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

Oluwabunmi Niyi-Gafar[*]

Abstract

Since the recognition of access to safe drinking water as a human right, nations have been charged with the responsibility of progressively realising access to water for their citizenry. Various approaches have been suggested, one of which includes a human rights-based approach. A human rights-based approach to water does not have a specific definition, however, it encompasses the principles that are necessary to aid a progressive realisation of access to water amongst the people, especially the poor. This approach to access to water takes into cognisance, the availability of water, the affordability of water and a constant quantity which must be of good quality. Beyond describing what a 'human rights-based approach to water' entails this article expounds South Africa's application of this approach to ensuring access to water for its citizens. It further suggests areas where this approach may prove useful where considered and applied in other African countries, especially Nigeria, to ensure a progressive realisation of access to water.

Keywords: Human rights, access to water, human rights-based approach, right to water, drinking water

Résumé

Depuis que l'accès à l'eau potable a été reconnu comme étant aussi un droit humain, les nations ont dès lors la responsabilité de réaliser progressivement l'accès à l'eau pour leurs citoyens.

Diverses approches ont été suggérées, dont l'une comprend l'approche fondée sur les droits de l'homme. Une approche fondée sur les droits de l'homme en matière d'eau n'a pas de définition spécifique, mais elle englobe les principes nécessaires pour favoriser la réalisation progressive de l'accès à l'eau par les populations, en particulier par les pauvres. Cette approche de l'accès à l'eau prend en compte la disponibilité de l'eau, son prix abordable et une quantité constante qui doit être de bonne qualité. En plus de décrire en quoi consiste une « approche fondée sur les droits de l'homme en matière d'eau », cet article relate l'implémentation de cette approche par l'Afrique du Sud visant à garantir à ses citoyens un accès à l'eau. Il suggère en outre les domaines dans lesquels cette approche peut s'avérer utile lorsqu'elle est envisagée et implémentée dans d'autres pays africains, notamment le Nigéria, afin de garantir la réalisation progressive de l'accès à l'eau.

Mots-clés: Droits de l'homme, accès à l'eau, approche basée sur les droits de l'homme, droit à l'eau, eau potable

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Introduction

Access to (safe drinking) water refers to the distance, the available quantity and the quality of water available for a person's domestic use.[1] According to this definition of access to safe drinking water proffered by the World Health Organization and the United Nations Children's Fund, 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 of access to safe drinking water encompasses the requirements ascribed to a 'human right to water' (such as the quantity, quality and the physical accessibility to water), as defined by the United Nations General Comment 15.[3] This is to say that access to water and a human right to water though used interchangeably do not necessarily mean the same thing. While a human right to water 'entitles everyone to sufficient, safe acceptable, physically accessible and affordable water for personal and domestic use', the term 'access to water' refers to the method or the process of acquiring water for domestic and personal use. In other words, access to sufficient water for domestic use may be realised through commercial means (where same is not necessarily affordable) or from an unimproved source (such as the rivers and streams); these methods of realising 'access to water' cannot be referred to as a human right to water.

Access to clean water and the human right to water are usually discussed through the lens of a human rights-based approach to development.[4] This is not completely misplaced, as there is a relationship between human rights generally and development.[5] Although the human right to water and the right to development are separate rights, both rights share similar characteristics as both rights are associated with human well-being.[6] Without access to clean water for survival and good health, a discussion on human well-being cannot exist. Furthermore, there can be no proper development without access to water, because water cuts across all areas

[1] WHO 'Health through safe drinking water and basic sanitation' (2006). <http://www.who.int/water_sanitation_health/mdg1/en/> accessed 6 February 2015.

[2] Ibid.

[3] E/C12/2002/11 Substantive Issues Arising in the Implementation of the International Covenant on Economic Social and Cultural Rights. General Comment 15 para 2.

[4] Filmer-Wilson E, 'The Human Rights-Based Approach to Development the Right to Water' (2005) 23 *Netherlands Quarterly of Human Rights* 213.

[5] Olowu, D *An integrative rights-based approach to human development in Africa* (2009) Pretoria University Law Press; Uvin, P 'From the right to development to the rights-based approach: how human rights entered development' (2007) 17 *Development in Practice* 597.

