

Vol. 19, No. 2

December, 2021

19

BANGLADESH JOURNAL OF LAW

Oluwabunmi Lucy Niyi-Gafar

A Human Rights-Based Approach to Water in Kenya

Shirin Sultana

How Far are New Generation Investment Agreements Capable of Protecting the Host State's Interests? - An Evaluation

Md. Rabiul Islam

Scrapped Academic Freedom to Transgressed Constitutionalism: The Lex CEU in Hungary

Dr. Syed Mahmood Akhter Hussain Gardezi

Interpretation of Phrase "For Private Ends" in the Internationally Codified Definition of Maritime Piracy

Dr. Mohammed Shamiulla Arab

Deconstructing Victimological Theory-Testing its Practical Challenges

Dr. Sayeeda Anju and Asaduzzaman

Application of Reformative Theory of Punishment to the Female Offenders: Role of the Judiciary and the Government of Bangladesh

Mohammed Moniruzzaman Bhuiyan and Dr. Mohammad Moin Uddin

Excessive Dower and its Impact on Wife-Initiated Divorces: An Empirical Study on Chattogram District of Bangladesh

Dr. Md. Shahidul Islam

Scientific Uncertainty and Need for Specialised Environment Court in Bangladesh: A Lesson from Australia, New Zealand and India

Umme Wara

Understanding Development-Induced Displacement and Victimization in Contemporary Bangladesh

Falguni Mozammel and Tanzima Akter Sumi

Women's Safety in Transport, Concept of Zero FIR and Jurisdictional Gaps in Bangladeshi Criminal Justice System



A BIENNIAL PUBLICATION OF

BANGLADESH INSTITUTE OF LAW AND INTERNATIONAL AFFAIRS (BILIA)



BANGLADESH INSTITUTE OF LAW AND INTERNATIONAL AFFAIRS (BILIA)

Professor Dr. Mizanur Rahman

LL.M (1st class Honours), DCL (Double)
Dip. in Journalism (1st class), MCL (Cum Laude)
PGD in Legal Studies (Distinction) Ph.D.

Director, Bangladesh Institute of Law and International Affairs (BILIA)
Former Chairman, National Human Rights Commission, Bangladesh

+88-02-22240057-58 (Off.)
+88-01729097093
+88-01711564877
+88-02-58155210
E-mail : banglamukti71@gmail.com
bilial222.info@gmail.com
Website : www.biliabd.org

EDITOR'S NOTE

As part of the regular publication of BILIA, Volume 19 Issue 2 of Bangladesh Journal of Law (BJL) has compiled a number of articles on various legal concepts and explored some legal issues of national as well as global importance. The concepts and study depicted in this volume are varied in range and wider in scope. The present Issue broadly discusses legal concepts, rights and interpretation of constitutional aspects of various legal matters. Thus, the wide ranging issues covered in the Journal include, *inter alia*, exploration of the law embracing human rights-based approach to water usage in Kenya, an evaluation of investment agreements capable of protecting host state's interest, scrapped academic freedom to transgressed constitutionalism, interpretation of the phrase "for private ends" in the codified international definition of piracy, deconstructing victimological theory in the context of practical challenges, an empirical study on excessive dower and its impact on wife-initiated divorces, need for specialised environment court in Bangladesh, understanding development-induced displacement and victimization in contemporary Bangladesh, and women safety in moving transport, etc.

We look forward to hearing from our valued readers and contributors on how this publication could be further improved. We aim to better address the socio-legal and constitutional landscape especially of Bangladesh, South Asia and the world in general. Given the importance of the journal, we would like to invite analysis of and study on critical aspects of Law and society for publication in our future issues.

