under which this right may be progressively realised.

⁶⁷ The Punch Newspaper 7 April 2015 Vol 39 No 20894 28.

⁶⁸ The Punch Newspaper 7 April 2015 Vol 39 No 20894 28.

⁶⁹ Water supply and Sanitation Sector Board of the World Bank (2006) at <http://siteresources.worldbank.org/INTWSS/Resources/colombia.pdf> accessed 1 September 2016.

Bulto has contended that there is an adequate legal basis for the human right to water.⁷⁰ He further maintains that socio-economic rights treaties (including the African Charter) do not limit states' human rights duties to their territory.⁷¹ As such, in his work, he sought to expand the inadequately explored international human right and water law for extraterritorial application of the human right to water.⁷² What I have done, however, is not to examine the 'inadequately explored' international human right to water for extraterritorial application, but rather to examine the inadequate water laws in Nigeria, vis-à-vis the adequate laws in South Africa and Kenya. The aim of this was to determine how Nigeria might improve its domestic water law, and, invariably, access to water for its citizens. I proposed a human rights-based approach to water.

I have not pursued the argument of Eyben, where she states that there is a difference between a rights-based approach and human rights-based approach. Rather, I examined the similarities of these approaches, which was sufficient in this thesis to justify as meaning the same thing. While further research may, in fact, show that there is a difference in these terminologies, I have differed from recognising any dissimilarity and have adopted the term "human rights-based approach." I have not delved into the practical dimension of a human rights-based approach to determine what else needs to be done for domestic water to be more realisable in South Africa. Rather, I have examined each principle of a human rights-based approach to water, and how these principles have been applied in laws and policies, as well as judicial pronouncements. This exercise is necessary for Nigeria to positively channel its resources towards a progressive realisation of water for all.

6.5 CONCLUSION

In this thesis, I have argued, in line with the implicit and explicit recognition of the human right to water in various international human rights instruments, that access to water is a human right that the Nigerian government is under an obligation to fulfil. I identified South Africa as an important jurisdiction for

⁷⁰ Bulto (2014) 268.

⁷¹ Bulto (2014) 269.

⁷² See Generally Bulto (2014).

assessing the realisation of access to water. I do not claim that South Africa presents as a perfect example of realising access to water, because the economic approach to realising access to water still has a stronghold on the activities of water providers. However, no researcher can deny the existence of a coordinated legal framework to realising access to water in South Africa, which is key in the progressive realisation of access to water in South Africa. This example is an important lesson for Nigeria that does not have a coordinated legal framework on the provision of access to water for Nigerians.

It is my contention that the legal framework of access to water in South Africa and Kenya is anchored by a human rights-based approach following the constitutional recognition of water as a human right. As such, I examined the principles of this approach to water, and how they have been applied in South Africa and Kenya, respectively. Although the implementation of a human rights-based approach to water in South Africa has not ended all the challenges of access to water, there is a continual realisation of the right to water with the participation of the citizenry, particularly with the activities of civil society organisations. I have maintained that South Africa has a more robust experience on a human rights-based approach to water than Kenya. Kenya, as I have argued, has taken concrete steps in establishing a framework based on a human rights-based approach, having first recognised it as a human right in the Constitution, and reviewing the 2002 Water Act in the Water Bill of 2014. Although these are just legal methods towards guaranteeing access to water, only time and the monitoring mechanisms put in place by the 2010 Kenya Constitution can determine how a human rights-based approach to water may have served and progressively improved access to water.

Although researchers may contend that a human rights-based approach to water has failed in South Africa, this, I argue, is not as a result of the laws which have been described to be “laudable,”⁷³ nor as a result of inadequate resources, which international human rights law provides should be within a country’s available resources,⁷⁴ but rather a failure of a human rights-based approach to water as a result of its non-application at water delivery level.⁷⁵ It is noteworthy that human

⁷³ Dugard (2014) 275.

⁷⁴ Art 2 ICESCR.

⁷⁵ SAHRC Report (2014).

rights-based approaches allow for effective monitoring and evaluation of the implementation and violation of the human right to water, particularly for the poor. The activities of civil, social organisations have also contributed to exposing the ineffectiveness of a commodity approach, embarked upon by water providers, which stalls or vitiates a human rights-based approach to water.

Furthermore, I have argued that an eventual constitutional recognition of the human right to water in Nigeria in the steps of South Africa and Kenya does not end the challenges of realising access to water. Rather, a complimentary legal framework like the WSA and NWA of South Africa, and the yet to be passed 2014 Water Act of Kenya, which sets out a progressive realisation of the human right to water and which empowers the people in access to water, are necessary tools in realising access to water in Nigeria. Nigeria should implement a universal standard in the water sector following international guideline, namely that water must not be discontinued and that concrete steps must be undertaken to ensure that women, children and persons with disabilities must have access to water and that water has an economic value. The fact that water has economic value should however not be considered to override other requirements, such as its accessibility and availability to the poor.

I have argued in this thesis that there is no excuse for the Nigerian government to deny its citizens the right to access water for their domestic use, because water resources in Nigeria exist in a surplus compared to those of South Africa and Kenya. Although the population of both Kenya and South Africa altogether is less than that of Nigeria, Nigeria still has sufficient water resources to serve every Nigerian, if properly harnessed⁷⁶ through a legal and institutional framework, where both frameworks are anchored on a human rights-based approach.

I contended that the only way Nigeria can begin to address this anomaly, which over the years has come to be perceived as normal, is by adopting a human rights-based approach to water. This approach necessitates the constitutional recognition of water as a human right, accompanied by institutional frameworks for the progressive realisation of the right. These should further be accompanied by implementation and monitoring mechanisms. Nigeria has signed and ratified all

⁷⁶ Information gathered from water officials in Nigeria on a research visit.

instruments that recognise water as a human right. As such, the four obligations imposed by General Comment 15 on state parties cannot be neglected. These obligations - general legal obligations, specific legal obligations, international obligations and core obligations - have to be considered in concert, in order to realise access to water.

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