[6] Olowu, D 'Human development challenges in Africa: A rights-based approach' (2004) 5 *San Diego International Law Journal* 179, 184–185.

of development, such as health and education.[7] Although this paper is about a human rights-based approach to water, it should be noted that the principles entrenched in the human rights-based approach was derived from the right to development. 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.[8] It seems at this point that a human right-based approach to water cannot be separated from the human rights-based approach to development or perhaps both rights approaches are part of the same coin. Clarity, regarding what a human rights-based approach entails, particularly to water, would be expatiated in this article.

Thus, this article proceeds from establishing the evolution of a 'human rights-based approach' and how it came to be applied to access to clean water. It further expounds the meaning of a human rights-based approach to water and analyses the principles of a human rights-based approach and how this approach is applied to access to clean water. The analyses of the principles of a human rights-based approach to water are heavily skewed towards South Africa as the pioneer country to constitutionalise the human right to water and hence adopt a human rights-based approach. References are made to Kenya, which also followed in the steps of South Africa by constitutionally recognising access to clean water as a human right. This article also highlights the two major components of the human rights-based approach – implementation and monitoring mechanisms – noting that without these mechanisms put in place the human rights-based approach to water would just be another phrase for access to water.

A human rights-based approach to water

In this section, the evolution of a human rights-based approach to development is discussed so as to provide a background of the evolution of the human rights-based approach to water. Furthermore, the principles of a human rights-based approach to water, and the jurisdictions that have adopted this approach, showcasing legal cases that best depict the principles of a human rights-based approach to water are analysed.

Evolution of a human rights-based approach

Discussions on 'human rights-based approaches' seem impossible without including development. Researchers have frequently mentioned 'development' when examining 'human rights-based approaches[9],' Notable amongst them is the summation of Uvin, who argues that although

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

[8] Declaration on the Right to Development (n 8) art 8.

[9] Olowu (n 5); Uvin (n 5) 597–606

development and rights are not the same, both can be understood as inseparable aspects of the same process.[10] He explains that human rights and development are 'conceptually and operationally inseparable parts of the same process of social change'.[11] Olowu also notes the link between human rights and human development, where he states that human rights are 'veritable vehicles for human development'.[12] Human rights are, in other words, components of human development, and also serve as a platform for achieving it.[13]

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.[14] Aware of the inconsistency in the understanding and application of the human rights-based approach to development; the United Nations Development Group[15] adopted a 'common understanding', to ensure consistency in the application of a human rights-based approach by the various United Nations agencies.[16]

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

[10] Uvin, P *Human Rights and Development* (2004) Kumarian Press: Bloomfield USA 122.

[11] Ibid.

[12] Olowu (n 5) 5.

[13] Ibid.

[14] Section Gruskin, E Mills & D Tarantola, 'History Principles and Practice of Health and Human Rights' (2007) 370 *The Lancet* 449.

[15] 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.

[16] 'The human rights-based approach to development cooperation: towards a common understanding among UN agencies' HRBA portal <http://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies> accessed 11 February 2015.

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.[17]

The implication of this 'Common Understanding' is that a human rights-based approach requires four necessary and specific elements:

1. an identification of the human rights claims and the duty bearers' obligations which should be analysed;
2. the capacity of the right holders to claim and the duty bearers to fulfil their obligations;
3. an evaluation of the outcome and process which is to be guided by human rights standards and principles; and
4. an application of the recommendations of international human rights bodies and mechanisms.[18]

The human rights-based approach is a contemporary framework of the United Nations formulated to be applied on human rights concerns such as the rights to health, development, education, sanitation and water.[19] 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.[20]

Even though human rights and development seemed to have related objectives, the relationship between the two was not recognised until the late 1980s.[21] According to Uvin, the human rights-based approach evolved as a result of the failure of structural adjustment programmes, which resulted in part, from the non-accountability of governments where civil society pressed for good governance and democracy.[22] Accountability, as will be analysed under section three of this article involves two categories of people – the duty bearers and the right holders. Where the duty bearers are not accountable, resources are usually mismanaged. According to Olowu, there is a primary responsibility for both the duty bearers and the rights holders, which a human rights-based approach would address by

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

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

[19] Nyamu-Musembi, C & Cornwall, A 'What is the "rights-based Approach"' all about? Perspectives from international development agencies' IDS working paper (2004) 234 1 <http://www.ids.ac.uk/files/dmfile/Wp234.pdf> accessed 12 October 2014.