Professor Dr. Mizanur Rahman
Director, BILIA
and Editor

A HUMAN RIGHTS-BASED APPROACH TO WATER IN KENYA

Oluwabunmi Lucy Niyi-Gafar*

ABSTRACT

The human right to water involves having sufficient water of good quality to be readily available and accessible to the people. Kenya in 2010 recognized the human right to water and entrenched this right in their Constitution. To progressively realise the human right to water, a human rights-based approach should be adopted. However, a human rights-based approach to water goes beyond mere recognition of water as a human right, this approach to water involves the adoption of five major principles. These five principles, which are Participation, Accountability, Non-discrimination, Empowerment and Legal Redress (otherwise called PANEL PRINCIPLES), are derived from human rights standards found in all international human rights instruments such as the Universal Declaration on Human and Peoples Rights (UDHPR) 1948, and the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966. In addition to recognising a human right to water and adopting the PANEL principles to guarantee a progressive realisation of access to water, it is imperative that there are monitoring mechanisms put in place to monitor the activities of water providers to ensure that the constitutionally recognised right is progressively realised. In view of this, this article examines the laws put in place to determine whether a human rights-based approach has been carefully considered and adopted for the realisation of access to water in Kenya. This article is sectioned in six parts wherein an overview of what a human rights-based approach to water entails is showcased; the legal frameworks available in Kenya is analysed vis-a-vis the required international law guideline; and the available case law and its judicial interpretation is examined.

I. INTRODUCTION

Between the 1980s and 1990s, the challenges of basic water and sanitation services increased in Kenya.¹ These challenges include; an increase in environmental pollution and a decrease in water access to the poor. This in turn caused increased pressure from the public for a lasting solution to water access. This pressure brought about the beginning of water reforms in Kenya. International conventions to which Kenya is a signatory formed the basis of water reforms in Kenya.² There were three

* Oluwabunmi Lucy Niyi-Gafar, LL.D. (University of Pretoria, South Africa), LL.M. (University of Ibadan), Bachelor of laws, (University of Ilorin), is a Senior Lecturer at the University of Ilorin.

¹ Ministry of Water and Irrigation Kenya (2007) at p. 6, <https://www.giz.de/expertise/downloads/Fachexpertise/2007-en-water-sector-reform-kenya.pdf> (Last visited on September 22, 2015).

² *ibid.*, at p. 7.

major concerns for the water sector reform which are urban and rural water supply, sanitation and water resource management.³ This article however, is restricted to urban and rural water supply which is the concern of a human right to water and a human rights-based approach to water.

The 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.⁴ In view of the 2010 constitutional recognition of the right to access water, water reforms which began in the 1990s changed gear in the water sector to align with the provision of the Constitution (2010).⁵ Since literature available on the current water reforms in Kenya, which showcase a human rights-based approach to water, is sparse and there are not readily available, water policies (on the internet) to conduct a desktop examination of a human rights-based approach to water in Kenya, I embarked on an academic study trip to Kenya to retrieve documents and discuss with water officials to ascertain to what extent a human rights-based approach to water in Kenya had been followed.⁶

The article is divided into three sections. The first section analyses the legal framework of the right to water in Kenya. To do this, the national water laws –the Constitution of Kenya (2010), the Water Act of 2002 and the Water Bill of 2014, which gave rise to the human right to water and a human rights-based approach to water are analysed. In the second section, an analysis of court decision on the human right to water to determine its alignment with a human rights-based approach is conducted. This is done to determine how the constitutional recognition to access to water may have been strengthened by the explicit provision in the Constitution of Kenya (2010). In the third section, an inquiry into the implementation and monitoring mechanism put in place to ensure access to water in Kenya is carried out. However, before these sections are discussed, it is pertinent to describe what a human rights-based approach to water entails.

II. A HUMAN RIGHTS-BASED APPROACH TO WATER

There is no particular definition of a human rights-based approach to water.⁷ However, water is a social good and this social good, concerns how more people in the society would realise access to water especially the poor in the society. A

³ *ibid.*, at p. 8.

⁴ Article 43 (d), the Constitution of Kenya, 2010 (hereafter the Constitution, 2010).

⁵ The Water Act of 2002 which was in operation had to be reviewed to align with the Constitution, 2010.

⁶ Academic visit to Kenya in September 2015 sponsored by the University of Pretoria and author was hosted by the Kabarak School of Law. Information retrieved are in furtherance of her doctoral thesis, (which was completed in 2017). Some of the information gathered is shared in this article.