[20] Ibid.

[21] Filmer-Wilson (n 4) 214.

[22] Uvin (n 5) 597.

emphasising the accountability and responsibilities of the government or the providers and the consumers.[23]

Both human rights and human development formed part of the four cornerstones of the United Nations Charter. These four cornerstones (human rights, peace, development and international law), were, however, found to be linked.[24] Dias and Leckie engage the connection between these four cornerstone objectives by explaining what each means:

1. Lasting peace must be built upon respect for the human rights of all people.
2. Development is the key to the progressive realization [sic] of human rights.
3. Human Rights provide the value framework and the criteria for accountability for all UN activities with respect to peace and development alike.
4. International law is the vehicle to achieve these purposes.[25]

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'.[26]

Academic writers in various disciplines such as health,[27] education[28] and journalism[29] have applied (in theory) a human rights-based approach to their disciplines.[30] London, who wrote on a human rights-based

[23] Olowu, D 'Access to safe water and the human development quandary in Africa: implications of a rights-based approach' (2014) 35 *Obiter* 205, 219.

[24] Dias, C & Leckie, S 'Human Development and shelter: a human rights perspective' United Nations Development Programme (UNDP) (Occasional Paper 21 – Human development and shelter: a human rights perspective (2002) <http://core.ac.uk/download/pdf/6248903.pdf> accessed 20 October 2015.

[25] Ibid 3.

[26] Filmer-Wilson (n 4) 213.

[27] London, L 'What is a human-rights based approach to health and does it matter?' (2008) 10 *Health and Human Rights* 65.

[28] Dina C, Banerjee D, King U, Lansdown G & Alan S 'A human rights based approach to education for all' United Nations Children's Fund (UNICEF) 2007 <http://www.unicef.org/publications/files/A_Human_Rights_Based_Approach_to_Education_for_AlA.pdf> accessed 11 September 2014.

[29] Rose, T 'A human rights-based approach to journalism: Ghana' (2012) 19 *The Journal of International Communication* 85.

[30] '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.

approach to health, has described this approach as holding states and other 'moral duty bearers'[31] accountable, developing policies and programmes that are consistent with human rights and facilitating legal redress in cases of violation to health.[32] Filmer-Wilson's approach to access to water was through the lens of human rights-based approach to development.[33] She notes the essential nature of water to human life, economic development and environment integrity,[34] and argues that a non-improvement in global access to water will inhibit progress in human development.[35]

The main focus of rights-based approaches is the integration of the laws and policies with human rights principles.[36] In other words, the principles of human rights are mainstreamed into laws and policies aimed at creating an enabling environment for the realisation of development.

A human rights-based approach considers 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.[37] This approach incorporates human rights standards into national law and integrates human rights principles into public administration and education in human rights and responsibilities.[38] It focuses on , the rule of law, empowerment and structural change, in favour of the vulnerable and the most deprived.[39]

Understanding a human rights-based approach to water

A human right to water is not the same as a human rights-based approach to water, and these terms cannot be used interchangeably. Simply put, a human right to water is 'the what', and a human rights-based approach is 'the how'. 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. When water is considered to be a human right, this can only be guaranteed by a human rights-based approach. If a human right to water as earlier defined involves access to sufficient safe clean water for everyone irrespective of gender, age or status, then the only approach that may very well guarantee this right is one that does not discriminate on the basis of gender, age or status. For example, where water is considered purely as an

[31] 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'.

[32] London (n 35).

[33] Filmer-Wilson (n 4) 213–241.

[34] Filmer-Wilson (n 4) 227.

[35] Olowu (n 31) 205.

[36] Gruskin (n 21) 492.

[37] J Hausermann, 'A human rights approach to development: some practical implications for water aid's work' (2003) 10 *Water Nepal* 131.

[38] Ibid.

[39] Uvin (n 16) 131.

economic good then access to such water will depend on whether the consumer can pay for it or not. A human rights-based approach to water ensures that no individual is denied access to clean water for domestic use purely on the basis that he or she cannot afford it.