⁷ Filmer-Wilson, E. "The Human Rights-Based Approach to Development: The Right to Water" 23 (2005) *Netherland Quarterly of Human Rights*, at p. 213.

social approach to water has been framed in human rights terms⁸ which in turn have culminated into a human rights-based approach.⁹ Human rights-based approaches consider the steps or range of systems necessary both at the national and international levels to promote, protect, respect and fulfil human rights by all people and used as a basis for human development.¹⁰ 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.¹¹ In other words a human rights-based approach focuses on social structure, rule of law, empowerment and structural change in favour of everyone most especially the vulnerable and the most deprived.¹²

Furthermore, a human rights-based approach takes into account the principles of human rights such as participation, accountability, non-discrimination, empowerment and legal redress. These principles have been coined as the PANEL principles.¹³ The PANEL principles which emanate from human rights standards found in all international human rights instrument serve as a guideline for realising human rights concerns such as the right to education, the right to a healthy environment and the right to water. Although 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. What does this mean? Recognising water as a right without framing this right in human rights language can result into access hardship. In other word, access to clean water particularly for the poor and marginalised becomes a herculean task. This is because when clean water is readily available to those who can pay for it, then discrimination sets in and clean water is realised by only those who can afford to pay for it. However when the right to water is framed in human rights language

⁸ Langford, M. "The United Nations Concept of Water as a Human Right: A new paradigm for old problems?" 21(2005) *Water Resources Development*, pp. 274-275; Miranda, L., Hordijk, M., Rommy K., Molina, T. "Water Governance Key Approaches: An Analytical Framework" 4(2011) *Literature Review*, pp. 9-12, available at <http://www.chance2sustain.eu/fileadmin/Website/Dokumente/Dokumente/Publications/Chance2Sustain_-_Literature_Review_No.4_-_Water_Governance_Key_Approaches_An_Analytical_Framework.pdf> (Last visited on December 06, 2018).

⁹ Niyi-Gafar, O.L. 'Adopting a human rights-based approach to water in Nigeria, lessons from selected jurisdiction, (2017). *Unpublished thesis* available at <https://www.repository.up.ac.za/handle/2263/62549> (Last visited on December 12, 2018).

¹⁰ Hausermann, J. "A human rights approach to development: some practical implications for water aid's work" 10 (1) (2003) *Water Nepal*, at p. 131.

¹¹ *ibid.*

¹² Uvin, P. *Human rights and Development*, Bloomfield, 2004, at p. 131.

¹³ Frankovits, "United Nations Educational, Scientific and Cultural Organization (UNESCO)" (2006), available at <http://unesdoc.unesco.org/images/0014/001469/146999e.pdf>, (Last visited on July 14, 2015), at p. 54.

then access to water becomes a right to everyone irrespective of race, gender or status. 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 can afford it or pay for that water. What distinguishes a human rights-based approach to water from other approaches to water is the human rights standard – the PANEL principles

Kenya has recognised water as a human right and constitutionalised this right. To constitutionally recognise the right to water does not necessarily suggest that a human rights-based approach to water will be adopted. However, a mere recognition without the necessary legal frameworks with an inclusion of the PANEL principles do not necessarily mean a human right-based approach has been adopted. To examine the approach adopted, the legal frameworks, case law and monitoring mechanisms put in place are hereby examined.

III. LEGAL FRAMEWORKS OF THE RIGHT TO WATER IN KENYA

Since the constitutional inclusion and recognition of water as a human right, legislations such as the Water Act of 2002 and the Water Bill of 2014. These laws are analysed in light of the recent reforms in the water sector to determine the extent of its consistency with a human rights-based approach.

3.1 Constitution of Kenya

The Constitution of Kenya (2010) replaced the 1964 Constitution.¹⁴ There were remarkable changes in the provisions of the Constitution especially the change which included socio-economic rights (one of which explicitly recognised the right to water)¹⁵ and the devolution of 47 county governments.¹⁶ With the inclusion of socio-economic rights in Kenya's Constitution there was an immediate comparison with the Constitution of South Africa (1996) Constitution which also guaranteed socio-economic rights such as the right to water.¹⁷ The Constitution of Kenya (2010) is no doubt a transformative Constitution as it aims at redistributing power and resources to eradicate inequality and promote social welfare.¹⁸

¹⁴ 'A short history of the 2010 Kenya Constitution' available at <http://www.kenyaconstitution.org/> (Last visited on May 02, 2016)q .

¹⁵ Article 43, the Constitution of Kenya, 2010.

¹⁶ Article 6, the Constitution of Kenya, 2010.

¹⁷ Section 27, the Constitution of the Republic of South Africa, 1996.

¹⁸ Orago, N. W. "Limitation of socio-economic rights in the 2010 Kenyan Constitution: a proposal for the adoption of a proportionality approach in the judicial adjudication of socio-economic rights disputes" 16 (2013) PER: Potchefstroomse Elektroniese Regsblad, pp. 1-53.

The Constitution of Kenya (2010) amongst other socio-economic rights provides that every person has the right to clean water in adequate quantities.¹⁹ Basic water service is expected to be provided by the national government by use of the equalisation fund.²⁰ The Constitution of Kenya (2010) creates 47 county governments.²¹ These county governments are saddled with the responsibility of providing water and sanitation services amongst other functions specified in the Constitution of Kenya (2010).²²

An important provision of the Constitution of Kenya (2010) which supports a human rights-based approach is the provision for minorities and marginalised groups.²³ According to the Constitution of Kenya (2010) 'marginalized group' is a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination.²⁴ The Constitution provides that:

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.²⁵

Article 56 of the Constitution of Kenya (2010) adopts a human rights-based approach to water especially the principles of non-discrimination, participation²⁶ and empowerment.²⁷ A human rights-based approach in the Constitution of Kenya (2010) creates an environment of equal access to water without

¹⁹ Article 43 (1) (d), the Constitution of Kenya, 2010.

²⁰ Article 204 (2), the Constitution of Kenya, 2010. One half per cent of all national government revenue is paid into an equalisation fund which is established by the 2010 Constitution. See Article 204 (1).

²¹ Article 6 (1), see also First Schedule of the Constitution of Kenya, 2010; for the list of the 47 County governments.

²² See Part 2 Paragraph 11 (b) of the Constitution of Kenya, 2010. See generally Fourth Schedule of the Constitution of Kenya, 2010 which highlights the distribution of functions between the national government and the county government.

²³ Article 56, the Constitution of Kenya, 2010.

²⁴ Article 260, the Constitution of Kenya, 2010.

²⁵ Article 56, the Constitution of Kenya, 2010.

²⁶ Article 56 (a), the Constitution of Kenya, 2010.

²⁷ Article 56 (c), the Constitution of Kenya, 2010.

discrimination based on gender and disability.²⁸ Article 56 of the Constitution of Kenya (2010) 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 must be designed to carry along in particular the minorities and marginalised groups.²⁹ 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'.³⁰

3.2 Water Act 2002 and a Limited Human Rights-Based Approach Institutional Framework?

The Water Act, 2002³¹ (Hereafter the Water Act (2002)) was repealed by the Water Act (Cap 372) of 1972.³² The Water Act of 2002 is aimed at the management, conservation, use and control of water resources and to provide for the regulation and management of water supply and sewerage services.³³ The Water Act of 2002 also repealed some of the provisions of the Local Government Act³⁴ and introduced changes to the legal framework for water management in the water sector like separating the management of water resources from the provision of water services.³⁵ This is similar to the position in South Africa where the Water Services Act³⁶ regulates water services and the National Water Act³⁷ regulates water resources. This is necessary to help prioritise domestic water and ensure its access to everyone especially the poor.

²⁸ United Nations Office of the United Nations High Commissioner for Human Rights, 2006, at p. 15 available at <http://www.ohchr.org/Documents/Publications/FAQen.pdf> (Last visited on May 02, 2015).

²⁹ Biswas, A. K. "Water for the third world" 60 (1) (1981) *Foreign Affairs*, at p. 154.

³⁰ Preamble of the Constitution of Kenya, 2010.

³¹ Act No. 8 of 2002.

³² JICA Nippon Koei Co ltd (2013) L5 (pdf 11). The development of the National Water Master Plan 2030 Final Report (Hereafter National Water Master Plan 2030 Final Report).

³³ Preamble of the Water Act of 2002.

³⁴ Section 111 of the Water Act of 2002 repealed Sections 168-176 of the Local Government Act.

³⁵ Mumma, A., Kenya's new water law: an analysis of the implications for the rural Poor, International workshop on 'African Water Laws: Plural Legislative Frameworks for Rural Water Management in Africa', 26-28 January 2005, Johannesburg, South Africa, available at <https://assets.publishing.service.gov.uk/media/57a08c88e5274a31e0001296/R8323-Proceedings.pdf> (Last visited on May 09, 2015)

³⁶ Act No. 108 of 1997.

³⁷ Act No. 36 of 1998.