A human right to water implies that the state must set a priority for the fulfilment of universal access to water as a basic need.[40] 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 affordable and accessible to everyone, especially persons who are most vulnerable to water scarcity.

While the normative content of the human right to water refers to the quantity and quality of water available and accessible for domestic use,[41] a human rights-based approach to water is described on two levels, that is, at a theoretical level and a practical level, respectively.[42] 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 and other actors or water providers which can be applied domestically or regionally.[43]

The link between the human right to water and a human rights-based approach to water is found in the explanation of the United Nations 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.[44] Human rights determine the relationship between individuals and the states where a human rights-based approach is adopted.[45] 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.[46] 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

[40] Winkler (n 9) 214.

[41] General Comment 15 4–7.

[42] Tremblay, H 'A clash of paradigms in the water sector? Tensions and synergies between integrated water resources management and the human rights-based approach to development' (2011) 51 *Natural Resources Journal* 316, 317.

[43] Nyamu-Musembi & Cornwall (n 26) 12–13.

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

[45] United Nations Development Programme (UNDP), 'Applying A human rights-based approach to development cooperation and programming: A UNDP capacity development resource' 17 (2006) available at http://waterwiki.net/images/e/ee/Applying_HRBA_To_Development_Programming.pdf (accessed 3 May 2015.

[46] Winkler (n 9) 214.

(MDG).[47] A human rights-based approach to water requires a progressive realisation, and has its emphasis on targeting the most vulnerable in a society.[48]

The human right to water had its roots in various international human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR),[49] Convention on the Elimination of All forms of Discrimination Against Women (CEDAW),[50] Convention on the Rights of the Child (CRC)[51] and Convention on the Rights or Persons with Disabilities (CRPD),[52] before its affirmation by the United Nations General Assembly.[53] 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 for example 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. However, at the international level, there are human rights monitoring mechanisms, such as the Special Rapporteurs, established to help promote and ensure specific human rights issues are promoted and protected. Independent experts or a working group are also appointed by the Human Rights Council to examine, monitor, advise and publicly report on human rights situations in specific countries or territories.

Also necessary at the national level is the human rights commission of various nations such as that of South Africa[54] and Kenya.[55] These commissions are expected to be independent in the discharge of their

[47] Millennium Development Goals and Beyond 2015 <http://www.un.org/millenniumgoals/environ.shtml> accessed 30 October 2015).

[48] Winkler (n 9) 216.

[49] ICESCR arts 11, 12.

[50] Art 14(2)(h).

[51] Art 24(1)(c).

[52] Art 28.

[53] United Nations General Assembly Resolution A/64/L.63/REV1.

[54] The South African Human Rights Commission was established by virtue of s 281 of the 1996 South African Constitution.

[55] The Kenya National Human Rights and Equality Commission was established by virtue of art 59(1) of the 2010 Kenyan Constitution.

duties which include monitoring human rights activities and ensuring the protection of the rights of their citizens. Although Nigeria has a National Human Rights Commission established by the National Human Rights Commission Act of 1995, the independence and the powers of this commission are somewhat limited as its powers as spelt out by the act are to:

(a) do all things which by this Act or any other enactment are required or permitted to be done by the Commission; and
(b) do such other things as are necessary or expedient for the performance of its functions under this Act. [56]

The problem with this provision of the Act is that where any provision is found to be inconsistent with the provision of the Nigerian Constitution, it becomes null and void. It is argued here that the Nigeria Constitution should have established the Nigerian Human Rights Commission as same can be accommodated in the Constitution like that of South Africa and Kenya which gives independence to the Commission in the performance of its duties to protect the sovereignty of the people and is not subject to direction or control by any person or authority.[57]

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, implemented and a 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.

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.[58] 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.[59] These principles have been given the acronym PANEL, which stands for participation, accountability, non-discrimination,

[56] Section 6(a) and (b) National Human Rights Commission Act 1995.

[57] Art 249(1) and (2) of the 2010 Kenya Constitution. See also s 181(1)–(4) of the 1996 South African Constitution.

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

[59] Kindornay, S, Ron, J & Carpenter, C 'Rights-based approaches to development: implications for NGOs' (2012) 34 *Human Rights Quarterly* 480.

empowerment, and legal redress.[60] 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.

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. Conventions such as the CEDAW and CRC,[61] even the International Convention on Civil and Political Rights (ICCPR), guarantee the right to take part in the conduct of public affairs and to have access to public services.[62] The CEDAW,[63] the CRPD[64], and the CRC[65] all provide for the rights of women, persons with disabilities and children (respectively) to participate and express their views in issues that concern them.[66] The principle of participation, which may be direct or indirect, is expected to be free and meaningful.[67] Direct participation will mean involvement in decision making of all people concerned, including women, children and persons with disabilities,[68] to give their opinions, suggestions or express their concerns such that it influences decision making.[69] Participation generally will include access to information on all water issues, with an avenue to complain if and when necessary. Indirect participation on the other hand will involve participation through representatives. Participation is expected to be inclusive, such that people can express their concern, or demands, which can also influence decision making. Participation incorporates every human being, irrespective of

[60] Frankovits, A (2006) 54. The last principle 'Legal redress' is termed differently. For example, Frankovits notes the L as 'Linkage to other human rights' Frankovits (2006) United Nations Educational, Scientific and Cultural Organization (UNESCO) <http://unesdoc.unesco.org/images/0014/001469/146999e.pdf> accessed 14 July 2015 54; Donald refers to it as 'Legality' in Donald A, 'A guide to evaluating human rights-based interventions in Health care and social care' <http://www.humanrightsinhealthcare.nhs.uk/Library/a-z/HUMAN%20RIGHTS%20IN%20HEALTHCARE%20EVALUATION%20GUIDE%20ALICE%20DONALD%20NOVEMBER%20EVENT.pdf> accessed 29 October 2015.

[61] Darrow, M & Tomas, A 'Power, capture and conflict: A call for human rights accountability in development cooperation' (2005) 27 *Human Rights Quarterly* 471, 475.

[62] ICCPR art 25: 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 1, 2 CCPR/C/21/Rev1/Add7, General Comment 25 art 25 <http://www.refworld.org/docid/453883fc22.html> accessed 28 October 2015.

[63] CEDAW arts 7, 12(1), 13, 14(2).

[64] CRPD art 29.

[65] CRC art 12.

[66] Winkler (n 9) 219.

[67] Declaration on the right to development (n 8) art 2(3).

[68] Winkler (n 9) 220.

[69] Gready, P & Ensor, J 'Introduction' in Gready, P & Ensor, J eds *Reinventing development? Translating rights-based approaches from theory into practice* (2005) Zed books New York 25.

status, sex, age or religion, to participate as right holders and not as mere recipients.[70]

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.[71]

The principle of participation encourages public participation in formulating and implementing water strategies and plans of action.[72] This principle is based on two criteria: participation in decision-making processes and access to relevant information.[73] In allowing people to participate adequately, information has to be conveyed in a language (including sign language, where appropriate) that they understand.

Participation also refers to the involvement of all stakeholders in the decision making, to express their demands, views and concerns on access to water.[74] 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.[75] 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.[76] Frankovits argues that for development agencies fostering democracy and human rights, participation is a prerequisite to ensure stability.[77] 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.[78] 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,

[70] Winkler (n 9) 220.

[71] Winkler (n 9) 220; Filmer-Wilson (2005) 221 233–234.

[72] General Comment 15 para 24, 48.

[73] WaterAid, 'Rights-based approaches to increasing access to water and sanitation' WaterAid Discussion Paper (2011) <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB4QFjAAahUKEwis0Oj32O7GAhXoF9sKHWQ6A_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=AFQjCNF2zY2b8ucz8vNPrpBG-sULU0BlM9g&bvm=bv.98197061,d.ZGU> accessed 12 February 2014.

[74] Winkler (n 9) 221; Filmer-Wilson (n 4) 217.

[75] Frankovits, A 'Rules to Live by The human rights approach to development' (2002) XVII PRAXIS *The Fletcher Journal of Development Studies* 1.

[76] The Limburg Principles on the implementation of the International Covenant on Economic Social and Cultural Rights UN Doc E/CN/.4/1987/17; Frankovits (n 80) 221.

[77] Frankovits (n 80).