Now before the Water Act of 2002, there was the Sessional Paper of 1999.³⁸ This paper contained amendments the Water Act³⁹ needed to undergo and which in effect became the Water Act of 2002.⁴⁰ Participation and accountability are two of the 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 alternative to water management.⁴¹ The sessional paper that preceded the Water Act of 2002 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 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 to 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."*⁴²

The above paragraph found in the sessional paper seems to tilt towards a human rights-based approach with the principles of participation which is indispensable in the success of realising access to water and the principle of accountability, which emphasises that an enabling environment should be created through legislation and policies which is a requirement of the international human right to water.⁴³ However the inclusion of 'private sector' may negate this thought especially when not properly expanded and more particularly because the consideration of the 1992 Rio de Janeiro Earth Summit, emphasises water as an economic good.⁴⁴ According to the sessional paper institutional weakness limits access to water⁴⁵ and the challenges of the previous Water Act⁴⁶ was the

³⁸ Ministry of water resources 'Sessional Paper No. 1 of 1999 on National Policy on Water resources management and development vi, 46 also available at <http://www.ircwash.org/sites/default/files/824-KE99-18207-1.pdf> (Last visited on May 09, 2015). (Hereafter Sessional Paper No. 1 of 1999).

³⁹ Cap. 372.

⁴⁰ Ministry of water resources 'Sessional Paper No. 1 of 1999 on National Policy on Water resources management and development vi, 46. Also at <http://www.ircwash.org/sites/default/files/824-KE99-18207-1.pdf> (Last visited on May 09, 2015).

⁴¹ *ibid.*, at p. 46.

⁴² *ibid.*

⁴³ Resolution 69/121, 1977 Mar del Plata Conference, 1992 Rio de Janeiro earth Summit.

⁴⁴ Solanes (1999) Global Water Partnership Technical Advisory Committee (TAC) No. 3 TAC Background Papers 9.

⁴⁵ *supra* note 40, at Paragraph 2.1.2, at p.12.

⁴⁶ Cap. 372.

absence of resources to monitor the operations of water users as well as the inadequacy of the provisions of the Water Act.⁴⁷ To address the challenges of access to water does not only require good laws and a legal framework; monitoring mechanisms are also necessary in order that challenges are immediately identified and tackled before further challenges arise.⁴⁸ Furthermore privatisation or an economic approach to water is a complete opposite of a human rights-based approach to water. 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 2002,⁴⁹ the Water Act of 2002 is not without its challenges which have made it a subject for criticism.⁵⁰ 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'.⁵¹ Although the 2002 Water Act seems to give 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'Akumu⁵² and Mumma⁵³ have however argued that the needs of the poor is ignored by the Water Act of 2002.

According to K'Akumu, the much needed water reform follows an economic approach, as such the local authorities who are in charge of water supply in the 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.⁵⁴ Although K'Akumu did not outrightly dismiss or argue against the Water Act of 2002 privatising water services, rather he analyses how the needs of the vulnerable maybe served under privatisation. Privatisation in most cases

⁴⁷ Cap. 372; *supra* note 40, at Paragraph 2.4.2, 2.4.3, at p. 17.

⁴⁸ *supra* note 9.

⁴⁹ Ministry of Water and Irrigation, Kenya (2007), at p. 13.

⁵⁰ K'akumu, O. A. "Privatization of the urban water supply in Kenya: policy options for the poor" 16 (2004) *Environment and Urbanization*, pp. 213-222; Akech, J.M.M., 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 (Last visited on May 03, 2016); Mumma, A. *Workshop on African waters Law: Plural Legislative Frameworks for rural water management in Africa*, pp. 158-172.

⁵¹ Akech, J.M.M., "Legal Aspects of Water Sector Reforms" (April 2002), available at http://www.ielrc.org/fr/activites/atelier_0704/content/d0702.pdf (Last visited on May 03, 2016)

⁵² K'akumu, O. A. "Privatization of the urban water supply in Kenya: policy options for the poor" 16 (2004) *Environment and Urbanization*, p. 213-222

⁵³ *supra* note 50, Mumma, at p. 160.

⁵⁴ *supra* note 52, at p.213

does not serve the needs of the poor as cost recovery is emphasised under this approach to water.⁵⁵ The Water Act of 2002 emphasises that water services will be on a commercial bases and in accordance with 'sound business principles'⁵⁶ however, the act does not define what 'commercial basis' means.⁵⁷ 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.⁵⁸ 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 time⁵⁹ 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 25,000 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 and attain to reach the performance level set by regulation.⁶⁰ Some of these functions however are found to be unclear and overlapping with other institutional functions⁶¹ and this may result into conflicts.⁶² In fact for proper accountability in the water sector, the

⁵⁵ See Generally Olowu, O. "Privatisation and water governance in Africa: implications of a rights-based approach"⁴ (2008) *The Journal for Transdisciplinary Research in Southern Africa*, at p. 36.

⁵⁶ Article 57, the Water Act of 2002.

⁵⁷ *supra* note 54, at p.217

⁵⁸ *ibid.*

⁵⁹ *ibid.*, at p.221

⁶⁰ Article 46 and 47, the Water Act of 2002.

⁶¹ *supra* note 32, at p. L12

⁶² Akech, J.M.M. 'Governing water and sanitation in Kenya: public law, private sector participation and the elusive quest for a suitable institutional framework Governing water and sanitation Paper prepared for the workshop entitled 'Legal Aspects of Water Sector Reforms' to be organized 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) available at

responsibilities of the water departments must be well-defined. For example, the Ministry of Water and Irrigation is responsible for monitoring and evaluation so also 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.⁶³ 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 the access to water in Kenya.⁶⁴ The crux of the current reform in the water sector is to separate water resources management and development from water services delivery.⁶⁵ The function of the Ministry of Water and Irrigation would therefore be limited to formulating policy, implementation and monitoring water resources. This will exclude the Ministry from other functions such as detailed regulation.⁶⁶ 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.⁶⁷ 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 Water Act of 2002 became necessary. This brought about the 2014 Water Bill.

3.3 The Water Bill 2014 and an Incorporated Human Rights-Based Approach to Water

Since the coming into effect of the Constitution of Kenya (2010) which recognised the human right to water, it became necessary for the Water Act of 2002 to be reviewed. The Water Act of 2002 recognised more of the economic approach to water and gave room for private partnership to help make water more readily available to the public. Although this approach might have been adopted to make water readily available to the populace, it soon became clear that only the rich would be able to access clean water for their domestic use since they would be able to pay for it. 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

http://www.ielrc.org/fr/activites/atelier_0704/content/d0702.pdf (Last visited on May 03, 2016), at p. 4., *supra* note 51, at p.4.

⁶³ *ibid.*, at p.13.

⁶⁴ *supra* note 38, at p.28.

⁶⁵ *supra* note 32, at p. L9.

⁶⁶ *supra* note 1.

⁶⁷ Sec 6, the Constitution of Kenya, 2010.

need for domestic use. However, incorporating a human rights-based approach to water which considers human rights standard will incorporate everyone in the plan to progressively realise access to water, while also ensuring that the marginalised are not neglected.

The Water Bill of 2014⁶⁸ sought to replace the Water Act of 2002 and was to be referred to as the Water Act 2014.⁶⁹ The purpose of the Water Bill of 2014 like the Water Act of 2002 is 'to provide for the regulation, management and development of water resources and water and sewerage services in line with the Constitution'.⁷⁰ Constitution of Kenya (2010) has set out the principles and values for which access to water may be realised which has also been considered and provided for in the Water Bill of 2014.⁷¹ The major reason for the coming into effect of the Water Bill of 2014 is to address the issues of accountability and to bring closer to the people development by the provision of the devolution of county governments which are responsible for water delivery within their counties instead of having everything at the national level. This in effect allows more people to participate in the issues of access to water.

3.4 The recent Kenyan Water Act of 2016

The most recent Water Act of Kenya is the Water Act of 2016.⁷² This Act is an improvement on the Water Bill of 2014 as it redefined roles and responsibilities spelt out under the Water Bill of 2014. The purpose of this Water Act was to align the water sector with the provision on devolution. One of the most striking features of this Act is the priority given to domestic water over other water uses.⁷³ This provision obviously supports and promotes the right to water as provided for in the Constitution of Kenya (2010). Another striking feature of the Constitution of Kenya (2010) which supports the human rights-based approach to water is the provision that states that where "by reason of exceptional shortage of rain or by reason of accident or other unforeseen circumstances, a serious deficiency of water for essential domestic purposes exist or may occur in any area" then anyone who is found to have a supply of water in excess of his or her needs will be directed to supply to areas of concern a quantity

⁶⁸ Kenya Gazette Supplement No. 27 (National Assembly Bills No. 7, 2014) available at https://www.google.co.za/url?sa=t&rcct=j&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&usq=AFQjCNEVxxw0SreOU1xQFOim85omVQHrIw&bvm=bv.121421273,d.d24 (hereafter the Water Bill of 2014).