[78] General Comment 15 para 24.

water services and the environment by whichever authority holding the information such as public authorities or third parties'.[79]

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.[80] One detailed example that exhibits different angles to the principle of participation is found in the case of *Federation for Sustainable Environment and others v Minister of Water Affairs and others*.[81] In this case, water supply was contaminated by 'acid mine water' in Silobela and Carolina, South Africa. Twenty tanks were brought in from neighbouring towns so as to provide water to these localities.[82] 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 an issue of concern as many residents had to walk long distances to access the potable water from the tanks.[83] 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.[84] They also petitioned the court to order the respondents in this case 'to engage actively and meaningfully'[85] 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'.[86] The court considered section 152 of the 1996 Constitution which makes provision for the 'objects of local government', which include 'encouraging the involvement of communities and community organisations in the matters of local government'. The court reiterated that the objective of the local government was to provide sustainable services to communities and 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

[79] Para 48 General Comment 15.

[80] See WaterLex & WASH United (2014) 14.

[81] (2012) High Court (North Gauteng, Pretoria) 3567/12 ZAGPPHC 128 (hereafter *Federation for Sustainable Environment*) available at http://www.saflii.org/za/cases/ZAGPPHC/2012/128.html accessed 29 October 2014.

[82] Ibid [4].

[83] Ibid [5].

[84] Ibid [5], [6].

[85] 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 paras 14 & 15.

[86] *Federation for Sustainable Environment* (n 86) [17].

full engagement of the community and access to information, since the respondents are responsible to the community.[87] 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.[88]

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, the case of *Beja and others* has further details on the meaning and usefulness of participation in ensuring access to water.[89] The court noted that effective interactive participation is a requirement under the National Housing Code and the Upgrading of Informal Settlement Programme.[90] The court also noted 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 there is 'meaningful engagement' with members of the community before a decision is reached.[91]

Accountability

The principle of accountability under a human rights-based approach is grounded in the identification of duty bearers and rights holders.[92] 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 focuses on the relationship between the duty bearers and the right-holders and emphasises that the provision of water is not a charitable act.[93] 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.[94] 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).[95] The principle of accountability under a human rights-

[87] *Federation for Sustainable Environment* (n 86) [24].

[88] Ibid [26].

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

[90] Ibid [86].

[91] Ibid [53].

[92] Darrow & Tomas, (n 66) 518; Winkler (n 9) 224.

[93] Winkler (n 9) 224.

[94] Smith, BC *Good governance and development* (2007) Palgrave Macmillan Hampshire 21–36.

[95] Winkler (n 9) 224.

based approach to water allows the right holders to hold the government accountable.[96]

According to Uvin, accountability is what distinguishes charity from claims.[97] Uvin argues that the distinction between claims and charity (also otherwise known as the rights approach and the needs approach, respectively) is a focus on mechanisms of accountability.[98] This is because, if there are claims, then methods for holding violators must also exist.[99] If a method is absent, the claims lose meaning.[100] 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 a right.

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 is referred to as the duty bearer. The government usually treats basic needs (such as water and education) of the people as a charitable act.[101] 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 District Municipality*,[102] the court notes that the Water Services Act was enacted to protect the constitutional right to water.[103] The respondents in this case, installed water pipes in 2001, supplied potable water from communal taps in 2004 and in 2008 water supply service stopped without notice to the community.[104] In February 2009, the respondent supplied water by truck cartage, which was insufficient and irregular, and also came to a stop in June 2009.[105] The respondents claimed that pipelines installed in the area were undertaken under the drought relief fund and that the quality of water forced production higher than the capacity for which they were designed as a result of unauthorised connections by the communities. This affected the 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

[96] Ibid.

[97] Uvin (n 16) 131.

[98] Uvin (n 16) 131.

[99] Ibid.

[100] Ibid.

[101] Olowu, D 'Privatisation and water governance in Africa: implications of a rights-based approach' (2008) 4 TD: *The Journal for Transdisciplinary Research in Southern Africa* 36.

[102] (2012) High Court (Eastern Cape Division) 2200/09 ZAECGHC 1 <http://www.saflii.org/za/cases/ZAECGHC/2012/1.html> accessed 2 November 2015.

[103] Ibid [4].

[104] Ibid [9].

[105] Ibid [10], [11].

increase quality on advice by scientific analysis.[106] 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 households without the consent of the municipality.[107] The respondents, in this case, took adequate measures to ensure that the people of the community were not left without a supply of water.