⁶⁹ Article 1, the Water Bill, 2014.

⁷⁰ Article 3, the Water Bill, 2014.

⁷¹ Article 5, the Water Bill, 2014.

⁷² No. 43 of 2016.

⁷³ Article 43 (2), the Water Act, 2016.

of water for a particular period as may be specified by the authority.⁷⁴ In other words it does not matter whether a person can afford to pay for all the water he or she still has to let go to satisfy other people that do not have access or cannot enjoy water for their domestic use where there is exceptional shortage of water supply provided the person in question has more than he needs, he has to make some available for those lacking. The Act makes it an offence for a person to have more than enough water for his needs and refuse to give to those without (that is after an order to do so has been made) as an offence. This shows the importance of availability of domestic water to everyone. As such no one is deprived of water. This provision embraces the 'phrase water for all'.

IV. WATER SERVICES TRUST FUND IN KENYA

The Water Services Trust Fund (WSTF) was created by the Kenyan government in 2004 as a state corporation established under the Water Act of 2002. Its purpose was to help finance the delivery of water and sewerage services to areas of Kenya without adequate supply. The WSTF serves as a water reform institution and "mobilizes resources and provides financial assistance towards capital investment costs of delivering water service and sanitation."⁷⁵ Part of what the WSTF does is to deploy low-cost technologies, including water kiosks, yard taps, and sanitation facilities. The public impact of the WSTD has been largely successful as millions of Kenyans in "undeserved communities" have access to greater quality and quantity of water. This has reduced the time spent for fetching water and as such improved hygiene and health amongst other things.⁷⁶

"The WSTF provides conditional and unconditional grants to the counties to help finance the development and management of water services in marginalized and under-served areas, including: the development of water services in rural areas that are not commercially viable for licensees; the development of water services in under-served, low-income urban areas; and improving transparency through online tracking and reporting of water access.

V. 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 South Africa. 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

⁷⁴ Article 140 (1) (b).

⁷⁵ The Water Services Trust Fund in Kenya, September 18, 2017 available at <https://www.centreforpublicimpact.org/case-study/the-water-services-trust-fund-in-kenya/> (Last visited on October 22, 2021).

⁷⁶ *ibid.*

and socio-economic rights in general. Kenya on the other hand recorded its first case in 2011 – *Ibrahim Sangor Osman vs. Minister of State for Provincial Administration and Internal Security*.⁷⁷ Although this case is not directly related to the human right to water, (there is no other known case, at this time, emanating from the constitutional recognition or violation of the human right to water); it however stirred up the constitutional recognition of the human right to water.

In this case, government began the demolition of houses at 'Medina Location' in Garissa, Kenya without notice, consultation or a provision of alternate housing to the inhabitants (petitioners). The petitioners have been in occupation of Medina Location since 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 nature and all sorts of risk.⁷⁸ 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, clean and safe water amongst other basic services.⁷⁹ 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 of the Constitution guarantees the fundamental rights of the petitioners.⁸⁰ The Court also cited Article 21(3) of the Constitution of Kenya (2010) 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'.⁸¹ 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.⁸² The court emphasised that the state owes a duty to protect and fulfil human rights in other words the state were 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

⁷⁷ High Court (Embu) Constitutional Petition No. 2 of 2011 at http://www.escri-net.org/usr_doc/Decision_Garissa.pdf (Hereafter Medina Location case). (Last visited on May 02, 2016)

⁷⁸ *Medina Location Case*, Para 4.

⁷⁹ *Medina Location Case*, Para 3-6.

⁸⁰ *Medina Location Case*, Para 12.

⁸¹ *Medina Location Case*, Para 10.

⁸² *Medina Location Case*, Para 11 and 12.

attempts to have an audience with 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 the people. The petitioners could seek a redress because they had the backing of the law.

Arguably the events of this case show a human rights-based approach is observed in Kenya and was followed by the court. What addresses the practical aspect is the aftermath of the decision in this case. It is to this effect that an implementation and monitoring mechanism is set up in Kenya to monitor the implementation of the human right to water to ensure a realisation of the human right to water. The practical aspect of a human rights-based approach to water is still yet to play out since the Water Bill of 2014 was created. And even though this bill is being replaced by the Water Act of 2016, the human right to water as recognised by the Constitution of Kenya (2010) as well as the Water Act of 2016 are yet to be fully interpreted or tested.