Non-discrimination

The principle of non-discrimination is another fundamental principle of international human rights law.[108] The ICESCR provides that the rights contained therein are exercised without discrimination.[109] International human rights instruments, amongst some other international human rights instruments, aim to eliminate 'discrimination' against women,[110] and persons with disabilities.[111]

The principle of non-discrimination is an important part of international human rights law.[112] The ICESCR guarantees the exercise of human rights without discrimination.[113] 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.[114] The principle of non-discrimination under a human rights-based approach to water addresses, in particular, the marginalised and disadvantaged.[115] 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 persons to enjoy potable water, as everyone needs the 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.[116]

The well-known case of *Mazibuko*[117] readily comes to mind. The applicants in this case argued that the introduction of prepaid meters in Soweto, but not in white suburbs elsewhere, discriminates between

[106] Ibid [13].

[107] Ibid [18].

[108] ICESCR art 2 (2); Winkler (n 9) 221.

[109] ICESCR art 2(2); Bourquain, K *Freshwater Access from a human rights perspective: a challenge to international water and human rights law* (2008) Martinus Nijhoff Publisher 102.

[110] CEDAW art 14(1)–(2).

[111] CRPD arts 3(b), 5, 28(2)(a).

[112] Winkler (n 9) 221.

[113] ICESCR art 2 (2).

[114] Filmer-Wilson (n 4).

[115] Winkler (n 9) 223.

[116] De Albuquerque (2012) 12.

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

'poor black South Africans and wealthy white South Africans', violating the prohibition of unfair discrimination in section 9(3) of the 1996 Constitution.[118] 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.[119] 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.[120] The court, however, held, while considering the three purposes of whom 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'.[121] However, the purpose for which it was introduced was to eradicate severe water losses, which constitute a legitimate purpose.[122] On the extent of harm, the court stated that 'it is not clear at all that a pre-paid meter system was harmful'.[123] In agreement with the court, 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 introduced was also unlawful.[124] Although the Water Services Act of 1997 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,[125] and these activities of the water providers must be provided in terms of conditions which must be accessible to the public.[126] In this case, the respondents provided for the conditions of water services and the installation of prepaid meters.[127] 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.[128] Regarding the

[118] Ibid [10], [148].
[119] Ibid [150].
[120] Ibid [151].
[121] Ibid [150].
[122] Ibid [150].
[123] Ibid [150]–[154].
[124] *Mazibuko* (n 122) [105].
[125] Section 4 WSA particularly (2)(c)(iv) & (v).
[126] Section 4 WSA (1), (2)(b).
[127] See s 3 Water Services By-laws 2003 as set out in *Mazibuko* (n122) [78].
[128] Section 4 WSA; s 21(1)(f) WSA; S 11 City Water Services By-laws in *Mazibuko* (n 122) [116] fn 72.

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'.[129] The court at this point agreed that there was, in fact, a possibility that Mrs Mazibuko[130] was not 'fully or properly informed'[131] 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.[132] 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 there is a discrimination between 'poor, black South Africans and wealthy, white South Africans'.[133]

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',[134] whereas as long as the other three deemed consumption areas with poor black residents were not discriminated 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.[135]

Empowerment

The empowerment principle is based on the process where the disadvantaged in society can exercise their rights and are afforded access to resources.[136] 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.[137] 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.[138]

In regard to this principle of the rights-based approach to water, it is argued here that the existence of concrete laws, the participation of the

[129] *Mazibuko* (n122) [132]–[134].

[130] The main applicant in this case, who passed away some time after the ruling at the High Court; see also *Mazibuko* (n122) [134].

[131] *Mazibuko* (n122) [134].

[132] *Mazibuko* (n122) [134].

[133] *Mazibuko* (n122) [148].

[134] *Mazibuko* (n 122) [145], [149].

[135] *Mazibuko* (n 122) [146].

[136] Luttrell, C, Quiroz, S, Scrutton, C & Bird, K 'Understanding and Operationalising Empowerment' (2009) Working paper 308 Overseas Development Institute <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/5500.pdf> accessed 7 July 2015.

[137] Winkler (n 9) 228–229.

[138] WaterAid (n 78) 44.

people and the opportunity to seek redress in court all form part of the principle of empowerment.

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,[139] 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.[140] Water has been recognised expressly under a few laws and it has been recognised implicitly under some more.

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, 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. Accountability in turn involves a participatory relationship between both duty bearers and right holders, as the people also take part in decision making.[141] 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.

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

[139] Winkler (2012) 229.

[140] Nigeria does not recognise water as a human right under its national laws.

[141] WaterAid (n 78) 44–45.

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.

Implementation

Implementing a human rights-based approach to water is mainly dependent on the legal framework put in place to ensure it.[142] The Constitution is the strongest of the legal frameworks because it establishes a national commitment.[143] A constitutional recognition, coupled with a statutory framework, which recognises 'practical and tangible significance' is the first step toward implementation.[144] South Africa is a good example of a country with a legal framework, having recognised the human right to water constitutionally and adopting the Water Services Act, 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 its implementation.[145] Implementation would require finances for construction, operation and maintenance. It would also require funding for developing the policies, participatory processes and information dissemination.[146] All these requirements for implementation may be realised progressively before full implementation.[147] It is argued 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.

[142] Albuquerque, C & Roaf, V 'On the right track: good practices in realising the rights to water and sanitation' (2012) (United Nations Office for the High Commissioner of Human Rights: Lisbon 51.

[143] Ibid 51.

[144] Ibid 52.

[145] Ibid 74.

[146] Ibid 76.

[147] Ibid 74.

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.[148] 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 effect on health.[149] 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.[150] The implementation of a rights-based approach is based on the relationship between right holders and duty bearers.[151]

The PANEL principles: Participation, Accountability, Non-discrimination, Empowerment and Legal Redress cannot be effective without two components –implementation and monitoring mechanisms. The obligation of a state to protect human rights, for example, means that such a state must put in place legislation and policies that prevent individuals, organisations or third parties from undermining the rights of others.[152] Furthermore avenues to complain must be put in place to ensure that individuals can lodge their complaints at the appropriate quarters without being victimised or discriminated against. Where legislation and policies are put in place then the water providers become accountable because the provisions necessary to guarantee access to water are visible to the right-holders who are the consumers. Independent experts, individuals and the human rights commissions must also be

[148] Boesen, J & Martin, T Applying a rights-based approach an inspirational guide for civil society (2007) Danish Institute for human rights: Denmark 31.

[149] Ibid.

[150] Ibid.

[151] Winkler (n 9) 217; Filmer-Wilson (n 4) 223.

[152] IT Winkler (2007), 'Respect, Protect, Fulfil: The implementation of the Human Right to Water in South Africa' Paper presented at the workshop on 'Legal Aspects of Water Sector Reforms' International Environmental Law Research Centre Geneva, 20-21 April 2007.

seen to be proactive in monitoring violations of the human right to water. Where the PANEL principles are existent with no legislative or institutional framework, then the proposed human rights-based approach to water cannot function effectively. Furthermore, where an independent organisation is not enabled to monitor the activities (and curb the excesses) of water providers then access to clean water cannot be realised.

Conclusion

A human rights-based approach to water is anchored on the existence 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 the 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 standards for all actors, guides sector reforms, and establishes monitoring and accountability and transparency mechanisms. It ensures a voice for the disadvantaged.

Access to water should not be a charitable offer, but a legal entitlement, which leads to claims.[153] 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.[154] Rather, access to water must constitute a legal obligation, which puts people in a position to claim. This 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.[155] A human rights-based approach, arguably, may be the only approach that can ensure a human right to access to water if adopted, and dutifully monitored, with room for a progressive realisation of the human right to water. Of course, there are other approaches to realise access to water such as financing, however this will not be the same as a human right to access to water because the poor and vulnerable may not be able to 'access' this water as the issue would now have cost implications for the poor. It is not argued herein that a human rights-based approach is a perfect approach to realising access to water; rather, the argument is that a human rights-based approach, with all its attendant principles, is more likely to guarantee a progressive

[153] Uvin (n 16) 129.
[154] Darrow & Tomas, (n 66) 485.
[155] Winkler (n 9) 214.

realisation of access to water for everyone, without discrimination and where attended by the demands of accountability.

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