The Kenya National Commission on Human Rights is an independent institution saddled with the responsibility of promoting and protecting human rights in Kenya. The Commission, recognises amongst other rights that every person has a right to clean and safe water in adequate quantities for their domestic use and as such has a duty to promote and protect that right.

VI. CONCLUSION

Although Kenya has been classified as a water scarce nation,⁸³ in spite of this classification Kenya has made more efforts in the last two decades to address the issues of access to water than some other countries. These efforts have in the water sector culminated in the recognition of the right to water in the Constitution of Kenya (2010). Although the recognition of a human right to water in a country's constitution does not automatically provide the populace with the water required, it is however argued that the recognition provides the populace an avenue to demand that this right be realised albeit progressively. It is further argued that a recognition of this right by a country's constitution shows the seriousness of government to ensure that the right to water is guaranteed to everyone irrespective of status or gender, thereby promoting the principle of non-discrimination.

The Water Act of 2002 which was initially enacted to address the challenges of domestic water supply by establishing the principles of a human rights-based

⁸³ World Bank (2004) "The Republic of Kenya: Towards a Water Secure Kenya: Water Resources Sector Memorandum", available at http://www-wds.worldbank.org/external/default/WDSPContentServlet/WDSP/IB/2004/04/23/000090341_20040423105557/Rendered/PDF/283980KE.pdf (Last visited on May 09, 2016); Ogendi, G. M. and Ong'oa, I. M. "Water Policy, Accessibility and Water Ethics in Kenya" 7 (2009) *Santa Clara Journal of International Law*, pp. 177-196.

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 Constitution of Kenya (2010). As a result of this and to align with the Constitution of Kenya (2010), further reforms are on-going in the water sector, especially legal reforms. The Water Bill of 2014 addresses the issues of overlapping functions raised in the Water Act of 2002. The principle of accountability, if properly addressed and harnessed, will contribute immensely to the progressive realisation of access to water in Kenya. The Water Bill of 2014 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.⁸⁴ In addition the Water Act of 2016 improves on the provisions of the Water Bill of 2014, and provides that access to water is for everyone. Making it an offence for some people to have water and refuse to give their excess to others, especially where they have been ordered to do so because of scarcity or otherwise.

Like South Africa, Kenya has adopted a rights-based approach to water following the recognition of the right to water in the Constitution of Kenya (2010) and the review of the Water Act of 2002.⁸⁵ Arguably Kenya is determined to address the challenges of access to water via a human rights-based approach as the Constitution of Kenya (2010) has intimated that the general rules of international law should form part of the laws of Kenya.⁸⁶ 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 now be applicable in Kenya.

Kenya recognizes the human rights to safe water and sanitation in its constitution and the government has made a commitment to achieve the SDGs and ensure universal access to water and sanitation services by the year 2030. The progressive approach towards ensuring access to water in Kenya through the establishment of the 1999 Water Policy and the Water Act of 2002, which sets out separated functions such as policy making, regulation, service delivery and resource management functions and establishing accountability lines between

⁸⁴ 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 during my academic visit in 2015).

⁸⁵ See Art. 43 (1) (d), the Constitution of Kenya, 2010.

⁸⁶ Art. 2 (5), the Constitution of Kenya, 2010.

them needs to be applauded. As these are tailored towards ensuring that r and invariably in the long run, all Kenyans have access to quality water.⁸⁷

As part of the government's political commitment to realizing a human to water which invariably includes non-discrimination, the WSTF ens financial assistance towards water delivery.

In the years to come, it is hoped that the true nature of the human right water in the Constitution of Kenya (2010) and the support to be rendered by Water Act of 2016 is tested. This will help scholars and researchers to unders how the human right to water is being perceived in Kenya and whether a hu rights-based approach has been genuinely adopted.

⁸⁷ Folscher, A., Liabwel, I., Malik, S., Moon, S., and Feuerstein, L., "Pipes, Policy and Public Mon Integrity in water sector public financial management in Kenyan Counties", 2019 available <https://www.globalwaters.org/sites/default/files/KEWASNET-WIN-2019-PipesPolicyPubl Money.pdf> (Last visited on October 22, 2021).